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The Jurisprudence of Constitutional Law: The Philosophical Origins and Differences Between the Western Liberal and Soviet Communist State Law

Ziyad Motala*

I. Introduction

Almost all countries deem it necessary to draw up a constitution, to describe in a hierarchical fashion the major institutions of government, and to establish the methods by which power is to be exercised. To many states, the constitution is a symbol of nationhood. In newly emergent nations, however, (particularly those finding themselves free from colonial rule), the constitution is used to articulate a new emerging order.

The origins of modern constitutions are thus attributed to a desire by the people to make a fresh start. This requires an outline of the new form of government. A constitution is especially important to a nation state in its infant stages. In this context, constitutions provide the rational legal basis for the present order.

This article will examine the philosophical notions of a constitution and a state system from a historical perspective. It will highlight the different philosophical bases of state law and the purpose the constitution is meant to serve under the two divergent orders. The approach will be descriptive and comparative. The purpose of this work is not (in the words of Christopher Osakwe) to pass off a political opinion about the desirability of one or the other legal systems.

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2. C. Friedrich, Constitutional Government and Democracy 584 (1968) [hereinafter C. Friedrich].
Instead, the essential focus will be to examine the jurisprudence underlying the constitutional systems, and the different uses that constitutions perform in the two orders. In a sense, the study proceeds from a level of abstraction.  

To some extent, the drawing up of constitutions (under both orders) is related to providing a moral and legal basis for the way power is to be exercised, i.e., to provide a basis for legitimacy. The legitimacy problem involves the extent to which the system can engender and maintain the belief that the existing political institutions are the most appropriate for the society. The question of legitimacy (whether the people believe the existing arrangements are the most appropriate) lies at the heart of any debate on constitutions and the exercise of power. Many political systems experience a crisis because of the failure to surmount the difficulties of legitimacy. At times, what may be seen to be an inherently unjust system may continue to enjoy support, because the beliefs in the system may be falsely grounded in some mystification.

The basis of this legitimacy varies between the principles of natural law, or what is considered “the natural order of things” under western systems, and the “rights of the working class” in communist systems. However, both systems ultimately claim their power from the people.

II. What is a Constitution?

Some commentators view constitution-making as a science, and if the correct structural principles are employed, freedom and justice will materialize. This calls for an explanation of what a constitution is meant to achieve in a particular order. There is a dichotomy in thinking between the western and socialist bloc countries as to whether a constitution is associated with a normative system, or whether it is purely a set of rules regulating government functions and agencies. The way in which law is viewed, and the place it is given in society affects the society in terms of its social aspirations.

6. It has to be emphasized at the outset that the philosophical basis of a system very often contrasts with the reality which is not the focus of this inquiry.
7. G. Mosca, The Ruling Class 70 (H. Kahn trans. 1939). Mosca argues that the ruling class do not justify their exercise of power by mere possession of it, but try to formulate a moral and legal basis for it.
8. Lipset, Social Conflict, Legitimacy, and Democracy, in Legitimacy and the State 88 (W. Conolly ed. 1984) [hereinafter Legitimacy and the State].
9. For a detailed discussion on the concept of legitimacy, see id.
10. A reading of nearly all constitutions shows that they usually begin with the phrase or statement claiming power from the people.
11. 5 Handbook of Political Science: Governmental Institutions and Processes 1 (F. Greenstein and N. Polsby ed. 1975) [hereinafter Handbook of Political Science].
There is a popular currency in the liberal theory to view law and the institutions of the state as neutral frameworks. In this comparative study it will become apparent that there is an interplay between constitutional legal theory and the institutions of state and social policies. Under the liberal paradigm it appears to be less overt, where as under the communist systems the notion of state law and the institutions of state having a separate and neutral existence is expressly rejected.

A. Constitutional Law and Constitutionalism in a Liberal Political System

Today, some Western constitutional lawyers make a distinction between constitutions and constitutionalism to reflect the dichotomy in interpretation with respect to whether a constitution is merely a legal document, or whether it is meant to reflect a normative order. The term constitution is used more in the sense of describing the codes and rules which allocate and regulate the functions, duties and powers of the various government agencies, the officers of the government and the relationship between these elements and the public. In the above sense the term constitution is not used in an overtly prescriptive sense, but more as a set of rules to regulate the system of government. Many academics still view a constitutional system in a stereotypical manner associating it with a highly normative system, particular institutional frameworks, and the protection of individual and property rights. However, the distinction between constitutions and constitutionalism can become blurred. The western constitutional lawyer’s measurement of a constitution is invariably weighed against the principles of constitutionalism, and when he refers to a constitution he in fact really means constitutionalism. In the words of one author, the constitution is both the symbol and instrument of constitutionalism.

B. The Core Principles of Constitutionalism

Constitutionalism is clearly linked to a set of political ideals. Some commentators have equated the difference between constitutions which conform to the principles of constitutionalism, and those which

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Rule of Law 16 (1986) [hereinafter I. Harden & N. Lewis].
13. Id. at 16.
15. K. Wheare, supra note 4, at 1.
17. B. Nwabueze, Constitutionalism in the Emergent States 23 (1973) [hereinafter B. Nwabueze].
that do not as the heart of the cold war. The core principle of constitutionalism is the limitation of government power and the guaranteeing of individual and civil liberties enforceable by the courts. In essence, constitutional government is "limited government." The limits imposed on the government are of two kinds. First, the powers of government authority are restricted. Second, the procedure the government is to follow in exercising its functions is spelled out. The control or limitation of government can be effected in several ways.

First, constitutionalism is associated with certain forms of institutional arrangements operating on the premise that there are certain demonstrable relationships between institutional forms and the attainment of certain values. The issue is presented as an ongoing contradiction between the government and the people. Power is in the hands of the government and the power has to be brought under control. The judiciary is the main agency for exercising this control. An independent judiciary constitutes the pivotal point in the institutional arrangements under constitutionalism.

Consequently, the first important aspect of constitutionalism, in respect to the institutional arrangements, is the doctrine of separation of powers. The doctrine of separation of powers can be traced back to the writings of Montesquieu who argued that the way to control power is to fragment it; Montesquieu advocated the classification and division of government power into a legislative, executive and judicial branch. Some writers link the doctrine to the notion of checks and balances, while others view it as an institutional arrangement of limiting government. The notion of checks and balances seeks to make the separation of power effective by balancing the power of one agency against that of the other. The strict notion of separation of powers stands for the complete separation of the agencies of government. The separation is to operate at the institutional level and in the composition of the personnel. Despite different in-

19. See B. Nwabueze, supra note 17, at 1, 10; K. Wheare, supra note 4, at 137; D. Cowen, The Foundations of Freedom 197 (1961).
22. Handbook of Political Science, supra note 11, at 36.
25. To some extent the arguments over the different meanings of the doctrine of separation of powers revolves around the debate between a preference for the United States presiden-
interpretations of the theory, the one outstanding and common thread to all interpretations of the separation of powers is the belief in the separation and independence of the judiciary from the executive and legislative branches of government. The separation of powers is seen as necessary to achieve liberty. The notion of liberty in this instance is perceived in negative terms in that it essentially seeks to weaken government. At the second level, constitutionalism amounts to accountable government, holding of free elections, the existence of pluralism in political organizations (multi-party political system), and legal guarantees for civil liberties.

III. Constitutionalism and its Political Ideology

The term constitutionalism today is the philosophical and legal shell under which liberal democracy exists. The origins of modern constitutionalism can be traced to liberalism and capitalism. Its main focus is on the individual and individual rights which are the libertarian aspects of the doctrine. This focus on individuality has been attributed to Christianity, which eventually gave rise to the notion of natural rights. Under ancient law, the constitution was seen to be the mere enactment of the prince or emperor. In the modern setting with the influence of natural law the constitution derives its validity from some higher law outside the prince and the constitution. This higher law could be fundamental law, the law of reason or the law of God or nature. This higher law is today referred to as natural law. Natural law provides a barrier beyond which the government should not penetrate. Natural law is stated as being in existence before positive law, and state law is derived from the former. State violation of this natural law is illegitimate and void.

In order to understand natural law, clarification is required as to what the natural law thinkers understood as the law of nature. Although there are differences in opinion among natural law thinkers as to the proper philosophical basis of the doctrine, they all share some guiding threads. The first common and crucial guiding thread

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26. Id. at 103.
27. At times the weakening of government operates to the point where the government is not able to fulfill many social and economic functions. See, e.g., M. Vile, supra note 21, at 14.
29. C. Friedrich, supra note 2, at 6.
32. See Handbook of Political Science, supra note 11, at 28.
is their focus on individualism and the protection of individual rights. The second, yet no less important, and interrelated guiding thread is the belief in and concern for the protection of private property.

The priority of the individual was seen to be derived from a previous state of nature in which no prior group had existed. Similarly, private property was seen to exist in the pre-social state and it was therefore also seen as a natural law not subjectable to modification. Today, the expression of these individual rights have come to receive a particular descriptiven term, fundamental human rights. The subject matter of these rights are essentially civil liberties and economic freedom, the main component of which is the right to property. The protection of property and individual rights is proclaimed to be beyond the encroachment of any government, and any such encroachment would be considered a violation of the law of nature. The protection of these rights has become part of the normative structure of western societies.

In the original state of nature, man's natural rights were subject to a state of flux and invasion by others. In order to protect these rights, man enters into a society and the formation of the state to guarantee these natural rights. Similarly, Rousseau argues that there were obstacles in the state of nature, and the human race would have perished if they had continued in this state. The entering into a society is referred to as the social contract which reflected a concerted effort to protect natural rights. However, the social contract theorists emphasize that the people were the possessors of all political power, who have subsequently surrendered a part of it to the state. The part that it has surrendered to the state was the power to prevent violent conflicts and the powers to protect natural rights.

Since the social contract was formed to protect the natural or-

34. See generally J. Locke, Of Civil Government, Two Treatises; see also, O. Gierke, Natural Law and the Theory of Society 1500 to 1800, at 96-8 (1957) [hereinafter O. Gierke].
36. O. Gierke, supra note 34, at 96.
38. The main civil liberties are rights, such as the freedom of speech, assembly, movement, press and political freedom.
40. In the United States, the protection of these rights is secured by the Bill of Rights.
42. Id. at 179.
43. Id. at 180.
44. O. Gierke, supra note 34, at 44-5.
der, it was deemed necessary to limit the powers of government and prevent it from transgressing beyond the boundaries of natural law. It was unthinkable to believe that man, on entering into a social contract, would wish to be in a worse position by relinquishing his equality, liberty and property. The control of government is to be effected by the other crucial doctrine in constitutionalism, namely, the rule of law. The rule of law is an important doctrine in western constitutional systems, and is used as a yardstick to judge whether a political system is "just" and "free." In Western systems, it is, in a sense, "the symbol of the legitimating force of the whole notion of constitutionality."

The main tenets of the rule of law are limited government in terms of clear, preannounced rules of law. The second, and somewhat controversial, aspect to the rule of law is the actual limitation of government power to do certain things. In the first instance, whether an action is lawful depends on whether it conforms with pre-existing rules. The point here is that there should not be any punishment for an action which was not a crime when the act was committed. According to Locke, in the state of nature, man did not have arbitrary power. Now that part of this power has been relinquished to the legislature, this power cannot be exercised in an arbitrary manner. Moreover, man entered into the social contract to prevent fluxes and uncertainties. Hence, the law should be open and clear so that people would be able to structure their actions

45. See Locke's essay in SOCIAL CONTRACT, supra note 41, at 75-82; see also Rousseau's essay in SOCIAL CONTRACT, supra note 41, at 197-8.
47. I. HARDEN & N. LEWIS, supra note 12, at 32.
48. F. HAYEK, THE ROAD TO SERFDOM 54 (1944). There are different interpretations to the rule of law. Some favor the view that the rule of law is simply government according to law. Others advance the view that the rule of law means both procedural and substantive justice. See A. MATTHEWS, LAW, ORDER AND LIBERTY IN SOUTH AFRICA 1-20 (1972), for the different notions of the rule of law. Matthews attempts to separate the notion of the rule of law from natural law thinking, arguing that to link the rule of law with natural rights is to prefer a political ideology. His argument and presentation of the Diceyan theory of the rule of law as a value free theory is untenable. The Diceyan theory of the rule of law is value laden as it is also premised on individual rights and the institution of private property — the two pillars of natural law thinking.
49. See discussion, id. See also E. WADE & G. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 92 (1955) [hereinafter E. WADE & G. PHILLIPS]. In a sense, the linking of the rule of law to limitation of government powers is to subsume the doctrine into constitutionalism. There are theorists who reject the association of the rule of law with "good" law or substantive justice. See R. CUNNINGHAM, LIBERTY AND THE RULE OF LAW 3-4 (1979). To theorists like Cunningham, the rule of law is limited to only the first definition. However, under liberal systems it is generally appreciated that the two are mutually interdependent. E. WADE & G. PHILLIPS at 90. In this study, the rule of law will be used in terms of the legality and substantive justice notion which are accepted tenets of constitutionalism. The doctrine of the rule of law in terms of the legality notion does not operate on its own, and has to be considered with all the other tenets of constitutionalism in western liberal systems.
51. SOCIAL CONTRACT, supra note 41, at 79.
IV. The Socio-Economic System and the Material Structure of Law in the Liberal Order

The theory of law in the liberal systems is an outgrowth from classical economic theory. Classical economic theory as enunciated by Adam Smith is not practiced in its pure form despite growing appeal. The form of law is, however, related to the broad economic philosophies of liberal societies. In its pure form, classical liberal economic theory is best represented by the writings of Smith, and by its modern variant, Milton Friedman. The writings of Adam Smith and the works of modern laissez faire theorists are based on natural law and that which they consider to be the natural order of things. Economic freedom is seen as a prerequisite for political freedom, and the two can only exist under conditions of free competition. Every individual should be permitted to conduct his affairs in an atmosphere free of restraint and in doing so, all members of society will benefit.

The cardinal emphasis is again individual rights and individual property, the guaranteeing of which should be the main purpose of government. Since the function of government is to act as an umpire guaranteeing the requisite rights of individuals, these theorists find it necessary to limit the power of government to fulfill only this purpose. Consequently, the government must be given sufficient power to fulfill this purpose and no more. In this sense, the government is seen more as a necessary evil. There is an ongoing conflict between private and public existence, and the role of the state must be confined to those areas identified as part of the public domain. Among the important government powers are those of defense, the protection of society from invasion by others, the administration of justice, and the erection of certain public works to facilitate commerce in the society. The dispersion of government power manifested in, among other things, the separation of powers is designed to fragment government power so as not to go beyond its "necessary" purposes.

52. Id. at 80.
53. F. Neumann, supra note 35, at 189.
54. Both the United States under Ronald Reagan and Britain under Margaret Thatcher are more committed to the principles of classical economics more than western countries have ever been before. This has been reflected in their respective economic policies.
55. See the classic, A. Smith, An Enquiry Into the Nature and Causes of the Wealth of Nations (1937) [hereinafter A. Smith].
57. Id. at 3.
59. Id.
60. A. Smith, supra note 55, at ch. 1.
The libertarian influence commits constitutionalism to the preservation of political liberty in terms of a particular conception favoring liberty over equality. In the first instance, the government is prohibited from doing certain things which constitute the libertarian aspects of the theory. A vital aspect of liberty is the protection of the institution of private property which is tied to the notion of individual rights. As part of the notion of individual rights, various freedoms such as the freedom of speech and assembly are championed.

Moreover, the institutional arrangements linked to constitutionalism are viewed as auxiliary arrangements to protect the liberal interests. The overall institutional arrangements and the notion of liberty are essentially geared to weaken government and to promote a negative conception of political liberty as imposing restraints on government. Positive government, directed towards economic and social change, is viewed as acting against the principles of constitutionalism.

The point has repeatedly been made regarding the supposed autonomy of the law and the neutrality of institutions of the state. Today, liberal theorists increasingly reject the notion of the neutrality of state institutions. When institutions are designed to weaken and limit the competencies of the government, the procedures designed to achieve this function are clearly value charged. Once introduced, the institutions of the state may operate in a neutral manner, but they are merely the means to achieve the values deemed essential.

V. Constitutional Law and Legality in Terms of Soviet Socialist Doctrine

In order to understand the socialist thinking of constitution making, one has to first formulate a conception of the Marxist approach to law. Such a task is not without difficulties because the founding fathers of Marxism, Marx and Engels, did not treat the law as a separate entity subject to specific analysis. It is, therefore,

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61. K. Wheare, supra note 4, at 137.
62. See the first ten amendments to the United States Constitution.
64. See Sartori, *supra* note 16, at 862. The author considers economic policies in the constitution as frivolous and a move away from constitutional telos. For the view that the positive government after the Great Depression was incompatible with the principles of constitutionalism; see also *Handbook of Political Science*, *supra* note 11, at 3.
67. *Id.*
quite common for Marxist thinkers to express that there is no Marxist theory of law.\textsuperscript{68} Not surprisingly, the Marxist approach to law does not consist of a single theoretical perspective. According to Ralph Milliband, the corpus of Marxism has a lot of limitations in providing answers to issues of politics and political theory. Regardless of how much analysis of Marxist thoughts one conducts, it is still difficult to achieve a "smooth, harmonious, consistent and unproblematic Marxist political theory."\textsuperscript{69} On the other hand, certain writers, while conceding there is no conception of law in the works of Marx and Engels, assert that there are sufficient concepts left by the founding fathers in which a theory of law can be developed and put forward.\textsuperscript{70}

Marxist writers allude to the two polar versions of Marxism.\textsuperscript{71} The first version is a theory which sees all law as serving as instruments of class rule.\textsuperscript{72} The second version sees the law as an extension of liberalism and seeks to introduce the rule of law, separation of powers and the other liberal rights into a socialist order.\textsuperscript{73}

**A. Marxist Theory Against All Law**

The first version is premised, to a great extent, on the Marxist metaphor of base and superstructure, and the apparent conclusions drawn from it. A much quoted passage in Marxist literature is Marx's statement:

> In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general. It is not the consciousness of men that determine their being, but, on the contrary, their social being that determines their consciousness.\textsuperscript{74}

\textsuperscript{68} R. Milliband, Marxism and Politics 2-5 (1977) [hereinafter R. Milliband]; G.D. Cameron, Soviet Lawyer and His System 19 (Michigan International Business Studies 1978).

\textsuperscript{69} R. Milliband, supra note 68, at 5.

\textsuperscript{70} M. Cain & A. Hunt, Marx and Engels on Law (1979).


\textsuperscript{72} H. Collins, Marxism and Law (1982) [hereinafter H. Collins].

\textsuperscript{73} See the last ten pages of E. Thompson, Whigs and Hunters: The Origin of the Black Act (1975) [hereinafter E. Thompson].

\textsuperscript{74} K. Marx, Preface to A Contribution to the Critique of Political Economy, quoted in R. Milliband, supra note 68, at 15.
The core interpretation of Marxists, drawing from the above statement and other writings of Marx and Engels, has been to emphasize the primacy of the economic base. Accordingly, all social institutions and political structures are seen to originate from, and adapt themselves to the nature of the relations of production. Similarly, the law is determined in content and form by the relations of production and the material base. Overall, the material base is determinative of all ideas, values, beliefs, superstitions and the law. The law is, therefore, an epiphenomenon and part of the superstructure. This approach to law in fact turns to a theory against law and the “principal aim of Marxist jurisprudence” then becomes “to criticize the centerpiece of liberal political philosophy, the ideal called the rule of law.”

This classical Marxist approach to law deserves consideration since it has certain important consequences flowing from it. The first is the notion that all law is an instrument of class oppression, and that the existence of law is necessary for the maintenance of capitalist society. This suggestion is drawn from a reading of Marx and Engels that “the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie.” All law is viewed as representing or disguising the interests of the ruling class. Law is considered the equivalent of terror and violence, and the presence of law is associated with control. The police and courts are similarly viewed as instruments of coercion to protect the interests of the dominant class. This view is a negation of liberalism and views liberal notions, such as parliamentary democracy, equality before the law, and the rule of law, as mere frauds which disguise the brute realities of oppression and exploitation. The task of socialist theorists, therefore, is to demystify the law and expose its harsh realities.

In a true communist society, there will be no state and no law, as evidenced by the famous Marxist slogan “the withering away of the state.” The state is the instrument whereby the oppression of the majority is maintained. In a communist society, social relations
would have changed so much that there would be no need for law, and work would be performed in a cooperative manner by a population living in harmony.\textsuperscript{81} According to this conception, the presence of law is not compatible with a communist society, and those societies that have the plethora of laws and regulations cannot be correctly labelled as a communist society.\textsuperscript{82} The presence of law in those countries, which claim to be communist, is attributed to a need to maintain the repressive system.

There are several twentieth century Marxist theorists who aim to locate the presence of law specifically at a capitalist society. The first renowned theorist is E. Pashukanis.\textsuperscript{83} Pashukanis' views are based on the writings of Marx and Engels centering on the decay of law. Law for Pashukanis is a manifestation of capitalism, because it reflects the fetish for commodities. Therefore, in a socialist order, there cannot be socialist law, because in the new order commodity relations will be abolished.\textsuperscript{84} Pashukanis defines "law" in terms of "subject" and "right." The law essentially amounts to a recognition of the rights of subjects concerning possessions. Law is necessary because it is vital to the system of production, and it is through law that the system of production is regulated.\textsuperscript{85} In this scheme of things, law is conceived in property rights and capitalist-socialist relations.

The popular liberal view sees the presence of law in society as a neutral institutional arrangement whereby conflict can be resolved, as opposed to the imposition of a specific ideology. Hence, in the liberal conception, law — influenced by natural rights — is equated with justice and not influenced by any material forces. The Marxist view of law rejects the autonomy of legal reasoning, and the notion of law having an inherent logic of its own. Drawing on the base and superstructure metaphor, law is seen to be materially determined by the relations of production.\textsuperscript{86} Consequently, the law, as part of the superstructure, cannot be an independent influence on social behavior. The rejection of law as an autonomous entity has profound consequences. According to this view, the relations of production require primary consideration, with the legal considerations taking a secondary role.

\textsuperscript{81} V. Lenin, The State and Revolution (1932), notably ch. 5 [hereinafter V. Lenin].
\textsuperscript{82} H. Collins, supra note 72, at 2.
\textsuperscript{83} The following discussion of Pashukanis' views are taken from his work The General Theory of Law and Marxism, reprinted in N. Pashukanis: Selected Writings on Marxism and Law (P. Beirne & R. Sharlet eds. and trans. 1980).
\textsuperscript{84} Id. at 273-4.
\textsuperscript{85} Id.
\textsuperscript{86} H. Collins, supra note 72, at 68-9.
B. Marxist Theory in Favor of Legality

The second polar version of Marxist theory shares several similarities with liberalism, namely its commitment to the rule of law. The leading Marxist proponent in favor of the rule of law is the English writer E. Thompson,87 who asserts that the rule of law is "an unqualified human good" in the sense that it "imposes effective inhibitions upon power."88 For Thompson, the rule of law is the opposite to arbitrary power and is a value worth preserving. In a sense, law is looked on as defining the relations of production,89 which is a major point of departure from the classical Marxist approach.

This approach applauds the achievement of liberal thought such as the rule of law and the maintenance of civil liberties and sees a democratic character in law and state power. The argument has been expressed more forcefully — that all states having public function purposes need to have public law. In a socialist system where there is greater state involvement in the public sphere, there is a greater need for a legal framework of public law. Constitutional restraints on state authority are seen as essential and the notion of the withering away of the state is viewed as unattainable.90 Many countries claim the socialist mantle and do have state constitutions. According to these theorists, the problem with these states and their constitutions is the absence of a framework that limits the power of the state agencies.91

C. Overview

In summarizing the two major versions of the Marxist approach to law, one sees merit in the rule of law while the other perspective looks at all liberal practices and civil rights as a sham to disguise the practices of bourgeois liberalism. Law is equated with oppression and all institutions are seen as part of the overall coercive machinery. The question of whether law is essential for the maintenance of the fabric of any society has become contentious.

To be true to classical Marxism, the presence of law is inconsistent with the ultimate stage of society where the state would wither away. In the writings of Marx, it appears that he foresaw the necessity for the retention of liberal rights only in the transition period.92 These liberal rights were important principles in the transformation

87. See E. THOMPSON, supra note 73.
88. Id. at 266.
89. Thompson states that law "is deeply imbricated within the very basis of productive relations." Id. at 261.
90. P. HURST, LAW, SOCIALISM AND DEMOCRACY 85 (1986).
91. Id. at 86.
This paradox poses serious questions which have to be resolved. On the one hand, there is the assertion of the withering away of law and the smashing of the bourgeois state, while on the other hand, there is a demand for the preservation of bourgeois rights in the transformation period. Furthermore, there are theorists such as Thompson who regard the rule of law as "an unqualified human good."

The polar versions of Marxist attitudes to law is a reflection, to a certain extent, of this paradox, with each side basing its tenets on apparently conflicting interpretations. The reality is that Communist countries have greater state involvement in the activities of people, hence, the greater need for legal regulation. In reality, none of the Soviet-bloc countries pay lip service to the notion of the rule of law, in fact, most of them reject it.

In terms of orthodox theory, the state and law were only to be temporary phenomena, yet the communist state in the Soviet Union has been in existence for some sixty years. This has called for rationalization and justification for the presence of law in these societies. Consequently, due to the presence of law in these societies, the ideological tenets of law and the purpose it serves must be examined.

According to present Marxist theorists, the answer to this paradox is to be found in the content and form of law in a new social context. The form of law is related to the relations of production, and the changing relations of production is interconnected to the forms of law. In any social arrangement there is a need for rules to coordinate man's behavior. This is particularly so in a country which believes in central planning and central direction of economic and social affairs.

According to the latter day theorists, however, the present rules have to be distinguished from rules which exist to inhibit freedom which underlies the link between rules and the new social context. In the political sense, the state is still preserved, but in the communist order, they argue it is not a "coercive" state superimposed upon society. Modern theorists argue that in a communist society the state is merged with society, and state functions become social functions, as opposed to a liberal society which seeks a separation between state and individual. In this sense, the law is more a form of social regulation operating in a context where there are no antagonistic in-

93. B. Fine, supra note 71, at 125.
94. V. Lenin, supra note 81. The relevant part of Lenin's views are also quoted in Soviet Institutions, supra note 92, at 26, 33.
95. B. Fine, supra note 71, at 44.
97. Soviet Institutions, supra note 92, at 53.
terests, and not an entity separated from the society. This questions the notion of the withering away of the state, or the correct interpretation of the withering away of the state.

There will always be a need to perform public functions and to organize the division of labor. In this sense, there is a recognition of the organizing functions of law in a constitution. As long as these needs persist, the Marxist criticism of all laws or legal systems, per se, is without basis. It is important to note that these rationalizations are all ex-post facto, and that under orthodox-Marxism there would ultimately be no need for a constitution, law or other forms of regulation.

VI. The Doctrine of Separation of Powers and the Notion of the Rule of Law in the Soviet System

The Soviet constitutional system does not fathom any notion of constitutionalism and separation of powers to act as a break on the government or party. The general spirit is that there should be a unity of state authority from top to bottom. Since the government views the people as the source of all power, and the elected representatives to the legislature are chosen by the people, there is no need for a separation of powers. As the people are the source of all power, there can be no limitation on the power of the people to act as represented by their legislature, the Supreme Soviet.

In terms of orthodox theory, the notion of separation of powers was an insufficient compromise between the legislature and the bureaucracy which had the effect of freeing the executive from popular control. An independent judiciary with the ability to question an act of the legislature would negate the principle of the sovereignty of the people. Accordingly, the legislature has to be supreme at all times, and giving the courts a testing power is viewed as bringing the courts into the political process.

Since the central government owns all the land, there is no demarcation of power between the center and the periphery. Moreover, the ideology of Soviet socialism sees the unity of economic and political systems as an important aspect of the authority of the state, and

98. Compar;ive Law Studies, supra note 76, at 309.
99. I. Kovacs, supra note 4, at 17.
100. H. Collins, supra note 72, at 122.
101. V. Lenin, supra note 81.
102. The role of the party in Soviet society is beyond this jurisprudential inquiry.
104. B. Fine, supra note 71, at 123.
there can be no different "centers" of power. Central direction of economic affairs is a fundamental tenet of Soviet socialism.

There may be division of tasks and functions, but these have to be performed in terms of fixed mandates given by the elected representatives. This is a significant point of departure from western constitutional systems. One can see the delegation of power by the Supreme Soviet (the Soviet legislature) to the Presidium (the collective head of state), and the further delegation by the Presidium to the Council of Ministers (the equivalent of the cabinet).  

Under the Soviet system, there are no popularly elected officials such as mayors, governors or a president, signifying the negative attitude towards individual leadership. Everything is conducted in committee or assembly where decisions can be reached in a collective manner. Those persons with titles are, in fact, spokespersons for the respective assemblies or communes chosen by the various forums under party supervision.

In terms of Marxist ideology, the representatives of the people should not be full time or professional representatives, but should come from the ordinary ranks of working people. The delegates should represent the people and then return to their normal lives. The effect is that the legislature does not sit for long periods of time. For this reason, there has to be a permanent organ of state power functioning in the periods when the legislature is not in session. This results in the delegation, as opposed to the separation, of power by the legislature to the Presidium, with the latter having all the powers that the Supreme Soviet has while not in session.

The Soviet system does, however, have a system of courts in which its judges are popularly elected. The purpose of the court is to decide on matters in a flexible way with greater emphasis on political affairs in the spirit of a "socialist conscience," rather than adopting a "legal" approach, as used by western systems. Flexibility in the law is an important aspect of the Soviet system; however, the judges are not free to interpret the law in terms of their own conceptions. The judges should merely interpret the intention of the Legislature. Invariably, most judges are members of the Communist

107. Id. at 975.
109. J. HAZARD, supra note 105, at 43.
111. Current talks of reform under Gorbachev aims at reforming this and making the legislature a more permanent body.
113. J. HAZARD, supra note 105, at 90-1.
114. In this regard the party exerts considerable control. See Feldbrugge, Law and Po-
party.\textsuperscript{118} In keeping with the communal orientation of Soviet ideology, cases are held collegially with lay assessors, who are essentially ordinary people, sitting with the judges.

The rule of law, particularly the need for certainty in the law — the cornerstone of Western constitutional systems — has no place in Soviet constitutional doctrine. The contrary principle of flexibility in the law is the operative notion.\textsuperscript{116} The idea of law as representing eternal justice is rejected, and law is seen as something which can and should constantly change to achieve the goals of society. Law is integrally related to the society, and in a society where there is central direction, the purpose of legislation is to transform the political programs into legal processes.\textsuperscript{117}

The constitution cannot be a rigid document if it is to serve as a framework for social change. The Soviets interpret the constitutions of western systems as being designed to protect certain interests as opposed to being a framework within which socio-economic change is achieved. Consequently, the prevailing notion of constitutions in the Soviet-bloc countries is that every time there is a change in the state, there has to be constitutional amendments or changes to take account of the transformation.\textsuperscript{118} However, there is a problem with altering the constitution every time it is believed that social values have changed. This will involve a great deal of legislative activity and instability in the society. The result has been to provide the higher organs of state power, namely the cabinet represented in the Council of Ministers, with a discretionary power to adopt plans of regulation.\textsuperscript{119}

VII. The Role of a Constitution in a Socialist Order

A constitution can contain two primary sets of provisions: namely, the main offices of state, such as the machinery of government, and second, the ideological basis of the political system. The first requirement must be present in all systems.\textsuperscript{120} However, it is against the background of the Marxist approach to law and the general conclusion that a legal system is necessary that the question posed, what function does a constitution serves in a socialist order?


\textsuperscript{115} The broader role of the Communist party and its all-encompassing supervision over all aspects of Soviet society is beyond the scope of this enquiry.

\textsuperscript{116} J. Hazard, \textit{supra} note 105, at 81.

\textsuperscript{117} \textit{Comparative Law Studies, supra} note 76, at 314.

\textsuperscript{118} Aspaturian, \textit{The Theory and Practice of Soviet Federalism}, 12 J. Pol. 41, 42 (1950).

\textsuperscript{119} \textit{Comparative Law Studies, supra} note 76, at 282.

This question has parallels with the differences surfacing between a constitution and the notion of constitutionalism in liberal systems. The debate has been formulated in terms of a preference for whether a constitution should be "state law" or "constitutional law." According to the former preference, the constitution is meant only to reflect "the structure of state power" and merely performs "a codification function, recording and legitimating the changes in state structure as they occur." On the other hand, the "constitutional law" school argues against the reduction of a constitution to a mere outline of an institutional structure and for a normative content. The constitution is viewed as a legal instrument which should define the social order. The latter should be reflective and programmatic, incorporating ideological goals and policies.

The preference in the socialist order is to consider the constitution explicitly as a political charter detailing the objectives which the government should seek to achieve. There has to be unity between the constitution and party program, with the party enforcing its changes through the constitution. In this sense, the constitution is more overtly a political document as opposed to merely a legal document. This line of reasoning is consistent with the overall socialist notion of unity of economic and political systems as an aspect of the state.

VIII. Conclusion

Under western systems, the tendency is to be restrictive when drawing up constitutions, since the constitution is not seen as an instrument for socio-economic change. The dominant view has been that a constitution should be a legal document with political considerations lying outside the realm of constitutional law. The notion that law and socio-economic factors are unrelated is untenable. What is termed justice is not some metaphysical entity arrived at through reason and popular consent, but it is inextricably linked to the socio-economic environment of which it is a part. However, the constitution as the "rules of the game," in terms of which gov-

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122. Id. at 8-9.
123. I. Kovacs, supra note 4, at 71-72.
124. R. Sharlet, supra note 121, at 8.
126. Equal Protection of Law, supra note 106, at 978.
127. See C. Beard, An Economic Interpretation of the Constitution of the United States 8 (1913). In his classic work, Beard attempts to locate the founding of the United States Constitution in terms of the needs of the property class.
ernment power is to be exercised, is not amenable to easy changes and fluxes. Certainty in the law represented by the notion of the rule of law is an important aspect of western jurisprudence.

A preference for a limited government is a political choice for a liberal socio-economic system with strong ideological connotations. In terms of liberal doctrine the ambit of political authority should be restricted to the limits defined in the constitution, and the fundamental rights defined should not be invaded. The doctrine of constitutionalism explains the philosophical basis of a constitution under liberal systems. The institutional arrangements are designed for the protection of individual rights and property. The institutional structures created are designed to enhance the values which certain members of society hold to be important. Over a period of time, the institutions under western systems have come to assume a so-called independent and separate existence. We see this in the importance attached to the separation of powers and the independence of the judiciary.

From a historical point of view, the emergence of these institutions can be located within the socio-economic system in which it exists. Today, with the “rules of the game,” namely, liberal society firmly entrenched, there is no need to overtly intervene and constantly manipulate the institutions of state. In this sense, the constitution and the institutions which are instrumental in achieving the goals of society have become part of the psycho-sociological complex, and, therefore, have assumed an important “independent” value.

In terms of orthodox Marxist political theory, law is part of the oppressive structure of the state designed to exert control over society. However, control and planning have become primary aspects of Soviet society which call for a rationalization and basis for state law in Soviet society. Today, Soviet jurists acknowledge the need for social norms to regulate human behavior, but distinguish their state from capitalist states as one not having antagonistic classes or interests. The Soviet state is presented as not representing class interests. The constitutional law and its regulations are put forward as representing the collective interests of the society. Consequently, constitutional law under Soviet communism regards the purpose of the state as an active agent in the socio-economic transformation of society. In this respect, it does not intend to place fetters on the ability of the government to act towards this goal. Unlike liberal theory, it does not accept any notion of a separation between law and socio-

130. COMPARATIVE LAW STUDIES, supra note 76, at 309.
economic policy. Similarly, it does not see any intrinsic value in the rule of law or in the notion that law should be certain. Since the purpose of law is merely to provide the framework to effect the socio-economic change in "the interests of the masses," the law should be amenable to change to meet evolving conditions. Under western systems, the constitution invariable has to be of a rigid character and not pliable to suit political and economic expediencies, or else it violates "the bedrock of constitutionalism."\textsuperscript{131}