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MARXIAN SOCIALIST LAW AND THE LAW REVIEWS

JOHN N. HAZARD*

Thirty-five years ago a law review considered itself daring to print an article on Marxian socialist law.¹ Today, such articles have become routine, not only as leading articles by the the teachers in the field,² but also as student notes.³ An entire issue of the Columbia Law Review was devoted in 1970 to a review of thirty-five years of research in selected aspects of Soviet law.⁴ By no means is writing limited to the law of the U.S.S.R., for much of it concerns the People's Republic of China,⁵ and other Marxian socialist countries, including those in Africa.⁶ Even Cuban law has recently been given a lead position in an article written by a former campus militant attracted to scholarship by a course in Marxian socialist law and a research visit to Cuban courtrooms.⁷

What is happening? Is this publication record evidence that the U. S. law student, the law teacher and even the readers of the professional journals have swung to the left? Undoubtedly this fact provides some of the explanation, as any spectator of campus demonstrations and of urban lawyers' activities can certify. New criteria of "relevance" are being presented today by lawyers and incipient lawyers discontented with familiar career patterns, yet, the new law review emphasis is hardly rebellion for rebellion's sake. It seems to represent something more: a search for provocative ideas by

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¹ Hazard, *Soviet Law: An Introduction*, 36 COLUM. L. REV. 1236 (1936).

² See WRITINGS ON SOVIET LAW AND ON SOVIET INTERNATIONAL LAW (W. Butler ed. 1966).

³ Note, *Collective Bargaining in the Soviet Union*, 62 HARV. L. REV. 1191 (1949); Comment, *Role of State Arbitration Under the New Conditions of Economic Management in the Soviet Union*, 116 U. PA. L. REV. 1285 (1968). Some grew into articles as with Markovits, *Civil Law in East Germany — Its Development and Relations to Soviet Legal History and Ideology*, 78 YALE L.J. 1 (1968).

⁴ 70 COLUM. L. REV. No. 2 (1970).

⁵ See Cohen, *The Criminal Process in the People's Republic of China: An Introduction*, 79 HARV. L. REV. 469 (1966); Hsiao, *The Role of Economic Contracts in Communist China*, 53 CALIF. L. REV. 1029 (1965); Lee, *Chinese Communist Law: Its Background and Development*, 60 MICH. L. REV. 439 (1962); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284 (1967).

⁶ Hazard, *Mali's Socialism and the Soviet Legal Model*, 77 YALE L.J. 28 (1967).

⁷ Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969).

a generation of editors sensing its inadequacy in the task of coping with the social problems of our time. These editors are, in the main, not revolutionaries, but rather are reformers seeking ideas.

In a sense the writers, editors and readers of the Marxian socialist materials have taken to heart what Dean Harry Bigelow of the University of Chicago Law School told his listeners in the 1930's. He was among the first to remark that the law school's function was not alone to train legal craftsmen but also to inspire incipient "statesmen" with ideas. In the 1930's it was still considered a radical departure from goals established centuries ago by the lecturers of the Inns of Court in London and later espoused by the law school teachers of 19th century United States. Today, this approach has become commonplace and finds expression in the annual reports and after-dinner speeches of Deans.

Bigelow's approach led to a reconsideration of both the legal techniques and the moral values to be imparted by teachers. It soon became evident to pioneer thinkers that Americans would be limiting the options they could offer others, if they were to search only in the common law world for their models and inspirations. It was not by accident that the first chair of comparative law was created at the University of Chicago under Bigelow's stewardship and filled by Max Rheinstein. In a very real sense Rheinstein provided a bridge to the Continent, and opened the eyes of his students to alternatives to the U. S. solutions. He did not limit his teaching to conduct of a seminar on comparative law, but rather entered the lists with the old-timers to present common law subjects with some provocative Romanist alternatives as accompanying materials. Chicagoans became aware of the rest of the world, a happening not customary in law schools of preceding decades where comparative law was considered a cultural subject suitable only to graduate students hoping eventually to emulate the erudition of a Roscoe Pound. Rheinstein made it an undergraduate experience appropriate to the prospective legislator in Springfield or the practitioner in LaSalle Street.

The idea of presenting a world outlook spread widely so that today it is commonplace to provide comparative law in the standard curriculum for the law undergraduate. More than 100 teachers have registered themselves in the Directory of the Association of American Law Schools as teaching com-

parative law. By no means are they only the foreign scholars who sought refuge in U. S. schools from various European tyrannies. Many are born and bred U. S. citizens, often with relatively limited experience abroad. Some have studied in European schools, and a growing number have taught in Africa, thanks to the extraordinary programs of the project of the International Legal Center known as SAILER.

Notable evidence of the practical value of comparative law is provided by a letter written the author in 1965 by a young Chicago practitioner after receiving a request for an evaluation of the course in the light of his practice. He wrote:

The most important thing to learn is that there is another system. Knowing this, an attorney can begin questioning his own system with the assurance that it is not the only way to organize a society. From this, I believe, an attorney can understand the true meaning of tradition and precedent.

When precedent is against me, I am not afraid to argue that it is now time that the rule be re-examined in the light of today's changed circumstances. When precedent is with me, I am not complacent with the knowledge that I have the support of tradition. Instead, I try to show that the rule is as valid today as it ever was.

This letter emphasizes what many have expected to be the case, that it is the "idea man" with a wide range of experience and learning who writes the best appellate briefs and drafts the best memoranda to meet the needs of law practice, and who is best prepared to respond to the multitude of policy questions which a contemporary legally trained mind is asked to examine in today's complex world.

Materials on Marxian socialist law now are a segment of the comparative law materials being presented in law school teaching and legal periodicals, from which so much teaching material is drawn. They are the most recent arrivals, following thirty years of French and German studies, and are now being seized upon as the most exciting. It is symptomatic of the growing concern for the value to be found in these materials that the VIII Congress of Comparative Law held in September 1970 in Europe included upon its agenda many topics of vital concern to all developed societies.⁸ In one case participants explored the methods for dispute resolution outside of courts and arbitration tribunals. The topic was suggested by a Harvard Law School professor, and avidly accepted by the Europeans responsible for the agenda. Their concern was the same as his, namely to determine whether there is some-

⁸ The papers by American participants were published in *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES* (J. Hazard & W. Wagner eds. 1970).

thing that can be done to reduce the burden upon the courts and at the same time develop a clearer sense of social consciousness among occupants of crowded, municipally owned apartment houses where the "cop" and the "court" are anathema, sometimes even psychological stimuli to disorderly conduct.

Quite independently of the Congress' thinking on the topic a young lawyer for Model Cities has been exploring methods of controlling disorder in municipal housing around the world so as to find ideas suitable to improvement of the situation in New York. His studies have led him to many systems, among them those of the Marxian socialist countries. The matter of Marxian socialist law is not, therefore, purely of theoretical interest. It has become practical, and neither he nor others who think like him will be surprised to learn that the Harvard professor who proposed the subject for discussion at the VIII Congress has chosen to write a paper himself on social controls in the People's Republic of China, expressing in his conclusion his opinion of their relevancy to other societies.⁹

Only a few years ago a suggestion that Marxian socialist controls in public housing might provide models for use in the United States raised cries of anguish from a class of students. The arguments were not only that there were grave constitutional problems of due process involved, but there were social attitudes which could not be abandoned if our way of life were to survive. One of these was that neighbors must not discipline neighbors. That was thought to be the task of the state official, and of him alone.

In 1969 the same suggestions of the utility of tenants' courts received quite different responses from young men and women who know the problems of the ghettos, and who abhor the intervention of police. Contemporary students are still not sure whether social controls of this nature are desirable under current social philosophies, or whether Constitutional precepts will change enough to permit their use, but the germ of an idea has been presented. The article by the recent law school graduate on the popular tribunals in Cuba¹⁰ is an example of such a search. He wanted to know what others are doing as he entered upon a career with legal aid, seeking to protect the ghetto dweller from excesses of the law and order system as it was manifested then in New York.

⁹ As an example, consider the *COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS* and *LAW AND SOCIETY REVIEW*, the journal of the Law and Society Association.

¹⁰ Berman, *supra* note 7.

Yet another aspect of Marxian socialism and its law has intrigued the law students of the current generation. There seems to be few in the law schools of the United States who are not interested in "development." Concern for this problem has aided SAILER in recruiting young teachers for African law schools. Still other graduates have found places in government agencies or private foundations concerned with the problems of aiding Africans, Latin Americans and Asians to develop their economies and democratize their political systems. Some are in business offices where the lawyer has to study not only problems of trade with developing areas, but the investment by U. S. business in these areas.

Development goes hand in hand in many countries of the world with "socialism." The U. S. adviser must understand the concept in "socialism's" various manifestations if he is to cope with its proponents in the regions with which he is concerned. Of necessity, law school courses in law and development, of which there are increasing numbers, must have materials explaining the hopes and fears of those in power in the developing countries, including those who look to one or another form of "socialism" for ideas and possible solutions. To provide these materials the law reviews are responding by publishing studies of socialism and law as manifested in a wide variety of countries.

The law review with its eyes on the world cannot but join the parade, for who can talk intelligently with a businessman or state official in a developing area, if he thinks of socialism only in terms of Stalinism? Even Marxian socialism now speaks in many tongues and with such variation that a widely spread group of legal scholars are now engaged in attempting to determine what those tongues and variations are. Some scholars talk even of ultimate convergence between East and West in a pattern like Sweden's. Considering all of this, can the law review seeking to stand in the adventuresome front rank omit the subject? The letters of invitation to write such pieces for law reviews throughout the country suggest that the matter is on many editors' minds.

Finally, Marxian socialist studies give outlet to editors seeking to break down the barriers between disciplines. No author can treat a Marxian socialist legal system without calling upon materials from economics, sociology, political science and philosophy. The Marxian socialist family of legal systems is distinguished by the intertwining of themes from all of these

fields of study. To treat any aspect of the subject requires a broad perspective. Some editors have not yet grasped this fact, as evidenced by one rejection of a Marxian socialist study on the ground that "it is not law," but many are quite prepared to take the plunge. Why not, when some law reviews have been introduced which treat of nothing but social problems in their broadest aspects, and use various techniques to supplement research in the books?¹⁰ Law in the current image becomes clearly a social science, an instrument of social engineering to be evaluated for its successes and failures in implementing a social philosophy and meeting contemporary need, often felt primarily in economic terms. Marxian socialist law is but the system most evidently engaged in social engineering in implementation of clearly expressed values, and law review articles on its provisions inevitably treat its many aspects. They give rise to thought about the U. S. legal system and the need of seeing it also in social terms.

All of this suggests that the law review in serving today's readers will want to publish more than the traditional articles on tax, corporation, constitutional and tort law, important as these are to the retention of subscribers. Editors find themselves in something of the same position as the conductors of symphony orchestras. There must be enough Mozart, Beethoven and Brahms to keep the old timers subscribing, but no concert will be called a success with the audience as a whole unless it includes Stravinsky, Bartok, Hindemith or Pinkham.

Law reviews have readers with a wide variety of concerns, as they always have had. They also perform a vital part of the educational process in the law schools of which they are a part, and on the continuing effective performance of that function hangs their subsidy from the faculty. To continue to recruit students they must appeal to inquisitive students, many of whom are now offered seemingly more exciting work as student practitioners in law offices for the poor. Under such circumstances law reviews must cater to both young and old, and among the young are those who wish to relate themselves more closely than has been customary in the past to the community. Quite naturally, they turn to other systems for ideas, and among these one of the most stimulating, whether to emulate or combat, is that of Marxian socialism.