

"JUSTICE IN RUSSIA": A DISSENT

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IN its subtitle, *Justice in Russia*¹ is described as an "interpretation of Soviet law." Many readers may feel that the time for "interpretation" has not yet arrived. For although we have available some materials dealing with the legal system of the U. S. S. R. and the theories underlying it, we have, to date, no systematic presentation of Soviet law in action;² and until such a work is available, it seems likely that any attempt at interpretation will fail. Therefore, while students may regard Professor Berman's efforts in this direction as a stimulating essay, he might well have chosen to allocate some of the space and effort now devoted to highly controversial interpretations of Soviet law and Russian history in general to the solution of the more immediate task—depicting Soviet law in its actual functioning as he has done to advantage in the chapters dealing with Economic and Labor Law.

The book is interesting for another reason. The problem of how to use the evidence available in the experiences of Displaced Persons constitutes one of the most urgent issues in the methodology of the analysis of any problem in Soviet society. The tendency of some Displaced Persons to become producers or inspirers of best-sellers, and the hopeless entanglement of experiences undergone in the U. S. S. R. with Western ideology and politics in which the analyst of such works finds himself caught do not encourage the use of that type of material. Professor Berman has, however, successfully used evidence collected from Russian DPs. To the accident that one of them was a Soviet Professor of Law who practised in the Court of Arbitration (where disputes between government corporations are decided) this book owes the merit of being the first Western study in which this most important aspect of Soviet civil law finds anything like adequate treatment. Since Professor Berman's wide use of DP evidence does not prevent him from seeing the proper place of law in the present Soviet system, other students of Soviet society will be encouraged to make further use of evidence from those DPs who are concerned with reflecting their Soviet experiences rather than playing a part in the present development of Western public opinion on the most controversial issues of foreign policy.

Apart from destroying the more popular type of misunderstanding as regards such subjects as advertisements, inheritance taxation, and family law,

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1. *JUSTICE IN RUSSIA*. By Harold J. Berman. Cambridge: Harvard University Press, 1950. Pp. 312. \$4.75. All page references, unless otherwise cited, are to this book.

2. The difficulty met in interesting a broad public in this problem is well illustrated by the fact that the basic raw material for such an analysis, *HAZARD & WEISBERG, CASES AND READINGS ON SOVIET LAW* (1950) still exists only in mimeographed form.

a Western study of Soviet law must first complete a most elementary task.^{2a} It must show that its subject exists, not as some external formality or as a relic of the past which is being gradually liquidated, but as a basic element of the new society which is essential for its functioning and the proper understanding of which is essential for its analysis. The fulfilment of this elementary task is complicated not only by certain ideological assertions current in the West, of which Professor Berman rightly makes short shrift, but also by some ideological properties of its own development.

For Soviet Law passed through a period during which pre-revolutionary legislation and the judiciary were abolished, to another in which the first attempts at codifying the new law were made until, finally, it arrived at the period of the New Economic Policy (commencing in 1922), during which the Codes on which Soviet law is still based were enacted. Although there was a good deal of legal anarchy during the first two periods, there was no official denial of the eventual importance of law for the proper functioning of a socialist, as distinct from the future communist, society.³

It was only after the enactment of the codes that a school of Soviet theorists, headed by Pashukanis, which asserted that commodity exchange was the only conceivable basis of law, became predominant.⁴ The implication was that with the end of the New Economic Policy (i.e. the liquidation of the remaining private enterprise), law as an agency of regulating social behavior would become obsolete. The growth of the Pashukanis School coincided with the realization of the NEP's shortcomings and the increasing desire of Soviet lawyers to restrict the benefits which the Nepmen and kulaks might earn at the expense of the poorer strata of the population. The School reached its peak when the abolition of the NEP (starting in 1927) was accompanied by thorough-going violations of the legal rights of entrepreneurs in town and countryside. It declined when it was realized that the new, completely state-organized economic plan also required a stable legal system. Before 1937, only the "commodity exchange" School produced systematic presentations of Soviet legal theory. Because such theoretical presentations were far more accessible to Western students of Soviet law than the numerous evidences of quest for stable, codified legislation even during the most "lawless" periods of War Communism (1918-1921),⁵ the myth that the very concept of Soviet

2a. See, *e.g.*, pp. 77-8, 90-1. Professor Berman properly distinguishes between the Russian concept of socialism and what is described as "socialistic" in political argument in the United States and other Western countries.

3. On p. 104, Berman states that "the very existence of law under socialism is an [Stalinist] innovation in Marxist theory." In order to refute this statement, it is sufficient to recall those statements made by Marx and Lenin (quoted in SCHLESINGER, *SOVIET LEGAL THEORY* 24-5, 30 *et seq.* (2d ed. 1951)) in which they declare that the inadequacies (not absence) of a socialist legal system makes it necessary to achieve full communism.

4. A more moderate wing of that school, headed by Stuchka, asserted that without commodity exchange there could be, at least, no civil law.

5. See, for example, the Decree of the Council of People's Commissars of December 30, 1919, stressing the need to enforce strict observance of the decrees of the Soviet

law originated with NEP and that preservation of "law" after the end of NEP represented a complete revolution from earlier Soviet concepts, has achieved widespread currency in the West.

This myth was promoted both by Western failures to realize that certain legal institutions can and do (even, to some extent, in the West) function without the classical liberal substratum of unrestricted private initiative, and by the Trotskyist attempts to interpret the typical pattern of socialism in terms of the communist Utopia which indeed was envisaged by Marx and Lenin as a society disciplined by purely informal, mainly moral, pressure. But in the schemes of Marx and Lenin, socialism and communism were clearly distinguished as two different stages of social development. The influence exercised by the Pashukanis School on many Western students provides a characteristic example of the pitfalls threatening anyone who deals with the evolution of some social system in terms of its theoretical output (which by the very nature of things, and especially in the U. S. S. R., is bound to emphasize alternative extremities of possible interpretation) instead of dealing with it in terms of such concepts as can be derived from its everyday workings.⁶

Professor Berman rejects the view that law is possible and necessary independently of the sphere allowed to the market⁷ as well as the theory that our familiar legal concepts presuppose the existence of private enterprise.⁸ In his view, "pure capitalism and pure socialism are myths."⁹ "Soviet law, in its socialist aspects, presents us with a forecast of the kind of legal system that goes with a planned economy."¹⁰ The reader should be warned from the very beginning that "socialist aspects" mean, to Professor Berman, no more than the general principle of planning which, as we shall see, is not, to him, even inherent in Marxism.

Congress in the People's Courts, the ordinary judicial tribunals. It is true, of course, that such bodies as the Cheka and the Revolutionary Tribunals, concerned with "counter-revolutionary" crimes, were given broad powers.

6. Another example is the interpretation of the Soviet family by western observers. The interpretation of the earlier period has been influenced to an inordinate degree by the statements of such radical outsiders as A. Kollontai. In studies of the present period, statements of conservative writers are stressed.

7. There is no other possible interpretation of the statement on p. 24 that the spirit of Soviet law (and not only a large part of the obviously anarchic practice) was one "of glorious transition to a new order of equality and freedom *without* law . . . the spirit of anarchism in its literal significance." This statement follows immediately after a mention of codes on family and labor law which were enacted during the period. Since the author speaks of the "spirit" of Soviet law, he should also have mentioned that a criminal code was envisaged during this period. See D. I. Kurskii's article of 1920 in *Materiali Narodnogo Kommissariata Yustitsii* Materials of the People's Commissariat of Justice (No. 3, 1921). What actually was lacking during that period was a code of civil law. But a society without civil law is not necessarily anarchic.

8. See his polemic against Dr. Gsovski p. 301, n. 2.

9. P. 91.

10. P. 95.

Precisely for this reason, he introduces into his interpretation a third basic element—the “parental” force—in addition to socialism and the national Russian background. There are occasional concessions to Western interpretations of the Soviet meaning of “identical terms”—with the unavoidable implication that the Soviet use of such institutions implies some yielding to a supposed demand for their Western counterparts¹¹—but on the whole, the author clearly deals with *Soviet* law and its role in the functioning of typical Soviet institutions. He knows that this part is not the whole play: he characterizes the basic Soviet thesis as

“the assumption that politics is beyond law, and that law only extends to those areas of society in which the political factor has been stabilized. Where the stability of the regime is threatened, law goes out the window. . . . Where real opposition is even suspected, it is dealt with by ‘suppression and the use of force.’ The Soviets have the delicacy at least not to call this law. Yet the line is not always easy to draw. . . .”¹²

Yet the sphere of stability is essential:

“[W]hereas economic expediency was previously [in the period preceding the stabilization of Soviet Law after defeat of the Pashukanis School] hailed as the ultimate criterion for the decision of disputes, it is now stated that the judicial protection of property and contract rights as such is itself the highest expediency. In this way the judicial process complements the planning process, giving it a measure of stability which it otherwise lacks.

“[S]oviet experience explodes the myth of the ‘administrative state’ in which all questions are decided in terms of ‘public policy.’ The judicial process has been found essential to the life of administration itself. . . . Stability of laws is itself public policy. And the rights of persons are emphasized as necessary correlatives of that sense of personal responsibility without which the Plan ceases to be a living thing.”¹³

As a result, we find a legal system in which lawyers have to solve most of the problems familiar to their Western colleagues. In addition, however, there are some new ones. Professor Berman attempts interpretation along three lines which, in his opinion, only conjointly give the complete background.

11. The granting of civil rights “in conformity with the interests of the working people, and in order to strengthen the socialist system” (Art. 125 of the Constitution of the U.S.S.R.) is described as “certain minimum concessions to public opinion and civil rights.” P. 286. What concessions did the Soviet state make when it invited the citizens to help carry out its policies? And what other freedoms did it grant?

12. P. 48.

13. Pp. 66, 78-9.

To the elaboration of each of those lines, one of the three parts of the book is devoted.

First, Soviet law is conditioned by economics; it is a necessary supplement of planning:

"Plan is that aspect of the social process which is concerned with the rational use of institutions and resources from the point of view of economic development; law is that aspect of the social process which is concerned with the formalizing and enforcement of social policy (plan) in terms of the personal and property rights and duties arising therefrom."¹⁴

Secondly, Soviet law is a stage in the development of Russian law. In the seventh chapter of his book,¹⁵ Berman gives numerous examples, mainly from the field of criminal law and procedure, to demonstrate the dependence of Soviet law upon Russian institutions and traditions which had grown up before and independently of the Westernizing judicial reforms of 1864.¹⁶ Although few students will disagree with him up to this point, there are some obvious exaggerations which are due to overemphasis on the differences between Western and Russian history and perhaps also to insufficient knowledge of the Western European counterparts of allegedly characteristic Russian developments. For example, Berman states that "direct employment of . . . workers by the state [in any event a characteristic of Socialist economics] goes back to Peter the Great"¹⁷ and that the obligation of Soviet citizens to perform temporary emergency work in case of disaster "is strongly reminiscent of Mongol law, with its principle of universal compulsory service."¹⁸

14. P. 54.

15. The two chapters on Western legal tradition and Spirit of Russian law bring into the book highly questionable speculations on the philosophy of history. The chapter on western tradition is based upon Rosenstock-Huessy's theory of a "chain of revolutions" commencing with the "papal revolution" of 1075. These revolutions are asserted to have shaped Western legality in contradistinction to the allegedly purely authoritarian and Tatar development of the East where the counterplay of reform and reaction was nearly lost.

This leads Professor Berman to omit the different stages in Speransky's career and the reaction following the Napoleonic Wars. Pp. 140-2. He also presents the February Revolution of 1917 simply as a successful resistance by the Duma of the Tsar's attempt to dissolve it! P. 150.

Because of this approach, the author presents, as characteristically Russian, issues familiar to reformers in many European countries. (E.g. religious marriage, p. 235).

16. I GSOVSKI, *SOVIET CIVIL LAW* 849 (1948) has already pointed out the pre-1864 Russian antecedents of the Soviet Attorney who has, in criminal cases, powers going far beyond those of a mere public prosecutor. Berman elaborates this point and mentions the Western (French) background of the Petrine Procuracy, pointing out, however, certain deviations from Western concepts which were preserved even in the 1864 legislation. P. 171 *et seq.*

17. P. 255.

18. *Ibid.*

Clearly, the institutions of any country with a pre-capitalist background date back to feudal times, if not earlier. In Russia, of course, they go back to Russian feudalism; but there would be no difficulty in finding some appropriate Tudor background for the institutions of a socialist Britain. A critical analysis reveals that, of all the fundamental juxtapositions of Russian and Western law hypothesized by Professor Berman, not much more remains than the indisputable fact that Russia (and, *a fortiori*, China) embarked along the line of socialism before a capitalist market, with its corollary concepts of law, was developed.

Professor Berman who, at other places, recognizes that Pashukanis' derivation of law in general—and not merely at some particular stage—from market-economics is refuted by the Soviet experience, pays some service to this theory in setting up the Western system as a "legal system" in contrast to the supposedly informal Russian way of ordering the affairs of society:

"The West has exalted law . . . it has fostered the doctrines of the supremacy and completeness of law, its basis in equality, its capacity for growth. It has by the same token tended to forget that law itself is ultimately dependent on the existence of nonlegal realities. Law is not its own justification, nor is it its own sanction. Behind it must lie the 'consent of the governed', as manifested in community self-consciousness, common service, a sense of common purpose and destiny. The traditional Russian appreciation of spontaneous, informal social relations, based on an inner intuition of group membership, is a challenge to us to find the link between the political-legal and the moral-spiritual aspects of our own heritage.

"By the same token, Western law is a challenge to Russia. In the nineteenth century Russian jurists accepted the challenge of the West and sought to build a Russian legal system in the Western image. The Soviets are now building both on the westernized Russian legal tradition of the late nineteenth and early twentieth centuries and on the nonlegal social and personal values which have been central in Russian life from early times. They are seeking to reconcile Eastern and Western elements in Russian social relations. They are trying to develop a specifically Russian legal system, giving legal forms and legal sanctions to the traditional Russian conceptions of the 'whole man' and the 'whole community'. Yet they are unwilling to sacrifice certain traditional habits and beliefs which stand in the way of this goal."¹⁹

After having devoted the first two parts of his book to the socialist and Russian elements in Soviet law, Berman brings the third basic element into

19. Pp. 192-3.

his analysis. With one of the many psychological analogies used in the book,²⁰ he describes this element as the "parental" influence. He refers to a distinction made in Karl Llewellyn's mimeographed *Lectures on Jurisprudence*, adding that this terminology denotes in essence what Roscoe Pound has described as the "socialization of the law" and what Soviet authors themselves describe as its "educational function."²¹ Immediately a question arises as to the need of a new terminology for a complex of facts already well appreciated in American as well as Soviet jurisprudence. Obviously, the law of a socialist state—indeed that of any modern system of social reform—cannot be interpreted in the traditional terms of a laissez-faire system. The desire to find in Soviet law some specific element, distinct from both the planning elements in any modern society and the background of Russian history, follows from an approach in which the *economic* distinction between Soviet socialism and the administrative agencies and public corporations extant in the United States is described as a mere difference in degree.²²

Yet still, I cannot see what sense there is in a description of the Soviet citizen being treated by the law "like a child or youth to be trained, guided, disciplined, protected"²³ unless this means merely that the Soviet interpretation of the subject of the law is different from the nineteenth century Western attitude in which the potential entrepreneur was supposed to look after his own business. The Marxist concept of an eventual withering away of any necessity for coercion is not specifically Russian, and in present Soviet ideology is regarded as referring to the remote future. But it certainly gives an additional moral sanction to the educational functions of the law. It is also true that the recent stress upon the element of "intent" in the field of "economic crimes" is connected with the adoption into law of ambitious economic ob-

20. On pp. 284-5, Professor Berman makes a further distinction between "maternal" and "paternal" law, the former being concerned merely in the enforcement of peaceful relations, the latter dealing with progress and achievement. I cannot see the benefits to be reaped from such generalizations of a purely hypothetical pattern. Mere confusion results when a concept of the "parental-educational" role of the Soviet law in general (including civil law suits between large business concerns) is applied to actual family matters such as suits for custody of children. The interesting point about the court case related by Berman on pp. 238-9 lies in the fact that the mother was awarded custody of the child in spite of the father's more comfortable material status. (There was no denial that either parent could not provide a normal home). The case is relevant as an illustration both of the importance attached to education by the mother in the Soviet Union and of the fact that the father at least tried (though in vain) to claim that wealth was an asset for the child's future. This can be stated far better by use of ordinary sociological terms than by resort to a new terminology. Use of this new terminology merely obscures the patent fact that the Soviet court, just as any other one, is "paternal" in the sense of its primary concern for the child's welfare.

21. Pp. 307-8, n. 6.

22. Pp. 91-2.

23. P. 205.

jectives. Since the goals are sometimes set beyond capacity for fulfilment,²⁴ it becomes necessary to distinguish between intentional or negligent violations of the Plan and cases of failure to meet requirements because of unforeseen difficulties (which do not come under criminal law).

But whatever heuristic value there may be in such considerations is only lessened if the material is arranged according to questionable hypotheses of history and law in general.²⁵ Only by comparing the direction and degree of Soviet development with that of other twentieth century societies can we learn to what extent Soviet phenomena must be explained by (1) a unique Russian heritage (2) general trends of economic organization in all modern societies and (3) specific characteristics of socialism in the Soviet sense. Unless we accept Professor Berman's denial of an essential difference between the latter two factors, the distinctions in the scope of legal organs in relation to the law may easily be found to correspond with differences in economic structure and corollary functions of law.

I simply cannot imagine, as the author does, that any socialist society could manage without some institution analogous to the Court of Soviet Arbitration for settlement of the pre-contract dispute between state enterprises. For one cannot have both Plan and law without the existence of an organ for deciding which legal obligations shall be entered into by parties who cannot refrain from entering contracts without disrupting the Plan. And I can see no reason why the position of the Soviet manager should be described as "going to school" unless this merely means that he is not an independent master of "his" business.

Caution against theoretical constructs intended to illustrate the obvious is increased by the encouragement of misunderstandings of facts implied in such illustrations. In addition to some minor errors,²⁶ the book tends to interpret

24. This idea, however, is definitely overstated by Professor Berman when he declares that Soviet "plans and regulations proclaim goals, ideals, which cannot possibly be met 100 per cent." P. 83. In all Soviet literature on the subject of collective agreements (e.g. Professor Dogadov's article, parts of which have been translated in *SOVIET STUDIES* (no. 1, 1949)), there is a clear differentiation between moral and legal obligations. No one would think of making ultimate objectives the subject matter of a legal enactment. Moreover, the Plans are regularly fulfilled by the large majority of economic ministries. There is no question, it is true, that some enterprises fall short of the planned targets.

25. I do not speak here of attempts to verify Marxist theories by Soviet experience. Whatever their merits, these theories represent the basis of Soviet ideology. Therefore, their conformity or non-conformity with Soviet practice is in itself an element in the development of Soviet society.

26. For example, Plekhanov is said to have first translated Marx into Russian. P. 10. Actually, the first volume of *CAPITAL* was published in a Russian translation by the *Narodnik* Danielson as early as 1872. Engels' last written work is quoted in the form published by the German Social Democrat party over Engels' express protest. P. 18. Berman states that "not until 1937 were the theories of Pashukanis renounced." P. 21. In fact, (see *SCHLESINGER, SOVIET LEGAL THEORY* 203 *et seq.*) Pashukanis was under pressure commencing in 1930 and had gradually been forced to retreat from his original

Marxism in a way which excludes from its basic concepts the possibility of the existence of law under socialism, any regard for the element of emotion,²⁷ and even the concept of planning.²⁸

In Soviet Russian reality, on the other hand, concepts of corporate nationality²⁹ and interpretations of collective agreements in such a way as to

positions. Berman interprets a directive by the Plenum of the Supreme Court to exclude special pleas by organizations and individuals not parties to the action from court proceedings as a symptom of outside pressure which might lead to more acquittals. P. 194. The existence of pressure from Party organizations cannot be denied, but it works only behind the scenes. The 1947 directive abolished the "social prosecutors" who, in arguing cases for the prosecution, stressed propaganda rather than the legal merits.

27. Marx and Engels are said to have "reduced all enthusiasms, all passions, all 'isms', to economic and social laws." P. 108. A few lines earlier, however, Berman states that "the only permissible passion is that of bitterness at the injustices of history." This formulation is completely alien to the spirit of Marxism. Marx himself wrote that "theory itself becomes material power once it inspires the masses." In distinguishing between the Leninist and Stalinist phases of Soviet ideology, the author writes, "[Under Stalin] it is the impelling factors, rather than the cognitive, that are now stressed. It is conscious loyalty, conscious fears and desires, conscious sense of responsibility, that Soviet law now attempts to instill." P. 219. I agree with the last statement but cannot find in it—other than the re-assertion of patriotism which is implied in the conquest of State power—a shift from intellect to emotion. In view of Marx's statement quoted above and Lenin's susceptibility to the emotional element, it would seem that "emotion" has always been present in Marxism. The appearances of such a shift arise from the fact that proper interpretation and application of theories are no longer hammered out in public but now proceed behind the scenes. Public propaganda is left with the task of generating enthusiasm for the decision arrived at and arguments in favor of the decision can be greatly simplified.

28. The concept of national economic planning is said "not to be found in the works of Marx and Engels." P. 52. *But see* 2 MARX, CAPITAL 361-2 (Sonnenschein ed. 1907) as to planning of the productive resources to be diverted into long-term investments; 3 MARX, CAPITAL 221 (1909 ed.) for distribution of labor forces according to social needs; *Id.* at end of chapter 49 on the same point and on the need for national accountancy. Naturally, these references were less extensive than those appearing in modern Marxist writings, but Marx's attitude seems completely clear to me. The neglect of the planning problem occurred around the time of World War I with acceptance of Guild Socialist theories by certain Central European Social Democrats. For this, see SCHLESINGER, MARX, HIS TIME AND OURS 354-5 (1950).

29. Professor Berman interprets the repression of Zionism as a contradiction to the avowed outlawing of anti-Semitism. P. 49. The Soviets, however, in discussing national rights, clearly mean to protect only those which are "socialist in content, national in form." Thus, the Soviets would argue that the Zionists' advocacy of emigration to a capitalist country deprives them of any claim of legality.

In contrasting the more severe penalties for polygamy in the Central Asian Republics with the lighter sentences in Byelorussia, the author writes, "The individual shares, so to speak, the guilt or innocence of the community." P. 182. He fails to realize that "guilt or innocence" is evaluated from the standpoint of protection of women rather than establishment of monogamy. In a European Russian community, the very rare polygamy which does occur is typically re-marriage without divorce. This involves only a minor disturbance of the administrative order. In those communities where the Moslem religion is strong, however, polygamy is a social custom which concerns the social status of the

exclude the theory of having parties to them³⁰ are asserted to prevail without sufficient foundation for such assertions. The disparity between these interpretations raises a problem. The main reason for it appears to me to be an exaggeration by Berman of the part played by the national Russian characteristics and the psychological factors underlying them.

I have not been convinced by Professor Berman. But I am, like many others, obliged to him for highly stimulating reading.

female half of the population. Moreover, when the Marriage Codes were enacted, the practice was so strongly entrenched that only draconic measures could end it.

The fact that Jews or Turkmens are persecuted through repression of Zionism or polygamy is due, in Soviet opinion, to the presence of "bourgeois nationalism" within these groups rather than to the ideology underlying Soviet law.

30. According to Berman, ". . . the word 'collective' in Soviet labor law refers neither to the union nor to management but to the enterprise as a whole." P. 262. This clearly ignores the origin of the term in the Code of Labor Laws of 1922. There, collective bargaining was interpreted in precisely the same sense as in Western legislation. Moreover, in the structure of collective agreements since 1947, the obligations of workers and management are always juxtaposed. It is true that the obligations assumed by either side serve the common aim of fulfilling the Plan. It is also true that the most common issues of Western collective bargaining, wages and hours, are decided by the government and only formally included in the agreement. But the general question as to what extent the freedoms of labor familiar to modern capitalism are compatible with socialist planning is quite independent of the assumption of some specifically "Russian" or "parental" shop community.

Perhaps more important than the correct interpretation of some individual institution is close observation of the direction in which the institution are developing. I am not at all sure that it is proceeding in the direction that Professor Berman supposes. For example, in 1940, jurisdiction over petty thefts was withdrawn from the Comrades Courts. P. 266.