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State and Law: Soviet and Yugoslav Theory, by Ivo Lapenna

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STATE AND LAW: SOVIET AND YUGOSLAV THEORY. By Ivo Lapenna. New Haven: Yale University Press. 1964. Pp. xi, 135. $5.00.

In his study of the political doctrine of communism,[1] Hans Kelsen concluded that after more than thirty years of communist rule the Soviet ideologists proved to be unable to work out an original theory of state and law based on the Marxian concept of society. In its tortuous development toward classlessness and the utopian paradise of full communism in which state and law would wither away, the Soviet Union in the period of Stalin bogged down amidstream, being incapable of moving further ahead and not daring to turn back. Making use of what he referred to as "Marxian dialectics," Stalin declared himself in favor of the strengthening of the proletarian dictatorship as a preparation for the withering away of the state. Later, he explained this sophistry, which violated the basic tenets of Marxism, first by justifying the necessity of the state as an instrument of defense against internal and external enemies of the Soviet regime, then by insisting that the withering away of

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9. *Id.* at 77-78.

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1. HANS KELSEN, THE POLITICAL THEORY OF BOLSHEVISM 34 (1948).

the state could not take place so long as the Soviet Union was encircled by capitalist states. It is not without irony that the Nazi menace and subsequent aggression against Russia provided the Kremlin dictator with a welcome excuse for his re-interpretation of the Marxian doctrine relating to the role of the state.

The author of the book under review, Mr. Ivo Lapenna, is to be congratulated for his concise but lucid, well-documented, and up-to-date account of the communist approach to the doctrine of the withering away of state and law, which he rightly recognizes as being of basic significance in the future of the entire communist movement. Although based on the analysis of Soviet and Yugoslav theory alone, the study is important also for the insight it allows with regard to the contemporary conflicts within the communist orbit, especially that between Moscow and Peking.

The first two of the four phases of the development of the Soviet concept of state and law described—the relatively free discussion and speculation of the early twenties, and the insistence on uniformity of opinion in the thirties—closely parallel the individual phases of the dramatic process by which Stalin took possession of both the CPSU and the Russian state. Of particular interest is the author's discussion of the infamous role played by A.Ya. Vishinsky, the "state procurator" changed into a legal theorist.[2] Slavishly following the example of his Kremlin master, he repudiated all theories denying or minimizing the utility of law in a socialist society, especially that of the leading pre-war legal philosopher, E. B. Pashukanis. Vishinsky suddenly discovered a new "socialist law," ascribing to it "an enormous creative and organizational role" in the period of transition from capitalism to socialism. All of his many definitions of this law, quoted by Lapenna, emphasized its quality as an expression of the will of the ruling class, sanctioned by state power, and serving the interests of workers and peasants. He accompanied his condemnation of practically all legal theorists by words of vituperation, referring to Pashukanis as "a spy and saboteur" and to his colleagues, such as P. I. Stuchka, as despicable adherents of the "traitor" Bucharin.

It was in the third phase which started in 1938 and lasted until the death of Stalin that "an impressive number of legal scholars fell into disfavor despite self-criticisms and repentance for mistakes committed."[3] Legal science, as all sciences, was hitched to the cart of the all-powerful

2. LAPENNA, STATE AND LAW: SOVIET AND YUGOSLAV THEORY 35 (1964) [hereinafter cited as LAPENNA].

3. LAPENNA at 37. Lapenna mentions, apart from Pashukanis (who perished in a Siberian labor camp) and Stuchka, the Soviet scholars Reysner, Chelyapov, Gurvich, Krylenko, and Berman, all of whom were victims of Vishinsky's wrath.

state, the gradual dissolution of which it was originally to guide and supervise. The law of the Soviet state was applied with all its severity not only against millions of innocent people but, rather ironically, also against those who dared to predict its future disappearance. The tragedy of the legal interpreters of Marxism, who no longer dared to express their opinions and parroted quotations from Stalin and Lenin, was best illustrated by the cynical statement of Vishinsky "that the method of 'scientific work' which might be called 'citology' is fairly widespread among us."

It was this concept of the state and law which the Soviet Union imposed on the individual states of East Central Europe. Mr. Lapenna, analyzing the development of Yugoslav jurisprudence, which he again divides into four phases, points out that the theory of the first Yugoslav phase was identical to that of the third in Russia. The Yugoslavs, he observes, did not escape the curse of "citology," for quotations from Lenin, Stalin, and Vishinsky abounded in the studies then published.

This development was reversed in 1948 because of the outbreak of the Soviet-Yugoslav conflict. Only after almost two years of ideological confusion were the Yugoslav theorists capable of proceeding to a more systematic search for what was later described as a special Yugoslav brand of Marxism. As indicated by Ivo Lapenna, their first reactions were essentially negative, consisting in the rejection of the most obnoxious aspects of Stalinism. However, the repudiation of state capitalism and the ever-growing bureaucratization of the Soviet state and party gave impetus to the revival of the hitherto dormant doctrine of the withering away of the state. Both Tito and the party ideologist, Edward Kardelj, made statements emphasizing that the decentralization of state administration and the transfer of factories to workers' collectives were the beginnings of the withering away of the state. Opinions were expressed foreshadowing the withering away of the party as well.

The subsequent chaos and anarchy caused Tito to call a halt to the speculation on these two issues, emphasizing the significance of state organization and, above all, of the party. Thus the third phase of the Yugoslav theoretical treatment of the state started with Khrushchev's 1955 visit to Belgrade. Various theories were advanced justifying the slackening of the tempo of the withering away process. In this period, Ivo Lapenna notes in his study, the Yugoslav legal theorists, while continuing to condemn Stalin, drew rather close to their Soviet colleagues.

But the rapprochement did not last long; the Hungarian events and

particularly the 1958 Ljubljana Program[4] revived the conflict between the two states and parties. Again Soviet state capitalism and Yugoslav revisionism came under the attack of the respective parties. Yet with regard to the theory of the state, the Yugoslavs adopted a rather cautious and even an ambiguous attitude. While declaring the state to be a necessary instrument of socialism, the Ljubljana Program endorsed the process of the withering away of the state as expressed by the limitation of governmental functions and their transfer to organs of social self-administration. Most characteristic of this second Soviet-Yugoslav conflict was its relative mildness, especially in comparison with the ferocity of the 1948 split.

There were two reasons for which the Soviets toned down their criticisms of the new Yugoslav heresies. Titoism opened the Pandora's Box of hidden nationalist forces within the entire international communist movement. By the end of the fifties it became clear that a number of independent or partially independent centers of political authority were emerging in the communist orbit. This development, which is known as "polycentrism," was accepted, willy nilly, by the Soviet leaders whose main preoccupation became the endeavor to maintain their position of *primus inter pares*. This aim, in turn, required more tolerance for the theoretical developments in other communist countries, especially among the Yugoslavs whose return to the fold was sought in order to symbolize the healing of the original breach in the communist world. The second cause of Soviet moderation was the post-Stalin development in the Soviet Union itself, marked by emphasis on socialist legality, by measures introducing a relative liberalization of the practices of the procuracy and the courts, and by a tendency to pay more attention to the rights of citizens. This evolution, which had made itself felt already at the Twentieth Congress, did not fail to have its effect also in the realm of the theory of the state and law. Soon after the Congress came the rehabilitation, if not of the teachings then at least of the names, of the victims of Stalinism who were recognized as outstanding representatives of the Soviet legal science. At the Twenty-First CPSU Congress, Krushchev, having announced that the Soviet people had finally accomplished the building up of a socialist society, discussed the withering away of the state, declaring it to be a question of the development of the socialist state into social self-administration. Surprisingly enough, emulating the example of Yugoslav "revisionists," he emphasized the transfer of certain state functions to the so-called social organizations, referring to it as the first step

4. The Program was adopted at the Seventh Congress of the League of Yugoslav Communists.

in the withering away of the state process. The main principles of this fourth phase of the Soviet theoretical approach to the state found their expression in the new party program adopted at the Twenty-Second CPSU Congress. The program, however, created more problems than it solved. While it strengthened the concept of social self-administration by declaring the Soviet Union to be no longer a dictatorship of the proletariat but a state of the entire people, it also stressed that the role of the party must be increased, and pointed out that it will survive together with the Soviet state until the full victory of communism. These cryptic pronouncements could not give much guidance to Soviet legal theorists whose comments on the program have been timid and rather contradictory.

Mr. Lapenna's views are no less pessimistic with regard to the communist concept of law which, he convincingly proves, has changed little since the days of Stalin. Despite semantic variations its definition is fundamentally the same as that of Andrei Vishinsky. No doubt, following the Yugoslav example, the 1961 program envisages the transfer of certain judicial functions to citizens' organizations, particularly the comrades courts and the citizens' voluntary police. Far from increasing legal security, these institutions provide a convenient means for the reintroduction of the old methods of lawlessness and arbitrariness, abandoned by the courts, through the back door. Even more significant is the admission of the party program that law would continue to exist even in the period of full communism. This clearly flows from the definition of communism as "a classless social system with one form of all-people's (public) ownership of means of production." Ownership, however, is a typical legal category recognized as such by all legal systems. Thus the once proscribed theory on the possibility of law without the existence of state has been revived.

During its conflict with the Soviet Union, Yugoslavia developed a special theory of "socialist legality" to be applied in the period of transition from capitalism to communism. Its main feature was the ever-growing importance of law to which even organs of state power were to be subordinated. While it was a definite improvement over the Soviet brand of socialist legality, the Yugoslav doctrine remained incompatible with the Marxian concept of the withering away of law. Attempts to remove this ideological inconsistency by emphasizing the replacement of legal coercion by voluntary observance of law, which would create a new "social legal system" to be based entirely on appeal to social discipline, are as imaginary as the Marxian utopia itself.

Mr. Lapenna's book demonstrates the inability of communist societies to achieve any tangible progress toward the withering away of state

and law. The transfer of state functions to citizens' organizations or to organs of "social administration" has nothing in common with this time-honored Marxian tenet. As the author points out, many of the functions to be returned to the citizens are those which in other societies "have never belonged to the state or come directly under its control."[5] One should add that the transfer of state functions to workers' self-government, citizens' organizations, and other ostensibly unofficial bodies has almost no meaning in societies in which practically everything belongs to or is regulated by the state. What in reality is happening is the shifting of functions between three types of organs—state, party, and social organizations—all of which must be considered organs of public order.

The value of Mr. Lapenna's book exceeds the rather narrow limits of a discussion of the development of the state and legal sciences in communist societies. Its importance, above all, is political. As the author states in his concluding chapter, the thesis of the withering away of the state and its law "was one of the most attractive points of the whole of Marxism,"[6] more readily understood than the complexities of the economic teaching of Marx and Engels. This utopian teaching, which promised to create a paradise on earth, gave the political movements which adopted it their peculiar energy, strength, and revolutionary enthusiasm. This almost religious faith was the mainspring of the early successes of communism. The dismissal of the withering away of the state and its law as a far distant and unrealizable dream is perhaps the most reliable measure of communist failure.

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Law and Tactics in Federal Criminal Cases is a symposium of articles prepared by members of the E. Barrett Prettyman Fellowship Program in Trial Advocacy at Georgetown University in Washington, D. C. The editor frankly admits the defense orientation of the authors. However, such a bias may commend the book to its audience, which will be comprised of far more defenders than prosecutors; and those prosecutors

5. LAPENNA at 98.
6. *Id.* at 118.
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