SOVIET LAW IN THEORY AND PRACTICE

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INTRODUCTION

It is customary to distinguish three main families of legal systems: Common Law, Civil Law, and Socialist Law.[1] Socialist Law[2] appeared first in the Soviet Union. Now, although some other countries claim to be socialist as well,[3] the USSR maintains the leading position in this regard. Thus, to know Socialist Law as one of three major legal systems of the contemporary world it is necessary to acquire some understanding of Soviet Law.

Soviet Law and Civil Law have many features in common. Instead of the system of precedent which has traditionally dominated the Common Law, Soviet Law rests upon statutory rules of human behavior. Codification has played an important role in the development of Soviet Law in contrast to the history of Common Law and akin to that of Civil Law. The same thing can be said about the systematization of Soviet Law. It does not, for example, separate the law of property, the law of contracts or the law of succession; rather, Soviet Law classifies the law of contracts as a subdivision of the law of obligations, uniting it with other types of obligations as different parts of a single whole. The vocabulary of Soviet Law coincides closely with that of Civil Law. Both use concepts unknown to the Common Law, and conversely, the peculiar terminology of Common Law has no analogues in Soviet Law and Civil Law. The notions of obligation or cause, for instance, seem unclear to Common Law to the same degree as the notions of "consideration" or "contracts under seal" to Soviet Law and Civil Law. Moreover, not only Civil Law, but also Soviet Law has historical roots in ancient Roman Law.[4] However, despite this similarity, Soviet Law cannot be considered as a simple variation of Civil Law. It represents a separate legal system different from both Civil Law and Common Law.

First of all, the USSR considers law to be not only created by the state, but also subordinate to the state. This means that law is binding upon all except the Soviet state itself, which, as an unlimited political dictatorship, rests upon force and not upon law. "The formal law is subordinated to the law of revolution,"[5]

said Vyshinsky, the former ideological chief of Soviet jurisprudence. And though Vyshinsky has been denounced together with Stalin, the actual Soviet approach continues to proceed from superiority of the dictatorial power over "the formal law." Hence, it follows that while Common Law in the United States of America can be called the system of legal constitutionalism, and Civil Law in West Germany assumes the name of the system of legal state (Rechtsstaat), Socialist Law in the USSR, in contrast, appears as a system of legal restrictions supported by the state which is itself legally unrestricted.

Law in the USSR reflects a social structure quite different from that which exists in the countries under the systems of Common Law and Civil Law. This structure does not allow private ownership of the means of production. They belong as a rule to the state and in some part to organizations (collective farms, cooperatives) controlled by the state. The individual may, as a rule, possess consumer goods and, as an exception, insignificant means of production necessary for satisfaction of his own consumer needs. This is why Soviet Law precludes the dichotomy represented by the parallel existence of public law and private law. Lenin instructed the first codifiers of Soviet legislation, "Everything pertaining to the economy is a matter of public and not of private law."[6] For the same reasons, Soviet Law includes branches of legislation, such as collective farm law, that are incompatible with Common Law or Civil Law.

The USSR needs law to deal with a politically and economically centralized society. Therefore, the legal rules in the Soviet Union differ immensely from those applied by Common Law or Civil Law. For instance, they allow contract, but only within the limits of its conformity with the national economic plan; state economic organizations created as juridically independent entities have property rights, but only with respect to objects owned by the state, etc. Specificity of legal regulations has engendered a specific legal vocabulary. Notions such as "planned contract" or "right of operative administration" of objects given by the state to its economic organizations, though strange and inexplicable for those accustomed to Common Law or Civil Law, have become ordinary terminology in Soviet legislation.[7] The peculiarities of this terminology have been further enlarged by the fact that ancient Roman Law is only one of the historical sources of Soviet Law. Many legal concepts in the USSR stem from the Tsarist Law of prerevolutionary Russia.[8] Marxist-Leninist doctrine is of still more essential significance for the development of legal

vocabulary in the Soviet Union, since that doctrine is the only officially-approved theoretical basis for Soviet jurisprudence and Soviet legislation.

Thus, Soviet Law really embodies a separate legal system under the name of Socialist Law, and without studying it one cannot get a comprehensive idea of the law of our time as represented by one of its most widespread and significant subdivisions. But the demands of legal education are not the sole and paramount cause that necessitates this study. Many other inducements are far more serious and important.

Soviet Law regulates the life and activity of a country generally accepted as one of the two superpowers of the world. Soviet foreign policy, which has such a great influence upon international affairs, grows out of the internal economic and political structure of the USSR. This structure, in turn, is reflected, accurately or distortedly, by Soviet Law. Hence, without knowledge of Soviet Law one cannot comprehend the internal Soviet system and as a result cannot predict or even explain Soviet foreign policy. For example, the Soviet leadership reiterates tirelessly the wish to improve relationships with China on governmental lines while it is impossible to attain the same result on the level of the Communist parties. What does it mean? Nobody can answer this question without being acquainted with the Soviet Constitution which says that "the leading and guiding force of Soviet society and the nucleus of its political system, of all state organizations and public organizations is the Communist Party of the Soviet Union."[9] Even this statement distorts the real situation, since the Soviet Communist Party as a whole, with about twenty million members cannot play the determining role in Soviet social life. But at the same time it hints at the objective reality, since the top leadership of Soviet Communist Party -- the Politburo -- actually concentrates all the highest powers of the country. Thus, an improvement of inter-state relationships on the governmental level means a second order change. A first order improvement of Sino-Soviet relations can be reached only when the relationships of two countries' Communist parties are correspondingly improved.

Further, Soviet Law is one of the areas of competition and struggle between socialist and capitalist systems of social organization. To succeed in this competition and struggle one side must know the other side's legal assumptions. Otherwise, one will be caught by unpleasant surprises. How heated, for instance, are

discussions about the gas pipeline agreement between the USSR and Western European countries. The problem of the future economic dependence of Western Europe on Soviet behavior connected with the sources of gas energy has become one of the most significant issues. Time and again it has been said that the Soviet Union will be able to determine the policy of Western European countries simply by switching on or switching off its gas pipe. Of course, legal regulation does not have unlimited power in this regard. However, some not insignificant resources are at its disposal. As a rule, impossibility of performance excuses a party to a contract, if the impossibility is physical or legal.[10] But according to Soviet legislation, civil law liability cannot be altered in scope or conditions in relationships between so-called socialist organizations.[11] Since Western European countries are not among such organizations, they may include a liability clause in the pipeline contract covering legal impossibility of performance. This clause would be an important contractual remedy in the event that in pursuance of its political goals, the Soviet government would order cessation or interruption of the gas supply.

In addition, Soviet Law is used in appropriate circumstances in the sphere of economic and cultural collaboration of the USSR and Western countries, as well as in the realm of relationships between Soviet and foreign citizens. The actual participants in these processes are in need of competent and correct legal advice. Of course, one may resort to aid of Soviet lawyers, and sometimes this is even necessary, since in many kinds of cases the Soviet judicial system is closed to foreign lawyers. But rather than dealing with a partner who simultaneously proves to be a foe, it seems more reliable to receive conscientious support, not predetermined advice. Therefore, western countries should have their own experts of Soviet Law -- not only theorists, but also practitioners. For example, the Soviet rules of foreign trade require that each contract made by a Soviet foreign trade organization be signed by two representatives of the organization who have a power of attorney. Suppose the manager of such an organization made a contract himself and ratified it only by his own signature. Is the contract valid or void? Reasoning logically, it is valid as having been signed by the official competent to supply any number of representatives with power of attorney. However, the rule about two signatures, provided by Soviet Law in order to ensure mutual control of Soviet officials in the realm of foreign trade, is imperative and must be observed literally in all cases without exceptions. Therefore, proceeding from Soviet Law, the contract is void, and the Western partners of Soviet foreign trade

organizations would be disconcerted if they were unaware of this rule.

Obviously, all the details of Soviet Law cannot be described in one book, and contemporary legal literature published in Western countries contains many kinds of works related to this subject. Some of these works deal with separate problems of Soviet law;[12] others state it in a general way. There are two types of books of general character. The first can be illustrated by John N. Hazard's and his coauthors' work written on the model of American "Cases and Materials."[13] The second can be illustrated by Harold J. Berman's work with its theoretical analysis and practical conclusions.[14]

The present work belongs to the second type -- general books. It is intended as an outline of Soviet Law as a whole, on one hand, and Soviet Law as an acting force in the most important social realms, on the other hand. Bearing in mind the subordination of law to the state in the USSR, the Soviet state with its structure, agencies and functions is considered first (Chapter I), and then Soviet Law with its system, branches and functions is described (Chapter II). After this Soviet Law undergoes concrete analysis in connection with politics (Chapter III), the economy (Chapter IV), and the individual (Chapter V). The closing part of the book touches upon the problem of legal responsibility in the USSR (Section VI).

Examples of judicial, administrative and economic practice are used wherever possible. They should not only make Soviet legislation easier to understand, but may also broaden knowledge about its application. In addition to cases published in the USSR, one will find those which, though sometimes more interesting, have not become publicly known and are drawn from the authors' personal experience.

Systematic description of Soviet Law has necessitated numerous references to legal rules and even verbatim citation of legislative texts. The reader who wishes to go further will find that extensive English translations of Soviet legislation are available.[15]

NOTES

1. E.g., R. David and J.E.C. Brierly, Major Legal Systems in the World Today, 2d ed. (New York: Free Press, MacMillan Co., 1978).

2. The terminology used is that officially adopted in the respective countries regardless of its conformity or lack of conformity with the real situation.
3. Albania, Bulgaria, Czechoslavokia, Kampucheia, Mongolia, Cuba, German Democratic Republic, Hungary, the People's Republic of China, the People's Republic of Korea, Poland, Romania, Vietnam, Yugoslavia and some African countries.
4. O.S. Ioffe, "Soviet Law and Roman Law," Boston University Law Review 62, no. 3 (May 1982), pp. 701-28.
5. A.Ia. Vyshinskii, Sudoustroistro v SSSR, [Court organization in the USSR] 2nd ed. rev. (Moscow: Sovetskoe Zakonodatel'stvo 1935), p. 32.
6. V.I. Lenin, Sochineniia [Works], 5th ed. (Moscow: Gosudarstvennoe izd-vo politicheskoi lit-ry, 1964), 44: 398.
7. E.g., Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i Soiuznykh respublic [Fundamental Principles of Civil Legislation of the USSR and the Union Republics], Arts. 21, 33, 34 (1961), Vedomosti Verkhovnogo Soveta SSSR, 1961, no. 50, item 525.
8. H.J. Berman, Justice in the USSR, rev. ed. (New York: Vintage Books, Random House, 1963), pp. 226-66.
9. Konstitutsia (Osnovnoi zakon) Soiuza Sovetskikh Sotsialisticheskikh Respublik [Constitution (Fundamental law) of the Union of Soviet Socialists Republics], art. 6, 1977.
10. 1964 Civil Code of the RSFSR, art. 235.
11. Ibid., art. 220.
12. E.g., S.L. Levitsky, Copyright, Defamation, and Privacy in Soviet Civil Law (Alphen aan dem Rijn; Germantown, Md: Sijthoff & Noordhoff, 1979).
13. See J.N. Hazard, W.E. Butler, P.B. Maggs, The Soviet Legal System, 3rd ed. (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1977).
14. Berman, Justice in the USSR.
15. W.E. Butler, The Soviet Legal System, Legislation and Documentation, (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1978); W. B. Simons, The Soviet Codes of Law, Law in Eastern Europe Series, no. 23 (Alphen aan dem Rijn: Sijthoff & Noordhoff, 1980).

CHAPTER 1
GENERAL CHARACTERISTICS OF THE SOVIET STATE

IDEOLOGICAL ASSESSMENTS OF THE PRE-SOVIET STATE

Hundreds, perhaps thousands, of books have been written on the history of the Russian state.[1] Most are in agreement on the basic breakdown of that history into periods: an early period of independent principalities, a period of Mongol domination from the thirteenth to the fifteenth century, the emergence of a centralized Russian state with its capital at Moscow; the conversion of this state into a bureaucratic autocracy by strong rulers such as Peter the Great; alternating reform and reaction under increasingly weak Tsars; the collapse of the Tsarist government; the ineffective attempt to establish a democratic government and the Bolshevik takeover in 1917. There is much less agreement, however, on the degree to which the Soviet regime established in 1917 inherited the characteristics of the Tsarist regimes that preceeded it.

To a large extent each generation's impressions of its country's history and of the meaning of that history are determined by the history books they have been assigned to read. For this reason, it is important to know what early Soviet leaders and modern Soviet jurists learned in their study of the history of the Soviet and Russian state. The following discussion will examine some of the interpretations that Russian and Soviet historians have made of that history, so that the reader can better understand the historical consciousness of those who have built the Soviet state.

The Early Period

Before the thirteenth century, the area that is now Russia was divided among independent and often warring princes. Different cities had different forms of government. Later Russian historians often pointed to one such form, the "veche" or popular assembly as showing that there was a strong democratic tradition in Russia. Supporters of autocracy tended to play down the importance of the veche in Russian history. To a large extent, Russian and Soviet historical works on this period are more interesting as guides to the politics of the authors and the period when they wrote than as

guides to Russian history. In fact, it appears that the veche was quite weak or nonexistent in many Russian cities, but was strong in Novgorod. The leading Soviet legal historian of the past generation, S.V. Iushkov, explains:[2]

> The veche also began to occupy a different position in the system of Novgorod political bodies. As was stated above, in other areas, in proportion to the strengthening of the power of the prince as a feudal monarch, the veche stopped being assembled and then gradually died out. But in Novgorod, on the contrary, from assemblies, called as needed, the veche began to be transformed into a real institution with a definite area of activity. This vitality of the veche, the growth of its political influence was caused by the fact that the boyars, to overcome princely attempts to broaden power, were forced to share their power with city merchants and craftsmen. Cleverly concealing their decisive role in adoption of decisions of the veche, they tried to oppose the prince with the whole group of residents of Novgorod.

The Mongol Conquest

All historians of the Russian state agree that one of the most decisive events in that history was the subjugation of the Russian princes to Mongol conquerors in the thirteenth century. Disagreements center on the extent of influence and whether the influence was all negative or was a mixture of positive and negative. The leading prerevolutionary historian of Russian law, M.F. Vladimirskii-Budanov wrote:[3]

> Neither the Moscow state itself nor its essential features were created in fact by the Tartar [Mongol] conquest: there is a direct tie of succession between old Rus' [the ancient name of Russia] and the Moscow state; but the two-hundred-year yoke, reflected in the character of the enslaved population also give the state certain partial characteristics of an Asiatic order.

Legal history textbooks under Stalin tended to play down the authority of the Mongols and play up the authority of the Russian princes -- no doubt because Stalin viewed himself as the successor of those princes. However, a standard post-Stalin textbook on legal history gives prominent play to Mongol law by devoting a chapter to it between the chapter on ancient Russian law and the chapter on the centralized Moscow state.[4] Thus, the current

generation of Soviet lawyers, like their grandfathers before the revolution, are being made aware of the importance of the Mongol influence. The Soviet textbook makes clear the autocratic powers of the Mongol ruler and the universal duty of service borne by the population, but stops short of explicitly drawing the obvious parallels with the Soviet system. Prerevolutionary and foreign legal history texts drew the parallels between the Mongol and Russian states explicitly; foreign commentators have pointed out the continuity with the Soviet state.[5]

Nearly all commentators are in agreement that in order to throw off the "yoke" of the foreign invaders, a strong and centralized Russian state had to be organized. Such a state was organized by the Moscow princes during the fourteenth century, and in the fifteenth century it succeeded in ridding Russia of the Mongol domination. Historians have debated whether the autocracy of the Russian state and the obligation of its subjects to serve the state are copies of Mongol institutions or were necessary steps in consolidating forces to resist Mongol institutions. Few would deny that the Mongol period was a decisive turning point in Russian history.

A number of historians have mentioned, but have not commented in detail upon another important feature of Mongol rule, namely its effect upon the popular image of the legal system. Judges occupied a relatively low place in the Mongol hierarchy, and received their compensation directly from the parties. The system that necessarily led to bribery and corruption.[6] Lawyers and legal education were unknown. After achieving independence from the Mongols in the fifteenth century, the Moscow princes continued the policy of using low status judges paid by the parties. Formal legal education remained nonexistant. It was only in the nineteenth century that Russia was to achieve an educated and relatively honest judiciary and the start of a system of legal education.[7] However, the low regard for law on the part of the people and their leaders has never been overcome.

The Strong Rulers

During the centuries after liberation from the Mongol Yoke, Russia had a number of strong rules, such as Ivan the Terrible, Peter the Great, and Catherine the Great. The strength of these rulers reinforced the trend toward autocracy begun during the struggle to throw off Mongol rule. Especially important was the attempt by Peter the Great to import much of the apparatus of a

Western style government, drawing in particular from the Swedish model.[8] Other important innovations by Peter were giving the state a central role in education and economic development and the commissioning of a formal ideology of the state.

The ideology was created for Peter by Feofan Prokopovich, who wrote what amounted to a legal brief, drawing upon leading Western European theorists of the state, to justify Peter's contention that he as an absolute monarch should have the right to choose the heir to his throne.[9] In many ways this document foreshadowed much that was to follow, even in the Soviet period. The ideology was designed to justify the ruler's decisions, not to guide them. It dealt with a problem inherent in absolute rule, the problem of succession, a problem that was to reappear in a most serious way during the Soviet period. Western ideas were used as justification of a break from Russian tradition. In many ways, the failure to solve the problem of succession can be blamed for the downfall of the Tsarist regime. The system of strict primogeniture eventually adopted ended struggles for the right of succession, but almost guaranteed that sooner or later the throne would be occupied by a person of small ability. Such a system causes few problems in a constitutional monarchy, for little ability is needed to perform ceremonial functions. However in an autocracy, a weak ruler in a time of crisis can be a disaster. Peter failed in his attempt to have rulers selected more on merit and less on heredity, and the eventual result was that in the twentieth century the throne came to be occupied by Tsars unable to cope with the problems of the times.

The attempts by Peter and his successors to set up a Western-style state largely failed because of the lack of a system of written law, the lack of persons trained in law, and the resulting lack of popular respect for law. Only in the nineteenth century was an effort made to overcome these problems, an effort that was spectacularly successful except for one fatal flaw. In the second quarter of the nineteenth century, a brilliant and energetic official, Michael Speransky, managed to reduce, collect, and publish the chaotic mass of Russian legislation and to organize it into a Code of Laws of the Russian Empire.[10] Law and government administration became an acceptable career choice for the nobility. Legal education and legal scholarship flourished.[11] The flaw was the state and the legal system continued to be regarded as instruments of the autocratic government in ruling the people, not as guarantees of the rights of the people. Speransky's Code began with the famous words:

> The Emperor of All Russia is an autocratic and unlimited Monarch. Obedience to his supreme authority, not only from fear, but from conscience, is ordained by God Himself.

These words of the first article of the Code of Laws of the Russian Empire remained in force from the first edition of the Code in 1832 until the fall of the monarchy in 1917. The idea of the ruler as a force above the law and commanding absolute obedience from his subjects by no means disappeared in 1917, but became even stronger under Communism, particularly during the Stalin era.

IDEOLOGIES OF THE SOVIET STATE

Lenin -- The State of Armed Workers

Lenin elaborated his theory of the state in State and Revolution, published in August 1917. Lenin argues that even after the victory of the Bolsheviks, a form of the state will still be necessary, "which, while maintaining public ownership of the means of production, would preserve the equality of labor and equality in the distribution of products."[12] Also necessary will be the "strictest control, by society and by the state, of the quantity of labor and the quantity of consumption; only this control must start with the expropriation of the capitalists, with the control of the workers over the capitalists, and must be carried out, not by a state of bureaucrats, but by a state of armed workers."[13] Lenin, of course, was right that it would be utopian folly to suddenly eliminate the state. However, he was grossly overoptimistic or over-Utopian when he hoped to replace the bureaucratic apparatus of the modern state with "armed workers." By the time of Lenin's death, a strong state bureaucracy had been reestablished in Russia.

At the same time, there is a notable omission in Lenin's discussion of the state in the passage cited from State and Revolution. This is an omission of the role of the Communist Party leadership as rulers of the state. While other works by Lenin had expressed a strong elitist sentiment -- for instance, What is to be Done? -- in which he called for a revolutionary party led by an intellectual vanguard of professional revolutionaries,[14] his prerevolutionary works speak of power for the workers, not of continued power for a self-perpetuating group of heirs to the revolution.

Thus began what is the most important and difficult problem for the Soviet theory for of the state. It is extremely