

Volume 8 | Issue 1

1956

The Communist Theory of Law by Hans Kelsen

Reginald Parker

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Reginald Parker, *The Communist Theory of Law by Hans Kelsen*, 8 W. Res. L. Rev. 104 (1956)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol8/iss1/13>

This Book Review is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Book Reviews

THE COMMUNIST THEORY OF LAW, by HANS KELSEN. New York, Frederick A. Praeger, 1955, 203 pages. \$5.00.

In 1949 Hans Kelsen wrote a short book on the political theory of the Lenin-Stalin brand of communism,¹ which was rightly called "by all odds the best critical analysis of the political theory of Marx and Engels, and of its later development by Lenin and Stalin."² And it is not only this, but indeed one of the best critical analyses of any political theory, full of calm acidity such as only Kelsen can produce it. I rarely fail to assign at least portions of it to jurisprudence classes.

The present book can be thought of as a continuation of the previous one. It deals with the theory of law and state of the communists up to and including the time of Stalin. It relies on the works and writings—aside from Marx and Engels—of prominent Soviet lawyers insofar as they are available in English, German, or French. I do not believe that the author's inability to read the original Russian sources has caused any serious deficiency;³ at any rate, however, it is only through their translation that those Russian sources have assumed international importance.

The preface explains the author's central theme, that is, the position of the anti-normative approach to social phenomena as an essential element of Marxian theory in general and Marxian legal theory in particular. In other words, the communist theory of law assumes that the legal order is not a normative order or system but rather a sum total of social phenomena. Specifically, Karl Marx treated law as a reality—as an "expression" of social reality and as the "official recognition" of economic facts. On the other hand, both Marx and Engels regarded law also as an ideology, thereby confusing law with theory of law. An ideology in the Marx-Engels sense is a false and deceptive theory; and by calling law a mere bourgeois ideology the two founders of scientific socialism as well as their followers have denounced the "bourgeois idea that law is just." Thus Marx's theory of law is essentially a natural-law doctrine. But Marx also stresses the allegedly non-ideological reality of the socialistic state, which in turn is a step toward the transition to the communistic society. The latter being somehow a community rather than a state will neither

¹ KELSEN, *THE POLITICAL THEORY OF BOLSHEVISM* (1949).

² EBENSTEIN, *INTRODUCTION TO POLITICAL PHILOSOPHY* 313 (1952).

³ Except for the minor flaw that Kelsen treats Vyshinski as the actual author of the book which in English is called *THE LAW OF THE SOVIET STATE* (1948). Actually, however, Vyshinski was the mere "General Editor," aside from the fact that, properly translated, the title should be "Soviet State Law," i.e., constitutional law. Cf. Parker, *Book Review*, 44 *ILL. L. REV.* 265 (1949).

need nor have law the state "has withered away." Much of Marx's thinking, as is well known, was based on Hegel's dialectics, which did "open the way for irrational metaphysical speculation," as Kelsen has irrefutably demonstrated in the earlier treatise.

Lenin's approach to law and legal theory shows the same failure to separate the scientific inquiry into the nature of the legal order from the political question of what the contents of a given legal order should be. The same is true of Stuchka, an early Soviet writer—the first of the Russian communist lawyers whose writings are analyzed in Kelsen's monograph—who maintained that law by definition is class law, wherefore there was not, nor will there be, any law in the classless society of either primitive man or of the future communist state, because in a classless society man is guided by a mere law of nature!

Reisner, on the other hand, represented the "revolutionary legal consciousness of the proletariat" as the foundation of the activity of revolutionary justice. Like his predecessors, he stressed the "ideological" character of bourgeois but not of the future communist law. Pashukanis refined, as it were, this theoretical stew by maintaining that only private law is law, whereas public law, in other words, the state, is not truly law. Pashukanis was later purged and called a "wrecker" by Vyshinski, who insisted that public Soviet law is law, too—even though public bourgeois law is a mere ideology (even as Marxism is the only social science, as distinguished from the non-Marxist ideologies that merely call themselves social sciences). And as there can be but one correct and scientific theory of law, viz., the Soviet theory of law, his approach to law, too, is in fact the opposite of what it pretends to be: a natural, rather than scientific, theory of law. Yet Vyshinski recognizes at least that law is not, after all, a system of social relationships or a form of production relationships, but rather an "aggregate of rules of conduct." In the Soviet state, Vyshinski, moreover, asserts, law is an expression of the will of all of the people, whereas in capitalistic states law is merely an expression of the will of the dominant class. The writings of Golunskii, Strogovich, and Trainin do not differ essentially from these conceptions or rather contradictions. Trainin may be noted for his blurred and misleading views of Kelsen's pure theory in general and his failure to perceive the identity of law and state. The last chapter of the present book is devoted to the Soviet theory of international law.

Anybody who has but a nodding acquaintance with Kelsen's writings⁴ can well imagine that the learned author spares no effort to show the

⁴ Of which I regard his book *GENERAL THEORY OF LAW AND STATE* (1945) and his article, *Science and Politics*, 45 *AM. POL. SCI. REV.* 641 (1951), as the two greatest.

fallacies and inherent impossibilities in all these pseudo-scientific writings. He concludes with the following warning: "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."

In other words, political theories must not be presented as scientific absolutes, and Hans Kelsen has aptly demonstrated that a political philosophy can be expounded and its desirability from this or that point of view explained without representing it as an either god-sent or history-imposed edifice of natural law.⁵ The present book is valuable, not because it helps in a battle against communism—to fight this political movement by pointing out the fallacies of its legal theories and theoreticians would be like throwing pebbles at a battle cruiser—but rather because it furnishes a tool in what ought to be our ever-lasting war against bemuddled thinking and wishdreams pretending to be reality. We must not forget that all the fallacies pointed out in Kelsen's book have occurred in many of the non-communist writers throughout the ages, although not so concentrated.

REGINALD PARKER*

SECURITY THROUGH FREEDOM. By Alpheus Thomas Mason. Ithaca, Cornell University Press, 1955, 232 pages, \$2.90.

This excellent volume by the distinguished scholar of American constitutional law is a major contribution toward an old, still unsolved problem: the rights of people in property as influenced by law and government. The six chapters—political *versus* judicial control of government; freedom and economic oligarchy; freedom and the New Deal; the Supreme Court in search of a role; welfare capitalism: opportunity and delusion; can freedom conquer fear?—represent the materials presented by Professor Mason in the Messenger Lectures on the Evolution of Civilization at Cornell University.

The book concentrates primarily on American political thought and practice in the control and regulation of property and wealth during this present century. The regulation and control of property by law and government, however, has been a very ancient and still remains a very permanent social need. After perusing *Security Through Freedom* one recalls the philosophic writing of H. G. Wells:

Lawyer and judge are essentially men of the literate and devoted tradi-

* Professor of Law, Willamette University.

⁵ See, e.g., KELSEN, *VOM WESEN UND WERT DER DEMOKRATIE* (2d ed. 1921); Kelsen, *Foundations of Democracy*, 66 ETHICS 1 (1955).