

COMPARATIVE LAW AND LEGAL SYSTEM:

Historical and Socio-Legal Perspectives



Edited by

W.E. BUTLER

and

V. N. KUDRIAVTSEV



Studies on Socialist Legal Systems
Faculty of Laws
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The present volume originated in the first bilateral academic symposium to be held in Britain between English and Soviet legal scholars. Arranged under the Direct Link between the Faculty of Laws, University College London, and the Institute of State and Law of the USSR Academy of Sciences, which entered into effect as from 1 January 1984, the symposium dealt in a broad and exploratory way with some of the general features and concepts of "legal system" in the Anglo-American and socialist families of legal systems and with some of the methodological and substantive issues, problems, and insights that arise or occur during a comparative analysis of each.

We should like to express our appreciation to The British Academy and the USSR Academy of Sciences, under whose umbrella agreement Direct Links between British institutions of learning and USSR Academy institutes are facilitated, to The British Council for providing initial financial support, and to The Master for setting the text for publication.

It was a pleasure to welcome Academician V. N. Kudriavtsev in London as head of the Soviet delegation and to hear his warm endorsement of Anglo-Soviet legal links, since borne out by subsequent symposia and exchanges of research scholars. Comparative legal studies are an indispensable tool for specialists on both sides to better comprehend their own system through the virtues, shortcomings, and experience of others, and that reservoir has hardly been touched.

W.E.B.

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INTRODUCTION

W. E. Butler

Direct scholarly links amongst the Anglo-American and Soviet legal communities are still at a relatively low, albeit very encouraging and promising, level of development. The principal modes of contact have been *ad hoc* bilateral reciprocal symposia, such as those on the law of the sea organised in 1983-84 by the Centre for the Study of Socialist Legal Systems, Faculty of Laws, University College London, and the Soviet Association of Maritime Law, Soiumzorniiproekt, and the Oceanographic Committee of the USSR; or in 1973-75 arranged by The American Society of International Law and the Soviet Association of International Law on foreign trade law and on the law of the sea and environmental protection; or those on local government and other topics held in the United States and the Soviet Union in the late 1970s and early 1980s. Those still tiny numbers of scholars on both sides who have been fortunate to participate in the symposia will be aware through their own contributions and by listening to others that the forum and format impose constraints not ordinarily encountered in other international gatherings: apart from the usual limitations of time and language, one quickly realises that even in addressing specialists one cannot make assumptions about a subject rooted in your own legal culture and expect the audience to grasp these. Moreover, one is not merely addressing or briefing them; one is laying the groundwork for discussion and comparative analysis of the topic as a whole in light of other contributions or formal interventions or subsequent commentary. In the field of law, at least, where mastery of another legal system requires not merely a knowledge of institutions and substantive rules but the ability to adjust your mental processes as fully as possible to that system -- and this just to accurately perceive the system; comparative *analysis* is yet another step beyond -- effective communication demands much more of the participant than where the language of scholarship is mathematical, symbolic, or predominantly international. Accordingly, legal studies originating in bilateral symposia of the nature described here are a veritable genre of legal literature of their own, to be measured against the past, the tenor of the times, the constraints inherent in the medium, and the possible unexploited possibilities of that medium. Direct links hold out the promise of collaborative or sustained legal

research over an extended period of time, if required, and in doing so represent a considerable increment to the long-standing schemes for individual scholars to reciprocally carry on their own projects. It remains for the parties concerned to make the most of the opportunity.

In the present volume twelve Anglo-American and Soviet legal scholars have addressed, from historical and socio-legal perspectives, the concept of legal system and its constituent parts. The contrast on the general plane is especially striking. The common law tradition found itself repeatedly attributing the present state and shape of the law to its historical pattern of development; Anglo-American law is an historical system of law in so many respects, even in its reception and development of the sociology of law. Soviet legal scholars stressed the transition in their country to the *planning* of legislation and legal change, contrasting the earlier years of the post-1917 period and their episodic, programmatic approach to law with the modern timetables of lawmaking for the legislature and emphasis on normative regulation.

On the more particular level, it is evident that both families of legal systems acknowledge the great interaction of international law and municipal legal systems and regard this as a major area of theoretical and practical concern. Each legal system is experiencing important changes within the constituent components of its law, the emergence of new branches of law or alterations in the configuration of established branches. In the Soviet Union the areas of development include constitutional, administrative, and economic law; in England, labour, family, and tort law. In both instances changing perceptions of the scope and nature of legal relations within each branch have, sometimes rather belatedly, caused legislation to respond in new ways to vexsome social and economic issues.

Especially welcome, however, is acknowledgement that comparative legal studies, in theory and in practise, can make an appreciable contribution to the development of both families of legal systems; indeed, that the most penetrating and helpful insights often are to be gleaned from a comparison of legal systems which have widely divergent approaches to issues. The papers in this volume, quite apart from their individual substantive contribution, give evidence of a new spirit in comparative studies long overdue.

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LEGAL THEORY AND LEGAL SYSTEM

SOVIET LEGAL SYSTEM: TRENDS OF DEVELOPMENT

V. N. Kudriavtsev

Before considering the major trends of development of the Soviet legal system, it is necessary to dwell briefly on the concept and general characteristics thereof. The legal system is understood in this paper in the broad sense of the term, as the aggregate of at least four components: legal norms, legal relations, legal institutions, and legal views inherent in a given society (A. M. Vasil'ev, V. P. Kazimirchuk, S. S. Alekseev, and others). Obviously when speaking of the trends of development of the legal system, one should have regard to the whole of its sophisticated structure.

Concepts of Legal System

In a narrower (technical) sense, one may refer to a system of law with a view to seeing how to classify its branches and sources with due regard for the subjects, object, and forms of legal regulation. This means in essence the systematization of legal norms and, to a certain extent, legal relations. In this context, one should note, first, that Soviet law is the law of a federated State. There are the Constitution and the laws and other legal acts of the USSR, and, in addition, of the constituent union republics (15), autonomous republics (20), and also the acts of local agencies of State power and administration. As the Constitution of the USSR provides, in Article 74: "Laws of the USSR shall have the same force on the territory of all the union republics. In the event of a divergence between a union republic law and an all-union law, the law of the USSR shall prevail."

There is, furthermore, so-called local lawmaking: the norms that extend only to a particular enterprise or institution (for example, the rules of internal labour order).

Second, as one can see from the foregoing, legal norms are in a certain state of coordination and hierarchy with the Constitution at the top, followed by: a Law adopted by the Supreme Soviet (of the USSR, or of a union or autonomous republic) or by a referendum, an Edict of the Presidium of the Supreme Soviet, a Decree of the Council of Ministers, and an act (decision or regulation) of a local soviet of people's deputies, etc.: "The Constitution of the USSR shall possess the highest juridical force.

All laws and other acts of State agencies shall be issued on the basis of and in accordance with the USSR Constitution (Article 173, Constitution of the USSR).

Third, there is a division of legal norms by object of regulation. This division of law into branches is not constitutional but rather of theoretical and instructional significance, yet it is fairly widespread amongst the members of the legal profession. There is, perhaps, no single concept of the system of branches of the law in force, but one can point to two official sources where such systems are set out, though applied to different objectives. The *Svod zakonov* of the USSR, which has yet to be completed, is built on the following system: (a) social and state system; (b) social development and culture, socio-economic rights of citizens; (c) rational use and protection of natural resources; (d) national economy; (e) international relations and foreign economic links; (f) national defence and the protection of State frontiers; (g) justice, procuracy supervision, and protection of the legal order.

There is another system in the list of legal specialities for which higher doctorates and Ph.D. degrees in law are conferred. It has been confirmed by the Supreme Attestation Commission attached to the USSR Council of Ministers and envisages the following specialities, combining them into nine groups: (a) theory and history of State and law; history of political and legal doctrines; (b) State law; administrative law; financial law; (c) civil law; family law; civil procedure; private international law; (d) economic law; arbitrazh procedure; (e) labour law; law of social security; (f) collective farm, land, water, forestry, and mining law; legal protection of nature; (g) criminal law and criminology; correctional-labour law; (h) criminal procedure; procuracy supervision, and criminalistics; (i) international law.

Early Post-Revolutionary Experience

In order to form a judgment about the basic trends of development of the Soviet legal system, it is necessary, above all, to take into account that the Great October Socialist Revolution of 1917 wholly repealed Tsarist legislation and abolished the former legal institutions, including the courts, procuracy, and police. The new regime abolished the estates, civil ranks, and all privileges and restrictions entailed therein, proclaimed the equality of men and women, the equality of people of different nationalities and different religious beliefs, and proclaimed the democratic rights and freedoms of citizens.

The entire legal system of the new society had to be built anew. This

process went on in the early years of Soviet power on the basis of the revolutionary lawmaking of the masses.

The early decrees of Soviet Power for the most part merely outlined a programme of action and could not claim to be complete in substance, nor could all norms be wholly implemented. That was inevitable when the Soviet State was just being organised and all the links of the State apparatus capable of carrying out the prescriptions of the law had yet to be created. Indeed, Soviet law as such was just in the making, being formed. Soviet legislation in those early years was fragmentary. It did not encompass, nor could it encompass, all social relations in need of legal regulation. Socialist transformation was being carried out for the first time in the world, and the specific forms of new relations could be worked out only through the practical experience of the toiling masses, which was not very great as yet. Revolutionary transformation was quite often accomplished not by way of legislation, but through autonomous revolutionary creative effort of the toiling masses and local Soviet agencies, they being not regulated by decrees but guided by their own revolutionary legal consciousness.

At the same time, a system of legal acts (laws, decrets, and decrees) of the young Soviet State began to take shape in the early 1920s, which was important from the viewpoint of the unity of legal regulation of social relations, strengthening legality in the country, and ensuring the rights and freedoms of citizens.

The VI All-Russian Congress of Soviets, in November 1918, adopted a Decree "On Precise Observance of Laws," calling on "all the citizens of the Republic, all agencies, and all officials of Soviet Power to observe laws in the strictest possible way."

Decret No. 1 on the Court, promulgated in November 1917, authorised the courts to refer in their judgments and decisions to old laws unless they had been repealed by the Revolution or were contrary to revolutionary legal consciousness. The 1918 RSFSR Statute on the People's Court proscribed references to the laws of overthrown governments, establishing that the courts of law should be guided only by the laws of Soviet Power, or, should these be found wanting or incomplete, by a socialist legal consciousness.

Codes relating to all the principal branches of law: civil, labour, family, criminal, and procedure, were drafted and adopted in the mid-1920s. That first codification essentially completed the creation of the Soviet legal system, reflecting and consolidating the social relations of the dictatorship

of the proletariat.

In accordance with the Soviet legal concept, based on the philosophical ideas of Marxism-Leninism, the law of each historical epoch reflects more or less accurately and fully the social needs and interests, which change in accordance with societal development. This appears to be wholly corroborated by an analysis of the peculiarities of the development of Soviet law during the past nearly seventy years.

During these years, Soviet society passed through several important developmental stages. As the peculiarities of the dictatorship of the proletariat exhausted themselves, the restrictions they imposed were lifted. The Soviet State had become a State of the whole people. Now Soviet society has entered the period of developed socialism, which is characterised by the coming together of all classes and social strata, and by the achievement of *de jure* and *de facto* equality of all nations and peoples constituting the Soviet people. Our legal system has changed accordingly during these years and decades.

Trends in Legislation and Branches of Law

We shall outline those changes, with an eye on those typological indicia of the legal system with which this paper began.

As to the system of union and republic legal acts and their scale of importance, one can note the growing activity of the highest legislative bodies and the general increase in the authority and role of the Law.

Upwards of twenty new all-union Laws have been adopted since the present USSR Constitution was adopted in 1977. These include the Reglament of the USSR Supreme Soviet, the Law on the USSR Council of Ministers, laws on the USSR Supreme Court, the Procuracy of the USSR, the Advokatura, State Arbitrazh, People's Control, Citizenship, as well as Fundamental Principles of Legislation on Administrative Violations, the Law on Labour Collectives and Raising Their Role in the Management of Enterprises, Institutions, and Organisations, to mention just a few.

Legislation of the union republics has been making just as effective progress. Their enactments, drafted and recently promulgated, include housing codes, the codes on administrative violations, and laws on environmental protection.

The system of branches of law also has changed appreciably. New ca-

tegies, such as air and space law, atomic law, and environmental law, have appeared in legislation and in legal theory. Scientific, demographic, and urban-development legislation is under consideration.

Trends in the Substance of Legal Regulation

It appears to be more essential to consider the trends which characterise the modification of legal regulation in substance, rather than in form. One should point, in this context, to the development of a number of principles of Soviet law and to changes in the methods of legal regulation of social relations.

For example, *the principle of equality of citizens before the law* has been fully developed in every aspect. As already has been said, so long as the dictatorship of the proletariat existed, there were certain restrictions imposed on some categories of citizens (for example, as regards suffrage). All of them were repealed by the 1936 USSR Constitution. But the fullest expression of the principle of equality of citizens has been formulated in the present Constitution of the USSR: "Citizens of the USSR shall be equal before the law, irrespective of origin, social or property status, racial or national affiliation, sex, education, language, attitude toward religion, type and nature of occupation, place of residence, or other circumstances. The equal rights of citizens of the USSR shall be ensured in all areas of economic, political, social, and cultural life" (Article 34).

It is worth noting that this formula is much fuller than the corresponding provisions of the international human rights covenants (1966).

Equal rights do not yet mean actual equality. The concern of the Soviet legal system is to contribute, as societal development proceeds, toward bringing classes and social groups closer together and equalising economic and cultural opportunities, thereby ultimately achieving the actual equality of Soviet citizens in accordance with the Communist principle: "From each according to his ability, to each according to his needs."

One should also point to the substantive development of the *guarantees of the rights and interests of citizens*. The 1977 USSR Constitution has expanded the list of the fundamental rights and freedoms of the citizens of the USSR by including therein, in particular, the right to housing, the right to health protection, the right to the enjoyment of cultural achievements, and so forth. One distinguishing feature of the Soviet legal system is that all of the rights and freedoms have not simply been proclaimed, but are secured by economic, social, and legal guarantees. A