

Books

“SOME LAWYERS WREAK HAVOC ...”: Jefferson, Marx, Lenin, Gorbachev, and the Self-Limitation of Revolutionary Constitutions
Some observations on Martin Krygier (ed) *“Marxism and Communism”**

The essays, collected, edited and presented by Martin Krygier, are fascinating reading and truly thought-provoking, looking at a dramatic and incisive chapter of “history in the making” through the eyes of participant observers describing what they call the collapse of communism. But, wittingly or unwittingly, the authors have provided much more than historical drama of a time and at locations with which Australian readers have little in common. By invoking the historical dimension, the “posthumous reflections” are not just a historical reminiscence of the socialist Polish past¹ but they provide a wealth of material for the analysis of the present and possible future scenarios of Poland and in fact, the “new world order” at large.

In view of this wider relevance of the Polish experience, the reader is immediately drawn to reflect not only on the wide scope of conclusions and findings which the authors present in view of the Polish experience, but also on what appear to be central issues which the collection of essays left out. While there is wide and multifaceted coverage of the ideological premises for Marxism-Leninism, the stunning gap between theoretical, ideological and moral postulates of Socialist and Communist ideals and the ironic contradictions of the coping with everyday life in a “planned” economy, there is – with a few commendable exceptions to which I’ll return – very little written on the role of law and order in a historical perspective, and more importantly hardly anything reported on the historical and constitutional “beginning” of Marxist-Leninist state society, that is, a verifiable status of the conditions and social structures in Poland, and above all in Russia, before Soviet rule. Without such a “tertium comparationis” of a historical or other base line, it appears to be easy but also slightly irrelevant to report, with sadness or with glee, the story of the “failure” or “demise” or “collapse” of communism in Eastern Europe.

In order to make my point and to touch a comparative base, I digress from the present collection of essays, and draw briefly attention to the constitutional history of the United States of America, that is, another grandiose failure, if not demise or collapse of law and order, namely the experience of American democracy by Afro-Americans. While a thorough analysis is beyond the purpose of the observations here, a quick cross-reference to the “American Creed” can show that Marxist-Leninist concepts are by no means alone in leading to a break-down in social relations when taken as a blue-print

* Krygier, M (ed), *Marxism and Communism: Posthumous Reflections on Politics, Society, and the Law* (Ga: Rodopi 1994) at 237.

1 The book is co-published as Vol 36 of the series “Poznan Studies in the Philosophy of the Sciences and the Humanities” and ten of the eleven articles (written in their majority by Polish authors) focus on Poland, with only Andras Sajó dealing with the case of Hungary.

for the structural design of modern societies. Such a comparative reference can also show that the "collapse of communism" is by no means an appraisal of other surviving constitutional designs as "winners". Interestingly, we find lawyers at the heart of the deficiencies of constitutional and legal designs of both Communist party rule and the US.²

The current situation of the countries in Central, Eastern and Southeastern Europe after the implosion of Soviet Russian rule is at best difficult and at worst desolate. For many observers, not least legal academics, this is an open and shut case of the failure of socialism, at least in its Marxist state economy version, to deliver on its promises to create a better world or at least a truly humane society. There can hardly be any clearer evidence for this failure than provided by the fizzling out of Communist rule in bankrupt national economies, abominable living conditions for most of the populations concerned and the absence of any civic order in many of the afflicted countries. After seven years into democracy and capitalism, the ratio of the income of the 10 per cent of the population with the highest income in relation to the 10 per cent with the lowest income is 15:1 in Russia, making it "one of the most inegalitarian countries in the world".³ The situation in Poland cannot be much different. However, post-communist societies are not alone among "developed societies" with such a staggering unequal distribution of life opportunities. The wide, and growing gap between wealth at the top and at bottom ends of the scale in the US is widely known. This gap is especially wide in relation to the life chances of the Afro-American population, and presents – having regard to the historical mission of the American constitutional ideals — a specific "American dilemma".⁴ Gunnar Myrdal, the outstanding Swedish lawyer and

2 Again, this point cannot be fully elaborated here, but it is certainly not a coincidence that Marx, Lenin and Gorbachev (and Jefferson for the United States) were lawyers and that these lawyers have thought about society and the role of law at the beginning of incisive self-creations of "new societies with a mission": "Leaving aside the question of the historical causes of [Gorbachev's] revolution, we can at least say that it was triggered by a repertory of misconceptions typical of a lawyer raised in the culture of the Soviet Union. One of these, due to the projection of legal thinking onto society, led to a gross overestimation of the role of reason in deciding the tenor of relations between society and the state. The misreading fuelled an expectation that social and political change could be steered by a new, benevolent regime; it went hand-in-hand with an underestimation of the strength of social forces ... The same outlook fed the illusion that the transformation of the party-state into a law-based state could be realised through exercise of legislative authority by reformed institutions that nevertheless remained dominated by communists. The elemental mistake, of course, lay in the assumption that communism ... could be salvaged in conjunction with the process of introducing democracy and capitalism ... Was Gorbachev — the lawyer — at all aware of what he was doing? ... Some lawyers wreak havoc. I can think of one who almost single-handedly managed to destroy an empire. He did so in ... pretending to establish a law-based state. The irony of history is that in the end the law-based state was enshrined in the constitution by a construction engineer from Sverdlovsk (Elt'sin)". Lowenhardt, J, Book Review on Donald D Barry (ed), "Toward the 'Rule of Law' in Russia?" in 21 *Review of Central and East European Law* 6, 633 at 634, 635, 637. My argument is that this observation, with a change of respective historical variables, applies equally to (in historical order) Jefferson, Marx and Lenin.

3 Brym, R J, "The Ethic of Self-Reliance and the Spirit of Capitalism in Russia" 11 *International Sociology* 4, 409 at 415.

4 Obviously a similar grossly unequal distribution of life opportunities can be found in Australia when comparing the socio-economic status of Aboriginal Australians with that of the Anglo-

winner of the Nobel prize in (political) economy, has addressed the "Negro problem" in the US, in one of the most ambitious and comprehensive studies of American democracy ever undertaken.⁵ His overall findings were, and this is relevant for our argument here, that there is a clear "split-level" operation of political ideals constituted as a pervasive "American Creed" and the unprincipled, "pragmatic" muddling-through of private and public everyday life. This divergence is no coincidence but structurally designed at the inception of the "new" American republic through its foremost constitutional architect Thomas Jefferson (1743-1826). Myrdal observes:

The American Creed is a humanistic liberalism developing out of the epoch of enlightenment when America received its national consciousness and its political structure ... centred in the belief in equality and the rights to liberty as formulated earliest by Jefferson in the Virginia Bill of Rights that 'all men are created equal and from that equal creation they derive rights inherent and unalienable, among which are the preservation of life and liberty and the pursuit of happiness'.⁶

This moralistic reference to natural law as a revolutionary vehicle to independence from Britain sets the later constitution apart from any other law, and puts it, as it were, "above the law".⁷ So Myrdal can observe, in 1938, both a "nearly fetishistic cult of the Constitution"⁸ and that "Americans have kept to [this] custom of inscribing their ideals in law"⁹, while there is generally a "low degree of respect for law and order".¹⁰ This is not a contradiction but the two sides of the same coin:

We must observe ... the moralistic attitude toward law in America, expressed in the common belief that there is a "higher law" behind and above the specific law contained in constitutions, statutes and other regulations ... The role given to the Supreme Court and the tradition of this tribunal not to "legislate", which as a court it could hardly have the right to do, but to refer to the higher principles back of the Constitution strengthened still more the

Celtic population. Without wishing to detract from this Australian problem, the argument here is related to specific constitutional promises which are internalised in American politics and everyday life but not found in Australian history. See for further details below.

5 Myrdal, G, *An American Dilemma, The Negro Problem and Modern Democracy* (1944). The study was commissioned in 1937 by the Carnegie Corporation with the specific condition that it should be undertaken by a scholar from a country with a clean record on racism such as Sweden or Switzerland, and it was conducted with the help of American researchers, notably Richard Sterner and Arnold Rose (see above n3), between 1938 and 1943. Professor Myrdal was at the time economic advisor to the Swedish Government and a member of the Swedish Senate.

6 *Id* at 8, 9.

7 See Luhmann, N, *Daas Recht der Gesellschaft* (1993) at 108, with the observation that the Constitution contains only references to the unity of the people and the instrument of government but not to individual rights. Therefore, it must be seen as "founded on itself", that is, not referring to positive law to which individual rights are subject. Myrdal has explained this peculiarity as a "plot of the Constitutional Convention against the common people" supported by historical research. "So by the logic of the unique American history it has developed that the rich and secure, out of pride and conservatism, and the poor and insecure, out of dire needs, have to come to profess the identical social ideals". Myrdal, above n5 at 13.

8 *Id* at 14.

9 *Ibid*.

10 *Ibid*.

grip of this old idea on the mind of Americans ... The citizen decides whether it is 'just' or 'unjust' and has the dangerous attitude that, if it is unjust, he may feel free to disobey it. The strong stress on individual rights and the almost complete silence on the citizen's duties in the American creed make this reaction the more natural. The Jeffersonian distrust of government — "that government is best which governs least" — soon took the form, particularly on the Western frontier, of a distrust and disrespect for the enacted laws. The doctrine of a 'higher law' fosters an 'extra-legal' disposition towards the state and excuses illegal acts ... America has become a country where exceedingly much is permitted in practice but at the same time exceedingly much is forbidden in law ... So this idealistic America also became the country of legalistic formalism.¹¹

In dismissing the institutional infrastructure of modern law as "unnecessary" or even "dangerous", the Jeffersonian design has failed American society, or at least large parts of the American society. In a later review of his study¹² Myrdal observed that little had changed in relation to the gross inequality of life opportunities for the underprivileged, now no longer only the Afro-American citizens, in the face of "a new wave of exclusionary economic restructuring ..., and a white unwillingness seriously to deal with the question of racial disadvantage".¹³ The repeated promises to deal with this question by Democrat presidents Kennedy and Johnson in the sixties, and most recently Clinton at the inauguration to his second term of office, only support Myrdal's observations of an intractable structural problem — which he dubbed euphemistically "dilemma" — and the fact that it has not been dealt with decisively yet. And there is little to suggest that it is not the legacy of Jefferson's blueprint (or lack of it) for a legal system which is at the core of this structural problem.

With these observations on US American history in mind, I'll argue that the story of communism in Poland, on which the authors of the present book reflect "posthumously", has striking parallels to the American Revolution in that it begins with a revolutionary idealist blue-print by a lawyer (Karl Marx) who has good reasons to mistrust an oppressive state and its law and who wishes both away, and that the failure of communism was "programmed" by a similar bifurcated constellation of a "moralist law"¹⁴ which operated simultaneously and disparately both with an idealist normative order "above

11 Id at 15-8.

12 As an indication for the reception of Myrdal's study in the US, it is worth noting that an American co-researcher of the study, Arnold Rose, had to defend himself against accusations that he, Myrdal and other authors of the study were part of an "anti-American" conspiracy together with Presidents Kennedy and Johnson. He died prematurely at 49 before his appeal at the US Supreme Court could be heard. See Davies, L, "The 'public figures' defence — a subversion of democracy" (1991) *Law Institute Journal* 1195-7.

13 Myrdal, G, "1974-1975, An American Dilemma Revisited", unpublished research papers, Stockholm, Arbetarrörelsens Arkiv, quoted in Schierup, C U, "A European Dilemma: Myrdal, the American Creed and EU Europe"(1995) 10 *International Sociology* 4, 347 at 351.

14 This constellation was evident long before its implosion and commented on as a structural deficiency. See Ziegert, K A, "Nach der Emanzipation des Rechts von der Moral: die Wirkungschancen der Moral am Beispiel der kommunistischen Moral [After the emancipation of law from morals: the societal effects of morals in the light of communist morality]" (1978) in Luhmann, N and Pfuertner, S H (eds), *Theorietechnik und Moral* 146.

the law" — here the "Communist Creed" instead of an American Creed — and with a "low degree of respect for law and order"¹⁵. Further, the low respect for law and the "fetishistic" treatment of the removed (and unmovable) idealist principles "above the law" are deliberate and self-made. The authors of the book reviewed here are our witnesses for the outcomes of this constellation of both underestimating and overestimating law in the process of "creating a new society".

Andrzej Flis examines this dilemma as a conceptual inconsistency between two concepts of socialism¹⁶. On the one hand socialism is conceptionally prepared as an ethical ideal by thinkers such as Owen, Fourier and Saint-Simon, on the other hand, a new scientific understanding of history lets thinkers like Proudhon and Marx see socialism as a real historical tendency and the "natural" result of human evolution. Flis correctly points the finger to Lenin and his Russian autocratic understanding of history to have hijacked the second concept for a specific Russian application:

Lenin, in accordance with Russian tradition, resorted to force ... socialism understood as a real historical tendency legitimised socialism as a totalitarian *design*. In just this way, the gigantic bolshevik experiment, sundering natural social links and fostering anarchy in the state and economy, was presented as the inevitable result of human revolution.¹⁷

Developing the specific bolshevik "Communist Creed", references to it were immunised from reality and couldn't be used for socio-technical decision-making, let alone legal decision-making, but were treated in a "fetishistic" fashion:

Marxian socialism, socialism as an organic social order, existed in the Soviet Union and eastern Europe only in ritual acts that were state-managed from above, while the sphere of everyday social life comprised the domain of the effects of the unsuccessful experiment. It is therefore hardly surprising that the rejection of political ritual ... boiled down to the immediate collapse of the socialist formation. Nor should it be surprising that its legacy consists of nothing but wide domains of internally disintegrated social bonds as well as relations incapable even of simple reproduction — institutions and relations called into being by socialism precisely as a design.¹⁸

Ritualisation, then, constituted "the structural mode of existence of the communist system"¹⁹ because it allowed "to pass quite smoothly from socialism as a design that made up an actual domain of everyday life, to socialism as a "historical necessity" in the public-state sphere"²⁰ and helped to conserve the mission of the Communist Creed without changing anything.

15 Also here the ideology provided justification for mistrusting law which in turn reinforced traditionally poor relations between an authoritarian and oppressive law and the citizens, like in Tsarist Russia (see Yakovlev, A M, "The rule-of-law ideal and Russian reality" (1995) in Frankenberg, S and Stephan, P (eds), *Legal Reform in Post-Communist Europe, The View from Within*) or in occupied and divided Poland (see below).

16 See Flis, A, "From Marx to Real Socialism: The History of a Real Utopia" in Krygier, above n1 at 19.

17 Ibid.

18 Id at 20.

19 Id at 29.

20 Id at 30.

Piotr Marciniak moves the discussion to the level of social theory²¹ and argues, not at all “posthumously”, that the implosion of the Soviet model of communism too easily overshadows significant gains in social and economic theory which have been made by Marx:

It's [Marxism's] great asset remains its ability to perceive the many-sided connections between various levels of social life ... an ability which results from the holism and historiosophical ambitions of that school of thought. A revived Marxism in eastern Europe will try to understand the processes occurring here as a phenomenon made up of complicated social arrangements. A great asset of Marxism might be precisely its ability to create a theory of a dynamic social order.²²

It is, of course, this analytical power of Marxism which has enabled the social-democrat thinkers of western Europe, Scandinavia and central Europe to move away from the Communist Creed and towards a humanist pragmatism, perhaps best expressed in Alva and Gunnar Myrdals' work in Sweden and internationally.²³ Marciniak, therefore, is optimistic and concludes, with a long-term view and against the evidence which is currently available in post-communist societies, that Marxism remains an inspiration for the social sciences, that its ideological success is social democracy, and that the “social democratic vision of social order — rooted in Marxism — can in a short time achieve significant popularity in the societies of eastern Europe”.²⁴

The view provided by the only American authors in the collection of essays, John Clark and Aaron Wildavsky is — perhaps typically — a moralist one, and, for them, quite amusing: they hold that what happened in eastern Europe is what Marx predicted for capitalism but what, according to them, has never happened to capitalism.²⁵ This is certainly an ironic reading of the events with a wide view on political theory but it is, of course, not a historical analysis but a dressing down of Marx for getting it wrong. And the authors don't disguise where their ideological preferences lie:

Marx's *Lumpenproletariat* is in many ways a terrifying vision of what can happen to individuals when they are deprived of meaningful work ... It was the deprivation of meaningful work, perhaps more than anything else, that was responsible for the social problems that continue to plague post-communist societies ... It is largely responsible for the “Moral Collapse of Communism”.²⁶

21 Marciniak, P, “The Collapse of Communism: Defeat or Opportunity for Marxism in Eastern Europe” in Krygier, above n1 at 31.

22 Id at 35.

23 On this work and its impact on Swedish society, see for instance Nilsson, J O, *Iva Myrdal — en virvel i den moderna strömmen* [Alva Myrdal — an eddy in the modern current] (1994).

24 Marciniak, above n22 at 46.

25 See Clark, J and Wildavsky, A, in Krygier, above n1 at 48: “The close fit between Marx's predictions for capitalism and the actual experience of communism is much more than coincidental. Marx's analyses of the anticipated collapse of capitalism do in fact go far in explaining both the long term decay and the more recent collapse of Soviet-style communist political economies”.

26 Id at 63-4.

This is a ridiculous and cynical statement, for even if one acknowledges the poor economic performance of the Soviet organisation of state enterprise and public services on the one side, and the class divide between nomenklatura and other groups in society on the other side, this economy never produced a "Lumpenproletariat" and it gave work at all levels, through the Communist Creed, a pervasive meaning and an egalitarian interpretation, even if not a competitive edge. The deprivation of meaningful work remains the trademark of a rampant individualism and underprivileged classes without equal access to life opportunities under capitalism which post-communist societies experience only now without an intricate and institutionalised network of nomenklatura patronage.

Edmund Mokrzycki, in contrast, provides a convincing and serious explanation as to the issue of the reasons for the collapse of communism²⁷ when he refers to the historical early closure of the Marxist-Leninist catechism which removed the texts from any further theoretical or scientific disposition and it deprived decision-making of any relevant reference to Marxist and Socialist theory. This "crisis of the theory" — which is hidden under "layers of recently still obligatory interpretations"²⁸ — results in an ad-hoc treatment of political realities and it is this position which is prevailing in post-communist societies and the cause for "social problems that continue to plague post-communist societies".

Also Roman Bäcker argues that the collapse of communism is a more complex process than implied by the imagery of a "Moral Collapse". He would like to put this process under the conceptual heading of revolution,²⁹ as indeed the democratic movements in Poland, Czechoslovakia and East Germany have interpreted their participation in the process which led to a transformation of collective social consciousness.³⁰ Again and for the stated reasons, Marxist categories do not fit this process but also historical models of the overthrow of despotic or autocratic regimes do not apply. The answer may be, as Bäcker seems to suggest and as I would endorse emphatically, that the processes in question do not amount to a revolution but a process of transformation.³¹ Indeed, the catalyst for the acceleration of transformation, notably starting in the Soviet Union, was not a revolt of the people but the decision from the top, that is by the Party Secretary Gorbachev, to "reform" society and move towards transparency ("glasnost") in the political process and a law-state.³² Gorbachev's overestimation of reason and the underestimation of social forces destabilised the social structure without providing a "democratic" substitute for the party rule. It is only in the process of this destabilisation in the Soviet Union that political actors of all sorts scrambled for control with, not surprisingly, a clear advantage for those who had political and economic control all along.

27 Mokrzycki, E, "Marxism, Socialism, and 'Real Socialism' " in Krygier, above n1 at 99.

28 Id at 101.

29 Bäcker, R in Krygier, above n1 at 111.

30 Ibid.

31 Id at 118 and Ziegert, K A, *A Theory for the Assessment of Legal Change: the Cultural Differentiation of Post-Communist Societies and Their Law* (1996).

32 See above n3.

This account of a not less dramatic transformation of the east-European communist states and societies rather than that of a revolution is also supported by the analysis of Andrzej Zybertowicz.³³ "Communism was not overthrown. It was in decay. While attempting to recover, it suddenly crumbled, collapsed".³⁴ So while the collapse could not come as a surprise, its character — "smooth and epidemic"³⁵ — surprised everybody. The smooth collapse was possible because an informal transformation of the modes of thinking of the nomenklatura had taken place. In combination with the call for transparency (glasnost) which exposed the massive character of corruption, the ruling elites could no longer refer to the Communist Creed or resort to violence. The dream of the utopia was over, and this produced an "avalanche-like" effect:³⁶

At the moment the communist rulers decided to embark on a trajectory of real reforms, no Marxist revisionism was viable any more. At the moment they decided to accept a reformist platform condemned for decades, they unintentionally made a revolutionary move — they opened the gate to the complete abolition of the system ... it simply reflects the cunning of historical unreason.³⁷

While the Polish authors focus on the role of the Marxist ideology and the various aspects of its "unrealistic" assumptions and dead-ends of ritualistic incantation, Martin Krygier importantly addresses the central issue of the rule of law³⁸ and draws a direct line from Marx to the communist legal order. Marx's concept of law allowed Lenin to rephrase his autocratic Russian concept of the revolutionary dictatorship as a "rule won and maintained by the use of violence ... that is unrestricted by any laws".³⁹ This position, as mentioned earlier, established the Communist Creed "above the law" and claimed that the Socialist rule of law represented a "higher, more perfect level of the development of the rule of law".⁴⁰ This, again, is a religious claim without references to elaborated theoretical concepts. As Krygier's brilliant summary of the extensive and at times "over-heated"⁴¹ discussion of the concept of the rule of law in modern democratic societies can make abundantly clear, such a discussion was deflected from Marxist thought right from the beginning by Marx's thin and vague analysis of law and the lack of his concerns for a (legal) protection of the integrity of individuals. So while ironically, Jefferson and Marx share a "philosophy of freedom, in a profound and pervasive sense"⁴², Jefferson based his constitutional design at least on the English legal tradition⁴³ while Marx harnessed his social

33 Zybertowicz, A in Krygier, above n1 at 121.

34 Id at 124.

35 Id at 125.

36 Id at 132.

37 Id at 135.

38 Krygier, M, "Marxism, Communism and the Rule of Law" in Krygier, above n1 at 137.

39 Id at 141.

40 Id at 142.

41 Id at 146.

42 Id at 166. Krygier refers only to Marx; in view of the arguments above I would add Jefferson as a not less radical proponent of enlightenment philosophies in which there was no role for law, as he knew it, to play.

43 See Myrdal, above n6 at 12.

theory “to a diagnosis of present exploitation and a prophecy of future deliverance”⁴⁴:

Marx’s disdain for law, and neglect of the rule of law, were theoretically driven ... Lack of concern for the rule of law, in other words, was built into Marxism; it was characteristic, not careless.⁴⁵

I agree with Krygier that here lies the single most decisive factor for the implosion of Communist states and societies.

Tragically, the “legacy of anti-legalism” does not end with the end of Communism. Adam Czarnota⁴⁶ and Grazyna Skapska⁴⁷ analyse in their contributions the effects of the Marxist design of the “Socialist rule of law” on the attempts of post-communist Poland to cope with the “avalanche-like” breakdown of law and order. Once more, the specific circumstances of a “smooth collapse” are apparent which left legal systems in eastern Europe largely intact but demanded a self-reform under a chaotic constitutional control. Characteristically, the analysis of legal structures reveals a much more differentiated cultural speciality of law in post-communist societies than the veneer of a monolithic Communist Creed suggests.⁴⁸ Czarnota shows how the Round Table discussions in Poland allowed for a resumption of Polish constitutional and legal traditions which, while not overcoming the structural problems of an incapacitated legal system at short notice, provide at least a constitutional basis for the rule of law in the long term.⁴⁹ Skapska analyses the structural problems of the Polish post-communist legal system in great depth and as a “troublesome awakening after the first euphoria”:⁵⁰

The institutional legacy of the communist system exists in the shape of ‘bad law’: a dual system of formally valid but often not enforceable norms, norms valid but perceived as unjust, norms incompatible with the emerging reality, norms having only declaratory but no binding force — [that is, quality of production] — and the really binding informal orders based on power structures, mutual networks and interconnections, informal relations.⁵¹

The institutional legacy of the communist system exists also in the shape of the destruction of the public sphere which would be necessary as a conduit for cultural change. In view of these nearly insurmountable difficulties Skapska’s conclusions are not optimistic:

The rule of law is more than simply laws and legal procedures; it is also a culture of legalism rooted in the society’s expectations, standards and values ... The inherited anti-legalism repeats itself ... high penalties, purges and educational efforts, political show trials ... pose impediments on the road of the formation of that culture.⁵²

44 Krygier, above n1 at 166.

45 Id at 171.

46 Czarnota, A, “Marxism, Ideology and Law” in Krygier, above n1 at 173.

47 Skapska, G, “The Legacy of Anti-Legalism” in Krygier, above n1 at 199.

48 See Ziegert, above n32.

49 Czarnota in Krygier, above n1 at 196.

50 Skapska, above n1 at 200.

51 Id at 203.

52 Id at 217-8.

This brings us back to our observations of puzzling parallels between Myrdal's analysis of the high degree of inequality in American society and the accounts in the reviewed collection of essays of the failure of Communism in Poland to create an egalitarian society. They all point to the dualism of an "extra-legal" ideal creed or belief system and the dismissal of legalism as a main operative from the public sphere. Both the "American Dilemma" and *Communist rule reach their crisis points* when well-meaning reforms – the civil rights movements and the legislative push of presidents Kennedy and Johnson in the sixties, Gorbachev's perestroika in the eighties — try to bridge institutionally, and that is through law, the gap between promise and deliverance. As the impressive array of eyewitness-accounts in this collection of essays shows, this gap is structurally unbridgeable: it could only be overcome with law, but the ideological design has dismantled the legal infrastructure: a culture of legalism.

Such is the paradox of law:

Solidarity [the Polish movement] created capitalism which was then captured and colonised by the former nomenklatura. Solidarity's real failure was its inability to translate victories into law. It is a profound paradox that the legitimacy of the postcommunist leadership is directly linked to the missing element of the anticommunist revolution — the constitution. It will be even more paradoxical if the postcommunist majority manages to *impose constitutional limitations on itself* [my emphasis], something that Solidarity's champions of freedom and democracy notably failed to do.⁵³

The lawyers Jefferson, Marx, Lenin and Gorbachev attempted to exempt their visions of a better society from the self-imposed constitutional limitations of a legal order and wreaked havoc.

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53 Osiatynski, W, "After Walesa. The causes and consequences of Walesa's defeat" *East European Constitutional Review* 35 at 43-4.