

In conclusion, I would say that I agree with Hook's first argument, I disagree with his second, and I am unable to reach a conclusion on his third. But I think that all three are valuable aids toward rational consideration of problems that are more or less lively political issues of the day. I can heartily recommend this volume to all who seek the help of the mind to resolve questions too frequently ignored by the intellect and resolved by emotion. All three essays stimulate thought, and no more should be demanded of any author.

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**Political Justice: The Use of Legal Procedure for Political Ends.** By OTTO KIRCHHEIMER. Princeton: Princeton University Press, 1961. Pp. xiv, 452. \$8.50.

What is Political Justice? In a sense all administration of justice, criminal and civil, is political, as it serves to maintain and at times to change, the social and political order of society. Kirchheimer deals with political justice in its more specific sense—the use of the law and the courts directly to influence the struggle for political power. Even in this narrower sense the term refers to a wide variety of phenomena, ranging from the judicial prosecution of the alleged revolutionary or traitor to the use of the courts by the political opponent who forces a member of the governing group into a defamation suit. This variety of forms in which political justice can appear is vividly illustrated by the author in the opening chapter of his book, in which he presents a concise historical survey and a detailed description of some typical political cases of recent times. The use of an accusation of common crime to discredit or destroy a political opponent is illustrated by the attempt of the Kentucky Democrats in the 1890's to wrest the governorship from the Republicans by preferring a specious murder charge against the Republican leaders. The story of this long forgotten, but by no means atypical, episode of American politics is instructive as well as thrilling. The equally specious, but successful, attempt of Clemenceau and Poincaré, through a treason charge to prevent Caillaux from attaining political power during World War I, and from using it to bring about a compromise peace, stands for what may be called political justice in its purest form. How a regime can be undermined by forcing a member of the governing group to defend himself against libelous charges before a judiciary sympathetic to the libellant's cause is demonstrated by the case of Friedrich Ebert, first President of the German Republic after the collapse of the monarchy.

While trial can thus serve as a weapon of attack, it is more frequently a weapon to defend an existing regime or government against its opponents. Political justice is a typical weapon of what Kirchheimer calls "state protec-

tion," meaning the protection of the regime or government in power. It is not the only weapon. A government may dispose, and often enough has done so, of its real, suspected or manufactured enemies without interposition of the judiciary. Administrative arrest and protective custody in a concentration camp are but illustrations from our own times. They have been used not only by fascist, national-socialist or communist regimes, but during World War II by Great Britain and the United States.

Observing political justice as a means of state protection leads Kirchheimer into a discussion of state protection in general, especially the dilemma that presents itself to the modern liberal-constitutional state where it is, or believes itself to be, in serious danger from an "opposition of principle," especially by opponents of the very bases of democracy, constitutionalism and individual liberty. Such enemies, in our days fascist and communist, want to make use of those very liberties of democracy which they are bent to destroy. How far can a democratic state go in its efforts to protect itself against such enemies without destroying its own foundations? How can state protection be squared with freedom of speech? What Kirchheimer has to say on this disturbing problem stands out among the mass of recent writing. Here, as in all other parts of his book, Kirchheimer draws on vast material taken from many parts of the world. The radical measures of the Federal Republic of Germany, finding itself directly confronted with efforts of communist penetration from East Germany, are contrasted with the cavalier attitude of Great Britain, believing itself to be immune. The vacillating, and at times frantic, American outbursts are shown to be due less to real danger than to politicians' attempts to ride a probably overestimated wave of popular fear and insecurity. Kirchheimer believes that at least some of the American advocates of radical measures may have felt that the harshness of their legislative proposals would be softened, or even declared unconstitutional, by the courts. To some extent this expectation has indeed been borne out, especially through the attitude taken by the United States Supreme Court in *Yates v. United States*.<sup>1</sup> That case has not been the last word in the political struggle about anti-subversive legislation. In later cases the Supreme Court itself has taken a more rigid approach, and local courts have frequently tended to lean in that direction.

Reviewing the broad scale of attempted state protection in the past and present, Kirchheimer reaches the conclusion that most of the measures are unnecessary where the opponents are insignificant, and that they are, in the long run, ineffective against an enemy representing the majority of the people struggling against a governing minority regime or a colonial power. In such generality this judgment appears too broad. It applies only to liberal constitutional regimes that have opened themselves to democratic ideology and lost faith in the justifications of their own rule. In our days such softening has gone so far as to result in the voluntary abdication of colonial rule. But where

<sup>1</sup> 354 U.S. 298 (1957).

there is a strong will to maintain power, minority regimes have been able to survive attacks from within as long as they have not been accompanied by defeat by the external enemy. The Czarist regime of Russia even managed to survive the defeat by Japan in 1905; it did not fall until the total defeat by Germany in 1917. Austria-Hungary survived all attacks by Czech, Yugoslav and Italian nationalists until the defeat in World War II. If, along with Kirchheimer, one regards pre-World War I Germany also as a country where a majority of the people was lorded over by a minority, it might be added as another illustration. However, the German example tends to indicate that the dichotomy, minority-majority, may be too simple. Not even the Social-Democratic Party which, as a matter of fact, never achieved a majority vote, constituted in its totality an opposition of principle. A government may well be drawn from a minority of the people and the majority may be content with, or at least acquiesce in, that situation. The futility of the half-hearted German attempt of the 1880's to suppress the Social-Democratic Party can indeed be used as a prime example of the problematic relationship between liberal constitutionalism and efforts at state protection. The German case does not constitute an example of the futility of vigorously attempted state protection against a popular majority. Neither was the majority opposed to the existing system, nor did that system ever undertake a full-fledged effort at determined suppression of even its declared enemies. Such an effort, if it had ever been undertaken, might well have run into trouble not only because it would have been contrary to the political climate of liberalism, but also because it could hardly have expected the full co-operation of the judiciary, which, as shown by Kirchheimer's own illustrations, was little inclined to harshness against such leaders of opposition as Bebel and Liebknecht.

Neither in Germany nor in the United States or other non-totalitarian countries have the courts corresponded to that communist over-simplification in which they appear as mechanical tools of the government—both government and courts simply constituting weapons of the ruling class in its struggle to keep down the exploited class. Neither, of course, have the courts been the never-flagging champions of individual freedom against governmental suppression, as they have occasionally appeared in Anglo-American oratory. Reality is more complex. Its sociological analysis by Kirchheimer is penetrating. Why do governments resort to courts at all? Why do they run the risk of being rebuffed by the courts and the danger of the political trial being used by the accused and his group as a public forum of the potentially highest efficiency?

These questions are answered by Kirchheimer in a searching analysis of the role of courts not only in political trials but in society in general. Obviously influenced by Max Weber, Kirchheimer finds the key in the deep human need for justification of the use of power. In order to be accepted, and thus to be stable, power must be felt to be "legitimate," *i.e.*, to correspond to postulates

accepted as self-evident. In our age, in which the exercise of power, in order to be accepted as legitimate, must be demanded by, or at least correspond to, reason, the reasonableness of the exercise of governmental power must be visibly demonstrated. This task of legitimizing in individual cases the exercise of governmental power, especially when it is directed against an alleged enemy, falls to the courts; the judges are the legitimizers of the exercise of governmental power. This insight proves itself a veritable key to the clarification of the problematic role of the judiciary in the political fabric.

Courts cannot serve as legitimizers of governmental power unless they can follow their own judgment independent of the views of the government. Here then lies the root of the democratic postulate of an independent judiciary. But, on the other hand, no state could survive a decided hostility of its judiciary against its government. A dramatic illustration of such a case is afforded by the German Weimar Republic. Hence the problem of finding the right balance between judicial independence and judicial obedience to the law. No hard and fast solution can be stated. The answer must depend on varying circumstances of time and place. How great the variations have been in the measure of success, and how manifold are the available means of formal and informal nature, is extensively shown by Kirchheimer. Modes of judicial appointment, tenure, appeals, administrative controls, personal background, relations to the public, both in general respect and in special relation to the political case, all come under scrutiny. The inquiry is extended to the role and position of the other actors in the judicial drama: the prosecutor, the attorney and the accused. For the accused the political trial can present a much desired opportunity to publicize, dramatize and propagandize his cause and thus to defeat the very enemy by whom he is prosecuted. But promotion of the cause may be fatal to him. Shall he save his own skin by turning informer or traitor to the cause? The dramatic dilemma is illustrated by numerous contemporary cases as well as by the two most momentous political trials of our history, those of Jesus and Socrates.

What are the peculiar tasks of defense counsel in the various types of political trial? Is it his first task to serve his client, or is he to promote the cause? The two tasks can be incompatible.

What, furthermore, is the role of the prosecution? How is the prosecutor's position to be organized if it is simultaneously to serve the government and not to compromise the people's confidence in the administration of justice? What are the motivations for the decision of whether or not to prosecute, and, in the affirmative situation, of how to "dress up" the case?

All these problems are discussed on the basis of a large amount of material taken from constitutional countries such as the United States, Germany, Switzerland, France, Great Britain and South Africa. But how do the problems present themselves in a totalitarian country? The German Democratic Republic (*i.e.*, East Germany) serves as a richly documented illustration of the

several techniques—formal and informal, crude and subtle—for the achievement of a situation in which the courts, like all other organs of state and party, are to function as reliable executive organs of an all-powerful regime bent upon remolding an entire people in accordance with an ideology regarded as ultimate truth. This fascinating description is followed by a survey of turns in Soviet theory on revolutionary legality, which, however, does not extend to those latest tendencies which may conceivably foreshadow a considerable intrusion of lay elements into the administration of Soviet justice and, perhaps, a growth of judicial independence.

A chapter of some fifty pages is devoted to “trial by fiat of the successor regime,” amply illustrated by cases from widely diverse places and periods. The trial of representatives of the defeated by the victorious regime appears to be a common, and probably inevitable, phenomenon. Kirchheimer uses the case to explain the essential difference between the trial and the action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results. But even in such administration of justice, gradations exist. In the courts-martial of the Vichy militia and the people’s tribunals of the first liberation days, enemies, whose fate had been settled in advance, were butchered. The liberation type of *cour de justice*, with all its prejudices, allowed for some primitive rights of defense. The elaborate military commission set up by the United States for the trial of such Japanese “war criminals” as General Yamashita is said to constitute a marginal case. The Nuremberg trial before the International Military Tribunal is regarded as a true rather than a merely simulated trial. The Nuremberg case is extensively discussed, but, in contrast to the general character of Kirchheimer’s inquiry, the refutation of the critics moves more along legalistic than political lines. Whether Nuremberg has produced, as Kirchheimer hopes, the positive result of a lasting condemnation of the use of inhuman practice in the political struggle may well be doubted. As pointed out by the author himself, the Nuremberg indictment was directed primarily against the National-Socialists’ attempt to subjugate Europe by force of arms, and only incidentally against the practices used in the pursuit of this aim. Inhuman acts unconnected with the war were expressly excluded by the Tribunal from its scope of jurisdiction. More convincing, on the other hand, are Kirchheimer’s arguments against the proposals to call in neutral judges in the condemnation of the National-Socialist rulers of Germany by their Allied successors, or to leave their condemnation to German courts.

In the chapter following, Kirchheimer investigates the role played in political justice by the corrective institutions of asylum and mercy. Asylum signifies the limitations imposed on political power by the limits of its territorial spheres. What are the considerations motivating a government to grant or to refuse asylum? What were the policies of the several nations in the nineteenth century, when the asylum seeker was typically an individual? What are

they today when the search for asylum has come to be the concern of vast groups of persons persecuted not only on grounds of political creed or activity but on grounds of nationality, race or social origin?

What, finally, are the complex and widely varying motives for granting or denying mercy to individual victims of political justice, or amnesty to entire groups? The comparison of Lincoln's practices with those of contemporary American administrations is as fascinating as the analysis of attitudes of Shakespearian characters, of Tudor and Bourbon kings, or of successive French and German regimes.

In summing up Kirchheimer returns to the comparison of political justice in constitutional and totalitarian regimes. In the former the existence of a "judicial space" is essential if the "detour" of the resort to trial is to fulfill its function of legitimating the governmental prosecution of the political foe. Only if the courts are left a space of freedom to exercise their own, though perhaps narrowly defined, judgment can political justice be expected to achieve its assigned end. There must be some risk of divergency between government and court, and thus some risk of the trial being used by the accused as a forum for effective advocacy of his cause. Where no such judicial space is left, the political trial can serve only the different functions of a potentially highly effective means of a totalitarian government to educate the populace along the ways desired. Whatever the regime, political justice "is bound to remain an eternal detour, necessary and grotesque, beneficial and monstrous."<sup>2</sup>

This final judgment expresses the well-balanced nature of Kirchheimer's investigation of a topic that easily provokes partisan approach. Kirchheimer leaves no doubt about his own convictions as those of a democratic, liberal constitutionalist. But through his comprehensive knowledge of history he is familiar with the complexity and inevitability of the problem. He pursues it not as the pleader of a cause but as a scholar in search of knowledge and understanding.

Kirchheimer is a political scientist and a sociologist. He looks at the phenomenon of political justice from this outside point of view rather than from the inside position of the lawyer.<sup>3</sup> It is exactly this approach that makes his work fascinating and important for the lawyer. The impact of the inquiry is due not the least to the comprehensive scope of the author's material. Political justice has been treated in a flood of writing, especially in recent years when it has become such a widespread and disquieting phenomenon. The number of American discussions of American cases, practices and problems has been legion. Nowhere else can the reader find such a wealth of material as in Kirchheimer's book. Consequently, the approach is from a higher level; phenomena and problems of one country are reflected in those of another. Thus new light is thrown upon the familiar phenomenon. The inquiry cuts down

<sup>2</sup> P. 430.

<sup>3</sup> The fact that the author is not a lawyer has found expression in his unorthodox and at times annoying mode of citing cases, American and foreign.

to fundamentals. The book constitutes a high achievement of comparative law as well as of jurisprudence. Law teachers might well consider its use as a base for discussion in seminars or courses on jurisprudence. For one striving at clarifying his thoughts about the problem of how to defend our social and political system against its enemies, without in the effort undermining its very foundations, Kirchheimer's book is, I dare say, indispensable. To the judge, attorney, or prosecutor involved in a political case, it will serve as a useful practical guide.

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**Flags of Convenience: An International Legal Study.** By BOLESLAW ADAM BOCZEK. Cambridge: Harvard University Press, 1962. Pp. v, 323. \$8.00.

This, so far as I am aware, is the first monographic study of the legal and related problems that arise from the registration of seagoing vessels in countries other than those of the nationality of their true owners. Issues involving aspects of the "flag of convenience" problem are now in the courts in the United States.<sup>1</sup> A related issue has recently been before the International Court of Justice.<sup>2</sup> The Geneva Conference on the Law of the Sea showed that the participating countries differed as to the legitimacy, as concerns third states, of the practice of flying flags of complaisant and essentially non-maritime states in order to reduce the competitive disadvantage to the owners were the laws of their nationality to be applied to the internal economy of the vessel, particularly as to wage scales and social legislation.<sup>3</sup> As a result of these differences, Article 5 of the Geneva Convention on the High Seas<sup>4</sup> was left imprecise on the issue of non-recognition:

Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its

<sup>1</sup> *Incres S.S. Co. v. International Maritime Union*, 10 N.Y.2d 218, 176 N.E.2d 719, 219 N.Y.S.2d 21, *cert. granted*, 368 U.S. 924 (1961); *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962), *app. pending*; *Sociedad Nacional de Marineros de Honduras v. McCulloch*, 201 F. Supp. 82 (D.D.C. 1962).

<sup>2</sup> Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, [1960] I.C.J. Rep. 150.

<sup>3</sup> Chapter IX of the book under review is a detailed account of the positions taken at the 1958 Geneva Conference on the Law of the Sea on the competence of states to confer their nationality upon vessels. Chapter VIII is even more detailed as to pre-1958 attacks on the "traditional principle" that each state has exclusive competence to determine the conditions for the grant of its nationality to merchant vessels.

<sup>4</sup> The four conventions open for signature as a result of the United Nations Conference on the Law of the Sea (1958) are not yet in force. The Convention on the High Seas, however, is regarded in most of its provisions as reflecting the present state of customary international law, thus sharpening the debate as to the meaning of Article 5 even before it comes into effect. Perhaps the most convenient citation to the four conventions, pending their coming into effect, is 52 AM. J. INT'L L. 830-67 (1958).