

BOOK REVIEW NOTES

BILL BOWRING 'LAW, RIGHTS, AND IDEOLOGY IN RUSSIA'¹

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Bill Bowring's *Law, Rights, and Ideology in Russia* is a collection of essays on Russian legal history. It contains a wide range of narratives about law and legal consciousness within the Russian tradition. The author starts with the beginnings of legal education in Russia in the late 18th century and finishes with the current controversies surrounding the human rights question.

I suppose this extensive frame of reference to be a very good one – necessary even, for an adequate comprehension of legal issues in the Russian context. The major difficulty that any researcher in Russian law has to face is that one witnesses legal phenomena in Russia that are seemingly identical to those in the West, and yet function in an entirely different way. This renders all attempts to understand legal developments in the Russian context by relying solely on authoritative texts, traditional taxonomies of comparative law and other formal techniques of that kind, futile and implausible. Only taking into account social-cultural variables can one understand anything. That's why broad references and wide ranging narratives are indispensable.

The book is highly informative. The author maintains a keen eye for detail, sometimes unknown amongst Russian lawyers. His knowledge of current debates is surprisingly extensive and precise.

There are, however, some disputable issues.

Confirming that Russian tradition 'has always been suffused, even saturated, with law,' Bowring argues that, 'the great debates, even in the midst of the Civil War that followed the Bolshevik revolution, have almost all been conducted in terms of and in the name of law.'²

¹ Reviewed book: Bill Bowring, *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013).

² Bowring, *supra* n. 1, at 272.

The big question is whether these debates had any substantial relation to what was really going on. I have much doubt about that. Russian reality is very similar to the following description of the realities of 'the law-society nexus' at the time of the Empire:

Yap had a legal system, with a legislature, a handful of judges and attorneys, a small police department, and a complete legal code based in its entirety on law transplanted from the United States. But vast portions of the Code had never been applied, few lay people had any knowledge of the content of the laws or of operation of the legal system, a large proportion of social problems were dealt with through traditional means without participation of the state legal system . . . Although the overwhelming majority of the populace lived in general disregard of the vast bulk of the rules of the legal system . . . I worked there as a busy assistant attorney-general for almost two years.³

Post-revolutionary praxis after the stabilization of the Bolshevik regime, and especially under Stalinism, have added another – but in some way key – feature: the imitation of the workings of a legal system. The Moscow Trials of 1936–1938 were only the most notorious exemplification of that trend.

Bowring himself cites the famous article of Bogdan Kistjakovskij about the predominance of legal nihilism within the Russian populace in general, and in intellectual circles in particular. Under these circumstances, the notion that 'debates in terms of law' can be considered reliable vestiges of a rich legal tradition is highly disputable.

One should also bear in mind the fact that the debates of the early post-revolutionary era, so admired by Bowring, were very limited in scope. The liberal conception of law was rejected as excessive. Within a decade or two 'free space' was narrowing: whereas in the early twenties Goikhbarg could afford to flirt with Duguit's 'fonction sociale,' by the end of the forties a mere reference to foreign doctrinal sources attracted suspicion.

All this brings us to the most important point: what does it mean to have a legal system?

Is it sufficient to issue authoritative legal texts? Or are faculties of law and law professors also required? The problem is that you can have both of these things, as well as courts, established procedures and trained staff, but still find the real impact of law negligible in the face of informal practice. Even more, legal instruments can be used in direct contradiction to their normal function to cover up and 'legitimize' crime, arbitrary decision-making, corruption, abuse of power, authoritarian practice and assaults on political opponents of ruling clans. Could it be that Pashukanis was right in his early writings, when he said that there is no law without a free market?

³ Brian Z. Tamanaha, *A General Theory of Law and Society* 145–146 (Oxford University Press 2001).

In other words, to date, we have had no reliable framework within which to plot an adequate description of the functioning of law in societies of nonorganic modernization. Without a framework like this, all comparisons, similarities and analogies are in vain.

I completely agree with Bowring's special emphasis on Pashukanis. In fact, Pashukanis is the sole Soviet Russian legal philosopher of world significance. However, I wouldn't recommend taking his late writings too seriously. The fact is that every intellectual writing in 1930s Russia faced the serious dilemma of intellectual liberty versus real life risk. The regime at that time no longer tolerated even moderate skepticism, requiring enthusiastic participation in what were in fact highly contestable and morally debatable activities. In such circumstances, every word, each written sentence, must have been very carefully weighted. Prominent Russian historian, Professor Andrey Yurganov, has masterfully depicted what he called 'the existential world of the Stalin-Period historians,' where indeterminacy, ambiguity and uncertainty became the prevailing management and repression strategy.⁴ It was a social phenomenon typical to the experience of every intellectual living under totalitarianism.

Another very interesting theme is Bowring's reconstruction of the soviet doctrine of public international law. He claims that this reconstruction is systematically underestimated by western legal science. If I understand the matter correctly, Bowring sees its genuine originality in the special emphasis it always places on the principle of self-determination. I do not major in public international law, but intuitively I would rather endorse the critical stance expressed by western scholars of the 1960–1970s, cited by Bowring.

To begin with, soviet practice in that field has always been very pragmatic. The self-determination principle could not prevent the aggressive politics of territorial expansion that began from the early 1920s, and not only under Stalin. As to soviet doctrine itself, it was not very original. Korovin is not particularly interesting, from my point of view. Tunkin is worth a detailed comment. Undoubtedly, he is a first class academic. To my mind, the key to his success lies in a very clever synthesis of the old splendor of the European doctrine of the *Belle Époque* written into the objectives of that awesome mixture of Messianism and isolationism, typical of soviet international policy. Triepel is the chief character of this piece. Despite the fact, that his *Landesrecht und Völkerrecht* has never been translated into Russian, even today it remains opus magnum for conservative academics. Triepel's dualistic principle provides the necessary justification for a sort of 'legal impermeability' of 'sovereign' national legal orders, so desired by any national authoritarianism in the world. It is no pure coincidence that this particular type of out-of-date legal theory, typical

⁴ Andrey Yurganov, *Russian National State: The Existential World of the Stalin Period Historians* (Russian State University for the Humanities 2011).

of the age of European wild nationalism, became one of the most in demand for soviet doctrine.

The problem, however, is that it became the sole type of western legal theorizing that was viably available to soviet scholars. All of the 20th century's legal theory from Kelsen to Luhman, Hart to Posner was practically unknown in Russia up until the 2000s. What I am trying to say is that the very existence of any original intellectual practice within a framework of ideological control seems doubtful.

The second element of Tunkin's synthesis is the 'treaty process' concept. Simply put, it means the conceptual assimilation of all sources of international law into treaty form. The goal is completely pragmatic – theoretical justification of the thesis that only these 'instruments' of public international law are binding on the Soviet Union, which itself expressly makes them binding. I can't resist pointing out that it is very comfortable doctrine to consider 'law' only that which you yourself treat as 'law.' All this is a very telling story and most informative to understanding the limits of legal consciousness during the soviet era.

The same 'instrumentalism' is typical of the legal-political agenda of the post-soviet Russia of 2000. Once again, the dualistic conception of Triepel is called for. As well as the Bismarckian and Wilhelmian concept of national sovereignty.

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