

to attempt delegation of nondelegable duties. But surely this is not the end of the matter. What role, if any, does the Court have to play in the creation of such responsible citizenship, given the institutional development which has actually occurred during a century and a half? It is not difficult to suggest areas where vigorous defense of individual rights by the Court seems to have encouraged intelligent political response, rather than the contrary. The cases involving judicial supervision of state criminal procedures under the Fourteenth Amendment, of which Justice Jackson was generally critical, may provide one example. The doctrines which have so spectacularly developed in the field may be criticized for the tensions created and for their numerous irrationalities. And yet it is demonstrable that in many particular situations, the Court has opened the way to sensible local legislative action by identifying and dramatizing problems which tend to become submerged and obscured in the welter of public issues confronting any modern legislature. Conceding that the Court has a limited role to play in the preservation of our political values, may it not be true, however, that, in the situation which actually confronts us, it is an indispensable role? These are intriguing questions. One might wish that Mr. Justice Jackson had given them more explicit consideration.

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The Communist Theory of Law. By Hans Kelsen. New York: Frederick A. Praeger, Inc., 1955. Pp. viii, 203. \$5.00.

Few Western legal theories have been more strongly criticized by Soviet jurists than that of the so-called pure theory of law. It is, therefore, quite fitting that Hans Kelsen, the founder and leading advocate of that theory, should now see fit to write this acute analysis of Communist theories of law. Dr. Kelsen, at the outset, frankly confesses his own ignorance of the Russian language; his work is based upon German, French, and English translations of the works of leading Soviet writers. It cannot be denied that this dependence upon translated material makes the basis for the Kelsen study far from adequate from a theoretical point of view. At the same time, in this reviewer's opinion, it is far more preferable to have this study upon Kelsen's terms than not to have it at all. Certainly, it is more fruitful to have Kelsen devote his juristic genius to translations of Soviet writers than to have a second-rate jurist, who happens to possess the necessary linguistic knowledge, do a similar job upon the Russian originals.

Dr. Kelsen starts his analysis by a critique of the doctrinal base of Soviet legal theory—namely, the Marx-Engels theory of State and law. As almost everyone knows, the dominant feature in the Marx-Engels theory is the doctrine of the “withering away” of the State and law. What is not so well known, however, is what this doctrine really means in practice. According to a celebrated

passage of Engels, during the transition period of the dictatorship of the proletariat, the interference of State power becomes superfluous in one sphere after another and soon becomes dormant. "[G]overnment over persons is replaced by the administration of things and the direction of processes of production. The State is not 'abolished,' it withers away."¹ And what was true of the State was true also of law, which Marx and Engels considered to be a coercive order issued by the State. Neither Marx nor Engels were legal thinkers and their writings on State and law show this clearly. Neither had a clear idea of the relationships between State and law and their theories on the matter were not as clearly worked out as their later disciples have assumed. Kelsen demonstrates most lucidly that, despite Marxist deprecation of natural-law doctrine, the philosophy of Marx and Engels was essentially based upon notions of natural law. Indeed, he goes even further and aptly asserts that "[t]he prediction of a stateless and lawless society of perfect justice is a utopian prophecy like the Messianic Kingdom of God, the paradise of the future."²

Marx and Engels spoke of the withering away of State and law as a matter of speculative theory. It has taken the establishment of the Soviet State to show us what the disappearance of law means as a practical matter. We can see this most clearly in the writings of E. B. Pashukanis, the most prominent representative of Soviet legal theory during the first period of its development. According to Pashukanis, all law has its basis in the exchange of commodities. The adjustment of controversies arising out of such exchange is seen as the end of law. Law, says he, will lose its *raison d'être* in a society where there are no conflicting individual interests requiring adjustment. Thus, law will no longer be necessary in a Socialist society. "Only capitalism creates all the conditions necessary to enable the judicial element to obtain its highest development in social relations."³ In the Socialist State, there will be no more law, but merely technical regulation; legal rules will be replaced by "social-technical" rules. "The withering away of bourgeois Law can under no circumstances mean its replacement by some new categories of proletarian Law, but only the withering away of Law in general, i.e., the gradual disappearance of the juridical element from human relations."⁴

As Dr. Kelsen aptly points out, the Pashukanis theory is a complete negation of the concept of law. Nor, under both that theory and the facts of Soviet life, is the social order divested of its coercive character. Quite the contrary! In Pashukanis' writings, technical regulation is posited as the substitute for law. But this is merely another form of Engels' thesis that, with the gradual transition to a Socialist State, the rule of law over men would be replaced by the mere

¹ Engels, *Anti-Duehring* 309 (Eng. ed., 1942).

² P. 38.

³ Pashukanis, *The General Theory of Law and Marxism* (1925), quoted in Schlesinger, *Soviet Legal Theory* 156 (1945).

⁴ *Ibid.*

administration of things. In terms familiar to us it is obvious that these "social-technical" rules are identical and coextensive with administrative rules and regulations—with the acts of executive officials unrestrained by law. A doctrine of administrative absolutism is to take the place of law in the settlement of disputes. "The more consistently the principle of authoritative regulation, excluding all references to an independent autonomous will, is carried through, the less room remains for an application of the category of law."⁵ In the State as postulated by Pashukanis, there "is to be no law, and but one rule of law, namely, that there are no laws, but only administrative orders for the individual case. Expediency is to be the guide for each item of judicial-administrative action."⁶

Perhaps the best commentary on Pashukanis' theory of arbitrary executive power as a substitute for law is to be found in an address by Dean Pound: "The professor is not with us now. With the setting up of a plan by the present government in Russia, a change in doctrine was called for and he did not move fast enough in his teaching to conform to the doctrinal exigencies of the new order. If there had been law instead of only administrative orders it might have been possible for him to lose his job without losing his life."⁷

With the establishment of the Soviet dictatorship upon a more or less permanent basis, Soviet writers themselves came to see the inadequacies of a legal theory that denied the existence of law. By the time of A. Y. Vyshinsky, Soviet jurists saw the need for working out their system in legal terms and posited the ideal of so-called Socialist legality. By then, it was all too apparent that, despite the Marx-Engels dogma, the State was anything but withering away in the U.S.S.R. And the Soviet Government, like all other governments, sought to inculcate its citizens with the ideal of legality. Dr. Kelsen well shows how Vyshinsky's contribution to the theory of the nature of law consists in his effort to adapt the definition of law to the new doctrine of the State decreed by his master, Stalin. "A nauseous servility toward the then dictator, an intellectual prostration that surpasses the worst forms of byzantinism, is a characteristic feature of this legal science, the highest ambition of which is to be a submissive servant of the government."⁸

One should not, it is true, minimize the place of law in the present-day Soviet system. Yet the significant thing about Soviet law is that it is law in the Anglo-American sense only in the field of private law. The administration of justice in the U.S.S.R. is still characterized by its essentially dualistic quality. To put it another way, Soviet law plays a controlling part only in the ordering of the relations between private citizens. Legal concepts are not applicable to the sphere of public law, which remains regulated by arbitrary measures in which the dominant officials exercise discretionary prerogatives. A system of law and a

⁵ Bodenheimer, *Jurisprudence* 90 (1940).

⁶ Pound, *Fifty Years of Jurisprudence*, 51 *Harv. L. Rev.* 781 (1938).

⁷ Pound, *Administrative Law* 127 (1942).

⁸ P. 125.

system of force exist side by side in such a State. As Professor Berman has put it, "There are certain areas into which law penetrates only slightly. For example, a person who is suspected of antagonism to the regime may be picked up by the secret police, held incommunicado for a long period of time, tried secretly by an administrative board, and sentenced to hard labor—without benefit of defense counsel and without any possibility of appeal. On the other hand, there are other areas which are on the whole governed by well-defined legal standards."⁹ The Soviet Union is thus what has aptly been characterized as a *dual State*¹⁰—one in which acts of the administration are placed in a privileged position of immunity from control by law. And this, it should be noted, is the central feature of all totalitarian States, whether they be of the Soviet or Nazi variety. Indeed, the very term "dual State" is one which was first used to describe the authoritarian National Socialist State. But it is certainly accurate as well to describe the State set up in post-revolutionary Russia. The Soviet, like the Nazi, State may well be described as being under a more or less permanent system of martial law, which, following Blackstone's famous definition, is "in truth and reality no law," for it "is built upon no settled principles, but is entirely arbitrary in its decisions."¹¹

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⁹ Berman, *Justice in Russia* vii-viii (1950).

¹⁰ Fraenkel, *The Dual State* (1941).

¹¹ 1 Bl. Comm. 413 (Cooley's ed., 1866).

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Nine Men. A Political History of the Supreme Court of the United States from 1790 to 1955. By Fred Rodell. New York: Random House, 1955. Pp. 332. \$5.00.

Roughly since the late 'teens of the present century, when Albert J. Beveridge published his monumental four-volume biography of John Marshall, lawyers, historians and political scientists have been analyzing and criticizing the Supreme Court as an institution of American government and the performances of individual justices. There have been histories of the Court, biographies of individual justices, studies of groups of justices, analyses of constitutional doctrines and of behavior in particular fields, and various other types of appraisal. The reasons for so many and such varied studies have included the following: In our American emphasis on the bigness and betterness of the present and the future, we have lost something of the halo that once betokened our constitutional system and its institutions, and particularly the Supreme Court. We have dissipated some of our reverence for the past and institutions hoary with tradition, with the result that each institution must be continually proving its case and in terms of prestige can draw but a minimum of sustenance from the past. The prolonged rift in Court decisions marked by relatively consistent