

# Between Exception and Normality: Schmittian Dictatorship and the Soviet Legal Order

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*Abstract.* This article addresses Schmitt's concept of sovereign dictatorship—a departure from the normal legal order aiming to bring about a new mode of legality—as applied to the Marxist, and then Soviet, “dictatorship of the proletariat.” Unlike Schmitt, Marx and Engels, as well as Soviet legal theorists, saw the space for law even while aiming to dispense with the legal form on the road to communism. This is best explained by Schmitt's failure to recognize the importance of legal systems not only for controlling social conflict, but also for coordination, the need for which does not disappear in extraordinary circumstances.

## 1. Introduction

For most of us, law is a palpable presence in the way we organise politically. But can it be otherwise? To the present day, Carl Schmitt's writing on law and the state reinvigorates discussions about their nature and their relationship to each other. One of the biggest achievements of Schmitt's scholarly output is explaining both the possibility and the indispensability of a functioning state without a legal system. The legal order, according to Schmitt, is not constitutive of the state, but subordinate to it and highly contingent on the circumstances in which the sovereign finds themselves. In emergency situations, such as the need to defend the current legal order from destruction or to effect a transition to a new legal order, it can be necessary to act above the law.

Schmitt's approach is, ultimately, sociological and draws from concrete legal orders, ranging from the Roman Empire to the Weimar Republic. Thus, it is appropriate to focus on Soviet law as another site of Schmittian enquiry, a site largely neglected in the secondary literature. Schmitt briefly mentioned communist legal systems first in *Dictatorship* (1921) (Schmitt 2014, xxxix, xli, 179) and later in *Theory of the Partisan* (1963) (Schmitt 2007, 33–6, 38). Marxist teaching on law and its implementation in the Soviet state were, to him, yet another example of how the state can exist without law.

As Marx said in his *Critique of the Gotha Programme* (1870),

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[b]etween capitalist and communist society there lies the period of the revolutionary transformation of the one into the other. Corresponding to this is also a political transition period in which the state can be nothing but the *revolutionary dictatorship of the proletariat*. (Marx 1989, 95; emphasis in the original)

While Schmitt conceived of this dictatorship as (i) an extralegal transition to (ii) a nonlegal order, Marx, Engels, and their intellectual heirs had to adjust this aspiration to the practical demands of a revolutionary state. As such, they had to mitigate this rejection of legality by opening up some space for law at both stages (i) and (ii).

This trend, culminating in a return to the *Rechtsstaat* in both Soviet practice and theory in the early 1930s, was a product of a certain difficulty with Schmitt's account of sovereign dictatorship. I argue that Schmitt conceived of legal rules as only tasked with mediating social conflict by encouraging or proscribing certain behaviour. While this is definitely a part of the function of law, legal norms are also indispensable for coordinating behaviour, which makes them hard to cast aside even if one actively seeks to step away from the constraints and demands of the legal form. This was particularly important for Soviet legal theorists, who confronted the need for coordination firsthand by having to build a new social order.

## 2. "Proletarian Dictatorship" in Schmitt's Political Thought

### 2.1. Schmitt's View of Legality

In order to understand Schmitt's concept of dictatorship, one needs to survey his view of law, the most complete synthesis of which can be found in *On the Three Types of Juristic Thought* (1934) (Schmitt 2004). He contrasts his preferred mode of thinking—concrete-order thinking (*konkrete Ordnungsdenken*)—with its counterparts, normativism and decisionism. Normativists conceive of law as a system of rules that apply to conduct independently of it (*ibid.*, 48–9). A perfect example is Kelsen's "pure theory of law" (*ibid.*, 133, n. 8), which Schmitt himself took on repeatedly in his work (Lindahl 2015, 39–45). The decisionist approach sees the foundation of law as an act of will of a sovereign authority. Law consists of small-scale decisions and cannot be accounted for in a systematic impersonal way as normativists conceive it (Schmitt 2004, 59–60). Schmitt (2004, 61–2) cites Hobbes (1909, 143), for whom all laws were essentially decisions of the sovereign, explained by reference not to a higher-order norm, but to that ruler's authority. A more modern equivalent would be legal realism, which eschews the significance of legal rationality in judicial decisions and conceives of them on their own (Cohen 1935). The sociological approach underpinning concrete-order theory connects the system-thinking of normativism with the realism of decisionists. According to Schmitt (2004, 54), a legal order is a product of specific circumstances requiring joint action akin to similar orders such as marriages, families, churches, and armies. In Lindahl's formulation, it provides a framework for collective action when it is needed, joining separate agents by imposing different, but interconnected,

rules and roles on them (Lindahl 2015, 50–1). These rules “cannot and should not seize and consume the essence of this order, but only serve it” (Schmitt 2004, 54). Thus, when the circumstances change, so does the order (*ibid.*, 57–8). As per Santi Romano (2017, 7), “[t]he legal order (*l’ordinamento giuridico*) is a uniform essence, an entity that moves to some extent according to rules, but most of all itself moves the rules like figures on a gameboard; the rules represent, therefore, mostly the object or the instrument of the legal order and not so much an element of its structure” (as translated in Schmitt 2004, 57).

## 2.2. *From Normality to Exception: Dictatorship Introduced*

Schmitt’s concrete-order thinking makes a legal order conditional on certain circumstances, and renders distinctively extralegal action possible in the absence of what he calls a state of “normality.” Dictatorship, according to Schmitt, is such an *extralegal* mode of action—a dictator “has the capacity not to obey general norms” (Schmitt 2014, 8). It discounts “considerations of opposing rights, the agreement concerning an obstructing third party, rights acquired through the normal channel or by hierarchical legal proceedings” (*ibid.*, 8), and the like.

However, Schmitt’s conception of dictatorship differs substantially from how the term is commonly used. In particular, Schmitt takes extra care to distinguish a dictator from a ruler possessing unqualified power. While another concept central to Schmitt’s political thought—sovereignty—presupposes a ruler able to transcend the limits of law and switch from normality to exception at any time, dictatorship rightly so-called appears only in “specific circumstances” of exception (*ibid.*, 7). Therefore, a dictatorship is not permanent, but exceptional or *temporary*.

One also needs to note that, despite being extralegal, Schmittian dictatorship is not “arbitrary despotism” (*ibid.*, xlii) and is not as vast as the sovereign power to decide—every dictatorship is not only justified, but also fettered by the “actual situation” at hand (Schmitt 2005, 5ff.). Each dictator is not a sovereign, but “necessarily a commissar [in a broader sense than that of the ‘commissary dictatorship’ discussed in Section 2.3 below]” (Schmitt 2014, xliii), acting at the direction of the sovereign in order to achieve a certain goal: “the enemies should be defeated, the political opponent nullified or destroyed” (*ibid.*, 7).

## 2.3. *“Reformations” and “Revolutions”:* The Emergence of Sovereign Dictatorship

A dictator thus possesses a temporary power to do what is necessary in exceptional circumstances regardless of general norms of the legal order. With this definition in mind, Schmitt distinguishes two types of dictatorship depending on the sovereign who opens up the possibility of the exception and on the nature of circumstances at hand.

One, an older form of dictatorship, Schmitt calls the *commissary dictatorship*. He refers to a Roman Republican dictator: an extraordinary magistrate—a government official possessing both judicial and executive powers—appointed by the consul at the Senate’s request for six months in order to dissolve a dangerous situation by waging absolute powers over life and death. As his mission came to end, his powers ceased and were restored to the Senate (Schmitt 2014, 1–2). This example perfectly illustrates the nature of commissary dictatorship: A commissary dictator is directed

by the current ruler to defend the current legal order against an external or internal threat. The commissary dictatorship, somewhat paradoxically, suspends a constitution in order to protect it (*ibid.*, 118). The practice persisted until the eighteenth century in the activity of royal commissars, who were granted vast executive powers by their monarchs (*ibid.*, 34ff.).

With a dictatorship of the Republic, Schmitt juxtaposes the later dictatorships of Sulla and Julius Caesar (*ibid.*, 2) and, later on, the activities of the National Convention and the “people’s commissars” during the French Revolution (*ibid.*, 127ff.). Unlike the dictators of the past, they attained power through coups rather than grants of authority, held their offices for longer and more indefinite periods of time, and undertook substantial legal and constitutional reforms rather than sought to win a war or suppress an insurrection. These examples highlight that the threat a *sovereign dictatorship* aims to tackle is not separable from an existing legal order—this order itself is a situation that dictatorship seeks to resolve. A sovereign dictator seeks to bring about a new legal order, a new constitution, rather than defend the current one (*ibid.*, 118). In other words, sovereign dictatorship is the “dictatorship of revolutions” rather than the “dictatorship of reformations” (*ibid.*, xlv). Rather than being directed by the current ruler, a sovereign dictator is a “direct commissar of the people,” who wish to create a new constitution through their constituent power (*ibid.*, xlv, 119). Schmitt’s theory of sovereign dictatorship is not, like in the case of commissary dictatorship, a theory of self-defence, but a theory of legal and political *transition*.

#### 2.4. Proletarian Dictatorship as a Transitional Order

Schmitt characterized the Marxist “dictatorship of the proletariat” as a sovereign dictatorship, or an order that, as shown above, is (i) extralegal, (ii) temporary, and (iii) transitional. Like any other sovereign dictatorship, the proletarian dictatorship does not want to be something definitive, but aims to be transitional (Schmitt 2014, xl). It is not a permanent legal order, but a means of bringing about an economic situation in which the state “withers away”—communism (*ibid.*, 179). While Schmitt viewed the proletarian dictatorship as a type of sovereign dictatorship, even at this stage of analysis one can see how it differed from other recognized examples. Firstly, while other sovereign dictatorships were based on a wilful exercise of constituent power, Schmitt acknowledged the Marxist denial of individual will as a catalyst of political change. Like any transition between political formations, the establishment of the proletarian dictatorship on the road to communism was part of a natural, predetermined course of history (*ibid.*, xli, xlii). As Marx (1996, 469) said, “[i]t is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.” Secondly, while a sovereign dictatorship exists in order to facilitate the transition to a new constitution, Marx and Engels saw the proletarian dictatorship’s goal as suspension of the legal form through and through (of its “withering away” or “dying out”: Engels 1987, 268) and of transition to a *nonlegal* order (Schmitt 2014, 179). Thirdly, while a sovereign dictator is normally a person (broadly defined to include individuals, offices, and organizations), Marx and Engels envisioned a dictatorship of a class of people—the proletariat (*ibid.*, xxxix). Per Marx and Engels, as reinterpreted in Schmittian terms, the proletarian class thus acts at the

direction of the people in order to suspend the capitalist legal order and bring about a nonlegal form.

### 3. Schmitt's Framework and Early Marxist Thought

#### 3.1. Marx and Engels

Marx's and Engels's vision of the proletarian dictatorship seems to fit the Schmittian model. In *Class Struggles in France, 1848–1850* (1850), Marx, in his first use of the term, defines communism as

the declaration of the permanence of revolution, the class *dictatorship of the proletariat* as the necessary transit point to the abolition of class distinctions generally, to the abolition of all the relations of production on which they rest, to the abolition of all the social relations that correspond to these relations of production, [and] to the revolutionizing of all these ideas that result from these social relations. (Marx 1978, 127; emphasis added)

Thus, there is no doubt that the proletarian dictatorship was originally meant to be *temporary*. The end point of the proletarian dictatorship is the *transition to a nonlegal order*. The passage from *The Class Struggles in France* points out that class distinctions will disappear. The state and the law, no longer needed to maintain class domination, will “wither away” (Engels 1987, 268).

The proletarian dictatorship also appears to be *extralegal* as it emerges from the rejection of the legal form. Marx and Engels saw the transition from a capitalist to a communist society as the product of a revolution that may disregard contemporaneous legal norms. Earlier on, in the *Communist Manifesto* (1848), they vehemently rejected criticisms based on “bourgeois notions of freedom, culture, law, &c.” (Marx and Engels 1976, 501). For them, these arguments did not represent eternal truths, such as freedom or justice, that create independent fetters on revolutionary action, but were contingent on the existing mode of production (capitalism) and exist in order to keep the dominant class (the bourgeoisie) in power (*ibid.*).

However, this did not mean that the proletarian revolution had to be violent and take place outside the current state structures. As Bender (1981, 528–30) observes, Marx and Engels recognized the possibility of democratic means for establishing proletarian rule, and thus rejection of the current legal order was not treated as a necessary condition of proletarian revolution. The *Communist Manifesto's* agenda similarly described the transition to communism as a series of legal reforms that seemed to be impossible to accomplish without something resembling a state, such as the abolition of inheritance and the establishment of a progressive income tax (Marx and Engels 1976, 350–1). Marx's later work, *The Critique of the Gotha Programme*, continues this thread. In it, Marx acknowledged that certain features of “bourgeois” legality, such as the doctrine of individual right (“equal pay for equal work” rather than the socialist “from each according to his ability, to each according to his needs”), would be “inevitable” in the “first phase of communist society,” where the old type of “economic structure” and level of “cultural development” still prevail. Only after this transition will “the narrow horizon of bourgeois right be crossed in its entirety” (Marx 1989, 87).

Engels, in 1875, also argued that the dictatorship of the proletariat would be a state, although he preferred the word “commonalty” (*Gemeinwesen*), as such a state, unlike bourgeois states, would be self-dissolving. The proletariat, he said, would need the state “for the purpose of [...] keeping down its enemies” (Engels 1991, 64). In that, Marx and Engels transcended Schmittian categories in either of the two following ways. In one version—characterizing proletarian dictatorship as an extralegal order (a violent revolt) before transitioning back to the pre-existing bourgeois legal order (with a shifted balance of power) and then to a nonlegal order—Lenin’s proletarian dictatorship was seen somewhere in between a commissary and a sovereign dictatorship. On the one hand, like a commissary dictatorship, the proletarian dictatorship ends with a return to the previous order—bourgeois law. On the other hand, similar to sovereign dictatorship, it results in a shift in the balance of power towards the proletarian class and proceeds with the ultimate demise of the legal order. The other, more natural reading, taking a broader view of proletarian dictatorship as incorporating both the revolution and the first phase of communism, would fit the sovereign-dictatorship model better, but would lose its extralegal character. This latter interpretation of the dictatorship of the proletariat will soon gain strength during the “refetishization” of law under Stalin. This dictatorship, in order to effect a transition to communism, has to necessarily use legal instruments.

However, one should keep in mind that Marx and Engels held no reverence for the value of the current legal structures, and they treated law and the state as only instrumentally useful to the achievement of their aims. The existing state structures would be used only if the proletariat could rise to power under these conditions (Bender 1981, 529). In other cases, the proletarian class could resort to a violent revolution: “In depicting the most general phases of the development of the proletariat, we traced the more or less veiled civil war, raging within existing society up to the point where that war breaks out into open revolution, and where the violent overthrow of the bourgeoisie lays the foundation for the sway of the proletariat” (Marx and Engels 1976, 495). Moreover, after the revolution, the proletariat would only use the law and the state inasmuch as it needs these instruments. Thus, the proletarian dictatorship under Marx and Engels, while capable of being *lawlike*, was not *legal* in the sense of being constrained by legal fetters. Instead, it was only assessed with regards to its being conducive to bringing about certain ends. In other words, it conceived law as a decision and not as a concrete order. While not needing to pursue the extralegal tactics of the Roman dictators or the people’s commissars in revolutionary France as described by Schmitt, the proletariat had a discretion in choosing its means.

*3.1.1. Lenin and the Russian Revolution.* In the 1917 October Revolution, the democratic road was not taken. Instead, the revolution took the form of a violent insurrection against the Provisional Government, shortly followed by civil war. Lenin, one of the architects of the revolution, continued the Marxist tradition by focusing, acutely, on the dictatorship of the proletariat. In his seminal work just before the revolution, *The State and Revolution* (1917), Lenin rejected a possible interpretation of Engels’s “withering away” passage as a gradual abolition of the bourgeois state through peaceful and lawlike means. Instead, he said that

[t]he “special coercive force” for the suppression of the proletariat by the bourgeoisie, of millions of working people by handfuls of the rich, must be replaced by a “special coercive force” for the suppression of the bourgeoisie by the proletariat (the dictatorship of the proletariat). (Lenin 1974, 397)

Thus, he defined the dictatorship of the proletariat as “the rule—*unrestricted by law* and based on force—of the proletariat over the bourgeoisie, a rule enjoying the sympathy and support of the labouring and exploited masses” (attributed to Lenin by Stalin, but not contained verbatim in the text of *The State and Revolution* itself: Stalin 1953, 118; emphasis added). Thus, Lenin envisioned an *extralegal* mode of action during the revolution.

However, paradoxically, while advocating for the rejection of legal norms when it comes to establishing the rule of the proletariat, Lenin fully embraced the legal, and not *extralegal*, character of the transition to a nonlegal order post-revolution (Kelsen 1955, 57–60). “Communism,” he said, “in the first phase retains ‘the narrow horizon of bourgeois law [and the bourgeois state]’” (Lenin 1974, 471). According to Beirne and Hunt, for Lenin, law was useful in performing a variety of functions: eradicating the remnants of bourgeois power, suppressing dissent, educating people and fostering discipline, and acquiring control over capital (Beirne and Hunt 1990, 72–7). Not only did the changeover to a nonlegal order require time, and some remnants of bourgeois law were *inevitable*, but it was implied that the legal form is *necessary* at this transitional stage. Law was not merely an anachronism to be reckoned with during the shift to communism before it disappears, but was *instrumental* in this transition. A new society required ordering via the means of social control before “the *necessity* of observing the simple, fundamental rules of the community [becomes] a *habit*” (Lenin 1974, 474; emphases in the original) and before the second phase, at which the state disappeared, could be given way. This was a dramatic change from recognizing legal norms as a mere outgrowth of material conditions to an instrument that is capable of *changing* them.

Still, at this stage it is clear that while Lenin recognized the necessity of legal *means*, he did not advocate for legal *ends*—the state is a mere “machine” taken “from the capitalists” and used as a “cudgel” to “smash exploitation of every kind” (Lenin 1951, 15). Hence, while the proletarian class was required to use law to entrench the new rules of the community, it was not subject to any *external* legal standards. In this respect, Lenin’s characterization of law was similar to Marx’s and Engels’s.

In addition, while the first stage of communism would be temporary, aiming to bring about a stateless society, the second stage of communism, after the state has withered away, while appearing to constitute a society “*without any rules of law*” (Lenin 1951, 15; emphasis added), still allowed for some “rules of social intercourse” and rudimentary enforcement mechanisms. All “individual excesses” would be responded to “by the armed people themselves as simply and as readily as any crowd of civilised people, even in modern society, interferes to put a stop to a scuffle or to prevent a woman from being assaulted” (Lenin 1974, 464). The only difference between this order and a legal order was, as per Lenin, that communism would be a system “under which people form the habit of performing their social duties without *special apparatus of coercion*” (Lenin 1970, 284; emphasis added).

### 3.2. Early Soviet Legal Thought: Stuchka and Pashukanis

3.2.1. *Stuchka.* After the Russian Revolution, tsarist law was promptly abolished, calling for a replacement (Solomon 1996, 17–77). One of the architects of the new system was Petr Stuchka, an early Soviet legal scholar and one of the first commissars (ministers) of justice. In *The Revolutionary Part Played by Law and the State: A General Doctrine of Law* (1921), Stuchka defined law, in the Marxian manner, as a “system (or order) of social relationships which corresponds to the interests of the dominant class and is safeguarded by the organized force of this class” (Stuchka 1951, 20). However, he, like his predecessors, also saw the need for a nonexploitative law, or the law of the socialist state brought about after the October Revolution in order to restructure social relationships in “the first phase”:

Before us is the period of a time of transition, in which we—taking into account the social material at hand—*must* consciously apply the laws of the development of capitalist society—laws which we have acquired or are still only in the process of acquiring—to the end of changing our social relationships. (Stuchka 1951, 40; emphasis added)

He put the idea into practice by designing, together with Lenin, a range of “simple and popular” (Solomon 1996, 19) laws for the new era. The culmination of this return to legality was the New Economic Policy (NEP), a reintroduction of some elements of capitalism and private property in order to ensure the economic revival and stability of the new society (*ibid.*, 17ff.).

Stuchka moved on from Lenin’s deliberations in *The State and Revolution* in one significant respect. While he saw that transitional law as having a capitalist character by virtue of being lawlike, he distinguished it from bourgeois law as the socialist state’s “own characteristic order,” its “Soviet law” (Sharlet 1977, 158–60). This stance can be explained by Stuchka’s recognition of more than one type of legal rules (Shalet, Maggs, and Beirne 1990, 49–50): those that stem from “sectional, private interest” and “technical rules of purely administrative nature” (Stuchka 1951, 51). Retention of the latter in a transitional legal order would consequently not make proletarian dictatorship “bourgeois.” Regardless, reference to “Soviet law” as a distinct phenomenon signified a shift from the proletarian dictatorship as a mere transitional category, as Schmitt described it, to a *sui generis* legal order. Thus, while the proletarian dictatorship, on Stuchka’s terms, was a *temporary* transition to a *nonlegal order*, it was emphatically *not extralegal*.

3.2.2. *Pashukanis.* Evgeny Pashukanis, the author of *The General Theory of Law and Marxism* (1924), also inherited some aspects of the Marxist-Leninist vision of law, such as its class character and its disappearance in a communist society. However, he differed from Stuchka in two respects (Shalet, Maggs, and Beirne 1990, 52). Firstly, he pointed out that not all “social relationships” constituted law—law differed from other social relations in that it only regulated the production and distribution of goods (Pashukanis 1980, 61–2). Thus, he tried to recast in economic terms any species of law that bore no relation to commodity exchange (an example being criminal law, which he saw as a relationship of retaliation, or literally “an eye for an eye”: Pashukanis 1980, 111ff.) or he denied their lawlike character, a

case in point being public law, which required principles of *raison d'état* rather than legal norms (ibid., 92) or “technical rules” (as will be discussed shortly). Secondly, Pashukanis, unlike Stuchka, saw all law as necessarily bourgeois by virtue of its reflecting commodity exchange, and thus he rejected any possibility of “Soviet” or “socialist” law: “the withering away of the categories [...] of bourgeois law does not signify their replacement by new categories of proletarian law. [...] The withering away of the categories of bourgeois law will under these conditions signify the withering away of law in general, i.e. the gradual disappearance of the juridic element in human relationships” (ibid., 46). The transitional stage was *not extralegal* and accepted some form of law, but it was not marked by a new type of law, either.

Therefore, law under the proletarian dictatorship is a *temporary* transition to a *nonlegal order*. While Pashukanis insisted that private law, or law proper, would disappear in the communist society, he, like Lenin, admitted that some “technical rules” would exist even after its dying out. However, unlike Stuchka, he did not see these rules as legal rules for the following reason. As Fuller noted, Pashukanis’s idiosyncratic definition of law as norms of commodity exchange, dealt not in rules, but in rights (Fuller 1949, 1160). Pashukanis gave examples of “bees and ants” that cooperate, obviously, without law; “primitive tribes” that use religious, and not legal, rules; modern, “purely coordinating” rules such as “train schedules” (Pashukanis 1980, 58); and the steps a doctor should follow when treating a patient (ibid., 60). On this view, coordination of this kind did not require legal regulation, and thus the essence of law lay not in regulating in this manner, but establishing private property rights (Head 2008, 182). Thus, coordination rules that would refer not to conflicting interests, but to conflicting purposes (Kelsen 1955, 104), could survive after the transition to communism.

Pashukanis’s “commodity exchange theory” coincided with rejection of Lenin’s and Stuchka’s NEP legalism, focusing on “replacing the NEP codes with shorter, simpler models” and “equivalence” with “expediency,” as well as reorienting legal education towards general matters of policy rather than specific disciplines (Sharlet 1977, 161–2). This period was later referred to as “legal nihilism”—it aimed at weakening the law in order to dissolve it rather than strengthening the legal order. Later on, Pashukanis attempted to revise his view in the light of Stalin’s policy shift towards legalism, first taking steps to gradually accommodate Soviet law into his theory and finally rejecting his central thesis in 1936 (Head 2008, 160–6). These revisions, while significant, are universally accepted as coerced and not authentic (ibid.)—as a result, this article will not discuss them and instead will turn to Vyshinsky’s theory of law as a better representation of the legal theory of the next era.

## 4. The Early 1930s: Return to the Legal Form

### 4.1. Practice: The “Refetishization” of Law

In “Concerning Questions of Leninism” (1926), Stalin followed Lenin’s definition of the dictatorship of the proletariat, summarizing the phenomenon in three main aspects:

- (1) The utilisation of the rule of the proletariat for the suppression of the exploiters, for the defence of the country, for the consolidation of the ties with the proletarians of other lands, and for the development and the victory of the revolution in all countries.
- (2) The utilisation of the rule of the proletariat in order to detach the labouring and exploited masses once and for all from the bourgeoisie, to consolidate the alliance of the proletariat with these masses, to draw these masses into the work of socialist construction, and to ensure the state leadership of these masses by the proletariat.
- (3) The utilisation of the rule of the proletariat for the organisation of socialism, for the abolition of classes, for the transition to a society without classes, to a socialist society. (Stalin 1954, 31–2)

These functions were supposed to be performed by the Soviet state, which Stalin saw as a perfected version of the Paris Commune, a political form necessary to effect the full emancipation of the proletariat before Communism could be in place. After all, as he noted later on in 1939, “Engels’ formula as to the fate of the socialist state in general cannot be extended to the [...] case where socialism has triumphed in [...] a country which is encompassed by capitalist encirclement” (Stalin 1951, 346), and transitional arrangements were needed to deal with these external threats. While he acknowledged that during the October Revolution and the Russian Civil War violent methods were to be preferred, in peacetime it was “the peaceful, organisational and cultural work of the dictatorship, *revolutionary law*, etc.” (Stalin, n.d., 33; emphasis added) that was to govern, with the coercive apparatus still, of course, necessary to secure compliance with the new set of norms. Thus, he laid down the agenda for developing “Socialism in one country” or strengthening the Soviet state as an agent of the proletarian dictatorship.

Hence there followed the law reform. After the uncertain post-Revolution years and brief period of rejection of legality in early 1930s, the Soviet state ushered in the period of “refetishization” of traditional legal order. In practice, this meant reorganizing legal agencies for centralization, strengthening the procuracy (the main agency Stalin relied on), putting more emphasis on formal legal education (Sharlet 1977, 168–78), hiring qualified legal officials, and using Soviet law to enhance the reputation of the Soviet state at home and abroad (Solomon 1996, 153). Chief Prosecutor Andrey Vyshinsky, the reformer-in-chief and later the prosecutor in the Moscow Show Trials, successfully defended these developments against the attack of his “Old World” rival, the Commissar (Minister) of Justice Nikolai Krylenko. As Huskey (1990, 179) summarizes, “[w]here Krylenko sought to distance the Soviet Union from the bourgeois legal heritage, Vyshinsky favored a return to certain ideas and practices found in the legal systems of capitalist states.” For instance, in 1934 he insisted on a model criminal code that would cabin judicial discretion by giving precise definitions of crimes. In other words, in practical matters Vyshinsky favoured a return to the *Rechtsstaat*, remarking that “we cannot allow a citizen to be brought to court for a crime that is not designated by law” (Vyshinsky 1935, 7).

A big part of the “conservative shift” was marked by the promulgation of “Stalin’s” Constitution of 1936. The new Constitution solidified the impression that what the Soviet state was after was not a temporary arrangement, but a new legal order. After that step, as Solomon emphasized, “the views on law espoused by Marxist legal scholars in the 1920s—such as of law as a temporary category likely to

disappear with capitalist social relations; or procedural law as mere technique whose simplification was praiseworthy—sounded discordant, if not downright disloyal” (Solomon 1996, 194). In addition, the new Constitution’s content was more in line with legal protections normally accorded to citizens in Western liberal democracies. For instance, Article 127 guaranteed Soviet citizens the inviolability of the person, demanding that “no person may be placed under arrest except by decision of a court or with the sanction of a prosecutor.” This reflected the legislators’ willingness to not only rule *by* law, but be bound by the rule *of* law, at least on paper. Even if one argues that the new constitutional guarantees were only a matter of securing the Soviet Union’s reputation at home and abroad, it speaks volumes that rule-of-lawlike features were considered necessary for that legal order’s legitimation.

#### 4.2. Theory: Vyshinsky’s “Socialist Legality”

While, on the policy plane, Vyshinsky was battling Krylenko, as a scholar he found his rival in Pashukanis, who would later, under his watch, be condemned as a counterrevolutionary and executed in 1937. Starting with the definition of law, Vyshinsky was eager to “rescue” the concept of law from some of the objections inherent in Marxism, leading him to a conclusion that “the dictatorship of the proletariat is not only *compatible* with legal regulation, but *demand*s it” (Vyshinsky 1949a, 11; my translation; emphasis added). Even though this thesis—that the dictatorship of the proletariat is not extralegal—can be traced back to Marx and Engels, one can see Vyshinsky going further than his predecessors. Vyshinsky, similarly to Stuchka and Pashukanis, defined law as

the totality (a) of the rules of conduct, *expressing the will of the dominant class* and established in legal order, and (b) of customs and rules of community life sanctioned by state authority—their application being guaranteed by the compulsive force of the state in order to guard, secure, and develop social relationships and social orders *advantageous and agreeable to the dominant class*. (Vyshinsky 1948, 50; emphases added)

However, he went beyond Stuchka’s very rudimentary concept of Soviet law as an instance of this definition. While still saying that Soviet law “is the aggregate of the rules of conduct established in the form of legislation *by the authority of the toilers and expressive of their will*” (ibid.; emphasis added), the worker’s will, in a society where class division was, as per the official Stalinist doctrine, long abolished, was identified with the will of everyone (Vyshinsky 1951, 339). This means that on Vyshinsky’s theory, Soviet law did not only exist as a concept, but was different—and “bigger, better, and purer” (Fuller 1949, 1163)—than the prerevolutionary alternative, representing a new legal order. Emphatically, *contra* Pashukanis, it was not “bourgeois”—and characterizing it as such was seen as a perversion of “classics” such as Marx, Engels, and Lenin, amounting to treason (Vyshinsky 1949a, 40).

Equally, Vyshinsky, while recognizing the *temporary* character of Soviet legal arrangements (Vyshinsky 1948, 52), goes further than Stuchka and Pashukanis in prolonging this temporary measure. Instead of claiming that disappearance of the law and the state is going to occur with economic change, Vyshinsky says that change will come only when Soviet law gives rise to new social arrangements and habits, in which capitalism is “annihilated” even “in human consciousness” (ibid., 50). This, as Fuller notes, is a longer timeline than a shift to a new economic system—it takes a lot of time

for new values to be so entrenched in the human mind that rules are no longer needed, and one may doubt if that is even possible (Fuller 1949, 1163).

This heightened role of law in moulding a new social order means that legal ideals, once again, become important in themselves and not just instrumentally. As Fuller notes, the architects of Stalinist justice in general and Vyshinsky in particular returned to bourgeois values of legality:

They have learned that the state without justice is impossible, or at least that it is impossible unless people believe that the state is attempting in some degree to render to each his due. They have also seen that some respect must be paid, sooner or later, to the principle of legality; men must know, or think they know, where they stand under the law and before the courts. (Fuller 1949, 1165)

Vyshinsky's "socialist legality" mirrored the more familiar rule-of-law concept, rejecting the reduction of law to politics characteristic of previous Soviet legal thought, and the "arbitrary perversity and lawlessness" attributed to bourgeois states, and demanding that "all administrative acts must be in conformity with law" (Vyshinsky 1948, 369) and that judges are independent as per Article 112 of "Stalin's" Constitution of 1936 (Vyshinsky 1951, 331). *Contra* Schmitt's model, this further crystallized Soviet law and made it into more than just a temporary measure. However, one can still note that socialist legality was ultimately seen as valuable only to the extent that it advanced socialist policy. As seen below, when it came to defeating actual or perceived enemies of the Soviet order, such as during collectivization and the Great Terror, this principle was easily disposed of.

While Vyshinsky talks about the eventual abolition of law and a transition to a *non-legal order*, he, unlike Pashukanis, implies that morality does not disappear with law, but becomes so strong as to make law obsolete (Fuller 1949, 1163). While Vyshinsky separated this morality from law, it is not clear how different those moral rules would be from their legal counterparts. Even though he emphasized coercion, this distinguishing feature can be contested. More importantly, defining law as necessarily coercive goes against Vyshinsky's own conviction that "the law [закон] is not just naked repression or punishment [... but] a great cultural and political force, which makes it possible to educate and reeducate people" (Vyshinsky 1949b, 237; my translation). Thus, on Vyshinsky's theory, even under communism some lawlike rules would be in place.

#### 4.3. *The Great Terror—a Return to the Exception?*

To many, this embrace of the *Rechtsstaat* in both practice and theory is surprising, considering that the Soviet state under Stalin is best known not for the institutional change described above, but the political terror that followed. While the 1936 Constitution hailed the virtues of socialist legality, those accused of plotting against the state were subjected to "show trials" that maintained only a semblance of due process, and to proceedings by extralegal tribunals ("troikas") that abandoned proper court procedure. Vyshinsky, once a proponent of a return to legality, took an active part in its destruction, representing the prosecution at the Moscow Show Trials and signing orders sentencing dozens of the accused to death or to the Gulag. Moreover, the Great Terror was not a *sui generis* event: It merely repeated on a larger scale the state repressions that had gone before, from the Red Terror after the Civil War to the collectivization that forced peasants to give up their farms. Thus, at first sight, the story of the

“refetishization” of law looks simply, in words of Hannah Arendt, like a “permanent background for [the Soviet state’s] lawlessness” (Arendt 1973, 398). In other words, like the Nazi state, the Soviet state was, in Franz Neumann’s formulation, a Behemoth rather than a Leviathan, embodying chaos rather than order (Neumann 1942, 5). As a result, one would be tempted, like Arendt (1973, 389–90), to characterize the Soviet state as that of Leon Trotsky’s “permanent revolution” or, in Schmittian terms, as a continuing sovereign dictatorship. This “totalitarian” model poses a significant challenge to both the accuracy and utility of the analysis conducted above. One way to respond to it would be to point out that what took place was not extralegal but *legalized* terror, enabled by creating special categories of offences that made it possible to dispense with ordinary procedure (Cercel 2018, 108–11). However, a better, more nuanced, argument would be that the political terror formed only a *part* of the Soviet legal landscape. It was seen as an exception rather than the default, and legality was still hailed as paramount in the ordinary organization and application of the law. In other words, following Ernst Fraenkel (1941), Stalinism can be described as a “dual state”—comprising a “normative state” that preserved some elements of legality and a “prerogative state” that dealt in extralegal categories. The former applied in “ordinary” cases, while the latter—in “extraordinary” or “political” cases (Sharlet 1977, 155–6). Thus, rather than prolonging the proletarian dictatorship described by Schmitt, the Great Terror represented a new state of exception appearing against the backdrop of a newly formed *sui generis* legal order—the Soviet state. This, in my view, can be explained via something that Schmitt did not take into account when formulating his theory of dictatorship—the multiplicity of law’s functions.

## 5. Multiplicity of Legal Functions: Complicating Schmitt’s Account

### 5.1. Multiplicity of Law’s Functions: Control and Coordination

When we talk about law, we tend to imagine coercive rules put in place in order to make law-subjects behave in a certain way. This picture, however, is incomplete. This becomes obvious when we turn to Campbell’s illuminating distinction between two possible rationales for rules—*control* and *coordination* (Campbell 1996, 50). Control rules, the rules we are most aware of, “depend on the general need to prevent directly harmful and encourage directly beneficial behavior” (*ibid.*, 52). Coordination rules, on the other hand, are “all those rules that relate to the social utility of having practices which enable people to anticipate the conduct of others and thus more successfully achieve their objectives either personally or in cooperation with others” (*ibid.*, 50).

As Campbell argues, not only control but also coordination rules are necessary to achieve (i) orderliness (resolution of complex disputes), (ii) fairness (maintaining the principle that like cases are to be treated alike), (iii) socialization (building identities and communities), and (iv) efficiency (making decisions relatively quickly (Campbell 1996, 50). Hart expresses this in his concept of the “puzzled man.” *Contra* Holmes (1897), he insists that a typical law-subject is not a “bad man” who seeks to avoid sanctions, but someone who wishes to do what the law or morality requires but needs directions as to what it is (Hart 2012, 40). Law serves him by providing these directions, and serves the public by connecting dozens of these “puzzled men” in concrete projects. Moreover, as Finnis adds, sometimes the law’s task goes beyond

identifying the ways of cooperation but persuading those who might prefer some and not others, or even disagree that coordination is needed (Finnis 2011, 67–70).

Finally, the coordination function is not to be dispensed with even when the control function is no longer needed. The idea of the inherent coerciveness of law was challenged in the “society of angels” thought experiment, first mentioned by St. Thomas Aquinas (*Sum I-II*, Q. 96, A. 4, in Aquinas 1911, vol. 8, pp. 69–71) and finding its modern expression in Raz’s argument (Raz 1999, 158). If we conceive of law as a means of bringing about moral conduct, we would find little application of this tool in a society of angels or saints, where everyone already behaves morally. Thus, in *Federalist* 51, James Madison observed that “[i]f men were angels, no government would be necessary” (Hamilton, Madison, and Jay 2003, 263). However, when the coordination function is taken into account, it turns out that angels still need law and a legal system to coordinate their conduct as they pursue different goals and aspirations, interpret the existing rules, and compensate for accidental damage (Raz 1999, 159–60). In a similar manner, Aquinas argued that men in “the state of innocence” would still need authoritative directives in order to converge in their pursuit of the common good despite different ideas on how to do so—it would even be a duty of the most knowledgeable of men to lead the others to the best path (*Sum I-II*, Q. 96, A. 4, in Aquinas 1911, vol. 8, pp. 69–71).

Therefore, the coordination function is at least as central to law as the control function. This is relevant when explaining why one would choose to govern by law. While Campbell’s reason (ii)—fairness—speaks for a ruler with certain normative commitments, (i) orderliness, (iii) socialization, and (iv) efficiency show that law’s coordination function makes this function indispensable to those in charge regardless of their aspirations. Law, in other words, is necessary for organizing the law’s subjects in pursuit of certain goals, whatever these goals might be.

## 5.2. *Coordination and the Necessity of Law*

However, while it is clear that law aids coordination, it is not the *only* means of coordination, and hence, *contra* Raz, is not something that would be necessary even in a society of saints. Thus, in order to substantiate the claim made in the previous section, one needs to identify how and why law is different from other similar means of coordination, such as propaganda, extortion, and custom. These three alternatives are, like law, capable of pointing out a desired course of action and providing an incentive to the agents at play to comply with this direction.

However, Finnis (2011, 71) convincingly argues that law, unlike these methods of coordination, is particularly effective in achieving this goal. Firstly, law is a “seamless web”—it is a system of interlinked norms, and one cannot reap its benefits without incurring its burdens. Thus, one has a stronger incentive to comply with the law even if doing so goes against their interests. Secondly, law’s “forms and modes of application and enforcement” ensure that free-riders are penalized, providing assurance to those who comply with the law to their detriment that they are not “a mere sucker or a fall-guy” (*ibid.*). Thirdly, the law’s “legislative capacities” make the law better suited to generating prompt and clear solutions for new coordination problems that emerge. Finally, law by its nature is structured so as to minimize the unfairness perpetuated by other modes of coordination.

Even though Finnis emphatically disagrees with the view that the point of law is merely to achieve effectiveness (*ibid.*, 72), at least three of his reasons—apart from the

minimization of unfairness—speak even to one who does not share his goal of bringing about the common good and is instead interested in ensuring “the survival of government or the future conformity of the potentially recalcitrant” (ibid.). Thus, while law is not *conceptually* necessary for coordination, it is next to *practically* necessary.

### 5.3. Beyond Schmitt: Coordination in a State of Exception

While Schmitt’s concept of law, as shown above, hints at the coordination function of rules—the legal “concrete order” is tasked with facilitating cooperation in the service of certain goals (Lindahl 2015, 50–1)—his account of the extralegal sphere fails to take this concept to its logical conclusion. The sovereign, when deciding on the exception to the legal order (Schmitt 2005, 5), is taken to respond to a political conflict that can be reduced to a distinction between friend and enemy (Schmitt 1996, 26). Thus, the main task of the “concrete order,” on Zarmanian’s interpretation, is to contain this conflict and make it capable of mediation and nonviolent adjudication (Zarmanian 2006, 53). This means that the legal order is reduced to control rules as they correspond to this goal in the most immediate way, and the coordination aspect of law is significantly neglected.

As a result, Schmitt’s account not only of normality, but also of exception, fails to appreciate the necessity of at least some lawlike rules even at the time when political conflict takes its most palpable form. For one thing, political conflict does not destroy the need for coordination in more mundane aspects of the state’s functioning such as entering into contracts or marriages, or, to borrow an often-cited example, figuring out which side of the road to drive on. And, for another, and more interestingly, as the sovereign is tasked with resolving political conflict by destroying the enemy, this goal also demands coordination rules. This problem is particularly pressing when it comes to Schmitt’s account of dictatorship, which is, like law, a means to a specific end—to defend the existing legal order (in the case of commissary dictatorship) or to bring about a new one (in the case of sovereign dictatorship). Therefore, like a “concrete order,” it would demand coordination and cooperation of a kind that would, per Raz and Hart, need lawlike rules.

Thus, while presenting a dictatorship as an extralegal order, Schmitt fails to account for the potential survival of some legal rules in a situation of emergency. While the law might not be enough to resolve the existential conflict at hand, it will still have a role to play.

### 5.4. Coordination and the Soviet Legal Order

As a result, Schmitt’s refusal to take into account the coordinating function of law is what explains why the intellectual history of the dictatorship of the proletariat does not match his “sovereign dictatorship” analysis. To recap, if we trace the evolution of this account from Marx and Engels to Stalin and Vyshinsky, the three features of the proletarian subtype of Schmittian dictatorship—its being (i) extralegal and (ii) temporary, and (iii) its expressing a transition to a nonlegal order—start to become less pronounced. This can be explained by the fact that communist, and especially Soviet, legal scholars operating in a context of revolution and the formation of a new Soviet state, had to confront not only the theoretical problems of transitioning to a new order, but also its theoretical problems. This made them more attentive to the problem of coordination and the indispensability of law in solving that problem, culminating in the “refetishization of law” of the mid-1930s. As Berman noted:

Without a legal system and a legal order—without Law with a capital L—the Stalinist regime could neither control the social relations of the people nor keep the economy going nor command the political forces in the country as a whole. It was rediscovered that law is not a luxury but a necessity, that at the very least it satisfies a basic need for some outlet for the feelings of justice, of rightness, of reward and punishment, of reciprocity, which exist in all people. Stalin did not want the Russian people merely to obey; he wanted them also to believe in the rightness of the order which had been established. This fact breathed in every word of Soviet legal literature from the statutes and cases to the treatises and law reviews. (Berman 1963, 64)

It is this practical necessity that Schmitt overlooked in his analysis—and what has come to animate the transformation of the dictatorship of the proletariat from its theoretical beginnings to its culmination as a new kind of legalism.

## 6. Conclusion

In writing this article, I pursued two objectives. The first one was to apply Schmitt's insightful analysis of the relationship between law and the state to the complicated case of the proletarian dictatorship as envisioned by Marx and Engels and put into practice in creating the Soviet state. This would continue Schmitt's sociological project beyond his scarce references to the matter in *On Dictatorship*, written when the theoretical and practical implications on the doctrine only started to take hold. I looked at Marx and Engels, Lenin, Stuchka, Pashukanis, and Vyshinsky in tracing the theoretical evolution of the concept in the run-up to the mid-1930s, when Soviet legalism reached its peak.

The second purpose of my inquiry was to use the resulting analysis to challenge some aspects of Schmitt's doctrine. While Schmitt presented the proletarian dictatorship as an (i) extralegal (ii) temporary (iii) transition to a nonlegal order, this was not true of the concept's realization from the very beginning, as even Marx and Engels recognized the indispensability of legal rules in the process of transition to communism. Moreover, the concept continued to change up to the 1930s, when the proletarian dictatorship, instead of continuing to be a mere transitional stage, "crystallized" in both theory and practice. The discrepancies between Schmitt's proposed model and its realization in practice are not a result of a mere classification error. More significantly, they point to a problem at the heart of Schmitt's framework. Even though the Soviet example does not challenge, but reinforces, Schmitt's category of exception, by implying that there would be no need whatsoever for law in an emergency, Schmitt neglected law's coordination function. Law does not only serve to resolve social conflict, but is necessary for making common projects come together. In a dictatorship, this makes law indispensable, despite the inability to solve the existential conflict defining the emergency by legal means. These were the considerations that Marx and Engels, and then the Soviet legal theorists, kept in mind when they tried to move on from the capitalist order. With law's practical necessity becoming more apparent as it faced the challenges of both state-building and self-defence, the Soviet state, *contra* Schmittian prescription, had reembraced legality.

Therefore, closer attention to the dictatorship of the proletariat demonstrates that the relationship between law and the state is complex and remains a fertile soil for further inquiry. While Schmitt's contribution remains significant, it needs to be qualified as more aspects of the law's nature become apparent. *Paradoxically, the state still needs law even if it actively eschews legality.*

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