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Book Reviews

O. H. Thormodsgard

Henry J. Tomasek

William S. Murray

BOOK REVIEWS

LIBERTY AGAINST GOVERNMENT. By Edward S. Corwin. Louisiana State University Press, Baton Rouge. 1948. Pp. ix, 210. $3.00.†

Edward Samuel Corwin, McCormick Professor of Jurisprudence at Princeton University, has contributed numerous articles to law reviews and journals on economics, government, philosophy, constitutional history and constitutional law. His leading books are *The Twilight of the Supreme Court* (1937); *The Constitution What It Means Today* (10 Ed. 1948); *Court Over Constitution* (1938); *Constitutional Revolution, Ltd.* (1941); and his recent book *Liberty Against Government* (1948). Since each book deals with some phase of constitutional history and law, there is a great deal of unity and coherence between them, and a reasonable amount of repetition on certain ideas may be noted. However, each book has its own merits. These excellent books give proof of the many sidedness of the problems of constitutional liberty.

The original concepts of liberty, as defined by the author, is the natural rights of an individual against government in contrast with the modern concept of liberty or freedom as meaning the protection of the rights of an individual against economic and other external social control by conflicting groups. The entire first chapter makes a comparison between the concept of constitutional liberty which is a juridical concept and the more broad concept of civil liberty or freedom, which were originally political concepts.

In chapter two the author traces the concept of constitutional liberty from Roman and English sources. He attempts to prove that the liberties as guaranteed by the United States Constitution are based on the premise that the natural law is "superior to the will of any human governor or law maker," and that this concept of law was the view of Demosthenes, Sophocles, Cicero, and other eminent philosophers and statesmen. The concepts of "the law of nature," "right reason," and "equality of all men" permeated their writings, which in time influenced the juridical and political ideas of Anglo-American jurisprudence. John of Salisbury, writer of *Statesman's Book*,

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was one of the first Englishmen who presented the concept of natural law as a "force of law among all nations and which absolutely cannot be broken." This view is the basis for the theory that governmental authority should be inherently limited and not unlimited. Theoretically at least, and with considerable historical proof, the author presented the view that medieval England made contribution to the American theory of liberty against government. Even though the historians may inform us of the myth of Magna Charta, Mr. Corwin is of the opinion that the immemorial rights and privileges which the American people asserted at the Revolution were at least the work of Sir Edward Coke and that he, in a lawyer-like method, had interpreted the Magna Charta in such a way that the Magna Charta has been regarded by us as the charter of our civil liberties. It should be noted that the Magna Charta was a declaration of existing rights and did not expressly grant new rights to the feudal barons. After the War of Roses, the prestige of the Bench and Bar increased, and the basic principles of the Magna Charta were incorporated in the common law of England. Effective restraint on the power of the crown was, in a large measure, due to professional craftsmanship on the part of the lawyers and judges. Sir Edward Coke's contribution to the subject matter of liberty against government was that the royal authority was a common law concept and hence subject to the common law and that even an act of Parliament should be in harmony with common law principles of right and reason. Coke's views were not only expressed in his *Institutes*, but also in legal opinions of other judges, in digests, and in the abridgments of that period.

According to the author, John Locke, in his *Treatise on Civil Government* expressed views which were favorable or similar to that of Cicero and Edward Coke in that he emphasized that the legislative power is not the ultimate power of a state. Because of political and social conditions, the concepts of supremacy of Parliament became an accepted fact under the Stuart Kings. Both Hobbes and Blackstone approved the theory of parliamentary supremacy. The philosophical concepts of Cicero, Coke, and Locke were the basis of the American constitutional principles which recognized certain natural rights, that is, individual liberties, which were above and beyond governmental powers.

The philosophical and historical interpretations as pre-

sented in the first two chapters in Corwin's books have special value to law students who are enrolled in a course in Constitutional Law. Corwin has given proof that the American Constitution has its roots in the past, which background the students should know.

The material in Chapter III, "Liberty Into Property, Before the Civil War" sketches a brief history of the development of the now moot question of the validity of judicial review. Specifically the chapter traces the concept of liberty in the leading decisions of state courts and federal courts to mean the protection and preservation of the property rights of the individual. Corwin labelled them vested rights. In a short period of time, the judicial attitude towards the "doctrine of vested rights" was extended to the "obligation of contract" clause in the Constitution. All legislation whether by the states or by the federal government would have to meet the test of reasonableness, that is, the law as enacted must not unduly or unreasonably restrict a person in the acquisition of property, or the use of his rights in property, or the free exercise of his freedom of contract. These rights were interpreted by the judges to be the natural rights of man. The terms "law of the land" or "due process of law" as found in the constitutions of several states and in the federal Constitution gave opportunity to the courts to translate the historical-philosophical concepts of liberty into a judicial concept. The validity of legislation became a duty on the courts to determine. Judicial review of legislation became an accepted fact. Legislation as it affected the individual or his vested rights was to be determined by the courts. Corwin's analysis of the contest between those who preferred legislative supremacy in the legislative field and those who favored judicial review over legislation and historically won the contest makes interesting reading.

Corwin in the Fourth Chapter, bearing the title "Liberty Under the Fourteenth Amendment," by means of selected cases interprets the constitutional trends since the Civil War. For a period after the adoption of the Fourteenth Amendment, the Amendment was given a restrictive interpretation. During this same period liberty was defined by constitutional writers and also interpreted by the courts to mean definite restraints and limitations upon the exercise of governmental powers. The principles of laissez-faire in economics were translated into the juridical concepts of liberty. "Life, liberty and prop-

erty" were protected under the "due process" and the "equal protection" clauses. By virtue of these clauses, legislative acts dealing with substantive and procedural rights were subject to be reviewed by the United States Supreme Court. The burden was placed on the states to prove validity of their acts. There were a series of cases in which the Supreme Court adopted as a theory that the police power of a state is by analogy similar to the police power of the British Parliament, and therefore, all legislative acts are presumed to be constitutional. In other cases the Court made use of another principle of construction, namely, that a statute would be declared unconstitutional if the court did not have sufficient facts to justify it, based upon the principles of judicial notice. The court made use of either the doctrine of presumed validity or the complimentary doctrine of judicial notice depending upon the nature of the case and the results which they wished to secure.

During and after World War I, the juridical concept of liberty was extended. Freedom of speech and of the press, which are protected by the first amendment from abridgment by Congress are liberties which are protected by the due process clause of the Fourteenth Amendment from impairment by the states. During and immediately after the depression years, the court extended the juridical concept of liberty by sustaining the minimum wage acts and by recognizing the rights of employees to organize and bargain collectively with their employers. Picketing was given the label of freedom of speech. Under the concept of liberty, religious groups were permitted greater freedom in carrying out their objectives by restricting the police power of the states. Corwin's view is that in recent years, the concept of civil liberty as he defined it, has replaced the concept of constitutional liberty. Constitutional principles as developed by the Supreme Court fully justify the view as presented by the author that the Supreme Court's role has been that of a doctrine maker. Its chief task as to the future will be to translate the constitutional liberties and civil liberties, which were developed when governmental restraints were limited, to meet our present problems in a society where the function of government has been modified and enlarged. This book has merits for laymen and lawyers. It is an excellent text book for students in Constitutional Law.

O. H. THORMODSGARD
Dean, University of North Dakota School of Law.

POLITICS AMONG NATIONS, by Hans Morgenthau. Alfred A. Knopf, New York, 1948. Pp. xvi, 1489, Index xx. $5.50.

According to Professor Morgenthau of the University of Chicago, the people of the United States can no longer treat the study of international politics in a disinterested manner. In our past, domestic problems were our main concern. The problems of the world could be settled not only without the participation of the United States, but they could be settled without influencing the domestic problems of this country. Since the end of World War II, the United States has become the most powerful country in the world. In the face of the two bloc system into which the world is now divided, what the United States does is of vital concern not only to this country domestically, but also to the rest of the world.

Because of our world position, the author has undertaken to write a book with a dual purpose: first, to enable the reader "to understand the forces which determine political relations among nations"; and second, to enable the reader to understand the problems which confront the peacemakers. Professor Morgenthau believes that international politics is a struggle for power; and in the past few decades, has also become a struggle for peace. He has therefore divided his book into the struggle for power and the struggle for peace.

In the first division the author discusses imperialism and national power. He then gives an account of the various methods which were used in the past to impose limitations on this struggle for power. These limitations include the balance of power, international morality, world public opinion and international law.

After a discussion of world politics in the Mid-Twentieth Century, Mr. Morgenthau begins his account of the struggle for peace. By clever and seemingly logical conclusions, illustrated by numerous well chosen examples, the author systematically discards the practicability of disarmament, collective security, international police forces, judicial settlement, peaceful change and international government (Holy Alliance, League of Nations and the United Nations). The author clearly, step by step, shows the practical difficulties encountered by those who attempted to use the above methods to maintain the peace of the world. He attributes the failure of these methods to the character of international politics itself—

i.e., international politics as a struggle for power, a struggle made more bitter by the nationalism of our day.

According to Mr. Morgenthau, peace can be achieved only after the political aspects of our problems are settled. This can be done, according to the author, by reviving diplomacy. Diplomacy can be revived if the parliamentary procedures now followed are abandoned. Once we are rid of the "vices" of public negotiation and majority vote, then international conflicts can be mitigated to such an extent as will enable the specialized agencies of the United Nations to develop a sense of loyalty among the peoples of the world. This international loyalty is then expected to replace the nationalistic feelings which now prevent the peaceful settlement of our international disputes. Upon this foundation of loyalty, we can hope to build a world state.

Of particular interest to the legal profession is the author's analysis of the role of international law and international courts. He shows the mechanical shortcomings of all attempts to preserve peace through the judicial process and later shows the political factors which led to these shortcomings. In this light he maintains that the analogy between the role played by domestic law and courts in maintaining order and the role which could be played by international law and courts is very deceptive.

We need not agree with all or any of Professor Morgenthau's conclusions, but we owe it to ourselves to read this stimulating, thought-provoking book.

HENRY J. TOMASEK
Political Science Department
University of North Dakota

THE LAW OF THE SOVIET STATE, by Andrei Vyshinsky. Translated by Hugh W. Babb. Macmillan Co., New York, Publishers. Pp. 749. $15.00.

This is the standard work of Soviet Law. Its author certainly needs no introduction. As of the date the review was begun, late in January 1949, it was reported that Andrei Vyshinsky was suffering from a "serious nervous disorder" and was "irrational." At that time, he was ostensibly con-

valescing at a Czechoslovakian health resort.[1] To anyone familiar with the rise and fall of public figures in the Soviet Union, it could easily have been surmised that Vyshinsky had been purged or was due for purging, as a plea of bad health is often used in such cases. But, in March, Vyshinsky was elevated to the position of Foreign Minister of the U. S. S. R., thereby proving not only that he is on the way up, not down, but also lending more significance and authenticity to the book under consideration.

The Law of The Soviet State was written in 1936, a year of great significance in the U. S. S. R. The Bukharinist purge trials had just been completed. The last of the "old Bolshevik" opposition to Stalin had just been liquidated, and as the chief purge trial prosecutor Vyshinsky's star was on the rise. It was the first step in a career which was to lead him to his post as Chief Delegate to the United Nations, and ultimately to the position he recently assumed.

The American edition of this book is part of the work of the Russian Translation Project of The American Council of Learned Societies, and has only recently been translated and published in the English version. In the words of the introduction:[2]

"Every Soviet student of government and law reads Vyshinsky's book. Administrators and jurists use it for reference. It is, in a sense, the militant handbook of those engaged in government. It provides a guide through the intricacies of the central and local levels of administration, an explanation of the Constitution, and a documented analysis of the laws relating to the courts, elections and rights and duties of citizens. It is designed also as a means of instilling in the public official a firm conviction that he is a part of a system of government which has no equal in the world outside."

Vyshinsky's intellect and breadth of learning shines through, despite what the American reader will find to be a shocking exposition of the theory of law and justice. It may seem almost tragic that a man of Vyshinsky's mental caliber should see the law, and the world, only through the distorted lens of Marxian dialectic.

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[1] It has been suggested that Vyshinsky was actually:
(a) In Czechoslovakia to arrange for the purging of the Czech Communist Boss, Klement Gottwald, for "Tito-ist" tendencies;
(b) Actually in Hungary masterminding the Cardinal Mindzenty trial. Communist trials are carefully stage-managed productions, with scripts as carefully prepared as in any theatrical performance.

[2] By John W. Hazard, Professor of Public Law at Columbia University.

He is, for instance, capable of quoting at great length from the constitutions of the world's major and minor powers; his knowledge of the American form of government is detailed and, with certain exceptions, remarkably factual. No authority in the realm of government, law or legal philosophy has escaped his attention. He has the remarkable faculty of quoting out of context in such a way as to condemn our form of government, even when the authority quoted is as staunch a defender of American democracy as, for example, Woodrow Wilson.

Here is a sample from Vyshinsky's comments on the United States:

"Furthermore, it must be added that committees enjoy a broad right of inviting to their councils 'experts' — representatives of the world of finance and industry. Through the committees the influence of trusts on Congress develops most directly—unique 'parliaments' behind the scenes made up of representatives, ministers, and 'experts' (financiers and so on) working at a distance from publicity and in fact playing a decisive part in the enactment of this law or that. Committees are also canals through which the financial resources of the treasury often flow into the pockets of the big monopolist enterprises."

Here is Vyshinsky's view on the birth of the American Constitution:

"The first act of the United States was the Declaration of Independence, adopted by the Congress on July 4, 1776. This differed from the declaration of the separate states in that it speaks of unalienable rights of citizens only in a general way and without precise definition or enumeration, saying: 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.' However, the Declaration of Independence, like other similar declarations, remained mere promises which the bourgeoisie, having assumed authority, neither fulfilled nor even set about fulfilling. Popular agitations began. In Massachusetts a former captain of the Revolutionary Army, Shays, raised a revolt, 'the delegates (of the Congress) seeming to fear a triumphant American army almost as much as they did the soldiers of George III.' Events compelled the bourgeoisie, interested in creating a powerful administration, to set about the creation of a federal constitution."

"The convention which assembled to work out the Constitution consisted of the biggest financiers and merchants, and owners of land and slaves; of course, the Constitution worked out by such people meticulously guaranteed the interests of capital. The Constitution does not include a single one of the fundamental civil rights depicted in such detail in

the constitutions of numerous states. It is not surprising that there was a wave of indignations against ratifying the Constitution drafted by the convention, chiefly on the part of small farmers, city laboring people, and the population burdened with debts. Notwithstanding the powerful opposition of the masses, the Constitution was adopted by legislative assemblies of the states with an over-whelming majority of representatives from the 'have' classes. In all, 160,000 citizens expressed themselves for affirmation of the Constitution, less than 5 per cent of the population of the thirteen states. A great wave of dissatisfaction compelled the state legislators to adopt a series of amendments, chiefly proposals as to fundamental civil rights. Within two months after the storming of the Bastille in Paris, and one month after the National Assembly in France had adopted the Declaration of Rights of Man and Citizen, the Congress of the United States assembled for final formulation of the Constitution. The influence of these events on the decision of Congress is indubitable. The first session adopted the Bill of Rights in the form of ten amendments to the Constitution. The first five confirmed freedom of conscience, freedom of speech, freedom of the press and freedom of assembly; the right to bear arms; a prohibition against billeting soldiers in private houses without consent of the owner; the inviolability of the person, dwelling, and papers of citizens; and responsibility of citizens to the court, and the right to life, liberty, and property. The remaining five speak of measures of criminal punishment, legal procedure, and so on."

It is extremely difficult to realize that this book is ostensibly a law book, because every piece of information about Soviet law is so intertwined and intermingled with propaganda and Marxist doctrine, that the average reader would consider it to be more on the order of a propaganda tract. There is one thing for sure. No one who reads this book will ever again suppose there can be any "middle ground" or compromise between the Soviet Union and the West. Vyshinsky emphasizes repeatedly that Communism [3] can only triumph with finality if the necessary revolution completely smashes, demolishes and destroys the fabric of the Capitalist [4] state. Here is a sample:

"Guided by Lenin and Stalin, the Soviet state always started from the position that the perishing classes would resist with

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[3] It is illuminating to note that the word Communism is not, to the reviewer's observation, used at any place in the book. "Democracy," "Socialism," "Dictatorship of the Proletariat" and similar terms are to be the more official ways in which the Soviet bureaucracy refers to itself.

[4] Capitalist, is a word infrequently used by Vyshinsky; perhaps significantly the essentially archaic and fraudulent word Bourgeoisie is preferred by him in denouncing what we call Capitalist nations.

all their powers until the last moment, and that their pitiless (sic) repression would therefore always constitute an imprescriptible and necessary task of the proletarian dictatorship. Accordingly, ... the pitiless repression of exploiters was openly proclaimed as one of the basic tasks of Soviet authority. In conformity with this principle of the proletarian dictatorship, Soviet authority takes substantial and definitive measures to crush the resistance of exploiter classes and their elements. It expelled them from all organs of state authority and cut off from them any access thereto. ... This is one of the basic tasks of the proletarian dictatorship, wielding the drawn sword of retribution created by the revolution — the Cheka, the Ogpu, and the NKVD.[5] The exploiter elements and their assistants were deprived of political rights — particularly the rights of suffrage."

To lawyers, there is much of interest in Vyshinsky's outline of the Russian court system.[6] (It is significant that so small a portion of this supposedly legal work is devoted to this subject, in view of the huge sections devoted to pure propaganda and fanaticism.) The court of original jurisdiction in the Soviet Union is the so-called People's Court. Vyshinsky says:

"Through it passes the basic bulk of criminal and civil matters."

It is composed of three members. The presiding judge is called the President, who is presumably educated in the law; the other two members are so-called people's assessors. These assessors are apparently a cross between a juryman and a layjudge. An observer, who claimed to have seen one of these

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[5] Now called MVD. This change of name has no significance.

[6] In this connection, a basic fact should be suggested, insofar as any trial having political connontations occuring in any Soviet or Soviet-dominated country is concerned: Such a court is an organ of vengeance to be used against enemies of the State, and no Soviet jurist would deny this fact. Any concept of "controversy" or "adversary" is ludicrous; there is no competition to see which party is right, the prosecution or the defense. Even the defense attorneys chime in to excoriate their own clients. A quite conservative and factual sounding account by an eyewitness to the notorious Mindszenty trial in Hungary makes this comment about the president of the court, one of the many Nazi leaders in Europe during the war who found the switch to Communism convenient and not especially abrupt:

"Olthi was the judge. Olthi also acted as prosecutor and jury. Like a machine gun, Olthi rattled questions at the defendants. Olthi completely drowned out the man called the prosecutor, whose main function seemed to be making the opening and closing remarks against the defendants. ... the defense tried to call one (witness), but Olthi rejected the request. ... (he) hardly looked up from the papers on his desk. Everything seemed to go according to schedule." (Babriel Pressman, CBS from Vienna, 11 February, 1949).

Needless to say, defendants at such trials are well rehearsed and do not depart far from the prescribed script; for grim reasons which are too obvious to mention here.

courts in operation in the city of Moscow about 1944, told this reviewer that on the minor and trivial matters which he saw presented to the court, a sort of crude justice was actually dealt out to the litigants. He said that concepts such as precedent or case law, were entirely absent from the proceedings.[7]

In theory, an aggrieved party can appeal from the People's Court to the Appellate Court. In connection with the Appellate Court, Vyshinsky says:

"The higher court in the U. S. S. R. cannot be limited, as are courts of last resort in bourgeois states, to a mere formal verification of the sentence or decision of the first court. Article 15 of the 1938 statute requires the higher court to verify both the legality and the basis of the sentence and decision appealed from — the fundamental soundness thereof in substance as well as in form."

These appellate courts exist in each region, territory or area. Each of the autonomous (sic) republics of the Soviet Union has its own appellate court which is called the Autonomous Republic Supreme Court. Above the appellate courts is the court of last resort. This court is called the Supreme Court of the U. S. S. R. Apparently this latter body has the additional function of generally supervising the administration of justice through the Soviet Union.

As do Western nations, the U. S. S. R. has a separate system of military justice. In addition, to the functions which our military courts perform, there are assigned the following ominous (to Western eyes) additional areas of jurisdiction:

"The jurisdiction of military tribunals includes authority over military *and counterrevolutionary crimes* and over crimes against administrative order or particular danger for the U. S. S. R., if perpetrated by persons in military service or obligated thereto or held up to the same responsibility, *as well as over crimes of treason, espionage, terror, arson, and other diversionist acts, irrespective of the prepetrator.*" [8]

There are also special courts, ostensibly to deal with transportation matters, both rail and water. Those who are interested in the role of labor in the Soviet Union might well ponder the following quotation in connection with these so-called transportation courts:

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[7] Interesting observations on Soviet court procedure will be found, in somewhat abbreviated form in Burdick's "Bench and Bar of Other Lands" pp. 425 et seq. (1939).

[8] Italics added.

"(They have jurisdiction over crimes directed at *undermining labor discipline in transportation and other crimes subversive of normal work therein.*"

There is much more of interest in this book. For instance, Vyshinsky has complete and utter contempt for all parliamentary bodies in the Western nations. To him all members of Congress and the State Legislatures in the United States are tools and stooges of bourgeois interests. Because the state of North Dakota has pioneered in establishing initiative and referendum, it is significant to note that Vyshinsky thinks the Soviet Union is the only nation in the world which has an effective law providing for initiative and referendum. He states flatly that although certain American states have laws providing for initiative and referendum, these statutes are meaningless as they are practically never used, and when they are only used to serve the interest of monopoly capitalism.

Vyshinsky boasts particularly about the elective system of the Soviet Union. It is probably needless to discuss the facts of the case here, because a far more factual account of how elections really work in the U. S. S. R. can be found by reading Victor Kravchenko's book "I Chose Freedom." Some of Vyshinsky's comments on American elections, however, are of interest because of the exaggerations contained therein. For instance, he says:

"The election of but one President of the U. S. A. cost the country thirty million dollars."

He also says:

"The election of three senators in Pennsylvania and Illinois cost two million five hundred thousand dollars — all spent on bribing voters."

The reading of this book is apt to confuse almost anyone. It is part of the tradition of Marxism to write in an obscure and muddy fashion, and Vyshinsky, despite the vast breadth of his learning, is in this, as in other things, a true disciple of Marx. The book is still well worth reading, especially in view of Vyshinsky's new position as Foreign Minister of the biggest empire in recorded history. No one who reads his book will doubt that he is a remorseless enemy of the principles of government which Americans have been taught to revere and respect. To him there are only two ways: The Soviet way and the enemy way. Vyshinsky lacks the hypocrisy characteristic of Communists and fellow travelers in the United States and elsewhere. He does not hesitate to use the word "dictatorship"

in describing the Soviet government — in fact he uses it repeatedly — the customary phrase is "dictatorship of the proletariat." He does not hesitate to promise bloody vengence and extermination for the enemies of the Soviet regime.

The publication of this book in America will do nothing to quiet the fears of those who are afraid of Soviet Russia. It is, however, of extreme value in enabling us to understand the apparent vagaries of Soviet foreign policy.

WILLIAM S. MURRAY*
Bismarck, N. D.

* William S. Murray is a member of the Bismarck, North Dakota Bar, a member of the State House of Representatives and former Secretary of the North Dakota Bar Association. In World War II he served with the Counter Intelligence Corps and Office of Strategic Services; and for a brief period in 1947 worked for the post-war Central Intelligence Group.