Review Article

Soviet Law After Stalin: In Search of a Larger Context*

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Volume 20 of the highly respected series, Law in Eastern Europe, will contain the “results” and “findings” of research into recent developments in Soviet law, undertaken by a group of scholars during 1975-1978 under a grant from the Ford Foundation. The ultimate purpose of such research, says John N. Hazard, is to determine whether observed new trends call for a “re-evaluation of the nature and course of Soviet law.” The first series of results and findings is now before us, as Part One of volume 20. When completed in 1979, the three-part work will provide the non-specialist with an impressive body of knowledge about many key aspects of contemporary Soviet law, presented in a context designed to make this knowledge more intelligible. The specialist, on the other hand, will find much that is new, partially new, or re-assessed with various degrees of skill. Upon the admittedly incomplete evidence of Part One of the project, he may well have also misgivings about the overall methodology used in the study, namely the interaction between the “prerogative” and the “normative” elements in the operation of Soviet law.

While awaiting the final verdict on the need for re-evaluation of the nature and course of Soviet law, perhaps even anticipating a “final conclusional statement” (Zilè, p. 260) about the main directions of such a re-evaluation, one might usefully ponder whether in the case of Soviet law, legal analysis may borrow the methodology of political science without itself becoming a handmaiden of Kremlinology. For if Mr. Feldbrugge is right that in the Soviet Union “the prerogative state does not co-exist or compete with the normative state—it absorbs it” (p. 48), then political science indeed provides the only valid approach in


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assessing the behavior of the Soviet legal system as a whole, and our knowledge must rest on judgment—Marc Bloch’s "la manie du jugement"—rather than be derived from traditional criteria of legal comparison.

This is not to say that the particular analytical model chosen by the avtorskii kollektiv will necessarily yield such knowledge: (a) The scales between the "prerogative" and the "normative" elements are bound to swing widely from branch of law to branch of law, in an almost direct proportion to the political sensitivity of each branch, and in the more sensitive branches the truth of today can become the fallacy of yesterday without warning or satisfactory explanation. (b) Meaningful generalizations applying to the legal system as a whole, such as Hazard had presumably envisaged, call for a systematic approach, analysis of every branch of the law, in preference to the random selection of topics which we find in the present volume and shall probably find in the two remaining volumes as well. But it is not at all certain that the analytical model adopted is suitable for generalizations. For what valid conclusions can one distill even from a systematic survey? The significance to be ascribed to the changing relationships between the prerogative/normative elements in individual branches of law is qualitative, not statistical, and even a conclusive preponderance of "normative" elements in, say, the marriage and divorce law (Juviler, pp. 119-157) is not usefully comparable to the given distribution of such elements in the criminal law branches. (c) With the distribution of topics tipped in favor of criminal law as it is in the present volume (60%), a more fertile field has no doubt been chosen to observe the qualitively more weighty swings in the balance between the "prerogative" and the "normative" elements. By the same token, the danger has been increased of arbitrarily tipping the scales on the side of "prerogative" in the overall assessment of the Soviet legal system as a whole and of relegating "non-criminal" topics (including the whole of civil law) to a position of near-irrelevancy, reflecting a "hierarchy" more easily justified in political science than in comparative law and demonstrating, at least for the branches of law occupying the "lower échelons" of this hierarchy, the truth of another dictum by Marc Bloch: "...à force de juger, on finit, presque fatalement, par perdre jusqu’au goût d’expliquer". If we have travelled far since the days when Jhering had placed private law at the top of the hierarchy as "die wahre Schule der politischen Erziehung." (d) If the analytical model is ill-designed for purposes of generalizations and overall conclusions, should not analysis have been restricted to one field alone, that of criminal law for instance, in which the model can yield valid conclusions? The experience of authors of the ten essays composing the present volume seems to indicate that this is not necessarily the case:

F. J. M. Feldbrugge has emphatically rejected the relevance of the model in analysing Soviet corrective labor law and penitentiary practice. Virtually all authors were forced to qualify, amend, or simply disregard the model in analyzing their own topics, "criminal" and "non-criminal" alike, or graft brief com-