

BOOK REVIEWS

The Soviet Legal System. By JOHN N. HAZARD AND ISAAC SHAPIRO. Dobbs Ferry: Oceana Publications, 1962. Pp. 186, 235, 174. \$12.50.

How Russia Is Ruled. Revised Edition. By MERLE FAINSOD. Cambridge: Harvard University Press, 1963. Pp. ix, 684. \$8.95.

Is there a legal system in the Soviet Union, and if so, what is its role in post-Stalin Soviet society?

The Soviet Legal System for the first time makes it possible for a lawyer or law teacher to plunge directly into a very rich collection of translations of case decisions, statutes and doctrinal commentary. Even without a background in Soviet studies, the authors' valuable commentary and the reader's own legal training should make it possible for him to evaluate the material presented. With the help of the new edition of Fainsod's *How Russia Is Ruled* he can see the development in the new Russia of a role for "legal" regulation, and the part it plays in the post-Stalin ordering of Soviet society.

In the past, a passing interest on the part of those best able to evaluate the Soviet legal system in operation has often cooled for lack of exposure to this kind of solid material. This book should now convince anyone but the most determined ostrich that there is something in Soviet Russia which at least has all the appearances of a legal system.

Moreover, the lawyer may be pleased to realize that this material can only be intelligently analyzed and compared by someone with technical legal training. The work to be done here is beyond the capacity of even the trained political scientists specializing in Soviet affairs. The lawyer feels a certain assurance once the discussion comes to center on the substitution of per stirpes distribution for per capita in the law of intestate succession,¹ the remedies available to the purchaser of a house after the discovery of concealed structural defects,² the refusal of the landlord's right to evict a tenant for failure to give the required month's notice of eviction,³ or the question of whether a scheme of workmen's compensation permits the worker to bring a supplementary tort claim in the ordinary courts against his employer in the case of an injury caused by a grossly negligent violation of safety standards.⁴ There is nothing mys-

¹ SOVIET LEGAL SYSTEM pt. III, at 61.

² *Id.* pt. III, at 37.

³ *Id.* pt. III, at 14.

⁴ *Id.* pt. II, at 75.

teriously socialistic about deciding whether a drunken dump truck driver or his employer should be held liable for damage to another car while he was using the truck for a personal trip outside of working hours.⁵

The first thirty-five pages of the book serve as an introduction to the theoretical basis of legal institutions in Soviet society. The authors summarize the pre-revolutionary and immediate post-revolutionary idea of an imminent withering away of the state, and with it, the legal system. They show how practical needs led to the abandonment of this pious hope, and gave rise first to temporary, then permanent, "socialist" legal institutions. In commentary and excerpts from current writing, the authors develop the effect on the legal system of Khrushchev's reintroduction of the possibility of experimentation in the forms of social control, viz., the introduction of new, popular, "comrades" tribunals to handle minor cases, and "peoples" militia to assist the regular police.

Beginning with chapter 4 of part I of this three-part book, the authors cover a variety of specific topics in the same format, *i.e.*, a text introduction giving some historical orientation regarding the particular problem in the Soviet system followed by a selection of cases, statutes and materials, many of them post-1959, dealing with present-day law. The balance of part I covers the organization of the courts, the prosecutor's office, the bar, civil rights, criminal procedure, civil procedure and substantive criminal law.

The material in this section amply documents Professor Hazard's thesis in his earlier work, *Settling Disputes in Soviet Society*, that in spite of recurring affirmations of faith in the possibility of simplifying legal procedures, the Soviets have found it necessary to adopt legal institutions and procedural patterns familiar at least to the civilian if not to the common lawyer. Cases are included in which a court is reversed for citing in support of its decision testimony given during a preliminary investigation which was not reintroduced at the trial;⁶ for going beyond the indictment when additional criminal conduct came to light during the trial;⁷ for refusing a defense lawyer's legitimate request for the appointment of a psychiatric expert;⁸ for failing to provide an interpreter for one of the three judges who did not understand the language being used in court; and for disregarding the principle that the accused has the right to have the last word at the trial.⁹

Part II is concerned principally with the administration of the Soviet socialistic system of production and distribution. The authors point out

⁵ *Id.* pt. III, at 86.

⁶ *Id.* pt. I, at 101.

⁷ *Id.* pt. I, at 102.

⁸ *Id.* pt. I, at 105.

⁹ *Id.* pt. I, at 106.

in their foreword that developing Soviet techniques of administration of goods and human resources are creating most of the unique features in the Soviet legal system. The American lawyer finds some strange elements here, but also much that is familiar. The state steel mills, auto factories, bakeries, etc., operate within the scope of a master economic plan, but do so as individual units which must show a profit on their operations.¹⁰ Business is conducted on the basis of contract relations among the various supplying, producing and distributing units. In addition, disputes among these units are resolved in a special system of arbitration courts rather than by simple administrative decision. In fact, an American lawyer may conclude too quickly that this is a competitive economy in socialist disguise. This would be at most a half truth, for a deeper look reveals the limited role of free contract negotiation in these planned contracts, as well as the quasi-administrative nature of the arbitration tribunal, which may, for example, force a recalcitrant offeree to bargain in good faith.

Chapters in this section cover the administration of land resources through collective and state farms, and the production control exercised by central planning agencies. Lawyers dealing with large American corporations will be particularly interested in chapter 12 on the operating agencies, as it shows the variety of organizational techniques employed in current Soviet practice to try to solve the various recurring problems of local initiative versus central control.

Chapter 13, dealing with law as an instrument of administrative order, does not, as one might expect, deal with administrative law but rather with the bulk of what the American considers basic commercial transactions. These disputes among state-owned industries, with hearings conducted by legal counsel before professional arbiters, represent the Soviet equivalent of our common commercial litigation. These tribunals, with their specialized knowledge of production and delivery problems, are reminiscent of the special commercial courts common in civil law jurisdictions. Substantive law in the Soviet Union, while maintaining a theoretical unity, also recognizes many institutions peculiar to the commercial contract,¹¹ just as there are special "commercial law" rules in many civil law jurisdictions.

¹⁰ "All state economic activity of an operating kind is now directed by the public corporation, whether it be engaged in industry, transportation, trade, public housing, or in agriculture as a state farm. The corporate form is used regardless of whether the activity is under the planning supervision of a Ministry, a regional economic council or a local soviet's executive committee. Nothing with major income from its operations is in any other form. Only Ministerial functions returning no income remain as bureaus, and some of them have charters to facilitate control." *Id.* pt. I, at 81.

¹¹ See, e.g., art. 50 of FUNDAMENTAL PRINCIPLES OF CIVIL LAW, regulating supply contracts, in SOVIET LEGAL SYSTEM pt. II, at 107-09.

The most interesting part of *The Soviet Legal System* for many legal specialists will no doubt be part III, which deals with legal relations between Soviet citizens. Here the authors deal with the traditional core of the private law system—property, contracts, inheritance, torts and family law. The rich collection of material dealing with Soviet citizens who own houses or cars, who lend other Soviets money, who collect tort damages for injury to themselves or their property, who get married and divorced, who leave their property by will to other Soviets or whose intestate death leads to a search for heirs brings home the varied nature of the apolitical legal aspects of Soviet life. Here the experienced Western legal mind is provided with an opportunity to evaluate the Soviet claim to having produced a completely new and different set of legal institutions and substantive rules.

Personal property, even though it always presents for the Soviets the danger of encouraging acquisitive, non-socialistic tendencies, has been sanctified in constitutional guarantees. Property interests have in fact been protected, for the incentive to acquire and use property has been recognized as closely linked to the will to participate in productive work. This same rationale has led to a reversal of what might appear to the uninitiated as a natural Marxian view toward inheritance—*i.e.*, its incompatibility with achieved socialism or communism. A complete re-introduction of a recognizable pattern of testate and intestate succession has occurred, its full impact accentuated by the absence of equalizing inheritance taxes. From a rejection of the Orthodox Church's strict marriage and divorce law following the Revolution, the Soviet pattern has come full cycle back to a strictness in the creation and preservation of the socialist family which goes beyond many Western systems. Marriage has been reglamorized, and divorce has been made expensive and difficult. While one might expect comprehensive social insurance to remove the need for traditional tort recovery, the Soviets have maintained recognizable rules of fault liability (couched in typical civil law terminology) in order to retain the salutary effect of responsibility for the consequences of one's carelessness.

In their presentation of materials dealing with contemporary contract law, the authors seem to agree with many Soviet writers that private contractual relations now play only a minor role in Communist society. If one compares, however, the position of the typical Soviet city dweller with that of his American counterpart, one might be surprised by how much similarity there is in their everyday contacts with "contract law." The agreements under which the Soviet citizen works and obtains his housing are contractual in nature, though obviously with some special characteristics resulting from the nature of his employer and his land-

lord. If he happens to get a defective television set, his recovery will be worked out much as would be the case in our own department stores, and if this same set has been bought under a conditional sales contract, which is possible, the American lawyer can predict many of the contract, not to mention property, problems which may arise. If and when the Soviet citizen is able to rent a car for a weekend trip, buys a plane ticket to fly to a Black Sea resort to spend his vacation, hires domestic help to work in his home to take care of the children while he and his wife are both at the office, borrows money from the State Bank to finance the building of a *dacha* in the country or loans a hundred rubles to an old classmate to tide him over a difficult end-of-the-month, it seems he is engaging in the typical kind of contract relations which his American counterpart might be likely to encounter in his daily life. In fact, a translated passage included by the authors contradicts their conclusion that contract law is of minor importance. The standard civil law text is quoted as saying that "the sphere of use of contract in relations between citizens is also constantly expanding."¹²

What is missing in Soviet contract law is the citizen operating as entrepreneur, *i.e.*, individual merchant, middleman or producer. If one were to look at the Soviet system from the civil law point of view, however, this activity is quite naturally included in the "commercial" sector, and the conclusion follows that the socialization of "commercial" relations and law has removed the individual from these traditional roles. The operative area then left for private law looks in many respects like the field of traditional "civil law" regulation in continental countries.

As a final section the authors have included an interesting collection of forms, covering such things as sales of real and personal property, life insurance, power of attorney, adoption and divorce. At the end of each of the three parts there is also a most helpful bibliography of original sources in translation as well as books and articles in English.

A picture of a young and confused system emerges from the cases and doctrinal writings presented. This system has inherited much from the continental experience both in substantive law and procedure, but the material gives the impression that it has yet to digest and apply much of the legacy. It is not easy to explain why this unsatisfactory development has persisted so long after the initial formative period where confusion was inevitable. Problems resulting from general totalitarian control are not its only source. Perhaps part of the answer is that for many years the caliber of people entering the legal profession was far below that of other professional personnel. The results of a lower social and economic position for lawyers could be seen in those who were attracted

¹² *Id.* pt. III, at 33.

by or assigned to legal work. Much of this has changed, and the present crop of bright students in the law faculties may be better able to cope with the system's problems.

One of the most pressing needs is a revision of the appellate system. The Western reader is shocked by what appears to be an abandonment of one of the most cherished Western ideas—the value of security of decision. Even though we may achieve finality of result in a particular case at some sacrifice of absolute justice or correctness, we assume that finality after normal appeal possibilities is a major goal in itself. While in principle the Soviets provide for only a single appeal, in the strict sense, from a trial court decision, there are in fact unlimited possibilities for an administrative type review at the instance of the government attorney's office or of the president of a superior tribunal in the hierarchy. It is not unheard of that decisions may be handed down successively in a particular case over a period of years by six or more levels of courts, and then the case be sent back down for a trial *de novo*.¹³ This incredible distrust of the court system cannot be explained solely by the fact that the higher courts and legislators may be aware of the low level of technical competence of the inferior courts, for many of the appellate decisions seem to involve simple re-evaluation of the evidence.¹⁴ It may well be rooted more deeply in the typical Soviet faith in the possibility of finding a perfect system of control and the inability to admit a final error has been made unless a scapegoat can be found.

A lawyer who has become aware of the difficulties involved in trying to understand the Soviet solutions to these recognizable legal problems, may want to turn for background material to a broader treatment of the Soviet system in action. The new edition of Fainsod's *How Russia Is Ruled* provides a survey of the power structure of the Soviet state, and gives an excellent introduction to basic Soviet attitudes toward authority.

At first glance the Fainsod analysis seems to challenge the conclusions to which *The Soviet Legal System* leads the reader. From Fainsod's schema, which centers on the personal-party-power structure as the real skeleton of "rule," and gives almost no place to the legal system as a significant element in this power pattern, the American lawyer might conclude that the impression of reality created by the Hazard-Shapiro materials is distorted, *i.e.*, that the legal system is in effect a sham, a

¹³ *Id.* pt. II, at 180. A three-year time limit on these reviews was proposed in the draft of new civil procedure principles (*id.* pt. I, at 117) but was dropped in the final version adopted by the Supreme Soviet of the U.S.S.R. Art. 49 of FUNDAMENTAL PRINCIPLES OF CIVIL PROCEDURE, 1961 Vedomsti Verkhovnogo Soveta S.S.S.R., No. 50(1085), item 526, at 1318.

¹⁴ *E.g.*, SOVIET LEGAL SYSTEM pt. III, at 117-18.

spineless creature subject to manipulation by the holder of political power.

Surely this would overstate the case, just as would the conclusion that the Soviet system is just another legal system for comparison at face value with our own. Perhaps part of the answer to the apparent conflict lies in the fact that Fainsod's basic theme is how Russia is "ruled," and not simply how disputes are settled in Russia. His power-oriented analysis does not give a leading role to the method by which apolitical conflicts of interest are resolved, *i.e.*, those situations which do not represent a power struggle or a threat to the established chain of command.

While he is concerned with the contest for authority in the factory between the manager and the trade union representative, by hypothesis he is substantially indifferent to how a worker who has been discharged from his job may force the factory manager to take him back. While it is often said that no dispute in the Soviet Union is completely apolitical, a worker's discharge for incompetence, or for that matter, an average divorce based on incompatibility or a suit to recover twenty-five dollars loaned to a fellow worker are unlikely means for direct implementation of any political philosophy. Rather, making adequate provision for resolving these controversies may simply be a part of establishing a firm basis for "rule," in that the satisfaction occasioned by objectivity in the functioning of the system established may well contribute to the ability of the regime to implement its ideas in other more crucial areas.

In the areas connected more closely with "rule," that is, the suppression of opposition to political theories and policies, the lawyer may conclude that this is only a "legal" question or a problem for the legal system in a country where the government recognizes court-administered constitutional controls on its own power. The fact is, that this fundamental attitude in our "legal" system does not exist in a meaningful form in the Soviet Union. The lack of effective constitutional guarantees of individual liberties does not mean, however, that there are not "rights" provided by statute or practice.¹⁵ A substantial part of the revised text in this new edition is concerned with the contest between expediency and a re-emphasis on legality in the ten years since Stalin's death. Fainsod says:

Stalin's death left a legacy of suppressed aspirations with which his successors had to reckon. There was first a widespread desire for improvements in the standard of living; second, a widespread yearning for greater security, for a life of stable expectations, a yearning for firm ground under their feet, and

¹⁵ See *id.* ch. 7.

third, there was the desire for greater freedom, not necessarily freedom in the Western political sense, but freedom to use one's talents and capacities, freedom to make decisions, and to transcend the Stalinist doctrinal rigidities in thinking and writing about Soviet realities.¹⁶

The successor regimes have responded to these needs. Some of the modifications of prior patterns directly involve the legal system. The harsh criminal penalties previously used to enforce labor discipline were largely abandoned and greater reliance was placed on economic inducements and sanctions to achieve the same ends.¹⁷

A climate of greater security was created by the subordination of the security police to party control, the enactment of new fundamental laws as a clearer basis for private rights of citizens and the strengthening of procedural safeguards to protect the rights of the accused. "All appeared to augur a new era of socialist legality in Soviet affairs."¹⁸ But the basic fact remains that "while the fear of the police receded and confidence in legal processes mounted in the post-Stalinist period, there was also a general awareness that the regime's self-imposed legal norms could and would be ruthlessly swept aside whenever the power of the leadership was challenged."¹⁹

Some experimentation has occurred on the fringes of the "legal" sphere of the control apparatus, though they have been insignificant in comparison with the drastic revisions in production and party organization. The people's militia and comrades' courts are part of the leadership's attempt to bring the people into the "preservation of law and order and the maintenance of labor discipline."²⁰ To a Western observer, this appears to be a part of the continued effort on the part of the Soviets to use the "legal" system as an instrument for inculcation and enforcement of specific patterns of conduct, a paternalistic technique for implementing morals and attitudes well beyond what we conceive to be "legal" norms. The new, informal, comrades' courts, where neighbors exhort each other to be good communists, seem to be logical extrapolations from earlier practices.

It is difficult for us to relate this portion of the Soviet experiment to our own experience. It violates some of our basic ideas about the appropriate sphere for "legal" regulation. The Soviets have, in effect, conceived of a more ample role for the legal system at the grass roots

¹⁶ *How Russia Is Ruled* at 117.

¹⁷ *Id.* at 123.

¹⁸ *Id.* at 125.

¹⁹ *Ibid.*

²⁰ *Id.* at 126.

level of implementation of basic governmental policies. We, on the other hand, have accorded a much more substantial role to the legal system at the highest levels of controlling government policy and activity. Somewhere in the middle, as is apparent from the Hazard and Shapiro materials, is a large body of what both of us conceive to be problems for "legal" regulation. In this area of less politically-oriented material, the Western legally-trained observer can with some justification compare and criticize both the basic norms and the way in which disputes are resolved.

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An Introduction to the Legal System of the United States. By E. ALLAN FARNSWORTH. Dobbs Ferry, New York: Oceana Publications, Inc. 1963. Pp. 184. \$5.00.

This book is the answer to a prayer. Time and again I have received inquiries from abroad: What is the best book to read as an introduction to American Law? Always, I have had to answer, there is none, except the book by André Tunc¹ which is excellent, but is written in French, emphasizes constitutional law and is voluminous. There simply has not existed any book on American law that could help an interested foreign lawyer, scholar or student to find his way in the labyrinth of American law by presenting its essential features. It is not easy to write good introductions to the study of such monolithic systems as those of France or Germany. For American law, the task is even more difficult. We are a federal nation with fifty-one, or, if you count the District of Columbia, the Commonwealth of Puerto Rico and the overseas possessions, some sixty separate jurisdictions; the sources of our law are spread over tens of thousands of volumes of cases, statutes, constitutions and administrative regulations. Our law combines the most modern institutions and ideas with the most ancient traditions. It has never undergone the great housecleaning of a major codification. Our legal profession is diverse in education, activity, standards and reputation. How can anyone write a book on the most unsystematic of all legal systems without either remaining in the realm of vague generalization or being lost in the mass of detail?

Professor Farnsworth has tackled the impossible, and he has succeeded. His *Introduction to the Legal System of the United States* informs the reader about the essential characteristics of American law without

1 LE DROIT DES ETATS-UNIS D'AMÉRIQUE (1955).