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IS SOVIET LAW A CHALLENGE TO AMERICAN LAW?

N. S. TIMASHEFF†

THE very existence of Soviet law is a challenge to American law, says Mr. Harold J. Berman, Visiting Professor at the Harvard Law School.¹

What traits of Soviet law could, in Mr. Berman's opinion, challenge American law? First of all, it is the law of a socialist society. The same is true of contemporary British society. Soviet law is, however, quite different. It is more than Soviet law; it is Russian law, grounded in Russian history. (245, 450)²

Is, then, the legal tradition of Russia so good that America should borrow some of its elements? By no means. Mr. Berman makes a cursory survey of that legal tradition, (250-254), and his findings are definitely negative. Russian law can be traced back to Byzantine law, which in Mr. Berman's opinion was essentially liturgical, *i.e.*, based on the use of right words, citation of right authorities, etc. At this point he seems to ignore the fact that Byzantine law, partly borrowed by Russia since her Christianization (989 A.D.), was Justinian's *Codex Juris Civilis*, the same code which, since the renaissance of Roman law, was the foundation of the legal system of continental Europe.³ He also ignores the fact that up to 1917, certain parts of the civil law of the Russian Empire, particularly the law of marriage and inheritance, more exactly reproduced Byzantine law, and *ergo* Roman, than the law of any Western nation.

Byzantine law, continues Mr. Berman, was grafted onto the primitive law of Kievan Russia, comprising such elements as composition, ordeals, and compurgation. He believes this mixture remained in force until recently with only partial modifications (251). Then, there came the period of the Westernization of Russia. According to Mr. Berman its impact on the Russian law was this: In 1832, a code was issued largely on the basis of the *Code Napoléon*. The new Russian code took over European law wholesale, often with little reference to Russian conditions (252). This is a very curious statement indeed. The true story is this: After many years of work, a committee of Russian jurists, headed

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1. Berman, *The Challenge of Soviet Law*, 62 HARV. L. REV. 220, 449 (1949).

2. Here and hereafter figures in parentheses refer to pages of Mr. Berman's article.

3. At (258 n. 54) Mr. Berman acknowledges this. In consequence he must ascribe "liturgical character" also to Roman law as the source of Western law. It is of common knowledge that the "liturgical character" was, however, a trait of early Roman law, but no longer of mature Roman law as codified by Justinian.

by Count Speransky, prepared a collection of all Russian laws enacted since 1649, the date of the magnificent *Sobornoye Ulozhenye* which was a complete code of laws of the Muscovite state. On the basis of this collection they drafted a systematic code of the laws in force. They were not legislators, and could not change the law. Their task was to systematize existing law. However, time and again they abstracted general propositions from particular rules, and introduced these into their code. In doing so they were on some occasions influenced by foreign law, especially the *Code Napoléon*.

In 1864, continues Mr. Berman, a general law reform took place. Attempts were made to engraft French and English law on the national tradition. The reform concerned itself with the structure of the judicial system and procedure. It is considered by all students of Russian history as one of the major successes of pre-revolutionary Russia. But, in the author's opinion, it was unsuccessful. The procedure remained undeveloped and unscientific; there remained the cruel treatment of peasants and the inadequacy of judicial practice (254, 260).⁴

In the presence of such a survey of Russia's legal history, the reader wonders how it is possible that Soviet law, which is Russian law, could be a challenge to American law. The puzzle is solved in this way: To balance the inadequacies of pre-revolutionary law, there were in Russian life four "redeeming elements", essentially extra-legal. These were: (1) the principle of *sobornost*—togetherness, cooperation, coming from Kievan Russia, the one of ordeal, compositions and so on; (2) the principle of universal compulsory service which was of Mongolian origin; (3) the Messianic principle of the Muscovite state expressed in the formula, Moscow the Third Rome; and (4) the principle of the state-controlled economic development inaugurated by Peter the Great (255-257). "Now the energy released by the Russian Revolution is being channeled into the creation of law" (255). In other words, these extra-legal principles⁵ are being incorporated into Soviet law. Now one understands: Soviet law may challenge American law because it is much better than pre-revolutionary law, since it embodies the lofty principles inherent in Russian life.

Moreover, the same release of energy, says the author, flatly contradicting what he said about the code of 1832 and the judicial reform of 1864, resulted in the building, for the first time in Russian history, of a

4. Study of the collection of the decisions of the Civil and Criminal Chambers of the Senate (equivalent to the Supreme Court) would have shown Mr. Berman that the procedure was well-developed and as "scientific" as any contemporary procedure.

5. It is hard to understand how such principles as universal service and state control of economics could have worked on an extra-legal level.

Russian legal system comparable to that of the West; a system incorporating the Western principles of Reason, Conscience and Precedents (255, 259).⁶ The basic principles of contract law, criminal law, and family law are essentially the same in the Soviet system as in German, French, Swiss, Italian, English or American law. In addition to earlier Western influences, continues Mr. Berman, this is due to the Soviet reliance on German, Swiss and French codes in the preparation of codes during the period of the New Economic Policy (450, especially n. 5). In this enumeration of sources of the Russian Legal System the author ignores the major one—the law of pre-revolutionary Russia. Relating to the civil code of 1922, he also ignores the influence of the draft civil code for the Russian Empire completed shortly before the outbreak of the First World War and in 1913 partly introduced in the Duma.⁷

Curiously enough, Mr. Berman does not notice the incompatibility of the characteristics ascribed by him to Soviet law. If Soviet law for the first time in Russian history embodies the principles of Western law, then it is not Russian law. On the other hand if it really embodies the peculiarly Russian principles of cooperation, universal service and state interference in economics, then it is closer to the law of pre-revolutionary Russia than to Western law.

However, let us not insist on this inconsistency, but, on the contrary, let us try to penetrate into the challenge to American law of a concoction of Marxism, old Russian (even Mongol) principles, and Western law suddenly grafted on the Russian tradition.

1. Soviet law, contrary to American law, is based on the principle that society decides what is good for itself (239). This is obviously a reflection, in law, of the collectivistic philosophy of Marxism which, according to the author, could be easily accepted by the Russians because of its affinity with some of the "redeeming principles" of Russian life. He believes there is a convergent movement with America, the latter gradually departing from the individualistic tradition while Soviet Russia is increasing the rights of the individuals (240).⁸ He is at great pain when trying to demonstrate the latter point. All he can say is that, in

6. These principles are defined by Mr. Berman at (247-49). A study of the collection mentioned in note 4 *supra* as well as monographs of Russian jurists would have shown Mr. Berman that Russian courts well knew the art of reconciling conflicting laws (principle of reason), and that they paid much attention to precedent. As to finding the law in the judge's conscience, this is definitely not a principle of continental jurisprudence.

7. On these sources see W. Zawadsky, *Zivilrecht*, in A. Makletzoff and others (editors), *DAS RECHT SOWJETRUSSLANDS* (Tübingen, 1925). See especially pp. 254-55, 282 and 287.

8. On the alleged converging movement see SOROKIN, *RUSSIA AND THE UNITED STATES* (1944).

the draft Union codes,⁹ features emphasizing the rights of the parties to a trial have been increased (456). The problem of the converging movement is secondary. The primary one is this: Is the challenge of collectivism a legal one? Very definitely, it is not. The contention between socialist and "capitalist" law is merely a reflection of a deeper contention between two basic philosophies of life. No really legal argument could be found in favor of the Soviet or of the American organization of social, especially economic, life. In this regard, Soviet law does not pose a new problem; the problem had existed many decades before the emergence of Soviet law, and would continue if, for some reason, the Soviet state should go under.

2. Much more specific are those alleged advantages of Soviet law which pertain to the nucleus of the legal organization; namely, to civil and criminal law and procedure. Mr. Berman believes that Soviet law has focused on the subjective side of crime. He presents as innovations¹⁰ these clauses of the penal code of the R.S.F.S.R.: "Unaccountability may be present even where the accused understood the factual nature of his acts, but was unable to understand their criminal character. Soviet law adopts a far more subjective standard of foreseeability than ours: in cases of criminal negligence the criminal is held not to the standard of an objective 'reasonable man' but to his own standard as determined by his knowledge and intelligence, or to the standard customarily required in the circle of persons to which he belongs. In cases involving specific criminal intent, guilt depends upon actual rather than imputed foresight" (260).

One may wonder whether American law should not take over all, or some, of these dispositions. In doing so, it would not be imitating Soviet law, but something quite different. All the clauses cited above have been taken over by Soviet law from the Imperial penal code of 1903. Article 39 precluded penal responsibility of a person who, at the time he committed a criminal action, was unable to understand its nature and significance.¹¹ In the memorandum of the drafters it was explicitly stated that the terms used by the law covered both the factual and

9. According to the Constitution of 1936, civil and criminal law and procedure have been transferred from the competence of the constituent republics to that of the Union. Hence the necessity of drafting new Union codes in place of the codes of the R.S.F.S.R. and other republics. See Hazard, *Drafting New Soviet Codes of Law*, 7 *AM. SLAVONIC AND EAST EUROPEAN REVIEW* (1948).

10. Here are his words: "In the trial of non-political crimes, at least, the Soviets have made interesting innovations" (260).

11. The formula of the penal codes of 1903 and 1926 is not very much different from that of the McNaughten rules, after all. See GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925).

the legal nature of the action. Article 48 of the same code (sh. 2) defined criminal negligence as an action whose perpetrator did not foresee the results, though he could have and should have foreseen them. In the comments it was explained that the first part of the formula (could) referred to the subjective standard, whereas the second part (should) referred to the standard behavior required from persons involved in situations similar to that of the offender. Article 48 (sh. 1) defined intention as direct desire of the result or its conscious acceptance; imputed foresight never sufficed.

These formulas of the Imperial code had very definite historical roots. The code was drafted by a committee of outstanding Russian criminologists who spent years on a careful comparison of English, French, German, Austrian, Hungarian, Italian and Swiss criminal law (including the draft penal codes which were being prepared in some of these countries), and published a memorandum of their studies in eight volumes. The results of their labors were commonly judged to embody the ideas of the progressive criminologists of the late 19th century.¹² In consequence, if American law followed suit to Mr. Berman's suggestion and imitated the clauses of Soviet criminal law singled out by him, it would really imitate ideas which fifty years ago were in vogue in continental Europe. Since that time many criminal codes have been enacted. Among them the Swiss penal code of 1938 would probably be a good model for imitation.

3. Mr. Berman highly praises the procedural codes of the Soviet Union. He begins by stating that Soviet criminal and civil procedure resembles the American, since it is based on bilateral hearing, in public, with oral testimony, judgment based on rational (as contrasted with formal or legal) proof, with parties represented by counsel, and with the possibility of appeal (453-54). (It is noteworthy that continental jurists, including those of Imperial Russia, commonly believed that their continental system of evidence was purely rational, while the Anglo-Saxon system was a hybrid between rational and legal evidence, because of numerous rules of inadmissibility unknown on the continent.)¹³

More striking, however, is this fact: None of the principles of Soviet procedure singled out by Mr. Berman is an innovation as compared with the law of Imperial Russia. There the procedure was also oral

12. The criminal code of 1903 was studied as one of the outstanding European codes by the German criminologists who completed the magnificent 16 volume *VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHTS* (1906). This work was done to prepare the drafting of a new penal code for Germany.

13. Recently Judge Jerome Frank has recommended "to discard most of the exclusionary evidence rules." FRANK, *COURTS ON TRIAL* 422 (1949).

and public, parties were represented by counsel, and appeal was known to an extent far exceeding the Anglo-American practice. In no case was judicial permission to appeal necessary, and, before a court of appeal, evidence was produced exactly as before a trial court.¹⁴

Mr. Berman continues his laudatory survey of Soviet procedure by saying: No punishment is foreseen for the accused for failing to cooperate at the pre-trial examination; the inquiring magistrate has to refrain from violence, threat or similar methods; the accused must be asked questions, the answers to which would tend to exonerate him, as well as questions directed to proving his guilt; he must be informed of his right to examine any part of the record (454-55). Are these innovations? The Imperial code of criminal procedure promulgated in 1864, the one described as "unsuccessful" by Mr. Berman, explicitly stated that the inquiring magistrate was not allowed to provoke the confession of the defendant by promises, threats, false pretenses, etc., and ordered this magistrate, after having finished his inquiry, to communicate the record to the defendant calling attention to his right to introduce additional evidence tending to exonerate him.¹⁵

At the trial level, continues Mr. Berman, the burden of the proof is on the prosecutor. The judge interrogates the accused and the witnesses. Admissibility of evidence is left to the discretion of the court. The verdict must be based on relevant evidence only. In criminal cases the complaining witness¹⁶ may be awarded a civil remedy in the same proceedings.

The uninformed reader is led to believe that all these legal provisions are innovations of the Soviet law compared with the law of Imperial Russia.¹⁷ Any such impression would be entirely wrong. One who knows the pre-revolutionary law is aware that each of the rules mentioned by Mr. Berman is a reproduction of pre-revolutionary law which was by no means original but which adhered to the common standard of the procedural laws of continental Europe.¹⁸

Moreover, Mr. Berman omits to say that the Soviet code of criminal procedure contains many clauses of a retrogressive character. When, in 1864, the code of criminal procedure was enacted, it was emphasized that it no longer allowed an *ex officio* revision of judicial decisions which had been common practice in Russia up to 1864 and in most European

14. To the Anglo-American appeal there roughly corresponds the French born *cassation*, incorporated into Russian law in 1864.

15. IMPERIAL CODE Art. 405, 476.

16. In actuality, the victim of an offense acts as a plaintiff and cooperates with the prosecutor.

17. Compare Mr. Berman's statement cited in note 10 *supra*.

18. See Articles 611, 612, 613, 683, 719, 776 of the Imperial code of criminal procedure.

countries in the first half of the 19th Century. But the Soviet code allows such revision. For those who believe in trial by jury this fact will seem important: The Imperial code knew it, the Soviet code has eliminated it!

In general, careful comparison of the Soviet code with the Imperial code of criminal procedure, as well as of the Soviet penal code with the Imperial code of 1903 allows us to assert that the two Soviet codes are deteriorated versions of the two Imperial codes, which were Western in their principles. He who is familiar with the main trends of Soviet culture since 1917 will not be astonished. Insofar as Soviet law is not based on the new directive idea of socialism it borrows heavily from Russia's past, but seldom reaches the old technical standards so important in law, and not always does it choose for imitation the best of the models present in Russian legal history. Thus, for reasons unknown, the penal code of 1926 has partly gone back to the penal code of 1845, itself an improved version of the penal section of the code of 1832 based, as explained, on a compilation of Russian laws from 1649 to approximately 1830.

Similar statements could be made relating to civil law and civil procedure. Mr. Berman reproduces, obviously as one more model for eventual imitation, the definition of property contained in the civil code of 1922, *i.e.*, the right to possess, use and dispose of goods. He omits to say that this article repeats article 420, Volume X of the code of 1832, an article which every student of Russian law was supposed to know by heart. If this article is a challenge to American law, the challenge is of the Russian law of the days of the Czars.¹⁹

Secondly, the author emphasizes the Soviet conception of a homestead as familial property (260-63). Once again he ignores that this was a basic principle of Russian Common Law, *i.e.*, of the customary law which, concerning real estate and the family, regulated the relations of the members of peasant communities.

4. According to Mr. Berman the greatest challenge of Soviet law is its paternalistic or educational character. What this really means he has not clearly stated. He throws together such heterogeneous things as Petrazhitzky's theory of intuitive law,²⁰ Lenin's statement that law is primarily for the purpose of propaganda, and the direction of the new divorce law (July 8, 1944) to have trial preceded by an attempt to reconcile the parties. He omits, however, to say that conciliatory pro-

19. ZAWADSKY, *op. cit. supra* note 7, at 275. See also C. Zaitzeff, *Das Agrarrecht* in the symposium quoted in note 7, at 170.

20. In the Soviet Union, Petrazhitzky's ideas have fallen in disrepute since the middle of the twenties.

cedures were well-developed in Russia's pre-revolutionary law. He also mentions the trend of Soviet procedural law to replace the self-reliance of the parties with an active participation by the judge who may on his own motion join parties, call witnesses and raise relevant issues (455). This is the paternal aspect of Soviet law.

However is this a good model for imitation? If the judge becomes a *paterfamilias* and educator, will he not cease to be an instrument of the impersonal law, an agency through which individual wills are shaped to conform with the common will expressed in pre-established legal patterns? Mr. Berman is aware of this danger. He even asks the question whether the Soviet state is not a tyranny (463). He recognizes that there is much validity in such a charge, but rather slides over the problems posed by saying that, despite the totalitarian characteristics of the Soviet state, there is some meaning in the constitutional provision that the judges are independent (464). He pays much attention to the decree of July 29, 1948, instituting a disciplinary action against the judges (463, n. 36). But this decree again is merely a reproduction of the Imperial *ukaz* of 1885 which was decried by progressive jurists as an intolerable curb of judicial independence. Moreover, the author does not take into consideration the fact that all Soviet judges above the level of the people's courts are "elected" by Soviets or Supreme Soviets, *i.e.*, political bodies forming part of the pyramid of the dictatorial machine. Therefore, they can hardly be independent. The discretionary power granted them under paternalistic and educational pretexts must, and eventually does, degenerate into subservience to local and central bodies. Is this really a model for imitation by America?

Summing up, one may say that out of the individual challenges discussed by Mr. Berman, the first and the fourth are reflections in law of the collectivist and totalitarian nature of the Soviet system. For those who reject collectivism these are not challenges but danger signals.

The second and third of his challenges are imaginary since that which is opposed to American law is continental European law of which the law of pre-revolutionary Russia was a specimen. Ignorance of this fact has induced Mr. Berman to offer to American lawyers a cluster of misleading statements. Like every law in force, American law could and should be improved. But when drafting legal reforms American lawyers do not have to look with deference at Soviet law. In it there is no source of inspiration or challenge to American law.

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