

REVIEWS

SOVIET MILITARY LAW AND ADMINISTRATION. By Harold J. Berman & Miroslav Kerner. Cambridge: Harvard University Press, 1955. Pp. xiv, 208. \$4.00.

DOCUMENTS ON SOVIET MILITARY LAW AND ADMINISTRATION. Edited and translated by Harold J. Berman & Miroslav Kerner. Cambridge: Harvard University Press, 1955. Pp. xi, 164. \$4.00.

WITH the help of a former Czech lawyer who served with the Czech brigade in the Soviet army during the war, Professor Berman has produced another important volume in support of the thesis that law exists in the U.S.S.R. He has chosen the military field, in which, as he admits, practice in all countries is farther from theory than in any other branch of the law. In spite of this fact he concludes that the Soviet leadership has found that in a complex, urbanized and industrialized society it cannot operate efficiently without an objective, rational legal structure. His volume of text is an exposition of this structure; the volume of documents supports his text.

Professor Berman coins an apt phrase when he says that "the Soviet leadership attempts to run law and terror in double harness."¹ It is because of the failure of some students of the subject to grasp this point that the domestic strength of the Soviet regime has been underestimated occasionally by wishful thinkers in the western world. There has been a school of thought that takes the position that there is no law at all in the U.S.S.R., and that the entire punitive apparatus operates on a completely arbitrary basis without rules and without reason.² Those who make this analysis then conclude that the Soviet Union is ripe for revolution since no people will consent for long to the instability in social relations that such arbitrary rule would be expected to provoke.

The author of this volume has been one of those arguing to the contrary. While completely aware of the role played by terror as a carefully directed instrument of Soviet policy, he has been saying for some years that the Soviet State has dual instruments. There is terror on the one hand, and there is a rational system of law on the other. In paraphrase of Professor Harold Lasswell's analysis of the role of propaganda,³ one might say that Professor Berman's thesis has been that the aim of law in the U.S.S.R. is to economize the material costs of power.

Having enunciated his thesis, Professor Berman sets out to show the extent to which there has been disorder within the confines of order. He believes that Soviet lawyers know what due process of law is, for their procedure includes certain of its basic features, such as publicity, presumption of innocence, the hearing of both sides, the examination of witnesses in open court, the right to counsel and the right of appeal. He finds that Soviet lawyers have evidenced their understanding of due process by providing specifically for circumstances

1. SOVIET MILITARY LAW AND ADMINISTRATION 160.

2. BERMAN, *JUSTICE IN RUSSIA* vii (1950).

3. Lasswell, *The Strategy of Soviet Propaganda*, 24 *ACAD. POL. SCI. PROC.* 214 (1950).

in which it shall not apply, as in trials for espionage, terroristic acts, and efforts to unseat the regime, and in proceedings before the Special Boards of the Ministry of Internal Affairs. He finds that Soviet military procedure follows the same lines as the procedure in use in civilian courts; in fact, that the military courts are identical in structure with the civilian courts, except for the fact that their professional judges are military personnel specially trained for the position.

Because of the intertwining of military and civilian justice, the book is as much a commentary on Soviet criminal procedure generally as it is on military law. The author has found it necessary to discuss Soviet concepts of "analogy," the importance of guilt, and the role of pre-trial procedure. He has correctly compared Soviet attitudes to those of continental courts with which Soviet courts have more in common than with common law courts. He delves into some of the unanswered questions of Soviet procedure such as the conflict between the constitutional guarantee of counsel and the express denial of this right in cases involving charges of terror and espionage. He brings out the curious fact that, in departure from the usual rule on uniformity of law in all Soviet Republics, the Ukrainian Republic has not included in its code of criminal procedure those articles adopted by the Russian Republic after Kirov's assassination in 1934 which exclude terroristic acts and espionage from the otherwise routine procedural protection of the accused.

The relationship between judges and members of the Communist Party are explored, as they must be in any realistic examination of Soviet law. Professor Berman concludes that the top Soviet officials are intent upon excluding influence by local party bosses, while preserving every opportunity for influence of the judiciary at the summit when a political issue is involved. He discards the thesis that because the Communist Party has power it can pull as tightly as it wishes on the reins holding the army, contending that the Communist Party must think of the efficiency and morale of the army which will suffer if the reins are pulled too tight. He also rejects arguments as to the ascendancy of the army over the party, showing that the whole complex of power in the U.S.S.R. is built upon the intertwining of these two agencies. His chapter on the manner in which this intertwining has been achieved is the talisman that has been needed to dispel the illusions of the wishful thinkers. The party is very well established in the army, not only through the political commissars but also through the separate agents of the Ministry of Internal Affairs. Would that a Zhukov or some other army spokesman might arise to speak his own opinion, but this seems unlikely. The behaviour of Zhukov at the "summit" meeting in Geneva suggests that Professor Berman has analyzed correctly the subservience of the army to the wishes of the party.

There are a few points at which the text is not entirely clear. It is said that in 1954 the death penalty for murders having no connection with politics or the military was established for the first time since 1754. While this is true as far as the text of a law is concerned, it leaves out of account a practice that Professor Berman described correctly in his earlier volume, *Justice in Russia*. Under that practice the death penalty had been meted out on many occasions to

persons who committed sadistic or brutal murders prior to 1954. This was done in application of the "analogy" provisions of the criminal code.

This fact of the application of the death penalty in murder cases not involving politics or the military might have been made clear in this book to indicate that the 1954 legislation has not so much increased severity as increased predictability. The same type of action would be punished in the same way both before and after 1954. The difference is only in the fact that the prospective criminal will now be explicitly warned beforehand of the possible consequences of his acts and he may stop to think twice. The 1954 law seems to be a victory for that group of Soviet lawyers who have been arguing for years for greater definiteness in the code and less use, if not abolition, of the "analogy" article.

There is also a failure on Professor Berman's part to appreciate that a Soviet policy maker does not consider that he is punishing the relatives of an army deserter who flees abroad by sending them to Siberia even though they had no knowledge of the escape. To the Soviet mind this is no more punishment of the relatives than it is punishment to the deserter's property to confiscate it. The punishment is of the deserter, and for that reason the penalty was adopted. Professor Berman has tried to relate the punishment of relatives to the rule of recent Soviet law that punishment is not to be meted out unless there is criminal intent or negligence. In spite of the explanation of one Soviet author suggesting that he also faces the same problem,⁴ it may be the incredible truth that Soviet draftsmen have placed the relatives of a traitor in a category similar to chattels. They have seen no inconsistency in their policy of removing the relatives from circulation so as to deter those who are planning escapes.

Professor Berman's conclusion that Soviet citizens are less amenable to legal controls in daily life than are western peoples, and his reaffirmation of his belief that the role of the Soviet judge is "parental," will probably arouse as much criticism from some of his readers as did such assertions in his *Justice in Russia*. Both generalizations are attractive and not without support in the evidence. Any one who has lived in the U.S.S.R. will have been amazed at the extent to which Soviet citizens go their carefree way in spite of the strict controls. It is also true that the Soviet judges behave more like fathers chastising their children than like referees in a contest of wits between a prosecutor and a defense attorney.

The companion volume of documents is an admirable collection of materials relating to the conclusions of the text volume. Some of these documents have been hard to find in the original. Work such as that of Messrs. Berman and Kerner in collecting them and translating them should be encouraged in other fields. We have the admirable translation by Vladimir Gsovski of the Soviet civil code and related laws,⁵ but there is little else in the other branches of law except the bits and pieces from many fields gathered some years ago by this reviewer and his collaborator Morris L. Weisberg.⁶

4. SOVIET MILITARY LAW AND ADMINISTRATION 69.

5. GSOVSKI, SOVIET CIVIL LAW (1948).

6. HAZARD & WEISBERG, CASES AND READINGS ON SOVIET LAW (1950).

The judicial decisions are perhaps the most unknown of the documents gathered by the editors of this volume. Two provide an unusual glimpse of Soviet attitudes. One draws a distinction between wartime and peacetime declaration of martial law. In the latter case⁷ only the procedural rules applicable in wartime are held to apply. The substantive law remains unchanged. The case involved termination of the war in the Latvian Republic at a time when there had been no formal decree declaring the end of martial law in that area. The judges were supposed to take judicial notice of the end of combat conditions and to start applying again substantive law applicable in peace time, although the procedural rules applicable in wartime and under martial law remained in effect.

The other unusual case⁸ indicated that the court did not or would not recognize that assignment to a penal battalion in wartime was the very serious penalty described by the authors in their text volume. The case involved a transport worker who had been absent without leave during the wartime period. The railroads were "militarized" at the time, and transport workers were generally subject to the same type of discipline as soldiers. Nevertheless, there had been adopted no amendment establishing equivalent penalties for absence without leave. The lower court in its effort to find an appropriate penalty examined the article of the code applicable to soldiers and found that it provided for assignment to a penal battalion. The court decided that only soldiers could serve in a penal battalion, and so it sought an equivalent, in accordance with the rule of the "analogy" article of the criminal code instructing a court to select a penalty, when there is a gap in the law, on the basis of a study of analogous articles. It decided upon two years of imprisonment.

The penalty of imprisonment seemed to the Supreme Court on its review of the case more severe than assignment to a penal battalion and, therefore, not analogous. It ordered the penalty reduced to a requirement that the convict continue at his regular job subject to a reduction in pay. Such a penalty amounted to nothing greater than an instalment fine under wartime conditions, because all workmen were frozen in their jobs. To an outsider the Supreme Court's decision seems unrealistic, for the penalty chosen can hardly be compared in severity with service in a penal battalion. The latter is said to have meant almost certain death. A transport worker might well have been killed as the result of a bombing of his train, but his risk was no greater under the penalty set by the court than that of a transport worker who had not been convicted of being absent without leave.

This reviewer continues to feel, as he has in the past, that Professor Berman's intuitions as expressed in his volume of text come rather close to the real situation. It will be interesting to see whether he retains them after returning from his trip to Moscow during the summer of 1955 and whether his next work will indicate a change in view.

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7. DOCUMENTS ON MILITARY LAW AND ADMINISTRATION 118.

8. *Id.* at 115.

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