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“Consecrated Ignorance of Foreign Law”?†

*Evsey S. Rashba**

THE LEADING ROLE assumed by this country in international trade and international affairs has greatly contributed to the rising interest in foreign law. It is plain that lawyers who discuss matters with colleagues from civil law countries, or who are instrumental in dealings or proceedings taking place abroad or involving foreign elements, need at least some basic knowledge of differing legal institutions, terms and modes of thought prevailing outside the common law jurisdictions.

It can also be shown that lawyers, if properly trained, can be particularly helpful in the rather novel, peculiar and increasingly important task of analyzing and assessing the essence and the potentialities of the revolutionary regimes now confronting us. It is not always easy even to penetrate the elusive theories and pronouncements marking the various revolutions, and to perceive the true purposes of the new leaders. There is always a difference, however, between purposes and ways of doing, between words and deeds. The further and essential question which should be investigated in each instance, therefore, is whether, to what extent and how changes visualized by the revolutionaries have been factually implemented. Such an implementation is impossible without, and inseparable from, legislative enactments designed to mold the new regime. Hence the usefulness of invoking the lawyer's skills for a proper study of the new statutes and the way in which they have worked and become living law or have failed and remained dead letters. There can be hardly a better means to discern crucial points in the social structure of new Russia, or China, or, say, Argentina.

The most important example is Soviet Russia. What were the theories and the purposes of the Russian revolutionaries? It will be recalled that, elaborating on the teachings of Karl Marx, they held that the now prevailing capitalistic social order was characterized by increasing disadvantages and conflicts; that another system was in the offing; and that this socialist or communist system would eliminate the evils of capitalism and secure a better life and a harmonious society. It has been the declared purpose of the new rulers to subvert the existing capitalist way of life and to replace it by the new one. The change, as envisioned by them, went primarily to the economic side of social relations. First, it meant elimination of private ownership as a basis of economic life and establishment of public ownership in factories, mines and other means of production. It means, secondly, suppression of businessmen, who buy tools, raw material and manpower,

† “All systems of law are to some extent rooted in tradition, and this traditional aspect of national law has, in all countries, produced an intransigent attitude toward any attempts to promote the study of foreign legal institutions and foreign rules of law. . . . The explanation of this aspect of our English legal mentality is to be found, as Maitland has said, ‘in our very complete and traditionally consecrated ignorance’ of foreign law.” GUTTERIDGE, *COMPARATIVE LAW* (1946).

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and organize production, motivated by the expectation that by selling their goods they will make a profit and increase their initial invested capital; and spelled management of economic enterprises by public servants, not because of an expected profit but, as the expression goes, "for use," that is, for satisfying the people's needs. It involved, thirdly, the resolve not only to uproot free enterprise, but also to build in its stead a novel kind of planned economy.

The Russian revolutionaries first thought that any law was "bourgeois" in character and that their war against the bourgeois world called for an outright destruction of the law. But, after experience had shown them that organization of an orderly society was impossible without a legal framework, they changed their initial view, turned towards restoration of the law and undertook to make their legal system respond to the demands of their government dominated welfare economy. Soviet endeavors to implement and develop such economy could not but be mirrored, then, in the Soviet law, its problems and its difficulties.

The first task undertaken by the Soviets, establishment of public ownership in factories, railways and other economic enterprises, as it now exists in Russia, calls for governmental agencies to exercise control over them. Designated agencies are subordinated to higher ones, and their executives are subject to orders of superiors. Those connected with the various agencies, executives and other employees, have a status which can be compared to that of our military and civil service personnel. Yet the same agencies are also supposed to conduct sales and other transactions with each other which are not dissimilar from those known in the capitalist world. Simultaneous application of the two different, if not opposite, schemes partaking of administrative and private law principles, requires an unusual interplay between bureaucratic and businesslike ways of doing. Efforts to rationalize and to organize such interplay have been going on for years. The traditional notion of sale has been twisted. Since Soviet theory considers ownership of all assets administered by the governmental agencies to be vested in the people at large, lawyers concluded that sales contracts made among the agencies could not involve transfer of ownership but simply a change in persons entrusted with handling the properties in question.¹ Recourse against identical acts, such as a bank's refusal to comply with a client's order of payment, can be different in different cases. If the bank, in the exercise of its supervisory function, takes the position that the requested payment would violate a government regulation binding on the client, the latter can appeal, but only to the higher administrative officials. If the refusal is made on the ground that the account does not show a proper balance, and the client insists that there was an error in the bank's accounting,

¹ R.S.F.S.R. CIVIL CODE § 180 still contains the traditional definition, "By the contract of sale one party (the seller) undertakes to transfer property to the ownership of another party (the buyer), while the buyer undertakes to accept the property and to pay the price agreed upon." This definition will be changed, however, in the U.S.S.R. CIVIL CODE now in preparation. See, e.g., 2 AGARKOV, BRATUS', GENKIN, SEREBROVSKI, SHKUNDIN, GRAZHDANSKOE PRAVO [Civil Law] 3-5 (1944); VENEDIKTOV, GOSUDARSTVENNAIA SOTSIALISTITSIESKAIJA SOBSTVENNOST' [State Socialist Property] 357-360 (1948).

he may start an action in a court of law.² How to evaluate the effectiveness of the many rules and procedures, grown out of the spread of public ownership, is a real problem.

Facts pertaining to the measure of efficiency of Soviet economy, run as it is by government officials, are apt to interest us because they afford an opportunity to verify the widely accepted view that bureaucrats could never match performances originating within the framework of private enterprises. It will also be noticed that since most goods are bought and sold in Russia at fixed prices the market cannot serve there to test economic efficiency as it does with us, and that the role which profits play in this connection under our system has been largely eliminated. In using the word "profits" the Russians give it a different connotation, not commercial, but technical. So-called profits are shown on the books of their establishments when productivity of labor, utilization of raw materials and other technical data correspond to, or surpass, the prescribed standards and keep the cost of the product low, warranting such things as higher pay to those responsible for the good results. In their striving to cut waste and improve work organized on new principles, with businessmen excluded, the Soviets have been applying traditional devices together with many new ones invented by them and peculiar to their system. Their statutes have introduced whole sets of legal controls intended to meet and check mistakes and abuses before they cause actual damage. By way of illustration, the new control function assigned to Russian banks has already been mentioned. They must be furnished by their clients with specified data explaining the purpose of each movement of their funds. They may not permit funds reserved for capital investment to be used for current expenses, or vice versa. They may not permit an agency to withdraw money to pay wages and salaries of its employees if the corresponding insurance dues are not remitted at the same time. They will "signalize" trouble if certain accounts or "limits" appear to be overdrawn.³ It may well be asked, how exactly are these and other arrangements supposed to function and whether they have actually counterbalanced suppression of the businessman's profit incentive, so decisive in the operation of our system, and if so, to what extent.

The further salient feature of the Soviet system, their planned economy, confronts us with other unusual situations. Economic planning as practiced in Russia involves obligations on the part of various economic agencies to contract among themselves. Central authorities frequently issue "orders" to the agencies to proceed with, or to speed up, completion of contracts.⁴ If the parties who, paradoxically enough, are required to agree

² See, e.g., Khalina, *Pravovoe Polozhenie Gosudarstvennogo Banka S.S.S.R.* [The Legal Status of the State Bank of the U.S.S.R.], BULLETIN OF THE ACADEMY OF SCIENCES OF THE U.S.S.R., Section of Economics and Law 3, 10-11 (1947, No. 1).

³ See, e.g., Shkundin, *O Juriditsheskoj Prirode Rastshetnogo Shteta* [On the Legal Nature of the *Rastshetnyi* Account], SOVETSKOE GOSUDARSTVO I PRAVO [Soviet State and Law] 33 (1950, No. 5). The adjective *rastshetnyi* is a legal term characterising the kind of bank account in question, close to, but identical with, our "current" account. It has no counterpart in English.

⁴ See, e.g., Baranov, *Khoziaistvennyi Dogovor—Orudie Vypolnenia Gosudarstvennykh Planov* [Contract in the Field of Economics as a Means of Implementing Governmental Plans], PLANOVOE KHOZIASTVO [Planned Economy] 63 (1949, No. 5).

do not come to terms within a reasonable time, a "pre-contractual litigation" ensues. Newly devised governmental bodies (the *arbitrazh*), with mixed characteristics of courts of justice and of administrative tribunals, have been vested with jurisdiction over this novel kind of litigation. The judges, arbitrators (*arbitry*), trained not only in law, but also in matters pertaining to particular branches of industry, are expected to settle the differences in a simple, speedy and inexpensive procedure, and with a view to the governmental plans and the requirements of economic efficiency at large.⁵ We are told that these arrangements have proved to be most satisfactory. Western lawyers will wonder, however, whether contracts arrived at in such a way still retain an appreciable relation to the traditional consensual elements, meeting of minds, freedom to accept or to refuse.

Soviet planning embraces also distribution of the labor force. Because of shortages of skilled workers and engineers required for the developing branches of industry, thousands upon thousands of boys and young men are drafted to be sent to designated schools to learn the needed trades at government expense. When graduated they are assigned to their future posts, as soldiers are with us. Their failure to report for work as ordered would be a criminal offense. Most people in the Soviet Union are not permitted to leave or to change their jobs without official approval.⁶ The assumption is, of course, that all this serves the common good. But did not similar assumption lay the groundwork for serfdom that was abolished in Russia less than one hundred years ago? Does it not loom again on the Russian horizon?

A Russian law teacher has recently written that "it is necessary to know the bourgeois law, not for the purpose of accepting it, but to be able, knowing the own law and the foreign, to perfect the own and to uncover the reactionary, exploitative character of the bourgeois law, to pound it in its most sensitive areas."⁷ Many American lawyers may be willing to subscribe to similar statements, once the word "bourgeois" is replaced by the word "Soviet". The fact is that a thorough study and interpretation of the Soviet law and its operation, relating to the numerous questions and situations which hitherto have remained obscure, would be of great theoretical and practical importance.

Under these circumstances, and at the present juncture of world affairs, a recent book by Harold J. Berman,⁸ *Justice in Russia, an Interpretation of Soviet Law*,⁹ published under the auspices of Harvard University, and under a grant from the Carnegie Corporation, deserves attention. The book

⁵ See *ARBITRAZH V SOVETSKOM KHOZIAISTVE* [*Arbitrazh in Soviet Economy*] (Mozheiko and Shkundin 2d ed. 1938). See also Rashba, *Settlement of Disputes in Commercial Dealings with the Soviet Union*, 45 *COL. L. REV.* 530, 534 (1945). In spite of the similarity in terms no useful analogies can be drawn to American arbitration.

⁶ *ALEKSANDROV AND GENKIN, SOVETSKOE TRUDOVOE PRAVO* [*Soviet Labor Law*] (1st ed. 1946).

⁷ Kazantsev, *Zadatski Nautshno-Issledovatel'skoi Raboty v Oblasti Prava* [The Tasks of Scientific Research-Work in the Field of Law], *BULLETIN OF THE ACADEMY OF SCIENCES OF THE U.S.S.R., Section of Economics and Law* 36 (1950, No. 1).

⁸ Assistant Professor of Law, Associate in the Russian Research Center, Harvard University.

⁹ Harvard University Press, Cambridge, Mass., 1950, x, 322 pp.

consists of three parts treating the subject from three different viewpoints as Socialist Law, Russian Law and so-called Parental Law. The author rightly starts with, and puts the accent on, socialist features developed under the Soviets.

Berman's explanation of these features shows, unfortunately, that he has difficulty in perceiving either the rationale of Soviet endeavors or the essential points of the system operating in Russia. This may be due, at least to a great extent, to a misconception of crucial aspects of Marxist, and for that matter of Leninist and Stalinist, teachings.¹⁰ For example, a basic doctrine of Marx is the so-called labor theory of value as developed by him in the first volume of *Das Kapital*. The initial form of this theory, going back to the classical economists, was to the effect that generally the exchange value of commodities in a free enterprise economy is dependent on the amount of labor expended for their production. Our author seems erroneously to assume that Marxian socialists, as did the earlier economists, apply this theory to the valuation of commodities only.¹¹ The formidable step made by Marx consisted precisely in his attempt to extend the theory to cover the valuation of labor itself. He came to the conclusion that, as long as labor is sold and bought in a free market as are commodities, its value expressed in the amount of the wage must tend to correspond to the amount of "labor necessary to produce the labor," that is, to the cost of the necessities of life required to make the worker go. It is from this thesis that Marx and his followers drew the explosive consequence that the worker in our society is paid but a part of the value that he produces and that the other part, the "surplus value", is appropriated by the owner of the means of production and goes into capitalist profits. It also led Marx and the Russian revolutionaries to claim that "wage slavery", inherent in the allegedly exploitative nature of capitalism, could only disappear, and other advantages ensue, if and when the means of production are owned by society along the lines already mentioned.¹² This idea which, among others, became an obsession with the Soviets, has influenced many things in Russia. It has determined the character of the Soviet planned economy. It cannot be of much use to discuss planning in general, as Berman does. For instance, planning born out of war or other emergency may turn primarily on rationing. Planning dominated by cartel interests may operate in restraint of trade and for no other purpose but swelling the profits of big business. The planned economy of the Soviets, on the contrary, purports to eradicate investors' profit motive altogether, in accordance with the underlying theory, and to modify radically the moving forces which direct the flow of investments and labor. As distinguished from schemes adopted elsewhere, their

¹⁰ Among statements made by Berman, are: "Marxism, according to its founders, is 'no doctrine but a movement'" (p. 8); "Socialism, in its economic aspect, is industrialization by planning" (p. 59); "Rights, according to the Marxist, are reflexes of subconscious interests. But Marxism, like Freudianism, offers no solution 'within the system'. Marxism cannot tell a judge whether to qualify a certain act as a breach of contract or a personal injury" (p. 12).

¹¹ See, e.g., BERMAN, *op. cit. supra* note 9, at 59.

¹² It was recognized that in a time of mass production it was impossible to abolish the wage system by having the means of production belong to the man who uses them.

plans have the force of law and are binding on all concerned. Berman's apparent failure to recognize and to make clear, here and at other points, important characteristics of the Soviet system leads him to fatal mistakes and strange conclusions.¹³ This can be illustrated.

There are few things on which the West and the East agree. One of them seems to be that our and the Soviet social systems are radically different. The problem therefore should be, not to have them mixed, but to see whether and how they can live together, and compete, peacefully.¹⁴ It appears, however, that Berman does not share this view. Apparently confusing Soviet socialism with state capitalism and social legislation, on the one side, and capitalism with personal initiative and efficiency, on the other, he holds that "not only the Soviet and the American economies, but any modern going economy, is a mixture of socialist and capitalist elements" and that "a progressive fusion of these elements" takes place.¹⁵ It is unlikely that he would have overlooked the limit beyond which this position, attractive to many well-intentioned people, becomes dangerously misleading, if he had gone to the bottom of the difference involved in the case of Russia. With us business has been protected and encouraged. The Soviets have been concerned with putting business out of business.

The legal implications of this difference are not difficult to detect. For example, the Soviet concepts and incidents of property¹⁶ and contract¹⁷ are at variance with ours. In Russia, so-called socialist property by statute receives special and privileged treatment.¹⁸ As already mentioned, it became necessary there to conceive of and deal with novel pre-contractual litigations. Furthermore, stock and commodity exchanges, and also the profession of broker, are nonexistent, and shares of stock practically unknown. No Russian receives dividends. The number of houses which a Russian may own is limited.¹⁹ He is forbidden to open a grocery store.²⁰ He is sent to jail if convicted of having bought some necessities of life with the intention of

¹³ As to the author's earlier work, Berman, *The Challenge of Soviet Law*, 62 HARV. L. REV. 220, 449 (1948, 1949), see Timasheff, 53 THE COMMONWEAL 101 (Nov. 3, 1950).

¹⁴ Cf. Rashba, Address on Soviet Law, Procedures, A. B. A. International and Comparative Law Section, 51, 55 (1948).

¹⁵ BERMAN, *op. cit. supra* note 9, at 92.

¹⁶ See, e.g., a leading Soviet textbook, VENEDIKTOV, *op. cit. supra* note 1.

¹⁷ See, e.g., AGARKOV, OBLIAZATELSTVO PO SOVETSKOMU GRAZHDANSKOMU PRAVU [Obligations in Soviet Civil Law] (1940).

¹⁸ See, e.g., Statute on Protection of Socialist Property, August 7, 1932, COLLECTION OF LAWS, U.S.S.R., c. 360 (1932).

¹⁹ See, e.g., R.S.F.S.R. CIVIL CODE § 182. Cf. BRAUDE, SDELKI PO STROENIAM [Transactions Concerning Buildings, Handbook, with forms] (1946).

²⁰ R.S.F.S.R. CIVIL CODE § 5 providing, among other things, that a citizen has a right "to organize industrial and commercial enterprises" is still on the books. See GRAZHDANSKII KODEKS [Civil Code] 11 (official annotated edition by People's Commissariat of Justice, 1943). It is, however, settled that this provision of the code is no longer law; in this connection Russian lawyers refer to the UNION CONST., Arts. 7, 9, 10, 11, 12, 118, 126, 130 and 131 (1936). *Id.* at 130. Compare the Union enactment of May 20, 1932, "Not to permit the opening of stores and shops by private merchants and to uproot by all means those buying for resale and speculators trying to enrich themselves at the expense of workers and peasants," COLLECTION OF LAWS, U.S.S.R., c. 233 (1932).

reselling them at a profit.²¹ Berman realizes, of course, that the legal systems of East and West are very different. But, as his book shows, and as he states expressly in writing of Soviet law and of the law of wartime America, he takes the position that "the differences are not immediately apparent in the codes, statutes, decisions, and rules of positive law" or in the "external normative acts" of the Soviets.²² He does not even engage in an analysis of legal texts, legislative techniques, administrative and judicial rules and practices.²³ He thus implicitly admits the failure of his attempt to use legal material for shedding light on signal peculiarities of Soviet socialism which otherwise would easily escape us.

The second part of Berman's volume deals with historical roots of the Soviet law. It could have been informative if the author had focused more attention on important facts. It is well known that until the Soviet revolution more than eighty per cent of the Russian population were peasants, that the so-called "agrarian question" was the perennial problem of Russian history and that the emancipation of the serfs (1861) and subsequent agrarian legislation were outstanding events, which, in the opinion of many scholars, contained the seeds of the tremendous upheavals of our time. Berman devotes some ten lines to the emancipation of the serfs including connected questions,²⁴ and three to four lines to the Stolypin reform undertaken under the last Tsar.²⁵ He devotes, by contrast, page after page to describe such things as the rather irrelevant activities of ten successive commissions which, over the period of more than one hundred years, attempted to codify the Tsarist law.²⁶

Another point is that purposeful discussion of historical facts, whatever their importance, must presuppose in our case that they are apt to suggest some connection between those facts and present or anticipated events. But links which Berman, without any further explanation, postulates in this respect are often gratuitous. He speaks of a "semilegal conception of the right of high dignitaries of the Church to intercede in behalf of the victims of the tsar's displeasure," as it existed in Russia some three or four hundred years ago, and imagines that it is this ancient right of petition which is preserved in the Rules of the Russian Communist Party which assure the members the right, among others, "to address any question or statement to any Party body, up to and including the Central Committee."²⁷

²¹ R.S.F.S.R. CRIMINAL CODE § 107 as interpreted by the U.S.S.R. Supreme Court, Plenary Session, Ruling of February 10, 1940, SOVETSKAYA JUSTITSIYA [Soviet Justice] 33-34 (1940, No. 4).

²² BERMAN, *op. cit. supra* note 9, at 200-201.

²³ He often fails to define the legal terms referred to. *E.g.*, at p. 187, "A special category of property, peasant household property, has been recognized—different from personal property, different even from joint property, and different from collective and state property." But none of these terms is explained, even though none means what the words are likely to suggest to an American lawyer. When the author tries to give a definition, he uses such phrases as: "Administration in the Soviet sense is . . . something less than ownership, but something more than giving orders" (p. 63); "codes . . . are statements of basic rules of law . . . which may be overridden by legislative and administrative decrees" (p. 166). See also note 61 *infra*.

²⁴ BERMAN, *op. cit. supra* note 9, at 147.

²⁵ *Id.* at 149.

²⁶ *Id.* at 139 *et seq.*

²⁷ *Id.* at 134, 135 and 164.

He tells us that "the sense of group identity which stems from the Russian Orthodox religious tradition of Kievan Rus" (862-1240) survives in the Soviet institution of the Comrades' Court which lets workers themselves sit in judgment on minor offenses committed within the plant.²⁸ It would seem that these and other speculations do not contribute at all to a genuine comprehension of the Soviet law or of the Soviet Union.

In the third and last part of his work Berman elaborates on what he calls the "paternal" character of Soviet law. Many of his pages, especially those dealing with collateral matters, are here very confusing. It is difficult to understand his terms "official laws" and "unofficial laws",²⁹ or to realize why there should be "an inevitable conflict between the specific economic functions of management and labor,"³⁰ or why, as the author states, the two tests of responsibility, psychiatric and legal, "remain logically as irreconcilable as ever."³¹ But Berman's main point is clear. He senses, and rightly so, that there is a notable difference between accents put on law and legal institutions in America and in Russia. He points out that rugged individualists vigorously pursuing their own advancement, and, in the final analysis, serving also the community, have been representative of American ways. Law, he thinks, has been conceived with us primarily as a means of delimiting interests, and of preventing interference by one person in the domain of another. Judges can tend to sit back as umpires while the opposing parties do battle with each other, since "independent adults" are supposed to know how to take care of themselves.³² All this, Berman rightly notes, is quite different under the Soviets. Rugged individualism has never been common, nor approved of, in Russia. *The Russian Idea*³³ has always stood for cooperative efforts and for primary devotion to causes transcending a man's own transient material existence. The revolution has pressed for patterns and endeavors which, according to the new Communist Orthodoxy, are assumed to be true and right. Judges are required to go further than ours do, to actually participate in the proceedings and to elicit by all means the true rights and relations of the parties as they actually exist.³⁴ Judges, moreover, are expressly required always to keep in mind the task of educating the citizens "in the spirit of devotion to their country and the cause of socialism, in the spirit of strict and undeviating observance of the Soviet laws, in a watchful attitude toward socialist property, in labor discipline, in an honest attitude toward governmental and public duties, and in respect for the rules of socialist community life."³⁵ The educational role

²⁸ BERMAN, *op. cit. supra* note 9, at 255.

²⁹ *Id.*, *e.g.*, at 201.

³⁰ *Id.* at 250.

³¹ *Id.* at 231.

³² *Id.* at 204.

³³ This is the title of a book by the late Russian émigré philosopher Nikolai Berdiaiev (Engl. edition, London, 1947).

³⁴ Thus, the court "may not restrict itself to the explanations and materials submitted to it, but must, by interrogating the parties, contribute to a clarification of the facts relevant to the decision of the case . . . so that no advantage may be taken of inadequate knowledge of the law or illiteracy or similar circumstances." R.S.F.S.R. CODE OF CIVIL PROCEDURE § 5.

³⁵ JUDICIARY ACT OF THE U.S.S.R. § 3.

of the courts is thus far greater in the Soviet Union than with us where, as Berman remarks, it is at best indirect and secondary. The author properly recognizes, even though vastly exaggerates, the importance of this fact. But apparently he does not see its relation to the peculiar approach of the Russians to their fellow-men and to the community to which they belong. Berman's thesis concerning the educational or, in his terminology, the "paternal" aspect of the Soviet law is to the effect that the Soviet citizen is considered to be a member of a "still immature society," a helpless cub, a child, and not a rugged bear-man, and who "like a child or youth" is "to be trained, guided, disciplined, protected."³⁶ Berman has here, perhaps, improperly combined and developed elements taken from schemes of "parental", "socialized", and "intuitive" law sketched, with a view to other phenomena, by such men as Llewellyn, Pound and Petrazhitskii.³⁷

In spite of the shortcomings of *Justice in Russia*, the book provides an unusual opportunity for illustrating some of those factors which appear necessary in the difficult task of analyzing foreign law.

A lawyer undertaking ordinary affairs is seldom concerned with basic problems of law and jurisprudence. It is different when, as in the case of the Soviets, he investigates a system seemingly rooted in doctrines which question the very role of law in society and even suggest that the state, and with it the law, might "wither away" altogether. In such cases clear vision of the field requires realization of the fact that existence of society without law is not only practically, but also logically, unthinkable. Once this is understood, we will tend to consider the withering-away idea, propounded with many others by the founding fathers of Marxism, as kept on the books primarily because of Soviet reverence for the old masters. It can be disregarded for all practical purposes.

A peculiar intertwining of private and administrative law elements has been an outstanding feature of the Soviet legal system. This is the field where we can find the greatest number of legal inventions made under the Soviets, which should interest the lawyer just as new surgical methods or jets devised by the Russians must interest a physician or a military man. However, to appreciate rightly these inventions and their practical effect we must grasp that private law and administrative law are but two sides of the same coin. Yet for Berman law is one thing and "administration of things", imagined by the early Marxists, another. The latter dimly visualized that after the withering away of the state there would be a "social order based not on law but on administration,"³⁸ and that society "would be," as Berman puts it, "regulated, administered—much as traffic at an intersection is regulated by traffic-lights and by rules of the road."³⁹ Our author does not show that a traffic light stands for a policeman with a raised hand, and that rules of the road are very much legal in character, and must so remain. Administration and law, and also Plan and Law, remain for him

³⁶ BERMAN, *op. cit. supra* note 9, at 205.

³⁷ *Cf. id.* at 307, 308.

³⁸ *Id.* at 17.

³⁹ *Id.* at 31.

two separate "columns" on which the Soviet system rests. He is aware, of course, that they must coexist. He tells us: "Administration is not enough; there must also be rights of possession, use, and disposition. Fiat and decree are not enough; there must also be adjudication on the basis of established norms."⁴⁰ But he does not admit that there is no inherent conflict between administration and rights of possession, use, and disposition, or between decree and established norms.

Again, confronted in the case of Russia with novel, sometimes exorbitant, and often challenging, facts which can be easily overlooked or misinterpreted, many will feel that before venturing a definitive comment on them they should learn and ponder what prominent men have thought and said about the subject. Leon Duguit is among the few legal scholars of the West mentioned by Berman, even though casually, in his book. Duguit concerned himself with legal aspects of the idea that protection of a person's right should be considered as based not on a concept of a mysterious, absolute, "natural" right, but on realization that rights and their exercise fulfill a useful social function. The judge was thus expected to refuse enforcement of a right where its holder exercised the right in a way inconsonant with its assumed social function or, in other words, where he abused it.⁴¹ These remarks, very inadequate indeed, will nevertheless show that Duguit was far from divorcing right and social function but, on the contrary, used the latter concept for trying to fix the scope and limits of the former, and to clarify the law with regard to so-called abuse of rights, *damnum absque injuria*, and so forth. His relativistic approach to the problems of protection of rights appealed to revolutionary jurists.⁴² Soviet legislators when drafting the famous Section 1 of their Civil Code⁴³ followed Duguit and his colleague and friend, Saleilles.⁴⁴ But in what connection does Berman mention the name of the French scholar? He does it when touching upon the Soviet concept of state ownership. He writes: "What the state owns it has the right to possess, use, and dispose of. But what a state business enterprise may possess, use, and dispose of—it does not own! May one speak, then, of a 'right' of possession, use, and disposition in the state business enterprise? Or does not the enterprise merely exercise certain economic-administrative functions delegated to it by the

⁴⁰ BERMAN, *op. cit.* *supra* note 9, at 254.

⁴¹ See DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLEON* (1920); 2 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* (especially, ch. 2) (2d ed. 1923).

⁴² Later on, Duguit was dismissed in Soviet Russia because he linked social purposes of rights with what the French call by the self-explanatory word, *solidarisme*, and not, as the Soviets would have wished him to do, with class struggle, teaching of which Duguit regarded as "abominable". DUGUIT, *LE DROIT SOCIAL, LE DROIT INDIVIDUEL, ET LA TRANSFORMATION DE L'ÉTAT* 3 (2d ed. 1911).

⁴³ R.S.F.S.R. CIVIL CODE § 1 reads: "The law protects private rights except in cases in which they are exercised in contradiction to their social and economic purpose."

⁴⁴ See, especially, SALEILLES, *ETUDE SUR LA THÉORIE GÉNÉRALE DE L'OBLIGATION* (3d ed. 1914) at 371 [translated]: "The true formula would be that which sees an abuse of right in an abnormal exercise of the right, an exercise contrary to the economic or social purpose of the subjective right, an exercise condemned by the public conscience and, consequently, going beyond the scope of the right, because, from a social view point, any right is relative and there are no rights, not even property rights, which are absolute."

state?"⁴⁵ The author ascribes to Duguit the position that "a right is nothing but a social function,"⁴⁶ and also "that the protection of 'social function' should replace the enforcement of individual rights,"⁴⁷ and thus hardly does justice to Duguit. He proceeds to look for an answer to a question of his own making: "How are we to test the difference between a right and a function?"⁴⁸ a question which is in itself as queer and illogical as would be a question about the difference between automobile ownership and automobile driving.

Just as it is impossible duly to assess the value of novel, or allegedly novel, ideas without following up, at least to a certain extent, their pedigree, it is also impossible properly to appraise peculiarities of statutes or judicial techniques of a revolutionary regime if we are not acquainted with comparable facts prevailing elsewhere. Among illustrations provided by Berman, we may choose his reference to an important provision of the Soviet Civil Code⁴⁹ to the effect that "where a person, under the pressure of distress, concludes a transaction clearly unprofitable to him, the court, on the petition of the damaged party, or on the petition of a proper government agency or social organization, may either declare the transaction invalid or preclude its operation in the future."⁵⁰ The author⁵¹ considers this provision to be a "revolutionary innovation."⁵² This assumption ignores many kindred provisions concerning void or voidable contracts which have been standard in major civil law jurisdictions.⁵³ He wants us to believe that the Soviet provision was derived—where is the connection?—from a Soviet social policy similar to that which, he says, led the Soviets to minimize the element of fault in regard to liability for personal injury.⁵⁴ Again, Berman's statements that continental courts in writing their opinions "only rarely mention the cases which were relied upon,"⁵⁵ and that the Ruling Senate, as the supreme court in pre-revolutionary Russia, "tended to decide cases on the basis of edicts then in force with little reference to past or future,"⁵⁶ are examples of unfounded generalizations.⁵⁷

⁴⁵ BERMAN, *op. cit. supra* note 9, at 61.

⁴⁶ *Ibid.*

⁴⁷ *Id.* at 29.

⁴⁸ *Id.* at 61.

⁴⁹ R.S.F.S.R. CIVIL CODE § 33.

⁵⁰ BERMAN, *op. cit. supra* note 9, at 29.

⁵¹ *Ibid.*

⁵² In doing so, Berman does not aim at the mention of a possible petition by a government agency or social organization, a somewhat peculiar collateral point which, according to Gsovski has been disregarded since 1938. 1 GSOVSKI, SOVIET CIVIL LAW 32 (1948).

⁵³ See, e.g., GERMAN CIVIL CODE § 138, which, in its second paragraph (as translated by Chung Hui Wang, London, 1907, at 31) reads that "a juristic act is also void whereby a person profiting by the difficulties . . . of another, causes to be promised or granted to himself or to a third party for a consideration, pecuniary advantages which exceed the value of the consideration to such an extent that, having regard to the circumstances, the disproportion is obvious," a common instance of this being usury.

⁵⁴ BERMAN, *op. cit. supra* note 9, at 28, 29.

⁵⁵ *Id.* at 119.

⁵⁶ *Id.* at 153.

⁵⁷ See Rheinstein, Book Review, 64 HARV. L. REV. 1387, 1391 (1951); David, Book Review, 99 U. OF PA. L. REV. 718, 720 (1951).

Another point goes to semantic difficulties. An American dealing with foreign law cannot be content with only knowing the meaning of legal terms as used at home, since they may have a different connotation under other legal systems. Here is an example. Discussing criminal negligence under Soviet law, Berman assumes that at trial the question must arise "there and here": "Ought he to have foreseen the consequences of his negligence?"⁵⁸ In fact such question would appear as tautological to the Russians. There can be "negligence" with us, but not with them, without a finding that the accused could and should have foreseen the consequences of his act.⁵⁹

Other difficulties are rooted in misunderstanding of foreign words. Thus, in speaking of the Soviet collective contract in the context of the labor law (*kollektivnyi dogovor*), Berman affirms that the Russian "collective" (*kollektiv*) refers to the enterprise as a whole and concludes that the collective contract is in effect the plant program.⁶⁰ Thus he apparently confuses the noun "collective" (*kollektiv*), denoting a body of persons united by common profession or occupation, with the adjective "collective" (*kollektivnyi*) which, when qualifying the word contract (*dogovor*), indicates, just as in other languages, that the contract applies not to a single man but to a multitude of employees.⁶¹

Illuminating treatment of obscure and controversial situations calls for clear thinking and clear speech applied to making complicated and strange things appear simpler and more intelligible. Berman, when confronted with a difficulty, often uses a cavalier or cryptic phrase or, sometimes, merely a capital letter. He tries to convey the meaning of the Russian word *pravo*, and to distinguish it from the Russian word *zakon*. Instead of explaining this word in the same way in which its exact German and French counterparts, *Recht* and *Droit*, are ordinarily explained and distinguished from *Gesetz* and *Loi*, he says that *pravo* "means law in the large sense, with a capital L, connoting Right and Justice."⁶² Why does not *zakon* (*Gesetz, loi*) mean law in the large sense, with a capital L? And is it really so that such expression as *torgovoe pravo* (commercial law, *Handelsrecht, droit com-*

⁵⁸ BERMAN, *op. cit. supra* note 9, at 218.

⁵⁹ According to the RESTATEMENT OF TORTS § 282 (1934) negligence is "any conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm", and, *id.* § 283, the standard with which a man "must conform to avoid being negligent is that of a reasonable man under like circumstances." According to R.S.F.S.R. PENAL CODE § 10 (as translated by the Foreign Office, London, 1934, at 82), "persons who commit socially dangerous acts" shall be punishable "only—(a) if they acted deliberately, *i.e.*, if they foresaw the socially dangerous consequences of their acts . . . or (b) if they acted carelessly, *i.e.*, if they did not foresee the consequences of their acts although they ought to have foreseen them, or if they light-mindedly hoped to avert such consequences."

⁶⁰ BERMAN, *op. cit. supra* note 9, at 262.

⁶¹ Berman's concept of "unofficial" rights and duties under "collective contracts" (p. 262) also seems at variance with the position taken by Soviet jurists. See, *e.g.*, Dogadov, *Etapy Razvitiia Sovetskago Kollektivnogo Dogovora* [Stages of Development of Soviet Collective Contract], BULLETIN OF THE ACADEMY OF SCIENCES OF THE U.S.S.R., Section of Economics and Law 83 (1948, No. 2); *K Voprosu o Sub'ekтах Sovetskago Kollektivnogo Dogovora i Evo Pravovoi Sile* [On the Question of Subjects of Soviet Collective Contract and Its Legal Force], *Id.* 202 (1950, No. 3).

⁶² BERMAN, *op. cit. supra* note 9, at vii.

merciale), or *pravo kreditora* (creditor's right, *Recht des Gläubigers, droit du créancier*), among innumerable others, are supposed to connote Right or Justice? Such loose verbiage as used throughout in Berman's book results in inconsistencies, and formulations, which can hardly be understood, if at all. A few examples have been given in the preceding pages.⁶³ They could be easily multiplied.⁶⁴

Of course, there have been other, and important, publications in the field of foreign and comparative law. Most of them have dealt with the laws of Western Europe and, partly, of Latin America. As far as Soviet law is concerned, it may suffice to name the work of Gsovski.⁶⁵ Berman's book is an ominous symbol of inadequate knowledge which still prevails in our profession with regard to legal systems and conditions abroad, especially with regard to those existing in uncongenial societies, built on unfamiliar bases and engrossed in unfamiliar pursuits. Many high placed and interested lawyers do not even suspect that general and specialized books, monographs and articles on property, economic organization, contracts, and so forth, have been actually printed and studied under the Soviets;⁶⁶ that, whatever the abyss which divides them from our Western world, their candidates for law teachers, independently of their special field, must show proficiency in Latin and in two living foreign languages, with particular regard to legal terminology;⁶⁷ that some of their publications have digested and discussed Roman, German, French, English and American authorities, and, sometimes even referred to our law review articles;⁶⁸ that some hand-

⁶³ See, e.g., notes 10, 23 and 61 *supra*.

⁶⁴ Berman declares at p. 281 that the law, including Russian law, is "time consuming" and that "its procedures are forbidding"; but at p. 283 he tells us, on the contrary, that the Russian "court procedure is informal and speedy." The author, at p. 18, names among alleged characteristic features of Marxism, "its faith in the impending triumph of 'consciousness', of Reason, over the material conditions of existence"; but, at p. 108, he writes that "Marx and Engels . . . fought . . . nineteenth-century Faith in Reason, Reason with a capital R," and that "[t]hey reduced all enthusiasms, all passions, all 'isms,' to economic and social laws." Again, there are such sentences as: "Land and chattels came to be dealt with more and more as a manifestation of the will of the owner; the transfer of property as a meeting of minds" (p. 97); "now intention became a concept, not just a category" (p. 117); "It was not so much the criminal act that was to be punished as the criminal himself" (p. 178).

"[T]he book under review is an enigma . . . [H]e [Berman] no longer has any real thesis to present and therefore has produced a book that is flat and void of content." Timasheff, Book Review, 53 THE COMMONWEAL 101 (November 3, 1950). Apparently the only lawyer who in reviewing Berman's work has found virtually nothing but praise for it is Professor John N. Hazard, who has written that "[h]ere is a book which exhibits a 'feel' for its subject" and that "the book is delightfully refreshing," 33 SATURDAY REVIEW OF LITERATURE 18 (November 11, 1950); and also that "[t]he volume is . . . for the legal and political theorist for use in classes devoted to subjects such as jurisprudence, law and society, and comparative law," and that "the book can be expected to have wide currency." 51 COL. L. REV. 139, 140 (1951).

⁶⁵ See, in particular, GSOVSKI, SOVIET CIVIL LAW. (Two volumes, Ann Arbor, 1948, 1949). Cf. Rashba, Book Review, 63 HARV. L. REV. 921 (1950).

⁶⁶ See, e.g., the works referred to in notes 1, 2, 3 and 17 *supra*.

⁶⁷ See, SOVETSKAIA JUSTITSIJA [Soviet Justice] 23 (1940, No. 13).

⁶⁸ E.g., RIMSKOE TSHASTNOE PRAVO [Roman Private Law, Textbook for Law Schools, published by the All-Union Institute of Juridical Sciences] (1948); Amfiteatrov, VOPROSY VINDIKATSII V SOVETSKOM PRAVE [Questions of *vindicatio* in Soviet law], SOVETSKOE GOSUDARSTVO I PRAVO [Soviet State and Law] 38 (1941, No. 2); Lunts, *Utshenie o Nevosmozhnosti Ispolnenia Obiasatel'stv v Angliiskom Prave v Sviazi s Zakonodatel'stvom i Sudebnoi Praktikoii v Period Vtoroi Mirovoi Voiny* [The Doctrine of Impossibility of Performance in English Law

picked new Western law books have been promptly translated into Russian;⁶⁹ or that Soviet cases may elaborate on such subjects as shifting of risk and presumption of innocence.⁷⁰ It seems that the stand of America's information on Chinese, or say Arabic, systems of law has been still more deplorable. Their study has been hardly approached. Plainly, great strides are still necessary in this branch of legal science.

What is the reason for the lag? Soviet antagonists have, of course, their answer: decadence of the capitalist science; reluctance to appreciate any pattern other than their own; readiness to dismiss anything which might displease the ultimate masters, "Wall Street". Few if any Americans will subscribe to such a verdict. One of the principal true causes is rooted in the fact that the United States is a young nation. It has performed miracles in those tasks with which it has concerned itself. But it has had no real opportunity, perhaps no time, to devote much attention to foreign law. In England, Maitland has already combatted the extreme insularity of English legal outlook, and lamented the English lawyer's "consecrated ignorance of foreign law."⁷¹ The problem now is whether America, too, is willing to consecrate ignorance of foreign law, or whether it is prepared effectively to oppose it, as it should in this time of rising international responsibilities.

It has not been undertaken to examine means and ways of improving the existing situation. It has only been intended to trace a weak spot in legal knowledge, and to suggest that if lawyers wish to assume the role of chemists analyzing the social matter, they must beware of getting into the footsteps of alchemists.

in Connection with Legislative and Judicial Practice During the Second World War] 5 *UTSHENYE ZAPISKI VSESOIUZNAGO INSTITUTA JURIDITSHESSKIKH NAUK* [Annals of the All-Union Institute of Juridical Sciences] 89 (1947); Arzhanov, *Filosofskoe Kredo Amerikanskikh Juristov* [Philosophical Credo of American Jurists], *BULLETIN OF THE ACADEMY OF THE SCIENCES OF THE U.S.S.R., Section of Economics and Law* 437 (1946, No. 6).

⁶⁹ *E.g.*, Martin Wolff's outstanding textbook, *PRIVATE INTERNATIONAL LAW* (London, 1st ed. 1945), appeared in Moscow in a matter of months after publication of its first English edition.

⁷⁰ It is particularly amazing that Soviet authors, as well as reported cases (which are, of course, not those dealt with by the secret police) give much attention to the problem of presumption of innocence of the accused. See, *e.g.*, STROGOVITCHE, *UTSHENIE O MATERIAL'NOI ISTINE V UGOLOVNOM PROTSESE* [The Doctrine of Material Truth in Criminal Proceedings] (1947), especially, Part 2, ch. III, *Presumption of Innocence*, with numerous cases, pp. 227-259; Kaminskaja, *Presumptsia nevinovnosti* [Presumption of Innocence], *SOTSIALISTITSHESSKAYA ZAKONNOST* [Socialist Legality] (1946, No. 4-5).

⁷¹ See Macmillan's review of Professor Gutteridge's well-known book, *Comparative Law*, 63 *LAW Q. REV.* 227 (1947).