OSWALD P. BACKUS III

Legal Analysis and the History of Early Russian Law

My principal objection to the very informative paper by Samuel Kucherov lies in the area of methodology. It strikes me that any effort to define indigenous and foreign influences of the legal heritage of a country is a difficult task and that without due attention to a comparative legal-historical approach and the insights to be derived therefrom, such an effort is likely to be less productive. In a word, my main objection to the article under discussion is in fact an objection that might apply to much of legal history, whether of Russia, Germany, England, or some other country. We are interested in influences of various kinds—among them, practical, legal, and philosophical. I emphasize these three because it seems to me that laws arise in response to circumstances, in response to other laws of a country or place or to laws of other countries or places, and in response to ideas, whether the ideas are in the realm of jurisprudence, religion, or philosophy.

Law in action should be an object of major concern. Unfortunately Dr. Kucherov does not address himself to it. On the last page of his article he merely asserts that "whatever its origin, the *Russkaia Pravda* is of such historical and legal importance as a document reflecting the legal and socio-economic life of the eleventh and twelfth centuries in Russia that the historian cannot overestimate it." That crucial point is one which he has not proven. The task is made all the harder by the existence of a "controversy over the official or private character of the *Pravda*," which seems "irrelevant" to him. I most politely disagree. At the root of the controversy lies the question, "What was the law in action?" Some have affirmed that the *Pravda* is a product of legislation, and others that it is a private compilation. These are conflicting stands which obviously make a great deal of difference in any effort to identify what constituted the "law in action." It would be nice if scholars had at their disposal data of the sort that would permit a clearer answer. Texts of judicial decisions based on the *Pravda* in which the *Pravda* was quoted would help greatly, and so would evidence of activity on the part of police or actions by the government, or even reactions to the law by contemporary Orthodox clerics. Although no such evidence is available, there are some sources at our disposal. The most important one is the internal evidence of the *Pravda* itself, to wit the changes that occurred between the early Brief Version (Iaroslav's *Pravda* and the *Pravda* of Iaroslav's sons)

and the later Expanded Version (the revised *Pravda* of Iaroslav's sons and the Statute of Vladimir Monomakh).[1]

Procedural changes merit special attention. According to article 14 of the Brief *Pravda,* a person could request a confrontation if he found someone in possession of property (chattels) which he believed to be his own but the possessor refused to surrender them. Furthermore, if the possessor did not come at once, he had to produce two bonds to guarantee his appearance within five days. Article 36 of the Expanded Version indicates what happened when there was a series of confrontations. The change from a single confrontation to a series of confrontations suggests a dynamic feature of the law —that it was undergoing change. It is reasonable to assume that the introduction of a series of confrontations into the law represented an introduction of a series of confrontations into practice. Clearly it would have been unfair for the right of possession of chattels to be dependent upon a single confrontation in which the current possessor's right was to be determined by the right of the previous possessor who had sold or given the chattels to him, because such an arrangement would destroy the chances that a victim of a theft might have of recovering his stolen property if the previous possessor could prove that he had come by the chattels honestly. A series of confrontations, on the other hand, would protect a victim of a theft to a far greater degree, for he could insist on further confrontations, back to the person who had originally stolen the property from him or to a person who was unable to prove how or from whom he had received the property. We see as well a tendency to force the plaintiff to sustain a higher burden of proof in the revised *Pravda* of Iaroslav's sons than in earlier articles of the *Pravda.* For example, under article 29 if a man was a victim of an assault and there was no trace of an injury upon him, he had to present an eyewitness to testify that the defendant had assaulted him. The plaintiff's burden of proof was especially high. Under article 49 if a bailee asserted that a bailor had deposited a lesser amount of goods than the bailor had asserted that he had deposited and sought to recover, the bailee had only to swear to the truth of what he said.

Provisions relating to the substantive law, whether of debt or of theft, make it clear that the law was becoming much more complex with the passage of time—a reflection of the law in action. Whereas Iaroslav's *Pravda* concerned itself with the rights of a partner, the revised *Pravda* of his sons dealt with matters of credit (arts. 50–52) and the Statute of Vladimir Monomakh dealt with the special position of a foreign merchant (art. 55). Whereas the statutes of Iaroslav's *Pravda* refer to the theft of a slave or a horse (arts. 11–12), the *Pravda* of Iaroslav's sons also mentions the theft of a boat, a

1. All citations are from George Vernadsky, *Medieval Russian Laws* (New York, 1947).

hound, a dove, a fowl, a duck, a goose, a crane, a swan, a ewe, a goat, a hawk or a falcon, and a sow (arts. 35, 36, 37, 40), and the revised *Pravda* of Iaroslav's sons refers to cattle, sheep, or goats in general (arts. 41–42) and specifically to a mare, a bull, a cow, a three-year-old cow, a heifer, a calf, a sow, a piglet, a ewe, a ram, a young stallion, a colt, and cows' milk (art. 45a), as well as grain in a pit (art. 43). The Statute of Vladimir Monomakh adds references to a beaver, a beehive, a tree in which there is a beehive, the bees themselves, a net, a hawk or a falcon, and an owl, as well as hay and lumber (arts. 69, 75–76, 79–82). One can see that we are dealing here with law in action, for this is evidence of the wish to add specific items to the written laws to guarantee their protection. In other words, the additional laws reflect changes in what the lawmakers (Vladimir Monomakh or his advisers) wished to protect under the law. Of course, some of the objects may have already been protected under the common law. Nonetheless, there is a reasonable chance that many of the objects were added in response to the needs of Russian society. There may have been another incentive to enumerate the additional objects: the fear that the failure to mention them might be interpreted as an intention to exclude them, even to the point of undermining traditional common-law protection of such objects. If common sense did not give rise to such a fear, an old Roman maxim coming from Byzantium may have: "Inclusio unius est exclusio alterius."

In identifying the law in action, it is important to try to identify the common or customary unwritten law that preceded the later written law and to determine its origins. Although I support Kucherov's rejection of Vladimirsky-Budanov's views on the origin of customary law, I do not believe that he has carried disagreement far enough on one of Vladimirsky-Budanov's arguments. I refer to the opinion, as stated by Kucherov, that "customs of different people, separated by space and time, are similar and frequently even identical." Vladimirsky-Budanov was in fact arguing that human nature is fundamentally the same throughout human society and that therefore customs and customary law tend to be similar. To be sure, on behalf of Vladimirsky-Budanov's view, one might point to a general disposition in human society to punish the theft of chattels or to punish murder, especially of persons belonging to a given kinship group or community.[2] Despite a substantial amount of agreement on such fundamental matters, the laws of different localities have varied widely. Two well-known examples serve to underscore that point. Under the Anglo-Saxons there were different customary

2. M. F. Vladimirsky-Budanov, *Obzor istorii russkago prava,* 7th ed. (Petrograd and Kiev, 1917), pp. 86–89. In appendix K (p. 292) Vladimirsky-Budanov reaffirmed his position. He asserted, in effect, that individual psychological differences only modify details: "the principal, basic norms remain the same throughout mankind."

laws in different parts of England, and it is commonly agreed that it was not until the mid-thirteenth century that a general English common law supplanted the various common laws of different regions.[3] Bracton's work of the mid-thirteenth century underscored the principle of a general English common law, and in that respect was a reaction against the regional differences.[4] In Poland and Lithuania independent local law persisted well into the sixteenth century, some of it of common-law origin. As late as 1540 a special code of law of Mazovia was compiled.[5] The drive for a unified law in each of these two countries was symbolized by the publication of the First Lithuanian Statute in 1529 and the editing of the first substantial collection of all-Polish laws in 1553, although these are by no means the first examples of all-Lithuanian or all-Polish laws.[6] The desirability of such a trend was underscored by Frycz-Modrzewski, the brilliant sixteenth-century Polish legal and political thinker, in his work *De Republica Emendanda* (1551).[7] That such a process was under way in Muscovite Russia can hardly be doubted. But however one may argue concerning the legal validity of the Code of the Northern Dvina Land of 1589, one must recognize that it differed in numerous respects, albeit frequently minor, from the Muscovite *Sudebnik* of 1550 and the *Sobornoe ulozhenie* of 1649 (the great legal monument to the reign of Tsar Aleksei Mikhailovich), and that it is the last compilation of a separate regional code within the area which early came under Russian domination,[8] although special codes have continued to be a feature of the law of the Russian Empire and subsequently of the Soviet Union, whether one thinks of the code for the

3. T. F. T. Plucknett, *A Concise History of the Common Law,* 5th ed. (Boston, 1956), p. 21, notes a simultaneous growth of local government.

4. Henry de Bracton, *De legibus et consuetudinibus Angliae,* 1st printed ed. (London, 1569).

5. One of the most important local Lithuanian laws is the Samogitian Privilege of 1492, published in A. T. Działyński, ed., *Zbiór Praw Litewskich od roku 1389 do roku 1529: Tudzież rozprawy Sejmowe o tychże prawach od roku 1544 do roku 1563* (Poznań, 1841), pp. 68–71. Of local Polish laws the Mazovian Code of 1540 is the most important.

6. The First Lithuanian Statute has been published, among other places, in K. I. Iablonskis [Jablonskis], ed., *Statut Velikogo kniazhestva Litovskogo* (Minsk, 1960). *Didžiosios Lietuvos Kunigaikštijos 1529 metu,* ed. A. Plateris, trans. J. Deveikė (Chicago, 1971), is a Lithuanian translation with an enlarged reproduction of Iablonskis's text. The collection of 1553 was followed by a systematic collection in 1570. Juliusz Bardach, ed., *Historia państwa i prawa Polski,* vol. 2, 3rd ed. (Warsaw, 1968), p. 22.

7. Ibid., p. 99.

8. A text of the Code of the Northern Dvina Land may be found in B. D. Grekov et al., eds., *Sudebniki XV–XVI vekov* (Moscow and Leningrad, 1952), pp. 366–414. A. I. Kopanev, the author of the commentary, tends toward the view that the code was in force (pp. 417–23). Vladimirsky-Budanov, *Obzor,* appendix M, pp. 301–3, indicates various arguments pro and con and concludes that, from the available evidence, "no conclusion follows either for or against the recognition of this monument as law."

Bashkirs of 1716, the codes for the Baltic region in the nineteenth century, or the codes for constituent republics of the Soviet Union today.[9]

Kucherov's failure to come to grips with Vladimirsky-Budanov's inattention to local variations in custom and in law implicitly reduces his obligation to come to grips with the question of the possible Scandinavian influence on the *Russkaia Pravda,* for if similarity in the customary law of different lands is normal, then the fact of similarity provides no persuasive basis for arguing that it demonstrates the influence of the law of one land upon the law of another. Professor Gerhard Hafström has pointed out similarities between the *Russkaia Pravda* and the early law of Sweden concerning the scale of fines for stealing livestock and for other criminal acts. It is particularly interesting that the figures three, six, twelve, forty, and eighty recur in both legal systems.[10] Why did both societies hit upon the same mathematical scale for fines? Since it is known that Vikings from Sweden were present in Kievan Russia at the time of the compilation of the *Russkaia Pravda,* it is not unreasonable to assume there is some connection between their presence there and the similarities between fines in Kiev and Sweden. It is far more likely, in my opinion, that either the Vikings from Kiev transmitted such a system of fines to Sweden or vice versa than that parallel systems of fines developed independently and simultaneously. At the very least one should discuss the issue. I do not assert that clear evidence has been published that demonstrates which country influenced the other, but I do believe that a failure to note parallels is inadmissible, for it reduces the area of discussion concerning possible foreign influences on early Russian law. Furthermore, the fact that the Vikings played a major role in Kievan government lends credence to the hypothesis that they might have sought to impose their own legal patterns upon Kievan Russia. I am reinforced in this view by the fact that a similar but less consistent pattern of parallels exists between the law under discussion and the law of England, where some Scandinavian or other Germanic influence certainly played a role at an early time. I do not believe that this question can be easily resolved.

First, it is necessary to note that no full-scale comparison has been made between the *Russkaia Pravda,* early Swedish law, and the law of other places

9. For example, *Provinzialrecht des Ostseegouvernements,* 2 pts. (St. Petersburg, 1845), *Fortsetzung des Provinzialrechts des Ostseegouvernements bis zumindesten Januar 1853* (n.p., n.d.), *Provinzialrecht des Ostseegouvernements,* 3rd pt. (St. Petersburg, 1864). Examples of codes of constituent republics of the USSR are the following codes of the Lithuanian Soviet Socialist Republic: *Civil Code of the LSSR* (Vilnius, 1964), *Code of Civil Procedure of the LSSR* (Vilnius, 1964), *Criminal Code of the LSSR* (Vilnius, 1962), *Code of Criminal Procedure of the LSSR* (Vilnius, 1962).

10. Gerhard Hafström, *Ledung och Marklandsindelning* (Uppsala, 1949), pp. 74–81, 83–86.

where Vikings were to be found—particularly Normandy, England, and Iceland. I believe that such a full-scale comparison is called for. Second, it is clear that we are handicapped by the fact that of the so-called eleventh-century Swedish law and Russian law neither is found in texts surviving from the eleventh century, but only in texts from the thirteenth century. Also the problem of Swedish law is further complicated by the necessity of extrapolating what part of a thirteenth-century Swedish code was from the eleventh century.[11] It is possible that a codex discovered in the Åland Islands some years ago, which I understand from Professor Hafström is from the eleventh century and contains similarities to both old Swedish law and Kievan law, may provide some answer. Third, I must repeat that it may be very hard to prove which country originated the system of fines. The late Stender-Petersen has demonstrated that Byzantine influences coming to Scandinavia via Russia affected the Scandinavian sagas,[12] which is evidence that influences came from Russia to Scandinavia and not vice versa. I believe, therefore, that it is important to investigate the texts of tenth-century Icelandic laws to determine just how early any elements similar to those in the *Russkaia Pravda* emerged in Icelandic law. If such elements were to be found in Icelandic law, the probability of a Scandinavian influence upon Kievan law would be increased, but not proven, for there remains the possibility of a ninth-century influence from Kiev on Iceland via Scandinavia. Such, however, would seem less reasonable, because there is always a higher probability that law written down at an earlier date represents law that was custom at an earlier date than law that was written down at a later date.

It is possible that a closer examination of the law would enable us to use agricultural and climatic evidence to determine the probable point of origin of a given provision. The answers to such questions as what are the metabolic requirements of cattle, pigs, and sheep and the problems connected with raising them, when does the ruggedness of terrain represent an obstacle, which animals are most affected by dry periods, and where do predators present more of a problem might make it possible to determine whether provisions protecting cattle, sheep, and pigs did or did not reflect adequately the real problems connected with raising such animals. If they did not adequately reflect such problems, then it is reasonable to suggest that the provision was borrowed from foreign law.

I should like to direct attention to the issue of the purpose of law.

11. L. B. Orfield, *The Growth of Scandinavian Law* (Philadelphia, 1953), pp. 253–54, indicates that "the oldest law text is the Vestgöta-lag" from the early thirteenth century. It was followed by other law books for various provinces. At the same time all-Swedish law codes developed from the thirteenth through the fourteenth century.

12. Adolf Stender-Petersen, *Die Varägersage als Quelle der altrussischen Chronik* (Aarhus and Leipzig, 1934) = *Acta Jutlandica,* vol. 6, no. 1 (Copenhagen, 1934).

Whether one focuses on love as Saint Augustine did, on the good as Thomas Aquinas did, on the command of the sovereign as John Austin did, or on social engineering as Roscoe Pound did, one can hardly escape coming to grips with the purpose of law if one wishes to achieve at least a partial understanding of the law in action.[13] The oft-quoted goal of peering into the legislative mind is one which an analyst of legal history can hardly ignore. If no effort is made to determine what the lawmakers were seeking to achieve by the laws they enacted, one can hardly know whether the law in question really represented the society for which it was ostensibly created. I admit that the materials available to Dr. Kucherov and others are not the kind to encourage efforts to determine with precision the purposes of the *Russkaia Pravda*. At best these purposes may be deduced from the written law as it stands. Even such a deduction, however, would permit one to see whether the law seems to reflect the social conditions of the society for which it was ostensibly written. Therefore, while excusing Dr. Kucherov for not peering into the legislative mind, I must urge that efforts be made to determine more precisely the purposes of the *Russkaia Pravda,* so that one may be in a better position to judge whether an indigenous or an alien purpose was being served, and thereby to hazard reasonable guesses whether the roots of various aspects of the law are to be found in Russia or elsewhere.

Another approach to the problem of identifying the law in action is to examine canon law and the changes in such law. To be sure, canon law did not deal with all matters covered by lay law. Yet there were areas of overlap, and by examining such areas we can obtain a clearer picture. As canon law changed it seems to have been yielding to popular pressures—to the unwillingness of the people to obey some of the strict injunctions of the law and to accept harsh penalties. We can form some idea of the popular response to the law by comparing shifting variants. The popular response, in its turn, reveals something about the law in action—something about the extent of popular resistance to law enforcement. The method is by no means likely to yield unambiguous results, yet in the absence of a substantial body of materials about law cases it is indispensable.[14]

Lastly I wish to question whether Dr. Kucherov may not have spent considerable time discussing customs that are not truly relevant to the issue of what constituted customary law. The mere fact that a custom was practiced does not make its practice an obligation under the law. If Dr. Kucherov were to demonstrate that the nonperformance of such customs entailed penalties,

13. For a discussion of purpose see L. L. Fuller, *The Morality of Law* (New Haven and London, 1964), pp. 145–51.

14. See O. P. Backus, "Folklore and History of Old Russia," *Folkways,* 3 (1964): 58–73.

then we would be persuaded that customary law was involved. Even in the case of common-law marriages he does not supply us with evidence of penalties for the violation of such marriages, although they may have been "in the eyes of the common people . . . a kind of civil contract." The attempt to define what constitutes customary law is difficult. The German scholar Friedrich Carl von Savigny (1779–1861) saw customary law as the product of the unconscious evolution of custom in the law. Such a view begs the question, or must be regarded as a confession of failure, because it leaves unclear precisely when it is that custom becomes law. I would argue that evidence of the enforcement of a custom is essential before it can be called a law.[15] Consequently, I would argue that Dr. Kucherov should strengthen his argument particularly when discussing the custom of a *bania* or sauna.

In sum, Dr. Kucherov should in my opinion modify his mode of analysis to consider what was the law in action, whether influences came from Scandinavia, what were the purposes of the law, and at what point a custom becomes law. I am grateful to him for having written his article and am interested in his response.

15. For a discussion of Savigny's handling of customary law see Carl J. Friedrich, *The Philosophy of Law in Historical Perspective,* 2nd ed. (Chicago, 1963), pp. 137–40.