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FAR EASTERN SECTION

THE SOVIET COURT AS A SOURCE OF LAW

JOHN N. HAZARD*

Common law lawyers feel themselves to be on unfamiliar ground when they try to understand the law of the Continent. They have learned to look at judicial decisions and to be sceptical of statutes until they see how they are applied by the courts. Civil law lawyers have not aided their common law colleagues. Civil law lawyers belittle the importance of court decisions and present their codes alone for examination.

Soviet law, as one of the civil law family, has likewise been presented usually in terms of statutes, both to Soviet law students and to outsiders seeking to understand. There are no Soviet "casebooks." Reported decisions exist but they are rarely brought to the attention of foreigners. Soviet jurists have written at all times since the revolution that the Anglo-American system of judicial precedent is completely foreign to the Soviet system of law. Only recently has the function of the Soviet court come into controversy and evoked special interest among Soviet lawyers.

The debate aroused by the new interest among Soviet lawyers in their court practice provides an occasion for the common law lawyer to look at the work of Soviet courts. It is the purpose of this paper to utilize the occasion. It may aid in providing appropriate materials for continuing the examination of Soviet law begun in an earlier issue of this Review¹

THE STAGES OF THE DEBATE

Until the middle years of World War II the writers of Soviet legal texts adopted a uniform position as to the function of Soviet courts. The courts were treated only as interpreters of the law, not as law-makers. There was no concept similar to that sometimes called by the American colloquialism "judge-made law." A standard text of 1938²

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¹ See Berman, *The Spirit of Soviet Law*, 23 WASH. L. REV. 152 (1948).

² VYSHINSKY, A. Y., SOVETSKOE GOSUDARSTVENNOE PRAVO 318 (Moscow, 1938). Available in translation as *THE LAW OF THE SOVIET STATE* (New York, 1948).

declares that legislation cannot anticipate everything, and so there is necessity for court interpretation, but the work of the court goes no farther.

A more precise statement of this position appeared in a text of 1940.³ The authors wrote that "court practice cannot and must not create new norms of law, new legislation; it must correspond with precision to existing norms, it must bulwark existing statutes." The authors were reserved, however, for they added that "to deny court precedent as a source of law does not mean the denial of all guiding significance to court practice."⁴

A change in emphasis was called for in 1943.⁵ An author, using the civil code as his departure point, argued that Soviet court practice had become a source of law, in that a judge is assured by Soviet legislation of an opportunity to apply law in a creative way.⁶ The author demonstrated to his satisfaction that the opportunity was being availed of.

The argument as to whether the Soviet court is a source of law extended into a general meeting of the Moscow Juridical Institute of 1946.⁷ Professors and judges spoke both in favor of and against the proposition that a Soviet court is a source of law. The debate seems to have resulted in a decision to reconsider the status of the court, for a 1947 textbook⁸ took the position that at least the guiding instructions on questions of court practice, issued by the full bench (plenum) of the Supreme Court of the U.S.S.R. and the instructions of the State Arbitration System of the U.S.S.R. may be considered as sources of law. The authors still adhered to earlier principles in some measure, for they added a cautionary phrase. They stated that "it must be borne in mind that the significance of sources of law is applied to these orders and instructions only in a very limited measure. Norms, collected in the orders and instructions, are not new legal norms but only expressions of existing legal norms in detailed form."

The issue is, apparently, still unsettled, for a 1948 Soviet legal periodical has carried the report of a discussion in the Institute of Law

³ GOLUNSKY, S. A. and STROGOVICH, M. S., *TEORIYA GOSUDARSTVA I PRAVA* 184 (Moscow, 1940).

⁴ *Id.* at 185.

⁵ See Vilnyanskii, S. I., *Znachenie Sudenbnoi Praktiki v Grazhdanskom Prave*, published in VSESOUZNYI INSTITUT YURIDICHESKIKH NAUK, MIN. YUST. S.S.S.R., *UCHENYE TRUDY*, IX (M. '47). Editorial note states all material was in readiness for publication in 1943.

⁶ *Id.* at 253.

⁷ *SOTSIALISTICHESKAYA ZAKONNOST*, No. 9, 21 (1946).

⁸ *INSTITUT PRAVA AKADEMII NAUK S.S.S.R., OSNOVY SOEVETSKOGO GOSUDARSTVA I PRAVA* 50 (Moscow, 1947).

of the Academy of Sciences of the U.S.S.R.⁹ The principal speech concerned the law of precedents in English and French practice; the commentator following the speech saw a need for uniformity of practice in Soviet courts, although he urged that it be established without any rigidity, such as he associated with a system of judicial precedent.

THE ARGUMENTS

Opposition to the proposition that Soviet courts are a source of law has been founded on several arguments. Academician A. Y. Vyshinsky has drawn upon Soviet political theory which holds that the Soviet system of government accepts no principle of "separation of powers."¹⁰ In Vyshinsky's opinion the Montesquieu doctrine, as carried into effect by the United States Supreme Court, permits that court to create new legislation through constitutional interpretation. The power to declare an Act of Congress unconstitutional is in his opinion the power to legislate in fact. He finds the position of the Soviet court to be quite different.

The Soviet system of government gives no right of constitutional review to the judiciary. The judiciary, like the executive branch of government, is subject completely to the will of the principal representative body of the state, the Supreme Soviet of the U.S.S.R. This principal body delegates the judicial function to the courts, but the latter are always responsible to it, and have no right to review its legislative acts to determine whether they are constitutional. The Supreme Soviet is its own judge as to whether a proposal requires adoption in accordance with the procedure set forth in the Constitution for its amendment.

Professors Golunsky and Strogovich argue that there is good practical reason why legislative authority can be the only source of law in the Soviet system.¹¹ They explain "that under the conditions of the rigid organization of the Soviet state, of the planned activity of its agencies and of the durable regime of socialist legality, the most complete, precise and definable means of reflecting the will of the toiling people of the Soviet country is legislation." They, therefore, exclude custom as a source of law, except in very rare cases, as when a statute establishes a rule in terms of custom to be determined in each case. They argue that a court is deciding concrete cases and these are

⁹ *Problema Sudenbnogo Pravotvorchestva, Doklady V. I. Kamninskoi i N. P. Karadzheiskrova, SOVETSKOE GOSUDARSTVO I PRAVO*, No. 2, 74 (1948).

¹⁰ Note 2 *supra* at 319.

¹¹ Note 3 *supra* at 182.

always individual. The decision in a case may have value as an example in subsequent similar situations, but it cannot have the force of law for such subsequent situations.

There is apparent in arguments of this nature the fact that Soviet jurists share with their contemporaries in other civil law countries a fear that courts may wander far from the provisions of a statute if they are permitted to build an edifice of decisions, each one resting upon the preceding one. Soviet jurists want the court to examine the basic statute in each situation and start afresh as if it were a case of first impression. They do not want a court to say that Judge Ivanov interpreted the statute to cover situation A, and, therefore, they decide in favor of the plaintiff, as situation B is a logical extension of the doctrine established in situation A. They want the court to determine whether situation B would fall within the terms of the statute even if there were no decision relating to situation A.

All critics of the suggestion that Soviet courts are sources of law rely upon the constitutional provisions relating to courts, arguing that these give no such authority to the courts.

Proponents of the proposition that Soviet courts, or at least the full bench (plenum) of the Supreme Court of the U.S.S.R., are sources of law rely mainly on practice. Professor Isaev has brought forth examples supporting the theory that in the guiding directives of the Supreme Court of the U.S.S.R. there is manifested the role of a force creating law¹² He is not fully content with the evidence, however, for he states that in order to decide the question one would have to study the practice of the Supreme Court of the U.S.S.R. for a number of years. He states that this work awaits investigation.

Mr. Vilnyanskii is less reserved in his conclusions based upon practice. He not only finds much in practice to support the theory that the Soviet court is a source of law, but he finds good reason in theory why it should be.¹³ He states the familiar Soviet thesis that in a capitalist society the court represents the most conservative class and acts as a restraint upon the wishes of the masses insofar as those wishes are reflected in legislation issuing from a popularly elected legislature.

Vilnyanskii proceeds with his argument, but omits a step which he probably assumes his readers can take without the necessity of restatement. To clarify the reasoning for American non-Marxists it may help to remark that communists look with suspicion upon courts because

¹² Note 9 *supra*.

¹³ Note 5 *supra* at 244.

of this reasoning. They consider them a restraint upon popular will, a last barricade against the movement to the left, and for this reason they support measures to restrict their power in capitalist societies. It may be that the early Soviet jurists who devised the arguments against permitting Soviet courts to be a source of law were motivated not alone by the civil law tradition, but by an inherited fear of courts as reactionary institutions.

With a background of appreciation of why Soviet jurists may have had political reasons for mistrusting courts, Vilnyanskii's next step in reasoning is clarified. He argues that in Soviet society there is no political or class conflict between the court and the legislature, because both institutions are agencies of the dictatorship of the working class and reflect the legal conception of the toiling masses. In consequence, he believes that court practice is able to work within the framework of socialist law and to guide its development in the direction of construction of socialist society and the step-by-step transition to communist society. Thus, he argues, there is good reason in theory for recognizing Soviet court practice as one of the sources of Soviet law, even though it is of a lower rank than legislation.

Proponents of this position also rely upon statute. They argue that Article 75 of the Judiciary Act gives to the court the right to fill in gaps in the law, and this implies the power to create law¹⁴

THE EVIDENCE

The statutory materials on which both proponents and opponents of the proposition that the Soviet court is a source of law rely are scanty. The Constitution of the U.S.S.R. states the jurisdiction of the Supreme Court of the U.S.S.R. in general terms.¹⁵ This jurisdiction may be limited—and Vyshinsky thinks it is—by the authority given to the Presidium of the Supreme Soviet of the U.S.S.R. to “give interpretations of the laws of the U.S.S.R. in operation.”¹⁶ The Constitution gives no such authority to the courts.

The Judiciary Act of 1938¹⁷ has two pertinent sections: 2 and 75.

¹⁴ See argument of Judge Smolitskii in opposition to what was apparently an argument of Professor Isaev, note 7 *supra*.

¹⁵ Art. 104. “The Supreme Court of the U.S.S.R. is the highest judicial organ. The Supreme Court of the U.S.S.R. is charged with the supervision of the judicial activities of all the judicial organs of the U.S.S.R. and of the Union Republics.”

¹⁶ Const. Art. 49 (c).

¹⁷ For English translation, see Second Session of the Supreme Soviet of the U.S.S.R., August 10-21, 1938, VERBATIM REPORT, 662 (Moscow, 1938).

Section 2 seems to be restrictive.¹⁸ Section 75 seems to give broader authority to the court, and as stated above, it is the statutory bulwark of those who believe the court to be a source of law.¹⁹ Its terminology does not, however, mention specifically the filling of gaps.

The statutory materials seem to give no complete answer. Incidentally, they indicate a procedure which will be unfamiliar to the American lawyer and which is important in understanding the work of the Supreme Court. The Supreme Court of the U.S.S.R. and the Supreme Courts of the Republics, unlike the United States Supreme Court, hear cases in benches of three judges, and only review cases having importance transcending their immediate facts before the full bench of all judges in what is called a plenary sitting.²⁰ The court practice of the U.S.S.R. is, therefore, composed both of decisions on individual sets of facts reported in the form common to American courts, and instructions, which are brief statements of a rule, "distilled" from a concrete situation, but the facts of the case are not restated in the instruction. The instructions are, therefore, of general application and do not lend themselves to the process of "distinguishing" as easily as is the case when a concrete set of facts is present for analysis.

Since statutory materials are not sufficient to reach a definite conclusion in the debate, proponents of the theory that the Soviet court is a source of law rely primarily upon practice. So that the American reader may see for himself how an article of the code is expanded upon and by what agencies, the crime of "speculation" has been selected as a case study

INTERPRETING THE CRIME OF "SPECULATION"

The crime of "speculation" was first placed by the legislature in the criminal code of the R.S.F.S.R.²¹ in 1926 as Article 107. It was then defined as "malicious increase in the price of commodities by means of cornering, concealing or boycott of commodities on the market."

¹⁸ "It is the task of justice in the U.S.S.R. to secure the strict and undeviating observance of Soviet laws by all institutions, organizations, official persons and citizens of the U.S.S.R."

¹⁹ "Protests against sentences, judgments or orders of the collegiums of the Supreme Court of the U.S.S.R. filed by the President of the Supreme Court of the U.S.S.R. or the Prosecutor of the U.S.S.R. are heard by a Plenary Sitting of the Supreme Court of the U.S.S.R. called for this purpose, which likewise gives guiding instructions on questions in the judicial cases examined by the Supreme Court of the U.S.S.R."

²⁰ Details as to structure and jurisdiction of all courts may be found in Hazard, *Soviet Agencies of Law*, 21 NOTRE DAME LAWYER 69 (1945).

²¹ The R.S.F.S.R. is the largest of the Soviet Republics and its codes have served as models for the others. There is, as yet, no federal criminal code, although one is in preparation.

The penalty was to be increased if there were a conspiracy on the part of merchants.

The legislature amended the code in 1932²² so that the crime became the "purchase or resale by private persons, for gain [*i.e.*, as a speculation], of any agricultural produce or of any article of mass consumption." The 1932 phrasing has remained to the present day. The penalty was set as "deprivation of liberty for a period of not less than five years and confiscation of goods in whole or in part." The 1932 revision occurred as a result of a federal decree of the legislature of the U.S.S.R. setting forth the danger seen in speculation and calling for internment of offenders in a concentration camp for periods from five to ten years without the right of amnesty²³

Within a month after its enactment, the application of Article 107 was extended by an order of the Supreme Court of the R.S.F.S.R. to reach persons who failed to take up ration books from workers who were dismissed or who issued ration books illegally, if such acts were accompanied by speculation in the goods obtained thereby. The next year the Commissariat of Justice extended the application of Article 107 by ordering that wealthy peasants (*kulaks*) who failed to make the required grain deliveries to the state within the period set were to be prosecuted as speculators.²⁴ The court was aided in its extension of Article 107 and cases to be discussed below by the fact that the criminal code permits prosecution of socially dangerous acts as crimes when the code does not specifically define them as crimes. This is done under Article 16, by way of "analogy" to appropriate articles of the code.

Two orders of the Supreme Court of the R.S.F.S.R. during the winter of 1933-34 extended the Article further. One declared that the resale of wine, liquors, and other spirits at prices in excess of the set prices was a crime of speculation. The other stated that the buying up of the collective farmers' expectancies in future distribution of produce ("labor days"), if done systematically, was to be treated as the crime of speculation.²⁵

Persons guilty of buying state bonds at less than face amount for the purpose of resale as a business were placed under the provisions of Article 107 by the order of the Supreme Court of the R.S.F.S.R. in

²² COLLECTION OF LAWS, R.S.F.S.R., 1932, No. 87, Art. 385.

²³ Decree of 22 Aug. 1932. COLLECTION OF LAWS, U.S.S.R., 1932, No. 65, Art. 375.

²⁴ See annotation to Art. 107 in edition of 1934. (This annotation was removed from the 1935 edition.)

²⁵ See annotation to 1934 edition of Code.

1935.²⁶ This order of the Supreme Court of the Republic was replaced four months later by an explanation of the Supreme Court of the U.S.S.R. to the same effect, but adding some additional provisions, such as activity of this character when conducted by organized groups was counterrevolution, to be prosecuted under Article 58²⁷

An extension of the Article was ordered by the Supreme Court of the R.S.F.S.R. in 1934, but not published as an annotation to the code until 1937. Under this order it was declared that the production of a secret flour mill, even by hand power, by former bourgeois elements or even by toilers, if conducted as a business and for the purpose of making a profit, was to be treated as the crime of speculation. A further extension was made in a directing letter of the Supreme Court and Prosecutor of the U.S.S.R. in 1935 to the effect that Article 107 should be applied to persons who pounded up state metal money into metal sheets and objects for sale.²⁸

A halt was called to what was apparently broad application of Article 107 by lower courts, when the Supreme Court of the U.S.S.R. issued an order on December 31, 1938.²⁹ Lower courts were admonished to investigate the personality of the accused in every case of alleged speculation and to verify all facts carefully so that it would be thoroughly established that the defendant had bought up *and* resold, or had bought up *for* resale, goods of agriculture and mass consumption for the purpose of making a profit. The court stated that toilers were not to be tried for retaining and selling agricultural produce and goods of mass consumption belonging to them, if it is not proved that these products and articles were bought up and resold for the purpose of making a profit.

A 1940 order of the Supreme Court reversed the trend.³⁰ While it restated the admonitions of the 1938 order, it stated that if there were no direct evidence of purchase for resale as a business, the court might rest upon circumstantial evidence, based upon the quantity, the assortment, the needs of the accused and his family for the goods purchased for his own needs and the other circumstances of the case. In such a situation Article 107 should be applied together with Article 19. The

²⁶ See annotation to 1935 edition of Code.

²⁷ See annotation to 1936 edition of Code.

²⁸ See *SBORNIK DEISTVUYUSHCHIKH POSTANOVLENIY PLENUMA I DIREKTIVNYKH PISEM VERKHOVNOGO SUDA S.S.S.R. 1924-1944* 47 (Moscow, 1946).

²⁹ This order was not printed as an annotation to Art. 107 until the edition of the Code in 1943.

³⁰ See annotation to 1943 edition of Code.

latter Article provides that preparation to commit a crime may be treated in the same manner as commission of the crime, depending on the court's feeling as to the measure of social danger represented in the defendant.

With the reintroduction of rationing at the outset of war in 1941, the Commissariat of Justice of the U.S.S.R. issued an order that speculation in ration coupons be prosecuted under Article 107³¹ This reinstated the practice formerly ordered by the Supreme Court of the R.S.F.S.R. in 1932 and subsequently dropped when rationing was eliminated. It may be pertinent to the discussion of this paper to point out that the order came from a court in 1932 and from the executive in 1941.

The buying up of raw materials to manufacture "moonshine liquor" and the sale of liquor subsequently, or the purchase of liquor for resale was to be punished under Article 107, according to an order of the Plenum of the Supreme Court of the U.S.S.R. of December 24, 1942.³²

The courts must have had considerable experience with the crime of speculation immediately after the war for the Plenum of the Supreme Court of the U.S.S.R. issued an extensive order on September 20, 1946.³³ The lower courts were criticized in this order for their unsatisfactory struggle with speculation. It was stated that they were often giving conditional sentences or fining rather than sentencing a defendant to the minimum term of five years provided for in Article 107 The jurisdiction to try cases in which large quantities of property were concerned or cases in which state-owned property was concerned was taken out of the People's Courts by the order and transferred to the Provincial Courts, who were to sit in such cases as courts of original jurisdiction.

EVIDENCE FROM CIVIL LAW PRACTICE

The practice of Soviet courts in applying the civil code has impressed exponents of the theory that Soviet courts are a source of law The civil code has some general terms in its articles, and courts are called upon to give meaning to them. In so doing, it is argued, they are making law For example, Article 421 of the civil code of the R.S.F.S.R. provides that all personal property of a decedent related to usual house-

³¹ See annotation to 1943 edition of Code.

³² See annotation to 1943 edition of Code.

³³ See annotation to 1947 edition of Code, p. 180.

hold needs passes to the heirs who are living with the decedent, rather than being divided among all heirs, regardless of where they are resident. To this general rule, there is an exception for "articles of luxury" The court determines in each case what are such articles. At one time it may be a grand piano. Vilnyanskii thinks that at another time a grand piano might not be a luxury when the cultural level of society has been raised.³⁴ The court would be the agency to make the decision.

Definitions are likewise called for from the court in defining *force majeure* in any case in which impossibility of controlling a dangerous element is pleaded as a defense to a tort action. The problem of court interpretation is prominent in all tort cases, due to the general terminology of the pertinent articles of the civil code. Perhaps the broadest extension of a court's authority would arise if there is general application of a rule urged by a text writer in 1938.³⁵ It was argued at that time that a court in applying tort law to cases in which an individual had violated "the rules of socialist intercourse," to which Article 130 of the Constitution requires adherence, could hold the individual liable if he were healthy and knew how to swim, yet "failed to render aid in the summer time to another person who was drowning in a river not far from its bank." There has been no reported case of this nature, and Vilnyanskii doubts whether a court will go so far. Vilnyanskii sees the necessity of the court's making law, however, if the obligation to obey the rules of socialist intercourse is to be a reality

Considerable latitude was given the court under Article 1 of the civil code. Under Article 1 the court is permitted not to apply a provision of the civil code if it feels that the party relying upon the provision has abused it. Many decisions were handed down during the 1920's.³⁶ While the courts are no longer finding it necessary to rely on this article to administer what they believe to be justice, the court formerly established remedies and denied remedies under it, when these remedies were available or not available under the other articles of the code. In doing so the court may have been making law

CONCLUSION

A common law lawyer will find much in Soviet court practice which corresponds with his understanding of the function of courts. The

³⁴ Note 5 *supra*, at 268.

³⁵ GRAZHDANSKOE PRAVO Vol. 2, 392 (Moscow, 1938).

³⁶ For an analysis of the decisions, see Greaves, *Social-Economic Purpose of Private Rights. Sec. 1 of the Soviet Civil Code. A Comparative Study of Soviet Non-Communist Law*, 12 N.Y.U. LAW Q. REV. 165 and 439 (1934-5).

extension of the Soviet crime of speculation is mindful of the work of the courts of England when they defined the common law crimes centuries ago. It would be hard for a Soviet lawyer to sustain an argument that law was not made when an article of the code defining as speculation the purchase or resale for gain of any agricultural produce or of any article of mass consumption was extended to cover ration books, silver and copper currency, state bonds, and probably even "labor days." The broadening of the crime to include ownership of articles in excess of personal needs on the ground that such ownership was circumstantial evidence of the intent to resell for gain may also be an extension of law and not merely a rule relating to the evaluation of evidence.

On the other hand, a common law lawyer would probably be less enthusiastic than Vilnyanskii in finding the civil law cases as evidence that the court was making law. In these cases the court was provided rules in general terms, and in defining items of luxury or *force majeure* in each case, it would be clearly within the limitations of the intent of the legislature. The record is not sufficiently complete to permit examination of whether subsequent decisions followed the rulings blindly, in which case one might argue that the court had made law. Even in cases of the application of the principle of Article 1 of the civil code, there would not seem to be lawmaking unless the rule in one case were made binding upon courts in the future.

Perhaps the conclusion is warranted that Soviet courts are required to adhere more closely to statutory law than in the present-day common law jurisdictions which often provide no statute governing the matter in issue, but that the Soviet court has considerably greater latitude in its operations than the strict constructionists believe when they argue that it is not a source of law at all but only an agency to interpret and apply rules of law which the legislature has enacted.
