# PART TWO

# SOCIALIST LAWS

## 115. Originality of socialist laws

In 1917 Russia began to build a new type of society. The society to be created is communist, under the aegis of fraternity, where there will be no more State and no more Law. These will have been made superfluous by a new feeling of social solidarity developed upon the disappearance of the capitalist world's antagonisms: the need for coercion will have disappeared, and social relations, to be ruled primarily by communist morality, will only be subject to simple rules of economic organisation and necessity.

This ideal of a communist society has not yet been achieved in the U.S.S.R., where in our time only a socialist state has been created, one characterised economically by the collectivisation of the means of production and politically by the omnipotence of the Communist Party. The socialist state's objective is to prepare for the advent of communist society, but that society is still very much in the future. Coercion, far from being banished, is more prevalent now than ever before because of the need for protection against attacks by enemies of the regime and the further requirement that citizens be strictly disciplined in order to create the conditions which will make communism possible. The state, before it can wither away, thus has enlarged spheres of activity and intervention, and is stronger than ever; until its decline becomes possible, it rules every aspect of society with an unprecedented rigour. The same holds true for law. The Soviets are today very conscious of the importance attaching to the place of law in their country. The building of a planned economy has ushered in a vast body of regulations and the existence of the principle of socialist legality is witness to the real authority of the law.

Is the present law of the U.S.S.R. to be considered an original system when compared with those of the Romano-Germanic

family? It is clear that the promised communist society, once it is realised, will be entirely different from society as we know it. For the moment, however, it has not been achieved, and the present law in the U.S.S.R. has an undoubted affinity with Romanist laws; it has to a large extent retained the terminology of these laws and, in appearances at least, their structure; it has a concept of the legal rule which seems no different from that of French or German jurists. Various authors, therefore, especially English and American, are inclined to deny Soviet law the originality that it claims, and to classify this law in the family of Romanist laws.

Jurists of socialist countries unanimously maintain the opposite thesis. In their view, law is nothing more than a superstructure, the reflection of a certain economic structure; it is unscientific and contrary to all reason to ignore the bond of fundamental importance uniting the law and the economy and to fasten on resemblances or differences which, in the last analysis, are purely formal. To the two types of different economies, two entirely different types of law necessarily correspond: laws of socialist countries and laws of non-socialist countries evidently belong to two different families so long as the play of economic forces in the latter is directed by private interests whereas, in the former, the means of production are exploited in conformity with a plan established in the collective interest.

It would be inappropriate here to deal at length with the question whether or not the opposition thus expressed is fundamental. By putting into effect new social—if not socialist—ideas, the free democracies have profoundly changed in the twentieth century, and their legal institutions are a far cry from those which Marx and Engels justly criticised. Whatever such transformations may have been, it must nevertheless be admitted that, at the present time, fundamental differences persist between the structures, institutions, and ways of life and thought of socialist and other countries. Perhaps, when the present lack of understanding and suspicion are dissipated by a recognised need for participation in common tasks, these differences will one day become less marked. For the moment, one passes into a new world by crossing the frontier of a country of the socialist camp; the problems are different to those in the non-socialist countries and words themselves often have a different sense. The terms "democracy," "election," "parliament," "federalism," "trade-union," and "collective agreement,"

for example, take on very different meaning because of the existence of an all-powerful Communist Party; the words "property," "contract," "civil service," and "arbitration" denote different realities because of the collectivisation of the means of production and state planning. For these reasons Soviet law must be classed in a different "family" from the Romano-Germanic. The jurist wanting to study Soviet law may indeed benefit from his training in a Romanist country, compared to his American or English colleagues but he is nevertheless far less at ease in the study of this law than he would be with another continental European law.

A major challenge today is to assure the co-existence of socialist and non-socialist countries. It is thus important that we in the West understand the socialist countries' attitude to their law. But an understanding of their efforts to create a new social organisation according to ideas and using techniques different from our own is also of interest in its own right—the study of socialist law enables us to adopt a new critical stance in regard to our own law. It may also frequently happen that, without rallying to the theoretical positions of Marxist doctrine, experiments attempted in socialist countries can be put to good use as well in the West.

### 116. Geographical area

The word "socialist" is not precise in meaning. Political parties of various hues have made use of it because of its connotations. The terms "socialist countries" and "socialist laws" suffer from the same imprecision. No attempt will be made here to dissipate such ambiguity; no debate on the appropriateness of Sweden, Syria or Tanzania, for example, claiming that they adhere to "socialist" doctrine, will be taken up. The study of socialist law presented here is centred around that of the Soviet Union rather than all "socialist" countries. Some attention will however be given to the laws of a number of European countries[1] which, like the U.S.S.R., aspire to create communist societies. As between the law of the U.S.S.R. and these other nations there are, however, many differences which must be underscored in order to destroy the fairly current myth that together they make up, without any differentiation,

[1] Rumania, Czechoslovakia and Yugoslavia are today classed as Socialist Republics; four countries (Albania, Bulgaria, Hungary and Poland) are termed People's Republics; East Germany is the Democratic Republic of Germany (D.D.R.).

a monolithic bloc of countries devoted to an unvarying totalitarian ideology. Indeed, these differences are such that, despite their similarities and common adhesion to a number of fundamental principles, some authors have explored whether it is really even appropriate to group these laws within only one socialist family.[2] In our view, however, the many similarities between them and their adherence to common leading principles, justify their grouping within a single family.

In this part of the work, we have omitted the laws of the non-European socialist countries. The law of China, which is the issue of a different tradition and civilisation, must be dealt with apart and in the context of our treatment of the laws of the Far East. The laws of countries on other continents which claim to belong to the socialist camp also depart in some important respects from the basic position of the Soviet Union,[3] with the possible exception of Cuba. Whatever may be the sympathy expressed for their political regimes, these countries are not considered, at least in the Soviet Union, to belong to the family of socialist laws, and we, for our part, have adopted the same attitude.

The historical evolution, the sources and the structure of socialist law, using Soviet law as the prototype, will be examined in the three principal divisions of this Part.

[2] Hazard (J. N.), *Communists and their Law. A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (1969). The "Socialist Commonwealth of Nations" studied in this work includes the European countries just listed and China, Outer Mongolia, Korea, North Vietnam, and Cuba. Chapter 18 of the work is devoted to Mali prior to the *coup* of November 1968.

[3] Hazard (J. N.), "Marxist Models for West African Law," *Ius privatum gentium, Festschrift für Max Rheinstein* (1969), Vol. I, pp. 285–297.

# TITLE I

## HISTORICAL EVOLUTION

### 117. Outline

This Title is divided into three chapters. The first is devoted to an examination of the legal tradition in the period preceding the assumption of power by the Communists. The second chapter explains the basic principles of Marxism-Leninism upon which the Communists intend to transform the whole of society. The final chapter traces the legal developments that have occurred from the time when that doctrine triumphed and a new order was established in the various countries to be examined.

# CHAPTER I

# THE LEGAL TRADITION

## 118. Importance of subject

The will to transform the whole of society has inspired socialist leaders ever since they took up the task of building a communist society in their respective countries. But to understand how they view this challenge, one must be familiar with the position from which they began. History alone explains why, quite apart from the adoption of new political principles, certain techniques have been used and why the law exhibits a particular organisational style. It is history as well which explains certain psychological attitudes that sometimes help and sometimes hinder, or orient in special ways, such developments.[1] The notable differences between the various socialist countries are, of course, the result of the different circumstances in which their laws developed—in other words, their common adherence to one doctrine on the subject of the society of the future, Marxism–Leninism, has left undisturbed their several conceptions of the best manner in which to achieve it. The Russian legal tradition[2] and that of other socialist countries can therefore be examined with profit.

## Section I—Russian Law before 1917

### 119. The Russia of Kiev: Russkaïa Pravda and Byzantine law

The historical period in Russia only begins at the end of the ninth century, when a tribe called the Varangians under the leadership of Riurik, apparently from Scandinavia, established its

[1] Berdiaev (N.), *Les sources et le sens du communisme russe* (1936).

[2] Russian words have been rendered according to their pronunciation in English (Lenin, Russkaïa Pravda, Khrushchev). The transcription according to the Czech alphabet has however been retained in the notes (Lenin, Russkaja Pravda, Hruščev), except of course where reference is made to texts written in other languages.

domination over the Russia of Kiev in 862. The state then created lasted until 1236, when it was destroyed by the Mongols. The most important event in its history was the conversion of the tribe to Christianity under the reign of Saint Vladimir (*d.* 1015) in 989. The first landmark in Russian law—excluding certain early treaties concluded with Byzantium[3]—appears immediately after this conversion. As in the West, the need to reduce the customs to writing was felt at this moment, principally with the aim of extending the influence of the Church through the magic power of the written word. The Russian customs of the Kiev region were drafted in the first half of the eleventh century; the collections, containing numerous variants explaining the custom, date from this time to the fourteenth century, and have the generic name *Russkaïa Pravda* (Russian law).[4] Drafted in Slavonic, they reflect a more generally evolved society than that of the Germanic or Scandinavian tribes at the time of the redaction of the "barbarian laws in the West." The law described is territorial not tribal in nature and, on many points, its provisions presage the feudal regime.

In addition to the indigenous customary law set forth in the *Russkaïa Pravda*, Byzantine law had an important place in the Russia of Kiev. Whereas in the West the Church observed Roman law, in Russia it observed Byzantine law as represented by the *Nomocanons*, the content of which united private law (that is, of secular society) and canon law.[5] Byzantine law is of extreme importance in the Russia of Kiev: the Church applied it directly to clerics, as well as with respect to its extensive land holdings in which its jurisdiction was exercised. It extended its use, moreover, by means of arbitration and by various interpolations in the drafted customs.

### 120. The Mongol domination

With the establishment of the Mongol domination (the Golden Horde) in 1236 the second period in Russian history begins. This

[3] Sorlin (I.), "Les traités de Byzance avec la Russie au X[e] siécle," *Cahiers du monde russe et soviétique*, t. II (1961), pp. 313, 447.

[4] On the Russkaïa Pravda, *cf.* Goetz (L. K.), "Das russische Recht," *Zeitschrift für vergleichende Rechtswissenschaft* (1911), Vol. 26, pp. 161–426. Portions of it have been translated into English in Vernadsky (G.), *Medieval Russian Laws* (1947) no. XLI of the *Records of Civilization. Sources and Studies* series of Columbia University.

[5] The nomocanons, translated into Slavonic in the 13th century, were called, generically, *Kormchaïa*, (*Kormčaja*) (Guide). On the subject of the Byzantine nomocanons, *cf.* Mortreuil (J.), *Histoire du droit byzantin ou du droit romain dans l'Empire d'Orient, depuis la mort de Justinien jusqu'à la prise de Constantinople en 1453* (3 vols., 1843–1846).

domination was only brought to an end under Ivan III in 1480, after a war of liberation lasting 100 years. Its political consequences are still felt today. One of them was the new prominence given to Moscow, rather than Kiev. But its most important effect was to isolate Russia from the West; nor did this isolation end when Russia regained its independence, since it was still separated from its western neighbours by its Orthodox faith. From 1056 the schism with Rome was complete. The Byzantine Empire had ceased to exist. Russia, with its new independence, was isolated and considered itself to be "the third Rome," heir to Byzantium in the crusade for the true faith.

From the purely juridical viewpoint, the Mongol domination had a negative rather than positive influence. Mongol custom (*yassak*) had never been imposed on the Russians and therefore had little influence on Russian law which merely stagnated as a result of Mongol domination. This Mongol presence explains the rise in the influence of the clergy and, because of the regrouping of the faithful around their clergy, the development of Byzantine law.

### 121. The code of 1649

A third period in the history of Russia and Russian law runs from the end of the Mongol domination to the accession of Peter I (the Great) (1672–1725) in 1689. During this period Russia had no windows open to Europe. It submitted to the despotic rule of the Tsars in order to avoid anarchy and preserve its independence against aggression from the West. In 1591 serfdom was established. The Church itself, deprived of any outside assistance, was subordinated to the Tsar. The sentiment took root that those who governed, and whose whim was law, were all-powerful. The distinctions between police, justice and governmental administration were poorly defined in this regime dominated by a routine adherence to custom, except for the occasional exercise of the arbitrary discretion of the Tsar, the local nobility or other administrators. The Tsars made no systematic attempt to reform society, although an effort to achieve some judicial reorganisation is shown in the *Codes of Law* (*Sudebnik*) of 1497 and 1550. The most interesting landmarks in the history of law during this period were the compilations establishing new, up-to-date editions of the *Russkaïa Pravda* and the *Kormchaïa*. Particularly important in this connec-

tion was the work done under the second Tsar of the Romanov dynasty, Alexis Mikhaïlovich (1629–1676) through whose initiative a work of consolidation was carried out in both Russian secular and canon law. The first was compiled in the Code of Alexis II (*Sorbornoé Ulojenié*) of 1649, comprising 25 chapters and 963 articles. The second was set forth in the official 1653 edition of the *Kormchaïa*, which replaced an earlier work known as the *Hundred Chapters* (*Stoglav*) of Ivan the Terrible (1551).

### 122. Peter the Great and his successors

The fourth period in the history of Russian law covers the time between the accession of Peter the Great in 1689 and the Bolshevik revolution of 1917, during which Russia renewed her contact with the West. Although Peter the Great and his successors endowed Russia with a modern administration, their efforts did not extend to private law and they therefore had no long lasting influence. The Russian people continued to live according to their customs, but under a more efficient administration to which they were generally submissive. Both great Russian sovereigns of the eighteenth century, Peter I and Catherine II (1729–1796), failed in their aim to revise the Code of Alexis II—Peter by favouring the adoption of a code based on the Swedish model, Catherine by adopting a code inspired by the doctrines of the Natural Law School.

### 123. The Svod Zakonov (1832)

A first step towards modernising Russian law, inspired by the French example, was taken at the beginning of the nineteenth century by Speranski, a Minister of Alexander I (1777–1825). But the rupture with Napoléon and the subsequent reaction were such that only a new "consolidation" rather than codification and modernisation of the Russian law was accomplished under Nicholas I (1796–1855). The body of Russian laws so established in 1832 is known as *Svod Zakonov*. It contained some 42,000 articles (later enlarged to 100,000 articles) arranged in eight sections over 15 volumes. About two-thirds of it was devoted to public law subjects. Because of its eclectic contents, casuistic method and

approach, it is more closely related to the Prussian *Allgemeines Landrecht* of 1794 than to the Napoleonic codifications. Nicholas I had given instructions that Russian laws be systematically arranged and presented without, however, any of the content being changed. These instructions were doubtless not followed literally by Count Speranski to whom credit is owed for the compilation. Nevertheless, it may be said in general that from the *Russkaïa Pravda* to the Code of 1649, and from the Code of 1649 to the *Svod Zakonov* of 1832, the work accomplished was always one of consolidation and exposition, and never one of complete reform and modernisation.

It was only in the second half of the nineteenth century, and under the reign of Alexander II (1818–1881), that a liberal reform movement developed. This movement, marked principally by the abolition of serfdom (1861) and by a reform of the judicial organisation (1864), also provided Russia with a penal code (1855, revised in 1903); but it never produced a Civil Code, although a draft was prepared.

When the Bolshevik regime came to power in 1917, such was the situation. The general character of the legal system as it then existed can now be briefly sketched.

### 124. Russian law in the Romano-Germanic family

To begin with, the science of law as it existed in Russia took its models from Byzantine law—that is to say, from Roman law—and from the countries of continental Europe belonging to the Romanist system. Original Russian customs certainly existed, as did original French or German customs; but, as in eighteenth century France and Germany, the only science of law to be found in Russia was that of the Romanists. Consequently, the categories of Russian law and the concept of law in the universities and among jurists were those of the Romanist laws. Although Russian law was collected in publications adopting the case-by-case approach, the Russian jurist did not conceive of law as "case-made" by nature. For him, as for the French or German jurist, the legal rule was, essentially, a rule of conduct to be formulated by doctrinal writers or legislators, not the judge. Russia was not as completely supplied with codes as the other countries of continental Europe, but it was ready for them.

**125. Weakness of the Russian legal tradition**

Another point worth emphasising was the weakness of the legal tradition and the very idea of law in Russia.[6] The serious matter here was not the technical backwardness of Russian law, nor the fact that it was incompletely codified; it was more a matter of the difference in the Russian people's attitude to law engendered by a different history, as compared with that of other European peoples.

Throughout continental Europe, as well as in England, law is considered a natural complement to morality and one of the fundamental bases of society. This idea did not take root in Russia. Until relatively recently, there were no trained jurists in Russia; the first Russian university, the University of Moscow, was only created in 1755, and the University of Petersburg in 1802. A Russian legal literature only appeared in the second half of the nineteenth century, and it was only with the judicial reform of 1864 that a professional bar was organised and the career pattern of a judge established as distinct from that of an administrative official. Until then no distinction was made between police power, justice and the civil service. Written law moreover was altogether foreign to the popular Russian mentality. What written law existed was essentially administrative and without roots in the private law. The portion of private law it did touch upon was not of interest to the vast majority of the population. It was a "law of the cities" and made for merchants and a small middle class, while the peasant masses continued to live according to their customs. For example, only family ownership (*dvor*) or communal ownership (*mir*), to the exclusion of the individual ownership which was anticipated by legislation, existed for the peasants. For them, too, justice meant equity as administered by the court of the *volost'*, made up of elected judges who were not jurists; and the court of the *volost'* came under the Minister of the Interior, not the Minister of Justice. The law in general was not based on the social consciousness of the people, as in the other countries of Europe, nor on tradition. Established only by legislative provisions, it was very largely the arbitrary work of an autocratic sovereign or a privilege

[6] Kucherov (S.), *Courts, Lawyers and Trials under the last Three Tsars* (1953); Berman (H.), *Justice in Russia, An Interpretation of Soviet Law* (1950).

of the bourgeoisie. It was, therefore, taken for granted that the sovereign was above the law which in itself was identified with his good pleasure: *princeps legibus solutus*. Jurists were the servants of the Tsar and the state rather than of the law; they had no *esprit de corps* of an independent professional group.

The unity of the Russian people is not founded upon a developed common sentiment about the law. Western authors may well mock justice and men of law, and scoff at their failings; yet no one imagines that society could exist without courts and without law. *Ubi societas ibi ius*. The opposite attitude is by no means shocking in Russia. Like Saint Augustine, Leo Tolstoy wished for the disappearance of law and the advent of a society founded on Christian brotherhood and love. The Marxist ideal of a communist and fraternal society does find deep roots therefore in the moral and religions sentiments of the Russian people.

## Section II—Other Socialist Countries

### 126. General characteristics

A number of important differences exist in the history of the former law of each of these countries. On this point, as in the case of Russian law, only general observations will be made here and emphasis will be placed on those characteristics which appear to have retained some importance for the explanation of the present law or which point out the differences between the development of a particular law in a people's democracy and that of the law of the U.S.S.R. Those characteristics which may have given any one of these laws some particular originality within the framework of the family of Romano-Germanic laws before the establishment of a people's democracy—however interesting they may be in fact—will not be discussed.

All the European states in which a people's democratic regime has been established were, before such event, members of the Romano-Germanic family of laws. Apart from this essential characteristic and considering only very generally their legal history, they can be divided into two groups. Those in the first, linked for religious reasons to Rome, were associated with the movement of ideas and the development of institutions of western Europe

with which they always had very close links. On the other hand, those in the other group, of orthodox Christian persuasion, were very much affected by the decline of the Byzantine Empire and for centuries were cut off from the West by the Turkish occupation.

### 127. Countries of western tradition

The development of Hungarian, Polish, Czechoslovakian and Slovenian and Croatian law was consistent with that in Germany, Austria and France.[7] The conditions affecting the laws of the countries of this first group were the same as those in the Germanic and Latin countries of Europe as opposed to those in Russia. A strong legal tradition existed; the civil law at least was in harmony with the feelings and habits of the population. Law was considered to be one of the bases of society; a large and respected body of jurists assured its administration and collaborated in its development.

### 128. The Balkan states

In the Balkan states which make up the second group, Albania, Bulgaria, Rumania, Serbia, the course of history was completely different. Like Russia these countries were at first subjected to a Byzantine rather than a western European influence. As in the case of the Mongolian occupation of Russia, the Turkish occupation in these other countries paralysed the evolution of law for centuries but, which was worse, it lasted much longer than in Russia, and only ended in the nineteenth or even twentieth century. Because of this, it is not surprising that conditions similar to those in Russia, only worse, existed in these countries. The attachment to the principles of law was weaker, because for centuries law did not appear to be an essential, or even important, part of national consciousness.

When compared to Russia however an important distinction attenuates, even if it does not altogether remove, the difference between these two groups of states. Russia freed itself from the Mongolian domination through its own efforts and, immediately

[7] On the development of Hungarian law, *cf.* Zajtay (I.), *Introduction à l'étude du droit hongrois* (1953). More generally, Csizmadia (A.) and Kovacs (K.), eds., *Die Entwicklung des Zivilrechts in Mitteleuropa 1848–1944* (1970). Wagner (W. J.), ed., *Polish Law throughout the Ages* (1970).

after this liberation, it created a state the breadth and power of which assured its complete independence and enabled it to consider itself as the successor to the Byzantine empire. The Balkan states, on the contrary, only gained their independence with outside help and afterwards were only small nations obliged to seek external support. In order to recover from the Turkish occupation and resume what were thought to be essential ties, they voluntarily submitted themselves to the cultural influence of central or western European states.

**129. Conclusion**

In these parts of the world the law had, in fact, a much greater prestige and the ties with the West were incomparably closer than was the case with Russia, and these conditions did not immediately change when a government dominated by the Communist Party came to power. It was indeed with some reluctance that the citizens of these countries saw their contacts with France, Germany, Austria and Italy fall away. Proud of their legal tradition they attempted to retain it as much as possible in the building of the new form of government. For them, therefore, it was not deemed necessary to accept, along with the development of the socialist state, the rules or institutions which, in Russia, are explained more by the weakness in their legal tradition and the absence of jurists than as a necessary consequence of an adherence to Marxist teachings.

# CHAPTER II

# MARXISM-LENINISM

## 130. Marxism: basic doctrine of Soviet society

A change of the utmost importance came about in the countries under study once the Communists assumed power. Attitudes and institutions were systematically examined, and more often than not rejected or transformed, in the light of Marxism-Leninism, a doctrine accepted as an indisputable truth. In order to understand the policy basis of the new law and institutions of socialist countries, it is therefore appropriate to review at least the major principles of that doctrine.[1]

Marxism-Leninism in the socialist countries represents something quite different from any philosophical doctrine in Western countries. It is, in fact, the official ideology, and every other doctrine appears to be not only erroneous but to constitute a subversive threat to the social order. Marxism-Leninism has discovered the laws which rule the development of society, and the ultimate formula which will make possible the advent of a society founded on peace and harmony, victorious over misery and free from crime. Those who do not adhere to this doctrine and who reject, or even put in doubt, the postulates of Marxism are, whether consciously or not, the enemies of mankind whose false ideas must be eliminated. Marxism-Leninism is at once an explanation of the world and a guide for action, indicating the path to follow in order to create a supposed better world. All citizens are obliged to know

[1] The fundamentals of the doctrine were put forward in the *Communist Manifesto* of 1848. The bibliography on Marxism-Leninism is immense. An excellent and easily readable work, presenting the views considered orthodox at the present time in the U.S.S.R., was published by the Foreign Languages Publishing House, Moscow, in 1961, *Fundamentals of Marxism-Leninism*. The *Collected Works of Lenin* have also been published in 40 vols. (1960–1966) by the same organisation. An excellent résumé of the doctrine, especially for that part concerning jurists, has been made by Stoyanovitch (K.), "La conception de l'Etat en Yougoslavie," *Revue du droit public et de la science politique* (1959), pp. 214–239; *La pensée marxiste* (1974).

the principles of Marxism-Leninism and this knowledge must be all the more complete on the part of those assuming greater responsibilities. "Practice is blind and can only grope," said Stalin, "if it is not enlightened by revolutionary theory." It is essential that those who govern belong to the circle of enlightened persons who best understand this doctrine and fully support it. It is no less essential that administrators, judges and citizens be familiar with it as well, in order that they may make an informed contribution to the implementation of a policy destined to guide society on the now revealed path of progress.

### 131. Evolution and progress: historical materialism

The Marxist doctrine, founded by Karl Marx (1818–1883) and Freidrich Engels (1820–1895), takes as its starting point the philosophical doctrine of materialism and the idea of evolution. The doctrine of materialism, simply stated, is as follows: the material principle, Nature, is the primary given factor; thought and intellect are simply properties of matter; consciousness is no more than a reflection of the material world. The idea of evolution is expressed thus: "Motion is the mode of existence of matter" (Engels); there are no permanent, immutable things in the world, fixed once and for all; there are only processes and things undergoing change. Nature and its different phenomena are therefore in perpetual evolution. The laws of this development are not established by God, nor do they depend on human will; they are peculiar to Nature itself, discoverable and entirely comprehensible.

In 1859, Darwin, in his *Origin of the Species*, had put forward an explanation of the principles governing biological evolution. Marx and Engels thought that in the social as well as in the natural sciences it was possible in similar fashion to discover the *laws* ruling the development of humanity. They believed they had discovered these laws, and were thus able to propose a *scientific socialism* in place of the dreams of the earlier *utopian socialism.* They took up the Hegelian thesis of the mechanics of evolution (the historical dialectic), but rejected Hegel's idealistic analysis of the causes which explain this evolution of society as based on advances made by human intellect. They, on the contrary, applied materialism to social life (historical materialism): it is Matter which commands the intellect, and Reality which give birth to ideas. Man is *homo*

*faber* before he is *homo sapiens.* "It is not the consciousness of men that determines their being," wrote Marx. " . . . The material productive forces of society condition the progress of social, political and spiritual life. . . . For me, ideas are merely the material world transposed and translated in the mind of Man. . . . The anatomy of civil society must be found in political economy . . . ."[2]

### 132. Infrastructure and superstructure

Marxist doctrine is in no way fatalistic. Man plays an important part in the accomplishment of historical laws. But the possibilities open to him are limited: "It is men who are the makers of their own history," writes Engels, "but in established surroundings which condition them on the basis of inherited objective material conditions."

What is truly decisive in a society is its economic basis or *infrastructure* and the conditions in which the means of production are exploited. As with Saint-Simon (1760–1825), the superiority of the principles of political economy over those of private law is admitted. All else is *superstructure*, closely dependent on the economic infrastructure, whether one envisages ideas, social habits, morality or religion.

Law, in particular, is only a superstructure; in reality it only translates the interests of those who hold the reins of command in any given society; it is an instrument in the service of those who exercise their "dictatorship" in this society because they have the instruments of production within their control. Law is a means of oppressing the exploited class; it is, of necessity, unjust—or, in other words, it is only just from the subjective point of view of the ruling class. To speak of a "just" law is to appeal to an ideology—that is to say, a false representation of reality; justice is no more than an historical idea conditioned by circumstances of class. The law of a capitalist state, which neglects the interests of the workers is, from their point of view, really the negation of justice.

The way in which Marxists consider law is thus entirely opposed to our traditional views. To grasp it and understand how the Soviet

[2] Marx (K.), Preface to *A Contribution to the Critique of Political Economy* (1859). This materialism differentiates Marxism from the "African socialism" of L. S. Senghor and that applied in India.

rulers conceive the communist society of the future, it is first necessary to be familiar with the Marxist theory of the origins and meaning of law and the state, as explained by F. Engels in his book *The Origin of the Family, Private Property and the State* (1884). In the following summary of this work, every effort is made to be consistent with Soviet orthodoxy.

### 133. Marxist concept of state and law

In the beginning, according to Engels, there existed a classless society in which all persons enjoyed the same position with respect to the means of production; individuals were equal and independent of each other, because the means of production were free and at the disposal of all. They respected rules of *conduct* but these rules, being founded simply on habits and corresponding to current behaviour, neither imposed nor sanctioned through the use of force, were not *legal rules.*

Later, primitive society became socially divided through the division of labour and split into classes. One of these classes appropriated the means of production for itself, dispossessing the others which it then began to exploit. It was at this moment in time that Law and the State were born. For the Marxists, there is a close bond between these two ideas. Law is a rule of human conduct which differs from other rules of conduct because it involves coercion, that is the intervention of the state. The State is a social authority which, either by the threat or the use of force, assures that this rule is respected. There is no law without a state, and there is no state without law; state and law are two different words designating the same thing.

Not every human society has a state organisation and law. The state and the law are the results of a specific economic structure of society. They are only to be found in a certain form of society at a particular stage of its evolution. Law and the state only appear when society is divided into social classes, one of which economically exploits the other or others. In such a situation, the ruling class has recourse to law and the state in order to strengthen and perpetuate its domination.

The law is the instrument which, in the class struggle, safeguards the interests of the ruling class and maintains social inequality for its own profit. It can be defined as that series of social norms which

regulate the dominating relationship of the ruling class to the subjugated class, in those areas of this relationship which cannot be maintained without recourse to the oppression wielded by a solidly organised state. And in itself the state is the organisation of the ruling class which assures its continued oppression of the exploited class for the purpose of safeguarding its own class interests.

Law and the state have not always existed. The moment at which they appeared represents a "dialectical leap" in society's development; the greatest social revolution humanity has ever known was the transition of a society without either law or state to a society possessing these institutions. All the later changes which have resulted from advances in the methods and means of production have been merely "quantitative" changes of lesser imortance. They may have brought about changes in the existing law and state, but they left intact the characteristics of a class society, rooted in private ownership of the means of production. These may have changed hands and altered in nature, but—whether one considers the periods of slavery, feudalism or capitalism—there is one observably permanent phenomenon: the exploitation by the "haves" of the "have-nots."

The history of humanity is essentially the history of class struggle: in other words, it is the incessant struggle engaged in by one class or another in order to seize the means of production and thus establish its own dictatorship. The turning points of history are marked by the victories of the exploited class which in turn becomes the exploiting class. The advent of a new social class represents a step forward, because it corresponds to a type of production which is more advanced and more in line with technological progress and the general aspirations of society. Society will continue to suffer from a fundamental defect, however, so long as the means of production remain the property of only some and so long, therefore, as there are those exploit and those who are exploited.

**134. Prediction of a society without law**

Class war and the misery of the exploited will end when this analysis is accepted. The way in which to solve society's problem will then be obvious; the merit of the Marxist ideology is to have revealed this solution to humanity. Since private ownership of the

means of production is the origin of social inequality and class struggle, such ownership must be abolished. The means of production must be made the property of the collectivity; they must no longer be exploited in the interests of only a few profiteers but for the benefit of the entire community. Such a transformation of the economic system will lead to a transformation of man himself, because his present evil propensities only result from the now defective organisation of society.

The essence of the Marxist doctrine, therefore, lies in this belief that the root of all social evil is class antagonism; social classes can, and must, be suppressed by prohibiting the private appropriation of productive forces and by putting them at the disposal of the collectivity which will exploit them in the common interest. Purged of the "antagonistic contradictions" of present society, a fraternal society will then emerge; a communist society in which the exploitation of man by man will have ceased, and in which harmony will reign; each will then work for the community according to his ability, and each will receive from the community according to his needs. In this communist society all coercion will be needless: state and law, the aim of which is to assure the compulsion necessary in other societies, will become useless and so disappear. In theory, this doctrine is the antithesis of fascism which sacrifices any interest of the individual in order to exalt the role of the state.

The transition to the new society, which will have neither state nor law, represents a new dialectical leap in the history of humanity—the inverse of that noted earlier. All exploitation having disappeared, there will be no further need for force. Man will once again be free. He will be his own master, and will be himself because he will no longer have to sell his labour-power to the profit of a ruling class exploiter. The rules of conduct in the future society will have the same character as those of primitive society; they will be moral rules, customs, technical precepts and forms of habitual behaviour. Individuals will observe them spontaneously since they will be freely accepted by everyone as emanations of a truly general interest and thus seen as a true expression of justice. Public services, such as health, education, transportation, communication and policing will be assured by all citizens in turn. This society will be one of complete equality and economic and social liberty. Its members will be equal because they will be provided for, not according to their capacities, but according to their needs;

they will be free because they will not be subject to any compulsion. Society wll no longer be democratic because it will not be subject to the rule of anyone, not even that of the people as a whole. With the disappearance of law and the state, democracy will also vanish: there will be a reign over things, not persons.

### 135. The Marxist doctrine of action

Marxist doctrine, broadly outlined in 1848 in the *Manifesto of the Communist Party*, was developed by Marx and Engels as a teaching, defended against its enemies and refined for the use of its adherents during the authors' lifetime. The Socialist International adopted it as its platform. As members of the Communist Party and philosophers, Marx and Engels frequently analysed the situation of society and the events of their time and decided what, according to them, was the line to follow in order to move forward and ensure ultimate success for those who supported their doctrine. Marxism, therefore, is not simly an explanation of history; it is at the same time a guide, based on the dialectical method, to political action and a blueprint for revolution.

### 136. Marxism-Leninism

In the eyes of the adherents of this doctrine, the historical and philosophical parts of Marxism retain their full value; and all the studies undertaken in this connection since the time of Marx merely aspire to confirm his theses by analysing the developments of ancient, modern or contemporary history in their light. On the other hand, the political part of the doctrine required up-dating and adapting to new circumstances, especially when a Marxist party—the Bolshevik party—succeeded in gaining power in Russia in 1917. The leaders of this party, principally Lenin (1870–1924), played such an important role in this respect that it has now become current in the U.S.S.R. and elsewhere to speak of *Marxism-Leninism* instead of simply *Marxism*.[3]

The contribution of Leninism was necessary in order to fix the line of action in the special period running from the assumption of power by a Marxist party to the achievement of a communist society. Marx and Engels were not able to forecast in which

[3] Chambre (H.), *Le marxisme dans l'Union soviétique: idéologie et institutions* (1955).

country a Marxist party would gain power for the first time, or the state of the world at the time of, or after, such an event. Marx's works contain at most only an indication that the advent of communism would necessarily be preceded by an intermediate phase—that of a socialist state, in which the dictatorship of the proletariat would be assured. "Between capitalist and communist society," he wrote, "lies the period of the revolutionary transformation of the one into the other, to which there corresponds a period of political transition in which the State will be nothing other than the revolutionary dictatorship of the proletariat."[4] It had to be specified how the structure and tasks of the socialist state were to be defined and understood in the country the communist party had to govern. Leninism, as a political doctrine, added on many points to the inevitably abstract work of Marx, but it nevertheless complements and does not refute Marxism; it reinforces Marxism, and by adopting the dialectical method and the materialistic philosophy of the world as set forth in Marxist doctrine is wholly consistent with it.

### 137. The importance of Marxism-Leninism

Before studying different aspects of Soviet law, the importance of this philosophy and the concept of law deriving from it in the U.S.S.R. should once more be stressed. Soviet society at the present time is considered imperfect by its own leaders, even though, of course, it is far superior to capitalist societies. The present organisation of social relationships, that of a socialist state, corresponds to a necessary stage in the construction of a communist society. Soviet Russia, therefore, has not yet completed its revolution; it is, and wishes to be, a revolutionary state. This point of view must constantly be borne in mind, and it follows from it that law in the U.S.S.R. is considered in a special way and plays a new role compared to its function in the West.[5]

Essentially, Soviet law is not meant to establish a rule of order by providing a principle for the solution of disputes. First and foremost it is a means of transforming, and thus guiding, society towards the communist ideal apart from which no true liberty, equality or morality can exist. The law is essentially an instrument

[4] Marx (K.), *Critique of the Gotha Programme* (1875).
[5] Toumanov (V. A.), *Pensée juridique bougeoise contemporaine (1974)*.

in the service of the ruling class. There are no scruples about freely admitting this, since Soviet policy is in itself different from that of bourgeois states. Enlightened by Marxist doctrine, Soviet leaders know what goal to strive for according to the scientific laws governing the development of society. To endow society with the economic organisation which conforms to these scientific laws is the aim of Soviet law and policy; their further aim is to educate the people by showing them the now deviant nature of behaviour which was comprehensible and in fact normal in the capitalist era.

Soviet law is thus characterised by its essentially economic preoccupation and didactic approach, as opposed to "bourgeois law" which blindly tries to establish order and morality, both of which are unobtainable in a world organised on the basis of a defective economic system. To the Soviet people, capitalist politicians and jurists appear to be tossed about on the sea of events, navigating conflicting currents at random without any compass to guide them. The leaders and jurists of the Soviet Union, on the other hand, have found their compass in the ideology of Marxism-Leninism; judges, administrators and citizens alike possess a sure guide for the interpretation of law. Soviet law, therefore, is not a law like other laws; obviously, its study cannot be dissociated from Marxist-Leninist doctrines which fix its objectives and guide its evolution, interpretation and application.

The Soviet regime only makes sense if one is convinced of the truth of the Marxist-Leninist doctrine, if one considers as scientifically exact its explanation of history and accepts as inevitable the solution it constructs for eliminating social conflicts and ushering humanity into a new era. In the U.S.S.R. everything takes on new meaning in the light of this doctrine. Communist morality, the only humane and true morality, makes of man "a fighter capable of transforming life according to the objective laws of nature and history in the interest of all humanity. . . . " To be a moral being, means dedicating all one's strength and energy to the struggle for communist society.[6] Freedom, far from being destroyed, takes on its full meaning under the regime of the Soviet dictatorship; and, in agreement with the ideas held in western Europe before the

[6] Prokofiev (V. I.), Antigumanističeskij harakter religioznoj morali, *Voprosy Filosofii*, 1959, no. 9, p. 42. A code of Communist morality was made part of the programme of the Communist Party of the U.S.S.R. in 1961: Hazard (J. N.), *Communists and their Law* (1969), p. 11.

eighteenth century, it is conceived as a neutral force which must be educated before it can be turned to good use. Before the eighteenth century, there was never any idea that private enterprise, left to itself, could orient production in the general interest.[7] "Liberty," wrote Montesquieu, "is not independence; it by no means consists in doing what one wishes, but in being able to do what one ought to wish to do."[8] Marxism creates the conditions of true freedom for man by teaching him, in the light of a scientific theory, what he should want.

Soviet society is not only a new but also a superior type of social organisation founded on scientific principles, and one more advanced on the road of progress than bourgeois societies. Whatever the efforts made to create greater social justice in these societies, such attempts are doomed to certain failure. Their aim is to perpetuate an essentially evil state of things, a social structure which carries with it an inadmissible and odious inequality. This becomes apparent once one penetrates the motives or subconscious mind of those who make such attempts.[9] There is no truly lasting solution, no salvation apart from the Marxist doctrine and the collectivisation of all means of production which it postulates. In the international sphere, the non-socialist states represent a permanent threat to humanity because of the basic internal contradictions inherent in their structure; there is always the danger that they will seek to escape these contradictions and prolong their existence by enslaving other peoples (colonialism), or by resorting to war (imperialism). Coexistence with non-socialist states is possible only on condition that the U.S.S.R. is stronger than they are.

### 138. Relations between Soviet and foreign jurists

Adherence to Marxism-Leninism imposes certain limits on the possibilities of a comparison between Soviet and bourgeois laws. Soviet writers do, certainly, define law in the same way in each case. "Your law," said Lenin, "is nothing more than the will of your class made into laws applicable to all." But the differences in the economic structures of socialist and capitalist countries result

[7] Piettre (A.), *Les trois âges de l'économie* (2nd ed., 1965).

[8] *Esprit des lois*, XI, III.

[9] Zivs (S. L.), *Razvitie formy prava v sovremennyh imperialističeskih gosudarstvah* (1960). Krutogolov (M. A.), *Antidemokratičeskaja sušč̌nost' buržuaznyh vyborov* (1963).

in Soviet law being fundamentally good and bourgeois laws being fundamentally bad. According to the Marxist analysis, therefore, bourgeois jurists, who cannot be anything other than the instruments of bourgeois class interests, whether consciously or not, are suspect.[10] All steps taken in the bourgeois countries are interpreted in the light of Marxism-Leninism as being for the purpose of consolidating the dictatorship of the propertied classes. Some of these measures, it is true, may have been extorted from bourgeois leaders through fear of the proletariat. But a just social organisation and just law can never be hoped for so long as the fundamental defect of society has not been remedied by suppressing the possibility that private persons usurp the forces of economic production. The exploitation of man by man is the inevitable consequence of the private ownership of such property.

It would indeed be vain to try to persuade Soviet jurists that they are mistaken, and that a just law may be sought by jurists committed to the principle of private ownership. For a Soviet jurist to make this concession would amount to denying Marxist doctrine and undermine the very foundations upon which the Soviet regime is built. Western jurists have some difficulty in imagining that anyone might see an incontrovertible truth in an ideology that does not purport to be a *revealed* truth, one which makes no attempt to give meaning to life and the universe and which so obviously belongs in the context of nineteenth century thought and is, in their eyes, already outdated in the second half of the twentieth century. But we must accept their point of view as inevitable. In the U.S.S.R. everything does take place as though the Marxist-Leninist doctrine were a revealed dogma; it does not occur to Soviet jurists to question its merits; for them it is beyond any possible discussion.

Soviet and bourgeois jurists cannot, for these reasons, ever come to an agreement on fundamental principles; and a worthwhile comparison between the Soviet and bourgeois laws can only take place on the technical level.[11] In spite of different political

[10] Toumanov (V. A.), *Pensée juridique bourgeoise contemporaine* (1974).

[11] Constantinesco (L. J.), *La comparabilité des ordres juridiques ayant une idéologie et une structure politico-économique différente et la théorie des éléments déterminants*, Rev. int. dr. comparé (1973), p. 5. Loeber, *Rechtsvergleichung zwischen Länder mit verscheidener Wirtschaftsordung*, *Rabels Z.* (1962), p. 206. *The Comparability of Socialist and Non-socialist Systems of Law*, Tel Aviv University Studies in Law (1977), p. 45. "Droit comparé et systèmes socio-politiques" *in Livres du Centenaire de la Société de législation comparée*, Vol. II (1971), p. 145. 15 *Acta juridica Academiae Scientiarum Hungaricae* (1973).

regimes, the problems in the U.S.S.R. and the West are often nonetheless the same because each, in its own way, is concerned with moral, social and economic development. The fact that one side considers economics to be subordinate to morality, while the opposite opinion is held by the other; the fact that these concerns are inspired by the desire to perpetuate the rule of the middle class in the one and in the other to create the conditions for the transition to communism—these differences, however essential they may be in principle, are seldom perceptible when one is dealing with technical rules or practical matters. It then becomes apparent that on many points the West has a great deal to learn from the experiments which have been and are being carried out in the U.S.S.R. The idea, for example, that an active participation by citizens in the various aspects of public administration is necessary for them to be efficient in their operation and in order that a true democracy be established is more and more accepted today, even outside Marxist countries.

# CHAPTER III

# THE NEW ORDER

### 139. Soviet Union and other countries

Russia and the other countries which, in its track, have embarked upon the road to communism have all had different legal traditions. The circumstances in which communists came to power in each case were also different. The leaders of the people's republics have moreover been able to profit from various experiments attempted in the U.S.S.R. It is thus appropriate to examine separately the situation of the U.S.S.R. and these other countries. The first two sections of this chapter will outline their differences; the final section will explain how, at the present time, apart from such differences, a common principle, that of "socialist legality," unites them all.

## SECTION I—SOVIET LAW SINCE 1917

### 140. The Bolshevik revolution

On November 7, 1917 (October 25, according to the Julian calendar then in force in Russia), a victorious revolution brought the Bolsheviks to power. From this date a new epoch began in the history of Russia.

The Bolshevik Party was resolutely determined to build the communist society announced by Engels and Marx as quickly as possible. Many points remained obscure, however, and now that a communist party had come to power the Marxist doctrine had to be perfected. Marx and Engels had enunciated the laws governing social evolution; they had described the final phase when happiness and peace would be found; and they had specified the technique for gaining power. But the Marxist doctrine was deficient on

such questions as what was to be done after the seizure of power? and how was society to be organised at this particular moment and during the waiting-period before the communist society was established throughout the world?

Marx anticipated that the revolution would first succeed in a highly industrialised country; yet it had just taken place in the most rural of nations. He thought that the revolution would spread rapidly through the entire world or, at least, the whole of Europe; instead, Russia remained the only country in which the Communists came to power. How, in such circumstances, was the intermediate stage of the socialist state which he predicted to be conceived? Their disciples did not clarify this question any more than Marx or Engels did. The attention of the Marxists had focused on the contradictions of capitalism, on how to secure power, and on the description of communist society in order to provide directives for the acting forces of the Party and an ideal for the proletariat. The study of the intermediate, socialist stage had been neglected, especially at the level of its institutions and of law. It was agreed that a dictatorship of the proletariat would rule. But should industrial workers alone be counted as the proletariat, after the revolution had triumphed in a country where that class was so small? Above all, how was the proletariat going to exercise this dictatorship? What measures should be taken, and what kind of institutions should be set up? While it was rich in philosophical, historical, economic and political studies, Marxist doctrine was poor in legal thought. To the extent that they existed, works on "socialist law" were open to suspicion because they had generally been written by authors who were not orthodox communists and who viewed the building of socialism as a process of evolution outside the dictatorship of the proletariat.

In these circumstances, it was necessary to establish some kind of working doctrine by fairly experimental means; jurists would, of course, be called upon to collaborate, but it was mainly to be done on the impetus of, and in conformity with, the principles laid down by political leaders—and, most importantly, by Lenin (notably in his pamphlet *The State and Revolution*, 1917).

The development of Soviet law since 1917 falls within two main phases. The first runs from the October Revolution to the U.S.S.R. Constitution of 1936; this is the period of the construction of socialism. The second, begun in 1936, continues still, and

includes the strengthening of the socialist state and the march towards communism.[1]

### § 1. From Bourgeois to Socialist State

The first phase of the history of Soviet law is itself divided into three periods: that of so-called revolutionary communism (1917–1921), that of the New Economic Policy (N.E.P., 1921–1928) and, thirdly, that of the collectivisation of agriculture and the five-year plans (1928–1936).

#### 141. Period of revolutionary communism, 1917–1921

The period of revolutionary or militant communism extends from the October Revolution to the end of the civil war and the final triumph of the Communist (Bolshevik) Party in Russia in 1921.

The very important work carried out in this period is distinguished by the exceptional circumstances in which it was accomplished. Russia was prey to civil and foreign wars and in a state of total disorganisation. The Bolsheviks were by no means sure of remaining in power. For them, the essential thing was not to establish practical working arrangements adapted to the possibilities of the moment but rather to defeat their enemies, remain in power, re-establish peace and, if they were to be eliminated, to have at least heroically proclaimed the principles for which they fought. "It is of no importance," declared Lenin in 1917, "that many of the provisions of our decrees may never be enforced. Their aim is to teach the masses how truly to progress. . . . We do not consider them as absolute rules applicable in all circumstances." Trotsky (1879–1940) too said: "The early decrees were more important as articles of propaganda than as administrative texts."[2]

The work accomplished in the period of revolutionary communism outwardly lacked realism. It seems that there was a desire to construct the communist society then and there by skipping the socialist stage forecast by Marx. The first Russian constitution of

[1] On the development of the different branches of Soviet law during the course of each of these phases, *cf. Istoria gosudarstva i prava* (2 vols. 1967). *Cf.* also, the excellent summaries of the historical evolution given in the various chapters of Hazard (J. N.), Butler (W. E.) and Maggs (P. B.), *The Soviet Legal System* (3rd ed., 1977).

[2] Trotsky (L.), *My Life* (1930), Ch. XXIX.

1918 avoids use of the word "state" (*gosudarstvo*). The right of peoples to self-determination (Declaration of the Rights of the Peoples of Russia) and a Declaration of the Rights of the Toiling and Exploited People were proclaimed; a message was addressed to all the Muslim workers of Russia and the East. The Church was separated from the State and a marriage code promulgated. Land, mines, industrial establishments of any importance and banks were all nationalised, and private enterprise was forbidden. It seemed as though money itself would disappear and that a system of sharing would be substituted for contractual bargaining. Inheritance was suppressed. The old courts and judicial procedures were abolished; jurists, a suspect class, were distrusted. Everything promised an immediate leap forward to the communist society without any transitional period. The newly established courts were asked to judge, with no formal procedures, according to revolutionary conscience, the socialist feeling of justice and the interests of the workers' and peasants' government.[3]

These measures are very interesting because, with a view to propagandising, they reveal the final objective of communism and the Russian leaders' views of the future. The desire to achieve this programme by a stroke of the pen, however, was not only unrealistic but also contrary to Marxist doctrine. Some dreamers in the U.S.S.R. retained a nostalgic view of the deeds of those early years, and endeavoured to hasten a return to the ideas proclaimed at that time. The more realistic leaders sought to delay the realisation of communist society until some later time and to work for the building, and then the consolidation, of a socialist state in the U.S.S.R. which differed greatly from this ideal.

The return to realism and a concern for practical considerations came with the end of the civil war and foreign interventions, when the communists, as the unchallenged masters, were faced with the gigantic task that awaited them: the reconstruction of the country and the building of socialism.

### 142. New Economic Policy (N.E.P.), 1921–1928

Putting the war-devastated country back on its feet was the most pressing task. In the seven years devoted to this, the building of

[3] Hazard (J. N.), *Settling Disputes in Soviet Society. The Formative Years of Legal Institutions* (1960).

socialism passed into the background—at least to all appearances. These seven years from the summer of 1921 to 1928 are the period of the N.E.P.[4]

Compared to the positions taken up in the preceding period, the N.E.P. is characterised by a certain withdrawal. Concessions were made, which sometimes affected matters of principle, in order to encourage the peasants to work and attract foreign capital. The impression was given that the excesses of the preceding period were repudiated; that the regime was "settling down," and no longer revolutionary; that it was going to become "liberal" by recognising the traditional values represented by private initiative and private ownership and by renouncing the chimera of a society not founded on law. In fact, the concessions made on the economic level were only of limited significance. The State retained control of industry and commerce. Violation of principle was admitted only in agriculture where the regime accommodated itself to the existence of a well-to-do peasant class, the kulaks, who employed hired labour.

On the other hand, the quite erroneous impression that the Bolsheviks were reverting to the thinking of the bourgeois world was given by what was, precisely, a return to true Marxist doctrine. The leaders of the U.S.S.R. abandoned the illusion—if, indeed, they had ever entertained it—that communism could be established immediately, and embarked on the building of socialism by putting the state in order and recognising the importance of law.

### 143. Return to legality

The period of the N.E.P. left its mark in several respects. The most apparent, and that which seemed reassuring to foreign countries, was the promulgation of codes; a civil code, a code of civil procedure, a criminal code, a code of criminal procedure, a family code and a new agrarian code. For the time being the regime renounced the ideal of a society founded on simple equity and on the natural feeling for justice of a fraternal community. At the same time the judicial system was re-organised, a new principle of socialist legality was laid down and a new institution, the *Prokuratura*, was created in order to ensure its strict observation by both

[4] "Novaja Ekonomičeskaja Politika."

the administration and citizens. The government itself was brought under control; henceforth state enterprises were to be managed not by a workers' committee but by a single person—the director responsible. They were, moreover, recognised as financially autonomous and were subject to the "principle of economic accounting," as well as obliged to keep within the limits of a balance-sheet and to take an interest in good management.

### 144. Abandonment of the N.E.P.

The N.E.P. had the success hoped for. It gave the Russian economy, disorganised by the war, a fresh start, and order was established on U.S.S.R. territory. These results were gained in the space of seven years, after which the Soviet leaders abandoned the N.E.P. This was not done with a view to establishing communism immediately—that was still premature.

To the minds of Soviet leaders—and in fact they have stated as much—the N.E.P. was no more than a strategic withdrawal, a necessary pause before the effort required for the building of socialism. It went without saying that this pause would not last long; the programme of the Communist Party was neither abandoned nor modified; it still required the total collectivisation of the economy, the complete elimination of man's exploitation by man. But once the leaders had embarked on economic planning as a means of developing Russian economic power, the abandonment of the N.E.P. was patently necessary from a practical point of view. It soon became clear that in such a plan of economic development everything was interwoven; in particular the industrialisation of the country demanded an increase in agricultural production which in turn could only be made possible by the mechanisation and, therefore, the collectivisation of the rural economy. On the other hand, the class of kulaks, in whom foreign "bourgeois" powers might have found an almost natural ally for the realisation of designs hostile to the U.S.S.R., appeared to be a danger in view of the growing international tension of the time.

### 145. Total collectivisation of the economy

When the first five-year plan for the nation's economic development, covering the years 1928–1932, was put into application, the N.E.P. was therefore abandoned. This was marked first of all by

the total collectivisation of industry and commerce, and by the suppression of concessions made to private individuals for carrying on certain industries. From 1930 on, however, it was mainly characterised by the pitiless liquidation of the kulaks and by the complete collectivisation of agriculture, the peasants being "invited"—and in fact obliged—to regroup their lands in agricultural co-operatives known as *kolkhozi.* This movement was completed in 1937; at that time 243,000 *kolkhozi*, representing 93 per cent. of Soviet soil under cultivation, had replaced 18,500,000 family farms.[5]

By this collectivisation of agriculture, the U.S.S.R. attained the economic infrastructure required by Marxist doctrine. Doubtless not all property and means of production were nationalised in the strict sense of the word; in addition to that belonging to the nation or the state, other property continued, and still does continue, to belong to co-operatives of production. However property and means of production in the U.S.S.R. are indeed "collectivised" in the sense that they are exploited according to a plan of economic development drawn up by the leaders and approved by the Soviet Parliament. The admitted exceptions to this principle are of limited significance; these are related to certain artisanal activities,[6] and particularly the complementary economy of the enclosures in which members of the *kolkhozi* may cultivate a few vegetables and rear some animals within limits strictly controlled by law.[7] Since 1935, commerce in the cities has become state-controlled; in the country it is carried on principally by co-operatives.[8] Private individuals are prohibited from carrying on any business; to do so constitutes the crime of speculation and profiteering. To the extent that it is admitted, private ownership of goods has been renamed "personal ownership" in order to underline the idea that it must serve to satisfy the personal needs of the owner and cannot be used as a means of producing income.

[5] *Cf.* below, para. 150, note 12.

[6] On these activities, *cf.* Hazard (J. N.), Butler (W. E.) and Maggs (P. B.), *The Soviet Legal System* (1977), p. 187. The artisanal co-operatives became state-controlled in 1960.

[7] The importance of this complementary economy must not be under-estimated although it has considerably diminished since the war. Today about 30 per cent. of consumer foodstuffs are produced on these family holdings according to official statistics. Nove (A.), *The Soviet Economy* (1966); Kerblay (B. H.), *Les marchés paysans en U.S.S.R.* (1968).

[8] 16,000 consumer co-operatives controlled 335,000 retail stores in 1963; they are the rural branch of the state's retail business. *Adde* Hazard, Butler and Maggs, *op. cit.*, Pt. 2, p. 181. Chambre (M.), Wronski (H.) and Lasserre (G.), *Les coopératives de consommation en U.R.S.S.* (1969).

### 146. Maintenance of the law

The abandonment of the N.E.P. was characterised by the collectivisation of the Soviet economy, but it did not involve a return to the communism of the preceding period. On the contrary, the period of the five-year plans is marked by the strengthening of the state, whose functions grew through the development of authority, discipline and compulsion in all forms, and through an increasingly clear affirmation of the principle of socialist legality. The codes promulgated in the period of the N.E.P. were left in force for another thirty years. A multitude of provisions of various kinds did gradually modify and perfect them, mainly by regulating new aspects of Soviet life. The partial desuetude of these N.E.P. codes was by no means a sign that Soviet law was on the wane; in fact, it became increasingly rich and perfected. According to the Marxist dialectic, the predicted disappearance of state and law during the era of communism was prepared for by an unprecedented development and exaltation of these two institutions. "Engels said that after the victory of the socialist revolution the State was to wither away. . . . The Soviet Marxists have arrived at the conclusion that, given the capitalist encirclement, the country of the victorious revolution should not weaken but strengthen the mechanism of the State in every way."[9]

The results of 20 years of effort were clear in December 1936, when a new Constitution was victoriously presented; the exploitation of man by man in the U.S.S.R. had ceased; the forces of production had been placed at the disposal of the collectivity and were exploited in the interest of all; a multi-national state had resolved the conflicts between nationalities; the world's first socialist state and law had been built; and the road to future progress and the realisation of communism seemed open.

## § 2. From Socialist State to Communist Society

### 147. Prolongation of the socialist state

More than 40 years have passed since the promulgation of the Soviet Constitution of 1936 and the firm establishment of the economic infrastructure on which communist society can be built.

[9] Stalin (J. V.), *Concerning Marxism in Linguistics* (1950).

Where, then, is the U.S.S.R. in the "march towards communism"?

One point is certain: a communist society has not yet been achieved in the U.S.S.R. where "power will be exercised by the Soviets, the unions, the co-operatives and other people's organisations." The stage of the dictatorship of the proletariat has now been surpassed and since 1961 the Soviet Union is described as "a state of all the people."[10] This term is revealing. The state, far from withering away, is stronger and more powerful than ever; nor is Soviet law being eclipsed; it is more abundant and just as imperative as it ever was.

The second point to be noted is that no turning back has taken place. The Soviet state has remained a socialist state, founded on an economic infrastructure that conforms to Marxist doctrine and it differs profoundly in its structure from the "bourgeois" states. A communist society has not yet been achieved, but it remains the proclaimed, and desired, ideal to which the U.S.S.R. must one day come.

A third and final observation is necessary: from 1936 to the present day there has been no stagnation. Despite the cruel war that caused its citizens untold misery and subjected its economy to large scale losses, the Soviet Union is today more powerful than ever on both the national and international levels. If it be true that the possibility of realising a communist society can only come with an unprecedented exaltation of the power of the state, we are now closer than ever to the conditions necessary for the advent of communism in the U.S.S.R.

### 148. Obstacles to the realisation of communism

What, according to Soviet doctrine, are these conditions, and how is it that communism still appears to be a distant ideal, forty years after the erection of the socialist state?

There are several reasons. The first of these is the "capitalist

[10] *Report on the Program of the Communist Party of the Soviet Union*, published as Vol. 2 of *Documents of the 22nd Congress of the C.P.S.U.* (1961) as approved in August 1961. Collignon (J. G.), *La théorie de l'Etat du peuple tout entier en Union Soviétique* (1967). The Chinese Communist Party was critical of this rejection of the proletarian dictatorship. *Cf.* Hazard (J. N.), "Socialisme et humanisme," in *Annales Africaines*, 1965, pp. 71–94. It was, however, vigorously defended in an article published in a Polish review: Zawadski (S.), "Controverses au sujet de l'essence de la dictature du prolétariat," *Państwo i Prawo* (November 1963).

encirclement." The Soviet Union succeeded in building a socialist state within this encirclement, and yet it is clear to Soviet leaders that in the present state of international relations, it would be suicidal to attempt to bring about the withering away of the state and to want to achieve communism now. This explanation alone suffices to justify the policy followed. The U.S.S.R. may very well try certain experiments intended to move closer to communism, but as long as it feels threatened by the existence of powerful non-socialist states, it will not be able to bring about completely a communist society.

The "capitalist encirclement" is not, however, the only explanation for the limited progress made towards communism. Another must be taken into account, namely the "survival of the habits of the capitalist era in the minds of citizens." Centuries of bad social organisation cannot be simply abolished; men have become accustomed to certain faulty ways of thinking and have come to regard as natural certain forms of behaviour which are, in reality, selfish and anti-social. It is not enough, although it is required by Marxist doctrine, to have remedied the fundamental defect of society and put its economic infrastructure on a sound footing by collectivising the means of production. Another task is involved: men must be re-educated and made to understand that the anti-social attitudes formerly excusable and even justified are so no longer in today's socialist state.[11] This task is to be accomplished by taking a person in hand from his childhood, and it is with this in mind that the new Soviet teaching programmes are conceived. This re-education is to be pursued during a man's entire life, and the Communist Party assumes a special responsibility in this connection.

The maintenance of state and law is all the more necessary at the present stage because, while social classes in the strict sense have disappeared, social groups—whether city dwellers or those of rural areas, intellectuals or manual workers, officials or the people at large—remain whose ways of life are still different. The differences between them are no longer "antagonistic" (in Marxist language), but there still is the danger that one of these groups may be tempted to appropriate the increased value of the work of

[11] A reading of the decisions rendered by Soviet courts shows how deep-seated this malady is, and what a long road is still to be covered in this respect. *Cf.* the many cases reported in the different chapters of Hazard, Butler and Maggs, *op. cit.*

the others, in order to become an exploiting class; the state must continue in order to prevent anyone from so harming socialist institutions. All feelings of opposition between these groups must be removed by equalising their living standards and bringing their various ways of life closer together before the disappearance of coercion, which will characterise a communist society, can be achieved.

To obtain of citizens this desired social behaviour and thus to allow the realisation of a communist society, the fulfilment of another preliminary condition, that of abundance, is also required. "From each according to his ability, to each according to his needs." This motto of communist society cannot become a reality if production is not pushed to the extreme, providing sufficient consumer goods for everyone. The maintenance of the machinery of the socialist state and the coercion it implies are necessary to achieve this.

### 149. The three tasks of Soviet law

The tasks of the Soviet state and law, during the present period of transition from socialism to communism, are thus threefold. The first, which need not detain us here, is one of national security: the power of the state must be consolidated and increased in order to discourage the enemies of socialism from attacking the Soviet regime and to assure peaceful co-existence between nations. Soviet law has, in addition, the economic task of developing production on the basis of socialist principles so as to create the abundance which alone will enable everyone to be supplied "according to his needs." The third task of Soviet law is one of education: that is, to destroy in Man those tendencies to selfish and anti-social behaviour that are the heritage of centuries of poor economic organisation.

### 150. Economic power: organisation of production

The economic task of Soviet law is in itself immense. The socialist regime puts far greater problems to its leaders in this respect than those facing leaders in capitalist countries. Law in the "bourgeois" countries can certainly come to the aid of the economy and is doing so more and more. Its basis remains, nevertheless, essen-

tially a moral one. Observe the rules of justice and morality, it is thought, and order will reign even on the level of the economy. With the Marxist doctrine the positions are reversed: guarantee a certain economic organisation of the collectivity, place the means of production at the disposal of the collectivity, and morality will be satisfied and justice realised besides.

Law in bourgeois countries may well have an economic function but, to the large extent that there is a private sector, it is individual initiative that assumes the task of organising production and seeking commercial outlets. The state provides the incentives, the means of co-operation and a measure of control, but it has not taken unto itself the direct exploitation of property. In the U.S.S.R., on the other hand, "economic power" has been consciously taken out of private hands and the instruments of production have been collectivised in order that they be exploited in the general interest rather than to show a profit. It is for the nation's rulers to define the terms of this exploitation, to specify how the means of production are to be developed and how the products thereof will be distributed in function of the general interest as they define it. The state has become the great overlord of industry, agriculture and commerce. To provide the leadership, to organise the development of productive forces and the sharing of economic wealth on the scale of a nation such as the U.S.S.R. is obviously an extremely difficult task. Soviet leaders do not pretend to have found the perfect solution to this problem. If the guiding principles established by Marxist-Leninist doctrine are clear, namely that "economic power" be taken away from private interests, it does not specify how this power is to be exercised anew by the representatives of all the people. It has proved necessary therefore to indulge in a continual process of experimentation and adaptation. And it is doubtful that final solutions will ever be found.

Agreement was reached early on to develop the economic resources of the country according to a plan. But views differed, and methods were altered, on how such planning was to be carried out—was it best to begin in the production sector (metallurgy, construction, industrial chemistry) or within a functional framework (labour, supply, financing); should economic management be centralised or de-centralised; what duration should the different plans have; which sectors were to be priorities (heavy industry or consumer goods, industrial chemistry or space exploration);

how was the management of state enterprises to be organised and controlled, and so on. In agriculture, a choice had to be made between state farms (*sovkhozi*) and co-operatives (*kolkhozi*), their maximum size determined, and the status of the workers established in each.[12] Bureaucratic tendencies in industry had to be put into check and a stimulus to production found. Constant critical re-appraisal of all these aspects of organisation is still seen as necessary in order to prevent the development of abusive practices whether in the form of a too-powerful bureaucracy, the slackening-off in production, the favouritism of special interests or the degeneration of the collectivisation of property into mere state capitalism and to ensure that the need to build for communism is not forgotten.[13]

In the history of the exercise of this economic power and the organisation of the means of production, some serious errors were committed and some unfortunate decisions made. Stalin (1879–1953) may very well have said that "the aim of production is [not] profit, but man and his needs, in other words the satisfaction of his material and cultural needs."[14] His own style of government did not however respect that policy: man, during his time, was in effect sacrificed to production and to the state. Although the Stalinist era was a painful one, the Soviet people today are reaping its advantages: the economy has been completely collectivised and the danger of National-Socialism eliminated. Since then it has been possible to condemn the excesses of the Stalinist era and to return to true Marxist teaching, which aspires to be a humanism. Marxist doctrine teaches that power and wealth are not sought for their own sakes but rather in order to liberate man and to promote his complete fulfilment in a society in which he is no longer oppressed.

[12] Between 1959 and 1963, one-fifth of the *kolkhozi* were transformed into *sovkhozi* and the *kolkhozi* themselves organised into larger units. In 1978 there were about 27,500 *kolkhozi* providing employment for 13 million peasants. Each *kolkhoz* worked, on average, 6,000 hectares. In 1976, there were 19,639 *sovkhozi* employing 11 million people in the working of almost 50 per cent. of the land under cultivation. Since 1966 an equalisation of the status of the members of *kolkhozi* and *sovkozi* has been achieved: the members of the former now have a minimum wage and enjoy social security benefits.

[13] Chambre (H.), *Le pouvoir dans l'Union soviétique* (2nd ed., 1960). Nove (A.), *L'économie soviétique* (1963). Hazard (J. N.), Butler (W. E.) and Maggs (P. B.), *The Soviet Legal System* (1977). Mayer (M.), *L'entreprise industrielle d'Etat en Union soviétique* (1966). Dumont (R.), *Sovkhoz, Kolkhoz ou le problématique communiste* (1964). Hazard (J. N.), *The Soviet System of Government* (1980).

[14] Stalin (J. V.), *Economic Problems of Socialism in the U.S.S.R.* (1952).

**151. The re-education of man**

Soviet law has an educational as well as an economic role. To make communism possible, and to remove the mechanisms of force which the state represents, it does not suffice that the means of production be collectivised and that they be reorganised in the interest of all. It is also necessary to change man, to rid him of reactions, attitudes and feelings engendered by millennia of defective social organisation. "The socialist state," wrote the First President of the U.S.S.R. Supreme Court, I. T. Goliakov, "must totally re-shape the conscience of the people; that is its most important task."[15] More than ever before this aspect of socialist law and policy is of the first importance.

Remarkable results have already been achieved: for a Soviet citizen it has become inconceivable that a private person or company might own a factory or exploit any natural resources whatsoever in his own interest or that of share-holders; peasants, it would seem, voluntarily accept the transformation of their *kolkhozi* into *sovkhozi*. Much more, however, remains to be done. The task of re-educating citizens, a work in which jurists are invited to co-operate, must be carried on with indefatigable patience. The Soviet Communist Party numbered only 17,480,768 members in 1980, or about 9 per cent. of the population. It is up to this *élite* to convert a disciplined population, but one which lacks a profound faith. Citizens must be inculcated with a new sense that work has become a matter of honour, as much as of necessity. They must be imbued with a sense that socialist ownership, which is an ownership of all,[15] is one they have the sacred duty to protect. They must be shown that law at the present time is just because it fully reconciles private and general interests. Citizens must obey the law not, as in the time of defective social organisation, through fear of a policeman, but because they feel in conscience bound to observe, without coercion of any kind, the natural principles upon which the newly reformed society is based. Law today in the U.S.S.R. is reason and true justice. It is important that everyone assent to the rules of socialist law, that the law be "popular."

Considerable and repeated efforts are made to familiarise citizens with the Soviet Constitution, institutions and laws. The local

[15] Goljakov (I. T.), *Vospitaltel' noe znavčenie sovetskogo suda* (1947).

Soviets, guided by the preparatory deliberations of the Communists among their members, are there to learn and, in turn, to explain to the population the sound basis and wisdom of decisions prepared by the Party.

All citizens are called upon to participate in drawing up important laws by suggesting appropriate amendments to the established drafts. The number of meetings at which the draft of the constitution of the U.S.S.R. or that of a law on the re-organisation of agriculture or on pensions has been discussed, and the number of amendments proposed, is cited with pride.[16] The citizens must feel that the law voted by their representatives is truly their own—a law desired by them, the strict observation of which they must support and safeguard. The Soviet court is thought of as a school. It admonishes, encourages, and gives advice as the law itself often does. Its composition, rules of procedure and very existence are explained by the educative role of Soviet law. A failure has occurred if the condemned party does not approve of his sentence, and if opposing parties do not leave the court reconciled by recognising the just character of the decision made in application of socialist law. This work of persuasion is gradually to render all coercion unnecessary, and in this way law can finally lose its sanctionist aspect in order to assume a merely directing role. According to the saying of Engels, "the government of men will give way to the administration of things;" everyone will spontaneously observe the rules laid down by the administrators of collectivised property, so evident will the usefulness of these rules be to all. Society will then function without any coercion; there will be no more Law in the sense that the Marxists understand this term.

### 152. Interest of Soviet law for non-socialist countries

The ideal of a communist society has not been fulfilled up to the present time, but this ideal, which the system of government applies itself to bring about, has nonetheless led Soviet leaders to try out new ideas in which social relationships are no longer, as in the past, regulated essentially, or even normally, by law. The transfer of functions presently carried out by the state to more

[16] Tchikvadze (V. M.), *Le concept de la légalité dans les pays socialistes* (1961), pp. 211–214. When the Fundamental Principles of Family Law were under consideration, 7,000 suggestions were made and 8,000 letters sent by citizens to *Izvestija* and *Literaturnaya Gazeta*.

flexible bodies, and the use of techniques other than law to regulate certain aspects of social life in the U.S.S.R. merit our attention.

In a number of capitalist countries even criminal law, for example, tends to become diluted or to take on new characteristics when there arises a new concept of social defence, dominated by a cluster of criminological sciences in which psychology, medicine and sociology are associated. In other areas (such as commercial and labour law) the techniques of arbitration and mediation also tend to be substituted for strict rules of law. In the U.S.S.R. the desire to see law vanish applies to all domains as a matter of principle. This stand may lead it to try experiments which, even in non-socialist countries, are of interest and value.[17]

## Section II—Other Socialist Countries

### 153. General characteristics

Ever since communist regimes assumed power in other European socialist countries their general pattern of development has been the same as that of the Soviet Union. It could not really have been otherwise: adhesion to the Marxist doctrine carries with it the same understanding of social history and of law, the same need to collectivise the means of production and to install the dictatorship of the proletariat. The Marxist governors of the European people's democracies very naturally looked for guidance to the Soviet Union which had been on the road to communism since 1917; its political power, moreover, afforded them protection in this early period.

But the conditions of the U.S.S.R. and the European socialist countries are, nevertheless, from many points of view, very different. No European country has either the continental dimensions or the world power and responsibilities of the U.S.S.R., and this geo-political factor alone necessarily implies much variation in the way in which problems are put and resolved. Then, too, the circumstances in which the communists came to power were different

[17] David (R.), "Le dépassement du droit et les systèmes de droit contemporains," *Archives de philosophie du droit*, no. 8 (1963), pp. 3–20. Jampol'skaja (T. S.), *Les organisations sociales et le développement de la socialisation de l'Etat* (1968).

in Russia and elsewhere. Economic and social conditions and traditions in these countries never were, nor are they now, those of Soviet Russia. Their several policies, while oriented towards a common goal, necessarily involve some adaptation to these conditions and circumstances. In other words, the model provided by the U.S.S.R. could not simply be adopted in these several states whose traditions, degree of industrialisation, social structure and culture were different.

For all these reasons, it is admitted in the Soviet Union that there can be differences between the laws of the U.S.S.R. and the people's democracies. It is seen as natural that there be departures from the Soviet model, although the deviations must have some limits if the state in question intends to remain within the socialist camp. The desire on the part of some countries to build "a new model of socialist society" is not, however, looked upon favourably by the U.S.S.R. There is a real fear that, under the cover of such a formula, there will be a new interpretation given to the fundamental doctrine of Marxism-Leninism and thus an abandonment of a number of its basic principles.

**154. Respect for law**

The Russian people, for the most part ruled only by their customs, did not consider law to be the basis of the social order before the Bolshevik revolution. For them legislation was associated with the whims of the sovereign and represented an essentially administrative technique. Marxism forecast the withering away of law and this so little shocked the Russians that they thought it possible, immediately after the Revolution, to look to the total and immediate disappearance of all law. There was also a lack of jurists in whom confidence could be placed for the administration of a new law. Lenin's affirmation of the principle of socialist legality at the time of the N.E.P. appeared to many as a backward step on the road to socialism; it was expected that this principle would be abandoned as soon as possible, along with the N.E.P. itself, if the principles of the revolution and Marxism were to be faithfully maintained.

On all those points the situation was different in the people's republics. Prior to 1945 in all these states, although to differing degrees, there was, or it was at least proposed that there should

be, the ideal of a state founded on law.[18] When the political regimes dominated by the Communist Party were established, it would have been possible to reject the idea of law held in the Romano-Germanic family and to deny, according to Marxist-Leninist doctrine, the continuity between the old and the new law. Not one of the people's democracies however passed through the stage of revolutionary communism known to Russia. And profiting from the Russian experience, it was unhesitatingly admitted in the people's republics that a transitional period between capitalism and communism was necessary; the principle of socialist legality was easily acknowledged. The traditionally respectful attitude for law very naturally remained, especially since in these countries, unlike Russia in 1917, there were both old and new jurists who were willing to serve the regime.

### 155. Survival of former law

Moreover, in none of the people's republics was it judged necessary, as it had been in Russia, to make a clean break with and to abolish *in toto* the existing law. Existing codes and legislation were left in force to the extent that they were not contrary to the principles of the newly created public order. Economic and political structures were, of course, thrown into confusion but an effort was made to retain in the sphere of law anything of the former system that might be salvaged. Techniques known from experience to be valuable and which were in no way incompatible with a renewal of the law were preserved. Substantively, legal provisions in which class characteristics were evident were abrogated; but the whole of the law was not rejected since it contained a portion of the national cultural heritage that was worthy of admiration and confidence.

Consider the case of Yugoslavia. A decision of February 3, 1945 by the praesidium of the Yugoslav Anti-fascist Council of National Liberation abolished the whole of the former law of the country, but it allowed judges to continue to apply those provisions that were not "opposed to the victories of the struggle for national liberation, the declarations and decisions of the different anti-fascist councils and the committees of national liberation." The Yugoslav Supreme Court in 1951 clearly indicated the value of the

[18] Wagner (W. J.) ed., *Polish Law Throughout the Ages* (1970).

former law by demanding of a lower court, when the latter refused to apply a rule of this law, that it specify "the rule, the institution or the political principle which the application of this rule would violate. It cannot simply reject a rule of the former law by saying that it no longer has force of law, without any further amplification."[19] This decision censures the opinion formerly held by Yugoslav authors that judges should no longer be allowed to give reasons for their judgments by referring to the articles of the old codes on the ground that these no longer had any value save as general legal principles. This legal point is now out of date but it is an example of a willingness to be original. Much legislation has been enacted since then, a recent example of which is the law of October 1, 1978 on the subject of obligations.

**156. Renewal of the law**

Not everything therefore in the former law was necessarily condemned; some of its provisions were only the result of the dictatorship of the bourgeois class, whereas others, corresponding to the customs of the people, could very well be in agreement with true justice. However the importance of the maintenance of the former legal system must not be over-estimated. Even though much old legislation has been preserved, it has often been interpreted in a new manner reflecting the political revolution that has occurred. A considerable amount of codification and new enactment has intervened which renders more and more theoretical the maintenance of the earlier legislation.

With regimes whose aim it was to create socialist societies completely different from old societies, it is obvious that the law had to change and that a vast work of revision of the codes and, in some countries, the unification of the law, had to be accomplished. But two methods of doing so were possible. It might, in the first place, have been tempting to copy the Soviet model; on the other hand, however, it was also possible to try to make use of existing institutions, by infusing them with a new spirit so that they could be put to the service of the socialist state.[20]

The first method was employed in the beginning but in a manner

[19] Stoyanovitch (K.), *Le régime socialiste yougoslave* (1961), pp. 169, 359–360.

[20] On the influence of Soviet law upon the law of the people's democracies, *cf. Izv. Inst. pravi nauki* (Sofia, 1968), Vol. 22 and especially the article by L. Vasilev.

which today is considered to have been excessive. The second is more and more gaining in importance. Was it not Lenin himself who stated that "When the national character is neglected in the building of socialism, the very meaning of socialism is distorted"?[21] Most jurists of the people's republics have welcomed the readjustment of Marxist-Leninist teaching which took place in March 1956 at the XX Congress of the Soviet Communist Party and the new, less strictly dogmatic and authoritarian current which has seemed to prevail since that time. "The mechanical opposition of the law, legislation and judicial practice of the socialist state to the corresponding institutions of the capitalist state," wrote the Polish Minister of Justice, "has been one of the negative factors exerting an influence on our legal development. The fact that these institutions were the product of a centuries long heritage has been underestimated; in the interests of socialism it would be better to perfect rather than to suppress them." It is regrettable, she continues, that "the traditions of progressive Polish scholarship" have been abandoned "in favour of a mechanical importation into Poland of the legal institutions of other states working for socialism."[22]

### 157. Collectivisation

The work of reform was directed, first of all, to bringing about the collectivisation of the means of production. Complete success was achieved in respect of industry.

Vast industrial development plans in the various people's republics required the complete annexation of industrial enterprises by the state; it was unthinkable that the proletarian working class, the members of which make up the ranks of the Communist Party, should remain subject to and be exploited by private employers. Moreover, the nationalisation of industry was easy and popular because the enterprises themselves often belonged to foreign interests or to capitalists whose position was compromised by reason of their association with the previous political regimes.

Although it was not pushed as far in the new democracies as it

[21] Cited by Maneli (M.), "Les idées de la Révolution d'octobre," *Państwo i Prawo*, November 1957.

[22] Wasilkowska (Z.), "Les tâches de la commission de codification," *Państwo i Prawo*, January 1957.

was in the U.S.S.R., private commerce was also forbidden. There are however privately owned stores in Bulgaria and Hungary, especially in the food-stuff trades. Elsewhere, in Poland for example, an accommodation was reached whereby the state conceded to private enterprises the right to operate various commercial concerns.

As in Soviet Russia, however, the more delicate matter was the nationalisation of land and the collectivisation of farming. The difficulties were overcome in most of the people's democracies and the resulting situation is very comparable if not identical to that in the U.S.S.R. Two states, however, Poland and Yugoslavia, only followed the movement to a very limited extent.

In Poland the land was not nationalised and the greater part of agricultural production is still carried out by individual farmers. The latter possess 86·3 per cent. of the cultivated land whereas 8,300 state-farms cultivate only 12 per cent. of the land; since 1956 the *kolkhozi*, which were never very extensive, have almost completely disappeared. The law only prohibits individual farms of more than fifteen to twenty hectares; in 1957 the free disposal of land was re-established subject to various conditions. Polish leaders and jurists are striving to create new means whereby the idea of co-operation can be re-enforced to prepare the peasants for collectivisation without provoking their resistance.

The collectivisation of agriculture is no more developed in Yugoslavia than in Poland. A first Yugoslav reform, carried out in 1945, limited to 25 or 35 hectares, depending on their nature, the superficial area of individual or family farms. This measure, however, only amounted to a confiscation of the lands belonging to the church and other large landowners; it did not achieve the collectivisation of agriculture because the confiscated lands were distributed to poor peasants who then cultivated them on an individual or family basis. Progress in collectivisation was only made after the break with Moscow in 1949. The association of peasants on *kolkhozi* was then actively encouraged, but because of its unpopularity this reform had to be dropped in 1951. Only in 1953 was the movement resumed by a further reform limiting individual farms to 10 hectares and family farms (*zadruga*) to 25 hectares. To the extent that land is collectivised in Yugoslavia the *sovkhoz*, and not the *kolkhoz*, has been employed. But even this measure has been minimal: 90 per cent. of the cultivated agricultural land remains in

the form of 2,300,000 small individual or family farms, 30 per cent. of which have a superficial area of less than two hectares. The largest part of agricultural production, quite apart from any institutional collectivisation, is still carried on by a generally poor peasantry that trades its produce as it chooses at the current market prices.

Agricultural collectivisation, in Yugoslavia as in Poland, remains a more or less unsolved problem. As an ideal, however, it has not been abandoned, but the efforts to establish co-operatives of various sorts take the form of trying to attract the peasants through education and persuasion and the prospect of material advantages rather than through dangerously authoritarian measures.

### 158. Planning

Like the economy of the Soviet Union, that of the people's republics is developed by means of a series of economic plans geared to create gradually the conditions necessary for the passage to the stage of communism. But the modalities of the plan are substantially different in each country. There is nothing surprising in such varied economic planning; it is the very principle itself of planning, and not its modalities, that Marxist-Leninist doctrine imposes; even in the U.S.S.R. successive phases of centralisation and decentralisation occurred with a rigour or a suppleness which varied according to current thinking about the best means to promote the development of the means of production. For reasons of a social or geographical nature, problems in planning often arise differently than they do in the U.S.S.R. The desire to work out suitable solutions in each country has however raised two types of suspicion. On the one hand it is feared that there may be a return to capitalistic methods; on the other, it has been observed that the new orientations may seem to imply a criticism of Soviet policies.

### 159. Yugoslav criticism of the Stalinist policy

The communist leaders of Yugoslavia were at first very closely linked to the U.S.S.R. but since 1948 there has been conflict with Soviet leaders on these matters. Considered to be "revisionists" or "deviationists" by the latter as well as other communist parties, Yugoslav leaders insist upon their loyalty to Marxism-Leninism

but claim the right to interpret the doctrine and to pursue communism in their own way. Moreover they severely criticise the mistaken ideas, especially those of the Stalinist period, entertained in the U.S.S.R.[23] The Yugoslavs consider that the U.S.S.R. is far from being a socialist state and has departed from the path indicated by Marxist doctrine in order to build a new kind of capitalist state. For them, the Soviet regime is a form of "state capitalism" in the service of a new class of bureaucrats; the riches of the nation are not exploited in the interests of all the people but in those of this new class of leaders despite the current terminology which is, in effect, worth little more than the hypocritical talk of the leaders of bourgeois countries.

Marxist-Leninist teaching, as seen by the Yugoslavs, requires that the means of production *in fact*—and not simply as a form of legislative fiction—be placed at the people's disposal. It therefore requires that the power of the state immediately disappear in all those areas where this can be carried out without endangering the victory of socialism. The ideal of the Russian and Yugoslav communists is the same. The Russians, however, think that the best means of achieving this ideal is to delay provisionally its realisation; the Yugoslavs, on the contrary, maintain that such a delay constitutes a repudiation. The new and wished for society must be set up gradually but *immediately* by means of new methods which are not simply a transfer to the state, dominated by a communist oligarchy of bureaucrats, of the wide powers formerly held by capitalist exploiters.

The abolition of the commercial classes in the U.S.S.R. ought normally to have led to the beginning of the withering away of the state; the different groups of the new social order are not, in fact, as bitterly opposed to each other as were the former social classes; there is therefore no more justification for the maintenance of the former functions and authority of the state and law. In the U.S.S.R., however, as Stalin himself proclaimed, exactly the opposite has occurred: the Soviet state has been more and more re-enforced by its taking into hand not only industrial relations,

[23] Stoyanovitch (K.), "La conception de l'Etat en Yougoslavie," *Revue du droit public et de la science politique*, 1959, pp. 214–239. *Adde* Djilas (M.), *The New Class. An Analysis of the Communist System* (1957). Garaudy (R.), *Le grand tournant du socialisme* (1969). Another break occurred in 1961 with Albania, which has turned towards the Chinese Maoist model.

which alone form the true competence of a state, but the whole of social life as well.

The reason for this state of affairs is that the corps of Soviet leaders, which at one time came from the heart of the proletariat, has now become detached and separated from it; they have made of themselves an autonomous group with its own interests, and these are different and sometimes even opposed to those of the proletariat. This group, now an extremely powerful bureaucracy, has brought the whole Soviet state under official control rather than democratising it; instead of creating a state that would waste away, it has created a totalitarian state the like of which history offers no peer. And the Soviet bureaucracy has not been content with the role of domination confided to it by the proletariat; it has, in turn, taken on the role of an exploiting class like that enjoyed by the middle class before the revolution. In the U.S.S.R. a simple system of state capitalism has been substituted for the intended socialist system.[24]

**160. Yugoslav constitutions**

The essential difference between the dictatorship of the working class and all other forms of dictatorship is not the fact that it brings about a dictatorship by the vast majority of workers over the minority of now dispossessed exploiters. It means rather that the proletarian state is not a state in the traditional sense but a transition between the state and the "non-state." To avoid the greatest danger for the proletariat—the bureaucratisation of the socialist state—it must be democratised—that is to say, the masses must participate in public administration as well as the management of the national economy. This is accomplished by removing from the *state* its former functions, one by one, for the benefit of *society*. Only in this way will the socialist state, so long as it does exist, remain a proletarian state and then wane, one day completely and finally to disappear.

This, it is declared, has been accomplished in Yugoslavia, where the regime led by Marshall Tito (1892–1980) has made a faithful and consistent application of Marxism-Leninism. The Yugoslav

[24] From quite another quarter, the Soviet regime has been criticised for the same reasons; the Chinese "dogmatists" accuse the Soviet leaders of having lost contact with the masses and any sense of revolutionary action.

Constitution of 1946 laid the basis for a centralised state similar to that of the Soviet Union. But with the collectivisation of the means of production and the disappearance of the capitalist bourgeoisie, its historical task, was completed and it was replaced in 1953, 1963 and then again in 1974 by new constitutions the role of which was to re-organise the state on a new foundation more in agreement with the newly developed conditions. The organisation of public authorities and the economic system were both reformed. The former were decentralised through the introduction of as large a measure of local autonomy as possible and the economic system was democratised by means of a participation by workers and salaried employees in the economic management of the country.

The economic policy of the proletarian state must tend to create and favour not a *state* but rather a *social* ownership which will be transferred without delay to the working people by removing it from the state and its bureaucracy. The economic functions of the state, therefore, are the first that should be transferred to society or, in other words, to the "free associations of producers." As a parallel to their participation in political power the Yugoslav people participate actively in the direction of economic power because, in each republic, as a federal unit, there is a chamber of producers which is also a chamber of the National Assembly. In each commune committee, in the same way, there is a chamber of "associated workers."

**161. Self-management of enterprises**

In addition, each economic enterprise has a workers' council, the highest managerial body of the enterprise. This is the famous industrial self-management of which Yugoslav leaders are so proud: economic management and administration of society, as required by Marxist-Leninist teaching (or at least as it is interpreted in Yugoslavia) are thus assured by the producers themselves.[25] The director of the enterprise is named by the workers' council upon an open competition. Before making its selection the council takes advice from the enterprise itself and from the commune in which it is located. The director, among other things, has the job of supervising the legality of the work of the enterprise in

[25] On self-management, *cf.* Stoyanovitch (K.), *Le régime socialiste yougoslave* (1961), pp. 312 *et seq.*; Hazard (J. N.), "Le régime juridique de l'administration des entreprises dans les pays communistes," *Liber amicorum baron L. Frédéricq* (1965) t. I, p. 539.

order to prevent it, under workers' management, from becoming a private enterprise in their hands and assures that its operation sufficiently observes the "social plan" and interests of the socialist economy of the whole country. A further, but temporary limitation of the workers' self-management can also occur with the "taking in hand" of the enterprise if this is necessary for the protection of social interests threatened by an insufficient social consciousness on the part of the producers.[26]

**162. Withering away of the state**

In Yugoslavia the state retains those functions, presupposing the exercise of force, that are necessary for the maintenance of order and social peace. These functions are the last to be exercised by society directly; their transfer will only occur when all the persisting inegalities to which, precisely, all violations of peace and the social order are due, have disappeared from society.

The state also continues to assure the defence of its frontiers. But that does not prevent it from withering away in all other respects. It has just been seen how the withering away of the state was conceived and organised in economic matters. The state and its bureaucracy must also immediately lose other functions, especially those relating to intellectual life, public health, education and social planning. For this reason attempts have been made in Yugoslavia to create a system without political parties. In 1952 the Communist Party became the Yugoslav Communist League in order to make it understood that it had become simply an organisation for the diffusion of communist ideas. The right to make actual decisions and to militate for their adoption as acts of state has been transferred to the Socialist Alliance of Working People which is, properly speaking, not a political party but rather a diversified organisation intended to include almost all citizens participating in the exercise of power in order to teach them how best to discharge this task.

**163. Influence of Yugoslav revisionism**

The Yugoslav criticism of the Soviet regime and institutions was considered in the U.S.S.R. in 1948 as a betrayal of the socialist

[26] Apart from the Constitution, the regulation of self-management is principally found in legislation of November 25, 1976.

bloc. But with the disappearance of Stalin in 1953 and the denunciation of the Stalinist dictatorship by Khrushchev in February 1956, it was at last asked whether in fact there was not some truth in these criticisms and whether, in any case, the Yugoslav Republic, being in a special situation, different from that of the U.S.S.R., could not legitimately adopt a course of action distinct from that of the U.S.S.R. Since that time considerable efforts have been made in the U.S.S.R. and in other Marxist-Leninist countries to eliminate those traits which gave weight to the Yugoslav criticisms. The "deviations" brought about in certain areas by the domination of a bureaucratic centralisation, the delays in official business, the excessive formalism and plethora of personnel have all been denounced. The down-grading of the elective bodies, which were unable to exercise any effective control, was recognised as having resulted in a separation of state and Party machinery from society and to have brought about violations of legality and encouraged oligarchical tendencies. "At the heart of socialist society there are contradictions that must be eradicated if its development is to continue."[27]

Since 1956 other countries of the socialist camp, and even the U.S.S.R. itself, have thought it necessary to undertake a "regeneration of socialist democracy;" the reforms introduced to "rectify the bureaucratic deviations of socialism" do, in their principle, recall the changes advocated in Yugoslavia.[28]

### 164. Cohesion of the Marxist-Leninist countries

The crisis that occurred in the relations between Soviet and Yugoslav Marxists is much less acute, now that experience has shown that even though it went its own way Yugoslavia has no intention of joining the capitalist camp. Other crises have occurred, or been threatened, between the Soviet Union and other countries which, in turn, have also wanted to depart from the Soviet model. It is difficult for those living in the Soviet context not to have some doubts about them in such circumstances; and this,

[27] Ehrlich (St.), "Notion et garanties de la légalité socialiste dans les pays de l'Europe de l'Est," *Politique, Revue internationale des doctrines et des institutions*, 1958, pp. 311, 324–325.

[28] On the similarities in the U.S.S.R. and Yugoslavia respecting the administrative regime of state enterprises, *cf.* the article, already cited, of J. N. Hazard in *Liber Amicorum Frédéricq* t. I.

in all probability, will always be, so long as the capitalist encirclement subsists and is looked upon as a menace in the U.S.S.R.

The picture of the Marxist-Leninist countries in the contemporary world is thus one of considerable variety. An American author has endeavoured to identify that factor which unites them all in respect of their law.[29] No great difficulty is encountered in finding many similarities, but in no domain—whether in public or private law—has he been able to state that there is uniformity. Variations are, however, natural in these societies which, from so many points of view, are different and fully intend to remain so. That voice which, at the creation of the Soviet Union in 1922, exclaimed to the constituent assembly "Long live the Soviet Socialist Republics of the whole world!" has ever since been without echo. The Soviet Union has not taken over any country which has come under the control of a communist party since 1945.

Each such country has its own originality and enjoys its own institutions and law. And the cohesion of the socialist bloc does not, moreover, imply that they renounce thereto—it merely supposes that they all adhere to a number of basic principles, a certain idea of what the social order should be and to some sense of solidarity with the Soviet Union. It cannot be forgotten that the Soviet Union itself has not yet achieved that form of society heralded by Marxist theory. Different paths can, then, be followed to advance towards this goal which itself legitimises the present day variations.

## Section III—The Principle of Socialist Legality

### 165. Position of the problem

The Marxist prediction of the disappearance of law in communist society, and the policy followed by Soviet leaders during the period of revolutionary communism, troubled many jurists of bourgeois countries who wondered if any Soviet law existed at all and whether the socialist state, aspiring to bring about its own disappearance, still recognised a principle of legality.

[29] Hazard (J. N.), *Communists and their Law. A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (1969). See also Eörsi (G.) and Harmaty (R.) ed., *Law and Economic Reform in Socialist Countries* (1971). Martinet (G.), *Les cinq communismes* (1971).

It would be as well to remove all doubt on this subject—the question may well once have existed in the case of China, but not in that of the U.S.S.R. and other European socialist countries where a principle of socialist legality is emphatically stated and where, at the same time, there are real guarantees to make this principle effective.[30] The principle and its guarantees will now be examined.

## § 1. Meaning of the Principle

### 166. Existence of a socialist law

The utopian position taken up at the time of revolutionary communism, when it was thought possible to abolish immediately the principle of legality and to replace all law by revolutionary conscience, has long been a thing of the past. With the affirmation of the principle of socialist legality, law has been given the character and authority that it has in capitalist countries.

The U.S.S.R. is not yet a communist society in which social relationships are exclusively governed by spontaneous feelings of solidarity and social duty. At present, discipline is the keynote in all fields: labour discipline, planning discipline—and coercion and law both play a role, far from exclusive but incontestable nonetheless and therefore not to be underestimated, in assuring this strict discipline. Law and state are necessary at the present stage. By conforming strictly to the law, the various parts of the administration, state enterprises, co-operatives and citizens work for the accomplishment of government policy and make way for the advent of communism. Strict compliance with the principle of socialist legality, in other words strict conformity to the Soviet legal order, is absolutely imperative.

### 167. Meaning of the word "socialist"

What does the epithet "socialist" add to the term "socialist legality"? It is far from meaningless. Indeed, in the eyes of Soviet jurists it is this adjective that legitimises the obligation to obey the law and makes the principle of legality meaningful.

[30] "Le concept de la légalité dans les pays socialistes," *Cahiers de l'Académie polonaise des sciences, XXI*, 1961. Alekseev (S. S.), *Social "naja cennost" prava v sovetskom obščestve* (1970).

Soviet citizens must obey Soviet laws because they are just; and they are just because the state is a socialist state which exists in the interest of all and not that of a privileged class. In all countries the Marxists have fought and still fight against the law, because to them it appears that law, in the non-socialist countries, serves only to defend and perpetuate a fundamentally unjust social order. When they demand on the contrary that citizens in the U.S.S.R. conform strictly to the legal order, they must therefore justify this change of attitude.

"The economic structure of society and the material conditions of the ruling class determine the social consciousness, the will and the interests that find their expression in law. To dissociate law and legality from the economy, to analyse the legal system independently of the existing economic relations is therefore incompatible with the basic principles of Soviet legal science."[31] The law is of value only in relation to the order which it serves to establish and the content of the legal rules it contains. The epithet "socialist" supplies, therefore, an indispensable justification; it underscores the idea that the principle of legality is only meaningful in a socialist economy and when it is subordinate to the interests of this economy. A "fetish" must not be made of law. Law only has value because it serves the interests of a socialist state. Law is important and indispensable, but it is, after all, merely a superstructure; its authority can only be based on a sound infrastructure, that of an economy in which the means of production are collectivised and exploited in the interests of all. The epithet "socialist" thus recalls this fundamental principle of Marxist thought.

### 168. Affirmation of the principle of socialist legality

But the principle, once admitted, was not accepted without some difficulty to which the present terminology still bears witness. Apart from any basic doctrinal position, the principle of socialist legality simply could not be recognised during the period of revolutionary communism. To be meaningful, the principle presupposes the existence of sufficiently detailed legal rules, and these did not exist at the time. It was only during the period of the

[31] Tchikvadze (V. M.), "Socialist Legality in the U.S.S.R.," *in Le concept de légalité dans les pays socialistes* (1961), p. 206. *Adde* Jaroszyński (M.): "Les éléments populaires dans le concept de la légalité socialiste," *ibid.* pp. 327–336.

N.E.P. that the principle of legality was first asserted in the U.S.S.R. This was, however, a period of compromise, when there was real fear that the capitalist elements (private industrial enterprises or *kulaks*) subsisting in society would attempt to use the existing laws for their own ends and to the detriment of socialism. Many jurists were not enthusiastic about these laws because of their suspicion of such capitalist elements, for whose benefit it might seem that the codes had been drafted in order to win them over and give them some reassurance. The full adherence of Soviet jurists to the principle of socialist legality, and the complete victory of the principle, only came about after the abandonment of the N.E.P., when the U.S.S.R. became a completely socialist state.

### 169. State enterprises

At this particular moment, there was some question whether a distinction—recalling that between public and private law—should not be made between state agencies or enterprises and citizens, the latter alone being fully subject to the principle of legality. Under current Soviet law, litigation of any importance involving such enterprises is not resolved by the ordinary courts established under the Soviet Constitution, but submitted to distinct arbitration organs ("state arbitration" or "administrative (department) arbitration"). As employed here, the word arbitration is equivocal. It suggests that in dealings between state enterprises a strict application of the law is not made or that such application may be tempered by other considerations. It is quite likely that in 1931, when the system of state or "administrative" arbitration was put into effect, the choice of this term was influenced by some such idea.[32] Whatever the situation may have been originally, it is now quite clear that state enterprises, like citizens, are strictly subject to the principle of socialist legality, and that dealings among them are rigorously governed by law; the arbitration organs must apply rules of law in the solution of disputes among these enterprises, to the exclusion of any considerations based on equity or some other non-juridical consideration.

[32] Hazard (J. N.), "Flexibility of Law in Soviet State Arbitration" *International Arbitration, Liber amicorum for Martin Domke* (1967), p. 120.

**170. Imperative nature of Soviet law**

The regime established in the U.S.S.R., however, changes the fundamentals of every problem, and the principle of socialist legality proclaimed in this country differs from the principle of the supremacy of law, *i.e.* "the rule of law," such as it is found in the bourgeois countries. It is now appropriate to consider some of the differences demonstrating the originality of the Soviet system in the present phase of socialism.

The first difference lies in the new functions that the law is called upon to fulfil in the Soviet Union. The Soviet government is revolutionary and its aim is to bring about a radical change in present conditions so as to establish a communist society. The primary function of Soviet law is not, as in the bourgeois countries, to express a certain concept of justice based upon tradition but to organise the nation's economic forces and to transform the behaviour and attitudes of its citizens. The dynamic nature of these functions distinguishes Soviet from bourgeois laws. To avoid or disobey the law in the U.S.S.R. does not merely constitute an infringement on the interests of private persons or an insult to the code of morality; it is a threat to the success of the policy of the leaders and involves the risk of delaying the advent of communism, if indeed not definitively compromising it. In bourgeois countries, the way in which a contract is negotiated, interpreted and executed concerns mainly private interests; in the U.S.S.R. the success of the plan and the economic development of the nation depend upon it. These new functions assigned to law in society and the revolutionary character of the government make respect for the law much more imperative in the Soviet Union than in capitalist countries in which, after all, the matter is often of more interest to private persons than it is to society in general.

Jhering vainly exhorted citizens of bourgeois countries to fight for law.[33] The feeling persists, however, in these countries that a poor settlement is worth more than a good trial, and society adapts itself to this feeling and practice. The same point of view would be inadmissible in the Soviet Union, where respect for law as the policy instrument of the leaders is a major social concern. "We have no more private law," wrote Lenin, "for with us all has

[33] Jhering (R. von), *Der Kampfum's Recht* (1872) translated as *The Struggle for Law* (1915) by A. Kocourek.

become public law." This statement must be understood to mean that all of Soviet law is intended to construct a new social order; any violation of the law is of concern to the public authorities and the state, quite apart from whoever is the immediate victim.

In the U.S.S.R. the principle of legality is more necessary and more demanding than in bourgeois countries, where the law attempts to promote justice mainly between private persons and where, to a very great extent therefore, law is only obligatory in so far as interested citizens are disposed to act in order to protect their rights. The differing functions given to law in the Soviet Union result in a stricter conception of the principle of legality and a more efficient guarantee that it will be respected, because there, unlike the bourgeois countries, both society and the powers that govern have a greater concern for its respect. The role of law and the importance of training good jurists were particularly emphasised by Party leaders in 1960 when it was decided to increase significantly the number of lawyers especially with a view to their employment in state enterprises.

### 171. Socialist laws and natural law

A second difference distinguishing socialist laws from other laws lies in their respective attitudes to natural law. Marxism has often been explained as a purely positivist doctrine and as one rejecting natural law. The reality of the matter is, however, more complex.[34]

Marxists will only qualify as law and as legal rules those rules of conduct laid down and sanctioned by the state, and in this sense they may be called positivists. But Marxists do not refuse to look behind the formal or exterior aspect of law; for them the law must not be divorced from its social context. Beginning with this idea, therefore, Marxism corrects the positivist view by recognising that there is a "given factor" in law—the social or natural context in which law, unfolding in an historical perspective, operates the "construction" of law. The legislature is not omnipotent; it cannot create law arbitrarily because it is limited in its actions by certain material considerations and prevailing ideals. The work of the

[34] Naschitz (A. M.), "Le problème du droit naturel à la lumière de la philosophie marxist du droit", *Revue roumaine des sciences sociales* (Série des sciences juridiques), t. X (1966), p. 19. Toumanov (V. A.), *Pensée juridique bourgeoise contemporaine* (1974).

legislature is thus conditioned and to some extent predetermined, by many varied social relationships prevailing among men.

Marxism, in this way, as a global philosophy, is different from positivism becuase it is willing to encompass in its conception and definition of law the fact that there are real limits to legislative power. The legislature is not completely free in its work of creating law; it is restricted by a number of exterior or anterior factors. And, therefore, because it recognises that its work is not wholly free and arbitrary, Marxism is close to the idea of natural law, even though it attaches a new meaning to this term (which is already attributed so many meanings). For the Marxist, natural law does not refer to the natural order of things, an abstract nature, or to some concept of an immanent and universal justice. The essential thing, that which in the end dictates any action by the legislature, is, for the Marxist, the material condition of life, the way in which the means of production are exploited and the productive relationships are arranged, rather than, as it would be for the Natural Law school, the factors of an idealised nature.

The Marxist position on this matter in no sense implies the negation of the basis, or the ethical finality, of law. The fact that a state has become socialist does not free it from constantly seeking out a better concordance of law and morality. The socialist state, indeed, takes up the challenge even more readily than others because it sees its morality—that of a classless society—as superior to that of other non-socialist states which are based upon the exploitation of the workers by the privileged classes. It can come as no surprise, therefore, to learn that those societies professing materialism also exalt the value of law and emphasise its moral or just character. And there is no objection to the use of the word "sacred" to describe a variety of legal institutions of Soviet law, whether it be the family, socialist ownership or the obligation to work.

### 172. The provisional character of socialist law

The principle of socialist legality has been proclaimed and today reigns uncontested in the U.S.S.R. and other socialist countries. However it must not be forgotten that this principle, like the structure of the socialist state itself, simply meets the necessities of a transitional period. The present law of socialist countries, writes

the Czech professor V. Knapp, is, generally speaking, just from the point of view of a socialist society but unjust, on the contrary, from the point of view of the later phase of communism. The dialectic contradiction between the just character of socialist law and its unjust character in a communist society will only disappear with the withering away of law upon the advent of communism itself.[35] The end in view is the construction of a communist society in which law and the state, and therefore the principle of legality, will no longer exist. For this reason there are insitutions in Soviet law which, within the framework of the principle of legality, presage and prepare for the non-juridical forms of tomorrow's society. And there are also institutions which do not appear to be fully in agreement with the principle of legality itself. Each of these observations is an opportune reminder that Soviet society does not want to be, and is not, "a society like others," and that its whole structure is dominated by Marxist-Leninist ideology.

## § 2. Guarantees of the Principle

### 173. Soviet conception of the problem

How is respect for socialist legality on the part of administrators, as well as people in general, to be guaranteed? In the broad sense it is assured by the entire range of institutions set up in the socialist state and by the consensus of the people who must be convinced of the excellence of their regime and its laws. This point of view, valid for all societies, is particularly true of the Soviet Union and other socialist countries.[36] There the advent of a society in which all coercion will be banished is predicted; henceforth, it is emphasised, the social order is to be assured by extremely varied techniques, in which state bodies, unions, the press and all citizens will fully and freely participate.

According to Soviet authors, the most fundamental guarantee of socialist legality lies in the fact that individual interests and the general social interest are in complete accord—an accord which, in a socialist regime, is assured by the collectivisation of the means of

[35] Knapp (V.), *Filosofické problémy socialistického práva* (1967).

[36] *Cf.* the different articles in the work previously cited, *Le concept de la légalité dans les pays socialistes* (1961), especially the report at pp. 327–336 and the article at pp. 91–115 of Professor M. Jaroszyński.

production which brings about the disappearance of any exploitation of man by man. Only within the framework of such a regime is it possible to expect—from both administrators and citizens—civic spirit and virtue which cannot exist in a country of socially antagonistic classes.

And so the guarantees of socialist legality in the U.S.S.R. are manifold.[37] A Soviet professor, G. I. Pietrov, mentions the activity of local soviets at many different levels of government and administration, that of the Control Commission of the Council of Ministers of the U.S.S.R., the varied inspections taking place within the administration, as well as the activity of the *Prokuratura* and the courts, the surveillance of social organisations and especially the unions, and the widely recognised right to lodge complaints and claims which administrative bodies are obliged to investigate.

In this work it is not possible to study all such guarantees and therefore examine all the institutions of Soviet law. Having placed them in a fairly general context by showing that the principle of socialist legality is guaranteed in many ways, our examination here will be limited to three particular institutions designed for this purpose. These institutions are the *Prokuratura* or Procurator's Office, the People's Control Commission and the *Advokatura* or College of Advocates.

### 174. The Prokuratura

In order to guarantee the principle of socialist legality a special institution, known as the Prokuratura, has been organised in the U.S.S.R.[38]

The creation of the Prokuratura in the Soviet Union dates from 1922, but it recalls to mind an ancient Russian institution created by Peter the Great in 1722—"the eyes of the monarch"—by means of which agents of the central power were posted in the provinces to watch over the legality of the acts carried out by administrative authorities. It was suppressed in 1864 in favour of a department of

[37] Pietrov (G. I.), *Le concept de la légalité dans les pays socialistes* (1961), pp. 375–376. Akademija Nauk SSSR, Institut Gosudarstva i Prava, *Pravovye garantii zakonnosti v SSSR* (under the direction of S. Strogovič, 1962).

[38] *Cf.* Timasheff (N. S.), "The Procurator's Office in the U.S.S.R." in *Law in Eastern Europe* (1958), p. 8. Collignon (J. G.), *Les juristes en Union Soviétique* (Paris thesis) (1974), p. 339.

state attorneys of the French type (*ministère public*). This department, associated in the mind of the public with the autocratic regime of the tsars, was abolished on November 24, 1918, along with the courts, and local authorities were therefore left with complete discretion. Although the present Prokuratura was re-established at the time of the N.E.P. in 1922, it is a return to the pre-1864 tradition. The 1936 Constitution confirmed the principle, and it is at present regulated by an ordinance of November 30, 1979.

The Prokuratura, since 1936, has been a completely autonomous body; its sole head is the procurator-general of the U.S.S.R. It is an indication of the Prokuratura's full independence that this official, enjoying the rank of a minister, is appointed for a period of five years (an altogether exceptional term in the U.S.S.R.) by the Supreme Soviet to which he reports directly and exclusively. He therefore appears as a kind of symbol of the permanence and authority of the law.

The Prokuratura is a highly developed part of the administration with numerous branches. Under the procurator-general, and appointed by him for a period of five years and strictly subject to his orders, are the procurators of the Soviet Socialist Republics, who in turn appoint the procurators of the provinces, districts or departments and towns. There are also special sections of the Prokuratura in the armed forces, work camps and a special division to watch over state security agencies. Its double function, in general supervision and collaboration with the courts, will now be examined.

### 175. The role of general supervision

The main function of the Soviet Prokuratura is to safeguard the respect for socialist legality. It is a body set up for purposes of surveillance rather than administration. It never renders a decision itself, but is limited to exercising a supervisory control and bringing illegalities or irregularities to the attention of the administrative, judicial or governmental bodies whose function it is to take the appropriate action.

The main role of the Prokuratura is one of "general supervision." One of its members attends meetings of the executive committees of local soviets and can therefore prevent illegal decisions or the passage of illegal resolutions. The Prokuratura

moreover undertakes a systematic examination of all administrative acts, some of which must in law be obligatorily communicated to it before becoming executory. It may also be seized, by way of complaint or petition from interested persons, of any case in which there has been a violation of the law. It thus exercises a general control over the whole administration.

If the Prokuratura does uncover an irregularity, its agents are bound to raise the appropriate objection on pain of their own disciplinary or penal liability. In some cases a time-limit is provided. The law also determines to whom the objection must be addressed—either to the authority that has made the questionable decisions, to a higher authority or, if necessary, to the judicial authorities. If the authority, once notified of an illegal measure, does not then annul or modify it within a specified delay (generally ten days), the Prokuratura is bound to seize a superior authority of the matter. In principle the objection of the Prokuratura does not have the effect of suspending the act complained of, but there are many exceptions to this general rule. If the act infringes upon the rights of citizens or legally protected freedoms, the act is suspended in its effects upon the lodging of the objection until such time as the competent authority has decided the matter.

Practice has shown that the Prokuratura effectively exercises this supervisory role. In all the cases reported[39] it appears that the objections raised by the Prokuratura were found to have been justified. It is worth noting however that the review in which they are reported (*Socialist Legality*[40]) is published by the Prokuratura itself. Its interventions appear to have occurred principally in labour law matters and in relation to the measures taken by local authorities. The decrees of more highly placed organs are less exposed to its criticisms because such bodies have in their own right greater administrative expertise and a greater ability to study matters in depth.[41] There is no lack of examples, however, of a decision of a ministry, or of the council or ministers of an autonomous republic or even of a Soviet Socialist Republic, being

[39] *Cf.* Morgan (G. G.), "The Protests and Representations lodged by the Soviet Procuracy against the Legality of Government Enactments, 1937–1964," *Legal Controls in the Soviet Union, Law in Eastern Europe* (1966), No. 13, pp. 103–286. The author analyses 242 cases. This study is carried forward by Boim (L.), "Protests of the Procuracy in the U.S.S.R., 1965–1973" *Law in Eastern Europe*, Vol. 20.

[40] *Sotsialistitcheskaya Zakonnost'*.

[41] Berezovskaja (S. G.), *Ohrana prav graždan sovetskoj prokuratoroj* (1964), p. 137.

annulled. In 1960, for example, the procurator-general of the U.S.S.R. obtained the quashing of a decree of the Lithuanian S.S.R. Council of Ministers which had prohibited the sale of cattle by citizens and *kolkhozi* outside the country.

But the role of general supervision of the Prokuratura is not limited to seeking to strike down acts violating socialist legality. It may also intervene directly by way of "representations" (*predstavlenie*) if it is of the view that some state agency or organ is, in a general sense, in violation of legality by refraining, for example, from decisions or actions that fall within its function. The bodies to which such representations are directed must report back, within a delay fixed by law, how they intend to rectify the situation. If the Prokuratura is not satisfied with the response, it will then carry the matter to the appropriate administrative or judicial authority for penal or other disciplinary action.

### 176. The role of collaboration with the courts

The Prokuratura also has a role of collaboration with the courts. It is charged with instituting actions in criminal matters[42] and may take the initiative in a civil action, as well as filing memoranda and conclusions in the court. It is charged with the surveillance of prisons. No person may be detained without an order from the judicial authority or the consent of the Prokuratura, and the latter may order the release of any person illegally detained; this is one of the rare instances where the Prokuratura itself is authorised to intervene directly.

In civil as well as criminal matters, therefore, the Prokuratura assumes the functions which in the West devolve to the department of a *ministère public* or to an attorney-general. Its role is much more extensive, however, because of the increased intervention of public authorities in all areas, as well, perhaps, because of its great power and extensive personnel,[43] and the further fact that judges are not necessarily legally trained in the Soviet judicial organisation. All these factors, and the desire to convince the population that it henceforth lives in a wholly just society, encourage the Prokuratura to participate actively in many cases—either

[42] In political matters the role of prosecutor falls to the K.G.B. (the State Security Committee).

[43] It was estimated that in 1971 it had 18,000 employees.

by instituting actions itself, intervening in trials already begun, exercising remedies against a decision which in its opinion is incorrect or supervising the execution of judicial decisions. A provision of 1955 even allows it to take action against a decision of the *plenum* of the Supreme Court of the U.S.S.R. and to take cases decided there to the Praesidium of the Supreme Soviet. This provision is a good indication of the great concern of present Soviet leaders that the principle of legality be exalted and given full effect.

**177. Other socialist countries**

As an institution, the Prokuratura has been adopted in other European socialist nations. It has, however, been criticised in various countries on the ground that it was ineffective in preventing many serious violations of socialist legality during the Stalinist era. In those countries in which it was adopted, the Prokuratura is understaffed and working with out of date structures, and its action has been limited to the traditional role of superintending the administration of justice rather than exercising, as much as would be desirable, a more general administrative supervision. In many of these countries, before they became socialist, there were administrative courts that held the government to respect for the law and which were much esteemed by the public. It is now therefore sometimes asked whether it was a good idea to have abolished them in favour of the Soviet system.

There is no obstacle in principle to the re-establishment of the former administrative courts. But other paths have nevertheless been pursued. A reform of the Prokuratura itself, first of all, was undertaken in Czechoslovakia in 1956 in an attempt to render it more efficient. Its function of surveillance has, elsewhere, been enhanced by regulating more precisely the procedures by which the administration must act; thus codes of administrative (non-contentious) procedure have been enacted in Czechoslovakia (1955), Hungary (1957), Yugoslavia (1957) and Poland (1960). There is moreover no objection to creating other forms of control in addition to that exercised by the Prokuratura and, in particular, by enlarging the jurisdiction of the ordinary courts so as to allow interested persons to contest the legality of administrative acts. The Rumanian Constitution of 1965 has anticipated this possibility

and a 1967 law permits private persons to take legal action against individual administrative acts, saving those decided upon by the Council of Ministers. In Yugoslavia administrative decisions are subject to judicial review in the ordinary courts. Further improvement can be sought, finally, by having the people participate more fully in the public administration. This last technique, especially, has attracted attention, so certain does it seem that the work of civic education drawing on popular feelings will always be, in the final analysis, and in all countries, the best guarantee of the principle of socialist legality.[44]

### 178. People's Control Commission

The control of legality is a formidable task in a country the size of the U.S.S.R. where the whole economy is collectivised. The Prokuratura, which specialises in the field of law and administration, therefore, has its parallel in the realm of the economy and finance. This body is the People's Control Commission, formerly the Party and State Control Commission, reporting to the Supreme Soviet of the U.S.S.R., its Praesidium and to the Council of Ministers of the U.S.S.R. and now regulated by a decree of November 30, 1979. But the role of the Commission goes beyond a mere control. It must ensure that important decisions taken in the economic field are effectively observed; it must defeat the tendency of any body or person to approach problems from the point of view of one branch of the administration only or with only local interests in mind. It must fight against bureaucracy and delays, and devise measures which might improve the functioning of the Soviets or administrative bodies of one kind or another in the Soviet Union.

### 179. Advocates: the Advokatura in the U.S.S.R.

The institution of advocates in the U.S.S.R. was originally viewed with some mistrust. The bar was suppressed after the October Revolution, at a time when it was thought possible to attain the communist era immediately; there was to be no need for courts or auxiliaries of justice in a regime where there would be no

[44] Wasilkowska (Z.), "Les taches de la commission de codification" *Państwo i Prawo* (January, 1957).

more law. These illusions were short-lived, but it took some time for the restoration of a professional bar to be allowed. Since that time a consistent effort has been made to see in the advocate—who also fulfils the function of solicitor, according to Russian tradition—a true auxiliary of justice striving for socialist legality, rather than a legal representative or defender concerned only with the interests of his client. For this reason in the U.S.S.R. at one time there were simply lists of legal experts who might either be employed as defending or prosecuting attorneys, and who received a salary from the state whenever the court called upon them to exercise such functions. This experiment and the one following, in which lawyers practised without fees and in addition to another often more principal activity, were abandoned in 1922. Since that date a professional bar has existed in the U.S.S.R. and today it is mainly regulated by a law of November 30, 1979, on the *Advokatura*[45] or College of Advocates.

There are important differences between the ways in which the legal profession is conceived and organised in Western countries and the U.S.S.R. According to the Soviet idea, the advocate must be thought of as a member of a team, made up of the judge, the prosecutor and himself. All three collaborate by attempting to examine the matter before the court in all its aspects; the advocate must not think of himself principally as an adversary of the public official with whom he appears before a judge who alone has the duty to discover the truth. Thus, if the advocate is convinced of the guilt of his client, he must not attempt to hide it from the court,[46] nor make the crime appear less serious than it really is. He must call attention to whatever may attenuate the responsibility of his client; but he must never lose sight of the interests of society and always keep in mind the impression his pleading might have on those attending the hearing. If, during interviews with his client, he gathers information affecting the security of the state, he is bound—more than any other citizen—to bring it to the attention

[45] On the whole of this evolution, *cf.* Hazard (J. N.), *Settling Disputes in Soviet Society. The Formative Years of Legal Institutions* (1960). Poltorak (A.) and Zaitsev (E.), *Le Barreau soviétique* (1963). Friedman (L. M.) and Ziles (Z. L.), "Soviet Legal Profession. Recent Developments in Law and Practice" Wisconsin L. R. 32–77 (1964). Hazard (J. N.), *Managing Change in the U.S.S.R. The Politico-Legal Role of the Soviet Jurist* (1983).

[46] Before 1958 the advocate in such a situation was advised to abandon the defence of his client, but the Fundamental Principles of criminal procedure of 1958 now forbid him this course.

of the competent authorities. It is evident that the Soviet lawyer is first and foremost an auxiliary of justice and a servant of socialist legality. To a certain extent this conception deviates from the prevailing practice in bourgeois countries, where the judge is called upon to play the role of an arbiter between the prosecution, represented by the public prosecutor or some other person, and the defence, to which the advocate devotes himself without the restrictions imposed in the U.S.S.R.

The Soviet idea of the advocate's role is reinforced in practice by the collective organisation of the U.S.S.R. bar. Interested persons may certainly indicate their preference for a particular lawyer, but they must always apply to a group of lawyers (*Kollegija*) to designate the advocate who will plead their case. It is the director of the "collective" who determines the fees payable by the client according to a fixed tariff. The client pays these sums to the group which then divides its revenue each month on a scheduled basis. This depersonalisation of the relationship between client and lawyer prevents any danger of collusion and, in the minds of Soviet jurists, should serve to impress upon the advocate the idea that he serves the interests of society as much, if not more, than those of his client. The notions entertained immediately after the Revolution have, moreover, been abandoned in the interests of socialist legality, and it is increasingly emphasised that advocates must be qualified jurists; in principle, only those who have completed university studies in law can be admitted to the practice of law.

The professional lawyer in the U.S.S.R. today is free from the suspicion and low esteem in which he was held shortly after the Revolution. The end of the Stalinist era favoured a return to the humanist outlook and a greater effort was made to defend accused persons, in order to give effect to the fundamental principles of justice set forth in the Constitution.[47] Among lawyers at the present time there are many members of the Communist Party, and articles have been published aimed at rehabilitating the profession by emphasising that Lenin was a lawyer. However, the legal profession at present offers only a mediocre income to practitioners; most of the activities which make it profitable in the West have in effect now disappeared in the U.S.S.R. with the suppression of

[47] On the practice in this respect, *cf.* Hazard (J. N.), Butler (W. E.) and Maggs (P. B.), *The Soviet Legal System* (1977), pp. 77–81.

private commerce, and the organisation of legal departments in public enterprises has removed the need for consulting lawyers. A Soviet lawyer's work is thus principally in the criminal law field; his services in civil cases are called for in only 5 per cent. or 6 per cent. of cases. Thus there are relatively few lawyers in the U.S.S.R.—19,000 in 1980 for the entire country, 96 per cent. of whom have done graduate work and 60 per cent. of whom are members of the Communist Party.

**180. Other socialist countries**

Several additional observations may be made which indicate a number of differences between the various people's republics and the U.S.S.R. In Czechoslovakia, the professional organisation of advocates is based on that of the U.S.S.R.; they are grouped into "colleges." Legislation of December 1963 has made the same system obligatory in Poland. In Yugoslavia, on the other hand, they exercise their profession on an individual basis and sometimes in association with others. Lawyers enjoy full independence in their work. They are registered in the bar of the republic in which they practise and the bars of the various republics are grouped within a federal bar.

# TITLE II

## SOURCES OF SOCIALIST LAW

### 181. Introduction

By sources of law, Soviet jurists mean first and foremost the economic infrastructure which, according to Marxist teaching, both conditions and determines the legal system of any country. In this sense, then, the fundamental source of Soviet law is composed of two factors: the collectivisation of the means of production and the establishment in the U.S.S.R. of the proletarian dictatorship. The techniques by which legal rules are developed or defined in any given place or at any time are, in Soviet doctrine, sources of law in only a secondary sense. While taking into account the country's economic and political structure, it is the study of these technical matters that will be undertaken here, with a view to determining the role played by legislation, decided cases and other factors in the development of law in the U.S.S.R.

# CHAPTER I

# LEGISLATION

## 182. Pre-eminence of legislation

Legislation in the broad sense is evidently and without doubt the main source of Soviet law. This fact may create the impression that, on this point at least, there is a similarity between Soviet and Romano-Germanic laws. The similarity, however is no more than superficial. The importance of legislation in Romano-Germanic countries derives from the belief that it is the clearest, and therefore the most satisfactory, way of *expressing* legal rules. In socialist countries, on the other hand, the primacy of legislation derives from the attitude that enacted law is the most natural way of *creating* law because law is seen as the will of the country's rulers. Legislation, moreover, in socialist countries, is pre-eminent because rapid and revolutionary social change is wanted in short order. The dynamism of Soviet law itself naturaly leads to an exaltation of the role of legislation when contrasted to the slower evolution that takes place through judicial decisions and the development of custom.

On the purely technical level as well, legislative texts are very different in Romano-Germanic and socialist countries. Marxist-Leninist doctrine views the political and economic organisation of power very differently from what they are in the western democracies.

### Section I—The Soviet Union

## 183. Rejection of the separation of powers

To begin with, there is a difference in policy outlook. In continental European countries, a distinction is often drawn between law in the formal and material senses. Law in the formal sense is

the statute voted by parliament and promulgated by the executive power; in the material sense it is any act which, though not necessarily emanating from the legislative power, contains provisions of a general nature prescribing compliance with certain rules of conduct.

This distinction is not simply descriptive. In the liberal democracies it is considered legitimate. According to the principle known as the separation of powers, an effort is made in these countries to achieve a balance of power. It is normal in these circumstances that rules of conduct prescribed by law should come from different sources and that the privilege of creating them not be exclusive to one of those powers.

Marxist-Leninist doctrine rejects the principle of the separation of powers. It has had ample opportunity to demonstrate how, in the reality of the modern world, this principle has increasingly weakened the role of real law—that is to say, the statutes enacted by the legislature—to the benefit of other "powers," especially the executive or administrative.[1] The development of the practice of legislating by way of decree, the new distinction between the province of legislation and that of regulation made in France by the Constitution of 1958, and the independence of the judiciary in Common law countries, are all denounced as ingenious tricks geared to undermine the principle of the people's sovereignty. In the U.S.S.R. these practices, being contrary to a true democracy, are not tolerated; all power is concentrated in the hands of the Supreme Soviet, under the Constitution; and, in each S.S.R., all power is concentrated in the Supreme Soviet of the Republic. The Councils of Ministers of the U.S.S.R. and the S.S.R. and all branches of the administration and all judges are subordinate to these Supreme Soviets. There is no question of a separation or a balance of powers; at most there is a sharing of functions among different bodies of the state administration, courts and the Prokuratura; but it is inadmissible that administrative agencies or courts should set themselves up as the equals of the Supreme Soviet in which, as the highest organ of the state, all powers are vested according to the principle of unified power held in the Soviet Union.

[1] Zivs (S. L.), *Razvitie formy prava v sovremennyh imperialističeskih gosudarstvah* (1960); Burdeau (G.), "Le déclin de la loi," *Archives de philosophie du droit*, no. 8: *Le Dépassement du droit*, 1963, pp. 35–54.

Legislative power is exercised by the Supreme Soviet of the U.S.S.R. or those of the S.S.R.[2]; and no one in the U.S.S.R. is disposed to weaken or deflect this principle by recognising a distinction between laws in a formal and material sense. It is thought that law in a material sense must also be law in the formal sense, unless the Constitution is to be rendered meaningless.

### 184. Application of the principle

There is one difficulty, however. How is it possible to apply this principle in practice so that all the laws of a society as complex as the U.S.S.R. are to be the work of the legislature? Soviet doctrine considers the practice of legislating by way of decree and the recognition and extension of an autonomous regulatory power, both of which are observable in bourgeois countries, to be the results of a conspiracy against the sovereignty of the people. But jurists of bourgeois countries explain this evolution differently—simply as a result of the increased number of tasks assumed by the state and imposed by the necessities of efficient administration. How, in the U.S.S.R., has it been possible to reconcile the respect for popular sovereignty with this need for efficient administration?

One method might have been to increase the sphere of competence and the powers of the local soviets which, like the supreme soviets, express the popular will. This communalisation of power has not been, however, the means generally followed up to the present time, even though the competence of local soviets has been enlarged in recent years.

Another means has been in fact adopted. The practice of decree-laws is unknown in the U.S.S.R. and legislative power is never delegated to state administrative organs such as the Council of Ministers. But the needs of efficiency are satisfied, without affecting principles, by the practice of the Supreme Soviet authorising a permanent delegation of power between sessions to its *Praesidium*. Legislation thus remains the exclusive production of the legislative authority, although in fact it is most often the creation of the Praesidium, the decisions of which are merely ratified by the Supreme Soviet. The number and the length of these

[2] The ability to propose legislation, on the other hand, also lies with the U.S.S.R. Supreme Court, the Procurator-General of the U.S.S.R. and the people's organisations, under article 113 of the 1977 Constitution.

sessions of the Supreme Soviet make this clear—the U.S.S.R. Supreme Soviet in general holds only two sessions each year and these last no more than two or three days each.[3] The Supreme Soviet itself is only called upon to vote directly the more important legislation (the Constitution, approval of the social and economic development plans, codes or fundamental principles of legislation). On these occasions it is seen as important that the representatives of the people themselves, after a debate that will have exalted the progress which the measure represents in the construction of socialism, actually vote the law, which will be passed unanimously. All other legislation is adopted by orders or decrees of the Praesidium of the Supreme Soviet or by orders or ordinances of the Council of Ministers. It should also be noted that the Supreme Soviet can freely amend the U.S.S.R. Constitution and that in these circumstances there is no judicial control whatsoever over the constitutionality of legislation.

The Council of Ministers is authorised under the Constitution to issue decrees and make regulations but this can only be done "on the basis of and for the furtherance of statutes in force." There is no autonomous regulatory power recognised in the Soviet Union. In fact, however, the broad language used in the texts of statutes and ordinances leaves to the administrative authorities a very considerable latitude, and most of the measures which regulate life in the Soviet Union have been decided upon by the Council of Ministers or its subordinate authorities.[4]

Moreover, whether one considers the activities of the Praesidium or of the Council of Ministers, it must be borne in mind, in order to have a realistic view of the situation, that there are close ties between these two organs and the U.S.S.R. Communist Party. Under the 1977 Constitution, article 6, the Party directs and orients Soviet society; it is the central element of the political system and of all state and social organs. The Secretary-General of the Party has become the chief of state, a function before 1977 carried out by the *Praesidium*. In fact, the new Constitution has

[3] There is a tendency today to increase the role of the Supreme Soviet by developing the number and activities of the standing committees of this Soviet. Lesage (M.), *Les régimes politiques de l'U.R.S.S. et de l'Europe de l'Est* (1971).

[4] Gélard (P.), "La loi, le décret et l'arrêté en Union soviétique" *L'actualité en U.R.S.S.* (*Droit et science politique*), 1967, pp. 81–107 and, by the same author, *L'activité et le fonctionnement du Soviet Suprême de l'U.R.S.S.* (1965–1972), *Ann. de l'U.R.S.S. et des pay socialistes européens* (1972–1973).

merely enshrined previous practice. Before 1977 the Communist Party had full direction of all national business. While decisions are theoretically made by the Party's Central Committee they are, in reality, the work of the *Politburo* or policy office assisted by the Secretariat.[5]

### 185. Soviet federalism

The U.S.S.R., made up of fifteen Soviet Socialist Republics (S.S.R), is a federal state. The size of the country and the many nationalities co-existing within it make necessary this federal structure which the tsarist regime had never managed to set up.[6] The Supreme Soviet is made up of two chambers. Since the Constitution of 1977 (art. 110), there is an equal number of members in each chamber. Alongside the *Soviet of the Union* to which members are elected in proportion to the number of inhabitants without reference to the division into republics, the U.S.S.R. Supreme Soviet also has a *Soviet of Nationalities* within which that division is operative, as well as the existence of the autonomous republics, regions or districts within each S.S.R. Soviet federalism is however tempered by reason of the fact that the Communist Party is centrally organised, without any reference to the federal structure, and the various S.S.R. governments are in fact dominated by the Party.

Since the U.S.S.R. is a federal state, there is a division of power between federal authorities and those of the federated republics. The development of the relationship between federal legislative competence and that of the S.S.R. which has taken place since the death of Stalin must be noted. The 1936 Constitution had made provision for the working out of legislation or federal codes for numerous branches of the law: judicial organisation and procedure, criminal law and private law. In fact, however, no federal law other than that of 1938 relative to judicial organisation, had been promulgated in execution of this constitutional provision. The preparatory work on federal codes only went as far as first drafts which remained unpublished. After 1953 there was a reac-

[5] The Central Committee at the present time has 319 regular members and 151 alternate members, to which are added the 75 members of the Central Examination Committee. The Politburo has 14 regular and eight alternate members. The Secretariat has a secretary-general and nine assistant secretary-generals. The Central Committee generally holds two very short meetings each year.

[6] Lalcharrière (G. de), *L'idée fédérale en Russie de Riourik à Staline 862–1945*, (1945).

tion against the excessive centralisation of the Stalinist period. The 1936 Constitution was amended and the newly admitted principle was re-affirmed in the 1977 Constitution (art. 73): apart from a customs code (1964), a commercial navigation code (1968) and a code of air law (1961), the Supreme Soviet charged with the task of ensuring the uniformity of legislation throughout the whole country, has enacted "fundamental principles of legislation," on the basis of which each S.S.R. then enacts its own legislation and codes.

**186. Fundamental principles of law and recent codes**

The drafting of these "fundamental principles" has been actively pursued since the constitutional reform just mentioned. Fundamental principles were promulgated on December 25, 1958 respecting judicial organisation, criminal law and criminal procedure; the fundamental principles of civil law and civil procedure were promulgated December 8, 1961. Those relating to family and agrarian law came into force in 1968, those on corrective labour and public health in 1969, those relating to work and water legislation in 1970 and those on national education in 1973. The principles relating to administrative infractions and to housing were enacted in 1980 and 1981. The work of codification, undertaken on the basis of these principles, has been carried out assiduously in the different republics. The largest of the Soviet Socialist Republics, the Russian Soviet Federated Socialist Republic (R.S.F.S.R.), promulgated its new law on judicial organisation, as well as its new criminal code and code of criminal procedure, in 1960; in 1964 it adopted its new civil code and code of civil procedure, its marriage and family code in 1969 and its agrarian code in 1970.

The provisions enacted in the "fundamental principles" are generally reproduced *verbatim* in the codes, except for necessary adaptations. The laws or codes established on the basis of these principles are nevertheless much more detailed: the law on the judicial organisation of the Republic mentioned above, for example, contains 64 articles compared to 39 in the fundamental principles; the number of articles for the criminal code is 269 (principles: 47), and for the code of criminal procedure 413 (principles: 54); the civil code has 569 articles based on 106 articles in the prin-

ciples. These figures are interesting because they given an idea of the margin of autonomy left to each S.S.R. In general this autonomy is only very moderately exercised. There is no organisation attempting to coordinate the codes and to assure their uniformity, but a practice of communicating a draft code to other S.S.R. does exist, and there is, in fact, some attempt made to have the codes as similar as possible.

### 187. Ordinances of the Praesidium

The conditions under which the Supreme Soviets of the U.S.S.R. and the S.S.R. meet and function are such that the number of actual laws (*zakoni*) passed by them is very small. This procedure is only used when a law is to be given special solemnity. In practice, laws are most often replaced by ordinances (*ukazi*) drawn up by the Praesidium of the Supreme Soviet; this practice seems so natural that it has been used in some cases to change the Constitution. The Supreme Soviets restrict themselves to approving *en bloc*, in each session, the *ukazi* drawn up by their Praesidium during the interval between sessions and without discussing their provisions.[7]

Laws and ordinances form the basis of the Soviet legal order. Both are easily accessible and are in fact published in the various official journals of the U.S.S.R. and the S.S.R. Chronological and special subject editions have recently been published for the laws of both the U.S.S.R. and the various S.S.R.

### 188. Other types of regulation

The measures decided upon by the Council of Ministers and the various ministries of the U.S.S.R. and the S.S.R., on the basis and in the execution of laws, vary in nature and form. These may be decrees of the Council of Ministers or an individual ministry, sometimes endorsed by the Central Committee of the Communist Party; ministerial decisions, collective agreements, or general terms of delivery or transport approved by one or several of the interested ministries; model statutes for *kolkhozi*, *sovkhozi* or artisanal enterprises, or statutes for a particular group of enterprises or combines; instructions addressed to a branch of the

[7] The Supreme Soviet adopts only a few laws each year (less than ten) whereas the Praesidium will issue several times more that many decrees.

administration or to a category of industries. The complexity of this regulation is considerable and surpasses that already deplored in bourgeois countries. One of the reasons lies in the second factor mentioned earlier—the national collectivisation of the economy—which considerably changes the role of legislation in socialist countries.

### 189. Role of government administration in Soviet economy

Because of the collectivisation of the means of production, and the authoritarian state planning which governs national economic development, the government administration in socialist countries has to assume tasks in the economic field which are not comparable to those of governments in the liberal democracies. The difference is not merely quantitative but also, so to speak, qualitative. Since the industries of the economic sector are collectivised and have the appearance of so many "public bodies," it becomes rather arbitrary, despite their admitted managerial and accounting autonomy, to attempt to distinguish clearly between different forms of "administrative" acts on one hand and "contractual" acts concluded by enterprises or groups of enterprises on the other.

In free enterprise democracies—but because these are becoming less and less free—there is a host of regulations, decrees and orders which put into actual application the laws passed by the legislature. In these countries there does nevertheless exist a vast area where the free play of private enterprise is possible. Business, industrial or agricultural ventures are increasingly subject to a framework of regulations within which they must organise their activity; they nonetheless retain a large measure of freedom respecting their direction of development, the degree of expansion they hope to carry out, the location of their branch offices, the choice of clients with whom they will deal and so on. The scope for action by the head of the enterprise and the principle of contractual freedom are subject to increasing restrictions; they are nonetheless still the rule and this, despite all these restrictions, enables us to speak of free democracies.

The opposite is true of the U.S.S.R., a socialist democracy. There the *raison d'être* and the mission of all enterprises is to carry out the plan for national economic development. Their activity is

both defined and limited by the statutes handed down to them by the state and by the provisions of the plan. They must accomplish what is imposed upon them by the plan and cannot exceed the sphere of action allotted to them according to their particular status. From this double rule derives the unprecedented importance of administrative regulation in the U.S.S.R. Apart from the functions which appertain to it in the free nations, the socialist government administration, through its regulations and decrees and other instruments, must fulfil the greater part of the economic role which in other countries is undertaken on the initiative of private enterprise. There is, therefore, a countless mass of different measures, with various names, flowing from the several ministries; a western author has estimated that in the first fifty years of the Soviet regime there were no less than 390,000 ministerial orders of which about 15,000 remained in force in 1967.

Legal writers in free democracies make a very clear distinction between the decree or regulation and the departmental administrative memorandum on one hand, and the administrative act and the contract on the other. In Soviet law these distinctions are blurred, if not altogether inexistent.

### 190. Regulations and departmental instructions

The essential difference between the regulation and the departmental instruction is that the first lays down obligatory rules for all, whereas the second is restricted to giving administrative directives which do not establish rules of law. In fact, however, the governmental administrative agencies in the free democracies are hardly ever concerned with the legality of the departmental instructions received; they apply them just as they would true rules of law. This attitude and identification cannot but be reinforced in the U.S.S.R., because there all important acts of economic life are carried out by public establishments. These may very well be autonomous, but they are nonetheless subject to a ministry. That they make any distinction therefore between regulations and departmental instructions is unlikely.[8]

[8] What is true of the economic sector is equally so of others. Art. 58(1)(*c*) of the former code of criminal procedure provided, in certain cases, for the punishment of members of the family of a delinquent (in cases of desertion or treason). This article fell into disuse even before it was removed from Soviet legislation by the introduction of the new codes because the organs of the Prokuratura received instructions not to institute suits to ensure its application.

**191. Administrative acts and contracts**

In the same way, the distinction between the administrative act and the contract becomes blurred in the conditions created by the Soviet economic structure. Contracts between public establishments have their origin in the requirements of the national plan for economic development. Their basic role is to put into concrete form the elements of the plan to which they constitute a sort of appendix. Only in appearance are they equivalent to the freely—anarchically, say the Marxists—concluded contracts of the capitalist economies. In the U.S.S.R. it seemed advantageous to retain the technique of contracts in the collectivised sector; but this is explained more by a desire for good administrative management than to allow for a sphere of free action to industrial leaders. It is perfectly conceivable that contracts could be wholly suppressed in the relations between establishments or organisations of the collectivised sector. It would suffice to articulate the plan in greater detail and to have the appropriate administrative organs intervene, and in this way contracts would become unnecessary. This is inconceivable in free economies, but it is by no means so in socialist economies where, apart from matters of principle, the problem of the inter-play between administrative acts of planning and contracts only brings up the question of the respective advantages of centralisation and decentralisation in administrative and economic life. Unlike the capitalist democracies, there is no question of finding the best balance between the contradictory demands of authority and freedom.

**192. Difficulties of documentation**

Relative to the above passage and keeping in mind the absence of distinctions between regulations, departmental instructions and even contracts, it is very difficult to gather satisfactory legal documentation on any point whatsoever of Soviet administrative or economic life. In the U.S.S.R. the dividing line between what concerns the public in general and what concerns only one or more industries—and, therefore, between what must normally be published and what need not be—is not clearly drawn by means of a distinction in principle. More subtle criteria may be used or, what is even more likely, the choice may be based altogether on practical considerations. This empiricism is traditional. Before minis-

tries were introduced in Russia, each of the old bureaux (*prikaz*) built up for its own use collections of administrative acts affecting the activities of its agents—and these collections were accessible only to such agents. In modern terms the situation would be described as follows: there were no rules of public law, properly speaking, only administrative practices or customs; there were no regulations, only departmental orders. The tradition of the old Russian *prikaz* has been revived in present Soviet practice.[9] Each ministry compiles one or more collections of administrative provisions affecting its own agents or establishments whose activity it directs and controls. These collections are intended for internal use and are only distributed to subordinate services or establishments. They are not for sale and they are not usually to be found even in Soviet public libraries. Official journals only publish those measures which for some reason are to be given wide publicity. All other acts are seen as having a somewhat confidential nature, like the internal departmental instructions in most branches of a western government administration. Fear of economic espionage has thus revived an old Russian practice in the U.S.S.R. This by no means facilitates the task of anyone wishing, in good faith, to study the workings of Soviet institutions. Even Soviet writers complain of the difficulties of obtaining primary source materials. In this respect the situation of Soviet law is far from satisfactory for legal scholarship. It is only fair to say, however, that even in the free democracies the study of law is often reduced to mere theory, since the actual practices of the *milieu* in question are not always readily known and are often considered by those belonging to it to be confidential and of no concern to outsiders.

It has already been observed that in the respective domains of administrative acts and contracts, there is a swing of the pendulum between advance and retreat, centralisation and decentralisation; there is a similar swing, depending on the period, in the amount of publicity given to administrative measures. The value of codifying the substantive rules of administrative law, such as has been attempted in France since 1945, is under discussion but in general the idea is still rejected. On the other hand, the possibility of a code regulating non-contentious administrative procedures is more favourably regarded.

[9] Loeber (D. A.), "Legal Rules for Internal Use Only" (1970) 19 Int. & Comp. L.Q. 70.

**193. Interpretation and application of the law**

The Soviet regime, guided by the Communist Party, is attempting to create an entirely new social order through legislation. The leaders' will is expressed and their policies enforced by promulgated laws and subordinate administrative regulations. Like any new body of law, it is highly imperative in nature and its interpretation must conform strictly to the intention of its draftsmen. Soviet jurists and judges are expected to interpret the law so as to ensure its application in the manner envisaged by its authors.[10] The imperative rather than the rational side of a new body of law is, naturally enough, always emphasised.

It does not necessarily follow however that legal interpretation in the U.S.S.R. is always a purely literal one. The Romano-Germanic tradition persists on this point in the Soviet Union, and Marxist doctrine in no way implies that legislation must be literally applied according to a wholly grammatical interpretation. Such an attitude would result in making a "fetish" of the law as an end in itself, independent of its underlying policy and therefore in direct opposition to Marxist doctrine.

Consequently the interpretation of legislation by the Soviet judge is not grammatical but logical; it tends to interpret the real meaning of legislative texts, taking into account the whole of the system and principles by which the Soviet rulers' policy is unquestionably guided.[11] The Soviet attitude towards interpretation of legislation cannot be properly understood unless one takes into account Marxist-Leninist teaching. The laws, ordinances and decrees of Soviet law have been made by legislators imbued with these teachings. To give them full effect, their intention must be interpreted in the light of these doctrines. But this involves no risk of legislative subversion. Any comparison with the situation as it exists in capitalist countries would be false. There the judge has no sure guide; in fact, when the bourgeois judge purports to be taking the needs of society into consideration, it is his own personal ideol-

[10] It has however happened, although the instance is rare, that judicial decisions and legal authors have "interpreted" legislation in a spirit contrary to its original intention in order to arrive at a result considered desirable: Eorsi (G.), *Comparative Civil (Private) Law* (1979), no. 329.

[11] *Cf.* Ordinance No. 3 of the plenum of the U.S.S.R. Supreme Court of May 26, 1960, reproduced in Hazard (J. N.) and Shapiro (I.), *The Soviet Legal System* (1962), Pt. 2, p. 138. The Supreme Court declares that one of its ordinances rendered on May 5, 1950 has largely ceased to be applicable, because of new developments.

ogy that prevails. He thus falsifies the meaning of the law in a way which naturally favours the interests of the ruling class. On the other hand, by resorting to the principles of Marxist-Leninist teaching, Soviet jurists clarify the meaning of the law which is in complete harmony with this doctrine.

Although it was paramount for a considerable time, the present role of Marxist doctrine in the Soviet Union as a guide for judges is less important than it was. Formerly, since there was little legislation, the judge often had to look for the solution to a dispute in the principles of Marxism-Leninism. The regime's first laws dealt with this need by directing judges to be guided by the political principles of the government of the Soviets, or to decide according to their socialist sense of justice. Nowadays this vague kind of formula seems incompatible with the desired stringency of the principle of socialist legality and the strict discipline needed in society. Soviet laws are numerous and detailed; it is by applying them that the Soviet judge satisfies the socialist sense of justice to which he need no longer refer as though it were an autonomous source of law. The tendency now is to exclude from legislation such general formulae as were found in the N.E.P. codes and simply to state in detail their various possible applications. At the time of the N.E.P., formulae of this type were indispensable since the legislators had not yet been able to draw up and perfect detailed provisions. Moreover, it was then necessary to keep close watch over the capitalist elements allowed to remain in society. The usefulness of these formulae is however very much reduced at the present time, as there is not the slightest worry now in the U.S.S.R. that the provisions of the law will be eluded in the name of vague considerations of equity.

The elaboration of Fundamental Principles, promulgated in 1958 and 1961, has given us some idea of the different currents which divide Soviet doctrine on this point. In the drafts of Fundamental Principles, as originally published, all general formulae had disappeared. Only article 4 of the Fundamental Principles of Civil Law specified that rights and obligations could arise outside those cases provided for by law, "by virtue of general principles and according to the spirit of the civil laws." On the other hand, the famous provision of the 1922 Civil Code (art. 1), excluding legal protection of civil rights when exercised contrary to the general interest, was omitted. It is interesting however to note that a pro-

vision reproducing the substance of this article was finally re-introduced into the Fundamental Principles of Civil Law: "Civil rights are protected by the law, except in cases where they are exercised contrary to the purpose of such rights in a socialist society during the period of the building of communism" (art. 5, para. 1). The Fundamental Principles of Civil Procedure also contain a provision which was not in the draft: "In the absence of a law regulating the dispute, the court is to be guided by the law regulating analogous relationships; in the absence of such law, the court is to be guided by the general principles and spirit of Soviet legislation" (art. 12, para. 3). On the other hand, the possibility that criminal charges could be admitted by means of analogy, included originally in article 16 of the 1922 Criminal Code of the R.S.F.S.R. (in accordance, moreover, with the precedent established by the previous Code of 1855 and retained until the revision of 1903), was dropped in 1958.

In fact—as the discussion which took place on this subject indicates—there is a division in the U.S.S.R. between two contradictory tendencies. One tendency favours maximum rigour in applying the law; the other advocates that equity be taken into account and favours the exclusion of all formalism and making a "fetish" of the law. The existence of two such tendencies is not peculiar to the U.S.S.R. However it does have a particular aspect in this country: that of being linked to a political option. The problem is not simply whether the law should be flexible or supple; it is a question of knowing to what extent one can and must envisage, as of now, and in relation to Marxist doctrine, the possibility of law withering away and being superseded. The respect for socialist legality is of course still obligatory; but it is difficult for a Marxist to resign himself to injustice in the law. He tends to favour a legislative statement which provides some loophole when necessary, just as he supports the many provisions of the law which free the judge from formalism.[12]

### 194. Authentic interpretation of the law

A feature of Soviet law which should be mentioned in relation to legal interpretation is the existence of institutions set up to provide

[12] *Cf.* especially art. 47 of the Fundamental Principles of Civil Procedure (1961): "No court decision can be set aside for a matter of pure form when it is correct in substance." Bellon (J.), *Le Droit soviétique* (1963), p. 106.

an "authentic" legal interpretation and to issue instructions concerning such interpretation to the organs responsible for administering justice. These are, aside from the Praesidium of the Supreme Soviet, the Supreme Court and the Chief Arbitrator of the U.S.S.R.

The present role of the U.S.S.R. Supreme Court, as we shall see, is more to give such instructions to judges than to revise decisions rendered in particular cases. Its mission is generally to watch over the way in which laws are interpreted and justice administered by the various existing courts. If, in the course of this surveillance, it notices any diversity in the interpretation of a particular law, it intervenes by issuing directives for the use of such courts.[13] Judges are obliged to abide by them, and it is up to the *Prokuratura* to intervene should the directives falsify the meaning of any particular legislation or be contrary to the law. It would seem however that this latter problem has never arisen.

What has been said concerning the authentic interpretation of Soviet Codes or laws by the Supreme Court also holds true for the Chief Arbitrator of the U.S.S.R. He examines the decisions of public arbitral bodies just as the Supreme Court examines those of the Soviet courts; and, in the same way, he formulates directives for their guidance.

## Section II—Other Socialist Countries

### 195. Place of legislation

In the European socialist or people's republics, as in the U.S.S.R., legislation is the principal source of law. And, as in that country, state power is concentrated in the legislature which alone can establish national policy and enact law. The Rumanian Constitution of 1965, for example, specifically states that there is no autonomous power to make regulations.

But while the principles may be the same, there are numerous differences to be noted between the various socialist countries and

[13] For example, it intervened in December 1971 to instruct the courts on the interpretation of art. 7 of the Fundamental Principles of Civil Law relating to the honour and dignity of Soviet citizens when it appeared that there was a difference in application by the lower courts—some repressing any criticisms at all, others refusing to levy any sanction when the defendant had acted in good faith.

the U.S.S.R. Yugoslavia created a Court of Constitutional Justice in 1963 and it is empowered to request that the legislature re-examine a statute judged to be contrary to the Constitution. The law lapses if, within six months, the parliament has not amended it. Various statutes, and in particular legislation on social security, have been referred to the court in the course of litigation between citizens. A Constitutional Court was also set up in Czechoslovakia to watch over the division of legislative competence as between the federal authority and the federal units. Rumania in 1965 also instituted a form of review of the constitutionality of legislation, but there it is undertaken by a committee drawn from the legislature itself.

Only Yugoslavia and, since 1968, Czechoslovakia are federal states; the division of legislative competence between the federal authority and the republics is not however the same as in the U.S.S.R.

In countries smaller and less populated than the U.S.S.R., and having a stronger parliamentary tradition, the legislative bodies meet more easily and are less prone than the Supreme Soviet to delegate their functions. The Polish Diet, for example, in which several political parties have representatives, plays an active part. It is altogether rare for its executive branch, the Council of State, to legislate in its place between sessions. Most draft laws prepared by the government are amended when presented to the Diet.

### 196. Codification

Extensive codification has been carried out since the communists came to power, especially in countries such as Poland, Czechoslovakia and Yugoslavia where the unification of laws on a national scale was never accomplished earlier.[14] These codes, compiled in some haste, have in some instances been more recently replaced by others in which the progress towards socialism is more fully reflected. Poland adopted new codes in civil law, family law and procedure in 1964. Since then codes in penal law, criminal procedure, private international law, labour law and maritime law and administrative procedure have been promulgated; work is progressing on the codification of administrative law and

[14] "Codification in the Communist World." Symposium in memory of Zsolt Szirmoi, organised by D. D. Barry, F. J. M. Feldbrugge and D. Lasok, *Law in Eastern Europe* no. 19, (1975).

international commercial relations, in which subjects, however, the number of organisms involved in some aspect of the law-making function has brought about a degree of confusion. Czechoslovakia completely reformed its codes with the adoption in 1963 of codes in family law, civil procedure, international commerce and private international law; its economic and civil codes were adopted in 1964 and its labour code in 1965. The German Democratic Republic adopted a new code on family law in 1965, new codes in civil law and civil procedure in 1975 and legislation on the application of law and on private international law and, in 1976, a statute on international economic contracts. In Albania, Bulgaria and Yugoslavia, major statutes have replaced the former law in a number of areas. Hungary in 1959 promulgated a civil code which it had not been able to achieve earlier.

### 197. Interpretation of legislation

Legislation is interpreted in the people's democracies much as it is in the Soviet Union. Jurists have submitted to the strict principle of interpretation imposed by Marxism-Leninism. "In socialist law," writes Professor Szabo, "the purpose of legislation is not to camouflage the will of the ruling class. It follows that the idea and the role of legislative interpretation are necessarily limited, since the will of the legislators does not allow, either at the time of promulgation or later on, that the substance of the legal rules be changed under the pretext of interpretation, or that there be introduced into the law by means of a so-called intepretation according to its spirit any element foreign to it . . . In bourgeois laws, the judge has become the pivot of the legal system. Socialist evolution has not made this error. Any remedial 'interpretation' is contrary to the principles of Marxism-Leninism."[15] These principles, however, are only valid with respect to the legislation or other legislative enactments adopted since the coming to power of the Marxist governments. The interpretation of such of the old laws as may have remained in force must be made according to other criteria. The rule used in Yugoslavia puts it very clearly: the application of

[15] Szabo (I.), *A jogszabályok értelmezése* (1960), cited from the French summary of the work, analysed by R. Lievens, *Revue de droit international et de droit comparé*, 1961, pp. 172–183.

such laws may be excluded if they appear to be contrary to the dominant principles of the new legal order.

With the gradual disappearance of these former laws and their replacement by legislation of Marxist inspiration, the advisability of preserving general legislative prescriptions has been discussed by jurists of the people's republics. And, just as in the U.S.S.R., it has finally been decided to adopt provisions which introduce a certain flexibility in legal interpretation and re-enforce the necessary link between law and society. The Czech Constitution of 1960, in article 102, allows judges to interpret legislation according to socialist legal conscience; a preamble of eight articles at the beginning of the civil code of 1964 gives more detail on this point. Article 5 of the Polish civil code states that acts contrary to "the rules of social life" or to the social and economic purpose of individual rights are not considered to be within the exercise of the right and are thus refused any legal protection. This provision has been applied with particular reference to acts leading to a deterioration of the environment.

**198. Publicity of the law**

The different and stronger legal tradition of the people's republics is indicated by the better publicity given to all kinds of regulatory texts. The typically Russian practice of somewhat confidential collections, designed only for the use of a ministry and not circulated to the public, is not followed. Because of this it is often somewhat easier to study the socialist law of these countries than that of the U.S.S.R., although for texts to be known it does not suffice, of course, that they may be published. And the jurists of the people's republics, like their colleagues in other countries, complain of the excessive proliferation and detail of such materials.

# CHAPTER II

# DECIDED CASES

## SECTION I—THE SOVIET UNION

### 199. The Soviet concept

The U.S.S.R. sees the role of judicial decisions quite differently from the capitalist democracies. If one asks a Soviet jurist what place they do have in the U.S.S.R., he will reply, in all good faith, that is an important one. If, on the other hand, the question is whether judicial decisions are a source of law, he will not hesitate to reply emphatically in the negative. What, then, is the real status of judicial decisions in the U.S.S.R.? An understanding of this point requires some familiarity with the Soviet judicial organisation as well as with certain other institutions created for the resolution of disputes by extra-judicial, but contentious, procedures.

### § 1. Judicial Organisation[1]

### 200. The hierarchy of courts

The principles governing Soviet judicial organisation are determined by Chapter XX of the U.S.S.R. Constitution. There are also Fundamental Principles of December 1958 respecting judicial organisation which replaced a federal law of 1938. These were supplemented and put into operation in the R.S.F.S.R. by a law of October 27, 1960.

Leaving aside special courts for the moment, it will noted that the Soviet judicial hierarchy has four levels: from the people's

[1] Kucherov (S.). *The Organs of Soviet Administration of Justice: Their History and Operation* (1970).

courts at the bottom to the U.S.S.R. Supreme Court at the top, through the provincial and S.S.R supreme courts. Depending on their nature and importance, civil or criminal actions may be instituted at any one of these levels. The general rule is in favour of the competence at first instance of the district people's court. If the case involves over 100 roubles in value, the court of first instance is the provincial court or even a higher court: the accusation lodged against a minister, for example, would be heard at first instance by the supreme court of an S.S.R. or the U.S.S.R., and the same holds true of certain trials of a political nature or involving high treason. Remedies, to the extent allowed, never omit a level; if there is an appeal, the judgments of the people's court are referred to the provincial court, those of a provincial court to the S.S.R. Supreme Court, and those of the latter to the U.S.S.R. Supreme Court. It should be mentioned, however, that since a decree of 1954 remedies against judgments may even be available within a given court; the decisions handed down by the various chambers, civil or criminal, of a provincial court or an S.S.R. Supreme Court can, under certain conditions, be annulled or revised by the Praesidium or *plenum* of that court.[2]

None of this will trouble a jurist familiar with the judicial organisation of a Romano-Germanic country. However, very great differences will be noted with respect to the manner in which Soviet courts are constituted and the way in which the range of remedies against judgments is organised.

### 201. Judicial personnel

The staffing of Soviet law courts is altogether different from that of bourgeois courts. In all courts of first instance, there are two classes of personnel: people's assessors and one or more judges. At higher levels there are only judges. A brief consideration of the judges and the role played by the people's assessors is called for here.

[2] The Praesidium is made up of the court president, vice-presidents and a number of judges fixed by the executive committee of the Soviet of the province or republic. The praesidium may also be directly competent in the case of appeal instituted against decisions of a lower court. The Praesidium in an S.S.R. Supreme Court is also called upon to decide cases referred to it by the U.S.S.R. Supreme Court (Law on judicial organisation of the R.S.F.S.R., arts. 36–38 and 52).

**202. System for the election of judges**

The characteristics of the Soviet judge are, first, that he is elected and, second, that he has not necessarily had any legal training.

Without exception, all Soviet judges are elected, by direct and universal suffrage in the case of judges of the people's courts and by the Soviets (of the U.S.S.R., S.S.R. or the provinces) in the case of other judges. All are elected for a period of five years, unless the electoral body exercises its right to revoke its choice. This right of revocation is only employed in exceptional cases, but it has been used even in the case of judges of the U.S.S.R. Supreme Court and, in the 1970 elections, 17 per cent. of retiring judges did not stand for re-election. The electoral system, provided for in the Communist Party programme as early as 1903, was adopted in the U.S.S.R. because of its democratic nature; this seems natural in a country where so much emphasis is placed on the dogma of popular sovereignty and where the law is defined as an instrument of policy. According to the democratic ideal both the creation of rules of law and their application must revert to the people's elected representatives. It hardly need be said that the election of judges, like other elections, is dominated by the all-powerful Communist Party. The voting by citizens or their representatives in the different Soviets is scarcely more than a ratification of the chosen candidates of the Party; there is thus eliminated much of the inconvenience which results from the election of judges in other countries. The candidates standing for election are most often members of the Communist Party. In May 1977, in an election in the R.S.F.S.R., 95 per cent. of the judges elected were Party members and women made up 35 per cent.

The Soviet judge has no need to be a jurist: no qualifying conditions of special aptitude, training or apprenticeship must limit the electors' freedom of choice. Apart from this, a matter of principle, an historical reason for the rule is found in the "trial and error" period of revolutionary communism. It was thought at that time that the law would be immediately replaced by a socialist sense of justice; moreover it was impossible to find politically safe judges among jurists immediately after the revolution. Today, the increasingly strong affirmation of the principle of socialist legality has led to a change of attitude. The Communist Party puts forward

more and more only those candidates whose university degrees or practical experience substantiate their legal capacities. It would seem, however, that much remains to be done in this respect concerning the judges of the people's courts. The remuneration paid judges is no greater than that of other workers; judges of the people's courts receive much the same salary as that of an ordinarily qualified workman.

### 203. The collegial principle

The prevailing principle in the U.S.S.R. is that of the collegiality of judges. Several judges hear each case in the higher courts and even at first instance, except in the people's courts.[3] When a case is heard in first instance, however, the judge is never alone except in those minor cases specified by law; whether there be one or several judges, the court is in effect completed by the presence of assessors in accordance with the U.S.S.R. Constitution.

### 204. The people's assessors

Like jurors, people's assessors are citizens who, for civil as well as criminal cases, complete the court for the purpose of hearing and judgment. The lists from which the assessors are selected are established by an elective process: either by universal suffrage in the general assemblies of workers, employees and peasants (lists for the people's courts), or by the Soviets of different levels (other lists). Election is for two and a half years (art. 152 of the Constitution). Two assessors join the judge in the people's court, and a varying number in the other courts, so that the assessors will always form the majority. During the time they fill this post, the assessors are relieved of the employment which they normally hold; they cannot be asked to take on this legal duty for more than two weeks each year. When they are called to hear a case they are, for purposes of hearing and judgment, placed on an equal footing with the judge; their voice has the same weight as that of the judge, whether in matters of fact or law. In reality, however, the judge—at least when he has had legal training—appears to have a

[3] A re-organisation of people's courts took place between 1959 and 1967 in which the number of courts in the R.S.F.S.R. was reduced from 4,500 to 2,375 and the new courts given as many or more than 15 judges. However, today, as formerly, a judge sitting alone hears the case.

great ascendancy over the people's assessors, and it is exceptional for him to be outvoted by them, although this has occurred.[4]

What is the purpose of people's assessors? At first glance it is rather difficult to see its usefulness. The juries or aldermen found in bourgois countries, and with which one is inevitably tempted to compare the Soviet people's assessors, play a useful role by making their technical knowledge available to the court, as in the case of aldermen, or else as in the case of jurors by bringing the voice of popular sentiment to the court and helping to correct the professional bias of the judge who is a professional jurist. These considerations do not apply in the Soviet Union where both the judge and the people's assessors are elected without reference to any particular qualifications in either case.

To understand this institution one must, once again, refer to Marxist ideology. The basis of the institution is connected to the Marxist idea of the withering away of the law in a communist society; its ideal is a society without law or courts, in which individual behaviour will be controlled only by the opinion of the community. The people's assessors' participation in trials presages and anticipates tomorrow's non-juridical forms. In the meantime it serves to educate the community by reinforcing the link between the court and the Soviet people; it calls upon a very large number of citizens[5] in the work of the law and these people will later return to their homes, factories or *kolkhozi* having seen the inside workings of a Soviet court and been convinced of the eminently just nature of Soviet law. The institution is therefore linked to the desire to educate and transform Soviet man—one of the principal tasks of Soviet law.

### 205. Special courts

A word should be said about the "special courts" of the U.S.S.R. A reform of 1957 did away with all these courts, except the military tribunals. The latter are specialised courts subject to the rules of the criminal codes and codes of criminal procedure of the different S.S.R. Since 1956 their jurisdiction has been limited to penal infractions committed by enlisted men and certain crimes (espionage, treason) affecting state security. Like other courts,

[4] Feifer (G.), *Justice in Moscow* (1965).

[5] More than 600,000 people were on the lists of elected people's assessors in 1970.

however, they are subject to the control of the U.S.S.R. Supreme Court which has a military chamber in addition to civil and criminal chambers.

Apart from the public arbitration bodies, which have a very special role and are to be discussed later, it should be noted that there are no "administrative" courts in the U.S.S.R. Where contentious administrative procedures are allowed, they are judged by the ordinary courts. One can therefore go before a people's court for example if a local Soviet has not respected the law in establishing electoral lists. One can also go before the regular courts to bring into play the civil liability of the government. But in the U.S.S.R. there is no contentious procedure open to individuals that can result in the annulation of some administrative action.

### 206. Remedies against judgments

The organisation of the system of remedies against judgments in the Soviet Union must now be examined. Once again differences with respect to bourgeois laws will be noted because of both the manner in which the Soviet court is constituted and the tasks incumbent upon Soviet law and the emphasis placed on the principle of socialist legality.

The way in which the Soviet court is constituted excludes any possibility of an appeal by way of a rehearing. That a higher court could reverse the decision of judges in a court of first instance on questions of fact is easily seen to be anti-democratic, since the judge is elected and the case has been heard with the aid of people's assessors. Only remedies against judgments based on an error of law committed by the judges are allowed. Thus the desire and the need to guarantee respect for the principle of socialist legality as fully as possible in a socialist country easily leads to the revision of judgments and sentences when it appears that an error of law may have occurred.

Soviet law admits two types of remedies: the appeal for an error of law (*Kassatsia*) and the petition for revision (*nadzor*). The parties and certain established authorities such as the *Prokuratura* have the right to lodge an appeal and they may, in the brief delay allowed by law, institute it against any decision rendered in first instance—but against these decisions only. The appeal is heard by the next highest court which can confirm the decision, set it aside

and return the case to the court of first instance or, which is most often the practice, pronounce upon the merits without, generally, referring the case back.

The petition in revision (*nadzor*), probably corresponding to an ancient Russian tradition,[6] is however an interesting feature of Soviet law. It is not a remedy available to the parties but only to the various authorities empowered to supervise the administration of justice in the Soviet Union. The *Prokuratura* and the presidents of the regional or Supreme Courts exercise a control over the decisions rendered within their respective jurisdictions either on their own initiative or in response to petitions received. If considered appropriate, they refer these decisions to a higher court for revision. The parties themselves cannot directly institute a request for revision; they, like all persons and particularly social organisations, can only request the competent authorities to act by way of petition. Contrary to the French practice in cases of an appeal in the interest of the law (*pourvoi dans l'intérêt de la loi*), the success of the petition in revision may benefit the parties; it does not merely serve to affirm some principle of law.

In the absence of statistics it is difficult to know the extent and significance of this type of remedy in practice. From reading Soviet legal works and collections of judicial decisions, one has the impression that it is far from exceptional and that numerous judgments and sentences are submitted to the criticism of higher courts in this way. In private law matters the grounds for lodging a petition in revision are those relating to some serious defect or irregularity in the procedures followed or judgment rendered. In criminal matters the grounds are broader and the remedy is open to correct a procedure or decision that is simply unfounded in law. The remedy is not subject to any special delays and it has the effect of suspending the execution of the judgment that it seeks to set aside.

### 207. Multiplicity of judicial levels

With a view to assuring a strict application of Soviet laws, the possibility of an appeal or a revision has been quite freely admitted. The western jurist is surprised by the number of levels through which, in theory at least, a trial may pass before final judg-

[6] Rudzinski (A. W.), "Soviet-type Audit Proceedings and their Western Counterparts" *Legal Controls in the Soviet Union, Law in Eastern Europe* (1966), Vol. 13, p. 287–399.

ment. The levels are not limited to the four mentioned in the Constitution. Within each of these possible instances, two kinds of examination can take place: first, by requesting a new hearing of the matter by the Praesidium of the regional court that decided the case and secondly, by submitting the decision rendered by a particular chamber of the Supreme Court of an S.S.R. to its full court.

### 208. The role of the U.S.S.R. Supreme Court

On the other hand a limit was placed in 1957 on the multiplication of remedies by reducing the role of the U.S.S.R. Supreme Court. The origin of this reform seems to have been the decentralising tendency evident at this period rather than any idea of stemming an excessive number of remedies. It was considered desirable for the Supreme Court of the S.S.R. to render final judgment in a large number of cases, without any appeal to the U.S.S.R. Supreme Court. The significance of this reform becomes clear when one realises the extent to which the personnel of the U.S.S.R. Supreme Court was reduced as a result of the new provisions. Before the reform of 1972 it had a president and 78 members. It now has only a president, two vice-presidents and 16 judges, to which number are added the presidents of the S.S.R. Supreme Courts (in the case of appeals instituted against a decisiosn of the Supreme Court of their own S.S.R.). The number of assessors was also reduced from 70 to 45. The reform has reduced the work of the Court by 70 per cent. The U.S.S.R. Supreme Court has other functions too, which were very important during the period (1963–1971) when there was no U.S.S.R. Ministry of Justice. Since then, however, they have been cut down. The Court retains nonetheless its right respecting the initiation of legislation and publishes its directives which deal with the application of laws and decrees and the administration of justice in general.

## § 2. Extra-Judicial Contentious Procedures

### 209. Importance of extra-judicial contentious procedures

In any country, a great many disputes are settled by extra-judicial methods. In western countries, for example, many disputes are resolved within a jurisdictional framework by various administrative courts which do not figure in the judicial organis-

ation itself. A great many contestations especially in commercial matters can also be resolved by means of arbitration which, while taking place under the control of regular courts, is not in fact carried out by them. It is the same in the Soviet Union: the courts contemplated by both the Fundamental Principles of Judicial Organisation and the laws governing that subject in the various S.S.R., are far from being the only means of settling differences.

Extra-judicial contentious procedures in the Soviet Union have an even greater importance than they do in non-socialist countries. This is so principally for two reasons. The first is related to the economic structure of the U.S.S.R. It is natural that disputes between state enterprises be submitted to bodies other than the regular courts and that disputes arising out of international commerce be removed from the purview of these same courts. The second reason is related to Marxist teaching and its prognostication of the withering away of law. Like law itself, the settling of disputes by courts is only a last resort. As far as possible, ways are now sought to avoid this by resorting to non-judicial techniques. This notion is important in the solution of certain types of dispute, especially labour problems which are generally heard before "people's organisations" that are distinct from the ordinary courts.

## *A.—Arbitration*

### 210. Various forms of arbitration

There are two very different forms of arbitration in the U.S.S.R. The first is public arbitration which, according to law, is used to decide disputes between nationalised enterprises or, as the case may be, between different ministries. The second is contractual arbitration which, while it is in principle excluded as a technique for disputes between Soviet citizens, plays an essential part in those arising out of international commerce.

### 211. Public arbitration[7]

To the mind of a western jurist, Soviet public arbitration bodies suggest a hierarchy of administrative tribunals existing alongside

[7] Abova (T. E.) and Tadevosjan (V. S.), Razrešenie hozjaistvennyh sporov (1968). Knapp (V.), "State Arbitration in Socialist Countries" *International Encyclopedia of Comparative Law* (1973), Vol. 16 Chap. 13. Lavigne (P.), "La spécificité organique et fonctionnelle de l'arbitrage d'Etat" (1969) Ann. de l'U.R.S.S. 175–196.

those of the judicial order. This comparison is useful because it helps to explain the existence of organisations whose function it is to resolve contentious questions, but which are not considered to be courts in the full sense since the word "court" suggests a "judicial" body. Comparison with French or other western administrative tribunals is otherwise misleading, however because the *raison d'être* and duties of Soviet public arbitration bodies are different. French administrative tribunals for example are mainly called upon to elaborate and apply a special law—*le droit administratif*—concerning principally relations between the government and citizens. The exclusive task of Soviet public arbitration bodies is, on the other hand, to apply rules which are considered part of the *civil* or ordinary law. Most important of all, their competence relates exclusively to disputes between the various public or state-owned enterprises through which the Soviet economy is for the most part directed. In no event does it cover disputes between government and citizens. This type of dispute is anticipated by the 1977 Constitution (art. 58, para. 2) and the regular courts have jurisdiction. Doctrinal writers see this as one of the fundamental guarantees of the principle of socialist legality.

The existence of administrative tribunals in France is linked to the distinction between public and private law. In the Soviet Union, on the other hand, public arbitration bodies owe their existence to quite a different consideration—the fact that the various publicly-owned industrial or commercial enterprises which help to implement the national economic plans are merely organs or extensions of the state. Conflicts arising between them on the interpretation or the non-performance of mutual obligations are not antagonistic and do not put into conflict two entirely distinct persons requiring an appeal to constitutionally established courts. They amount to conflicts between two or more branches of the same enterprise; it is only normal that they be resolved, without recourse to courts of law, by the arbitration of a common superior.

### 212. Practical necessity of this institution

In view of the way in which the regular Soviet courts are constituted, it is even more understandable that these types of dispute be removed from their jurisdiction. Elected judges with general qualifications may judge fairly and apply the law effectively in mat-

ters relating to the everyday life of the citizens. In such circumstances, it may be beneficial both to contemplate and guide the popular idea of justice. But the disputes between state economic enterprises are altogether different. They bring into play rules of technical organisation rather than considerations of morality and justice, and the political aspect of such disputes is thus less pronounced. In these matters the judge must often have the qualifications of a technician rather than those of a jurist. Alongside the ordinary courts the public arbitration bodies thus provide for a justice applied by technicians. Their particular merit is speed; in 75 per cent. of cases a solution is handed down within fifteen days after the arbitral body is seized of the affair.[8]

### 213. Different types of public arbitration

Soviet arbitral bodies were created and have functioned for some time without having been mentioned in the Constitution which laid down rules only in respect of the courts. They are now expressly governed by the Constitution of 1977 (at Chap. XX entitled "Courts and Arbitration"). Article 163 puts the principle that "the resolution of economic disputes between enterprises, institutions and organisations is carried out by state arbitral bodies within the limits of their respective jurisdictions.

Soviet doctrine divides public arbitration into two large types: departmental arbitration[9] for the resolution of disputes between enterprises responsible to the same authority and state arbitration *stricto sensu* for the resolution of differences arising between enterprises reporting to different authorities.

### 214. State arbitration

State arbitration, which originated in a decree of 1918, was organised in 1931 and reformed in 1960. An ordinance of 1974 brought about further considerable changes in the system and the matter is now governed by legislation of November 30, 1979.

State arbitration is organised as a unitary and centralised system with a number of commissions: arbitration commission of the

[8] Bellon (J.), *Le droit soviétique* (1963), p. 109.

[9] The literal translation from the Russian (*vedomstvennij arbitraž*) would be "administrative arbitration." In Russian state arbitration is *Gosarbitraž* (*(gosudarstvennij arbitraž*).

U.S.S.R., of the S.S.R., of autonomous republics of the territory of a province, of cities, and of autonomous provinces and regions. The sharing of jurisdiction between the different arbitration commissions depends upon the nature of the parties and the importance of the litigation.

**215. Departmental arbitration**

Not very much is known about this form of arbitration and its organisation is more complex. It varies according to the different ministries and institutions concerned, and can only be studied by those having access to the internal documentation of such bodies. A decree of July 10, 1967 does no more than lay down a number of uniform rules in respect of the U.S.S.R. ministries; similar provisions have been drawn up for the S.S.R. ministries.

**216. Arbitration commissions**

The various public arbitration commissions are directed by a chief arbitrator, assisted by a number of deputies. When a case is referred to a commission, an arbitrator is designated. He hears the case, assisted by experts if need be, with the representatives of the parties (such as the director of the enterprise or some other authorised officer).

The procedure laid down for the hearing of economic disputes by state arbitration is distinct from that found in the codes of civil procedure of the various S.S.R. The commission can only proceed after an effort has been made by the parties to come to a solution. Once it is seized of the dispute, moreover, the arbitrator and the parties must as a preliminary procedure attempt to come to a settlement by means of a common search for the legally correct solution. Many disputes end at this stage because the parties are able to find a solution acceptable to the arbitrator. If they are unsuccessful, they then enter upon a quasi-judicial phase of the procedure although it rarely happens that lawyers will then be called in.

The decision of the state arbitration commission may, at the request of the parties, be sent for a re-hearing to other branches of the commission or other state bodies. This re-hearing must be requested within a year of the decision. The decision is verified by the state arbitration commission at the next highest level or by the

chief arbitrator or his deputy. Proceeding against the decision in this way may have the effect of suspending all further action in the case if the arbitrator so decides. The procedures are not private and many of the decisions rendered in public arbitration are published in specialised reviews.

### 217. Consultations and directives

Public arbitration commissions are not limited to resolving disputes referred to them by state enterprises or branches of the administration. They have other activities, such as being charged with a number of administrative and regulatory functions, which make them resemble administrative organisms as much if not more than judicial bodies.

They may, for example, in their own right, take up questions touching upon the proper operation of state enterprises, require the latter to supply information on the steps taken to correct deficiencies, submit reports to the appropriate authorities and suggest disciplinary action. They may also occasionally set the terms and conditions of a contract which parties must conclude or in respect of which the parties have agreed upon an arbitration. It also sometimes happens that they will give advice by way of consultations to enterprises, which may ask, for example, whether they are within their rights in inserting a particular clause in a contract or what their rights and obligations are in some specified circumstances.

The U.S.S.R. State Arbitration Commission publishes directives and issues instructions on matters within its competence to all state arbitration bodies. It also participated in the drafting of the General Conditions governing the delivery of products and supplies among Soviet state enterprises. A collection of instructions on state arbitration in connection with the U.S.S.R. Council of Ministers has been published, although irregularly, since 1955; it also reports the decisions of arbitration bodies. This collection is a source of documentation of primary importance in the legal problems of the Soviet economy.

### 218. The extent of public arbitration

The activity of the arbitration commissions is considerable. An ordinance of the Praesidium of the U.S.S.R. Supreme Soviet, pro-

mulgated on July 26, 1959, decreed that as of January 1, 1960 all disputes between state organisations would be submitted without exception to arbitral bodies. As previously recommended by various Soviet authors, the role of the courts in such disputes has been completely eliminated. According to one author, close to 700,000 cases are now submitted to state arbitration each year.[10]

### 219. Private arbitration

Public arbitration is compulsory. The disputing parties are obliged to submit to it by virtue of law even though, in practice, efforts are made to have an arbitration agreement signed. Arbitration resulting from an agreement freely concluded by the parties is quite different. By common accord they decide to submit their differences to arbitration.

This type of arbitration, insofar as disputes between Soviet citizens are concerned, is only of minor importance at the present time.[11] It is not to be ruled out, however, that as a means of resolving disputes it might be more developed in the future communist society, since it encourages conciliation and harmony. The law of August 17, 1960 on state arbitration has provided for the possibility that public enterprises submit their disputes to a mutually agreeable arbitrator. The role of the judge, moreover, is often seen as that of a conciliator; many suits instituted by private persons are resolved, prior to any public hearing, in chambers and upon the advice of the judge.

### 220. International commercial arbitration

If, at the present time, contractual arbitration is not much used in relations between Soviet citizens, it occupies on the other hand in international commercial relations, an understandably important place. Foreign businessmen and merchants dealing with the Soviet Union have no desire to go before the Soviet courts described above. Soviet jurists are the first to admit that because of their composition, operating rules and system of remedies, these

[10] *Cf.* Loeber (D. A.), *Der hoheitlich gestaltete Vertrag* (1969), p. 68.

[11] Loeber (D. A.), "Plan and Contract Performance in Soviet Law" (1964) U. of Illinois Law Forum 128–179.

courts are not suited to foreigners contracting with the Soviet Union. On the other hand, they are obviously disinclined to submit possible future disputes with foreigners to the jurisdiction of foreign state courts. For this reason the U.S.S.R. now favours arbitration in international commercial matters and it has actively participated in the efforts of the United Nations and its European Economic Commission by signing and ratifying both the New York Convention of May 1958 and the European Arbitration Convention of April 1961. It has further shown its inclination to settle international commercial disputes by arbitration by concluding numerous bilateral treaties. Of course, like other countries, it hopes that this arbitration will be carried out as much as possible on its own territory and through the offices of a Soviet institution.

The institution in question is the Arbitration Court of the U.S.S.R. Chamber of Foreign Commerce,[12] regulated by a decree of 1932. Soviet bodies authorised to conclude foreign commercial contracts endeavour to include clauses giving this court jurisdiction in the event of a dispute since it can only be seized on the basis of an agreement between the parties.[13] The Court of Arbitration fixes its own procedure; it decides according to the terms of the agreement of the parties and, subsidiarily, according to commercial custom and the national law recognised as applicable. In the U.S.S.R. its awards cannot be appealed. It may be surprising to find such significance attached to the principle of the freedom of contract but it must not be forgotten that in this case one of the contracting parties is the state itself. In view of the Soviet monopoly of foreign trade, the U.S.S.R. has no more reason to take exception to the principle of the freedom of contract than the capitalist monopolies; it is powerful enough to turn it to its own advantage.

[12] Ramzaitsev (D. F.), "La jurisprudence en matière de droit international privé de la Commission arbitrale soviétique pour le commerce extérieur," Rev. crit. dr. int. privé, 1958, pp. 459–478;—*Aspects juridiques du commerce avec les pays d'économie planifiée* (1961), a collection of articles published by the International Association of Legal Science. Pisar (S.), *Coexistence and Commerce: Guidelines for Transactions between East and West* (1970). Giffen (J. H.), *The Legal and Practical Aspects of Trade with the Soviet Union* (1969).

[13] No express stipulation is however necessary in connection with the commercial dealings between the U.S.S.R. and other European socialist countries (except Yugoslavia) or Outer Mongolia. Commercial relations with these countries are regulated by an international agreement concluded in 1972 at Moscow which refers to different *General Conditions* drawn up by the "Council of Mutual Economic Assistance" and specifies the details of the arbitral procedures applicable. Caillot (J.), *Le C.A.E.M. Aspects juridiques et formes de co-opération économique entre les pays socialistes* (1971).

### *B.—Appeals to People's Organisations*

**221. Reason for these procedures**

In the courts and public arbitration commissions, justice is rendered according to law and in the name of the Soviet state. However the law and the state must disappear in the superior form of social organisation that communism represents. Disputes will not disappear in communist society, but such conflicts will no longer be "antagonistic," requiring the use of law and force for their resolution; a process of persuasion, undertaken by members of the community to which the parties belong, will resolve them. Even now it is possible in the socialist society already established to experiment—but with care and to a limited extent—with those forms of social organisation to be developed in this new society.

Thus many matters of concern to only the interior life of the *kolkhoz* will not fall within the jurisdiction of the courts. They are finally decided by the general meetings of the *kolkhoz* itself. As a general rule the courts must refuse to intervene if the criticised decision concerns the allocation or boundary lines of individual plots of land; in such cases the executive committee of the local soviet is the organ exercising control over the legality of the decision. On the other hand, the courts can be seized by the *kolkhozian* who maintains that he has not received his due in respect of his work.[14]

In labour relations, the role of the trade unions has been developed in the same way. These people's organisations, called upon to play a role of the very greatest importance in communist society, can henceforth be given many of the tasks of the state organisations destined to disappear.[15] Particularly with respect to labour problems, they have quite naturally been entrusted with the task of bringing about conciliation and compromise; a decree of January 31, 1957 initiated this development. Labour relations commissions, made up of an equal number of representatives from

[14] *Cf.* the article by Ju. Naumov, in Hazard (J. N.) and Shapiro (I.), *The Soviet Legal System* (1962), Pt. 2, pp. 26–28.

[15] Gélard (P.), *Les organisations de masse en U.R.S.S.: syndicats et Komsomol*, 1966. On the varying importance, according to the period, given to the unions in relation to collective labour agreements, *cf.* Greyfié de Bellecombe (L.), *Les conventions collectives de travail en Union soviétique* (1958). Lowit (T.), *Le syndicalisme de type soviétique. L'U.R.S.S. et le pays de l'Est européen* (1971).

the management and the local union committee, operate in all industries; if the solutions proposed by the commissions are not agreed to by the parties, a new effort is made by the local union committee; only if this second attempt fails can the people's court be seized. To what extent in fact are there judicial proceedings after the exhaustion of these conciliation procedures? Statistics would be necessary on this point; it may be that the pressure of public opinion, represented by the two successive conciliation organs, reduces very considerably the amount of such litigation. Certain important questions, however, can be submitted by the interested parties directly to the people's courts; and this is true especially with respect to the dismissal of workers.[16]

This type of extra-judicial settlement of disputes does not surprise a western observer. In the capitalist countries there are similar conciliation procedures; the difference lies in the conditions under which such procedures are called upon to play a role and to be effective in a country such as the U.S.S.R. Certain recent developments since 1957, however, have no parallel in countries of the West and should be mentioned: in particular, the Comrades' Court and the Community Meetings.

### 222. Comrades' courts and community meetings[17]

The Comrades' Courts are intended to sanction certain forms of anti-social behaviour of minor importance which do not merit the attention of regular courts. The Community Meetings, instituted in 1961, are designed to reprove certain anti-social acts. They deal with those who evade their social obligation to work or lead a parasitic way of life, and may pronounce penalties of banishment within the S.S.R. for a period of two to five years and impose the obligation to work and the confiscation of profits unduly received.

Community Meetings were not considered to be true courts by Soviet jurists; if they had been, their activity and even their exis-

[16] Bellon (J.), *Le droit soviétique* (1963), p. 72. For an example of a non-judicial proceeding in disputes relating to copyright and trade mark, *cf.* the same work, pp. 74–79. The Councils of the bar associations may also adjudicate respecting the discipline of their members: Tchikvadze (V. M.), *Le concept de la légalité dans les pays socialistes* (1961), p. 101.

[17] The Comrades' Courts are regulated in the R.S.F.S.R. by a law of July 3, 1961, modified on October 23, 1963. An English translation of these documents is given in Hazard (J. N.), Butler (W. E.) and Maggs (P. B.), *The Soviet Legal System* (1977), pp. 22–30. On the Comrades' courts and community meetings *cf.* also Hazard (J. N.), *Communists and Their Law* (1969), pp. 117–126.

tence would have been rather difficult to justify in the face of article 4 of the Fundamental Principles of Criminal Procedure of 1958 to the effect that a penalty cannot be inflicted save by judgment of a court according to the criminal law. Soviet authors, however, considered the institution as an experiment of limited significance, *on the fringe of the law*, carried on as a preparation for the advent of communist society through the participation of the masses in the maintenance of social discipline and in observation of the rules of community life. The arguments mentioned above, however, carried the day, and the institution was abolished in 1965. Today only the Comrades' Courts remain, but their modest role and powers do not excite the same criticisms. Now the role of these bodies is to exert a social influence and through education and persuasion to prevent behaviour harmful to society.

They are made up of members elected for two years by the collective of the workers' general meetings and may hear cases of petty theft, public drunkenness and tenants' disputes. They are empowered to levy fines in small amounts, issue reprimands and make findings of public censure. They may also recommend to the management of an enterprise that a guilty person be temporarily downgraded or transferred.

## § 3. Role of Judicial Decisions[18]

### 223. Soviet concept

When the concept of law and the organisation of the courts and other institutions for settling disputes in the U.S.S.R. are understood, the role allotted to judicial decisions becomes clear. In a country where the law is closely linked to ruling state policies and where there is professed concern that there be an effective sovereignty of the people through its representative legislative body, it is obvious that decided cases must be confined as much a possible to a role of strict *interpretation* of enacted law rather than the *creation* of legal rules. This fundamental position is reinforced by the absence of a body of judges or judicial class which might be tempted to make itself a fully independent—if not a rival—power to that of the legislators. In Russia where the judges until 1864

[18] Bratus (S. N.), ed., *Sudebnaja Praktika v sovetskoj pravovoj sisteme* (1973).

were considered to be simply civil servants and where, in the period 1864–1917, there was insufficient time for a judicial corps to develop a sense of autonomy, such a class has never existed.

"Judges," says the Soviet Constitution "are independent and subject only to the law." The independence referred to in this article is with respect to the local soviets, the various branches of government administration and the *Prokuratura:* judges are not subject to the orders of the administration or local soviets,[19] and they are in no sense obliged to conform to the conclusions of the *Prokuratura* in any particular case submitted to them. But the judges are subject to enacted law and they are not allowed to be indifferent to the policies of the government: "The court is an instrument of the governing class; it assures the domination of this class and protects its interests." This notion, as expressed by Vyshinsky (1883–1954) in 1937 is still true today. In a country proclaiming the principle of the concentration of state power in the Supreme Soviet, the independence of judges has nothing whatever to do with an attempt to strike a balance between the judicial and the legislative powers. Judges, while applying the law, must be sensitive to the directives given by the Communist Party and the government.[20]

### 224. Supremacy of enacted law

There is no review of the constitutionality of legislation in the U.S.S.R. Such control cannot be confided to the courts, nor can it be carried out by the *Prokuratura* whose only function is to exercise "the highest supervision over the strict execution of the laws," not their constitutionality. The only provision touching on the constitutionality of laws is article 74 of the Constitution by virtue of which, in case of contradiction, a law of an S.S.R. gives way to a federal (all-union) law.

Soviet tribunals might, without violation of any principles, be

[19] In order to avoid any interference by the government in the machinery of justice, the U.S.S.R. federal Ministry of Justice was abolished in 1956 as were, sometime later, the Ministries of Justice of the S.S.R.; their right to inspect the courts and tribunals was attributed to the Supreme Courts. This reform was itself abolished, however, in 1970. In China, on the other hand, it is still considered desirable that local soviets exercise a surveillance over the judges. *Cf.* Hazard (J. N.), "Socialisme et humanisme" in *Annales africaines* (1965) pp. 71–94.

[20] Feifer (G.), *Justice in Moscow* (1964), p. 275 shows how at times a policy of leniency and at others a policy of severity has been applied in the field of criminal law as a result of campaigns led by the Communist Party of the S.S.S.R.

authorised to judge the simple legality of all acts of different branches of the state administration, such as the Council of Ministers, individual ministries or other parts of the administration. As a matter of fact however they do not exercise this power. Only very exceptionally are Soviet citizens permitted to complain before the courts of some government act which they esteem illegal and prejudicial. Reliance is placed rather upon the *Prokuratura* to assure respect for socialist legality on the part of the administration or the local soviets.

The courts, therefore, apart from any review of constitutionality or legality, simply apply the laws, ordinances, decrees, regulations, orders and instructions made in execution of the legislation in force. Their sole function is to interpret in order to apply Soviet law which they neither create nor develop by means of adapting it to particular circumstances. Soviet law itself does confer, when it is deemed appropriate, a certain latitude upon the judges in specific instances. But apart from such cases the judges cannot, either out of equity or for any other reason, stray from the terms of enacted legislation. The legislators, not the courts, create the law. "The court," declared Lenin, "is an organ of state power. The liberals sometimes forget this. For a Marxist it is a sin to do so." In our free democracies we are prone to admire the creative work carried on through judicial decisions and the judicial preoccupation for social justice and equity. The Soviet regime intends that judges be kept in their place—which is that they apply and not create the law. *Aequitas legislatori, ius iudici magis convenit.*

What has just been said will surely convey the impression that the role of judicial decisions is considerably less than it is in many bourgeois countries. This impression is confirmed when the place occupied by judicial decisions in Soviet legal literature is considered. For a long time the only collection of reported cases was the "Practice of the Courts"[21]; but this collection has not appeared since 1957 when it was replaced by a Bulletin of the Supreme Court of the U.S.S.R.[22] Since that time the Supreme Courts of the S.S.R. have also published collections of their judicial holdings but there is still no systematic organisation of the publication. Legal writings make very few references to judgments. These publi-

[21] *Sudebnaja Praktika.*
[22] *Bjulleten' Verhovnogo Suda S.S.S.R.*

cations were in effect established for the use of other courts to which they are sent, and not for general distribution outside the judicial system.

### 225. Real importance of decided cases

The conclusion naturally drawn from all these observations must not, however, be made without some reservations. In reality, decided cases play a very important role, quite apart from the essential matter of simply restoring peace and order by resolving disputes. But to understand their creative and political role, it is necessary to appreciate the Soviet milieu and not expect to find the equivalent of what we are accustomed to in western countries.

The concern for discipline and the preoccupation for legality in the U.S.S.R. do not permit either a formation or an evolution of the law through the anarchical initiative of judges. On the other hand, however, a realist must recognise that the legislative order necessarily has gaps. Laws are sometimes incomplete or insufficient and an examination of judicial decisions brings these *lacunae* to light. Consequently, the Soviet constitution itself provides that a control over all judicial activity will be exercised by the highest judicial organ, the Supreme Court of the U.S.S.R. and, in turn, that an analogous control will be exercised by the Chief Arbitrator of the U.S.S.R. over the activity of the organs of public arbitration.

The Supreme Court of the U.S.S.R. and the Chief Arbitrator are not limited to a review of cases already judged by inferior courts or bodies. One of their functions—the principal one, probably, in the case of the Supreme Court since 1957— is to publish instructions or issue orders with a view to guiding Soviet courts or the organs of public arbitration in their application of enacted law. It is possible of course to say that in the exercise of this activity the Supreme Court and the Chief Arbitrator are transformed into administrative organs and no longer have a properly judicial function. A Soviet author for his part would reply that by creating rules of law a French or an English judge is changed into a legislative organ and departs from his judicial role. In the U.S.S.R., it is important to observe, the experience of the courts is not neglected. Judgments and decisions are not perhaps cited as such in order to know what the law is; but in the light of judgments and

decisions rendered, judicial authority co-operates in the development of Soviet law by publishing instructions and orders relative to the application of the law. As with the organs of state administration, it is well understood that the instructions issuing from the Supreme Court, like those of the Chief Arbitrator of the U.S.S.R., must intervene on the basis of and in execution of "the laws in force." In practice, however, this only means that they cannot be contrary to enacted law; in fact their object will sometimes be to specify the manner in which the application of a particular law must be conceived and sometimes to fill a gap in the legislation. By way of example of the first type, there is an instruction relating to the application of the Family Code which provides judges with directives concerning the possible grounds for divorce (which the law does not specify); of the second type, there is the example of an instruction (ante-dating the coming into force of the new Fundamental Principles of Civil Law) ruling matters of conflicts of law. The U.S.S.R. Supreme Court has had, moreover, ever since 1958, and this is confirmed by the 1977 Constitution, the right to submit legislative proposals to the Supreme Soviet, and, we are told, much use is made of this prerogative.

It has also been realised in the U.S.S.R. that it may be very useful to refer to the holdings of the courts in order to explain the provisions of the law in a more lively and concrete manner. Doctrinal works seek more and more to illustrate the rules by means of actual cases which are approved or criticised for their interpretation of the law. And in recent years even works devoted especially to the study of questions considered by the courts in particular branches of the law have been published. For some time a summary of judicial decisions has appeared quite regularly in the official review *Soviet State and Law* (*Sovetskoe Gosudarstvo i Pravo*).[23] Nor are decided cases ignored by the legislators; the Fundamental Principles of Civil Law, adopted in 1961, embody many of the solutions previously admitted by the courts.

### 226. Educational role of decided cases

The study of court decisions in Soviet law would not be complete without asking what place is given them by Soviet legal doc-

[23] This review has been published since 1938 under this title.

trine itself. The matter is treated in a completely different way to that to which we are accustomed in western countries. Since the starting-point is the premise that the law is an aspect of policy, legal doctrine insists that the role of the courts must be to co-operate in bringing about the success of the state policy. To this end the courts do not exist simply to interpret and apply Soviet laws in the manner described above. They must also help to assure the success of government policies and prepare for the withering away of law by means of an active participation in the work of educating the Soviet people. Of this they are capable. In each case to be resolved, the court must bring to light, and especially in the minds of the popular assessors, that the solution founded on an application of Soviet law is both reasonable and just, and one that every honest citizen would be happy to accept. The party who loses his case, and even the condemned man himself, must approve the judgment rendered; public opinion must support it and be in agreement with the law on the basis of which it was rendered. The Soviet court must not be a show; it must be a school.[24] It is important to demonstrate that, in achieving a socialist state, one enters into the kingdom of justice.

## Section II—Other Socialist Countries

### 227. Comparison with U.S.S.R.

The judicial systems of the people's republics are patterned on the same principles as those applying in the U.S.S.R. They organise a corps of judges entirely devoted to the programme of social change set up by the government rather than a caste of jurists. "Judges must not be animated by an *esprit de corps* which will

[24] The Fundamental Principles of Judicial Organisation, promulgated in 1958, specify in art. 3, entitled *The Tasks of the Court:* "In all its activities, the court educates the citizens of the Soviet Union in a spirit of devotion to the country and to the cause of Communism, in a spirit of exactitude and firmness in the execution of Soviet laws, of honesty in behaviour towards socialist property, observation of discipline in work, of sincere attachment to the duties owed to the State and society, of respect for the law, of honour and dignity of citizens and the rules of the socialist community. When it provides measures for the repression of crime, the court does not limit itself to punishing the delinquent, but devotes itself to his reform and re-education." Art. 2 of the Fundamental Principles of Civil Procedure (1961) also underlines the role that procedure must have in the education of the citizen. *Cf.* also the most vivid description of cases by Feifer (G.), *Justice in Moscow* (1964).

make more difficult their understanding of State policy, the directives of which are laid down by the Workers' Party."[25] There is thus a natural subordination of the judicial authorities to the organs of state power and the lower courts are obliged to give an account of their activity to the people's councils.[26]

Despite this basic similarity as to principle, the judicial organisation of the people's republics is not a simple duplication of that in the U.S.S.R. No serious reason was seen for upsetting a system which had proved its worth; the Soviet organisation, so it appeared, was due in part at least to conditions particular to the U.S.S.R. and to which no heed had to be paid in countries where similar conditions did not prevail. The decisive consideration for the leaders of the people's republics is the need to devise the best means of bringing about socialism in their own countries rather than to follow in all respects the model provided by the U.S.S.R. The principle of socialist legality may be more surely respected by means different than those used in the U.S.S.R.; and no feelings of vassalage therefore force adoption of Soviet solutions.

### 228. Hierarchy of courts

A number of remarks should be made respecting the existing hierarchy of courts. Some differences are explained by the fact that the people's republics, with the exception of Yugoslavia and Czechoslovakia, are not federal states; they therefore have no court comparable to the Supreme Court of the U.S.S.R. and the interpretative role given to this court in the Soviet Union is attributed to other judicial or non-judicial organs. There are also other differences respecting the jurisdiction of the courts. The Czech and Rumanian regional courts, for example, unlike the provincial courts of the U.S.S.R., are always at the second degree; it is altogether exceptional, and in effect only by virtue of specific legislative texts, that they can be seized as courts of first instance.

Further differences also exist in the case of the special courts and quasi-judicial organs of both groups of countries. It has

[25] Ehrlich (St.), "Notion et garanties de la légalité socialiste dans les pays de l'Europe de l'Est," *Politique, Rev. int. des doctrines et des institutions*, 1958, p. 327.

[26] Polish law on judicial organisation, art. 13. The *People's Council* in Poland (*rady narodowe*) is the equivalent of the Russian *Soviet*.

already been noted that Yugoslavia now has a court of constitutional justice. The Polish judicial organisation comprises courts of social security alongside military courts; both, since 1962, are subject to the control of the Supreme Court. On the other hand, minor infractions or misdemeanours, which, since 1961 have not been included in the penal code, are within the competence of penal administrative commissions, the decisions of which are subject to appeal to the praesidium of the People's Councils of each province (*voivodie*). These special bodies are sometimes provided for by the constitution as in the case of Yugoslavia and the German Democratic Republic.

The Soviet Comrades' Courts have their Hungarian equivalent. They were created in Hungary in 1957—prior to their establishment in the U.S.S.R. therefore—and have a considerable workload. The Czech experiment with "local people's courts" appears, on the other hand, to have been a failure and legislation of 1969 abolished them. A first attempt along the same lines was a failure in Poland, but the idea was taken up again in a new law of 1965 which, in the perspective of the new society, created "social conciliation commissions" and "social enterprise courts."[27]

### 229. Public arbitration

Like the U.S.S.R., the other European socialist countries, as well as North Korea, Outer Mongolia, and Cuba—but not China—confide litigation arising in the collectivised sector to specialised bodies, independent of the regular courts, which are called either "economic arbitration commissions" or "state arbitration commissions" (*Staatliches Vertragsgericht* in the German Democratic Republic). These systems have always been somewhat different from that prevailing in the Soviet Union and such differences have been accentuated in the last few years as the economic organisation of these countries has developed along separate lines.[28]

[27] Rybicki (M.), "La participation des citoyens à l'administration de la justice en Pologne et dans les pays socialistes" (1971) Rev. int. dr. comparé 553–565.

[28] Knapp (V.), "State Arbitration in Socialist Countries" (1973) *International Encyclopedia of Comparative Law*, Vol. 16, Chap. 13.

The public arbitration commissions in general only exist at two levels, central and regional, and may sometimes be attached to various different authorities such as the President of the Council of Ministers in Poland or the Committee for Economic Co-ordination in Bulgaria. Sometimes their jurisdiction is greater than it is in the U.S.S.R., as for example in Bulgaria, Poland and Czechoslovakia where it includes litigation arising between agricultural co-operatives and state enterprises. Public arbitration procedures may also differ. In the German Democratic Republic, for instance, the sessions are private. In Bulgaria and Poland the decisions of the regional commissions may be appealed to the central commission; in Czechoslovakia the decisions of the central commission may be taken on appeal to its *praesidium* (constituted by the chief arbitrator and his first assistant). In East Germany some decisions of the arbitration commission may be treated as binding precedents (*Grundsatzverfahren*). The extent to which administrative functions are confided to these bodies also varies considerably; it is very limited in Bulgaria and Poland compared to the practice in the U.S.S.R.

Apart from these matters of detail, a most remarkable development has occurred in three countries, Yugoslavia, Albania and Hungary. Public arbitration commissions were abolished in Yugoslavia in 1955, in Albania in 1969 and in Hungary in 1972. In Yugoslavia they were replaced by an autonomous hierarchy of economic courts, in which people's assessors collaborate, whose jurisdiction extends to litigation with foreigners as well as between organisms of the collectivised sector. In Albania litigation arising in the collectivised sector has simply been placed within the jurisdiction of the ordinary courts. In Hungary yet a third technique has been adopted for this type of litigation: special chambers have been instituted within the Provincial Courts with an appeal lying to the economic division of the Supreme Court.

In addition to its adjudicative functions, the *plenum* of the Supreme Economic Court in Yugoslavia, like the State Court of Arbitration it replaced and the Federal Supreme Court, also has a regulatory function; it thus promulgated a statement of "general usage respecting merchandise exchanges" on January 18, 1954, published in the Official Journal; this regulation is a summary of the rules of civil and commercial law rather than a true collection

of commercial usages, and it remedied in part the absence of a federal code of obligations in Yugoslavia.

### 230. Election of judges

The principle of electing judges applies in all European socialist countries but the details of the implementation of this principle are often very different from those in the U.S.S.R.

All judges—even those at the base of the court system—are picked by elected assemblies, such as the different levels of the people's councils in Czechoslovakia and Yugoslavia, or of the office of the National Assembly (Diet) in Hungary and Poland. And whereas in the U.S.S.R. any citizen may be elected judge, the law in Bulgaria, Hungary, Poland, Czechoslovakia and Yugoslavia requires that judges have some legal training. In Bulgaria, courses of instruction are even organised for the people's assessors in order that they have some introduction to legal principles. The term of office for judges varies as well from country to country: three or five years in Bulgaria (according to the court), eight years in Yugoslavia, 10 years in Czechoslovakia. In Poland, the Supreme Court judges hold office for five years and others "for an indefinite period," which really means for life because in Poland judges at all levels can only be removed for the grounds specified by law.

### 231. People's assessors

The participation of people's assessors in the judgment of disputes has been adopted in Poland, as in the U.S.S.R., but with a difference: the Polish assessors are elected by people's councils rather than by universal suffrage. It is thought that this innovation has generally produced good results because it allows for a continuous exposure of the professional judge to public opinion. However, it is now apparent that the principle of such participation has perhaps been over-extended; and it has been limited therefore by different means and, in particular, by providing in certain cases for a simplified procedure according to which a professional judge sits alone. Such, for example, is the general rule in criminal matters when the maximum penalty to which the accused may be liable is less than two years' imprisonment. In civil matters, with certain exceptions, the president of the district court may

decide that the case will be judged by a single or by three professional judges.

There is also provision for people's assessors in the Czech Constitution of 1960. In order to indicate the equality of assessors and professional judges, it mentions (in section 100) judges who practise their functions as a profession and people's judges who exercise such functions but not as a profession. These judges are elected for a four year term by district national committees; their role is now limited in civil matters because the principle of the judge sitting alone was admitted in 1969 except in family and labour law matters. Similar rules apply in Hungary.

In Yugoslavia the institution has been adopted as well. People's assessors sit with the judge in all courts of first instance except in those cases where the law authorises the judge to decide alone. Unlike the other people's republics, such assessors are also to be found in the Yugoslav economic tribunals, which are treated as real courts.

### 232. System of remedies

The system of remedies against judgments in the people's republics also differs on certain points from the system in the Soviet Union. In Czechoslovakia and Yugoslavia, for instance, the principle of an appeal by way of rehearing is still retained whereas it is not admitted in Russia. In Poland it has not been retained although the exercise of other types of remedies is more available to private citizens than in Russia. The recourse by way of special revision is in particular different from that in Soviet Russia; it is taken directly to the Supreme Court but it does not result in the quashing of the judgment or decision unless it is lodged within a delay of six months from the time such judgment or decision became final; after this delay, it may be decided in the interests of legal principle that the decision or judgment was poorly decided, but it nevertheless retains the authority of *res judicata*. It is also necessary to remember that in practice the Polish public prosecutor fulfils a much less important role than the Soviet *Prokuratura*; his control is exercised primarily with respect to the application of criminal law; the recourse by way of a petition in revision, which can only be taken by the minister of justice, the attorney-general and the first president of the Supreme Court, is in such circum-

stances therefore if not theoretical at least very rare in civil matters.[29]

### 233. Role of decided cases

The different rules discussed above respecting the existing court structure of the U.S.S.R. and certain of the people's republics may have some influence upon the role of decided cases. There is no doubt at all that in both the U.S.S.R. and the people's republics decided cases are strictly subordinate to enacted law: Marxist-Leninist teaching requires that this be so. A different relationship can however exist between the courts and the legislators according to another tradition. The distinction as to what is a matter of principle, and which must, therefore, be determined by the legislators, and what is simple application or development of the principle, which can then be left to government administration or judges, is not always very precise. And so, while strict compliance with doctrinal requirements is everywhere observed, the working out of relationships between state and administrative or judicial authorities may therefore vary from one country to another.

A Polish law of March 28, 1958, modifying the code of civil procedure, increased the jurisdiction of the district tribunals and diminished correspondingly that of the *voïvodie* tribunals; the purpose was to lessen the burden of the Supreme Court, a court of second instance, and to allow it to be devoted, more than in the past, to its general duty of supervisory control over judicial decisions. This reform provoked certain objections. Some Polish jurists think that the Supreme Court would work more effectively for the success of socialist legality by exercising its control, as it did in the past, over specific decisions which it would revise or quash, rather than by developing a more abstract method consisting of instructing judges on the ways in which the law should be understood and applied in the light of a whole series of judicial decisions which it will have reviewed *ex officio* in the discharge of its administrative duties.[30]

In Hungary, Poland, Czechoslovakia and Yugoslavia, the

[29] In 1958, 378 petitions in civil matters are recorded, of which 282 were held to be founded and 35 rejected. After October 1956, the procedure of special revision was used to reverse a large number of unjust condemnations from which no appeal lay, after having been handed down during the oppressive regime which was later repudiated.

[30] Woner (T.), "Rola jurysdykcyina sadu Najwyszczego," *Nowe Prawo*, 1959, Vol. 2, pp. 148–153, analysed in *L'U.R.S.S. et les pays de l'Est*, 1960, Vols. 2–3, p. 38.

administration of justice is entrusted to judges who qualify, by their education and national traditions, as jurists much more than Soviet judges. This factor is not without its significance. Although it would be contrary to official doctrine to claim this to be so, it is altogether likely that decided cases will have a more important place in fact in these countries than in the U.S.S.R. A comparison of the collections of reported cases published in the U.S.S.R. and the people's democracies supports this supposition. In Yugoslavia the law gives the Federal Supreme Court the task of supervising the regular publication of its own important decisions and those of the different supreme courts. Three annual volumes of the decisions of the supreme courts have been published every year since 1956 in the federal Official Journal. A similar legal provision respecting economic courts obliges the Yugoslav Supreme Economic Court to ensure the regular publication of judgments within its jurisdiction. In Poland, as well, an official collection of decisions of the Supreme Court in civil and criminal matters, and an official collection of the arbitral awards of the General Arbitration Commission, are published regularly.

The series of reported cases published in the people's democracies are official; only selected decisions are included and in this respect Soviet practice is observed. Decisions are chosen for publication because of their usefulness to judges or jurists and because they are considered to agree with official policy. They are not, therefore, as in bourgeois countries, used to shape legal development independently of the will of the legislators.

# CHAPTER III

# CUSTOM AND RULES OF SOCIALIST COMMUNITY LIFE

## 234. Custom

The preceding discussion of Marxist-Leninist doctrine and the role of legislation in Soviet law may convey the impression that custom has a very restricted role in this legal system. The total transformation of society—and even of man—which will be brought about in order to establish a truly communist regime implies a revolutionary upheaval, one in which no further dependence can be placed on the customs of what appears to be a bygone era.

Custom only remains important in the U.S.S.R. to the extent that it is useful or necessary for the interpretation or in the application of enacted law (*consuetudo secundum legem*), or in those very few instances where the law itself refers to custom or usage and allows them some scope of application.

This secondary place to which custom is relegated in the Soviet legal system is not at all surprising. Particular mention should nonetheless be made of it because it constitutes a complete rejection of what was Russian tradition. But the rejection of custom by Soviet law has nothing to do with the phenomenon which, in countries of the Romano-Germanic system, during the nineteenth and twentieth centuries, brought about the substitution of an essentially enacted law, founded on codes, to the previous customary law. This latter transformation was essentially one explained by a change in techniques and not, as a general rule, in either its object or its result, a change in the substantive principles of customary law. In the U.S.S.R., on the other hand, a complete change in the substance of the law accompanied the change in technique; it was intended, in a truly *social* revolution, that citizens become accus-

tomed to living in a completely different manner and according to new rules.

### 235. The rules of socialist community life

The decline of custom in the U.S.S.R. is however only temporary. The ideal of Marxism-Leninism is to build a society in which there is no longer any law and where social relations will be ruled by custom alone. Custom, therefore, although rejected today, is called upon to play a future role of the very greatest importance when the communist goal has been attained and law will be needed no longer. This future held out for custom is already apparent in certain expressions of Soviet law or doctrine which make reference to rules of community life in the socialist society. Article 59 of the Soviet Constitution states: "It is the duty of every citizen of the U.S.S.R. to observe the Constitution of the U.S.S.R., to respect the law and the rules of socialist community life and to bear with dignity the high calling of citizen of the U.S.S.R."

Writers, both in the U.S.S.R. and outside, have wondered what significance should be attached to the analogous terms found in the 1936 Constitution and what consequences should be drawn from it. For some the reference to the rules of socialist community life appeared to constitute a principle susceptible of replacing the bourgeois legal notion of public policy or public order and good morals. Others have seen in it the basis for a kind of custom *praeter legem* through which certain obligations might be imposed on citizens (such as that of bringing help or assistance to one's fellow citizens in certain circumstances) apart from those instances where such obligations result from a legislative text. Thought of in either of these ways, the words of the Constitution have received little application outside of those cases where further consequences have been specified more concretely by other legal texts.[1]

In fact however the principle has quite another meaning; and it is deformed when any attempt is made to charge it with juridical content and therefore to attribute to it some precise significance

[1] It has a place, *e.g.* in the definition of the civil offence of "hooliganism": *cf.* Marie (N.), "Le houliganisme en Union soviétique" (1970), Rev. de l'est 143–166. Similarly, in Poland a Supreme Court directive of March 18, 1968 states that divorces must not be granted if it appears to be contrary to the rules of social life: Gorecki (J.), "Les directives de la Cour suprême en matière de divorce" *Państwo i prawo*, August–September 1968.

within the framework of the legal order. The "rules of socialist community life" to which the Constitution refers are not—and are not intended to be—law. The expression can only be really understood by considering the future era of communist society: law will disappear and only precepts of living in a communist society will remain to govern men's behaviour. At the present time the words of article 59 of the Constitution have only a very limited significance; they are however the basis for certain experiments in new social structures in the U.S.S.R. The rules of socialist community life in a socialist society are the basis for all the administrative activities of the country in which citizens can, right now, voluntarily co-operate, by enrolling in the militia or in various social services for example. These activities presage the full reality of life among men in the communist society of tomorrow.

# CHAPTER IV

# DOCTRINAL WRITING

Doctrinal writing, like the other sources of law, requires several comments. On this point as well the Soviet legal system is original.[1]

## 236. Marxism-Leninism

When speaking of doctrinal writing and its role in Soviet law, it is impossible to consider only those published works which are strictly legal in nature. Even before making any reference to them, consideration must be given to the materials in which the doctrine of Marxism-Leninism itself is authoritatively expressed. In the U.S.S.R. the law is nothing other than the putting into practice of this doctrine; it is the very basis of the policy of the Soviet leaders.

Soviet authors are wholly convinced of this. They find as much if indeed not more support for their affirmations in citations from or references to the writings of the "doctrinal fathers" of Marxism than in the published works or articles of jurists; the writings of Marx, Engels and Lenin whose complete works are the basis of any law library have first place. Appeal is also made to writings or speeches of Soviet political leaders and to the programmes and other resolutions of the Communist Party itself. These last materials are not, strictly speaking, legal sources but their doctrinal authority is uncontested: there one finds the currently authorised explanation of the Marxist-Leninist doctrine in the U.S.S.R. with respect to any number of matters. A Soviet jurist or anyone wanting to study Soviet law must refer to them constantly.

## 237. Doctrinal writing properly speaking

Alongside these basic documents indicating the spirit of Soviet law

[1] Tchkhikvadze (V. M.), "L'évolution de la science juridique soviétique" (1968) Rev. int. dr. comparé 19–34.

and providing general guidelines for Soviet judges, what we in the bourgeois countries understand by legal writing or *doctrine* also presents certain special characteristics in the Soviet Union. In fact the organisation of things in this respect forces an almost complete distinction to be made between the teaching of law and legal research.

Professors of law do not criticise the law; they are only expected to simplify its teaching and application, by clarifying the intention of the legislators; and, like judges, they must also seek to ensure the success of government policy by convincing citizens of the eminently wise and just character of Soviet law. The works written for this purpose therefore make no attempt to be original. Moreover they are very often the work of a group (*kollektiv*) of authors headed by an editorial chief who supervises their collaboration. Before the work is published it is generally submitted to the criticism of a committee which examines it in detail for its conformity to law and to the orthodoxy of the regime.

The tasks of those who have opted for a career in research is quite different. They are not professors nor do they teach law; they are scholarly associates in some institute of the U.S.S.R. or one of the S.S.R. The most eminent of these is the Institute of State and Law of the Academy of Sciences of the U.S.S.R. which employs about 400 associates divided into a number of sections.[2] At the federal level, the Institute of Soviet Legislation, reporting to the U.S.S.R. Ministry of Justice, and the Institute specialising in criminal matters attached to the *Prokuratura* are also important. Research in these different institutes is organised according to a plan, but this plan is to a very great extent established on the basis of suggestions made by the various sections themselves and their own researchers; the authorities who finally decide upon the plan do little more than make sure that the many different paths of research on the same subject are carried on with all possible coordination and control the desire to expand, or on the other hand to relax, the research of any particular section. Before being printed the work prepared by researchers is the object of detailed

[2] These sections are devoted to the following purposes: problems of constitutional law; administrative sciences; general theory of law and the state; administration of agriculture; economic law; general problems of socialist legality; history of the state and of law; private law; contemporary bourgeois states and laws; international (and cosmic) law; laws of newly independent countries. The official journal of the Institute is the publication *Sovetskoe Gosudarstvo i Pravo*.

discussions within each section or at a higher level, but it is finally published under the name of the individual researchers who prepared it. The institutes—or at least the most important of them—possess excellent libraries and facilities for this work and a very high calibre of scholarship is the result of their organised research. For some years the efforts of the institutes were hampered by various factors, but at the present time, and in an atmosphere of greater freedom, they have been successful in their reaction against excessively conformist attitudes. It has been realised that legal scholarship should not merely be a matter of explaining Soviet law and exposing its merits. Research in new areas has been taken up; an increasingly important place is given to sociology, especially by those working in criminal, family and labour law. There is also new interest in comparative law, especially in the laws of the other socialist countries.[3]

### 238. Other socialist countries

The role of doctrine in other socialist countries, especially in Poland, is closer to the Romano-Germanic system than to that of the Soviet Union. It is not limited to explaining the rules of positive law, but also to co-operating, actively and in the national interest, in improving the law. Polish leaders freely admit the legitimacy of this position; and they show it by consulting the Polish Association of Jurists before enacting new legislation. But this very full co-operation in the work of legislation and codification somewhat monopolises the attention of legal authors so that their publications are in the form of articles or commentaries on individual laws rather than general, less fragmentary, works.

The legal writers in the people's republics are less doctrinaire than their Soviet counterparts because they have a greater attachment to the western tradition of intellectual freedom and have retained a closer connection with western Europe. They know, and have no hesitation about writing to this effect, that the capital-

[3] Szabo (I.), "La science comparative du droit," *Annales universitatis Budapestinensis. Sectio juridica*, Vol. 5, 1964, pp. 91–134. Eorsi (G.), *Comparative Civil (Private) Law* (1979), "Comparative Analysis of Socialist and Capitalist law," *Coexistence* (1964), pp. 130–151. Dutoit (B.), "Die sowjetische Rechtswergleichung gestern und heute" *Jahrbüch für Ostrecht* (1975) p. 49–71. Tille (A. A.) & Svekov (G. V.), *Sravnitel' nÿ metod v juridiceskih disciplinah* (1973). Tille (A. A.), *Sotsialisticeskoe sravnitel' noe pravovedenie* (published also in English as *Socialist Comparative Law*) (1975). Tumanov (V. A.), ed., *Sravnitel' noe Pravovedenie* (1978).

ist regimes have undergone great changes since the time of Marx and Engels. It would seem that they want to co-operate in bringing about a greater understanding between the two camps rather than condemn the bourgeois laws outright. They do not systematically interpret the preoccupation of capitalist states with social justice as the inevitably suspicious and hateful reaction of a threatened bourgeois class.[4] They believe that western legal science continues to provide them with models and that the experiments of Western states, despite the differences in their political systems, are worthy of study and may, sometimes, even inspire their own socialist leaders. "Many bourgeois legal ideas and opinions," writes a Polish author, "are not acceptable, but that does not mean . . . as it once was thought, and wrongly . . . that certain ideas, statements and theories advanced by their legal science are *a priori* to be rejected as erroneous or sterile. Our task is not to refute *a priori* all intellectual attainments of bourgeois scholarship but rather to examine critically such attainments."[5] Today's generally accepted point of view is very well expressed by an Hungarian author was writes: "While socialist legality reveals itself to be historically the antithesis of capitalist legality, it is also its continuation and historical successor. The socialist principle retains all the progressive principles included in the capitalist notion of legality; it maintains and uses every method and technique susceptible of bringing about the goals pursued by socialist legality . . . We study the legal institutions of the West in order to draw lessons from their legal method and technique so that socialist legality can be strengthened and developed."[6]

The prevailing attitude in the people's democracies is, therefore, in the end, in substantial agreement with that of the jurists of bourgeois countries who, although they may consider that the Soviet regime is oppressive and based on a highly doubtful doctrine, do not for this reason think that they must inevitably condemn everything done in the U.S.S.R.

[4] Zawadski (Z.), "Contribution à l'origine de la conception du "welfare-state," *Państwo i Prawo* (August–September, 1960).

[5] Auscaler (G.), "Les buts idéologiques actuels de la science du droit," *Państwo i Prawo* (July 1956).

[6] Szabo (I.), in *Le concept de la légalité dans les pays socialistes* (1961), p. 402.

# TITLE III

## STRUCTURE OF THE LAW

### 239. Originality of socialist laws

The structure of a law can be considered from three different points of view: by investigating its principal divisions and categories, by examining its jural concepts and by studying the manner in which the legal rule itself is conceived.

Soviet law, as the successor to the former Russian law, inherited the concept of the legal rule shared by the countries of the Romano-Germanic family; no particular remarks are required in this respect.

On the other hand, Soviet law is certainly original with respect to its categories and concepts, for while the *form* of the categories and concepts of the Romano-Germanic family has been retained a total renewal of their *substance* has been achieved. In a new type of society founded on a completely different economic organisation and professed ideal, the problems are not the same. The names of former categories and concepts may thus have been retained, but for the most part they have been changed in their real nature and are not, save in a formal sense, the categories and concepts of the pre-Soviet period familiar to jurists of the Romano-Germanic family.

# CHAPTER I

## DIVISIONS OF SOCIALIST LAW

### 240. Formal resemblance to bourgeois laws

In appearances the divisions of Soviet law have remained, with some exceptions, those of the Romano-Germanic laws. There are, of course, some differences: family law is distinct from civil law, the classification known as commercial law has disappeared and a *kolkhoze* law and a law of habitation have been created. However variations also exist among the different laws of the Romano-Germanic family and those to be noted in Soviet law do not, simply in themselves, justify the classifying of this law as a special family.

Soviet authors do not admit however that only such formal differences can be considered and argue that one must take into account the actual content of each branch of law.[1] They stress that the resemblance between Soviet law and non-socialist laws of continental European countries with respect to principal legal divisions is wholly one of form, and therefore superficial; in reality, they maintain, the difference in economic structures of the two groups of countries means that the substance of private, constitutional, administrative and criminal law is very different. The law in general may very well be divided into a certain number of branches having the same name, but the analogy can be carried no further because substantially different problems exist in socialist and non-socialist states. Moreover, the Marxist-Leninist doctrine leads to a new non-individualist way of envisaging these various problems.

### 241. Constitutional law

There is hardly any need to insist upon the fact that Soviet constitutional law is very different from the constitutional law of capitalist countries.

[1] *Cf.* especially the observations of P. S. Romachkin, in *Le concept de la légalité dans les pays socialistes* (1961), pp. 364–371.

There are two principal features which characterise the constitutional system of socialist countries.[2] The first is the very great importance of the Communist Party at the political level. The second is the fact that the soviets of different levels exercise real political and administrative powers. The events of 1968 in Czechoslovakia, and that country's policy of appearing to admit criticism too freely and thus endangering the primacy of the Party itself, show the importance attached to the first point. The events in Poland in 1981 confirm the same point. The very name, *Soviet* Union, shows the fundamental character of the second. It is the acceptance of these two principles that makes of a country a member of the socialist family of laws. A political regime in which the Communist Party would share power with other parties, or in which there were no people's councils modelled along the lines of the soviets of the U.S.S.R., would not be looked upon as a socialist country, at least in the sense that it is understood in the U.S.S.R. itself.

The Soviet state structure did not figure in the original platform of the Communist Party; it was articulated immediately after the 1917 Revolution as a way of showing that, even with the small number of actual Party members, power really did henceforth belong to the people. In fact however real power has always resided within the Party itself. It is the Party that selects candidates for election to the soviets of different levels and controls the training and assignment of personnel to all posts included in the lists (*nomenklatura*) established by its own executive authorities.

### 242. Other branches of law

The completely original character of the institutions of Soviet constitutional law can hardly be questioned, but its originality in other branches is no less marked when they too are compared to those of bourgeois countries. The transition to the socialist state, on the basis of Marxism-Leninism, has given rise to an almost complete transformation of attitudes and structures. This is so

[2] Hazard (J. N.), *The Soviet System of Government* (5th ed., 1980), *Communists and their Law* (1969). Mouskhély (M.) and Jedryka (A.), *Le gouvernement de l'U.R.S.S.* (1961). Chambre (H.), *L'Union soviétique. Introduction à l'étude de ses institutions* (2nd ed., 1966).

whether one examines private law or administrative law, or again such fields as labour relations, social security or criminal law.[3]

### 243. Private law

Consider the private law. The fundamental issue facing jurists in capitalist legal systems is the preservation of individualist interests and therefore private ownership, the economic basis of a capitalist society; the essential concern is to recognise the *meum* and the *teum* in the law of property, contract or succession. In the Soviet Union, on the contrary, the regulation of what is called "personal ownership"—and not *private* ownership, in order to show that even here a change has come about—is only of secondary importance. Soviet civil law is centred around the notion of *socialist ownership*, the various forms, the legal regime and the guarantees of which are studied in the U.S.S.R.[4] A reading of the Soviet Constitution makes the primordial importance of this new type of ownership apparent; it is also evident from a reading of the Fundamental Principles of Civil Law (1961) which contain an enumeration of the things which are the property either of the state (art. 21), the *kolkhozi* (art. 23) or co-operatives (art. 24) on the one hand and, on the other, those which may be owned personally (art. 25) or by the family of the *dvor* or collective farm household (art. 27). The protection of socialist ownership raises problems quite different from those of individual private ownership. It is much more difficult to protect adequately and effectively. Private individuals are always ready to fight for their own rights and interests and can be counted upon to defend their own private property; but the protection of socialist ownership must be organised by means of special institutions for the defense of general interests. To the extent then that Soviet law has socialist ownership as one of its objects—and it is on this point that the Soviet jurist faces his greatest problems—it is very different in content from the private law of non-socialist countries where there is not much, or sometimes any, preoccupation with such problems.

[3] Hazard (J. N.), Butler (W. E.) and Maggs (P. B.) *The Soviet Legal System* (1977). Bellon (J.), *Droit pénal soviétique et droit pénal occidental* (1961). Ancel (M.), *Introduction au système de droit pénal soviétique* (1962). Lowit (T.), *Le syndicalisme de type soviétique. L'U.R.S.S. et les pays de l'Est européen* (1971).

[4] Stoyanovitch (K.), *Le régime de la propriété en U.R.S.S.* (1962).

**244. Administrative law**

In administrative law as well there has been considerable change in the types of questions raised and the kind of emphasis they receive.[5] To a jurist of the capitalist world the essential challenge is once again to protect the individual and affirm his rights against a government administration whose abuses must be curtailed or punished. The Soviet jurist is not indifferent to these problems either, but he does not approach them from the same point of view.[6] For him it is vain to want to assure a protection of the individual outside of the complete social change which Marxist-Leninist doctrine has brought about through the collectivisation of the means of production. Moreover, this collectivisation suffices, as a general rule, for solving the problems which concern jurists of the capitalist world; from the Soviet point of view, individual rights and interests are automatically protected and guaranteed once society is founded on the wise principles of Marxism respecting economic organisation; complete agreement between the interests of the individual and those of society is in fact brought about, it is argued, in a socialist regime.

The administrative law problems of primary interest to jurists of the socialist countries are thus largely new ones. Here, once more, the notion of socialist ownership is very important. The instruments of production, in the U.S.S.R., have all passed into socialist ownership. Socialist laws endeavour to multiply methods of control which will assure an ordered exploitation of such property and its protection from all kinds of wastefulness and encroachments. For reasons already mentioned, reliance cannot be placed, as in capitalist countries, on the initiative of private persons; many different kinds of compulsory controls must be set up, and new institutions created, if the collectivisation of the means of production is to amount to more than a moral gesture—the suppression of man's exploitation by man—and really benefit all citizens.

The discussions at the conference of the International Association of Legal Science held at Warsaw since 1958 showed this to be so. Jurists from socialist and non-socialist countries had a great

[5] *Cf.* the report of the Polish professor Jaroszyński, in *Le concept de la légalité dans les pays socialistes* (1961), pp. 91–115. *Cf.* also the reports and discussions at the end of the same volume. The remarks respecting Polish law apply with equal force to Soviet law save in the case of several of the examples provided.

[6] Hazard, Butler and Maggs, *op. cit.* pp. 181 *et seq.*

deal of difficulty in understanding each other. The non-socialist jurists had trouble in understanding an administrative law which is not centred around the protection of individuals, nor dominated by some kind of judicial control over the administration. But the jurists of socialist countries were concerned with something else; for them it is essential that the government's policy for building communism be successful; and they have replaced judicial control with a new type of control exercised by the people's representatives and organisations. But the 1977 Constitution has somewhat drawn together these different approaches. Article 58 (para. 2) of the Constitution provides in effect that "the actions of officials in violation of the law, in excess of their powers, or infringing the rights of citizens may be the basis for proceedings in the courts according to the conditions established by law." This text is significant because it enlarges considerably the scope of judicial review.[7] Soviet administrative law nonetheless remains distinct from its counterpart in bourgeois countries in this respect. Marxism-Leninism leads socialist jurists to seek solutions to problems by means of principles quite different from those admitted in capitalist countries.

### 245. Rejection of the public law—private law distinction

The originality of Soviet law is further shown by the doctrinal rejection of the *summa divisio* of law as understood in the Romano-Germanic family.

The distinction between public law and private law is both fundamental and traditional in the countries of the Romano-Germanic family. It dates from Roman law and is fundamental in the sense that these countries have always considered private law to be the heart of law. Public law, very closely linked to politics and distinguished only with difficulty from the "science of governing," was, for many centuries, wisely left aside by jurists; even today in many respects public law remains uncertain and unstable compared to private law.

Marxist-Leninist doctrine is on quite a different footing. In a letter to Kursky, Lenin used an expression which has since become famous: "We do not recognise anything 'private,' and regard

[7] Lesage (M.), "Judicial Review of Administration in the U.S.S.R." (1980) 4 Rev. soc. Law, 465.

*everything* . . . as falling under *public* and not *private* law." The idea has been taken up by all Soviet jurists. It should not be understood as meaning that public law has absorbed private law; it merely signifies that in the economic field the dualism of public law and private law as two autonomous bodies of rules is not admitted. To deny the distinction between public law and private law is therefore to affirm the unity of law; and this unity results from the fact that law, in all of its branches, is essentially a reflection of the economic organisation of society.

There is, too, a further consideration. Marxism-Leninism identifies law with coercion. It does not consider rules conforming to justice or inspired by morality, and which men spontaneously follow in their mutual relations, to be rules of law at all. According to this doctrine, only those rules imposed more or less openly or hypocritically by the ruling class and in order to protect its economic interests and perpetuate its own "dictatorship" are *legal* rules. Law is only an application of policy, an instrument in the service of the ruling class. There is therefore, in this view, no more place for a private law which, independently of any political character or preoccupations—and that, after all, is the essence of the idea of private as opposed to public law—purports to give expression to ideas of good organisation and social justice.

The negation of private law is imposed by the new concept of law affirmed by Marxism. To say, as Lenin did, that all law has become public law is simply to state, in another form, the idea that all legal relationships are ruled by a political idea and that rules of law are in no sense the expression of an immanent justice. Law is policy and reciprocally what is not policy is not law.

There are several practically important consequences which flow from this rejection of the distinction between public and private law.

### 246. Mandatory character of law

Because all law, and not simply what we would call public law, is an aspect of policy, and in order that that policy be successful, an imperative or mandatory character is inevitably given to the largest possible number of laws; and the imprint of public policy is given to the largest possible number of rules. This is especially desirable because the Soviet regime is not satisfied with society in

its present form. It aspires to bring about its total transformation in order to create a new kind of society.

All kinds of relationships and behaviour must therefore be changed in order to create the conditions in which it will be possible to renounce force and law, and so that citizens will henceforth behave with respect to each other with automatic mutual understanding and fraternity. Suppletive legal rules which may mean the perpetuation of past mistakes must disappear to make room for imperative rules—these alone will be able to create, and impose, the new society.

But it will not be enough to affirm that civil law is in reality public law and to say that its rules must all be mandatory. In many cases this imperative character must be reinforced, in order to guarantee better the success of the policy of Soviet leaders, by applying penal sanctions for the violation of private law rules. The non-performance of contracts in the collectivised sector of the Soviet economy thus carries penal sanctions; the member of a *kolkhoz* who does not accomplish the minimum amount of work due to the *kolkhoz*, and purchases made for the purpose of resale, are both punishable under criminal law; the creation of a private business under the simulated form of a co-operative is also a criminal offence.

### 247. Search for new systematics

Soviet authors, imbued with the desire to break away completely from the capitalist societies they consider so unjust, sometimes seem ill at ease for having retained, even though only in a formal sense, the legal categories of bourgeois laws. The entire renewal of the concept and the very substance of Soviet law also requires, in their eyes, that the law repose on a new systematic classification rejecting that of the past. These efforts up to the present time have not, however, met with much success; they must nevertheless be mentioned because they are linked to some of the crises through which Soviet law has passed and they give some indication of the way in which the evolution of law and its eventual disappearance are understood in the Soviet Union.

Doctrinal quarrels on this point have twice centred around the question whether or not it would be suitable to recognise a special branch of law to be called "economic law" within the legal system.

Briefly put, the idea of "economic law" was that law in the true sense (*i.e.* containing definite rules) was really only suitable for private relations and that when the state (or some public body or organism) was concerned such rules should give way to considerations of what is simply opportune and suitable in the public interest. Such a conception would obviously clothe public authorities with very great discretionary power.[8] No attempt will be made here to retrace the often heated discussions which took place on this point. Today the quarrel seems to have subsided. As long as a socialist state and law subsist in the U.S.S.R. there is every likelihood that the present categories of Soviet law and its reliance upon "rules" will be retained. In the U.S.S.R. and most socialist countries, therefore, no concerted legislative attempt is being made to enshrine the idea of such a distinct branch of law.[9] But it has prevailed in Czechoslovakia and in East Germany and, in the former, great efforts have been made to present the law in a new organisational framework that reflects its socialist structure. Apart from the distinction between the civil and economic codes, a new terminology has been developed for use in the civil code itself: in the place of the traditional notion of "contract," for example, there has been substituted the notion of "services" owed by bodies of the collectivised sector to citizens. And with the promulgation of a code on international commerce it has been recognised that for a socialist country at least there is a considerable difference between internal governance and international commercial activity.

[8] Hazard (J. N.), "Le droit soviétique et le dépérissement du droit," in *Université de Bruxelles, Faculté de droit, Travaux et conférences*, VIII (1960); *adde* Bilinsky (A.), "Ringen um das Zivilrecht im Ostblock," *Europa Recht*, 1961, pp. 174–190. Kučera (J.), "La théorie du droit économique socialiste. Son application en Tchécoslovaquie" *Ann. Univ. sciences sociales de Toulouse*, t. XXI, 1973, p. 337.

[9] On the present state of the question, *cf.* Mateesco-Matte (M.), "Le droit économique socialiste dix ans après sa 'codification' dans la législation civile soviétique" *Annuaire de l'U.R.S.S. 1970–1971*, p. 35.

# CHAPTER II

# SOCIALIST LEGAL CONCEPTS

### 248. Domination of Marxist doctrine

The people's dictatorship and the collectivisation of the national economy bring about a distortion of a whole series of traditional concepts; in the new conditions in which they are used, they mean something quite new. Although they employ a vocabulary inherited from Russian law, Soviet jurists deal with different problems and they examine them from a quite different point of view. In these circumstances familiar words have taken on vastly different connotations. In studying Soviet law, therefore, it is necessary to rid oneself of our established conceptual philosophy and to realise that these concepts have a variable, not an absolute, value. Adversaries of the Soviet regime deny that a democracy exists or that there are any real freedoms in the U.S.S.R. It would be fairer to say that these concepts have changed meaning in Soviet society. For the sake of clarity, it may be regretted that a new terminology, clearly specifying these changes, has not been created. However, we must adjust ourselves to Soviet terminology and realise that the concepts of Soviet law, whatever the vocabulary employed, are not really those of the bourgeois laws. A study of the Soviet substantive law itself is necessary in order to appreciate the breadth of the change that has taken place. So much, however, cannot be attempted here.

Observations on ownership and contracts in Soviet law, and on the "most-favoured nation" clause in commercial relations with the Soviet Union, must suffice by way of characteristic examples.

## SECTION I—OWNERSHIP

### 249. Bourgeois and socialist concepts

The central notion of Soviet law—that which Soviet jurists proudly state they have completely changed—is the notion of

ownership. The western jurist is at first somewhat surprised that so much emphasis is placed on a notion which, in French law at least, is not of primary concern.

It is however altogether natural that the regulation of ownership be placed in the forefront by Soviet jurists. Marxist doctrine holds that law is conditioned above all by the economic structure of society; of essential importance to society, then, is the manner in which property is appropriated. The law ruling ownership and property is therefore crucial. And with respect to the law of property and ownership Marxism requires a complete change of ideas—a revolution, the effects of which will consequently be felt in all other branches of law and even in men's consciences.

The apparent simplicity moreover of the regime of ownership even in the capitalist countries is in itself a pit-fall. The usual description given in continental civilian systems, for example, of the substance of the law of property is undoubtedly far from exhaustive and gives an entirely false idea of this part of the law. The many restrictions on the rights of owners are often omitted and little mention is made of municipal law or environmental law or the status of the tenant farmer; these matters are studied elsewhere.[1] Even the autonomy of the law of contract as distinguished from the law of property is only a consequence of the extreme individualism, and therefore of the primary role attributed to the individual will, admitted in western societies; in the absence of this attitude, the contracts of sale, lease and hire and others similar might very well be regarded as forming part of the law of property in a large sense.

Soviet law rejects such a narrow concept of the law of property. In the U.S.S.R. property law consists of the whole body of rules dealing not only with the appropriation of things and the transfer of the right of ownership, but also with its administration and management and the legal operations in which it is involved.

### 250. Difficulties of comparison

The law of property in the Soviet Union therefore differs from that in the capitalist countries from many points of view.

[1] Compare the comprehensive approach given to the presentation of property law in English law, for example, in the work of Lawson (F. H.), *Introduction to the Law of Property* (1958).

The distinction considered fundamental to the Common law, that of "real" and "personal" property, or to the laws of the Romano-Germanic family, that of "movable" and "immovable" property, is of no interest to the Soviet jurists. The distinction they make, and for them one no less fundamental in Marxist doctrine, is between means of production and goods for consumption.[2] Compared to the unity—apparent at least—of the ownership regime of the Romanist countries, there are three regimes in Soviet law: personal ownership, collective ownership and, most important and newest of all, the regime of socialist or state ownership.

It must be added that Soviet law also rejects the traditional Western notion of real rights. According to Soviet jurists rights are created to regulate relations between men; only a capitalist mentality could conceive of a right linking a person and a thing, the owner and the object of his ownership.

For all these reasons it appears to Soviet jurists that the socialist regime has made something new of ownership compared to what it is in a capitalist regime; this is so much the case that they say it is difficult to see how a truly meaningful comparison between the property laws of each society can be made. When Soviet jurists express themselves in this way, they have in mind above all the capitalist law as it existed in their own country before the socialist revolution. Their point of view is less justified if one considers the present property laws of non-socialist European countries with all their present complexities. But even so, the Soviet point of view is still largely justified; there are, it will be seen, very considerable differences between the capitalist and Soviet laws because of the different principles upon which the society of each is based.

### 251. Personal ownership

The differences are not too marked however with respect to the first type of ownership in the U.S.S.R., *personal ownership*. Private ownership has been so re-named in order to show that it must only be used for the satisfaction of the personal needs of the individual enjoying such right, and for the purpose for which such

[2] The notion of "goods for consumption" is in no way comparable—need it hardly be mentioned—to that of *choses consomptibles* or "fungible" property known to Romanist laws.

property is intended, and not in order to draw profit from it or to use it for speculative ends.

With this important reserve, personal property deriving from money earned through employment is otherwise subject to the same general rules as private property in capitalist countries: the owner may use his thing, dispose of it for value or gratuitously, or bequeath it by testament.

The only really special characteristic of this kind of ownership is, apart from the prohibition to employ it for purposes of gain, that only consumer goods in the Marxist sense, as opposed to goods of production, enter the restricted category of things which can be owned in this way. Article 13 of the 1977 Soviet Constitution specifies that "Personal property consists of articles of everyday use, for personal consumption and convenience, things used in subsidiary household husbandry, a dwelling house, savings derived from employment . . . ." In some socialist countries, such as Yugoslavia, small artisanal enterprises (employing no more than 5 salaried persons) forming part of the "small economy" may also be personal property.

### 252. Collective ownership

Soviet law, however, is entirely original with respect to "socialist" ownership and its two forms: collective ownership and state ownership.

The typical form of *collective ownership* is the ownership of the *kolkhozi.* Land, of course, has been nationalised; it does not, therefore, belong to the *kolkhozi.* The latter have over it only a perpetual right of use and enjoyment. It would be gratuitous to remark that this form of perpetual enjoyment is in no way similar to the notion of *usufructus* known to Roman law or its modern derivative of *usufruit* found in continental civil law: the adjective *perpetual* suffices to indicate this since, in such laws, *usufruct* is essentially a temporary right. Further, and corresponding to this right to the land conceded to the *kolkhozi*, there exists a whole series of obligations which so distinguishes this Soviet right of use and enjoyment from the Romano-Germanic concept of *usufructus* that it is quite impossible to conceive of the Soviet form of the right as a fragmentation of the right of ownership or a true real right.

The *kolkhoz* is obliged to cultivate or exploit the soil granted to it in a definite way; it may be obliged to make certain payments or render certain services to the state; and it must also be organised and carry out its management according to the rules of the law of *kolkhozi*.[3] The collective ownership of the *kolkhozi* involves for those so invested a whole series of obligations over and above the prerogatives it confers. It is difficult, if not impossible, to compare it to the ownership found in laws on co-operatives in capitalist countries or to see in it the notion of an *estate* known to the Common law.

### 253. State ownership

Even more different is the regime of *state ownership* (or "of the whole people") prevailing in the industrial sector and in the state agricultural farms (*sovkhozi*). This form of ownership bears on two types of property the regimes of which are themselves very distinct: fixed capital and circulating capital or, to be more concrete, the soil, buildings, installations and machines on the one hand and, on the other, the raw materials and products. The reason for the differences in the legal regime of these categories is that the first is intended for exploitation (and cannot normally therefore be alienated), whereas it is intended that the second category, on the contrary, be disposed of.

For both types, however, a similar preliminary question may be asked: who in fact *owns* them? This question excited long doctrinal discussions which in themselves indicate the originality of this particular Soviet institution. But the discussions led to the following conclusion: in a socialist regime the important thing is not so much to know *who* is the owner but rather to know *by whom*, and *how*, such property will be exploited. In the face of this kind of conclusion we are far removed indeed from the capitalist point of view according to which the owner is, in principle, sovereign and the manner in which he chooses to exploit his property is not, as a general rule, even a question taken into account by the law.

The holder of the state right of ownership is the state, or rather

[3] A new regime was adopted in respect of *kolkhozi* in 1969 by the National Council of Kolkhozi and approved by the Central Committee of the Communist Party and the U.S.S.R. Council of Ministers.

all the people or the nation of which the state is the provisional representative. The theory of socialist ownership thus evokes the theory of *domaine* of French *droit administratif* rather than the civilian or Romanist theory of ownership. However any comparison on this point with the doctrine of the capitalist countries is not very satisfactory for a number of reasons.

The property belonging to the state, and therefore handled by state industries, is of many different kinds. That property forming capital assets has been gratuitously affected by the state to certain enterprises by virtue of a kind of concession, the terms of which can always be unilaterally modified by the state authorities; with respect to such assets, therefore, the enterprise has, properly speaking, no right which can prevail over that of the state itself. Other kinds of property, on the other hand, are produced by those working for such enterprises; and this factor, as well as the consideration that such products are destined to be disposed of (to the benefit of another enterprise or a consumer), means that they are subject to a distinct legal regime.

In both cases, however, the essence of the socialist regime of state ownership results from the affectation of property to the needs of production and consumption. It is not really important to specify to whom the property belongs or how such property (or its enjoyment) can be transferred. It is much more fundamental to know how it is to be "operationally managed' or exploited and in what way such property will be disposed of according to the established provisions of the national economic plan. The existence of such a plan in the U.S.S.R. makes the law of property a matter subject to a completely different regulation from what it is in non-socialist countries. It is true of course that even in the latter countries the state plays an important role in today's economy. But the "flexible" economic planning that may exist in capitalist countries is quite distinct from the U.S.S.R. "strict" planning, which is not limited to setting general objectives but strives to establish a specific task for each enterprise. The quantitative difference between state intervention in socialist and capitalist countries becomes, by virtue of its dimension in the U.S.S.R., a qualitative difference as well. Socialist ownership, therefore, has now very little to do with ownership as understood in the capitalist countries, even though the word *ownership* has been retained and even if state or public property in the capitalist countries is taken into account.

## Section II—Contracts

### 254. Different function of contract: economic contracts

Soviet law defines contract in the same way as the laws of the Romano-Germanic family; but a contract nevertheless represents something different in Soviet law from what it is in bourgeois laws because in Soviet economic conditions the contract fulfils an often very different function. Jurists of the Romano-Germanic family and Soviet jurists are frequently speaking of two distinct things, therefore, when they consider even the idea of contract.[4]

The difference between the contract of Soviet law and that of the western laws is at once apparent when the "economic contracts"—that is to say those occurring in the collectivised sector of Soviet economy—are considered. This sector is managed, according to the directions of the organs of economic planning, by state enterprises, monopolies or *sovkhozi*, collectives or *kolkhozi.* An examination will be made here of the manner in which these state monopolies or enterprises, which are responsible for the whole of industrial production in the U.S.S.R., carry on their activities.

In the Soviet Union, this whole subject is dominated by the principle of economic planning. State enterprises exist solely in order to execute the plan of national development (both economic and social) approved by the Supreme Soviet.[5] They must do whatever is necessary to accomplish the plan and they are not permitted to undertake activities or duties which are not connected to such plan. The particular enterprise which, according to the plan, must produce *x* kilometres of railway track is bound to perform this planned task; it cannot manufacture in the place of or in addition to such rails, metallic tubing or steel girders, on the pretext that it is better suited to such an activity or that it would be more profitable. A *sovkhoz* which has been granted land for the purposes of agricultural exploitation cannot then begin to mine or draw

[4] Halfina (R. O.), *Značenie i suščnost' dogovora v sovetskom socialističeskom graždanskom prave* (1954). Pfuhl (E.), *Der Wirtschaftsvertrag im sowjetischen Recht* (1958). Halfina (R. O.), *Pravovoe regulirovanie postavki produkcii v narodnom hozjajstve* (1963). Loeber (D. A.), *Der hoheitlich gestaltete Vertrag* (1969). Loeber (D. A.) and Rossi (G.) "Autonomia contrattuale delle imprese di Stato soggette al piano" (1969) Rev. dir. comm. 62–94. *Adde* Tunc (A.), "La possibilité de comparer le contrat dans les systèmes juridiques à structures économiques différentes" (1962) *Rabels Zeitschrift*, 478.

[5] Mayer (M.), *L'entreprise industrielle d'Etat en Union Soviétique* (1966). Crespi Reghizzi (G.), *L'impresa nel diritto sovietico* (1969).

materials from the sub-soil or exploit a peat-bog.[6] Each must remain within the limits of the task assigned to it.

### 255. Socialist economic planning and capitalist financial direction

The "strict" economic planning of a socialist country is not at all similar to the "flexible" financial planning of a non-socialist country. In western European countries or other capitalist nations there may very well be a plan for national development which involves a certain amount of state control. But such a plan is no more than a statement of desirable objectives which the government wishes to achieve; and if it really hopes to reach these goals, the government will take various steps such as credit arrangements, granting of aid, customs and labour regulation and so on. It is hoped thereby that the outlined goals will be attained by making it advantageous for private industries to take the plan into account. But the plan itself imposes no specific duties on such industries; they are not obliged to carry on a specific activity or assure a fixed amount of production. It is altogether different in the U.S.S.R. because there all the means of production have become the property of the nation and all industrial enterprises are now state enterprises. Because of these facts planning has of course a quite different character. Concrete steps are taken in the form of administrative acts; each state enterprise is assigned a particular job within the framework of the plan and, when these various enterprises have completed their work, the goals of the plan will then have been attained.

### 256. Planned and unplanned contracts

In order, therefore, to understand the idea of contract in the collectivised sector of Soviet economy, it is important to bear in mind this principal idea—that the task of each enterprise is determined by an administrative planning decision before there is any question at all of a contract. This decision is, in a way, a kind of reason or *causa* (in the Romanist sense) for the contract that will come about.

The role of contract cannot therefore be understood except in connection with the directives of the plan. The latter may have

[6] Kazancev (N. D.), *Zemel'noe pravo* (1958), pp. 89–92.

been more or less mandatory and more or less detailed according to the period or the branches of the economy considered. The role of contract, to put it simply, has varied, and continues to vary, according to the character and specifications of the administrative decisions upon which it is based.

Sometimes, therefore, these administrative planning decisions go into considerable detail, specifying the products to be delivered, their price, the dates of such delivery and between which enterprises such contract will occur. Psychologically, as well as economically, the interest of the contract in such circumstances is the assurance that the obligations resulting from the administrative acts of planning have in fact been understood by those upon whom they are imposed; the latter, by signing the contract anticipated by the plan, indicate that they consider themselves capable of discharging these obligations and they engage their personal liability by placing their signatures on a document reproducing the details of the administrative decision.

That the contract however fulfil only this role alone is exceptional. Most often the administrative planning decisions do not enter into any great amount of detail; they leave room for the initiative of the enterprises themselves, and the contract, economically, is thus called upon to play an even more important role. Two hypotheses must therefore be distinguished: that, according to the Soviet terminology, of the planned contract and that of the unplanned contract.[7]

### 257. The legally imposed contract

In the first hypothesis, that of the planned contract, the administrative decisions have already specifically enumerated the enterprises between which the contract must occur. It is simply laid down that enterprise *A* will contract with enterprise *B*. This was the case mentioned previously, but up to this point it has also been assumed that every aspect of the future contract will have been specified by the administrative decision. In the vast majority of cases, however, this is not so; it is expected that the parties will make more concrete in the contract the duties imposed upon them by the plan. The quantity of products and their price, of course,

[7] Ioffe (O. S.), *Graždanskoe pravo* (1958), p. 390.

will as a general rule be fixed by the plan. There also exist, for a whole series of items, "general conditions of delivery," established by administrative authorities which specify many of the clauses of the future contract in a generally mandatory fashion. There remains, nevertheless, a certain number of practically important points with respect to which experience has shown that there is nothing better than a direct agreement between the interested parties. The contract will deal with these points: the quality and various kinds of commodities, the packaging, the timing of deliveries and so on. A retail enterprise, for example, is in a better position than the administrative authorities to know the needs and tastes of the public: the size of shoes required, the preferences for material of a certain colour and so on. A construction enterprise is in turn more qualified than the administration to know the exact dimensions of the boards, tubes, sheet metal or other materials needed. In most cases it is the contract that serves this function: it translates into concrete details the general scheme of the plan in the interests of an improved quality of work to be performed or of goods to be delivered.

### 258. The economically necessary contract

The second hypothesis is where the administrative decisions made by virtue of the plan do not specify that enterprise *A* or enterprise *B* has any obligation to enter into a contract. The only duty imposed on either of them is the performance of a certain task, but they are left with the choice of the methods to do it. The obligation to enter into contracts in the vast majority of instances results therefore, but indirectly, from the need to perform the tasks set out by the administrative decisions of the plan. But the latter do not state between what parties the contract must be made: this choice is left to the individual enterprises even though it is, in fact, limited. Unless the contrary has been specified, one Soviet enterprise can only deal with another Soviet enterprise and what it requires to be done by such other enterprise must be within the scope of the latter's activities according to the plan. In this second hypothesis, however, there is some resemblance to the notion of freedom of contract such as understood in bourgeois countries. Important differences do nonetheless subsist. Many aspects of the contract to be drawn up will have been established in

advance by a whole series of measures that govern the Soviet economy (such as general conditions relating to the delivery and naming of products, decrees setting the deadlines for the conclusion of contracts, pricing policies and so on). An essential difference lies above all in the fact that the specific task to be performed is fixed *for each enterprise* by the plan's administrative decisions; the plan, therefore, is not restricted to indicating in a general way and for a limited period what the economic policy of the government will be.

The present tendency in the U.S.S.R. is to develop the practice described above and to allow different enterprises, to the maximum extent possible, to choose their contracting parties. Administrative designation of the contracting parties is becoming more exceptional, but is still employed in special instances, as for example when one of the parties enjoys a position of monopoly in the furnishing of raw materials like coal, iron, petroleum and so on. But by generally leaving the choice of the contracting party to the enterprise in question, it is hoped, generally, that those involved will be favourably stimulated, that poorly managed enterprises will be detected and the quality of production improved. In granting this freedom it is in particular hoped that state enterprises will find it possible to establish long-term production schedules, and that then the contract will be part of the drafting of the plan and not merely the instrument for carrying it out. This would help to eliminate a poor matching of production to needs. Too often massive stocks of items that will not sell have been produced when the needs of consumers have nonetheless remained unsatisfied. It is, of course, difficult to attribute such a double function to contracts and to return, to some extent, to a market economy while at the same time retaining the principle of centralised planning which is the very basis of a socialist economy. It is still not clear how, and in what sectors and to what extent, it will be possible to reconcile these two different principles in the U.S.S.R. of the future.

### 259. Role of contract

The preceding remarks indicate the role played by contract in Soviet economy and law. It is clearly very different from that of the countries of free enterprise even when the latter have moved in the direction of a more planned economy. In the U.S.S.R. the

contract exists only in order to assure the execution of the plan, with respect to which it is no more than a subordinate instrument. In non-socialist countries, on the other hand, the contract is a fully autonomous instrument upon which the very dynamic of the economy rests; and even when economic planning does exist in such countries it is only a statement of a generally political nature, devoid of that truly legal character so fundamental to the way in which the organisation of relations between enterprises is conceived in the Soviet Union. From this difference in the role of contract, and the relations existing between the plan and the idea of contracts, there flows a completely different legal technique for its regulation. It will now be useful to examine these differences with respect to the formation, the effects and the performance of contracts and the consequences of their non-performance.

### 260. Formation of contracts

First of all, with regard to the formation of contracts, a further distinction must be made in connection with the two hypotheses described above. If the administrative decisions of the plan have anticipated that a contract will be concluded between enterprises *A* and *B*, then this contract is obligatory. If they do not agree on the terms of the contract upon those conditions (often very detailed) laid down in the administrative texts, they will then be forced to do so by the decision of an arbitral organ; these organs of public arbitration therefore deal in many cases with a *pre-contractual dispute.* At the present time, however, such disputes are less frequent than they once were because of the fact, already mentioned, that planning is now more flexible and enterprises are more often given the choice of their contracting party.[8] Thus when one enterprise refuses to contract with another, the organs of public arbitration cannot be seized of the question.

### 261. Performance of contracts

Soviet legislation also departs from the capitalist position respecting the effects of contracts and the consequences of their non-

[8] In Hungary in 1967 and in Rumania in 1969, legislation withdrew from the purview of public arbitration organs any such pre-contract dispute. Litigation arising in the context of negotiations preliminary to contracts which the plan made mandatory have, since then, been resolved by purely administrative action.

performance. Bourgeois laws, since they see the contract as only a pecuniary matter or an opportunity to turn a profit, are satisfied by its performance in the form of an equivalent value: the party who has not discharged his contractual obligations is condemned to pay damages—that is, an equivalent sum of money—to the benefit of the other party.

Such is not the case in the law of the U.S.S.R. The performance of contractual obligations by the payment of damages cannot satisfy Soviet enterprises because their aim is not to make a profit. For them it is essential that the plan be actually carried out. There thus must be specific performance of a contract because the execution of the plan depends upon it; this is all the more important in the U.S.S.R. because of the country's economic structure and the impossibility of one enterprise being "replaced" and demanding that another be substituted for the defaulting enterprise unable to perform its contractual obligations.

The principle of specific performance is therefore—not in theory, as in the Romanist laws, but in actual fact—the ruling principle of the U.S.S.R. And since it involves the guaranteeing of a basically important objective, the execution of the plan, the enforcement of contractual obligations is strictly conceived. The non-performance of a planned contract will be severely sanctioned: the contract itself must necessarily specify penalties which, especially in the case of delay, will be added to the specific performance. The penal clause of Soviet law is not a contractual evaluation of the damages resulting from non-performance; it is a private penalty *in addition to performance*.[9] One party does not even have the right to free the other of the penalty; such a collusive agreement, contrary to the interests involved in the strict performance of the plan, cannot be admitted in Soviet law. Apart from this, disciplinary and even penal sanctions may sometimes be imposed in the case of non-performance of contractual obligations assumed.[10] In the U.S.S.R., the performance of contracts within the framework of the execution of the plan is thus a matter of public order.

[9] Benjamin (P.), "Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law," (1960) 9 Int. and Comp. L.Q. 600–627.

[10] *Cf.* examples given in Hazard (J. N.), Butler (W. E.) and Maggs (P. B.), *The Soviet Legal System* (1977), pp. 247 *et seq.* and pp. 263 *et seq.*

### 262. Conclusion

Is there, then, anything in common between the contract of Soviet and bourgeois laws? The word itself has been retained and it may, sometimes, refer to the same reality: the contracts which occur "outside" the plan—contracts between commercial state enterprises and consumers and those between citizens—are very similar to the contracts known in western countries. As important as these may be—for it is to them ultimately that the whole dynamic of the economy is aimed—such contracts are not of great practical interest to the jurist because, for the most part, they are the simple contracts of everyday life and do not raise many legal problems.[11] Jurists' attention is directed rather to contracts of the planned sector: their regulation, and indeed the very concept of contract in this context, has completely changed because of the new connection linking them to a type of economic planning unknown in western countries. However tempting, it would nonetheless be inexact to speak of them as "administrative contracts." It is certainly true that they have more kinship with our administrative contracts than with our civil or commercial contracts, but essential differences—arising from the collectivisation of the means of production, the existence and modalities of the Soviet plan, and the absence of an opposition of interests between the contracting parties—distinguish them from all the various contracts known to non-socialist countries. In this respect, therefore, the complete originality of Soviet law must be frankly admitted.[12]

## Section III—Most-Favoured Nation Clause

### 263. New aspect of the question

Integrated into an administrative system of economic planning, the contract of Soviet law is no longer called upon to play the role expected of it in the countries of free enterprise. The change which

[11] On these contracts, *cf.* Hazard, Butler and Maggs, *op. cit.*, p. 269. It should be noted that labour relations are not based on "contract" in the Soviet context.

[12] The possibilities but also the limitations of a comparison appear upon a reading of Loeber (D. A.), *Der hoheitlich gestaltete Vertrag. Eine rechtsvergleichende Untersuchung über den Planertrag im Sowjetrecht und den "diktierten Vertrag" im Recht der Bundesrepublik Deutschland* (1969).

has occurred in its function dissociates the Soviet contract from the idea of freedom of contract which to our eyes is fundamental; a profound transformation of the very idea, as well as the role, of contract is the inevitable result. Soviet law speaks of contract in the same way as bourgeois laws, but something very different is actually meant. To understand what a Soviet jurist considers to be a contract and what problems confront him in this area, the Soviet economic structure must be constantly borne in mind.

By examining the most-favoured nation clause, the highly practical importance for the bourgeois countries of understanding the changes that have occurred in the Soviet economy can be illustrated. The most-favoured nation clause in itself has not become something distinct in the Soviet Union, but since it still has a place in what is now an entirely changed legal and economic system, it loses, more or less entirely, the meaning it has in relations between countries of free enterprise.[13]

An analysis of the clause without reference to the function it fulfils would be a hollow exercise; in order to understand any institution, the purpose it serves must also be considered. From this point of view, the very idea of the most-favoured nation clause has been modified in the Soviet system.

### 264. Meaning of the clause in a socialist economy

The purpose of the clause in relations between countries of free enterprise is to establish an equality between the businessmen of different foreign countries with which the national commercial interests have dealings so as to obtain either the goods or services required. The operation of the clause presupposes a milieu of free enterprise in which national business interests plan their own development and obtain their own supplies, by taking into account essentially commercial considerations, because they have primarily in mind the realisation of a profit. In the Soviet system, the role of the clause is completely altered.

Soviet enterprises cannot, any more than Soviet citizens, contract directly with foreign parties. Foreign trade in the Soviet Union is the monopoly of about fifty bodies which specialise in dif-

[13] Domke (M.) and Hazard (J. N.), "State Trading and the Most-Favoured Nation Clause" (1958) 22 Am. J. Int'l. L. 55–68.

ferent branches of the economy, such as *Eksportles* which deals in wood, *Sovnafteksport* trading in mineral oils, and so on. The decision by these bodies to export or import some product is made in the light of considerations different than those taken into account by profit-seeking enterprises in capitalist countries of free competition. No real effort is made in the Soviet Union to develop exports; prices are not competitive, the products themselves are often poorly presented, and there is never any servicing of the customer after the sale. Little heed is given to the fact that an item may be purchased cheaply in a foreign country and then sold at a profit in the Soviet Union. And the conditions in which something may be bought or sold are only taken into consideration once it has been decided that it is necessary, or at least opportune within the framework of the plan, to get in a supply or sell. Even at this stage the decision to buy from or sell to foreign parties is not necessarily based on price alone. The choice of dealing with one country rather than another may be based on political considerations, such as the desire to be of assistance to that country or because it is disposed to buy certain Soviet products and that this will assist in the general balance of payments. The U.S.S.R. only imports products in order to carry out its plan of national economic development and the plan is not profit-oriented. It is as though the whole country were an immense monopoly in which the decisions to buy or sell were never based exclusively on the price of the product but taken rather in the general context of political or economic relations, existing or anticipated, between the Soviet Union and the foreign country. Considerations other than price may very well therefore prompt the choice of the foreign contracting party in the first place. It is characteristic, and significant, that it has never been thought necessary to set up a preferential tariff system within the bloc of European socialist trading countries,[14] whereas the creation of a customs union was one of the very first objectives of the European Economic Community.

What meaning, moreover, could custom duties really have in a socialist country? The state, which collects them, is also in the end bound to pay them when a nationalised enterprise imports pro-

[14] That is, within the Council of Mutual Economic Assistance (COMECON) created between socialist countries in 1948. Caillot (J.), *Le C.A.E.M. Aspects juridiques et formes de co-opération économique entre les pays socialistes* (1971). Lavigne (M.), *Le Comecon (Le programme du Comecon et l'intégration socialiste)* (1974).

ducts upon which they are owing. The "equality" of foreign traders in the scheme of the customs tariff is thus no more than an enticement in a country whose economic system is one where imports are the monopoly of state enterprises and the latter may receive compensatory payments from the state itself.

It should also be noted that the terms of the contracts of trade in the trading relations between socialist countries themselves are largely unknown. The whole subject is treated as a state secret. In these circumstances it is therefore very difficult for an outside nation to urge that its nationals have not been treated as they ought to have been under the most-favoured nation clause.

**265. Possible solutions**

In the end the most-favoured nation clause, conceived originally for market economies based on the profit motive, has no meaning when it is inserted in trade agreements with socialist countries; and it provides no guarantees at all for those trading with them. The socialist countries may well insist upon it, because it serves them in avoiding any discrimination directed against them in their trade with the free enterprise countries. But the reciprocity of the clause is illusory. Nothing guarantees to the foreign trader that exports will be facilitated. And so trading countries with free economic systems are endeavouring to find other means for promoting their trade with socialist countries. The European Economic Commission of the United Nations has, in particular, taken up the study of the problem. Since the nationalisation of trade has changed the conditions of normal competition, attention has now turned to the actual results of these trading exchanges and socialist countries are now being asked to enter into purchase agreements for specified amounts. The General Agreement on Tariffs and Trade (GATT) has encountered difficulties in its attempts to settle trading relations with countries whose economy is completely planned and whose foreign trade is a state monopoly. But preference and discrimination can in fact be achieved in respect of these countries by methods other than those employed in countries of free competition. Special agreements have thus been created for those socialist countries that have adhered to GATT (Czechoslovakia, Poland, Yugoslavia, Rumania, as well as Egypt and Cuba).