

1978

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Recommended Citation

Leonard Salter, *American Lawyers and Russian Dissidents: The Lawyer as Social Engineer*, 12 INT'L L. 869 (1978)

<https://scholar.smu.edu/til/vol12/iss4/15>

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American Lawyers and Russian Dissidents: The Lawyer as Social Engineer

There are three questions asked here of consuming interest to American lawyers recently commanded more of their attention: Should American lawyers (along with lawyers of other nations) become involved in the infringement of human rights by foreign governments against their own citizens? Second question: Can such activity (especially by American lawyers) be effective? There is, then, the third question: How do the members of the American Bar make their voices heard so that the message reaches those precincts where it would do the most good?

Lawyers in Los Angeles, Philadelphia and Boston have organized groups to bring pressure on the Russian Government with respect to its treatment of Jews and other minorities. It seems that an area where the most weight can be applied is upon Russia's pride in its criminal laws, which, it claims, adhere to the principles of justice, due process and the rule of law. It must be admitted, say savants acquainted with this field, that the claim is, in general, not unjustified. Whatever its real impact, the new constitution is a substantial advance over the previous one. Human rights were apparently given serious concern by the legislators. It is rather in the application of these principles that the failure of the Russian system of justice is most glaring.¹

The recent case of Anatoly Shcharansky was perhaps the most vivid example of this misapplication of basically sound principles. Shcharansky was arrested on March 15, 1977 and placed in jail. Under Russian constitutional law, he could be held without charges being filed for two months. This period can be extended to a period of nine months by decree; however, the prisoner must be released at the end of nine months. On December 15, 1977, Shcharansky, under applicable Soviet law, should have been released. Professor Burton

*Of the Massachusetts Bar.

¹The USSR has signed 11 out of 19 major multi-lateral human rights instruments. See THE RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES: A REPORT OF THE COMMITTEE ON HUMAN RIGHTS, WORLD PEACE THROUGH LAW CENTER (Washington) 1976, at 1.

Caine, of Temple University, who was in Moscow on that day, queried a Russian lawyer on the reason why Shcharansky was still in custody. It appeared, was the report, that a special law had been passed extending the period of this incarceration for an additional six months. When Professor Caine remonstrated that this was a violation of all due process provisions, ex post facto legislation which would certainly be held illegal under the U.S. system of justice, the rejoinder was "This extension is within the power of the President; they make the law, they can change it."

This could provide a fulcrum where the Soviet legal system may be moved slightly in the direction of a higher regard for legality. Harold Berman, Professor of Russian Law at Harvard, taught a course in American Constitutional Law in Moscow University in 1961-62. In an essay covering his experiences, he wrote:²

(A) If Soviet citizens are concerned about the possibility of such a return (Stalinist terror) and on the part of many of them, there is a visible effort to prevent this possibility from materializing. Among the jurists, this effort takes the form of an attempt to create an institutional structure that will safeguard what the Soviets call "legality," *zakonnost*. For without legal and institutional guarantees against arbitrary political and administrative action, the terror may return—not because anyone wants it, but because it will appear necessary and there will be nothing to stop it.

Russian pride in the regularity of their law and legal system, can be pricked by testing some of the legal principles they are so proud of. There is no law on the problem of emigration in the Soviet Union. There are no written criteria that one can refer to, no person to answer the question of why an application is rejected. When the President of the Moscow Bar Association, Konstantin Apraksyn, was questioned by Professor Caine on the official rules concerning state secrets and emigration from the country, the President responded, "Who knows?" When one appears for a visa to emigrate, he must surrender his passport; if his visa is refused, his passport is not returned to him. If he has to give up his job, surrender his pension, give up his apartment, the would-be emigrant is without any visible means of support. He may now be arrested and jailed. Russian *Catch 22*, indeed! If one should take the matter to court (traditionally a bulwark against illegality) and win, the would-be emigrant is relegated once more to his remedy before the very same Bureau. The hierarchy wants the Russian citizen to live on the edge of caprice and that's where the majority in Russia live. In those cases where the authorities do offer to return the applicant's passport, the acceptance of its return cancels all the applicant's previous efforts in connection with his attempt to emigrate.

²*The Role of Soviet Jurists in the Struggle to Prevent a Return to Stalinist Terror*, 14 HARVARD LAW SCHOOL BULLETIN 3 (Dec. 1962).

There are two difficulties in keeping the Soviet system on track toward the goal of justice and the Rule of Law, as follows:

1. There is no ingrained, doctrinal feeling on the part of Soviet citizens toward the establishment or protection of the individual's civil and human rights.

2. The propaganda machine has done its work on the Soviet citizenry so effectively, that it is difficult, if not impossible to eradicate this basic *Weltanschauung* ("ideology").

With respect to (1) above, we must examine the kind of person we are talking about, the Russian citizen who submerges himself in the collective life rather than asserting his individuality. In the first place, the argument made by a Soviet Lawyer in defending the system, is that the treatment of the Soviet Union of its citizens is an internal matter, not to be examined by other nations. But this argument, it may be urged, is no longer applicable in today's world of close-knit interdependence and instant worldwide communication. What goes on in one country is instantly communicated to all countries. Satellites, moreover, tell us what each country is doing within the confines of its borders, that might be inimical to world order. In addition to this significant trend toward the elimination of secrets, there is increasing universal intellectualization of the defense of civil and human rights. This spirit is being diffused through all societies. Whether it is South Africa, the Philippines, Chile or South Korea, the lawyers and other public spirited citizens of the world find that the violation of one citizen's rights may well set a dangerous example elsewhere.

On the other hand, the difficulties of penetrating this public consciousness are amplified by the kind of individual who lives under the Soviet system. For Marx, the individual was useful only to serve the group; his responsibility was to society. History was an impersonal force; to achieve utopia, the individual must sacrifice, not indulge himself. But as Professor George Ginsburgs of Rutgers Law School has phrased it, a paternalistic society has gone from paternalism to parental abuse. Until recently, Russian society was a peasant society (Marx called it an "idiotic" existence), and was lived mostly on a farm. Rural life is collective, the unit is more important than the individual. A maverick, asserting his individual rights against the collective society, only upsets the rhythm of peasant life, the even tenor of its way. All hands were dedicated to economic improvements of the units. Social and economic rights come first; individual rights are subordinated and secondary. In short, the Soviet administration of justice is merely a reflection of the minimal interest that the Soviet citizen has in protecting those individual rights.

There is another significant problem that one encounters in dealing with the Soviet citizen's relationship to abstract principles, i.e. individual human

rights. When Professor Caine discussed with a Russian lawyer the unconstitutionality of an *ex post facto* law, he was met with the following argument. "The U.S. indulges in similar illegalities." Asked for examples, of specific instances of violations of fundamental due process, in the United States the example of Presidential amnesty was advanced. Amnesty, said the Russian, did the same thing as the Presidium's extension of the Shcharansky detention. It changes an edict which had been previously enacted. Professor Caine pointed out to his Russian colleague that amnesty was exactly the opposite to the Shcharansky extension; it was the release of a prisoner after he had been tried, convicted and incarcerated. An almost biblical benignity had been exercised to free the prisoner. The Russian had stood the case on its head.

Given the lip service to the principles of the Rule of Law and the appearance of legality, the discrepancy between theory and practice is blatant. And this dichotomy could well be labored by an outsider to encourage the Russians to see (if they are not already aware) that the emperor does not, in fact, wear clothes. Further, that the Russian stance of legality is wholly untenable under any fair assessment of the truth.

During the course of one of his lectures on economics at Moscow State University, Professor Marshall Goldman of Harvard asked the class to explain why multinational corporations had grown so slowly before World War II and so extensively in the 1950s and the 1960s. One student asserted "Because of the organic framework." When asked to elucidate the answer, the student was unable to do so. Another student announced "Because of the scientific technological revolution." Again Professor Goldman queried the student as to the meaning of his words. Still there was no cogent answer to the Professor's question. It was evident that the student's response had come out of a Communist Party handbook. It was only after the teacher and the students had broken through the rhetoric and the rote that the true answer to the question could be achieved. It would appear from this example and the amnesty story that the precise analysis of a particular problem (especially in the political realm) is an aptitude not widely distributed among the Russian populace.

The propaganda machine manned by the Soviet hierarchy asserts that activists like Shcharansky have connections with big Jewish capitalists in the United States and through them with important government figures. The average Russian (or at least the Russian who is intellectually able to think about it) cannot understand how Shcharansky could engineer the Jackson-Vanik Amendment³ which links favorable trade with the United States to emigration rights. How can someone like Shcharansky spoil economic relationships with the United States?

³Public Law 93-618.

If there is any leverage to move the Russian legal and political system even a little distance from where it is, the area of trade seems to be the logical place of attack. The Soviets are puzzled as to why Congress made favorable trade and credit terms dependent on Jewish emigration and treatment of Soviet dissidents.⁴ Grandiose plans, made in 1972, involving a six billion dollar, 20-year plan to extract natural gas from Yakutsk in East Siberia and ship it to America has been scaled down to much smaller compass. The Chase Manhattan Bank was the first American Bank during the euphoria of detente in 1973 to establish a bank in Moscow. Last December 15, it was announced that a 600 million multi-bank credit facility had been organized by Chase with sixty other Western banks for the international investment bank in Moscow. The response to this "opening to the East" has not been at all as enthusiastic as had been hoped.

A few years ago, Samuel Pisar, a distinguished international lawyer based in Paris, wrote a landmark book on the intricacies of East-West business transactions.⁵ As of the date he wrote, his views on the changing attitudes of the former monolithic philosophy, the narrowing differences in economic organization between East and West, offered the promise of expediting an approach to the Russian hierarchy.⁶

In the last few years Eastern economies have given ample evidence of their desire to become integrated into a single world market. National leaders and business executives of communist countries have scarcely disguised their admiration, even envy, of Western production and marketing efficiency. In the interest of mutually beneficial ventures there has been an unmistakable willingness to embrace capitalist methods both at home and abroad, although euphemistic devices have frequently been needed to disguise the common, profit-oriented objectives.⁷

Evidence has been accumulating that Pisar was right and that the Russian interest in developing their economy along capitalist lines, is vivid and real. A recent report from Warsaw⁸ indicates that Poland, East Germany and the Soviet Union are cautiously embarking on a highly unusual joint offshore oil exploration that could serve as a prototype for a broad range of joint venture operations in Eastern Europe. The most interesting development is that each of the three participants is looking at something for itself in the arrangement and yet they are all willing to work together to accomplish this joint endeavor. Poland would like to wean itself away from its almost total dependence on coal and replace it with a large chemical industry. Russia is interested in joining with its European neighbors in such joint efforts to display its modern

⁴New York Times, February 27, 1978.

⁵PISAR, *CO-EXISTENCE AND COMMERCE*, McGraw Hill Book Company (1970).

⁶PISAR (*Supra* n. 6) p.7.

⁷*Ibid.* (*Supra* n. 6) p.8.

⁸New York Times, (January 10, 1978).

techniques for oil extraction. Rarely has the Soviet Union been willing to award entirely equal partnerships to a group of its East European associates in Comecon.

Not only is trade with the United States a highly prized goal in the Soviet Union; almost equally as important, is access by its scientists to American universities and laboratories.⁹ They are interested in absorbing our most advanced research (when we can exchange professors, they are mostly linguists and historians). Some Americans complain that the exchange is not an equal one because of the different areas that the American and Soviet professors do research in. However, as Goldman points out, not all scientists go back to the Soviet laboratory. The late Rector of Moscow State University who spent 1959-60 at Stanford University, ultimately went back into the Soviet hierarchy. Hopefully, he may have sought to humanize it.

Another method of encouraging a change in the Russian legal system with specific reference to its disregard of human rights, is to point out continually its inconsistencies and discrepancies. Every large city in the United States should have an organized group of lawyers who are concerned with the miscarriage of Soviet justice. With respect to the dissidents and refuseniks, meetings should be called, seminars and discussions held, telegrams and letters sent both to the authorities protesting their illegal actions and to the dissidents, giving them encouragement in their lonely vigils. Every United States lawyer traveling in the Soviet Union, should seek opportunities to meet with the Soviet legal authorities, heads of bar associations, procurators and the like to try to ascertain the status of particular prisoners. There should be a clearing house for these activities of the lawyers involved throughout the United States to preserve an ongoing dialogue concerning the fate of these unfortunate individuals. Briefs could be written and submitted to the Soviet authorities on the facts as we have them, and the Russian law obtaining in a particular case. American lawyers will have to become acquainted with the provisions of Russian law to prepare themselves for these confrontations.

The potential importance of all this activity should be obvious. According to a dispatch from Moscow, visiting American legislators who have talked with Soviet officials reported to them that there is no chance of getting legislation favorable to the Russians, through Congress.¹⁰ According to a recent Senate visitor, the conviction of Shcharansky could even deter the Senate from approving an arms limitation pact. This kind of activity, it is to be hoped, might induce a reassessment by the Soviets of the path they want to pursue: the restrictive, repressive, limitation of human rights, or the implementation of the Rule of Law contained in its new Constitution. The concerted pressure

⁹Marshall Goldman, *New York Times*, (January 27, 1978).

¹⁰*New York Times*, (January 27, 1978).

American lawyers bring to bear on the Russian legal hierarchy (and incidentally, its political decision makers) could possibly have a significant effect on which of these decisions is rendered.

Unfortunately, the recent, tiresome Belgrade meetings proved to be a charade. The Carter administration failed to pull its trump card in the USSR over its recalcitrant stand at Belgrade. Helsinki was an important milestone in Soviet diplomacy, in finally achieving acquiescence from the West in certain boundary adjustments for which it had long sought recognition. Because they wanted them so badly, they concurred in Basket III. But under standard principles of treaty law, if the Soviets persist in disregarding the obligations they assume at Helsinki, it is always open to the United States to repudiate all the concessions we made there. The time has long come to call a halt to the Communist tactic of extracting advantages from the West for commitments they do not intend to honor.

