

## Book Review

CONTRACT LAW IN THE USSR AND THE UNITED STATES: HISTORY AND GENERAL CONCEPT. By E. Allan Farnsworth and Victor P. Mozolin. Washington: International Law Institute, in cooperation with Parker School of Foreign and Comparative Law, Columbia University School of Law, 1987. Pp. xii, 350.

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This book, the first of a planned series on Soviet and American contract law, consists of two major parts. The first half is a discussion of contract law in the USSR written by a Soviet scholar, and the second half is a summary of Contracts in America prepared by Professor Allan Farnsworth. Professor Farnsworth's contribution is a basic introduction to the area designed for readers with no background in American contract law. (The book will be available in both Russian and English.) Accordingly, the second half of the book will be of little interest to most American lawyers.

Nor does the book offer much to readers looking for an analysis of the two systems from a comparative perspective. It would have been possible in the course of writing such a book systematically to identify similarities and differences between the two systems and to glean insights into each that would otherwise go unnoticed. Apart from a five-page afterward, however, the authors eschew any efforts at comparison. Indeed, they seem to consider themselves unqualified to undertake such an analysis. [pp. 335-36]. The authors also limit themselves to describing contract doctrine, and make little effort to show "how the institution of contract actually functions in either the Soviet Union or the United States." [p. 335]. Again, the explanation is that neither considers himself "equipped to describe how these rules actually work in practice." [p. 335].

This refusal to put Contract in social context or to do much by way of comparison substantially reduces the value of the book. The

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result is two rather dry doctrinal summaries. If Farnsworth and Mozolin are really incapable of a more comprehensive approach to the subject, then perhaps the coordinators of the project should be faulted for not choosing someone else to write the book.

For American readers the principal attraction of the book is Victor Mozolin's description of contract law in the USSR. There are chapters on the "concept", "history", "sources", and the "characteristics and organization" of Soviet contract law, as well as a short chapter on the system of courts and arbitration, entitled "settlement of contract disputes." One learns that, in spite of Marxist ideology, private individuals can sometimes make contracts with one another and with the state. [pp. 16-17].<sup>1</sup> Moreover, the state-controlled economy is increasingly organized by contractual arrangements among state agencies, and less through state planning. [p. 37].

Soviet contract law was not made up out of whole cloth after the Revolution by Marxist theoreticians. While Marxist thought has had substantial impact on the content of the law, the law's roots lie in Russia's czarist past and can be traced back to the Roman law.<sup>2</sup> Thus, Soviet contract law, like that of other continental legal systems, is a product of the civil law tradition. Its substantive rules resemble those of Western countries, and in particular those with a civil law background. As in western systems, the contract is conceived as an agreement between the parties [p. 4] resulting from an offer and an acceptance. [pp. 129-30]. As in other civil law systems, consideration is not necessary in order to validate the contract.<sup>3</sup>

The methods of reasoning characteristically employed by Russian judges will also be familiar to readers who have studied civil law systems. Results in particular cases are supposed to be reached by deductive reasoning from abstract propositions found in a code, and prior decisions are not regarded as sources of law. [pp. 87-88.]. In the Soviet Union, as in other civil law countries, this focus on the

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<sup>1</sup> Since the book is doctrinal and does not attempt to put Contract in social context, it is hard to tell just how much private contracting is done in the Soviet Union. See p. 335: "[W]e have not attempted to amass statistics on the relative role of contractual autonomy as opposed to state planning in the Soviet Union . . . ."

<sup>2</sup> This point is not made in the book as explicitly as one might hope. It must be inferred from Mozolin's description of the structure and content of Soviet contract law. For a more straightforward discussion, see Hazard, *Contrasting Socialist and Capitalist Contracts*, 88 COLUM. L. REV. 882, 884 (1988).

<sup>3</sup> *Id.* at 885.

Code as the sole source of law seems often to be more a matter of theory than practice. Soviet judges, like their civilian counterparts elsewhere, do pay attention to the case law and are guided by it in resolving new issues. [pp. 99-100].<sup>4</sup>

Soviet contract law contains some features that will seem odd to American readers. For example, an acceptance that varies the terms of the offer even slightly does not make a contract but is only a counteroffer. [p. 130.] The authors do not propose any basis in Marxist ideology for this rule and I cannot think of one. Other peculiarities can be explained by the rather special context in which Soviet contract law operates. Penalties and specific performance are more common remedies in Soviet than in American contract law. [pp. 336-37]. One explanation for this difference may be the civil law origins of the Soviet system. The authors maintain, however, that this feature of Soviet practice is accounted for by the absence of ready alternatives to the promised performance in a system where most resources are controlled by the government. [p. 337].

If there are similarities between Soviet and Western contract doctrine, and particularly between Soviet and Western civilian systems, Mozolin's account makes it clear that the differences are far greater than the similarities. In the West, individuals own land, objects, and their own labor. They choose how to deploy those resources, and whether, when, and with whom to exchange them for other goods. By contrast, the government controls most of the productive resources in the Soviet Union. Accordingly, contracts among private individuals and firms play only a small role in the Soviet economy. From the amount of attention given them in this book, one infers that the most important type of contract in the Soviet Union is the "planning" contract between state controlled enterprises. [pp. 26-36, 75-78, 81-86].

Whether the contract is between individuals, state agencies, or an individual and a state agency, there are many more legal restrictions on liberty of contract in the USSR than in the United States or other western countries. As Mozolin explains, "[i]n Soviet society, the significance of contract is not limited to the parties themselves. Society as a whole has an interest in the proper organization of contractual ties." [p. 19]. It follows that the State must determine the terms of contracts by law "in those cases where the interests of society have a

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<sup>4</sup> For similar observations regarding other civil law systems, see I F. LAWSON & B. MARKESINIS, *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* 186 (1982).

well-established and durable character." [p. 25]. Most prices are not determined by the market but by the "State Price Committee." [p. 20]. And the quality of goods is not a function of what consumers are willing and able to pay for; rather, standards are set by agencies like the "State Committee on Standards of the Council of Ministers of the USSR". [p.23].

Mozolin's account is larded with Marxist jargon and oblique references to Soviet statutes. Without more explanation of the statutory references, it is hard for the uninitiated reader to appreciate their significance. Perhaps this difficulty is unavoidable in a brief account of a broad topic. The Marxist terminology is another matter. Consider an example: early on, Mozolin distinguishes between "commodity and money relations", a term which evidently means "contracts for exchange of money, goods, and services", and "direct relations", which apparently means "government ownership of resources and non-market distribution of goods and services"; then he tells us that "[i]n a socialist society, commodity and money relations are regarded as supplementary to direct relations and, indeed, because of the impact of planning on the economy, they reflect many of the characteristics of direct relations." [p. 13]. I divine that this passage means that government control over resources is so dominant as to crowd out most private contractual relations, or at least to determine their content. But I may be wrong. Since Mozolin addresses his discussion to American lawyers, I regard this use of jargon as a serious fault. Not many of them will want to wade through his clumsy prose, translating it into plain English as they go along.

In the afterward, the authors "prefer to emphasize what we see as similarities, rather than stress differences" between Soviet and American contract law. [p. 336]. They point out that both systems "were born—or reborn—after revolutions" and in each there occurred a "reception" of pre-revolutionary contract law. [p. 337]. Each is a big country in which contract law varies somewhat from one region to another, [p. 338], and each "shows a tendency toward fragmentation of contract law" with different rules for different kinds of contracts. [p. 339]. Finally, since the early twentieth century, "the two contract systems have tended to become more alike under the influence of such factors as greater complexity in human relationships and increasing economic demands of society." [p. 339].

Since the authors prefer to leave to others the task of identifying divergences between the two systems [p. 336], perhaps it is not inappropriate to point out a fundamental difference between them. The contrasts noted earlier between Contract in the USSR and the United

States are not mere matters of detail and emphasis, as are many of the differences between American contract law and that of the civil law systems of countries like France and Germany. The first premise of Contract in America, and in liberal societies throughout the West, is that society is the sum of the individuals who comprise it, so that the general good is best served by permitting, indeed encouraging, each individual to pursue his own ends so long as he does not interfere with the ability of others to do likewise. Granted, this freedom must be curbed in order to protect others against the social costs of individuals' actions, as by environmental and antitrust law, and even on occasion in order to protect individuals against their own folly, as with much consumer protection law. Nonetheless, this premise of individual liberty remains paramount in our system.

And it works. With little or no government planning, entrepreneurs motivated by nothing more noble than the lure of profit identify consumer wants and produce goods and services to satisfy them. Prices set by the anarchy of markets responding to fluctuations of supply and demand inform merchants and their suppliers what consumers want. Individuals seeking work are not placed in jobs by some government department. They examine the labor market for themselves and decide what training to obtain and what terms of employment are feasible and acceptable to them. Without minimizing the role of government in maintaining a prosperous economy, notably by pursuing sound fiscal and monetary policies, it is fair to say that individuals acting in essentially free markets bear far more responsibility than does government for our success.

In the Soviet Union the first premise has been precisely the opposite. The society and its interests are conceived as different from the sum of the interests of all the individuals who compose it. The interests of society are represented by the government and may conflict with those of individuals who seek to contract. When they do, the interests of society must prevail. Accordingly, "the means of production" (resources) are owned by the State, prices are set by the State, and the quality of goods to be produced by one State agency is set by another State agency.

It is no secret that this approach to the problem of meeting social needs has not worked very well. Government planners, whatever their nationality, are not as adept as free markets at producing the goods that people want to buy. From time to time in Soviet history, and notably in recent years, the regime has tried to incorporate some market principles into this process. In some contexts, the government encourages private enterprise. For example, individual farmers on col-

lective farms are encouraged to produce more by being permitted to grow produce on private plots as well. [p. 17]. The most important arena for the introduction of market principles has not been the expansion of the private economy, but, rather, the state's organization of its own productive efforts. In the past, determinations about what to produce and how to produce it have been more centralized. The bureaucracy simply constructed a plan for the production and distribution of various items in varying amounts, and then directed managers to fulfill the plan. Today, the plans emanating from the bureaucracy are more flexible. The various State enterprises are encouraged to make more decisions for themselves and to contract with one another in implementing those choices.<sup>5</sup>

In my opinion, it is highly unlikely that these developments will proceed very far or make much difference to the efficiency of the Soviet economy in the long run. Consider first the planning contract. This is doubtlessly a better way to organize economic activity than reliance on edicts from central planners. But the managers of State enterprises, like managers everywhere, are human beings motivated by their personal interests. In a regime of private enterprise, the shareholders and managers of companies bear the costs of bad decisions and capture the benefits of good ones. When the State owns the productive resources, managers may be fired if things go disastrously wrong, and promoted if things go well. But they will rarely if ever be adequately rewarded for bold ventures that succeed, or demoted for mediocre results. Like government officials everywhere, they will tend toward caution and progress will be slow.

Putting substantially more productive resources in private hands would solve this problem, for individuals would both capture the benefits and bear the costs of their decisions. But this solution would be far riskier to the nation's rulers. Private property and contracts take dominion over resources out of the hands of bureaucrats and give it to the people of the country, who would then make their own decisions about where to sell their labor and how to spend their earnings. On a theoretical level, such a development would undermine the first premise of the Soviet system, that the interests of society are separate from and paramount over the sum of the interests of all of its citizens.

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<sup>5</sup> See Hazard, *supra* note 1, at 888.

But the theoretical anomaly of private contracts in the Soviet system is not the most compelling reason to doubt that such contracts will really become significantly more important there. Self interest is far more important in regulating human affairs than theory. Soviet rulers surely understand that they would lose much of their power and prestige in a system that relied more on private contracts and market forces. Human beings everywhere struggle to retain their authority and perquisites. I doubt very much that Soviet bureaucrats are any less selfish, or any more concerned for the public good, than the rest of us. Fundamental change in the Soviet Union would require another revolution. Since that is not going to happen, the Soviet and American systems of contract law will probably remain far more different than they are alike.