SOVIET LEGAL THEORY.*

By G. W. PATON.

Dicey has made familiar the phrase "the rule of law" and many writers urge that a rule is law only if it exists to protect certain ideal ends. The theory of natural law here made an outstanding contribution. To take a modern example, Bodenheimer[1] defines law as a mean between anarchy and despotism and describes its function as being the creation of restraints upon the arbitrary and unlimited exercise of power. Public administration not limited by law is pure power rule.[2] "A purely administrative state is synonymous with an autocratic state, as the experiences of modern totalitarian states have amply demonstrated. An absolute identification of law and administration tends to obliterate the difference between power and law and thus to render the notion of law void and meaningless."[3] The logical result of this argument is sometimes said to be that real law exists only if fundamental liberties are protected by a constitutional guarantee which renders void any legislative attempt to annul them. U.S.A. could thus claim that the country was subject to law: whereas in England, since Parliament is omnicompetent, law would not in this sense exist, for a cabinet with the necessary majority could destroy overnight the liberties gained through so many centuries of struggle. In a dictatorship very little of law (in this sense) would exist.

This theory is attractive, for it satisfies a deep-set instinct of man to identify law and justice. As Duguit scornfully asks, if law is simply majority rule, is it worth the effort of study? But the fundamental defect of this approach is that it slides so easily into the proposition that law is that which protects what I like. This, ultimately, is an anarchical view, for in the realm of ethics and morals, each conscience must be a law unto itself. It is rather difficult to believe that there was no law in Nazi Germany—there was a very effective legal system and the complaint of the democrat was merely that it was used for ends of which he did not approve. The view of Kelsen is that law is merely a social technique which may be used for differing ends. Whatever the views of those who control the machine, law exists so far as it is in effective operation.

The purpose of this paper is not to discuss these rival theories in detail, but to indicate the contribution of Soviet jurists to this problem. On what theory is based the rule of law in Russia or is there no rule of law? The writer has no direct experience of Russian affairs, and unfortunately the available sources—at least for one who does not read Russian—are not very extensive. Judah Zelitch wrote on the criminal law in 1931[4] and in 1945 Schlesinger produced a work on legal theory.[5] There are also various articles in periodicals[6] and a short survey by Mr. Pritt, K.C.[7] There are, of

* This article, although too long for a book review, is suggested by, and largely based upon, Rudolf Schlesinger's *Soviet Legal Theory*, (1945).

1. *Jurisprudence* 14.
2. op. cit. 91
3. *ibid.* Cf. Professor Campbell's article in 62 L.Q.R. (1946) 141, on *Fascism and Legality*. When a question arose as to the powers of a police court "the true National-Socialist way of treating the case would be to say that under the new regime all Germans were a great band of brothers, a concrete *Volksgemeinschaft*, that the police were their natural leaders and that therefore anything the police did was right and could not be criticised by the Courts" (at 147)
4. *Soviet Administration of Criminal Law.*
5. *Soviet Legal Theory* by Rudolf Schlesinger.
6. S. Dobrin 52 L.Q.R. (1936) 402: J. N. Hazard, 32 Amer. Jo. of Int. Law (1938) 244 and 29 Jo. of Criminal Law and Criminology, 157. For the attitude of the Societ to international organisa-

course, scores of books on Russian problems, but few of the writers touch, or are competent to touch, on the legal issues involved. Schlesinger's bibliography, if we omit works in Russian, contains a very small number of works dealing with the legal issues.

It is proposed to discuss first the Soviet general theory and then its effects on such problems as the separation of powers: membership of the legal profession: staffing of the courts: procedure and evidence: criminal law, and finally codification. Historically the problem falls into three periods, firstly that of War Communism (1917-21): secondly the New Economic Policy which came into operation in 1921 and lastly the recent period from 1936 onwards.

The Soviet General Theory.

The classical Marxist theory distinguishes sharply between society and the state. The state was an institution for the exercise of compulsion in the interest of the dominant class. Society could be described in terms of its economic basis, for the means by which men attain their livelihood determine the actual law in force. Man's attitude to any social problem can be explained only in terms of the class to which he belongs, and conflict between classes is inevitable. The real factor in social causation is, therefore, the view of the dominant class, for even if men consider that ideal justice is being followed, frequently the theory of justice is but a reflex of the actual economic interests of those who create the law. It is an exaggeration to say that the Marxist regarded economic forces as the sole determinant of law. Most systems show examples of a sacrifice of the powers of the ruling class in the interests of a weaker section, e.g. legislation protecting industrial workers. It is elementary that the emergence of the lawyers as a learned class introduces a new element—the desire to make law consistent and to develop the logical structure of the system. Engels admits these factors but he emphasises that frequently the lawyer's view that he is operating with *a priori* principles is an illusion. Such an approach rejects any theory of natural law, for legal rules do not depend on any principle of ultimate validity. Law is a social technique ruthlessly used by those in power. The test of law is effective operation—not its consonance with ideal justice. Hence to be successful, a revolution must destroy the machinery of the existing state and replace it with new institutions in order to meet the threat of any alliance between capitalist reaction and the army. The Soviet succeeded precisely because it did set up a new machinery whereas the socialists in Austria and Germany failed because they were not sufficiently ruthless.

But the early Soviet view was that, once the new Communism was successful, then the whole basis of the state would disappear. If law and the state are but incidents of the class struggle, it may be necessary to use these weapons in the fight of the new order for survival. Once, however, communism introduces a " class-less " society, then law, together

tions, see Charles Prince, 36 Amer. Jo. of International Law, (1942) 425, and vol, 39 (1945) 450: see also an article on Soviet Jurisprudence by the same author in Amer. Bar Assoc. Jo., November, 1945. The most recent article is that of J. N. Hazard in (1946) Wisconsin L.R. 90, entitled, *The Lawyer under Socialism.*

7. *Twelve Studies in Soviet Russia*, 145.

with the state, will wither away. This was the view of Engels—" the government of persons is replaced by the administration of things and the direction of the processes of production. The State is not abolished ; it withers away."[8] This view was adopted by Hoichbarg in 1919 who described law as a " bourgeois fetish," as a " dope " which like religion would disappear in the new world order and there were traces of the same doctrine in the writings of Lenin.[9]

By a curious paradox, the Russian view was affected by the writings of the stubborn German individualist school who for entirely different reasons tried to show that law and exaggerated collectivism were irreconcilable. The Germans used this as an argument against collectivism.[10] The Russians accepted the theory, but used it as an argument against law. If we thumb the pages of German jurisprudence from Ihering to Jellinek we find many traces of the view that law is essentially concerned with the protection of individual rights. Law (it is said) pre-supposes the existence of bearers of rights : it comes into existence only when two individuals enter into a right-duty relationship. Hundreds of acts are outside the law : I may sleep or work without affecting the rights of another. In the same way many of the acts of the state are outside the law : a decision to build a new railway is a pure act of administration which can come into the sphere of law only when the rights of subjects are affected. The essence of law is the relation of co-ordination between individual bearers of rights. Law depends on conflicts between equals —it depends on equality rather than subjection. Hence many statutes do not create law in this individualist sense for two reasons : some statutes consist of mere administrative directions which are no more law than the directions of the manager of a factory to his staff : secondly and more fundamentally, since law is the relationship between equals, the state is bound by law on any matter only in so far as it sheds its sovereignty and agrees to be treated, at least in that matter, as a private individual. Such is a summary of the individualist theory. It has obvious limitations for which we need not search far. If law is only co-ordination between equals, much of administrative law is not properly so called. Such a narrow limitation of the term law is most inconvienient. One of the most important parts of a legal order is that which relates to the distribution of legal power—surely these rules are part of the law.

Pashukanis represented a typical Russian approach of the nineteen-twenties—Marxism with a dash of German individualism.[11] The difference is that the German writers regarded the protection of the private individual as the ultimate, eternal and only aim of law—whereas Pashukanis regarded their theories as merely a reflection of the economic conditions of their age. He considers that private law is based on the commodity exchange of capitalism, the basis of which is essentially the mutual recognition of property rights. In theory, contract and property may seem to protect the liberty of man—in fact they may be the realm of domination rather than freedom. Abstract liberty of contract is of little service to the

8. cited Schlesinger, op. cit., 24.
9. Schlesinger, op. cit , 147.
10. Dobrin, 52 L.Q.R. 402.
11. *The General Theory of Law and of Marxism* (Moscow 1925). Professor E. B. Pashukanis was also editor of *Soviet State Law.*

worker, if unemployment is widespread—liberty to hold property does not protect those who lack the economic means to acquire it. Kelsen would put it that private law may in fact be as much a realm of domination as public law, for the rules of any society relating to contract and property are naturally a reflection of the economic basis existing therein. This emphasis on law as the basis of commodity control was very popular with Russian writers. Civil law attempts to describe the relation of those who act in the market as commodity dealers, and even criminal law exists largely for the protection of property. Moreover in the typical democratic approach, there is a "value" attached to each infraction of the law: the commodity dealer has "valued" larceny at so many years and burglary at a greater price. Hence the apostle of class war regards Western individualism as showing that law and collectivism cannot co-exist together. Once capitalism is finally abolished, the individual subject, the basis of law, will disappear and then the law also will fade away.

Pashukanis also developed the second point of the German theory —that under socialism the whole national economy becomes the private business of the state and is, therefore, beyond the law. To put it crudely, society would be run as a state enterprise and administrative rule would take the place of conflicts between equals. He denied the reality of public law.

This theory dominated Russian thought for some time. Mr. Pritt was told in 1930 that all litigation, civil and criminal, would disappear within six or seven years. Students at this period solemnly discussed whether it was worth continuing their studies. Some Judges closed down their courts in 1930, after hearing that communism had won the day. A few years before, Nemzov had advocated the training of a greater number of skilled administrators, so that the law could disappear and each question be decided according to its merits and the interests of the state.[12] It was suggested that the criminal code should be abolished and another introduced which would allow the Judge to deal with the man rather than his acts.

There was a lack of historical sense in this approach which is curious, for the theory itself claims to be based on a study of historical evolution. Law, as a weapon of society, has served many ends as the decades roll by, and it is absurd to suggest that any economic charge will remove the necessity for legal regulation. Law, as the German individualist knew it, may disappear—but, whatever type of society we create, some form of law will still be needed to compromise the conflicting interests of men. Moreover there was a total lack of appreciation of the fact that the state as well as the citizens would benefit from the acceptance of a fixed system of rules. Some elements of predictability and certainty are essential in order that the private individual and the state corporation may plan their future conduct. The substance of law may change, but the need for regulation still exists. Indeed it was not long before these elementary truths were perceived by Soviet jurists. In 1934, it was officially stated to be a grave perversion of Marx to say that law and planning exclude

12. Schlesinger, op. cit., 202.

each other. Over-zealous judges and administrators were reprimanded: the students were sharply told to go on with their studies: the theory of the disappearance of law and the state was declared a heresy and Pashukanis fell into disgrace.

Although in the early period there was a tendency to treat the classical text of Marx in much the same way as a "fundamentalist" cites the Scriptures, Stalin has shown considerable realism. He pointed out in 1939 that it would be ridiculous to expect Marx to provide ready-made solutions for each and every theoretical problem that may arise.[13]

Contempt for law by the authorities tends ultimately to weaken and not strengthen state control. Moreover, the international situation in 1939 required a strengthening, not a weakening of the state, if the Soviets were to survive. New schools of thought are springing up, but no consistent theory has yet been evolved. From the cataclysm of the war, the Soviet regime has emerged immeasurably strengthened. The early Soviet rejection of international law has inevitably disappeared—at first it was regarded as a mere concept of a capitalist world. Not even a Soviet state can live alone in the field of power politics and even the most cynical view of international affairs requires at least lip-service to the validity of the rules of law. Hence recent Soviet writers, such as Rappaport, are evolving new doctrines which strive to explain why the Soviet must recognise the theoretical validity of international law. Here again there is a return to orthodoxy, at least for the moment.

The Theory of the Separation of Powers.

The general theory of a dictatorship is that law is power, not a means of controlling power: that it is a sword for the executive and not a shield for the private citizen. This view was modified in U.S.S.R. by the doctrine of the ultimate disappearance of law, but this theoretical view was not allowed to obscure the realities of the situation. Any view that the courts should protect the liberty of the subject was treason at the bidding of out-moded liberalism. Hence there was no specific theory of distribution of powers, for any such doctrine might hamper the executive in its battle against the enemies of the state. Indeed, prior to the Constitution of 1936 legislative and administrative powers were rather barely defined, and the organisation of the judiciary was such as to keep it in control. Thus Stuchka defined law as "technical instructions" which did not bind those who issued them.

In 1936, with the final rejection of the theory of the disappearance of law, there was a desire to return to greater legal security and predictability. Thus we find that the position of the Judge is somewhat strengthened. But no theory would be acceptable which, under the guise of a separation of powers, put severe restraint upon executive action.

The Legal Profession.

The early view was that the lawyer belonged to a class which was so permeated with the values of the old regime that he must be regarded with suspicion. Apart from this personal distrust, there was the view

13. Cited Prince, Amer. Bar Assoc. Jo., Nov. 1945.

that the common-sense of the man in the street was superior to the technicalities of codes. The First Decree accordingly laid down that any person might be an attorney and defend. This so annoyed the lawyers that they had the courage to expel from their ranks the lawyers who drew the decree. If this failure to require a legal training seems strange to us to-day, we should remember that it is not historically unique. Pound emphasises that after the American Revolution, the public was naturally very hostile to England and all that was English and the common law could not escape the " odium of its origin."[14] The very idea of a legal profession was disliked—all callings should be on the same footing and it was undemocratic to make the practice of law a " profession " and to set up stringent barriers of entry. Admission to the bar was deliberately made absurdly easy. Mr. Justice Miller is reported to have said that a prime factor in shaping the law in the western states of U.S. was ignorance.[15] Before the Revolution, in Massachusetts from 1692-1776, out of thirty-three judges only three were lawyers and this policy continued after 1776. A blacksmith sat in the highest court of Rhode Island from 1814-18 and a farmer was Chief Justice from 1819-26.[16] In America the theoretic driving force was the eighteenth century view of natural law : in Russia it was the body of the principles accepted as the basis of the Revolution.

To return to Russia, in 1922 a college of advocates was formally set up. A standing was required either of two years' service in the Soviet judiciary with a status not lower than that of " people's inquisitor " or of a pass in a special examination. This is not a college of barristers only but of all practitioners—the profession never was divided in Russia. By permission of the Commissariat of Justice, private practice may be pursued by persons not members of a college, but this is discouraged by discriminatory taxation. The college is controlled by a committee which elects new members. A college has disciplinary powers over its members.[17]

Fees are paid according to a tariff approved by the Commissariat of Justice. In the case of a member of a college, the fee is paid to the college which periodically divides the sums collected among members according to the work each has done. A certain amount of free legal aid must be given by every member ; for example, the college may ask a member to defend without pay or to give gratuitous legal advice. The general rule is that poor persons pay no fee and that in other cases the fee is graded according to means and status.

According to Pritt, 85 per cent. of the advocates in 1931 were not members of the communist party.[18] This does not necessarily indicate hostility to the regime as some lawyers feel that they should not be formally tied, but left free at least in theory.

How far is the lawyer allowed freedom to present unpopular cases ? Here opinion varies much. Pritt states : " So far as can be judged,

14. *Formative Era of American Law*, 7.
15. *ibid.*, 11.
16. *ibid.*, 92. Hazard makes the same point. " Few American attorneys at that time had the benefit of a formal legal education, even at a night school " : (1946) Wisc. L.R. 102.
17. Hazard, (1946) Wisconsin L.R., 103-5.
18. *Twelve Studies in Soviet Russia*, 159.

advocates are enabled to present their client's cases freely and fearlessly: in particular, one of the most eminent advocates, who had appeared for many persons accused of counter-revolutionary activities, stated that he never felt the least embarrassment or difficulty in presenting his case as strongly as he thought fit.[19] Yet in Provincial or Regional Courts, an advocate may be employed only at the discretion of the court: these courts also have the power to exclude a particular advocate or to disallow the final speeches of counsel. Pritt thinks these powers are not often exercised—but nevertheless they exist, and one cannot believe that there is that freedom to defend which is the hall mark of the English tradition. Modern Russian theory, in opposition to the earlier view, recognises that the function of defence is just as important as that of prosecution. Vyshinsky criticises the earlier writers who argued that there was no room for lawyers under the Soviet system.[20] Allen, in dealing with the development of the doctrine of the presumption of innocence in English law, states that " only when society is emancipated from fear . . . dare it give suspected persons the benefit of the doubt."[21] Hazard makes the same point for Soviet Russia—that in times of crisis the privileges of the defence are curtailed, but that when society is more stable, greater emphasis is placed on the provision of adequate defence facilities.[22] Thus, to-day the presence of counsel for the defence is compulsory in cases of serious crime, and in other cases the court has the power to decide whether it is advisable to allow counsel for the defence. On the other hand, in civil cases, a party can obtain counsel only by applying to the college which may refuse to provide assistance, subject to a right of appeal to the court. The governing body can thus discourage frivolous litigation, but this power could easily be abused.

The Courts.

On November 24th, 1917, the entire judicial system of the Russian Empire was swept away. No new courts were set up although the system of justices of the peace was re-organised. A local permanent judge was appointed in each district and two temporary co-judges were added each session from a panel chosen by popular vote. It should be noted, however, that the first judge could be described as permanent only in comparison with the juror-judges—the term was frequently as short as one year and a power of removal existed. It was considered essential to bring the judiciary into close relationship both with the executive and popular thought. The permanent judges were not elected from the ranks of the advocates, but were members of the civil service under the Ministry of Justice—there was, of course, nothing new in this. Special revolutionary tribunals were set up to deal with public enemies: this was probably inevitable as a revolutionary aftermath.

There were many tentative experiments made between 1917 and 1922. In that year extensive reforms were carried out and the first criminal code introduced. In 1930 on the criminal side the following structure existed:

19. *ibid.*
20. Cited Hazard, (1946) Wisc. L.R., 100.
21 Legal Duties, 272.
22. Hazard, op. cit., 100-1.

1. *The People's Court.*

(a) A permanent judge sitting alone (preliminary enquiries).
(b) A permanent judge and two temporary juror-judges.

This is the trial court which has jurisdiction over the majority of criminal causes. Thus in 1924 it dealt with two million cases, whereas the provincial courts dealt with only 131,000. The permanent judges are elected for one year, but may be re-elected. In certain cases they may be removed by the body that elects them. The juror-judges are intended to be an integral part of the court so long as they sit and they decide both matter of fact and of law on equal terms with the permanent judge. No legal training was required of the juror-judges and by this means the administration of justice is brought very closely into relationship with the mind of the average man. Juror-judges sit for about six days a year—this means that there is a continual stream of fresh blood. The permanent judge might be a real lawyer and therefore need curbing.

2. *The Provincial Court.*

This comprises a President, two Deputy-Presidents and a number of permanent judges—all elected by the provincial executive committee for a term of one year. Some qualifications are required as a pre-requisite of election, but not a formal legal training. The President must have acted as a Judge of the People's Court for three years.

This court acts as an appellate court in certain cases and also has original jurisdiction over political crimes, offences against the public administration, certain crimes of officials and serious crimes generally.

3. *The Supreme Court.*

Judges of this court must be qualified by three years' service as a judge of the People's Court.

The qualifications of the judges seem to be rather meagre, but for the last decade there has been no hostility to legal education. In 1931 about half the Judges of the regional courts had been professionally educated. The Ministry of Justice has set up special Institutes of Soviet law, where the courses are long and thorough.

In 1936 the position of the judges was strengthened, it being laid down by Art. 112 of the Constitution that judges were independent and subordinate only to the law. Thus the beginning of a separation of powers is creeping in. In 1938 the power of removal was modified, although not entirely destroyed.

Procedure and Evidence.

From the beginning formal theories of evidence and detailed rules of procedure were swept away—for technical defences were regarded as a mark of decadent democracy. The " sporting theory " of justice was rejected—the judge is not merely the umpire who must see that the rules are observed, for he is bound to discover the truth. The advocate has a subordinate position compared with English practice and there is not the same facility for cross-examination. The court keeps a strong control and counsel is not expected to regard solely the interests of the client.

As is necessary in a court with a relatively untrained judiciary, procedural rules are simple and formality is cut to a minimum.

Criminal Law.

In the early period there was much flexibility. Criminal law being regarded as a necessary weapon to defend society, it was essential to keep it fluid, until new rules suited to the new era could be evolved. *Nulla poena sine lege* was re-written as *nullum crimen sine poena.* No criminal must be allowed to escape because the legislator had not yet had time to produce a section directed at that particular wrong. Analogy (on the strength of Article 10 of the Code of 1922) was freely used to extend existing sections to cover a gap in the law and, even if an offence was clearly covered by a section, analogy might be used to bring into play another section which carried a heavier penalty. In twenty-three months, the courts in the Moscow district applied by analogy fifty-three articles of the Criminal Code to offences which strictly were not covered. In 1928 Krylenko wished to abolish the criminal code and introduce a simple rule which would allow the Judge to deal with the man and not his acts. He regarded it as a relic of capitalism that the code should attempt to assign a definite punishment to each infraction. Pashukanis wished to abolish the notion of fault, for functionally criminal law was a means of social defence and the judge should be bound only by broad principles which explained to him the basic needs of the new age. What was needed was a " minimum of form and a maximum of class substance."

The desire to keep the criminal law entirely fluid did not prevail and, as in other parts of the law, detailed codes have now been drafted. Some of these contain omnibus provisions,[23] but if we rail at them we should remember the elasticity of the common law " offence to the public mischief."

Crime, however, was divided into two classes—political crime and mere crime. In the former case, the court was regarded, as Krylenko put it, as an instrument of vengeance against the enemies of the state—leniency and regard for the rights of the prisoner was dangerous, as that imperilled society itself. The " mere criminal," however, was treated in an enlightened and comparatively lenient manner. Thus the *maximum* penalty for simple stealing is six months' imprisonment, whereas the *minimum* period for stealing a farm horse was two years. (In the latter case, the offence was considered one imperilling public property.) Banditry was made a capital offence because that affected social security. Cornering the market carried a minimum of six months.

Kursky found that of 61,128 judgments, 35% of the sentences imposed imprisonment (four-fifths of these under probation), 8% required the prisoner to do socially necessary work without curtailing his liberty, 4% imposed fines, 10% admonitions or minor punishments and 43% were acquitted.[24] To Pritt the trial of those not charged with political offences seemed fair—the theory of retribution was unpopular and that

23. Article 6 of the Penal Code 1926: " Every act or omission is considered socially dangerous which is directed against the Soviet regime, or which violates the order of things established by the workers' and peasants' authority for the period of transition to a Communist regime."
24. Cited Schlesinger, op. cit., 72.

every effort was made to re-habilitate the prisoner.[25] Imprisonment is served in open air camps, where sometimes family life is allowed. On release the absence of stigma renders it possible to earn an honest livelihood. The real merits of the Soviet approach lie not in new theories of criminal law—for all that can be found in Soviet criminology is but an echo of Western theories—but in the sincere attempt to remove the economic causes of crime and to fit the prisoner into the social order at the smallest cost to society and to himself.

If there is class justice in Russia, it is a justice designed to protect the working class. A member of the communist party will be more severely punished for a crime than one who is not—corruption, for example, is more dangerous in the ranks of the rulers than outside.

Codes.

The preliminary difficulty was that immediately after the Revolution, the old laws were not applicable and new codes could not be produced without much preparatory work. Yet the life of the community must go on. It is an exaggeration to say that there was no formal law from 1917-22, for there were hundreds of decrees. Moreover, the courts were instructed to follow the old laws if they were not opposed to the philosophy of the revolution. The task of the juror judges was to see that the technicalities of the old law did not defeat the new forms of social philosophy.

In the N.E.P. period, some codicification was inevitable. If any private enterprise was to be allowed, some security must be given and the possibility of abuse curbed. In 1922 the Civil Code was introduced and the first Article is significant : " Civil rights are protected by the law, unless they are exercised in a sense contrary to the economic and social purposes for the sake of which they have been established." Private property was recognised, but only in so far as it could be regarded as assisting the productive resources of the country. Article 33 allowed any legal transaction to be nullified on proof of duress—and this term included economic pressure. It has been suggested that the Constitution did not attempt to set up private rights, but rather rights established by the state in favour of private persons. The public interest remained paramount. Much of this code was very traditional. Ownership is defined in an orthodox way, although the number of potential holders of property was restricted. Thus land, forests and railways were declared to be public property. The Labour Code of 1922 has been described as mere reform legislation satisfying trade union demands for good standards of work.[26] Matrimonial codes were enacted in 1918, 1921 and 1926 and Criminal codes in 1922 and 1926. To-day, divorce is procedurally more difficult to obtain in Russia than in America.[27] Many of these codifications were unpopular in some quarters, for under the then prevailing view of the disappearance of law, the rules were regarded as a compromise with " the enemy."

After 1936, many of the earlier codes remained in force, though changes in economic policy deprived many sections of their real base. In that year there was a new constitution and much new codification.

25. Twelve Studies in Soviet Russia, 160 et seq
26. Schlesinger, op. cit., 97.
27. Hazard, (1946) Wisc. L R., 98.

No change was made in the political structure of the dictatorship, but there was an obvious desire to stabilise legal relations and to gain the advantages of increased certainty in, and predictability of, the operation of the rules of law. Schlesinger points out that it is significant that in 1938 a Russian article should appear stressing the incompatibility of the principle of analogy with the new constitution.[28]

Conclusion.

In the end there is a clear recognition of the part that both law and the lawyer must play in social life. Immediately after a Revolution, society is fluid, and new law cannot be created in a day. As the lines of the new order become clearer, so do the rules of law crystallise. " Cadi ' justice, with its worship of discretion, cannot work satisfactorily in a complex community. Efficiency of administration, justice for the individual, the welfare of the state—all demand a relative certainty in the operation of the rules of law. The early Church found it impossible to extend its sphere of operation without developing a very technical body of canon law. Equity, although created only as a gloss upon the common law, found it inconvenient to leave the operation of its rules entirely to the whim of the Chancellor. The merchants in the middle ages, although at first relying on their own custom and special courts, found it essential eventually to encourage the creation of rigid law and its enforcement in the King's Courts. The early Soviet jurists would sneeringly accept these analogies as illustrations of the dependence of capitalism on law. But law existed long before capitalism was created and it will survive future economic charges just as it has outlasted those of the past. The only hypothesis on which we could conceivably imagine the disappearance of law would be the advent of the millenium. If everyone were morally perfect and interested only in serving his neighbour, the crude compulsions of law might be abolished—but then everybody might be so willing to sacrifice himself in the interests of others that law might become necessary to force one to accept the other's sacrifice. Admittedly acquisitiveness is bred in the bone of modern capitalism : but the operation of law is not confined to regulation of the money instinct. Even if we assume that a community is so perfect in structure that no man covets his neighbour's possessions, it is still possible that he may covet his neighbour's wife. A vast field of social regulation is necessary apart from the economic side of life. Moreover, no one can suggest that U.S.S.R. has done more than set up a new economic order, and the complexity of its planning may eventually demand more and not less law than that of capitalism. The form of law differs from one society to another, but law itself remains the essential basis of community life. Indeed the " corporation lawyer " of capitalism appears in Russia in another guise—that of legal adviser to the government corporations.[29]

Hence the U.S.S.R. provides little that is new for the theory of jurisprudence, although it furnishes an interesting field from which data can be drawn. It is hoped that further literature will be available to answer some of the questions with which Schlesinger's able and stimulating work is unable to deal.

28. op. cit., 225-6.
29. Hazard, (1946) Wisconsin L.R., 97.