

# A COMPARATIVE COMMENT

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Professor Luryi has written a most comprehensive article on Soviet family law. It is not the intent of this article to be as extensive in nature. It is my intention merely to comment wherever I think it necessary to elucidate on the more salient similarities and dissimilarities of the Soviet and Canadian legal systems as they relate to family law.

## I. IDEOLOGICAL PRECEPTS

Every organized society adheres to some kind of religiosity. *Webster's New Twentieth Century Dictionary* (2nd ed.) defines religion, *inter alia*, as: "any specific system of belief, worship, conduct, etc., often involving a code of ethics and philosophy . . . loosely, any system of beliefs, practices, ethical values, etc., resembling, suggestive of, or likened to such a system. . . ." The 1964 edition of the *Shorter Oxford English Dictionary* contains the following definition, among others, of religion: "a particular system of faith or worship. . . ."

Both of the above definitions contain one common denominator; mainly that of a *uniform* belief or beliefs manifested by *organized* thought processes. It is common knowledge that family law in the Western world has as its fountainhead Judeo-Christian philosophy. Indeed, it was not until the enactment of the *Divorce and Matrimonial Causes Act of 1857*<sup>1</sup> that family law in England was removed from the exclusive jurisdiction of the Ecclesiastical Courts and placed, for the first time, within the ambit of the courts temporal. This religious legacy is with us to this day, it is the very basis of our family law legal substratum. I am not a philosopher; whether social mores evolve from religious dogma, or whether societal needs are the crucible from whence religion springs, is quite beside the point. The final results in Western family law, of which Canadian family law is merely a small, but rather typical example, are self-evident. Sociology and religion are now imperceptibly merged as the two dominant characteristics that have moulded our family law system.

Is the situation so different in the Soviet Union? The bulk of the ethnic groups that comprise the diverse constituencies of the peoples of the Union of Soviet Republics were practising Christians prior to the revolution of 1917. Marx and Engels would probably recoil in horror at the barest intimation that formal religious thought played any role in their creation of a new ideology. Yet it is interesting to note that, although Marx and Engels perceived marriage as understood in a capitalist society to be basically exploitative economically,<sup>2</sup> monogamy and other bourgeois concepts such as "love" and "mutual respect" are perceived by them to be integral components of a valid marriage in a truly socialist society.<sup>3</sup>

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1. 20 & 21 Vict., c. 85 (U.K.).

2. Luryi text, *Supra* n. 7-10.

3. *Id.*, at n. 12-13.

As Professor Luryi graphically points out,<sup>4</sup> Marx, Lenin and Engels were the holy triumvirate of the new Soviet religion, with Marx and Engels playing the additional roles of chief religious scribes; the role of Lenin, at least in Soviet family law being, that of a mere minor architect; he contributed more symbolism than substance. So if Marx be the father, then Engels is the son and Lenin the holy ghost. The role their writings and comments played in the development of Soviet family law is analogous to that of the old and new testaments in the formation and evolution of family law in the Western world.

## II. CONSTITUTIONAL ASPECTS

Canada, of course, is a prime example of a "federal" legal system. Like our American brethren to the south, we are ever mindful of the intricate system of legal checks and balances that are so necessary to ensure the viable operation of a sovereign country that is geographically very extensive, yet regionally diverse. The same problems are endemic to the Soviet Union; perhaps to an even greater degree. The largest land mass in the world has many distinct ethnic and regional boundaries. Hence, we note that, in addition to the Fundamentals of Soviet family law which is the basic legislative code applicable to all Russian citizens, there are separate and distinct "Family Codes" adopted in each of the 15 republics of the U.S.S.R.<sup>5</sup> The Canadian "Fundamentals" are enshrined in the *British North America Act*.<sup>6</sup> Our regional "codes" in the main are local jurisdictional statutes dealing with the solemnization of marriage,<sup>7</sup> matrimonial causes other than nullity and divorce,<sup>8</sup> the disposition of marital property,<sup>9</sup> and child welfare legislation.<sup>10</sup> The Russians are in an advantageous position when dealing with the final resolution of the constitutional allocation of powers. A monolithic state, modelled in theory, at least, on true collectivist principles, need not bedevil itself with the subtle legal niceties of interpreting true constitutional constraints. In the final analysis, it is the Politburo of the Central Committee of the Communist Party that can actually make centralist decisions that affect all of the Soviet citizenry.<sup>11</sup> As shall be discussed later, political considerations play a more major role in the Soviet legal system than in Western legal systems. Nevertheless, when political paramountcy is deemed not to be overly significant, then regional considerations can be the controlling factor in resolving legal disputes.<sup>12</sup>

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4. *Id.*, at n. 1-13.

5. *Id.*, at n. 14-16.

6. 30 & 31 Vict., c. 3 (U.K.).

7. See e.g., *The Marriage Act*, R.S.M. 1970, c. M50.

8. See e.g., *The Family Maintenance Act*, S.M. 1978, c. 25 (F20).

9. E.g., *The Marital Property Act*, S.M. 1978, c. 24 (M45); *Family Law Reform Act*, S.O. 1978, c. 2.

10. E.g., *The Child Welfare Act*, R.S.M. 1970, c. C80.

11. Luryi text, *Supra* n. 14.

12. *Id.*, at n. 21.