

Polish Law Throughout the Ages

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BOOK REVIEWS

Polish Law Throughout the Ages. W. J. WAGNER (ED.). Stanford, California: Hoover Institution Press. 1970. Pp. xii, 476. \$14.00.

A.D. 966—a date, it is interesting to reflect, that is separated from the era of Jesus by almost ten centuries—is commonly cited as the year Poland was Christianized. True, some Poles had been baptized earlier, but it was in 966 that the ruler of the country, Mieczyslaw I,

decided to accept the new faith for himself and the whole nation, proclaimed Christianity as the official Polish religion, and invited foreign missionaries to spread the new doctrine. He exemplified his fervor by personally destroying some statues of Slavic gods.¹

Thus it was in 1966 that Poland celebrated the completion of its first millennium of Christianity. As a somewhat belated contribution to that celebration, the papers collected in this volume have been prepared by a group of eminent Polish scholars, most of whom are now living in the United States and western Europe.

The title of the book well expresses the thrust and scope of these essays. For the western reader unacquainted with the Polish language Professor W. J. Wagner and his colleagues have provided what heretofore has been unavailable in English: a single-volume goldmine of information on the past and the present, the realities and the philosophical undercurrents of Polish law.

The essays can be broken down into three groups. Those constituting the first group deal with the history of Polish law from the tenth century to the time of the Second World War. The papers in the second group survey the law of present-day Poland, emphasizing the changes brought about by the Communist regime. Two of the essays, comprising the third and smallest group, are devoted to the contributions of Polish legal scholars and political theorists.

The historical essays are of interest not only to students of Slavic culture; their main importance, it seems to this reviewer, lies in the contribution they make to a synoptic perception of European legal history. Until recently most writings on the history of continental law were limited to a single nation, with predominant emphasis on the development of the legal systems of France and Germany, and to a lesser extent of Italy and Spain.² Only in recent years have continental

¹ P. 1 (Wagner, *Introduction*).

² See R. SCHLESINGER, *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 216 (3d ed. 1970).

scholars begun to look at European legal history as a unified subject.³ Much time may elapse before treatises and textbooks presenting an integrated view of continental (and not merely German or French) legal history become available to English-speaking readers. In the meantime, the historical essays in *Polish Law Throughout the Ages* will do much to round out our knowledge of the subject.

Although the law of Poland evolved within the mainstream of European legal culture, it would be erroneous to assume that Polish lawmakers simply followed the models which they found in the countries to their west and south. The migration of legal ideas, which in the pre-code era as well as during the age of codification characterized the development of continental legal systems, did not proceed along a one-way street. As far as Poland was concerned, its legal development undoubtedly was influenced by Roman law, canon law, Germanic law, the law merchant, and all the other sources which generally inspired the legal systems of the civil law world.⁴ But Polish statesmen and jurists also played the role of originators.

The list of innovative ideas and institutions on which Professor Wagner and his co-authors have pinned a "Made in Poland" label is impressive indeed. For example, Polish scholars of the fifteenth century were far ahead of their western colleagues in enunciating some of the fundamental principles of "modern" international law, such as the postulate of legal equality of Christian and non-Christian nations, the natural right of self-defense (now enshrined in article 51 of the United Nations Charter), the unlawfulness of belligerent acts against civilians except when justified by "inevitable necessity,"⁵ and the limited availability, as against war crime charges, of the defense of superior orders.⁶

Another claim strongly put forth by Professor Wagner and his co-authors is that Poland, much more than its neighbors on either side, has an old tradition of legal protection of religious minorities. In 1367, when in England, France, and Germany all Jews were subject to expulsion and extermination, Casimir the Great granted them freedom of worship, political self-rule, and other privileges.⁷ It was for this rea-

³ *Id.* at 250.

⁴ *Id.* at 224.

⁵ The same rule, expressed in almost identical words, now appears in the Hague Regulations art. 23g, attached to Convention Respecting the Laws and Customs of War on Land, done Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

⁶ Pp. 63-71 (Szyzkowski, *The Law of Nations in Poland from the Middle Ages to Modern Times*).

⁷ P. 229 (Kos-Rabcewicz-Zubkowski, *Polish Constitutional Law*). See also p. 4 (Wagner, *Introduction*).

son that during the ensuing period Poland became the principal home of Ashkenazic Jews. In a later era, especially during the seventeenth and eighteenth centuries (even before the partition of Poland delivered many of its Jews into the merciless hands of the Russian tsarist regime), the legal privileges bestowed by Casimir the Great did not always protect Polish Jews from actual oppression. But although frequently violated by later generations, the charter of minority rights issued by that outstanding fourteenth century ruler still commands our admiration as a bold political and legal innovation, promulgated at a time when religious tolerance was a desperately scarce commodity in the Christian world.

During the 150 years following the death in 1370 of Casimir the Great, the nobles gained (or regained) much political power at the expense of the Crown. A parliamentary system was developed. The Crown became subject to definite constitutional limitations, and a statute of 1505 provided that the King could enact no new laws without the consent of Parliament. Whether the Parliament, at that time an aristocratic rather than a democratic institution, was possessed of greater wisdom than the King, and whether the peasants in particular would not have fared better under an absolutist regime, may be matters of debate. Yet it is worthy of note that a system of constitutional monarchy was perfected in Poland during the sixteenth century, while in England the comparable constitutional powers of the "Mother of Parliaments" were not firmly established until 1689. A reader given to nostalgic speculation may well wonder what further legal and political innovations might have sprung from Polish soil during modern times if the country had not been suppressed and divided by its neighbors from 1772 until 1918.⁸

Having restructured and reunified its legal system during the brief period of freedom between the two World Wars,⁹ Poland again was forcibly divided in 1939. When peace returned, the weakened and devastated country found itself militarily controlled by Soviet Russia. Poland thus became a part of the Communist orbit and had to adopt a legal "superstructure" reflecting that fact. Several of the essays in the volume survey the changes which have been wrought in the Polish legal system during a quarter-century of Communist rule, in the areas

⁸ Professor W. W. Soroka provides an interesting account of the forced importation of non-Polish legal systems during the partition period. Pp. 119-37 (Soroka, *The Law in the Polish Lands During the Partition Period*).

⁹ See p. 139 (Helczynski, *The Law in the Reborn State*).

of constitutional law, criminal law, private law (with special emphasis on the law of contracts), and administrative law.¹⁰

Those parts of the volume which throw light on the present-day law of Poland are not so unique as the ones devoted to legal history. The English-language literature on post-war legal developments in the satellite People's Democracies, and especially in Poland, has grown to substantial proportions.¹¹ Nevertheless, in my opinion the volume edited by Professor Wagner makes a real contribution to the study of Communist law by giving the reader a composite view of the impact of Communist ideology on the legal institutions of a country which in pre-Communist days already had a highly developed legal system. The hypertrophic development of administrative law at the expense of all other legal institutions—probably a typical feature of Communist systems—is described with particular effectiveness.¹²

Two of the essays deal with the contributions Polish thinkers have made to political and legal theory. In one of these, Professor Jurij Fedynskij acquaints us with the lives and important writings of the most prominent Polish law professors of the last one hundred years.¹³ To a non-Polish audience, the names of most of the professors will sound unfamiliar. But to a reader who keeps in mind that Poland has inherited the civil law tradition of strong academic influence upon the development of the law, Professor Fedynskij's account of the law teachers' lives and scholarly achievements conveys a real sense of the intellectual forces and cross-currents which recently have shaped the law of that country.

A separate essay, under the title "The Polish Psychological Theory of Law," is essentially devoted to the teachings and worldwide influence of Leon Petrazycki (1867-1931).¹⁴ Both Russian and Polish scholars claim Petrazycki as their own; there is controversy even whether his

¹⁰ E.g., p. 177 (Chrypinski, *Postwar Developments in Polish Law: A Survey of Criminal and Civil Legal Rules*); p. 389 (Wagner, *General Features of Polish Contract Law*); see p. 229 (Kos-Rabcewicz-Zubkowski, *Polish Constitutional Law*); p. 363 (Piekalkiewicz, *Polish Administrative Law*).

¹¹ See, e.g., K. GRZYBOWSKI, B. HELCZYNSKI, Z. NAGORSKI & D. LASOK, *LAW IN EASTERN EUROPE: STUDIES IN POLISH LAW* (1962). For comparative studies of the socialist legal systems of eastern Europe, with plentiful references to Polish law, see 1-2 GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE (V. Gsovski & K. Grzybowski eds. 1959); J. HAZARD, *COMMUNISTS AND THEIR LAW* (1969).

¹² P. 363 (Piekalkiewicz, *Polish Administrative Law*).

¹³ P. 417 (Fedynskij, *Prominent Polish Scholars of the Last One Hundred Years*).

¹⁴ P. 299 (Langrod & Vaughan, *The Polish Psychological Theory of Law*).

name should be spelled in the Russian or Polish manner.¹⁵ One can hardly doubt, however, that in his time he was "the greatest legal philosopher of both countries."¹⁶ The seminal role of Petrazycki's psychological intuitionism—culminating in the recognition of law as an essentially psychological phenomenon and in the postulate that legal rules reflect and engender altruistic community attitudes—has been acknowledged by Roscoe Pound¹⁷ and others.¹⁸ In our own day, much of the intellectual base underpinning the younger generation's protests against the value system inherent in our institutions may well (unbeknown to the mass of the protesters) be derived, at least indirectly, from the theories of Petrazycki. The essay devoted to his teachings thus is distinctly timely. It is also scholarly and instructive.

In sum, I submit that *Polish Law Throughout the Ages* deserves to be widely read. Imbued with the nostalgia of authors who have chosen to leave their native country, but also with the true scholar's quest for detachment and objectivity, this volume is worthy of its purpose: to commemorate an important milestone in the life of a proud nation.

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¹⁵ Petrazycki is the Polish version; for a transliteration of the Russian spelling see note 18 *infra*.

Petrazycki was the son of a Polish patriot whose estates were confiscated because of his anti-Russian activities. During an important period of his life, however, Petrazycki was professor of law at the University at St. Petersburg. During that time he wrote mostly in Russian. Some of his other works were written in German and in Polish. The latter language no doubt was his native tongue.

¹⁶ Gurvitch, *Lev Iosifovich Petrazhitsky*, in 12 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 103 (E. Seligman & A. Johnson eds. 1934).

¹⁷ 1 R. POUND, *JURISPRUDENCE* 343-44 (1959); Pound, *Fifty Years of Jurisprudence*, 51 *HARV. L. REV.* 777, 809-1 (1938).

¹⁸ *E.g.*, Babb, *Petrazhitskii: Theory of Law*, 17 *BOSTON U.L. REV.* 793 (1937), 18 *id.* 511 (1938); Gurvitch, *supra* note 16.

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