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DOMESTIC RELATIONS IN SOVIET LAW

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DURING RECENT YEARS there has been a tendency to regard the changes in the Soviet law of marriage and divorce as an admission of the failure of Marxist social doctrine. One must, however, view those changes with some caution; they are changes of form rather more than of substance. The basic postulates of the Marxist doctrine of the family as a social phenomenon remain unaltered, and there has been no decisive shift in emphasis in the civil law which they condition. It must be realized that Soviet legal theory is still struggling to reconcile social stability with the conception of the Soviet in its transitional phase from capitalism to collectivism. Russian law is, in consequence, in almost every aspect in a state of flux and characterized by experimentation. In Lenin's own words the present state of the dictatorship of the proletariat signifies a régime "not bound by fixed legal norms." If the outward forms of bourgeois legal institutions such as marriage and the family have in recent years tended to become more consolidated, that may imply nothing more to Soviet theorists than a temporary and entirely utilitarian adjustment of the new social mechanism to the traditional civil law categories. It does not necessarily indicate a fundamental alteration in the Marxist conception of the husband and wife and parent and child relationships. Engels' thesis that in the classless society of the future the economic basis, and hence the formal institution, of marriage would dissolve and be replaced by true love and affection and a decline of prostitution, would still seem as intrinsic an hypothesis in dogmatic Marxism as the conception of the withering away of the state. Just, however, as the latter is being proved more and more an illusion, so has Engels' naive conception of the family been unrealized. While hesitating, therefore, to ascribe too much significance to the contemporary development in the Soviet law of marriage, one may legitimately discover in it proof that concessions must be made to the natural law if only in the interests of State expediency.

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The Czarist Civil Code of Marriage was largely of canonical origin. It required for the validity of a marriage between Christians a religious ceremony appropriate to the denomination of the parties. The only exception was a marriage between sectarians of the Orthodox Church known as the Old Believers, which had to be registered by the police. The form and validity of the marriage of non-Christians was regulated by the laws or customs of the religion or society to which the parties belonged. Marriages of Jews were required to be in the form prescribed by the Talmud. The relevant religious law likewise determined the capacity of the parties to marry. Orthodox believers over eighty, for example, were incapacitated from marrying by a synodal decree of 1744 which asserted that "marriage is established by God for the increase of the human race, which is completely hopeless to expect from anyone eighty years old." Divorce was likewise a matter of ecclesiastical or customary law. The Russian Eastern Christian Church permitted divorce on the grounds of adultery, impotency, conviction for penal offences with deprivation of civil rights, absence without indication of whereabouts by one spouse for five years, and the decision of the spouses to enter the religious life. The divorce decrees of the Orthodox ecclesiastical tribunals and those of the Protestant tribunals were recognized by the imperial law. There was no divorce between Catholics, and questions of nullity and separation involving Catholics were reserved for the appropriate ecclesiastical processes.

The Revolutionaries displayed characteristic haste in abolishing all institutions of status, and repudiating all natural relationships of superior and inferior. Marriage in their eyes was exclusively a matter of contract, an association based on consensus, and in no sense organic. Lenin proclaimed that "it is impossible to be a democrat and a socialist without immediately demanding complete freedom of divorce." In the first enthusiasm of the Revolution, Bukharin stigmatized the family as "a formidable stronghold of the turpitudes of the old régime." Alexandra Kollontai asserted that "the family is ceasing to be a necessity both for its members and the State." In 1927 Professor Brandenburgsky, who as a legal theorist enjoyed a privileged position in the Soviet hierarchy, asserted that "the family creating a series of rights and duties between spouses, parents and children, will certainly disappear in the course of time and be replaced by government organization of public education and social security." Legislation attempted to give formal recognition to this doctrine. Two decrees of 19 and 20 December, 1917, consolidated in the Code of 1918, abolished the old ecclesiastical laws and jurisdictions, and substituted for them a new law of civil marriage and divorce. Only civil marriage was recognized. It could be contracted by registration and dissolved by mutual consent. The practice arose of divorce by postcard addressed to the registrar's office. In the absence of mutual consent the divorce procedure was based on the petition of one party. No grounds other than consent or incompatibility were required. The only concession made to the natural law in this legislation was in the rules relating to capacity. Males of eighteen and females of sixteen years of age alone could contract marriage, and marriages between ascendants and descendants, brothers and sisters were proscribed. The more doctrinaire elements in the Soviet remained dissatisfied with the survival of even these vestiges of the tradi-

tional institution of marriage, and after 1918 the general trend of legislation was in the direction of the complete elimination of the concept of marriage from the law. The 1926 Code of Marriage Laws[1] represents the ultimate formulation of the doctrinaire view. It was no longer necessary for parties to register in order to marry. Their de facto cohabitation, together with circumstantial evidence of the relative permanence of the liaison, alone sufficed. All judicial procedure for divorce was abolished. The bond between the parties could be severed unilaterally and without stating reasons; when the consensus of one party was withdrawn the basis of the marriage disappeared. A common surname might be employed as the parties pleased. If one spouse changed his or her abode there was no obligation on the part of the other to follow. Neither spouse enjoyed any evidentiary privilege in litigation involving the other. It followed logically from this view of marriage that not the formal institution but mere fact created the relationship of parent and child, and all distinction of legitimacy was abolished. In the new millenium, which in the early 1920's was regarded as impending, no legal significance whatever would be attributed to the husband and wife and parent and child connections. No obligation on the one side or the other would arise from these connections. In the 1918 Code nothing was said of the obligation of maintenance and support save where the spouse or child was destitute, and in this latter case the rationale of the obligation was not a natural relationship but the desirability of transferring from the State to the individual the economic responsibility for the non-productive elements in society. The duty of maintenance was specifically incorporated in the Code of 1926, but again the motive was the same. The Soviet did not intend to make a social security system a substitute for the economic dependence of the infant and disabled upon their next of kin. This is clear from the judicial interpretation of the provision in question. As the Supreme Court of the Soviet stated in a judgment in 1929, "the right of maintenance may not be used as a means of promoting parasitism and leisure of some members of the family at the labour and expense of others."

The prevailing attitude towards sexual relationship was reflected also in legislation in 1920 legalizing abortion, and in the failure of all the Soviet codes save those of Georgia and Azerbaijan to penalize bigamy. In those Republics the motive behind the employment of the law in the suppression of bigamy was the elimination of polygamy as "a relic of tribal society, based on the exploitation of woman's toil." The Federal Supreme Court in 1929 even went so far as to confirm on appeal the decision of an inferior court that two persons were entitled to share as wives in the distribution of a deceased's estate. Bigamy ceased during the 1920's to have any juridical significance, and was regarded as a sociological concept alone. In none of the other Republics was incest or homosexuality a criminal offence.[2]

The more responsible elements in the government of the Supreme Soviet would seem to have been early aware of the moral excesses which the orthodox theory and its implementation in the law invited and encouraged. Lenin himself exclaimed "our youth has gone mad, completely mad. It has become the evil fate of many young

[1] R.S.F.S.R. LAWS 1926, *text* 612. Translated in 2 GSOVSKI, SOVIET CIVIL LAW 239 (1948).

[2] See generally BERMAN, JUSTICE IN RUSSIA ch. 12 (1950); 2 GSOVSKI, *op. cit. supra* note 1, at 118.

men and girls. Its devotees assert that this is Marxist theory." Official pronouncements on marriage became less and less extravagant in their terms, and promiscuity was increasingly discouraged. According to the few statistics available to us, whether or not they are reliable, the powers that be had occasion for alarm by the mid-1930's. In Moscow in 1935 the number of abortions (estimated at over 12,000 a month) exceeded substantially the number of births. In 1935 for every 1,000 marriages there were 383 divorces. (It is assumed that the figures relate to registered marriages, and it may be taken that the incidence of "divorce" was much higher in the case of unregistered "marriages.") The dissolution of family life brought additional evils in its train, not the least of which was a staggering spread of juvenile delinquency. The administrative branch of the Procuracy was overburdened with the task of locating putative fathers, entertaining affiliation suits against them, and enforcing payment of maintenance. Anyone with experience in this field in our courts will appreciate the impossible task which the Procuracy was expected to undertake. The problem of the unmarried mother became one of economic urgency and national importance, especially since it occasioned widespread absenteeism from factories and farms.

After 1935 the pendulum began inevitably to return to the opposite extreme.[3] The traditional institutions of social stability were consolidated by a series of steps which indicate an awareness of the need for continuity with the past and of a sense of tradition. The objectives were the elimination of delinquency, the increase in the birth rate, and the integration of the family in the economic system. In their totality those steps were characteristic of the new phase of Soviet policy which has become defined as "Stalinism," the indefinite projection of the "transitional stage" of Marxist organization. The new line was reflected in an article of 28 May, 1936, in Pravda: "So called free love and loose sexual life are throughout bourgeois and have nothing in common either with socialistic principle and ethics or with the rules of behaviour of a Soviet citizen. Marriage is the most serious affair in life. Fatherhood and Motherhood become virtues in the Soviet." Gsovski quotes an even more "reactionary" enunciation of Boshko, a professor of law, in an official publication: "Marriage by its basis and in the spirit of the Soviet law is in principle essentially a lifelong union. Moreover, marriage receives its full lifeblood and value for the Soviet State only if there is birth of children, proper upbringing, and if the spouses experience the highest happiness of motherhood and fatherhood." These, and other references to the "sanctity" of marriage do not imply any acceptance of the traditional metaphysical character of the institution, but are intended to impress the Russian people who are peculiarly awed by whatever is sacrosanct. Nevertheless, from 1936 the tendency has been toward a metaphysical conception of marriage, whether it be recognized officially as such or not. After 1935 parents could be fined for the delinquency of their children, and were made jointly liable with children over the age of fourteen years for acts of intentional violence and damage.[4] This liability was extended by Decree of the Praesidium in 1941 to acts of negligence. In short, the concept

[3] TIMASHEFF, THE GREAT RETREAT 192 (1941).

[4] On the 1935 decrees, see Berman, *Soviet Law Reform – Dateline Moscow 1957*, 66 YALE L. J. 1191 (1957).

of parental responsibility was restored. In 1934 homosexuality was made an offence, and in 1936 abortion. In 1938 judgment was given that a marriage registered while a previous marriage remained undissolved did not create any juridical consequence for the parties since "the annulment." Legal textbooks reflected the tendency to regard bigamy as illegal, though not necessarily criminal. It assumed a criminal character by legislation constituting marriage for the sole purpose of seduction rape.

In 1934 a very practical obstacle to divorce was introduced in the form of a scale of fees. Fifty rubles was made the fee for the first divorce, one hundred and fifty for the second, and three hundred for subsequent ones. The tremendous losses in population during the war accelerated the process of strengthening of the marriage bond, and the practical result was a Decree of the Praesidium of the Supreme Soviet of 8 July 1944,[5] which was inspired by the desire to encourage large families. The preamble stated that "care for mother and child and support of the institution of the family have always been among the most important duties of the Soviet State." After providing for unmarried mothers, establishing State grants to large families, extending privileges to expectant mothers, and creating a graded tax on bachelors and fathers of small families, the Decree proceeded to restore the legal institution of marriage. Only a registered marriage would for the future be recognized as having legal effect, and as creating rights and duties of husband and wife and parenthood. The mother of a child born before the date of the Decree outside a registered marriage might claim alimony from the natural father after affiliation process. After that date, however, such children have no right to the father's name, no succession to his property, and no claim on his support. The mother is provided for by the State alone. In substance, therefore, the traditional distinction of legitimacy is restored even if the terminology is not. As one Russian commentator observes, "it remains to be seen whether the change in legal status will be followed in daily life by a social stigma of illegitimacy."

To what extent the new marriage law has conduced to a stabilizing of family relationships can, however, be gauged only from a consideration of the divorce provisions of the Decree and their application in the courts. The unrestricted competence of either partner to dissolve the marriage without reasons, and in opposition to the will of the other partner, was ended, and a judicial process of divorce introduced.

Divorce is no longer merely a matter of registering the discontinuance of cohabitation but constitutes an annulment of a status relationship. It is granted not as of right upon the withdrawal of consensus, but only at the discretion of the court. No grounds for divorce are stated in the Decree of the Praesidium, and it is the responsibility of the court in each instance to determine whether the reasons put forward for terminating the marriage are sufficient. It is clear, therefore, that the Decree has not altered the basis of Soviet marriage law, namely the voluntary consent of the parties, but has merely instituted a procedure whereby indiscriminate changing of spouses might be checked. This seems to be clear from the attitude of the courts. Accurate statistics are not available, but Sverdlov analysed some four hundred divorce suits decided by eighteen courts, and extracted

[5] 1 GSOVSKI, SOVIET CIVIL LAW 120 (1948).

from them certain principles on which the courts have acted.[6]

Sixty-six per cent of the suits were initiated with the consent of the respondent. In every such case a decree was granted, and Sverdlov concludes that mutual consent is regarded by the courts as sufficient in itself to constitute a ground for divorce. Of the contested suits twenty-three per cent were refused on the grounds of absence of guilt. In each case there were infant children. Decrees were granted in the remaining contested suits on the ground of adultery, mutual incompatibility or chronic illness. Of the total number of petitions presented only five to six per cent were refused, and it seems that Gsovski's comment that it is now more difficult to obtain a divorce in the Soviet Russia than in many capitalist countries should be treated with caution. If there is any real restraint on divorce it arises from certain practical considerations and procedural obstruction and not from the principle. The fees for filing the petition and registering the decree, for example, are scaled to restrain the irresponsible. A divorce costs, according to the court's discretion, between six hundred and two thousand one hundred rubles (between $150 and $550 approximately). In addition the petitioner has to pay for the publication of the papers in the suit in the local press. The procedure is cumbersome. There must be an attempt at reconciliation before the People's Court, and only then may a petition be presented to the divorce court.

In addition to the cases assembled by Sverdlov several others are available which seem to indicate that mere incompatibility is no ground for divorce when there are infant children, and even in cases where there are not. When two grandparents quarrelled over the bringing up of grandchildren after forty years of married life, a divorce granted on this ground was reversed by the Supreme Court of the R.S.F.S.R. In 1948 the Supreme Court of the U.S.S.R., in reversing a decision of the Supreme Court of the Azerbaijan Soviet, discussed the purpose underlying the Decree of 1944. That Decree, it stated in the judgment,

> is directed to the strengthening in every way of the family and of the marital life of the spouses. The dissolution of marriage can consequently take place only if such facts were established by the court as provide a basis for considering that the family has disintegrated and there is no possibility of its restoration. The reference to "incompatibility," without explanation of how it manifested itself, is obviously insufficient and cannot provide a basis for the decision pronouncing the dissolution of the marriage. The court also ought not to have overlooked the fact that the spouses have been married since 1945 and that they have a little boy.[7]

It must be noted, however, that both these suits were disputed.

Further evidence of a trend away from the notion of the State as the sole source of education and in favour of the traditional role of the parent is found in the few reports of custody suits available to us. The Supreme Court of the U.S.S.R., in an appeal from the Supreme Court of Georgia, discussed at length the basis of a grant of custody. The court, it was held, must consider primarily the interests of the child. In doing so it must bear in mind that those interests are not secured solely by the ma-

[6] *Sovietspoye Gosudarstro i pravo,* No. 7, p. 22 (1946), translated in 11 MODERN L. REV. 163 (1948). See discussion by Wolff in 12 MODERN L. REV. 290 (1949).

[7] *Sotsialisticheskaia Zakonnost (Socialist Legality)* No. 5, p. 60 (1948).

terial conditions necessary for its upbringing. The peculiar relation of mother and infant was more important than any material conditions. The case is rather significant in view of the fact that the father, who was a professor of pedagogy, was in a position to give the child an advanced communist education, whereas the mother, it was admitted, was not. Custody was nevertheless given to the mother.[8]

To what extent the modern law represents any decisive trend away from dogmatic Marxism is difficult to decide in the absence of more reliable facts, and it is equally difficult and perhaps unwise to suggest in what direction the law of domestic relations will next advance. It would seem that a tension has been set up in Soviet law, between the conflicting demands of Marxist theory, with its repudiation of all status relationships, and the need to preserve consonance between human nature and social organization. The present situation is clearly a compromise, despite the myth of Revolutionary continuity, and is, in consequence, highly unstable. It seems, however, that the matrimonial bond will continue, under the pressure of economics if for no other reason, to consolidate itself. The law is creating in many directions a vested interest in the permanence of marriage. When a spouse dies, his or her share in the matrimonial property does not fall into the estate but is transmitted automatically to the survivor. The matrimonial home, if acquired after marriage, can only be disposed of with the consent of both parties. The same tendency is emphasized in legal texts in the assembly of matters of domestic concern under one rubric; in the provision for guardianship of infants and curatorship of minors under rules analogous to those of Roman law systems; in the like provision for adoption; and in an elaborate code of maintenance laws under which destitute or infirm brothers, sisters, grandparents and parents may claim support from their relatives. It might be concluded, therefore, that the types of social relation, which the Civil Code preserved only in the interests of national expediency, are recognized to be so fundamental as to create of their own character rights and duties which the law must continue to recognize and protect. Soviet law has thus ceased to be merely a technique subservient to a political goal, and is tending to base itself, however unwilling, ever more securely on the natural law.

[8] See BERMAN, *op. cit. supra* note 2, at 239.