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John Quigley

Excerpt

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PART ONE

THE SOVIET CHALLENGE

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1

The Industrial Revolution and the Law

FROM THE MOMENT THE BOLSHEVIKS TOOK POWER IN Russia, Western governments worried that the Soviet idea might spread.¹ Earlier revolutions had spread like a “contagion” – the Papal Revolution of the twelfth century, the Protestant Reformation of the sixteenth century, the English Revolution of the seventeenth century, the American Revolution of the eighteenth century.

These revolutions, wrote Harold Berman, had “enormous all-Western repercussions,” namely, “a reaction of fear and hostilities in other countries – fear of the spread of the revolutionary virus, hostility toward the nation that was its bearer.” The Western world was united by ties of history and the kinship of the monarchies. What happened in one country affected another.

The process of reaction to revolution, as described by Berman, was that “when the revolution had settled down in its home country, the other countries accepted a mild version of it.” Berman detailed the impact of these revolutions, including the Bolshevik: “after the Luther revolution had subsided in Germany, absolute monarchies with a strong civil service appeared in England, France, and other countries; after the Puritan Revolution had subsided in England, constitutional monarchies and quasiparliamentary institutions emerged on the European continent in the late 1600s and early 1700s; after the French and American revolutions had subsided, the English enlarged the electorate to include

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the middle classes in 1832; and after the Russian Revolution had subsided, 'socialist' or 'new deal' governments appeared in the 1930s in Western Europe and the United States."²

The most recent social revolution had been but a century before. Napoleon came to power in France and challenged the notion of monarchy, alarming European royalty. To thwart domestic unrest, the monarchs of Europe accepted constitutional limitations to accommodate Napoleon. The absolute powers of monarchs devolved onto legislative bodies and government ministers.

Western leaders viewed the Bolshevik Revolution with the same dread with which their predecessors had viewed Napoleon. "The attitude of Europe and America to the Russian Revolution has been as blind and as irrational as their attitude to the French Revolution a century and a half ago," said the socialist lawyer Harold Laski. "In each case, they sought to build a *cordon sanitaire* about ideas because the rights of property were called into question."³

Socialist Ideas in Nineteenth Century Law

The threat the Soviet government posed was the greater because it did not base itself on concepts homegrown in Russia. Its grounding was in ideas developed in Europe, with Karl Marx as the principal exponent. Those ideas involved an analysis of an industrial revolution that had been born in England and then spread to the Continent. If Marx's ideas could inspire revolution in backward, agrarian Russia, they had even greater potential in the countries that had spawned the industrial revolution.

Marx's ideas had already found reflection in the law of Europe. The industrial revolution put pressure on governments to protect those who could not survive in the competition to make a living. The dark side of industrialization was apparent to any who would look. The mechanization of manufacturing came at a time when the population

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of laborers was high. The new machinery could produce with less labor input. Workers were in a weak position to seek good wages or conditions of employment. Owners of manufacturing establishments could extract labor at low wages.

The extremes of wealth and poverty were chronicled by novelists and social commentators. Robber barons fleeced the public, unhampered by any countervailing force. Governments did not restrain capitalists. The economy was a perpetual roller coaster. In good times, companies overproduced, and when the goods could not be sold they laid off workers, resulting in recessions or depressions. Irreplaceable natural resources were exploited for profit, with little control. In some industries, instead of the competition that was the *raison d'être* of the system, the strong companies drove out the weak, creating monopolies.

Marx saw no way out of the exploitation so long as ownership of the means of production remained in private hands. The issues that Western governments addressed were to Marx only the symptoms of a fatally ill body politic. The reforms were mere tinkering with a machine that could not function. Marx described and analyzed the concentration of productive resources that accompanied the industrial revolution.⁴ He said that the capitalist order was based on profit, and that in order to compete successfully, entrepreneurs had to give their workers as little as possible.⁵ In the cycles in economic life that led periodically to overproduction of goods, with high unemployment, Marx saw an inevitability.⁶ A mechanism needed to be found to ensure appropriate levels of production at all times.

Marx's *Das Kapital* gave a name to the socio-economic order that emerged from the industrial revolution. Capital was the money invested in an enterprise, and Marx used the term, adding an "ism," to define the entire system.

Marx's *Das Kapital* was highly influential. By choosing the term "capitalism," Marx focused on the less human side of things, and the term became a pejorative. Defenders of the existing order scurried to invent other terms that would put the system in a more favorable light.

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They called it “free enterprise” or “market economy” or “the free market.”

Marx was not alone in challenging the sweatshops of Europe’s towns and cities. Nineteenth century social reformers of less radical persuasion tried to improve the situation. Governments assumed a role to ameliorate the abuses. In England, child labor laws were enacted to keep factory owners from working children inordinately long hours.⁷ In France, old age pensions were introduced.⁸

The concept that law is a product of struggle of social classes was already current in Europe in the late nineteenth century.⁹ Marxist thought established itself there in a political movement called social democracy. “The theory of law as a product of class struggle,” wrote Roscoe Pound, “drew attention to the unequal operation of doctrines derived by the nineteenth-century method of abstraction upon the basis of an assumed natural equality when applied in a society in which industrial progress had resulted in well defined classes. This unequal operation of legal precepts based on a theoretical equality became the subject of study by a group of socialist jurists.”¹⁰

The Austrian Karl Renner or the Dutchman Willem Bonger viewed law as a product of struggle between social classes.¹¹ The view of law as class-based also drew the attention of jurists who did not define themselves as socialist. They, too, argued for changes in the law to protect those who lacked economic power.¹²

Even before the Bolshevik Party came to power in Russia in 1917, the West paid heed to the Marxist critique. The revolutionary activity in Europe in 1848, inspired by Marxist ideas, brought a reaction from European governments, concerned at the prospect of the revolution that was being threatened by those who shared Marx’s analysis.¹³

Reforms were introduced to accommodate working-class demands, just as, following Napoleon’s challenge to monarchy, a number of countries introduced constitutional reform in the direction of republicanism. In the 1880s, Germany instituted the first social insurance programs. To German workers, insurance for illness was provided in 1883,

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for on-the-job injuries in 1884, and for old age in 1889.¹⁴ In Great Britain, by the late nineteenth century, socialist ideas influenced legislation being adopted by Parliament.¹⁵ Western governments began to intervene in the economy, seeking to avoid the damaging effects of cyclical changes.¹⁶

New political parties were formed, espousing reforms in the direction suggested by Marx, but stopping short of advocating the overthrow of the owning class. Social democracy took hold in Scandinavia and elsewhere in Europe, becoming eventually the major political force on the continent.¹⁷

Even across the Atlantic, efforts were made to curb what were viewed as the excesses of capitalism. In 1887, the U.S. Congress established the Interstate Commerce Commission to regulate the prices charged by railroads.¹⁸ U.S. Senator John Sherman introduced legislation to stop monopolistic activity by large firms. The U.S. Congress adopted it in 1890: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."¹⁹

To colleagues who thought that his bill was overly restrictive of business, Sherman invoked the specter of revolution: "Sir, now the people of the United States as well as of other countries are feeling the power and grasp of these combinations, and are demanding of every Legislature and of congress a remedy for this evil, only grown into huge proportions in recent times. They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before."²⁰

More broadly in the United States, a movement developed to curb what were viewed as the excesses of a free market economy. Progressivism exerted a strong influence in the early years of the twentieth century, its adherents securing reform legislation at the state and federal levels of government. Progressives promoted regulation of banks and railroads, and women's suffrage.²¹ Progressives viewed themselves as

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an alternative to socialism. Progressive leaders decried “the menace of Socialism as evidenced by its growth in the colleges, churches, newspapers,” viewing their reform efforts as blunting the calls for more radical political change then coming from American socialists.²²

Despite these initiatives in Europe and North America, Western law underwent no fundamental change during the nineteenth century. Western law remained rooted in the social conditions that predated the industrial revolution. Europe’s nineteenth century civil codes, Roscoe Pound wrote, “antedated modern industrial conditions; . . . In the juristic new start represented by the codes such a thing as a class of industrial laborers was unknown to the law. At that time the law only knew of agricultural laborers.” Even the German Civil Code adopted in 1900, Pound noted, failed to account for industrial conditions.²³ In the United States, the courts protected corporations against legislatures that tried to regulate them.²⁴

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Economic Needs as Legal Rights

THE ASCENT TO POLITICAL POWER OF A PARTY ESPOUSING Marxism heightened the threat to Western governments. Soviet political and legal philosophy posed a challenge to the West on issues spanning the full breadth of the law. In regard to the economy, a new notion of rights of individuals on economic issues was espoused. Crime policy was viewed in a new light. Equality of the sexes figured prominently in Soviet thinking. Homosexuality and prostitution were analyzed anew. Even relations between nations were revisited, in particular, Western nations' control over colonies.

The Soviet analysis of economics was central to the new thinking on all issues. The revolutionaries were steeped in the Marxian analysis of capitalism. Economics, proclaimed Friedrich Engels, determined other aspects of society: "the production of the means to support human life – and, next to production, the exchange of things produced – is the basis of all social structure."¹

As Marx grasped the effects of the industrial revolution and how it changed society from the rural-based economies that preceded it, he concluded that this radical change in economics had changed the political and social order.

In Russia, the government of the Bolshevik Party that emerged out of the 1917 revolution took Marx's analysis seriously. It derided Western governments for providing formal legal equality to citizens but for

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presiding over an economic order that kept many citizens unequal in fact.² Lenin said that politics based on capitalism proclaimed formal equality among citizens, but that this formal equality masked a factual inequality of social classes.³ This inequality was reflected, argued Soviet jurists, in the legal order of a society based on capitalism.

Western law gave prominent place to private property and freedom of contract, but these were used oppressively by the owning class: “Under the conditions of economic and political domination by capital, freedom and democracy are instruments of the bourgeoisie in suppressing the exploited classes.”⁴

Soviet economics posed a threat to the West by the demonstration effect of Soviet policies. If the Soviet government could achieve what it proclaimed, then there was something fundamentally wrong with capitalism. The Soviets challenged the West in the name of justice and equality. Whereas the West asserted the sanctity of private property and freedom of contract, the Soviets replied that these yielded economic injustice.

The Soviets envisioned a social order in which inequity would disappear. They proclaimed a goal of economic well-being for all citizens. The Soviet government undertook to organize and operate the nation’s economy, viewing such control as essential to providing full employment and social benefits. The state would plan production and avoid the cyclical changes in employment levels found under capitalism.

The Soviet government nationalized industry.⁵ It nationalized private land estates as well as the estates of the church, which were vast. In a Decree on Land, it put these properties in the charge of newly created local councils.⁶ “Land to the peasants” had been a Bolshevik slogan, and it was one of the most popular. The Orthodox church had held a third of the farm land, and its power was resented. The Russian peasantry had always been poor, operating under feudal conditions long after they had been eliminated in Western Europe. For the peasants, the prospect that they would control the land was dizzying. To

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the notion of private ownership, the Decree on Land was a powerful challenge.

When a civil code was adopted in 1922, it reinforced the nationalization of land by stipulating that land could not be the subject of commerce. It proclaimed, “Land is the property of the state and cannot be the subject of private trade.”⁷

Civil-legal relations were subjected to overriding societal concerns. The civil code of Russia, adopted in 1922, was called by one Soviet lawyer, “the classic model of a collection of civil legislation of a socialist state.” He contrasted it to Napoleon’s civil code of 1804, which he called “the classic model of a civil code of a bourgeois society.”⁸

The 1922 civil code proclaimed a societal interest underlying civil relations by stipulating that the code protected civil-legal rights “except for situations in which they are implemented in a way that contradicts their socio-economic purpose.”⁹ The civil code stipulated that if a contract were concluded in a way that harmed state interests, it would be invalid, and any gain acquired under it would forfeit to the state treasury.¹⁰

Worker Rights

Soviet legislation of the 1920s promised to ensure the welfare of the population. Everyone would have a roof over their heads, they would be provided medical care, and they would have jobs. No government in history had assumed such responsibilities.

Laws on worker rights were perhaps the most radical. A right to work was guaranteed to “all able-bodied citizens” at “the compensation established for the given type of work.”¹¹ A worker, once employed, was protected by a tenure system. A worker who performed a job properly was guaranteed virtually life-time employment. In labor relations in the West, employers had complete discretion to dismiss a worker, under