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BOOK REVIEW

RUSSIAN LAWYERS AND THE SOVIET STATE. By Eugene Huskey†, Princeton, N.J.: Princeton University Press, 1986. Pp. xii, 228.

*Reviewed by George M. Armstrong, Jr.**

“The first thing we do, let’s kill all the lawyers.” Shakespeare, *King Henry VI Part II*, act IV, sc. 2.

The thoroughness of any social revolution might be measured by the degree to which the revolutionaries follow Dick the butcher’s advice. Lawyers are often considered one of the principal bulwarks of the established order, perhaps its best unarmed defenders. A revolution, the transfer of political power from one social class to another, usually involves the liquidation of the lawyers as well as the criminal and civil codes which are their tools.

The anomalous survival of the Russian bar after the Bolshevik revolution is not attributable to the charitable disposition of the communists toward lawyers. Lenin held the profession of which he had briefly been a member in particularly low regard, castigating defense counsel as “intellectual scum.” The legal profession survived the revolution because at its outset lawyers were not sufficiently important to engage the attention of Soviet leaders. A tradition of legal representation had not become well established in Russia and the bar was unimportant in size and influence in 1917. Integration of the bar into the power structure of the Communist Party was less urgent than the management of physicians, engineers and writers, to say nothing of industrial workers and peasants. Once socialism had ceased to be revolutionary and itself became the established order in the 1930s, the legal system replaced terror as an instrument of social control. Attorneys then became agents of the established power structure rather than its

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antagonists.

These are the conclusions which Gene Huskey presents in his recent study of the Soviet bar in the first post-revolutionary generation. Huskey's volume is itself a valuable contribution to the second generation of western scholarship on Soviet law. Samuel Kucherov and John Hazard, the pioneers of research in this field, examined the Soviet bar together with many other aspects of the legal system. The present study, when combined with other studies of the prosecutors, substantive and procedural law published in the last fifteen years is evidence of the maturity of scholarship in this discipline. A study which examines a single facet of the legal system can no longer be criticized for narrowness.

Historical precedents for the Bolshevik impact on the Russian legal system are rare. The legal system before and after the American Revolution was distinguished by continuity of private law and the practicing bar. The French Revolution, accompanied by the codification movement, exemplifies the societal reevaluation of the legal system toward which most Bolsheviks aimed. The Maoist attempt to abolish courts and formal law, substituting street corner justice and notions of revolutionary consciousness, illustrates the approach of radical Marxism toward the legal system.

The first twenty years of Soviet power witnessed a grand debate on the role of law in socialist society and a protracted political contest to determine the fate of the practicing bar. Huskey's contribution is to place the controversy surrounding the role of lawyers in the larger context of the debate on the role of law.

The Bolsheviks came to power in October 1917 without a blueprint for the organization of society.¹ The writings of Marx were almost exclusively devoted to analysis of the decay of capitalism, not the construction of socialism. Even such fundamental questions as the continued existence of personal property had not been addressed. The pre-revolutionary testament on the nature of law was also ambiguous. Friedrich Engels, Marx's chief collaborator, was a positivist, maintaining that law was imposed on society by the state which acted, in turn, at the behest of whichever class controlled the means of production. According to this view law derives its authority to bind the individual not from the inherent justice of the state's command, but from a governmental monop-

1. E. HUSKEY, *RUSSIAN LAWYERS AND THE SOVIET STATE* 36 (1986) [hereinafter *RUSSIAN LAWYERS*].

oly on legitimate use of force.

Engels' ideas, published in *The Origin of the Family, Private Property and the State*, were adopted by Lenin and expounded in *The State and Revolution*, written on the eve of the October uprising. In a lecture delivered at Sverdlov University in 1919, Lenin reiterated this positivist theory of law. Speaking of the state, he declared:

This mechanism—this group or persons governing others—always takes into its hands a certain mechanism of constraint—of physical force. . . . The methods of violence have changed. But whenever there was a state, every society had a group of people who governed—gave commands, exercised domination—and who, in order to retain authority, had in their hands a mechanism of physical constraint, of violence. . . .²

The principal writings of Marx on the nature of state and law were unpublished during his lifetime and were rediscovered after Lenin's death. Nonetheless Georg Lukacs, the Hungarian philosopher, discovered in *Capital* itself the foundation of what might be termed Marx's theory of natural law.³ Once Lukacs had published his research in Russian, his ideas were adopted by E.B. Pashukanis, justly famous as the premier Soviet legal philosopher.⁴

The salient distinction between naturalist and positivist theories is found in the definition of justice. A positivist, such as Hans Kelsen, declares that a law is just if it is enacted in proper form, with the necessary legislative majority and the executive's signature. Natural law theories attribute significance to the content of the law's command rather than to the procedure in which it was enacted.

Marx was not a traditional naturalist inasmuch as he rejected any appeal to the will of God, to reason, or nature as the source of law's authority. According to Marx the objective requirements of the mode of production—slavery, feudalism, capitalism or socialism—determine the content of the law's command.⁵ Allen Wood has written that for Marx, justice is determined "by the concrete

2. SOVIET LEGAL PHILOSOPHY 7 (H. Babbtrians ed. 1951).

3. G. LUKACS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 83 (1971).

4. E. Pashukais, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY, *supra* note 2, at 111.

5. THE MARX-ENGELS READER 136 (R. Tucker ed. 1972).

requirements of a historically conditioned mode of production. . . . [T]he justice of an act or institution is its concern fittingness to *this* situation in *this* productive mode. The justice of transactions, Marx says, is not a matter of form, but a matter of content."⁶

Lukacs introduced into Soviet Russia the notion that the content of legal norms corresponds to the requirement of the particular stage of economic development. In 1924 the Soviet theorist Pashukanis expanded this concept from a diagnosis of the nature of law in capitalism to a prognosis of the nature of the law in socialism.⁷

Capitalism is a society of private production and market exchange of goods. Market exchange, replacing production for personal use, is capitalism's remarkable characteristic in contrast to earlier epochs. The solidarity and hierarchy of medieval family, church, guild and community are replaced by an atomized society of equal, autonomous and egoistic individuals.⁸ Man defines himself, according to Pashukanis, by the characteristics which market exchange requires. Participation in the market affects the individual's self perception.

In socialism, on the other hand, the individual would "[merge] his ego with the collective and [find] therein life's highest satisfaction and meaning."⁹ Being liberated from the exchange of private property, Pashukanis believed that people would no longer view one another as isolated, autonomous individuals. The social solidarity of medieval community would return on a higher level of technology. Communist society would abolish law founded on principles of autonomy, equality and egoism and inspired by market exchange and replace it with technical rules of community administration of public property. Society would distribute necessary goods and services through the dole, not through the market. The victory of the planned economy, he wrote, will put an end to the idea of rights and to juridic personality and will govern economic relations by "technical expediency."¹⁰ Public administration would replace contract, just as contract had earlier displaced

6. Wood, *The Marxian Critique of Justice*, 1 PHIL. & PUB. AFF. 244, 257 (1971).

7. SOVIET LEGAL PHILOSOPHY, *supra* note 2, at 162.

8. *Id.* at 195.

9. *Id.* at 201.

10. *Id.* at 181.

property as society's central legal principle.

The role foreseen for lawyers in Soviet society depended upon the length of the transition period between capitalist society, regulated by law, and socialism, administered by technical norms and economic expediency. Lawyers, it was believed, would not be needed once all distribution was regulated by the economic plan. Initially the Bolsheviks expected the period of transition to be brief. Economic collapse, however, followed the civil war of 1918-1920 and the government reintroduced market exchange in 1921. The practicing bar, previously considered an anachronistic, vestigial remnant of pre-revolutionary Russia, suddenly became necessary to lubricate the wheels of this reintroduced market economy.

The Bolsheviks never developed a coherent policy toward the practicing bar. Their ambivalence was due in part to the nature of the profession. Huskey notes: "As the educated elite of the country, the intelligentsia was essential to the Bolshevik program of transforming Russia into a modern industrial state. However, as specialists whose social backgrounds and professional activities were associated with the old ruling circles, they posed a threat to the party's monopoly of political power."¹¹ Moreover the government had no consensus on the length of the period of transition to socialism, the period during which the assistance of lawyers would be necessary. Although Lenin once implied that the period of transition might require a generation, free economic exchange had in fact been eliminated by 1929.

Huskey's study also discloses another cause of the absence of coherent policy toward the bar, a fundamental aspect of the Soviet government which is too often ignored. That aspect is simply disagreement among leaders on the proper course to be pursued. Lenin, whose antipathy toward the bar has already been noted, differed markedly from other Bolsheviks who had practiced law under the old regime. Huskey describes this group as less unrelentingly hostile.¹² At least during the first decade after the revolution, competing factions in the government pursued different policies toward the practicing bar.

The preeminence of Stalin over his political adversaries, collectivization of agriculture and the introduction of economic planning wrought a "revolution from above" in Robert C. Tucker's words. A by-product of this revolution was a reconceptualization

11. RUSSIAN LAWYERS, *supra* note 1, at 3-4.

12. *Id.* at 37.

of the nature of law. Law was no longer considered a vestige of capitalism, lingering into the transition period. Stalin's acolyte, Vyshinsky, declared that law had attained a socialist content,¹³ a possibility flatly rejected by Pashukanis.¹⁴ The cause of this shift in legal theory was no mere, arid ideological dispute. Vyshinsky explained the purpose of socialist law as the strengthening of the Soviet state. Thus law ceased to be a relic of the previous era and became an officially acknowledged weapon of social control.

Law and terror were instruments of social control pursued simultaneously after 1932, Huskey argues. His periodization of Soviet history revises most western scholarship which has analyzed the Constitution of 1936 as the landmark of revived stability of law. Law and terror coexisted as methods of social control until the death of Stalin in 1953.

Owing to the specificity of his focus on the practicing bar, Huskey is able to proceed with care. His conclusions are well supported by material from original sources. Although his research is exhaustive, the product never descends into tedium. Huskey's study should be of interest to anyone who is concerned with the independence of the legal profession and the attorney's freedom to represent a client vigorously.

Law students in the United States learn that vindication of the client's interest excludes virtually all other considerations as the watchword of professional achievement. Although the presentation of a client's case is circumscribed by certain strictly defined obligations to the court, prudence rather than duty ordinarily restrain the attorney's zealous advocacy.

In Soviet society, on the other hand, the official ideology elevates the collective above the individual interest. The attorney's task of individual representation sits uneasily in the balance. The expedient course is to denounce one's client and to plead only for an amelioration of the sentence. But the rule of law, a guise in which the Soviet government frequently masquerades, urges the protection of individual rights.

The vicissitudes of governmental policy on the subordination of the individual to society compose a drama of which we have not seen the final act. Aspects of this drama pervade Soviet society, concerning not only legal representation but also the right of privacy, the management of state owned factories, rewards to inven-

13. SOVIET LEGAL PHILOSOPHY, *supra* note 2, at 332.

14. *Id.* at 201.

tors and every other realm of endeavor. The author's contribution is to disclose the multiplicity of ideas, strategies, interests and personalities which contribute to this developing story, the complexity of the relationships at any given moment and the impossibility of predicting the course of subsequent change.

