

BOOK REVIEWS

THE COMMUNIST THEORY OF LAW. By Hans Kelsen.
New York: Frederick A. Praeger, Inc., 1955. Pp. viii, 203. \$5.00.

What Soviet lawmakers think about the nature of law is a matter of the greatest practical importance not only to the people who live under Soviet law but also to us, insofar as we live under an international law which the Soviet Union can help make or break. It is also a matter of considerable theoretical interest, since Soviet legal thought is the product of a theory of society—Marxism—which offers a profound challenge to our own traditional beliefs.

Unfortunately, it is extremely difficult to discover what Soviet lawmakers *really* think about the nature of law. The doctrines which they officially endorse and proclaim as orthodox Marxist legal theory do not necessarily correspond to their own operative concepts. Very often a doctrine is adopted as a means of accomplishing a particular result, rather than as a means of expressing a real belief. For example, when Vyshinsky said in 1938 that "Soviet law has been socialist from the first days of the October Revolution," he probably did not expect anyone to believe that the Soviet codes of the 1920's were not copied, by and large, from the "bourgeois" codes of Continental countries; but the doctrine served the function of preventing any future disparagement of provisions of the codes, on ideological grounds, by Soviet lawyers and judges. In short, it operated as a legal fiction operates. Much of Communist legal theory has a fictitious character, in that sense. It is consciously intended to reconcile new Soviet legal and political practices with pre-existing Marxist doctrine in order to maintain the continuity of the doctrine despite the novelty of the practices.

Professor Kelsen, however, applies to Communist legal theory the same method of analysis which he has applied in other works to various branches of law; that is, the method of textual analysis of definitions in order to discover logical consistencies and inconsistencies, without any reference to the purpose which the legal norm (or in this case legal theory) is designed to accomplish. It is doubtful that this method can avoid producing serious distortions of the meaning of any theory, and it certainly is an inappropriate method of analysis of a theory which is not just a theory but an orthodoxy.

Thus in analyzing classical Marxist theory—which is a genuine theory, and not an orthodoxy—Professor Kelsen puts the statement of Marx and Engels that law is part of an ideological superstructure reflecting the substructure of economic relations alongside another statement of Marx and Engels that law exerts an influence upon economic relations; he sees a logical contradiction between the two statements. But the contradiction is easily dispelled if one considers what Marx and Engels were attempting

to do. They were seeking to formulate a theory of historical development over the centuries; they were saying that in the long run and in the last analysis economic relations determine the nature of the legal system, though at any particular moment law may have an effect upon the economic base. The theory may be wrong, but it is no more self-contradictory than it would be to say that man is basically selfish though he may at times act unselfishly. (Of course Kelsen, with his abhorrence of paradoxes, might equally object to that statement!)

The same kind of objection may be raised against Kelsen's criticism of the Soviet doctrine that the strengthening of the proletarian state will bring about the "withering away" of the state under pure communism. The doctrine may be attacked on many grounds, but to attack it as self-contradictory is to miss the point. It is as if a writer on Christian theology were to criticize as a logical fallacy the belief that Christ is both human and divine.

Again, Kelsen considers it an inconsistency that on the one hand Marxists claim to be "scientific" in their analysis of society but on the other hand they postulate a moral order of reason, freedom and equality, and condemn "bourgeois" law as immoral. Here, too, there is no inconsistency, though again, perhaps, a paradox. Marxists simply use the word "scientific" in a different sense from that of Kelsenists.

Yet Kelsen's interest in finding logical contradictions in Communist legal theory has yielded some important results. His book shows sides of Communist thought that have hitherto been obscure to many students. In particular, his rigorous belief that law should be viewed as an aggregate of norms entirely isolated from moral and social principles and purposes, has led him to the discovery that both classical Marxism and its Soviet offspring adopt what is in fact a natural-law theory. They find the source of law not merely in the command of the sovereign but also in the inner order of human nature and of society. Since Soviet legal theory has been considered by many writers to be the epitome of positivism, it is of considerable interest that in the light of Kelsen's "pure theory of law," at least, it appears highly moralistic. Kelsen writes,

"When Marx applies the distinction between the existing, merely external reality and the true, hidden reality as the *Sollen* [ought], the ideal destination of reality, to the state, he adopts exactly the same scheme of interpretation as the natural-law doctrine. . . . What Marx says of the state, exactly the same could be said of the law: that even where it does not fulfill the requirements of socialism it contains in its modern form the postulate of reason, *i.e.*, justice, and that it pretends to realise reason, that is to say, to be just. . . . The task of 'scientific' socialism, says Engels, is . . . 'to discover in the economic situation created by [historic economic] development the means for the solution of the [class] conflict.' . . . The means for the solution of the class conflict: the just social order of communist society, is

immanent in the social reality of production and, hence, can be discovered by an examination of this reality. This is genuine natural-law doctrine." (pp. 20-21).

Soviet writers, too, reject the idea that a theory of law can be worked out from a study of the norms of positive law. Rather it must be worked out, in Vyshinsky's view, "from life . . . from the content of social relationships." "What is most amazing in this theory of the bolshevik Vyshinsky," writes Kelsen "is that it is exactly the same type as that bourgeois theory which the Soviet writers have derided and ridiculed more than any other theory: the natural-law doctrine. . . ." (p. 120).

Though he does not attempt to analyze Soviet politics in any detail, Kelsen states that "Soviet legal theory adapts itself submissively to every change in the policy of the Soviet government" (p. vii), and again that "the deplorable status of Soviet legal theory, degraded to a handmaid of the Soviet government, should be a grim warning to social scientists that true social science is possible only under the condition that it is independent of politics." (p. 193). Yet is it not possible that the natural-law doctrine espoused by Soviet jurists, and their insistence that law must serve the needs of man in society, while it is presented on the one hand as an apology for Soviet law, at the same time contains a basis for criticizing Soviet law and even Soviet politics—and that this second function of the theory is well understood by its exponents? We may well be grateful for this particular inconsistency!

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SOVIET MILITARY LAW AND ADMINISTRATION. By Harold J. Berman and Miroslav Kerner. Cambridge: Harvard University Press, 1955. Pp. xiv, 208. \$4.00.

DOCUMENTS ON SOVIET MILITARY LAW AND ADMINISTRATION. Edited and Translated by Harold J. Berman and Miroslav Kerner. Cambridge: Harvard University Press, 1955. Pp. xi, 164. \$2.00.

The book first mentioned is an analysis and discussion of Soviet military law and administration. The other is a source book on the same subject. It is a translation into English, with notes, of those parts of the Constitution of the Union of Soviet Socialist Republics, and of those Soviet statutes, edicts, regulations, and judicial decisions, which are pertinent to military law and procedure. One who, like the writer of this review, has previously known little or nothing about the subject of these books rises from a reading of them with a feeling of surprise that the armed forces

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of the Union of Soviet Socialist Republics has as efficient and just a system of military law as it does.

When the Bolsheviks assumed power in Russia in 1917 they permitted election of officers by the troops, abolished salutes and all titles and insignia of rank, and introduced political commissars into the military forces. Officers were described, not as "captain" or "major," but as "company commander" or "battalion commander," and were addressed as "comrade." The soldier's oath began, "I, son of the toiling people and citizen of the Soviet Republic, . . . before the toiling classes of Russia and the whole world, pledge myself to direct all my acts and thoughts to the great goal of liberation of all toilers." The army regulations said that discipline rested upon "the consciousness of the necessity of the heaviest personal sacrifices for the sake of total liberation of the entire toiling class from the yoke of the capitalist system." But the officers of the imperial forces who had been retained in the service knew, and the Soviet leaders soon learned, that something more than class consciousness and devotion to the Soviet cause was necessary to create that discipline without which an army becomes an uncontrollable mob.

The history of Soviet military law since that time has been a gradual abandonment of such practices as have just been described, and a return to a written military law which on its face approximates that, not of England or the United States, but of the former Russian Empire and of the nations of continental Europe today. It provides for the infliction of non-judicial punishment, which in our army we call "company punishment," not only by the offender's immediate commanding officer, but by any officer or non-commissioned officer in the chain of command above him. They may not only punish, but they may also give rewards. If there is to be a trial by court-martial, Soviet military law provides for a formal written charge, for a public trial by a military court at least one member of which must be a professional military judge, for the assistance of counsel, for the presumption of innocence, for the compulsory attendance of witnesses for the defense, and for appeals to higher tribunals and eventually to the Supreme Court of the Union of Soviet Socialist Republics. The Soviet leaders, many of whom have had military experience, apparently know, as every intelligent American officer knows, that, not only does the escape of the guilty from punishment destroy morale and discipline, and therefore military efficiency, but that the conviction of the innocent has the same disastrous effect. Men will not cheerfully submit to the hardships and dangers of military life, or be efficient soldiers, if they have no faith in the fairness of the disciplinary and judicial processes to which they are subject.

The Soviet military law is flexible. The higher the command of the officer exercising disciplinary powers, the severer the non-judicial punishment which he may impose and the greater the rewards which he may bestow. In fixing punishment, such officers and the courts-martial are to take account of extenuating or aggravating circumstances. Permissible punishments vary also with the rank of the offender, but officers are not

unduly favored when they are accused. In many instances the punishment which may be imposed upon an officer is heavier than that which may be imposed upon a soldier for the same offense.

In this pleasant picture there are some shadows and even some black spots. One principle of Soviet military law which strikes an American lawyer unfavorably is that of analogy, the doctrine that a man may be convicted of an offense not described in the military code, but analogous to one that is described there. However, this has been limited by judicial interpretation to little more than a doctrine of liberal construction, in contrast with our view that a penal statute must be strictly construed.

Russian military law allows an officer to use a weapon to compel obedience "in an extreme case which does not permit delay." During World War II, the shooting of a Soviet soldier by an officer for this reason happened fairly often.

A statutory provision denounces the flight of a member of the armed forces across the frontier, and then fixes this penalty:

"Adult members of the traitor's family who lived with him or were supported by him at the time the crime was committed shall be subject to deprivation of electoral rights and to deportation to remote regions of Siberia for five years."

The director of the Russian Military Law School thus supports the foregoing provision:

"The political sense of this norm consists in the strengthening of the general preventive effect of the criminal law relating to such a very grievous crime as flight across the frontier, as a result of which the guilty person himself cannot be brought to punishment. The threat of application of repression to members of the family may impel the criminal to refrain from committing the treasonable act."

No military man will minimize the gravity of desertion to a foreign country, but the punishment of innocent relatives cannot be justified.

One of the blackest spots in the picture is the law and practice with respect to a "counter-revolutionary" crime. This is defined as an act "directed toward the weakening of the Soviet government or of the basic economic, political, and national conquests of the proletarian revolution." This is so broad as to include almost any dissent from official doctrine. If the accusation is espionage, treason, sabotage, or any one of certain other counter-revolutionary acts, the written charge shall be presented to the accused twenty-four hours before his trial, no appeal shall be allowed, and a death sentence shall be executed upon denial of a petition for clemency.

There are also vague definitions of treason and "propaganda or agitation." In 1938 the Supreme Court held that, in order to be convicted of a counter-revolutionary crime, the accused must have had a specific counter-revolutionary intent. However, in a later edition of that opinion, its lan-

guage was changed so as to be less restrictive. It seems probable that in cases having a political tinge pressure is sometimes put upon military judges by a Communist party leader or by the political officer who accompanies each unit. (On the other hand, there are occasions when the political officer interferes to protect soldiers from a tyrannical commanding officer.) Furthermore, and worse still, in some trials which the high authorities desire to publicize for the purpose of propaganda, such as the purges, there can be no doubt that, although the trials follow the procedure laid down by law, the evidence has been doctored or manufactured, confessions have been obtained by brainwashing or duress, and the judges know what findings and sentence are desired of them. Finally, and worst of all, the Soviet law expressly allows cases of terrorism and some others having a political flavor to be tried in secret in the absence of the accused. If the death sentence is imposed, it is executed immediately, with no right of appeal or petition for clemency. Beria was tried and put to death in this manner. Also, a serious political case may be handled by a secret administrative trial before the Special Board of the MVD.

Notwithstanding these black spots, and very black they are, in cases having no political aspect, which means the vast majority of them, the Russian officer or soldier accused of an offense receives a fair trial, with procedural guaranties not significantly inferior to those provided for members of the armed forces of other nations of continental Europe.

One of the authors of the books under review, Colonel Kerner, served in World War II in that rank in a Czechoslovak corps along with Russian units and under the Russian high command. He therefore had an opportunity to observe Soviet military discipline and justice at close range under the stress of combat.

These two books are the best and almost the only source of information available to English-speaking readers on Soviet military discipline and law, a subject of great importance to military men and of interest to many others.

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SOVIET LAW AND SOVIET SOCIETY. By George C. Guins.

The Hague, Netherlands: Martinus Nijoff, 1954. Pp. xv, 457.
\$7.30.*

It is, of course, extremely important that the West develop an accurate understanding of the Soviet system, and that lawyers in particular understand how law is used in the Soviet sphere to further the ends of the Bolshevik leadership. The USSR stands today as an example of the rapidity with which a backward nation can be made strong, and there is

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* This book can be ordered through Tice & Lynch, Inc., 21 Pearl St., New York 4, N. Y.

reason to fear that the Soviet example seems attractive to many countries with underdeveloped economies and nationalist ambitions. Under these circumstances, careful analysis of Soviet legal materials is most welcome.

This book has had several forerunners: Vladimir Gsovski's *Soviet Civil Law; Cases and Readings on Soviet Law*, collected by John N. Hazard and Morris L. Weisberg; Harold J. Berman's *Justice in Russia*; John N. Hazard's *Law and Social Change in the USSR*; and Hans Kelsen's *The Communist Theory of Law*,¹ to mention only the most important. It would be pleasant to report that Professor Guins has made a substantial additional contribution, but unfortunately the volume under review does not so qualify.

The title accurately suggests the book's coverage and the generality sought after by the author. Six chapters set forth what amounts to ideological background. Then eight chapters are devoted to description and evaluation of legal controls over economic activity, five to legal controls over political life, and five to legal controls over social relations. Two chapters discuss the legal aspects of Soviet international relations, and a 16-page summary concludes the study. There are abundant references to Soviet sources and Western commentaries, and an index.

Professor Guins was trained as a legal scholar in Russia before the Revolutions of 1917, and after two decades in Manchuria has been in this country since 1941. He refers to himself as a follower of Leo Petrazhitskii and is especially concerned with the psychological foundations of law. His emphasis is on evaluation of Soviet law in terms of its ethical fitness, measured according to inherited concepts of Roman *ius* and 19th century laissez-faire capitalism. There is frequent reference to arrangements which are "natural," and to "human nature," and a recurrent assertion that his psycho-legal analysis is "scientific."

One is left with a frustrated feeling of sympathetic confusion. Of course the Soviet system is horrible; we know that. With Professor Guins' ultimate value judgment in favor of individualism, we would all agree. But his detailed argument is anything but convincing. Instead of analyzing empirical evidence dispassionately, he tilts against the doctrinal bombast of Marx-Engels-Lenin-Stalin, *cum* Vyshinsky *et al.*, with the earnestly outraged polemics of a Victorian liberal. As if this were not enough, the book is marred by awkward English, poor proofreading, and careless indexing.

On the whole, it appears to me that a reader might find this an exciting introduction to the subject, but that he is likely to reach more informed judgments through tackling the volumes already cited above as forerunners.

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1. Reviewed, *supra* p. 444.

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