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FEDERALISM OR FEDERATIONISM

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FEDERALISM, DEMOCRATIZATION AND THE RULE OF LAW IN RUSSIA. By *Jeffrey Kahn*. Oxford: Oxford University Press. 2002. Pp. xii, 319. \$65.

When I took up my appointment in October 1970 as Reader in Comparative Law in the University of London, I was invited to collaborate in teaching the LL.M. course in Soviet Law offered within the University on an intercollegiate basis. The course had been introduced two years previously, the first of its kind within the realm. Originally it was offered by a team of three, regrettably all now deceased: Edward Johnson, Ivo Lapenna, and Albert K. R. Kiralfy. I had come to England to replace the late Edward Johnson, whose untimely death had left vacant the Readership in Soviet Law, tenable at University College London. He had, I believe, been instrumental in introducing the Soviet Law course, having in 1967 launched a series of evening lectures on the subject which were open to the public, were well attended, and resulted in the book that appeared posthumously.¹

With my arrival, Albert Kiralfy decided to step out of the course and leave it to be taught by Lapenna and myself, which we duly did for the next seventeen years. It soon became clear that we shared a fundamentally different perception of the nature of the structure of both the USSR and, within that entity, the Russian Soviet Federated Socialist Republic ("RSFSR"). Having discovered the differences, we developed a "horse and pony" show over the years to introduce students to what we considered the core issues to be. And great fun it was.

I was away on sabbatical during the 1986-87 academic year, so I never learned Lapenna's latest views on perestroika and its implica-

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1. E. JOHNSON, INTRODUCTION TO SOVIET LAW (1969).

tions for constitutional law. When we last had the opportunity to perform together in autumn 1985, no changes were in evidence. The essence of Lapenna's perception therefore will not, I think, have changed. In his view the Soviet Union as a whole, and the RSFSR as a constituent union republic of the USSR, were thoroughly "federalized." In substance the USSR was a unitary state clothed in "federal" dress. The trappings of statehood for the fifteen union republics, and *a fortiori* for lesser administrative-territorial entities, were nothing more than a symbolic genuflection in the direction of structures that served, and should serve, ideological purposes against the particular background of Russian history. The Soviet Union in this respect was a triumph of substance over form, and that was all that truly mattered.

Without necessarily quarreling with the perception of substance, which I pointed out did vary over the course of time, I emphasized the importance of form. The Treaty of the Union of 30 December 1922 — which formed the Union of Soviet Socialist Republics — was a document of international law concluded, initially, by four independent states. Labels are not easy here, but to me, on the spectrum of "*confederation — federation — federal*," it was closer to the confederation but supple enough to incorporate strong dosages of federation and federal models. Lawyers tend to focus upon the formal mechanisms of federalism: rights of secession, applicable law, remedies, attributes of statehood, and so on. Lapenna dismissed the treaty and constitutional rights of secession by the union republics as "paper" rights, unrealizable in practice without civil war. To me they were "sleeping dog" provisions, unrealizable at the time, but who could say what their future role might be.

Looking back over the past decade, "form" proved to have been of exceptional, if not decisive, importance in shaping the dismantling of the Soviet Union, and form continues to be a central concern in reshaping the structure of the Russian Federation. Those who viewed the Soviet Union as irretrievably unitary or federal in substance will quite naturally have expected any disintegration of that structure in all likelihood to have been accompanied by widespread violence and civil strife. That disintegration should have proceeded in accordance with the international law of treaties some find as implausible as the peaceful turning over of Hong Kong back to China once the lease and treaty schemes had lapsed there.

Be that as it may, "federationism" — to use the term I preferred in my own study of Russian law² — in the Russian Federation has taken new directions to address old problems. Dr. Jeffrey Kahn's³ admirable and thoroughly researched study offers invaluable materials and in-

2. See W. E. BUTLER, *RUSSIAN LAW* 274 (1999).

3. Jeffrey Kahn is a graduate of St. Anthony's College, Oxford University (D.Phil.) and the University of Michigan Law School.

sights on what has been transpiring in the world of Russian federalism (and beyond) from the earliest Soviet days to the present, with particular emphasis and depth on the post-Soviet decade.

Kahn's study is a revised version of a D.Phil. thesis completed at Oxford University, and to a certain extent, but not disruptively, it betrays its dissertation origins. As for the Butler/Lapenna dialogue, he would have been strongly pro-Lapenna, although he creates as his nemesis Professor William H. Riker,⁴ whose classic study of federalism serves as the foil for many of Kahn's observations and conclusions. Kahn makes his position absolutely clear from the outset:

It has frequently been asserted, first, that federal government is possible in a non-democratic regime, and second, that this holds true even when fundamental legal principles are absent. The Union of Soviet Socialist Republics is cited as the classic example of such a state structure. I dispute the validity of these theoretical and empirical assertions . . . the Soviet Union was a federal facade that hardly masked the most centralized state in modern history. (p. 1)

He rightly observes that this "facade" had "tremendous repercussions" for the development of post-Soviet Russian federalism, itself a multinational species of federationism built upon the "crumbling foundations" of the former Soviet Union. And he rightly observes with some wonderment that "a new state was built almost overnight in both the real and ideological rubble of the *ancien regime*" (p. 1).

In my view, of course, there should be no wonderment, for such is the beauty of "legal form," moribund or not, that the disappearance of one level of state structure founded formally upon international legal concepts leaves a residual vessel into which the new federationism pours relatively readily. This is not to suggest that the Russian Federation is nothing more than a USSR at a new level; it most emphatically is not, and Kahn's study is the best known to me that overwhelmingly and scrupulously makes that plain.

But I find Kahn's assault upon Riker⁵ unpersuasive because, for different reasons, I find Riker, as expounded by Kahn, unconvincing. The difficulty seems to me to lie with American political science generally: its "Americanization" of the concept of what is federal and what is not, and its "romanticism" about the putative relationship among "federalism," democracy, and the rule of law. Terminology may be partly, or mostly, at the root of the issue.

American terminology concentrates upon the word "federal" and "federalism." Kahn says that "federalism is a broad church, and 'fed-

4. See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* (1964).

5. "In a departure from the classic exposition of federal theory by William Riker, I dispute the assertion that federalism is possible in an authoritarian environment. The immediate implication of this approach is the rejection of the surprisingly unchallenged view of the Soviet Union as an authoritarian, yet nevertheless federal, system of government." P. 2.

eral' can describe a wide continuum of institutional arrangements" (p. 2). But that is just the point. "Federal" is not in reality a broad church; it is a narrow church at one end of the "federationist" continuum or spectrum. I used the word "federationism" in my study of Russian law precisely because in my view the expression "federal" would have been inappropriate and misleading. I would here go further to suggest that we need to apply and, if necessary, invent a range of terminology to cope more accurately with the finer distinctions of the federative syndrome.

Working just with the Russian language for the moment (others must be brought into the equation), it is simply wrong in my view to translate "federativnyi" and "federal'nyi" as synonyms (which Kahn does not necessarily do, although the substance of his argument conflates the concepts). But that is only the beginning. There is "federalizm" (federalism), "federalizatsiia" (federalization), "defederalizatsiia" (defederalization), "federirovanie" (whose translation needs thoughtful consideration) and "federationism" — all of which have subspecies, such as, state federalism, financial federalism, budgetary federalism, and so on.⁶ Is the United States of America a "federal" system? Absolutely. Is it a federation, or a federated system? Not really — at least not since the Civil War. Is the Russian Federation a "federal" system? No, but it is a "federative" or "federated" system, and it has a "federal" government.

Insofar as federalism is by definition linked with the "requirements of democracy and the rule of law," depending upon how these are defined, we move away from considerations of structure and balances of power to more subjective characterizations. Federationism is certainly possible in an authoritarian environment, and both the former Soviet Union and the present Russian Federation are examples, given that authoritarianism also operates on a spectrum of degree. All states are authoritarian to some extent in some of their public's eyes. But surely to pursue the proposition, one must be able to distinguish terminologically among the species or types of federative schemes which exist and which existed in the past.

As for the requirements of democracy and the rule of law vis-à-vis federalism, I am not confident as to precisely what these are. Kahn is content to define them by using concepts of political science. Democracy, for example, is defined on a working basis by invoking R.A. Dahl's⁷ institutional guarantees for democracy and elaborating them. The rule of law is defined by recourse to Elster's distinction between

6. See FEDERALIZM: TEORIIA, INSTITUTY, OTNOSHENIIA (SRAVNITEL'NO-PRAVVOE ISSLEDOVANIE) [FEDERALISM. THEORY, INSTITUTES, RELATIONS (COMPARATIVE LAW STUDY)] 11-44 (B. N. Topornin ed., 2001).

7. R. A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

the rule of law and the principle of legality.⁸ They both serve Kahn well in his approach, and he intelligently and persuasively extends their application to Russia insofar as they may be applicable.

Yet here, too, is an excessive "Americanization" of the conceptual apparatus. Elster's proposition that the rule of law means the "prospective principles that laws be stable and predictable" (p. 25 n.23) obscures one of the most fascinating and meaningful debates in Russian legal thought, a debate whose outcome is far from assured. Elster would not, nor would nearly all Anglo-American political scientists or jurists, think to distinguish between the concepts of law routinely expressed in European tongues but not in the English language: the distinction between *jus* and *lex* (Latin), *droit* and *loi* (French), *recht* and *gesetz* (German) and *pravo* and *zakon* (Russian). The core of the debate in Russian jurisprudence at the moment with regard to the rule of law is, "which law?": *pravo* or *zakon*? Adherence to *zakon*, or *lex* — that is, man-made statutory law — is normally a principle recognized in authoritarian and democratic states alike. Andrei Vyshinskii, the lead prosecutor in the Stalinist show trials, called in the mid-1930s for a return to "stability of laws" (*stabil'nost' zakonov*), a perfectly respectable principle of positivism. President Putin's much debated plea for the dictatorship of a law (*diktatura zakona*) may be understood in the same way, or may be construed as a reference to legality, that is, compliance with legislation. Depending upon context it is merely a plea to be more law-abiding, for a reduction of criminality, for compliance within a federated system of federal law on the part of the subjects of the Russian Federation, and so on.

Many Russian jurists equate *jus* and *lex*, *pravo* and *zakon*. The last is a mirror image of the first. Others insist upon their being distinguished: *pravo* is the totality of law, not merely man-made legislation, and *zakon* must conform to *pravo* or be deemed illegal. For proponents of *pravo* a key issue is its source — divine law, customary law, natural law, or others. It will be obvious that the human rights clauses of the 1993 Russian Constitution have an origin in something other than *zakon*; they must have, if those rights are to be considered inalienable, as the Constitution provides.⁹

Kahn is well aware of the issue, though (pp. 53-56), and he distinguishes between "Law" and "law" to make his point effectively in English. Whether A.V. Dicey should be read to support a linkage between the rule of law and federalism, I have some doubts. Dicey believed that federalism meant "legalism — the predominance of the judiciary in the constitution — the prevalence of a spirit of legality among the people" (pp. 54-55). This, coming from a jurist whose coun-

8. CONSTITUTIONALISM AND DEMOCRACY (J. Elster & R. Slagstad eds., 1988).

9. See BUTLER, *supra* note 2, at 84.

try did not and does not have a constitution, may be read as the views of a proponent of "lex" as much as "jus." Kahn, however, believes Dicey has in mind Law, not law; that is, Dicey's "legalism" means Law, whose core qualities are: "legitimacy, predictability, stability, fairness, efficiency, and a repudiation of secrecy in promulgating laws and regulations" (p. 55). Those are core qualities that President Putin would associate with his expression "dictatorship of law" as a positivist. Whether they are *pravo*, and whether Dicey in positivist England saw them as Law, is open to doubt.

Around that issue turns the compatibility of federalism with both democracy and authoritarianism. Since I understand federalism to be a more centralized scheme, legally, formally, and actually than federationism, which is a looser relationship that invokes statehood and sovereignty to a greater degree than would be the case in a federal system, the rule of *jus* is more essential if a federation is to be truly democratic and respect the elements of autonomy granted to subjects of the Federation.

If, however, it were to be accepted that federalism cannot truly exist without democracy and the rule of law, one must ask why there are so few federated states in the world. Here is where the implications of "federal theory" become obscure. If Kahn is correct, is it the view that the antithesis also is true: democracy and the rule of Law are inherent attributes of true federalism, but without federalism democracy and the rule of Law cannot exist? Surely world experience is otherwise. Kahn observes that "federalism appeals to states struggling with various forms of internal disharmony, but which nonetheless value diversity within a more unitary framework There is seldom a single motivation; a variety of factors often intermingle and co-determine the prospects for federalism" (p. 61). That would seem to be as prescient an observation as possible.

From "federal theory," or what I would prefer to call "theories of federationism," the book moves on to a thorough and fascinating consideration of the legacy of Soviet "federalism," Gorbachev's "federalism problem," the process of federal transition, inter-governmental relations under Yeltsin's new federalism, federal effects on transitions in Russia's republics, and the federal reforms of President Putin. These require six chapters in all, and I have not seen a better account, or a more perceptive one, in any language. One may disagree with observations in passing, or the emphasis placed, but overall the account is assured and full of insights.¹⁰ Indeed, here is where the book comes into its own, for the author has conducted extensive interviews with the architects of federationism at all levels in Russia, explored the national and regional press and national, regional, and local legislation,

10. One useful account which eluded the author is Z. Douglas, *Constitutional Foundations of Russian Federalism*, IV SUDEBNIK 823-68 (1999).

judicial practice, and the Western literature on federalism — all scrupulously recorded in an excellent bibliography.

And here too is where, to borrow one of Kahn's favorite terms, an "asymmetry" exists. One of the many strengths of the study is Kahn's account and assessment of Western federalism theories and Soviet and Russian practice. Missing is an examination of post-Soviet Russian doctrines on federalism. The literature is considerable, because the debate has been active, continuous, and interdisciplinary. To venture a purely impressionistic judgment, the Russian literature on federationism has become more interesting and perceptive than its foreign counterpart simply because Russian federationism is still in the making and Russian scholars have either a ringside seat or a participatory role.¹¹

Perhaps the disposition of social scientists and lawyers to "classify" causes us to overlook the wheat for the chaff. The Russian Federation did indeed inherit a Soviet-structured species of federation, and the early debate naturally resounded on how much of that structure to retain and what changes should be introduced. Concepts such as "sovereignty," "statehood," "nationhood" — associated more with public international law and independent statehood than with constitutional law and federationism — were bandied about, as Kahn demonstrates, in the most remarkable and inconsistent ways by individuals who had little appreciation, perhaps, of their full implications. But that is precisely the point. This has been quite properly a Russian dialogue, and the formal trappings of federationism as measured by continuity in the stature of territorial-administrative entities, boundaries, state structures, and the like remain greatly indebted to the Soviet era. Allocations of jurisdiction have, of course, redounded to the side of the subjects of the Federation. Although the central government seems determined to claw back some of what was conceded, and at the moment is succeeding, this will always be in Russia a sphere of shifting gravities as part of the political process. And so it should be.

Parts of the story might have received greater attention from Kahn in their legal dimension. The treaties between the central government and the subjects of the Federation, more than 800, are a story far from fully told, yet they seem in a difficult transition era to have played a constructive lubricant role in enabling central-periphery relations to achieve a proper balance. Their uncertain legal status may have introduced elements of flexibility during an era when lines drawn sharply in the sand could have provoked more serious conflicts than they did. A particularly attractive feature of the book are the occasional excur-

11. See, e.g., FEDERALIZM I REGIONAL'NAIA POLITIKA V POLIETNICHNYKH GOSUDARSTVAKH [FEDERALISM AND REGIONAL POLICY IN POLY-ETHNIC STATES] (R.N. Ismagilova & V.R. Filippov eds., 2001); OSNOVY NATSIONAL'NYKH I FEDERATIVNYKH OTNOSHENII [FOUNDATIONS OF NATIONALITY AND FEDERATIVE RELATIONS] (R. G. Abdulatipov ed., 2001).

suses into individual case studies — Bashkortostan, Kalmykia, and others — to examine individual leadership, election, or other issues. Comparative tables inform the reader, although sometimes they suffer from unsatisfactory translations of legal texts.¹²

In his Conclusion, Kahn quotes William Riker to the effect that “an initial difficulty in any discussion of federalism is that the meaning of the word has been thoroughly confused by dramatic changes in the institutions to which it refers” (p. 279). Riker is quite wrong. It is not the meaning of the word that has been confused; it is the inadequacy of the terminology generally to keep apace of and satisfactorily to describe the multiple variants of federationism. Small wonder that political elites in Russia confront conflicting conceptions of what exactly it means to be federal. It is not for the Russians to fit themselves into any preexisting procrustean bed of federalism; it is for them to fashion their own destiny within a species of federationism that they find congenial and suitable to their circumstances. Other conceptions of federationism may inform some of their choices, as will their own history. Whether Russia meets or will meet some ideal type of federationism is irrelevant; more important is whether she conforms to democratic and rule-of-*pravo* values and standards consistent with her own standards and those of international law.

Kahn offers sensible advice in observing that a “culture of legality” should be created, to which I would add a culture that is consistent with the rule of Law. He observes that if the federation is to survive, consensus must be achieved to assert jurisdiction over individual issues and the level of the state that should be engaged, and that a sense of legal constraint must operate. Whether unilateral declarations of sovereignty should give way, however, is to my mind more doubtful. They and the political philosophy underlying them are the safety valve of form should the Russian Federation at some point veer backward toward the Soviet substance of federalism. Here the ground is more uncertain, for many political communities in the Russian Federation are manifestly not sovereign and will not be recognized as such in the world as we know it. The Russian Federation is not a treaty-based federation in the sense that the USSR was, and the treaties of the federation are not widely accepted, if at all, as documents of international law either by most of the parties thereto or by the international community. But the Russian Federation is officially named a federation (which the USSR never was), and during the Soviet era it was named a “federated” or “federative” republic.

In reading Kahn’s account of especially the past decade, one is struck by how rapidly everything has proceeded within the context of federationism — from a state which played the lead role in disman-

12. In Table 6.5, the passage from the 1994 Udmurtia Constitution is legally unintelligible, and many of the others contain internal inconsistencies or infelicities.

ting another state, to a fragile political climate in which burgeoning sovereignties could have led to self-destruction of the country, to a melange of schemes for "papering over the cracks," to a considerable tug-of-war between the center and the periphery that initially, in the form of treaties, went very far in favor of the periphery, to the present era in which the center is, through a combination of presidential and judicial authority, taking back some of what was conceded previously.¹³

The saga is not over; it has barely commenced. Kahn's study is the best and most thoughtful account available of the early experience.

13. A senior member of the Administration of the President of the Russian Federation involved in renegotiating the basic treaties between the Federal Government and the subjects of the Russian Federation observed, in an interview with the present writer in July 2002, that the Russian Government intends to dissolve all these treaties by agreement with the subject of the Russian Federation concerned. Thirty-two treaties have been terminated by consent during the past year and another ten are in the process of either termination or renegotiation. In the view of the Federal Government, these treaties create unacceptable exceptions to the 1993 Russian Constitution and an unequal legal regime amongst the subjects of the Russian Federation. Some treaties may come to be replaced by "agreements" which implement particular federal policies or programs in the regions without establishing unconstitutional privileges or concessions for individual regions.