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## Scholarship on Soviet Family Law in Perspective

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# SCHOLARSHIP ON SOVIET FAMILY LAW IN PERSPECTIVE

WHITMORE GRAY\*

## INTRODUCTION

The radical changes in the norms of Soviet family law over the past fifty years have reflected the convulsions of Soviet society as well as the revisions of Marxism-Leninism-Stalinism. This paper is a commentary on the writing in this field by Americans in particular, and by other non-Soviets in general. In view of the volume of writing in this field, it has been necessary to limit discussion in the text to a few representative articles illustrating a few of the subject matters treated and various typical approaches employed.

The topic is a particularly timely one, for new, comprehensive Principles of Family Law<sup>1</sup> went into effect in October 1968, and we therefore have a relatively recent restatement of Soviet thinking in this area. The paper will use the elements of novelty and continuity in the Principles as a focus for a backward look at our scholarship in this area.

In putting together this critical overview of the American literature, it has seemed to me helpful to keep at least one eye on what our European colleagues were doing during the same period (as well as perhaps both eyes on what was being written in England, since that was fully accessible to the English-speaking American reader). Since we suffer from our isolated common-law viewpoint in regard to family law, as in other private law areas, the views of European scholars also provide a helpful check on the apparent degree of deviation by the Soviets from more generally accepted patterns of norms.<sup>2</sup>

In evaluating the examples of writing chosen, a major criterion will be the balance of exposition and commentary achieved therein. Certainly it seems at first glance that we (and writers in other countries) have erred on the side of excessive exposition and re-exposition of the basic statutory material. Of course, this is a recurring problem in much comparative law writing, for

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This article is a commentary on a few selected items from a more exhaustive annotated bibliography prepared by the author. It contains over 300 items in Western languages on Soviet family law. The author would be glad to send a copy on request to any interested reader.

1. FUNDAMENTAL PRINCIPLES OF LEGISLATION OF THE U.S.S.R. AND THE UNION REPUBLICS ON MARRIAGE AND THE FAMILY, Ved. Verkh. Sov. SSSR, No. 27, July 3, 1968, Item 241, at 401 *et seq.* [hereinafter cited as PRINCIPLES].

2. A most helpful recent article in this regard is Mueller-Freienfels, *The Unification of Family Law*, 16 AM. J. COMP. L. 175 (1968). This masterful overview of many systems is helpful in putting both U.S. and Soviet family law in perspective, and is richly footnoted in the international literature in the field. For other general comparative perspectives see Rheinstejn, *Challenge and Response in Family Law*, 17 VAND. L. REV. 239 (1963); L.N. BROWN, *COMPARISON, REFORM AND THE FAMILY* (1967).

the person with linguistic ability and knowledge of the foreign "system" does not always have sufficient substantive expertise in the area under consideration to do more than report. Of necessity, he cannot have sufficient knowledge in all fields where he may be led in the foreign law to be a sophisticated analyst for those familiar with the subject matter at home.

He should, however, try to keep in mind the developments in his own country in the field during this same period. Writers in any comparative law field are likely to have the greatest impact when they are talking about what foreign legal systems are doing in respect to identified problems in the writer's own country. It is not only good journalism but also good comparative law scholarship to attempt to look at foreign institutions from the perspective of the expert reader, looking for foreign experience in connection with problems he has identified.<sup>3</sup>

Looking at comparative law work in general, my own feeling is that it is appropriate that Americans working with foreign law make it their first task to supply as much straight information as possible. Obviously they should balance statutory provisions with information about practice to the extent possible, and this is particularly true in the family law field, where we have recently come to rely heavily on a wide range of factual data for teaching and criticism.

As a practical matter, however, except for court decisions, very little data concerning the Soviet Union of the type needed for evaluation and criticism has been available to us until relatively recent times.

Furthermore, the Soviets gradually came to follow an approach to legal scholarship which resulted in a drying up of basic criticism and controversy subsequent to the final adoption of a particular normative position. To read a standard text of the fifties, one would not know that the leading Soviet writers had any interesting thoughts in their heads. Their only purpose in life appeared to be to expound and justify the law as it was. The revival of open criticism prior to the adoption of the new Principles in the various fields, beginning in the late fifties, shed a much more favorable light on the quality of Soviet legal thinking, but unfortunately we still do not have the benefit of anything like the continuing scholarly commentary we get on European legisla-

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3. Perhaps this is an appropriate point to add an apologia for undertaking a review of family law writing in view of my own lack of expertise in the field. We are, however, dealing with a field which I assume most American scholars approach with less expertise than they bring to many other areas of private law. While most all of us have had property, contract and tort courses, probably only a few studied family law in law school, and even fewer have had practical experience in the field. While we can take some comfort from the fact that relatively few of the best legal minds in this country have been attracted in the past to the family law area, this in fact makes it even more difficult for us to find adequate text material in preparation for comparative work. This fact should also encourage us to keep an eye on European writing in this field, for every lawyer, teacher and student there has had the family law material as a basic part of his initial law study, and the best civil law teachers regularly bring their broader viewpoint to bear on family law problems.

tion. Many of the authors who opposed particular points in proposed legislation became uncritical exponents if not proponents of the same rules upon adoption.

These recent spurts of controversy make us nostalgic for the early years of Soviet law, when people seemed to speak their minds with conviction, and often eloquence. Certainly some of this must have still been in the air when the young John Hazard went to the Soviet Union to begin his studies in 1934. In addition to his book *Settling Disputes in Soviet Society*,<sup>4</sup> which recreates the whole period, the literature of family law is blessed with an excellent collection of materials compiled by Rudolf Schlesinger, *The Family in the USSR*,<sup>5</sup> where he translates *in extenso* the debates connected with the adoption of the Family Code of 1926.<sup>6</sup> This single selection is the most stimulating, and at the same time the most discouraging, document I have read in relation to work in the contemporary family law material. It demonstrates eloquently what an interesting area family law can be, for the lively, at times earthy, debate among legal scholars, government officials and simple citizens shows the deep impact of family law on the traditional patterns of a society. On the other hand, one cannot help feeling somewhat frustrated by the realization that this kind of material is not available in connection with the intervening legislation, and only to a limited extent in connection with the new Principles. Perhaps we can console ourselves somewhat with the fact that a new wave of sociological data is now becoming available to liven up work in this field.

### I. THE NEW SOVIET SOCIOLOGY

Ten years ago Soviet family law was not a very exciting field of study. There had, of course, been some dramatic changes in norms over the preceding forty years, but neither the Soviets nor Western authors had done much to tell us about the background for changes, nor to furnish us with information concerning the results which they had produced in practice. In large part this was because of a firm Soviet doctrinal position opposed to sociology as a discipline and sociological method as employed in legal studies. In the *Great Soviet Encyclopedia* edition of the late fifties, for example, the only "true sociology" is stated to be dialectical, historical materialism.<sup>7</sup>

Somewhere around that time, however, perhaps in reaction against the "subjective" reforms of the Khrushchev de-Stalinization period, there appeared a movement aimed at finding out what actually goes on in society. The oversimplified past view of the identity of individual and collective interests

4. J. HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY* (1960).

5. R. SCHLESINGER, *CHANGING ATTITUDES IN SOVIET RUSSIA: THE FAMILY IN THE U.S.S.R.* (1949).

6. CODE OF LAWS ON MARRIAGE, THE FAMILY AND GUARDIANSHIP, R.S.F.S.R. Sob. Uzak., RSFSR, No. 82, Art. 612 (1926) (cited hereinafter as FAMILY CODE OF 1926).

7. *Sotsiologiya*, in 40 *BOL'SHAYA SOVETSKAYA ENTSIKLOPEDIYA* 202 (1957).

began to crumble. Both academic and governmental circles allowed themselves to become officially aware of a more complex picture of the wants and needs of the population, and interests quickened in collecting data of all kinds.<sup>8</sup>

The first indication of this was a sociology seminar begun at Leningrad in 1958, followed by the founding of the Soviet Sociological Society in 1961, and the first publications in the field of sociology in 1962.<sup>9</sup> Beginning in about 1964, this new interest made itself felt in the legal field. Particularly in the fields of criminal law, labor law and family law, there arose an increased awareness of the need to operate on the basis of data showing the problems to be solved and the effect of prevailing legal patterns of regulation.

Perhaps this interest in sociology of law was an inevitable reaction to the conceptualism of the Vyshinsky<sup>10</sup> era. Once the barriers were let down to allow differences of opinion, *i.e.*, once argument was permissible regarding basic assumptions, each side began to search for supporting data instead of simply declaring its point of view to be the truly orthodox one.<sup>11</sup> While the discussions of the draft criminal law and civil law codes were less than perfect illustrations of the fully developed movement, the range of fundamental propositions which were challenged gave some indication that a new spirit was in the air. Probably the full impact of this sociological approach was not felt, however, until the discussions of the Principles of Family Law. Indeed, this interest in the use of sociological data helped to account for the long delay in their appearance, eight years after the draft Principles of Civil Legislation were published.

The impact of sociology on family law studies has not yet been quite as dramatic as that on the criminal law field. For example, criminology is now taught at all law faculties, and in the doctrinal area, writers are now giving up the simplistic formula that the cause of crime is to be found in survivals of bourgeois mentality, and are looking at socio-economic factors in present-day society, *e.g.*, malfunctions of the government apparatus, improper rearing of children, and alcoholism.

As for the family, scholars have at least begun to turn their sociological attentions to the abiding problems in the area, and the legal scholars have

8. By 1968 a Soviet author could state, "To obtain a true picture of the social structure of socialist society it is necessary to study the difference between classes and between social groups within the classes." G. Glezerman, *The Social Structure of Socialist Society*, 1 CURRENT ABSTRACTS OF THE SOVIET PRESS (CASP), No. 6, 5-6 (1968). For an early skeptical view of the chances for success of this "sociological" revolution, see Labeledz, *Sociology as a Vocation*, 48 SURVEY 57 (1963).

9. See generally Schultz, *Der Einfluss der "marxistischen soziologie" auf das straf- und familienrechtliche Schrifttum im Ostblock*, 11 RECHT IN OST UND WEST 59 (1967).

10. See, *e.g.*, the chapter, "Family Law," by G.M. Sverdlov, in FUNDAMENTALS OF SOVIET LAW 358-400 (P.S. Romashkin ed. 1961), and passage quoted at note 14, *infra*.

11. It was also no doubt spurred by work being done in East European countries, which displays a considerable degree of sophistication. See, *e.g.*, *Mathematical Methods of Determining Alimony for Minors*, 2 CYBERNETICS AND LAW 1 (1968) [Institute of Law, Czech Academy of Sciences].

necessarily been swept along. Professor Kharchev, a Leningrad philosopher, in 1964 gave the first comprehensive look at the statistical background for analysis of many family law problems,<sup>12</sup> and this was just the kind of data which the drafters of the new Principles needed. For example, he showed that in fact of those seeking divorces, twenty per cent were already living in *de facto* marriages, thus raising questions as to the "social engineering" effect of the strict divorce laws.

A good deal of this material was made available to Western readers in an excellent article, "Motives of Marriage in the U.S.S.R.," by Professor Kharchev published in English in 1964.<sup>13</sup> Both his approach and the information presented were like a breath of fresh air in the Soviet family law field.

For comparison with his approach, here is a typical passage describing the basis of Soviet family law, taken from a 1961 text:

Marxist-Leninist teaching about marriage and the family serves as the ideological basis of Soviet family law. An examination of Soviet family law must therefore be prefaced by a brief summary of the most important principles of this teaching.

The history of the development of marriage and the family is determined by the condition and development of production relationships. . . . The Soviet family, as a family of new type, arises from and then develops on a completely different socio-economic basis than does the bourgeois family. If the essence of a bourgeois family depends on private property, the social nature of the Soviet family is determined in the final analysis by the socialist system of economy and by socialist ownership of the instruments and means of production.<sup>14</sup>

Contrast with this the opening of Professor Kharchev's article:

Of the various social institutions, the family is one of the most complicated. The fact that family relations are so manysided makes them depend on a great number of different social factors; such, for example as: the ratio of male and female population in a country or the moral standards in a community. Among these factors, however, the main is the economic system, which has an influence on the status and development of the family institution either directly or through other social factors, such as: the social position of women, the standard of living, State policy and law, social ideology and psychology.<sup>15</sup>

While Kharchev concedes the existence of an economic determinant, he is obviously oriented toward a look at society as it exists, in the hope of understanding how it functions. Instead of continuing with theoretical considerations, he goes on to point out that the 1959 census showed that the number of women in the USSR exceeded that of men by 20.7 million, and that "[a]ll that, of course, has an influence on consciousness, mind and behavior of

12. A.G. KHARCHEV, *BRAK I SEM'YA V SSSR* (1964).

13. Kharchev, *Motives of Marriage in the U.S.S.R.*, 8 ACTA SOCIOLOGICA 142-154 (1964).

14. 2 SOVETSKOE GRAZHIDANSKOE PRAVO 467-469 (P. Orlovskii ed. 1961).

15. Kharchev, *supra* note 13, at 142.

people. . . . That is why the present status of marriage and family in the USSR cannot be viewed upon [sic] as a result of the socialist reorganisation of the economic and social structure."<sup>16</sup>

Kharchev's article is largely the result of a questionnaire given at the end of 1962 to marrying couples in the Leningrad registry office, and also an analysis of the certificates of marriage in the registry offices in the cities of Tumen and Kefe, in the Mga district of the Leningrad region, and in the Uzbek Soviet Socialist Republic. He goes on to discuss the representativeness of the sample and the technique of oral interviewing of some of the young couples at the time of their filling in the questionnaire, sounding just like any sociologist trying to justify the survey research method he has used. While the author makes a number of comments to show how these data fit in with Communist socialist theory, he provides us with a great deal of information from which we are free to draw our own conclusions. The statistical tables are ample, and the article is likely to be of lasting value to anyone doing work with Soviet marriage and divorce law.

We might cite as American parallels articles like Kent Geiger's "Deprivation and Solidarity in the Soviet Urban Family,"<sup>17</sup> or Richard Pipes' "The Muslims of Soviet Central Asia,"<sup>18</sup> for both contain attitudinal material gathered in interviews. These products of refugee interviewing were particularly valuable additions to our source materials at a time when the Soviets were not generating anything similar themselves, and the information from this self-selected, aging sample will no doubt continue to be of interest to those doing historical work. Fortunately the Soviets seem now to have taken up the task of supplying ample data for analysis of current problems.

## II. THE LITERATURE IN REVIEW

Before we begin our look at the writing in the field, we might first take stock of our present very favorable position as to original source material in translation. The most recent addition to the already considerable volume of older work is the excellent set of materials put together by Harold Berman in the Summer 1968 issue of *Soviet Statutes and Decisions*.<sup>19</sup> Recently added to this is the revised material in the new Hazard, Shapiro and Maggs casebook,<sup>20</sup> so even the English-only reader has the basic statutory material and a good selection of illustrative cases available to him. In addition, there are scores of articles translated in *Current Digest*, *Current Abstracts*, and *Soviet Law and Government*.

We should not forget, however, that this was not the case when almost

16. *Id.* at 143.

17. 20 AM. SOC. REV. 57 (1955).

18. 9 MIDDLE EAST J. 147 (1955).

19. 4 SOVIET STATUTES AND DECISIONS No. 4 (1968).

20. J. HAZARD, I. SHAPIRO & P. MAGGS, *THE SOVIET LEGAL SYSTEM* (Rev. ed. 1969).

all of the material here under consideration was written. When we find a high level of simple exposition on the part of sophisticated writers capable of much more penetrating analysis, we should realize that they could not assume that the basic information could be obtained by their readers directly from translated sources. In fact, because of the disarray in Soviet legal materials, it used to be much more difficult than it is now even to put together such an overview of statutory provisions.

When we look at the mass of American and Western writings as a whole, my impression is that there have been some moments of greatness, and that in view of the manpower devoted to the task the overall results are indeed respectable. Because of time and space limitations I had to be selective in the material that follows both as to topics and as to representative literature.

Before proceeding to some of the particular topics, perhaps a few words are in order about the more general publications which attempt an overview of the whole of family law. The most impressive of the studies is certainly the Schlesinger collection of materials and comment already mentioned. It is really the only work of this scope in the field, and the next category is made up of survey articles and chapters in books.

Here, the chapter in Gsovski's two-volume text on civil law<sup>21</sup> is typical of several. In 26 pages he summarizes the legislation up to about 1947 and gives a fair amount of commentary on the practice as reported in official sources. Early in my own study of Soviet law, he told me that one must always try to compare the Soviet result with what the Russians would have done had there been no revolution. Even though this may have been his personal bias, it is not much in evidence here, and the account is relatively complete and informative.<sup>22</sup> The Gsovski articles in the field are based on this work, and the chapter in his later work with Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe*,<sup>23</sup> is of lesser quantity and quality. General articles by Hazard and Berman are discussed below in other contexts.

We are fortunate to have available some excellent writing which gives us perspective concerning the relationship between traditional Russian or other indigenous family law patterns and modern Soviet law. In fact, the writing in the family law field has given us some particularly successful examples of what might be done in other areas of Soviet law, and so is particularly worthy of note.

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21. V. GSovski, 1 *SOVIET CIVIL LAW*, pt. 3 (1949).

22. As is the case with other substantive writing about this period, a helpful complement is provided by John Hazard's thorough work on the functioning of the legal system in its early years, *SETTLING DISPUTES IN SOVIET SOCIETY* (1960). While there are only a few family law cases discussed directly, the book is extremely helpful in portraying the system which was applying the rules.

23. V. GSovski & K. GRZYBOWSKI, *GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE*, Ch. 41, *Sovietization of Civil Law, Soviet Union* (1959).



For the general history of Russian family law, the first part of Harold Berman's general article on Soviet family law written while he was a student at Yale Law School, "Soviet Family Law in the Light of Russian History and Marxist Theory," remains the basic work.<sup>24</sup> The treatment is both imaginative and thorough.

In addition, we are fortunate to be able to turn to other sources in English for pre-Revolutionary material. Maxime Kovalevsky's lectures at Oxford in 1889-90<sup>25</sup> included two masterful lectures on "The Matrimonial Customs and Usages of the Russian People" and "The State of the Modern Russian Family at the End of the Nineteenth Century." A standard reference work is of course Vernadsky's *Medieval Russian Laws*, published in 1947. This type of scholarship was handsomely supplemented recently by the appearance in 1966 of *Muscovite Judicial Texts 1488-1556*, edited by H. W. Dewey, and perhaps we can continue to hope for serious work in this field in years to come. A different background for the study of modern Soviet law is given by two excellent books published in Tien tsin in 1937 and 1938 by Professor Riasanovsky, *Fundamental Principles of Mongol Law and Customary Law of the Nomadic Tribes of Siberia*. These fascinating anthropological descriptions of customary family law in important areas of the Soviet Union open one's eyes to the ethnic as well as historical perspective of the work which may someday be done in looking at Soviet family law norms and their impact on the widest possible variety of societies to which they have been applied. Pipes' recent article, "The Muslims of Soviet Central Asia,"<sup>26</sup> is a much less scholarly look at a similar topic, but does not do more than raise questions for further work.

Another good treatment of the continuity theme is Bernice Madison's "Russia's Illegitimate Children Before and After the Revolution."<sup>27</sup> Since the problem of how to treat the illegitimate child has been one on which the Soviets have taken almost every imaginable position at one time or another over the last fifty years, this is a very helpful perspective to have for analysis of the present and future norms. For example, she cites figures showing the rate of illegitimate births during the years 1884-92, and states that the figure was low in comparison with other countries in Western Europe.

Another recent piece demonstrates the need for perspective from related fields of law in addition to that of historical development. William Shinn, in "The Law of the Russian Peasant Household"<sup>28</sup> gives a look at the rural family as an economic as well as social unit during the latter part of the nine-

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24. Berman, *Soviet Family Law in the Light of Russian History and Marxist Theory*, 56 YALE L.J. 26 (1946).

25. M. KOVALEVSKY, *MODERN CUSTOMS AND ANCIENT LAWS OF RUSSIA* (1891).

26. 9 MIDDLE EAST J. 147-62, 295-308 (1955).

27. 22 SLAVIC REV. 82 (1963).

28. 20 AM. SLAV. & EAST EUROP. REV. 601 (1961).

teenth century and into the Soviet years. Shinn's account of its near-demise, then resurrection by the Soviets is a major contribution from original sources, and is of course also of interest in connection with work with personal property, inheritance and land law.

The following sections take up writing dealing with selected topics in contemporary Soviet law: marriage and divorce, matrimonial property, illegitimate children, relationship between parents and children, adoption and abortion.

### A. *Marriage and Divorce*

In December 1917, during the second month of the Soviet regime, civil marriage and consent divorce were substituted for the strict religious control which had prevailed under the Tsars. These decrees were replaced in 1918 by a Code of Laws Relating to Acts of Civil Status, Marriage, Family and Guardianship. In 1926, the new Code of Laws on Marriage, Family and Guardianship set forth the general principles which were to form the basis of Soviet family law until the new Principles were adopted in June 1968, to go into effect October 1, 1968.

Many changes occurred in the period under the 1926 Code, however. Under the Code, civil registration of marriage was declared optional, and was to serve simply as evidence of marriage. The requirement of registration was restored in 1944, however, and after that date only marriages registered with the Civil Registry Office were to be accorded recognition. After 1935, divorces were made more expensive to register, and in 1944 litigated divorce was re-introduced, with the result that divorce became difficult to obtain under the court procedures and standards prescribed. This series of changes was well reported in articles of the period, though with only occasional insight into results of the previous norms and the reasons for the new rules.

A fine exception is Peter Juviler's article, "Marriage and Divorce,"<sup>29</sup> published in 1963, a model for modern writing on Soviet law. It is packed with human interest, the flavor of academic controversy, and the sweep of historical perspective. As he moves through divorce law from the Imperial period to the early sixties, the reader is given an excellent view of the attitude of the ordinary Soviet citizen toward divorce law. Excellent interview material is used to balance the reports of formal proceedings.<sup>30</sup> For example, a people's court judge is reported as saying, "In my eight years as a judge, I have had only two cases of reconciliation. Of these only one worked. The other couple came back again in four months."<sup>31</sup> He gives an excellent feeling

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29. Juviler, *Marriage and Divorce*, 48 SURVEY 104 (1963).

30. Interviewing has now become respectable. Cohen, *Interviewing Chinese Refugees: Indispensable Aid to Legal Research*, 20 J. LEGAL ED. 33 (1967). Compare Harold Berman's justification of this "not generally recognized technique of legal scholarship" in *Soviet Law Reform—Dateline Moscow 1957*, 66 YALE L.J. 1191 n.2 (1957).

31. Juviler, *supra* note 29, at 107.

for the public pressure which has been built up behind reform in the divorce area. "Three hundred thousand divorces pass through the courts yearly. Many thousands of others pass around them. The masses have been evading the law; it took the writers, journalists and lawyers to articulate their problems. Without their criticism, divorce reform might never have been considered at this time."<sup>32</sup> He then goes on to summarize the various attitudes toward possible changes, such as the introduction of unregistered marriage, or a compromise on divorce by mutual consent in cases where there are no children.<sup>33</sup> He even expresses the doctrinal debates between leading theorists.<sup>34</sup>

This type of article appears to me to be as original and informative as any written by the Soviets themselves in the same period, and could well be cited as an example of a creative input on the part of a Western scholar,<sup>35</sup> no doubt of interest to the Russians themselves.<sup>36</sup>

The new Principles restate much that was already familiar in this area. As for marriage, they generally continue the prior legislation, *i.e.*, a registered marriage is the only normal way of forming a legal conjugal unit. Some details are provided for in the Principles, but some latitude is also left to the new republic codes. For example, marriage age is set at 18,<sup>37</sup> but a lowering by not more than two years may be provided for in the republic codes. This was a point on which there was a distinct lack of uniformity in the old codes, and was probably one where a single, uniform solution was not worth the battle.

It raises a question in connection with our scholarship, however, for we can ask how well the fact of diversity, as well as particular diversities, have been apparent in the writing in the field. This is more than an academic question, of course, for the family law field, like inheritance, is one where specific information is likely to be needed by the practicing lawyer. While many writers mention the diversity, most limit their reporting to the RSFSR provisions. Gsovski gives an almost complete resume of the provisions of 25 years ago, inaccurate only by its omissions.<sup>38</sup> The real problem, however, is

32. *Id.* at 111.

33. *Id.* at 111.

34. *Id.* at 112.

35. Though a Western scholar of a particularly American bent, we might add. Europeans are more likely to prefer scholarly, theoretically oriented studies where the Soviet material is noted, though of less interest. *See, e.g.*, O. BRUSIN, ZUM EHESCHEIDUNGSPROBLEM (1959).

36. The Russians no doubt also had an eye on the writing coming from other East European countries in this area. Polish studies in the divorce field have provided a good deal of insight, *e.g.*, Gorecki, *Recrimination in Eastern Europe: An Empirical Study of Polish Divorce Law*, 14 AM. J. COMP. L. 603 (1966). The Soviets also will benefit from a typically thorough study of Soviet divorce law which appeared in Germany in 1967. In 445 pages of detailed text and extensive footnotes Florkowski gives a kind of treatment to the substantive and procedural law in the field that will not likely be produced in this country. Perhaps it will not come until (if ever) we come to have doctoral students with legal training to turn loose on topics like this.

37. PRINCIPLES, Art. 10.

38. V. Gsovski, *supra* note 21. A more detailed summary by individual republics appears in Freund, *Das Zivilproze Brecht in der Union der sozialistischen Sowjetrepubliken*, in Leske-Loewenfeld, DIE RECHTSVERFOLGUNG IM INTERNATIONALEN VERKEHR 318-

that this kind of exposition is not the kind of thing most people think is interesting to write (or read!) about. Hopefully we will be blessed with another treatise-writer in the near future or will expand our supply of well-indexed, translated original source materials to fill the need for information.

As for divorce, the new Principles finally succumbed to public pressure for easier divorce and less cumbersome procedures. I say finally, for while new court procedures had already been introduced in 1965, the draft of the Principles failed to make any further concessions. The final version took the plunge, however, and consent divorce by simple registration is now available where there are no children. Contested divorces, and those where children raise third-party interests, remain in the courts, where the single ground for divorce continues to be the total "breakdown" of the marriage, *i.e.*, the court's finding that a continuation of conjugal life is impossible.

The novelty of this unique ground was mentioned in a good deal of writing in the past, though most of the writers neglected the opportunity to impose a helpful analysis on the quantity of individual reported decisions that poured out of the Soviet courts. With our present perspective, this was an unfortunate example of failure to use domestic insights in comparative writing, for this could have been instructive at a time when the "breakdown" theory was gaining ground in the United States and other Western countries.<sup>39</sup>

### B. *Matrimonial Property*

The problem of property rights between spouses presents a particularly interesting area for comparative analysis of Soviet law. Not only is there a continuing influence of Russian thinking in the field, but there is the impact of ideology and economic realities to observe. Perhaps most difficult, there is the long period when *de facto* unions commonly replaced technical marriages, obviously significant and yet difficult to evaluate without interview or survey data from the period.

John Hazard's contribution to the 1955 Friedmann symposium on matrimonial property published in 1955 gives a good review of the early years.<sup>40</sup> He illustrated his summary of statutory provisions with a number of Soviet cases, letting the reader see directly the inconclusiveness of many of the court decisions as guides to identifying firm rules of law. A 1967 article by the late E.L. Johnson, "Matrimonial Property in Soviet Law,"<sup>41</sup> recapitulates the earlier material, and then gives a very thorough, scholarly treatment to

74 (1933), and a more accurate (and up-to-date) summary in A. BILINSKY, *DAS SOWJETISCHE EHERECHT* (1961).

39. A group of Anglicans, appointed by the Archbishop of Canterbury, urged replacement of existing grounds for divorce in England with a single basis for relief—the irretrievable breakdown of the marriage. *PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY. A REPORT TO THE ARCHBISHOP OF CANTERBURY* (1966).

40. *Matrimonial Property Law in the U.S.S.R.*, in *MATRIMONIAL PROPERTY LAW* (W. Friedmann ed. 1955).

41. 16 *INT'L & COMP. L.Q.* 1106 (1967).

the subject matter in more recent law. There are copious citations to primary material in the notes, and the discussion is generally more substantial than that in many standard Soviet texts. The article places Soviet law in the perspective of other developed systems, showing that in general the system of acquests is in accord with much progressive thinking in Western countries. As to one of the real difficulties which exist under such a system, however, *viz.*, the question of liability for debts, he points out that the Soviet legislator has not faced the problem,<sup>42</sup> that the courts have evolved no clear practice, and that the Soviet jurists have elaborated no generally acceptable doctrine. The article is an excellent example of Soviet practice taken seriously by a comparative scholar, who is willing to accept the proposition that there is in fact "comparability" in the institutions, and that as a result constructive insight may be obtained by a look at the Soviet system.

One might have hoped for inclusion in the Johnson article of the impact of the other interrelated institutions, *viz.*, the mutual obligations of support of the spouses, and the spouses' rights to inherit each other's property. Perhaps this more imaginative treatment is a particularly appropriate one in looking at the Soviet materials, for the variety of permutations in each of the three areas over the last fifty years leaves the field wide open for helpful comparative comments.

### C. *The Illegitimate Child*

Ever since the late fifties, Soviet civil law professors have been saying that the question of what to do with the illegitimate child would be one of the stumbling blocks in the formulation of new general principles in the family law area. The prevailing norms were much criticized at home and abroad, but a consensus on a new solution was hard to find.

Immediately following the revolution the concept of illegitimacy was abolished, and all distinctions between legitimate and illegitimate children were erased.<sup>43</sup> Blood and not marriage was to determine who had the responsibility to support and to rear a child. An unmarried mother could present to the registry office in her place of residence a declaration showing the time of conception and the name and place of residence of the putative father. Following this action, which had to be taken not later than three months before birth, notice of the declaration was then sent to the person named as father, who had two weeks to contest the mother's claim before a court. If he did not contest it, he was held to have acknowledged paternity. Under the subsequent 1926 Code,<sup>44</sup> the limitation on the period for the mother's filing of her

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42. The Principles also failed to answer this problem, so it will be left to the ingenuity of the individual republic drafters.

43. CODE OF LAWS ON ACTS OF CIVIL STATUS, MARRIAGE, FAMILY AND GUARDIANSHIP Art. 133 (Sob. Uzak., RSFSR, 1918, Nos. 76-77, Art. 818). See also note 27 *supra*.

44. FAMILY CODE OF 1926, *supra* note 6.

declaration was removed, so that she could do so before or after the birth of the child, and the father's period for contest was lengthened to one month, with a proviso that he could challenge the court decision decreeing paternity within a period up to a year (during which time, however, he had to continue support).

In 1944, all this was changed.<sup>45</sup> While the concept of illegitimacy was not re-introduced, the law abolished the mother's right to have paternity established and thus the child's right to obtain support. The child no longer got the father's surname, nor could he inherit on equal terms with children of a registered marriage. He remained fatherless unless the father married the mother and acknowledged paternity.

Despite this apparent ban on paternity suits, an exception was available indirectly through Article 42<sup>46</sup> of the RSFSR Family Code, which the courts have recently used extensively. A right to continued support was available if the child had at any time been a *de facto* dependent of the defendant, though the defendant in such a suit was not recognized as the father and the child did not acquire any rights except alimony.

The debate raged long and hard. When asked about the new Principles during their drafting in 1967, a staff member of the Institute of State and Law responded, "The division of children into two effectively unequal categories—'legitimate' and 'illegitimate'—has long been obsolete. A child cannot and should not be responsible for his parent's thoughtless or amoral actions. Nor is there any reason to exempt parents from material responsibility for their children."<sup>47</sup>

When the draft appeared, it contained a compromise on this point. Paternity suits were again to be available, but only against fathers who cohabited and maintained a common household with the mother before the child's birth, or who participated in the rearing or support of the child after birth.<sup>48</sup> Vigorous debate ensued, and when the final version appeared, one additional concession had in fact been made. Paternity could also be established on the basis of other evidence which reliably established the father's own acknowledgment of paternity.

While the provisions are hardly a model of clarity, it is at least clear that the child of the casual union, who is subsequently rejected by the father, is left without name or support. The question which remains is: Why? It is because of this question that I have gone into the background of this particular rule in some detail, for it poses an important, typical dilemma for Western

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45. Law of 8 July 1944, §§ 20, 21 (Ved. Verkh. Sov. SSSR, No. 37(297), 16 July 1944).

46. *Id.*

47. *On Family Law*, 19 CURRENT DIGEST OF THE SOVIET PRESS (CDSP) No. 6, 15-16 (1967).

48. PRINCIPLES, Art. 16.

scholarship. What is our function in commenting on this course of development and the particular result? Should we be content simply to observe in passing that this rule leaves many children in the Soviet Union in a position long since abandoned by most enlightened Western systems? Or should we as Kremlinologists try to locate the power center responsible for this conservative decision? Perhaps as sociologists we should try to determine ourselves whether this decision does in fact reflect public opinion on this point, *i.e.*, whether the strong voices urging a full return to the right to prove paternity were unrepresentative of general opinion.

Certainly the last course does not really seem open to us. While we should obtain and use a large measure of personal interview input, as was done successfully in the Juviler article mentioned above, we are certainly in no position to take public opinion polls. Since the pattern of non-antagonism on the part of academics to recently-decided basic propositions seems still to be in firm control in the Soviet Union, it also does not seem likely that Soviet scholars will be very helpful in their criticism.

As historians, perhaps we should at least observe that this may be in part a long-term carry-over of the especially disadvantageous position of the illegitimate child in Tsarist times, but we are short on data to support this conclusion regarding the causal relationship. We unfortunately lack the kind of statement we find in the Schlesinger material regarding the 1926 Code: "As to the question of the marrying age, quite a number of comrades have argued that 16 is too low a marital age for girls. A considerable number of rural delegates, too, demanded that this minimum age should be raised. This is a matter for careful handling. Why did we choose 16? Sixteen is the customary norm, which existed even before the Revolution. We feel that it reflects reality."<sup>49</sup>

Perhaps we should Kremlinologize, but I think we should do this with a great deal of caution, realizing that we should first do more general work with the question of the functioning legislative process in the Soviet Union before spending an undue amount of time tracing one provision. At the very least, however, an American writer commenting on such a result can give a kind of Soviet historical perspective which a Soviet author might not choose to impart. He might suggest, here, for example, that the present provision is in some way a return to the early years, when *de facto* marriage was sanctioned as the basis for family relationships. In other words, as far as the parent-child relationship is concerned, there are cases where acts will be held even against the will of the party to speak louder than registration. In addition, registration of the marriage may be voluntarily circumvented, for this effect can also be obtained by a joint parental declaration, including parents

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49. SCHLESINGER, *supra* note 5, at 152.

of children born before October 1, 1968. (If the children have now attained maturity, however, such establishment of paternity is to be allowed, however, only with their consent.)

Perhaps we should go on to speculate as to the effect of this legislation on other areas of family law. For example, it has been said that 20 percent of the divorced couples in the past were already living in new *de facto* marriages, and a motive for divorce was that it was necessary to legitimate the children of the new union. Probably this kind of writing is not particularly helpful, though, and we do better to stick to the fields of exposition and analysis.

#### D. *Other Topics*

There are a number of other topics on which interesting writing has appeared, and even more which we may hope will be the subject of writing in this area in the future.

For example, the whole area of the relationship between parents and children has been only partially covered. John Hazard's article, "The Child Under Soviet Law,"<sup>50</sup> surveys the early developments on questions of support, and suggests a number of topics for further development. The question of how to resolve disputes between parents connected with the upbringing of children is one which is of current interest to Soviet authors, and is likely to receive more detailed regulation in the new republic codes, for it was avoided in the new Principles. Mutual obligations of support, parental responsibility for juvenile offenders, and many other questions will continue to be of interest, particularly if the promised supply of sociological data about the family materializes.

Detailed regulation of adoption has also been left largely to the republic codes. Article 44 of the new Principles alone has five items referred to republic legislation, and the other adoption articles show the same pattern. This is a field where we can hope for some imaginative treatment of Soviet attitudes along with Soviet legislation. For example, the Soviets seem obsessed with the idea of secrecy of adoption, perhaps reflecting traditional attitudes which at least in other countries are undergoing substantial change. They do not as yet treat such contemporary topics as inter-racial adoption, or adoption by single persons, and we can expect sociological data input to have an impact on Soviet legal writing in this field.

Of course, this is a good example of an area in which we as lawyers are not sure just what our role should be. Is it simply to comment on the distinctions between invalid adoptions and adoptions which have been terminated (as a good deal of the Soviet writing does), or is to explore the relationship between the society and the norms in force? Perhaps our own recent rethinking of the teaching of family law and the role of the lawyer in family problems

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50. 5 U. СНИ. L. REV. 424-445 (1938).



will allow us to serve as realistic (if not cynical) critics of the Soviet proposals in this field.<sup>51</sup>

#### CONCLUSION

Taken as a whole, there is reason to be satisfied with the work done in this field to date. Both American lawyers and sociologists have made creative contributions, and the groundwork for more interesting work in the future has been laid.

If there are only a few of the pieces of past work which will be of lasting interest, this is simply because the writers chose journalistic exposition as their goal and the subject matter of their writing no longer exists. For the good of many people who have to use material in this field in a practical way, let us hope that we do not eliminate good expository writing entirely. Let us simply hope that it not be used as a substitute for translation, where that would be of even more utility.

In fact, close analysis of the present round of new legislation, *i.e.*, new Principles and new republic codes, may give us further insight into the functioning of the legislative process today in the Soviet Union. For example, it will be interesting to see how high a level of uniformity is maintained through informal channels on the many points left to the republic codes for solution.

The thing we can look forward to is a chance to use the new information about Soviet attitudes and the functioning of Soviet society in future analytical writing in the family law field. The experience of those working on Communist China is very relevant here, for the dearth of official normative output has forced them to work with much soft data from the beginning. Hopefully we will now have the best of both worlds, as the Soviets generate data for us along with turning out ample statute and case material, and we can in addition verify both kinds of information by personal observation and research *in situ*.

Perhaps the family law material can serve as a basis for work on some general topics in Soviet law. For example, it is perhaps the time to do a legal-method study on the creative role of the Soviet judge under present statutory provisions and practices.

In a number of provisions the new Principles give the court (or in some instances the Soviet executive committee) a broad discretion to formulate rules for individual cases. For example, the extended right of support of a spouse accorded under the new Principles<sup>52</sup> may be limited or eliminated by a court, taking into consideration the circumstances of the individual cases, *e.g.*, the shortness of the marriage or shortcomings in the past in the conduct within the family on the part of the spouse asking for support. We have also

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51. See, *e.g.*, George, *New Directions in Family Law Teaching*, 20 J. LEG. ED. 567 (1968).

52. PRINCIPLES, Art. 13.

discussed above the positive role of the court in divorce cases because of the vague "breakdown" standard. It would be interesting to trace the gradual development of this confidence over the years, for the present situation is a sharp contrast with the early days of the regime described so well by John Hazard in his *Settling Disputes in Soviet Society*. At that time, the pattern was one of continual distrust for the decisions of judges, leading to a system of checks through special tribunals, an appellate hierarchy, and eventually the unfortunate possibility of interminable review of decisions which persists to the present day.

In conclusion, I would be happy if this brief treatment of a few of the many topics which might have been chosen has at least aroused some enthusiasm for future work in this area.