

Book Review

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

(1983) "Book Review," *Cornell International Law Journal*: Vol. 16: Iss. 1, Article 8.
Available at: <http://scholarship.law.cornell.edu/cilj/vol16/iss1/8>

This Book Review is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

BOOK REVIEWS

SOVIET LAWS AND SOCIALIST LEGALITY

Constitutional Development in the U.S.S.R.: A Guide to the Soviet Constitutions. ARYEH L. UNGER. New York, New York: Pica Press, 1981. Pp. viii, 310. \$30.00 (cloth).

The Soviet Codes of Law. WILLIAM B. SIMONS. Alphen ann den Rijn, The Netherlands: Sijthoff & Noordhoff International Publishers B.V., 1980. Pp. xlviii, 1239. \$92.50 (cloth).

*Russell K. Osgood**

Anglo-American interest in the Soviet legal system has increased since the end of World War II. This probably is attributable both to the expansion in Soviet power and to the growth and maturation of that legal system. Scholarly interest has focused on a number of questions, including: To what extent is the Soviet legal system autonomous from the control of the Communist Party? Is the Soviet system, putting political ideology to one side, an appropriate subject for comparative study? Is the initial promise of the ideology, i.e., a legal system divorced from class and wealth, producing notably different or better results in terms of securing justice? Is there any difference between justice in a socialist versus a mixed economy state?¹

No one has fully answered any of these questions. As one would suppose, commentators have found that the Soviet system, except in areas of great political sensitivity or social bias, such as the

* Associate Professor of Law, Cornell Law School. The author thanks John J. Barceló, Gordon P. Hugenberger, Mark W. Janis, and Dale A. Oesterle for reading drafts of this review.

1. E.L. Johnson's AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM is a lucid and brief introduction to this issue, and Johnson concludes that the Soviet system is really just an extreme version of a positivist, civil law system. E. L. JOHNSON, AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM 3 (1969). Johnson attributes this to Stalin's decision to lay a legal foundation for the Soviet political order, which Vyshinski effectuated. *Id.* at 72-75. Andrei Vyshinski was the greatest apologist for the Soviet legal order. See A. Y. VYSHINSKY, THE LAW OF THE SOVIET STATE (H. W. Babb trans. reprinted in 1979).

treatment of Jews, does not operate in lock step with the latest whims of the local commissars of the Party.² Commentators have also found that certain Western legal ideas have gradually become assimilated into the Soviet legal system, either through the adoption of some facet of Western law, like a code,³ or, perhaps, in response to international obligations regarding human rights.

The promulgation of a new Constitution of the USSR in 1977 stimulated further work by Western scholars.⁴ This is the fourth constitution of the modern Russian state, and is commonly associated with Brezhnev's period of ascendancy. Each of the three earlier constitutions can be easily identified in relation to a particular political or historical period or event. The Russian Constitution of 1918, promulgated only with respect to Russia,⁵ is both revolutionary and idealistic in character, appearing as it did during the early and tense years of Lenin's control and the desperate fight against the whites and their half-hearted Western allies. The USSR Constitution of 1924, approved by Lenin before his death but adopted afterwards, retains an idealistic flavor, but ignores the retreat from socialism openly admitted with the adoption of Lenin's New Economic Policy of 1921.⁶ The most profound difference between the Constitutions of 1918 and 1924 is that the latter created, in a way which has never been fundamentally altered, the *federal* character of the Soviet Union.⁷ Finally, the USSR Constitution of 1936 emerged during Stalin's period of rule. Although the aspirations of 1918 are stripped away, political and other rights are more fully recognized than in earlier constitutions. This recognition of a citizen's "rights" proved to be of no significance to the victims of Stalin's purge trials, which began in 1935 and ended in 1937.

2. See generally H. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 171-273 (1963).

3. THE SOVIET CODES OF LAW XXXIII (W.B. Simons ed. 1980) [hereinafter cited as CODES].

4. See, e.g., the comprehensive, although somewhat tentative, discussion of the 1977 Constitution by Christopher Osakwe of the Tulane Law School in *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PENN. L. REV. 1350 (1979). Mr. Osakwe has written a more critical and informative discussion of the human rights provisions of that Constitution in *Soviet Human Rights Law Under the USSR Constitution of 1977: Theories, Realities and Trends*, 56 TULANE L. REV. 249 (1981).

5. The Soviet Union currently is comprised of fifteen union republics, including the Russian Republic (RSFSR). U.S.S.R. CONST. (1977) art. 71. Article 72 gives each republic the right of "free secession." In 1918, the Bolsheviks controlled only portions of the old Tsarist empire, and the 1918 Constitution related only to Russia. The Constitution of 1924 brought in most of the other territories and peoples of the Tsarist empire as constituent republics.

6. A. L. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE U.S.S.R.* 50-51 (1981).

7. See *supra* note 5 and accompanying text.

Two recently published works will make the original materials, which constitute a large part of the data used to discuss the legal development of the Soviet Union, more easily available to English readers. Aryeh Unger's *Guide to the Soviet Constitutions*⁸ contains the four constitutions. Mr. Unger introduces each constitution with a short essay that places that constitution in its historical context and compares it with its immediate predecessor. A somewhat less original work is the compendium entitled *The Soviet Codes of Law*,⁹ edited by William Simons, which contains translations of the Constitution of the Russian Republic, along with eighteen of the Russian (RSFSR) and Soviet (USSR) codes governing particular areas of substantive law, such as family law or criminal law. The translations are stilted at times, but the translators include such well-respected experts as Harold Berman of the Harvard Law School and A. K. R. Kiralfy of the University of London. These two books differ from other materials currently available in that one contains all four constitutions and the other entire codes, rather than presenting materials in terms of more discrete subject matters.¹⁰ They share a characteristic of other books in this field in that there is no regular program for updating the material presented.¹¹

A popular Anglo-American view, derived both from the purge trials and the recent experience of dissidents, is that Soviet law is likely to be disregarded in the face of whatever the Communist Party leaders deem expedient. In its more extreme version, this argument

8. See A.L. UNGER, *supra* note 6.

9. See CODES, *supra* note 3. Simons edited another book which also appeared in 1980, THE CONSTITUTIONS OF THE COMMUNIST WORLD (1980) [hereinafter cited as CONSTITUTIONS]. Each nation's constitution, such as Albania's for example, is introduced in a cursory fashion. The CONSTITUTIONS book has one enormous practical advantage over the CODES book in that it has a comparative chart at the end which functions adequately as an index.

10. See, e.g., THE SOVIET LEGAL SYSTEM (W. E. Butler ed. trans. 1978). Mr. Butler organizes materials by various topic headings. Under the heading "The Church," for example, Mr. Butler has the Decree of the All-Russian Central Executive Committee and the Council of People's Commissars of April 8, 1929, as amended, which governs the registration and operation of religious organizations, but he omits other legal materials on religion. *Id.* at 381. Mr. Butler includes only the Fundamental Principles of the Criminal Legislation of the USSR and Union Republics, rather than the entire criminal code. *Id.* at 661-83. Compare with J. HAZARD, W. BUTLER & P. MAGGS, THE SOVIET LEGAL SYSTEM (1977), which is in some ways a more useful book than the CODES volume reviewed here because it gathers together all of the materials on a subject. The section on religious freedom, however, contains only one of the applicable criminal statutes, Article 142 of the RSFSR Criminal Code. *Id.* at 90-91.

11. There is one set of English language materials that is updated, William Butler's COLLECTED LEGISLATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE CONSTITUENT UNION REPUBLICS (1982). In addition, Simon's CODES volume has no index or useful table of contents, like many books on Soviet law.

treats Soviet law as nothing more than a charade.¹² To test the validity of this view of Soviet law, I have reviewed the text of the 1977 Constitution and the Russian Republic's Criminal Code with respect to freedom of religious expression to see if there is, in its written form, wide divergence between what these laws say and what is commonly known about religious freedom in the Soviet Union.

Both the Constitution of the USSR and that of the RSFSR promise religious freedom to their respective citizens. Article 52 of the 1977 Constitution provides that:

Citizens of the USSR shall be guaranteed freedom of conscience, that is, the right to profess any religion or none, to perform religious worship, or to conduct atheist propaganda. Incitement to hostility and hatred in connection with religious beliefs shall be prohibited.

The church in the USSR shall be separated from the state, and the school from the church.¹³

Article 50 of the 1978 RSFSR Constitution provides that:

Citizens of the RSFSR are guaranteed freedom of conscience, that is, the right to profess any religion or to profess no religion at all, and to perform religious rites, or to conduct atheist propaganda. The incitement of hostility and hatred in connection with religious beliefs is prohibited.

The church in the RSFSR is separated from the state, and the school from the church.¹⁴

Both constitutions provide, however, that in exercising their rights, "citizens may not injure the interests of society and the state or the rights of other citizens."¹⁵ Lest anyone be in doubt about who decides what constitutes the "interests" of society, and what might be an "injury" to those interests, Article 6 of the USSR Constitution of 1977 states:

The Communist Party of the Soviet Union shall be the guiding and directing force of Soviet society, the core of its political system and of [all] state and social organizations. The CPSU shall exist for the people and shall serve the people.

Armed with the Marxist-Leninist teaching, the Communist Party shall determine the general perspective of the development of society and the lines of the internal and foreign policy of the USSR, direct the great creative activity of the Soviet people, and impart a planned, scientifically-founded character to its struggle for the victory of communism.¹⁶

Similarly, Article 6 of the RSFSR Constitution provides that the Communist Party will determine when the interests of society justify infringements upon freedom of conscience, or, for that matter, any

12. This view has been reinforced by the powerful work of Aleksandr I. Solzhenitsyn. See 3 A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 522-25 (1976).

13. U.S.S.R. CONST. (1977) art. 52 (see A.L. UNGER, *supra* note 6, at 241).

14. R.S.F.S.R. CONST. (1978) art. 50 (see CODES, *supra* note 3, at 19).

15. R.S.F.S.R. CONST. (1978) art. 37 (see CODES, *supra* note 3, at 15-16) and U.S.S.R. CONST. (1977) art. 39 (see A.L. UNGER, *supra* note 6, at 241).

16. U.S.S.R. CONST. (1977) art. 6 (see A.L. UNGER, *supra* note 6, at 234-35).

of the other freedoms secured in that Constitution.¹⁷

In order to determine the efficacy of the constitutional grant of freedom of conscience, one would like to have recourse to elaborate studies by social scientists outlining the social, economic and political consequences of being religious, or engaging in religious practices in the Soviet Union. Although there is a significant amount of literature and commentary on this question (written mainly by political and religious dissidents) suggesting that religious faith is an enormous liability that leads to economic and, occasionally, legal reprisals,¹⁸ there is currently no such scientific study of Soviet behavior. In the absence of such a study, and in light of the main purpose of this review, I have studied the RSFSR Criminal Code to see how religious behavior, which might be protected by the constitutional provisions guaranteeing freedom of conscience, still could constitute a criminal offense.

Article 7 of the RSFSR Criminal Code defines a crime as being "a socially dangerous act . . . which infringes the Soviet social or state systems," or any violation of the more particular provisions of the code.¹⁹ This section of the Code singles out "grave" crimes for special treatment. Article 70 defines one of the crimes labelled "grave":

Agitation or propaganda carried on for the purpose of subverting or weakening the Soviet regime or of committing particular, especially dangerous crimes against the state, or the circulation, for the same purpose, of slanderous fabrications which defame the Soviet state and social system, or the circulation or preparation or keeping, for the same purpose, of literature of such content, shall be punished by deprivation of freedom for a term of six months to seven years, with or without additional exile for a term of two to five years, or by exile for a term of two or five years.²⁰

Exile means being sent to some place different from one's normal abode.²¹ Article 70 of the RSFSR Criminal Code could easily be applied to religious activity. Any attempt to proselytize, for example, might be seen as an attempt to weaken the Soviet regime.²²

17. R.S.F.S.R. CONST. (1978) art. 6 (see CODES, *supra* note 3, at 8).

18. For a short but informative history of Soviet attitudes towards religious activity, see Fletcher, *Reductive Containment: Soviet Religious Policy*, 22 J. CHURCH & STATE 487 (1980). For an article on the Soviet and Eastern European legal treatment of Jewish identity and religion, see Charvin & Brami, *Notes sur la Question Juive en URSS et dans les Etats Socialistes*, ANNUAIRE DE L'U.R.S.S. ET DES PAYS SOCIALISTES EUROPÉENS, 263, 275-79 (1979-80).

19. R.S.F.S.R. CRIMINAL CODE art. 7 (see CODES, *supra* note 3, at 57).

20. R.S.F.S.R. CRIMINAL CODE art. 70 (see CODES, *supra* note 3, at 93).

21. R.S.F.S.R. CRIMINAL CODE art. 25 (see CODES, *supra* note 3, at 67).

22. Although Aleksandr Solzhenitsyn is rarely precise about the section of the Russian Criminal Code under which a defendant is charged, many prosecutions seem to be under Article 70 or its predecessor. See A. SOLZHENITSYN, *supra* note 12, at 514-18.

Article 227 of the Criminal Code defines a less serious crime, but one more closely tied to religious activity:

The organizing or directing of a group, the activity of which, carried on under the appearance of preaching religious beliefs and performing religious ceremonies, is connected with the causing of harm to citizens' health or with any other infringements of the person or rights of citizens, or with the inducing of citizens to refuse social activity or performance of civic duties, or with the drawing of minors into such group, shall be punished by deprivation of freedom for a term not exceeding five years or by exile for a similar term without confiscation of property.

The active participation in the activity of a group specified in paragraph one of the present article, or the systematic propaganda directed at the commission of acts specified therein, shall be punished by deprivation of freedom for a term not exceeding three years, or by exile for a term not exceeding one year.²³

The definition of this crime casts a wider net, and appears to make religious exhortations criminal, even when addressed to fellow believers, if they might lead to a "refusal" to perform "proper" social activity or hinder a citizen in performing his civic duties. As a backstop, Article 142 of the Criminal Code creates a vague misdemeanor offense for religious activity:

The violation of laws on the separation of church and state and of school and church shall be punished by correctional tasks for a term not exceeding one year or by a fine not exceeding 50 rubles.

The same acts committed by a person previously convicted of violation of laws on separation of church and state and of school and church, as well as organizational activity directed to the commission of such acts, shall be punished by deprivation of freedom for a term not exceeding three years.²⁴

In summary, although the Soviet Constitution of 1977 and the Russian Constitution of 1978 do provide for freedom of conscience, that freedom is carefully hedged, even in the constitutional text. The RSFSR Criminal Code reveals that certain crimes, such as the prohibition on anti-Soviet behavior and the anti-infringement article, may make any kind of religious proselytization a potential criminal

23. R.S.F.S.R. CRIMINAL CODE art. 227 (*see* CODES, *supra* note 3, at 143).

24. R.S.F.S.R. CRIMINAL CODE art. 142 (*see* CODES, *supra* note 3, at 111). The Presidium of the Supreme Soviet issued a decree on March 18, 1966 which extends Article 142 to:

Compulsory collection of taxes and contributions for the use of religious organizations and clergy, preparation for the purpose of mass distribution, or mass distribution of appeals, letters, leaflets and other documents exhorting refusal to observe legislation on religious denominations; commission of fraudulent acts for the purpose of arousing religious superstitions in the masses of the population; organization and conduct of religious meetings, processions and other ceremonies of the denomination, violating public order; organization and systematic conduct of classes to teach religion to minors in violation of the regulations established by law; refusal to hire or to accept in a school, dismissal from work or a school, and deprivation of privileges of citizens because of their attitude toward religion.

Reprinted in J. HAZARD, W. BUTLER & P. MAGGS, *supra* note 10, at 91.

offense. This, when coupled with the non-legal disabilities that fall on non-Party members, eviscerates the right to freedom of conscience.

But does all of this show that the Soviet legal system is not serious, or not "legal" in an Anglo-American sense?²⁵ I think not, for a careful reading of the authoritative legal texts reveals that the words match the reality. In some abstract sense, the Soviet Union tolerates religious freedom. Any kind of religious expression which emanates from the believer's head and becomes action, however, could threaten other authoritative principles, such as the hegemony of the Communist Party and its ideology. One may disapprove of this ordering of principles, either because one is a believer or because one thinks that it is ill-advised to place religious and political ideology in opposition. There is nothing inherent in this particular ordering, however, which allows one to label this group of statutes and constitutions more a fairy tale and less a legal agglomeration than our own.

This conclusion does not imply that these codes necessarily operate in a fashion that Americans would recognize as being similar to our own legal system. Indeed, there probably is a wider disparity between the aspirations expressed as rights in the 1977 Constitution and the realities of Soviet life, than there is between those expressed in the United States Constitution and the realities of American life. But both constitutions do perform symbolic functions. It is certainly true that the right against unreasonable searches and seizures contained in the fourth amendment can be interpreted, and perhaps narrowed, by courts to accommodate changing social realities. Perhaps a good faith exception to the warrant requirement would "interpret" this provision too much, but few would argue that the other well-developed exceptions to the warrant requirements, such as the grand jury exception or the plain view doctrine, are in some sense lawless.

If the symbolic meaning of words embodied in constitutional provisions play one role in one society, then it is not irrational to think that they might play a different role in a different and economically less developed society.²⁶ Therefore, even if the religious free-

25. I think the Anglo-American sense of the word "legal" is best defined in contrast to the word "political." A decision is "legal" in nature if it applies a general norm backed by state power. A decision is "political" if made by an official on the basis of public policies which are not perceived as generally applicable norms. *See generally* L. FULLER, *THE MORALITY OF LAW* 46-49, 79-81 (rev. ed. 1969) and H.L.A. HART, *THE CONCEPT OF LAW* 20-25 (1961).

26. I make this statement based on the percentage of workers employed in agriculture. The Soviet Union's percentage (23%) is much higher than those of developed Western nations with a significant agricultural sector, including France (11.5%), West Germany (8.4%), Japan (12%), and the United States (3%). *THE WORLD ALMANAC & BOOK OF FACTS* 92, 535, 539, 551, 586 (1980).

dom guaranteed to each Soviet citizen is more clearly an aspiration than a fact in the Soviet Union than in our society, this does not necessarily place the Soviet Union on a wholly separate continuum of legal development.

The most difficult thing to judge from an examination of these two books of texts is whether the Soviet legal system will develop in a manner analogous to the Anglo-American model as time goes along. Certain similarities have developed; for example, the text of the 1977 Constitution is longer and more complex than earlier versions. On the other hand, it seems unrealistic to think that the Soviet legal system will move very close to the Anglo-American model of law without some historical break that dislodges the Communist Party from its pre-eminent position. Perhaps an economic collapse, or a revolt by non-Russian peoples, would cause such a break, but there seems to be little evidence that either possibility is imminent.

Finally, one is led to ask why Soviet drafters have inserted a provision into their constitution which seems to have a predominantly symbolic significance. One possibility, suggested by Mr. Unger in his book's introduction to the Constitution of 1977, is that some rights were added and particularized in the 1977 text because of various treaties and conventions on human rights which the Soviets feel obligated to honor in some fashion.²⁷ This explanation cannot apply to the freedom of conscience provision since it appeared in the Constitution of 1918 in language that closely resembles the present provision.²⁸ This fact does not infuse the provision with any more significance, but it does seem to indicate that freedom of conscience is an enduring and potentially significant symbol which will have to be honored at some point. The words of the American Declaration of Independence, similarly, are not binding in any legal sense, and yet they occasionally are used with great force in domestic American political discourse to justify demands for equality. Although it is hard to imagine at this point, freedom of conscience might be used someday, as can any authoritative text which functions symbolically, to challenge the very order that created it.

Just as the contribution of these two books lies in their making available in English Soviet and Russian legal texts, so the value of

27. See A.L. UNGER, *supra* note 6, at 194. For an inconclusive discussion of the opposing Soviet and Western attitudes on human rights in international law, see Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 VA. J. INT'L LAW 55 (1980).

28. This provision in turn seems to have originated in a decree of the Council of People's Commissars of January 23, 1918. See A. VYSHINSKY, *supra* note 1, at 607-08. Article 13 of the 1918 Constitution also promised "freedom of religious and anti-religious propaganda." See A.L. UNGER, *supra* note 6, at 28. This provision disappeared ominously in Stalin's 1936 Constitution.

that contribution must be measured in terms of whether they will lead scholars to consult them. On this score the Unger book is a success. It is attractively printed, laid out, and bound. It contains all the constitutional texts, and introduces them in a lucid fashion. By contrast, the Simons book is difficult to use because of the lack of an index, the aridity of the text (code upon code), and the thinness of the introduction. Surely if we can spend billions of dollars to build redundant nuclear warheads aimed at the Soviet Union, we can afford more and better books by which to understand exactly what is going on there.²⁹

29. There are afoot efforts to get the federal government to invest more money in Soviet Studies. See Scully, *\$50 Million Asked to Reverse Decline in Soviet Studies*, 26 CHRON. HIGHER EDUC. 1 (No. 6 April 6, 1983).

