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**SOVIET LAW TAKES
A FRESH BREATH**

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Soviet Law Takes a Fresh Breath

John N. Hazard

A decrepit nineteenth-century locomotive sitting on the rails of a discarded roadbed provided the 1991 cover story for the Russian Republic's *Sovetskaya Yustitsiya*.¹ The editors seemed to be symbolizing the end of an era dominated by "Soviet Law." The wheel had turned full circle. That electrifying 1917 moment when a nine-year-old boy carried his father's morning paper to the table was relived. There were pictures of Lenin and Trotsky on the front page. The Russian Empire had ended and the Russian Revolution was beginning. Papers in 1992 similarly announce the end of an era, but today it marks the end of Bolshevism and the dismemberment of the USSR. Jurists in Moscow are taking a fresh breath.

The "class struggle" that had inspired Bolshevism's founding fathers has been abandoned. Few can now remember Lenin's improvised legal system of 1917-18, initiated with no plan of legislative action and devised only to provide state security. To fill the gap in law Lenin called for "revolutionary" judges to punish enemies and restructure civil institutions. His first decree instructed them to apply their revolutionary consciousness and revolutionary conscience, while being guided by as much of old Tsarist law as seemed suitable. Not until 1922 was Lenin ready to establish a fully documented legal system, but his creation was not what he had

hoped for. His wartorn nation had passed through revolution and civil war. He had met his security needs by ad hoc decrees as danger threatened, and his courts had applied their revolutionary concepts of justice.² Now Lenin was prepared to think about "law."

Lenin's motives in establishing formality were clear. He needed to reconstruct his battered country's economy. His Commissar of Justice told his staff that the British Prime Minister, Lloyd George, had said that Soviet Russia would have to establish a known system of legal norms if other countries were to have permanent relations with her. Lenin's minister suggested that eventually Bolsheviks would dictate the law, but he admitted that for the present commercial treaties would have to be negotiated, and investors would demand specific guarantees of property and persons. A law to attract not only British financiers, but also Russian peasants, restless with forced deliveries of grain, seemed necessary.

Lenin mobilized his lawyers for the draftsmanship. Many had been trained in Germany or in Petrograd and Moscow universities. Those who had remained in Russia after the Revolution were put to work on codes of law. Naturally, as "civilians" of the European school, their focus was a civil code, for that was the key instrument of property

1 *Sovetskaya Yustitsiya*, no. 7 (April 1991). Cover story.

2 Materials in this introduction have been drawn from my *Settling Disputes in Soviet Society: The Formative Years of Soviet Legal Institutions* (New York: Columbia University Press, 1960; rpt. Octagon Books, 1978), chapter 1.



regulation, as it had been in the Empire. The Bolsheviks showed themselves wary of erstwhile Tsarist jurists. Consequently, they feared that respect for property ownership could open the way to revival of "bourgeois" law to the detriment of "socialism."

Precaution took the form of drafting Article 1 of the civil code, denying protection to persons claiming rights at odds with principles believed to be essential to socialism. The article made it clear that "the law protects private rights except as they are exercised in contradiction to their social and economic purpose."³ Within a few years the courts had interpreted the practical consequences of Article 1, and a series of judicial decisions were published. The flavor was established by a decision depriving a mill owner of ownership when the mill was operated at less than full capacity, selling equipment and closing some shops. The court seems to have concluded that the owner had to produce for the community's benefit and not in accordance with what the owner thought desirable.⁴

Together with the precautionary measures introduced into the civil code, Lenin created a procuracy modeled upon the Tsar's. His intent was to create an eye on the "bourgeoisie," lest they regain power under the permissive features of civil law.⁵ The Bolsheviks were not, evidently, willing to risk their future for what seemed to them a concession to capitalists. Law was obviously grudgingly reinstated because it seemed necessary to encourage investment and hard work on the farms. Nevertheless, there was to be no abandonment of Marxist ideology.

Lenin's architect of a revived legal structure, Nikolay V. Krylenko, made this clear to his students when he lectured on the concessions being made under what was dubbed the New Economic Policy (NEP). Krylenko argued that there were, of course, similarities between civil codes enacted before the Revolution, but the content under NEP was new. He castigated those who argued against him that NEP was "West European."⁶

Historians have argued for decades whether Lenin would have extended NEP for years, while Russia was regaining its footing.⁷ Lenin gave no

clues to his long-range plans for NEP before he died. His successor, after a brief hiatus, was Joseph Stalin. By 1928 he was ready with his plan for the future. It was to attack capitalism with a full-blown state economic plan to augment the narrow scheme introduced by Lenin as a plan for electrification. Under the economic plan producers were regimented; a decree introducing heavy taxation was instituted to phase NEP out of existence; and the peasants were driven into collective farms under the slogan calling for the "liquidation of the kulaks as a class."

Stalin's attack on capitalists caused the civil law draftsmen to amend the civil code to excise the chapter on private ownership and corporations; to limit property ownership of producers' goods to state ownership; to reduce the number of artisans, and, most importantly, to prohibit employment in their shops. The goal was eventually to satisfy customers through "distribution in accordance with need." This was what Marx had advocated, but he had set no time schedule for the execution of his plans. His followers expected the state to make a total transformation of commodity production away from the use of money.

The Shock of Gorbachev's *Perestroika*

"New Thinking," both economic and political, was introduced by Mikhail Gorbachev in his study of *perestroika*.⁸ Those who recalled the Stalin-Khrushchev-Brezhnev era were severely shocked by two points in the definition of New Thinking. The electrifying one was the repudiation of the long-standing call for "class struggle." But this shock, as electrifying as it was, was not the only one. It was accompanied by a proposal to reinstitute "entrepreneurship" in the form it had taken during NEP, but with a difference. Whereas NEP had been a repudiation of the War Communism of 1917-22 as a temporary measure designed to revive a devastated economy, Gorbachev's *perestroika* seemed to envisage permanency.

3 For English translation, see Vladimir Gsovski, *Soviet Civil Law* (Ann Arbor: University of Michigan Law School, 1949), vol. 2, p. 16.

4 For a report of civil cases decided during NEP, see V. E. Greaves, "The Social Economic Purpose of Private Rights," *New York University Law Quarterly Review* (1934-35), vol. 12, pp. 165, 439.

5 See Hazard, *op. cit.*, p. 229.

6 *Ibid.*, p. 485.

7 See Rudolf Schlesinger, *Soviet Legal Philosophy: Its Social Background and Development* (New York: Oxford University Press, 1945), p. 83.

8 See Mikhail Gorbachev, *Perestroika: New Thinking for Our Country and the World* (New York: Harper & Row Publishers, 1987).

To the ideologically inclined, the abandonment of "class struggle" was more far-reaching than the introduction of "entrepreneurship." The latter had been introduced as a reprieve during NEP. It was not, therefore, a shattering idea to Bolsheviks because it had been utilized during the hard times of the 1920s. "Class struggle" had never been abandoned as a permanent part of the socialist arsenal. NEP could and was defended by Lenin as "one step backward in order to take two steps forward" as soon as circumstances permitted. No hint has ever come to light that Lenin ever imagined that "class struggle" would be replaced by some kinder approach, at least until the whole world had moved into the communist camp.

The abandonment of "class struggle" was first broached, presumably with Gorbachev's consent, in a speech by his foreign minister to listeners in Siberia. Shevardnadze's analysis of foreign policy objectives surprised his listeners, and eventually his readers, with the statement that he saw no need to conquer capitalists in the West.⁹ "Mankind" was now to be the concern of socialists. The goals of warfare and struggle were to be abandoned for peacemaking. The Soviet policymakers were arguing for New Thinking not only in international lawmaking, but also in municipal lawmaking. The future was to be not revolutionary law but "rule of law." The goal of the state would be transformed.

Such a transformation required reinstating the "young" Marx as an exponent of "humanism," which meant not only the enhancement of "human rights" but also a reconstruction of the civil code as a non-ideological tool designed to meet the needs of men and women in both the Soviet Union and the world. This reorientation of goals was twofold. Not only would the "class struggle" be set aside and state ownership and its companion, "state economic planning" be abandoned, except for a minimal segment, but the century-long expectation of the ultimate "withering away" of law would no longer be kept on the legislative agenda. Law would be drafted and enforced against the few who deviated from society's democratically defined norms.

A Search for a Definition

Gorbachev declared, even after the abortive coup of August 1991, that he still held to his goal of achieving "socialism."¹⁰ He did not elaborate, but his scholars had already set their minds to formulate a definition. It was evidently not to be the definition of the "Marxist classics." Nor was it to be the definition conceived in 1957 in a meeting of the then "communist parties in power."¹¹ That definition had dominated communists right up to the advent of Gorbachev. Because of its importance it bears restating in shortened form.

The form is that of a "check list" of goals to be kept before the orthodox. Some Marxist-oriented scholars have argued that the check list formulation is a misnomer, since the framers had not done more than express their views on the practical aspects required to achieve socialism. The framers were believed to have far deeper thoughts of a philosophical nature. Whatever the true nature of the check list, it served at least as "guidelines" for thought on the topic of socialism. It became accepted widely among political scientists, so much so that it was dubbed by one author the "New Communist Manifesto."¹²

These are the principles in abbreviated form: (1) guidance by a Marxist-Leninist party; (2) public ownership of the means of production; (3) socialist reconstruction of agriculture; (4) planned economy; (5) socialist revolution in ideology and culture; (6) abolition of national [ethnic] oppression and establishment of equality and friendship between peoples; (7) defense against external and internal enemies; (8) proletarian internationalism.

Compare these professed goals with a revised list of goals prepared in July 1989 by a committee of social scientists headed by the vice president of the USSR Academy of Sciences, V. N. Kudriyavtsev, himself a well-known legal scholar.¹³ The preamble of the committee's formulation declares:

New Thinking not only pertains to international relations and global problems of the present day, but is closely connected with a new vision of socialism.... Lenin's model of socialism is an extremely

9 See Eduard A. Shevardnadze, *Pravda*, 25 October 1989, p. 2. English translation as "A New Look at Foreign Policy," *Current Digest of the Soviet Press* (hereafter CDSP), vol. 41, no. 43 (1989), p. 5.

10 "Gorbachev Memoir Affirms Socialism," *New York Times*, 27 October 1991, p. 12. See also *Pravda*, 6 April 1991, pp. 1-2.

11 See "Declaration of the Twelve Communist Parties in Power" (November 1957) in *The New Communist Manifesto*, edited by D. Jacobs, 3d. rev. ed. (New York: Harper & Row, 1961), p. 176.

12 *Ibid.*

13 *Pravda*, 14 July 1989, p. 2. English translation as "Scholars Update Theory of Socialism," CDSP, vol. 41, no. 31 (1989), pp. 4-8.

important source of today's view of socialism. But the approach to it must be creative in nature.... Any concept of socialism must first of all satisfy the criteria of being socialist in nature, which means that priority must be given to the human being, his interests and his needs.

The definition is forceful in listing the evils of the past to be avoided: abuse of power; domination of state forms of ownership; the decentralization of state ownership and introduction of multi-level ownership (national, collective farm, cooperative, municipal, individual, etc.) with the dominant role played by public, socialist ownership. The authors insist that socialism must rule out administrative compulsion in the economy, and must espouse socialist social justice. This is said to require recognition of equality of opportunity; distribution of the social product in accordance with labor contribution; full participation in the management of public affairs; and the protection of individual rights and freedoms.

Within two years Soviet legislators had multiplied laws designed to implement "socialist" goals as defined by the declaration. The legislation was intended to renovate the economy and open the way to a Western-contrived form of "civil society." Commands from the government were to be replaced by a social structure that would develop independently and without the presence of all-pervasive command.

A former KGB colonel, Vladimir Rubanov, has indicated his interpretation of the causes of economic decline in his country, seeing them in excessive secrecy.¹⁴ He argues that production has lagged because of this security emphasis: engineers could not communicate with their colleagues throughout the world. Consequently, they did not keep up with invention and technology. He has called for a new conception of state security: not the secrecy enforced by the policeman, but rather the opening of markets to the world. He believes that the proper place to protect secrets is through intellectual property law. Thus, protection of the state would take the form of self-executing laws administered by open courts in the interest of a civil society, rather than a policeman's conception of what makes for state security.

Liberalizing Public Dialogue

This conception of enhancing social strength through liberalization of law runs throughout the legislation enacted to implement New Thinking. Not only is intellectual property seen as a key to strengthening society, as Rubanov argues, but loosening the long-held reins on public religious observation plays a role. Gone are the years of repression of religion. Gone are the policies of arresting "cult" leaders, destroying places of worship, prohibiting religious instruction, and state support of atheism.

New Thinking takes the form of a law authorizing citizens and religious groups to engage in public dialogue; to disseminate religious belief; and to participate in charitable activities.¹⁵ The motivation is clear: not only the Patriarch of the Russian Orthodox Church, but the state has suffered. The Patriarch because citizens have lost their traditional humanism, but the state has lost the myriad hands of those who for generations staffed the hospitals, the charitable institutions, and the schools.

Not all restraint on religious institutions has been relaxed. Religious organizations may not yet conduct state education; nor may they participate in political life, except as individual members of the clergy, as some have done as deputies of legislative bodies. The clergy, however, may provide religious instruction to children and adults in the language of their choice, both individually and in conjunction with others on premises belonging to the organization.

Registration is required by the local government, which asks questions about property ownership, location of place of worship, the plans to form enterprises, media outlets and educational institutions, but no questions on dogmatic aspects of the corporation are required; nor are questions on the organization or conduct of the organization permitted. Citizens forming the corporation must have reached the age of 18, and must act in a group of at least 10 persons. Property may be donated or received from the state. Voluntary donations may be solicited and accepted, and no tax may be levied on donations.

Employees of the corporation are subject to the same laws as workers and office employees in state

14 See R. Rubanov, "Ot totalitarizma nas spasit lish' novaya kontseptsiya bezopasnosti," *Stolitsa*, no. 17 (1991). This issue, distributed by Rubanov on 6 December 1991 at the Harriman Institute, Columbia University, is not available for verification by me.

15 Law of 1 October, 1990, *Vedomosti SSSR*, no. 41 (1990), item 813.

and public enterprises, institutions and organizations. Social security must be paid not only to corporate employees but also to clergy. Perhaps the major threat to religious institutions is the continuation of the USSR State Agency for Religious Affairs, which in the past was a restraint on whatever was proposed. Today it is authorized to provide "expert review" as well as simple information and consultation.

To modernize the bill of rights on religious practice, the USSR Congress of People's Deputies, as its last legislative act before dissolution following the August 1991 abortive coup, adopted a declaration to be incorporated into whatever constitution might eventually be promulgated, restating what had become the traditional guarantee of "freedom of conscience."¹⁶ Since Lenin's first formulation of the concept in 1918, such a guarantee had been incorporated into various forms as the right "to profess or not to profess any religion and to conduct religious worship or atheistic propaganda." In the 1991 declaration the formulation was expanded to authorize citizens "to engage in religious or atheistic upbringing and education of children." The earlier prohibition of hostility or hatred on religious grounds was removed from the declaration, presumably because it was thought more appropriate to include it in the criminal code if the hostility became manifest by incitement to pogroms.

Liberalization of public dialogue was enhanced markedly by the Press Law of 1990 that abolished press censorship.¹⁷ For citizens accustomed to prosecutions and administrative control through the censorship bureau of GLAVLIT, this law indeed introduced New Thinking. Under its provisions the press was declared free of censorship, except for publication of state secrets. As set forth in the law, state secrets, other secrets protected by law, appeals to forcibly change the existing state and social system, the advocacy of violence and brutality of racial, national or religious exclusivity or intolerance, the dissemination of pornography, or other criminally punishable acts may not be aired. Outlets for publication are no longer limited to those owned or

controlled by the state, for the press is now to be open not only to the state, as formerly was the case, but to political parties, public organizations, mass movements, professional unions, cooperative, religious and other associations of citizens created by law, labor collectives, and, finally, to citizens who have reached the age 18.

Although censorship has been banned and the press "freed," the law requires registration of outlets of material to be disseminated publicly. Depository libraries must receive copies of copyrighted materials, while radio and television scripts must be preserved for one month. Repeated violation of law incurs termination of registration by the original registrant or by a court. Included among protected materials are court preliminary investigations, unless authorized by the recording agency, and judicial hearings when designated secret by the courts.

While the law covers officially registered outlets, the *samizdat* press, if it is to be disseminated publicly but unregistered, appears still to be controlled and subject to prosecution if the procurator deems it necessary. Soviet commentators took pride in the law when it was enacted, arguing that restraints on publication had been inspired by provisions of the United States Code and by the practice of the United States Supreme Court in interpretation of the constitution.

As with the law on religion, the provisions on the press have been incorporated in the declaration adopted by the Congress of People's Deputies as its last act. The Congress again repeated the longstanding provisions on freedom of speech, press, assembly, meetings, street processions and demonstrations,¹⁸ but added a new provision, saying "there should be no state ideology made incumbent upon citizens."¹⁹ With this change, the original limitation on freedom of expression was dropped at the point where the constitution had guaranteed expression "in accordance with the interests of the people in order to strengthen and develop the socialist system." Evidently, the deputies thought the new provision necessary to exclude reference to socialist ideology.

16 *New York Times*, 7 September 1991, p. 5.

17 Law of 10 June 1990, *Vedomosti SSSR*, no. 26 (1990), item 492.

18 Originally introduced in RSFSR Constitution, 1922, Articles 13-16. English translation in Aryeh L. Unger, *Constitutional Development in the USSR: A Guide to the Soviet Constitutions* (New York: Pica Press, 1982), p. 24.

19 *Op. cit.*, note 16, Article 7.

Shattering the Communist Party

The longstanding monopoly of the Communist Party, established in practice in 1918, and in constitutional law by the "Stalin" constitution of 1936, was shattered by constitutional amendment in March of 1990. The Party had been reluctant to respond to Gorbachev's wish to introduce a multi-party system, but under the constant pressure from the "liberals" of Gorbachev's administration, the die was cast, and adjustments made in the law.²⁰ Formulation of the status of the Communist Party had varied with time. In the 1936 text, the constitution in its Article 126 variant, guaranteeing the right to unite in public organizations, had inserted a phrase saying the Communist Party "is the vanguard of the working people in their struggle to build communist society and is the leading core of all organizations of the working people, both public and state." This almost offhand provision was strengthened in the 1977 constitution by inserting Article 6, declaring "the leading and guiding force of Soviet society and the nucleus of its political system, of all state organizations and public organizations, is the Communist Party of the Soviet Union." Nothing was said of the right to form other parties.

The new Article 6 declared that "the Communist Party of the Soviet Union, other political parties, as well as trade union, youth, and other social organizations and mass movements... shall participate in working out the policy of the Soviet State and in the administration of State and social affairs."²¹

A law of 9 October 1990 codified the constitutional provision to exclude cooperative and other organizations pursuing commercial goals, religious organizations, and governmental entities.²² These exceptions had already been established by other legislation, as had the general provisions of the criminal code. Evidently, it was thought desirable to repeat these criminal provisions, for the law banned associations with the following goals: overthrowing or violently changing the constitution; forceful violation of the territorial unity of the USSR or of its autonomous formations; advocating war,

violence or cruelty; stimulating social, racial, national, or religious discord; commission of crime; and the formation of militarized associations. Registration of parties with information on their finances, purpose, membership, and party affiliation in the various legislatures within the state was required, as was auditing of accounts.

With the 1990 constitutional amendment and its supporting legislation, the indicia of "socialism," formerly set forth in the 1957 declaration of the Communist parties in power had been discarded and New Thinking on the Communist Party had been dramatized. New parties emerged immediately with prominence being given to the Liberal Democratic Party, the Christian Democratic Union, the Democratic Union, the Social Democratic Party of Russia, and more.²³ Although the Communist Party remained a strong force, its influence was decidedly weakened.

Gorbachev himself saw the writing on the wall. On 26 August 1991, he published his declaration of resignation as Secretary General of the Party.²⁴ In his brief statement he wrote, "In this situation the CPSU Central Committee must make the difficult but honorable decision to dissolve itself. The republic Communist Parties and local Party organizations will determine their own fates. I do not consider it possible to continue performing the functions of general secretary...."

Already, on 20 June 1991, Boris Yeltsin, as president of the Russian Republic, had issued Decree No. 14, terminating the activity of political parties generally, including the Communist Party, in state agencies in the republic he dominated.²⁵ He made no move to ban the Communist Party totally. On the contrary, he recognized the right of citizens to exercise their constitutional rights to assemble and to hold any position in political parties, but noted that persons in state service are not bound by decisions of political parties and have the right to participate in political party activity only during non-working hours and off the premises.

These declarations and decrees did not mean that the Communist Party was no more, but they did handicap the work of the Party, which no longer

20 For the debate on abandoning Communist Party monopoly under the Constitution, see "CPSU Plenum Mulls Statutes, Party's Role," *CDSP*, vol. 42, no. 11 (1990), pp. 9-10.

21 See W. E. Butler, *Basic Documents on the Soviet Legal System*, 2d. ed. (New York: Oceana Publications, Inc., 1991). Amendment of 14 March 1990, p. 5.

22 *Vedomosti SSSR*, no. 42 (1990), item 839.

23 See *Wall Street Journal*, 19 October 1990, p. A12.

24 *Izvestiya*, 26 August 1991, p. 2. English translation as "Gorbachev Quits as Head of Dying Party," *CDSP*, vol. 43, no. 35 (1991), p. 8.

25 *Sovetskaya Rossiya*, 23 July 1991, p. 1. English translation as "Yeltsin Orders Party Out of Workplace," *CDSP*, vol. 43, no. 29 (1991), p. 1.

operated from its protected monopoly position. For those who had followed the Communist Party's ascendancy during the early years of revolutionary fervor and its absolute domination of political life during the Stalin-Khrushchev-Brezhnev era, this seemingly most solid pillar of socialism, as defined in the 1957 declaration of the communist parties, had crumbled.

Inroads within the State Apparatus

Although the Communist Party was weakened, the state apparatus remained in place. Not a word had been uttered for decades about the expectation held by Marxist purists in the early years following the Revolution that the state would eventually "wither away." Indeed, Stalin in his notable speech of 1930 to the Party had declared that it must remain strong right up to the time when it was no longer needed.²⁶

Stalin had implemented his dictum by weakening his two principal longtime advocates of "withering away," namely Eugene B. Pashukanis and Nikolay V. Krylenko. On a memorable day for students in the Law Institute in February 1935, the professors told their classes that Pashukanis had been declared an "enemy of the people."²⁷ No one had failed to appreciate what that meant to a career, and it was no surprise that shortly thereafter both Pashukanis and Krylenko were arrested. Word soon seeped out that they had been executed. The one had been the principal draftsman of Stalin's new constitution and the other the commissar of justice.

With these signals all knew that the state would not "wither away" soon. By 1938, Stalin's procurator and legal philosopher, Andrey Vyshinsky, had published his support for Stalin's 1930 thesis that law must be strengthened as the pillar of Stalin's power.²⁸ The notorious purge trials, organized by Vyshinsky as prosecutor in the mid-1930s, rid Stalin of his enemies. Vyshinsky exalted the "confession" as the preferred evidence of guilt. Bukharin, Radek, and the prominent enemies were taken before the

court in the Columned Room of the Trade Unions, and lesser-known persons were taken before the "Special Board" set up to try in secrecy the people whom Stalin had designated for imprisonment or execution. The mid-1930s became the nadir of the era of Soviet "revolutionary" law.

Stalin's death in 1953 and its implications seeped slowly into the consciousness of those who inherited the responsibility of government. By 1957, Nikita Khrushchev reached the point that encouraged him to denounce Stalin's regime in a secret speech given to the Party. Soon thereafter, Khrushchev ordered that Stalin's corpse be removed from the mausoleum in Red Square, where he had been laid alongside Lenin, and he was buried in the ground behind the building. Stalin's law was gradually liberalized and "humanized."

Codes of law were revised in the early 1960s, most notably in criminal law and criminal procedure, to such an extent that Professor Harold J. Berman, who had long shepherded his students at Harvard through the developments, found it possible to say that "the means of implementation and safeguards are now much stronger than in the past."²⁹ The state was still very strong, as evidenced by Khrushchev's penchant for application of the death penalty, even for property crimes, but students of Soviet law, both within the USSR and abroad, thought they sensed a fresh breath emerging. At least the horrors of the 1930s were repudiated.

The state was hardly benevolent, indeed law remained in the form it had taken in the 1930s, but the spirit with which it was applied to those accused of deviance from social norms was different from the Stalin years. Among many Soviet citizens the expectation emerged that change was afoot. Yet the draft of a new constitution to replace the one that had been sponsored by Stalin in 1936 was delayed beyond expectations. Leonid Brezhnev, as inheritor of Khrushchev's mantle, eventually seemed to feel that socialist law had taken a new stride. Finally, Brezhnev instructed his draftsmen to speed preparation of the draft, and in 1977 the "Brezhnev Constitution" was promulgated to call for the opening of an era of "developed socialism."³⁰ In truth, the

26 For an English translation of the relevant paragraph, see "Political Report of the Central (Party) Committee to the XVI Congress, 1930," in *Soviet Legal Philosophy*, trans. Hugh W. Babb (Cambridge: Harvard University Press, 1951), p. 235.

27 I have chronicled this event in John N. Hazard, *Reflections of a Pioneering Sovietologist*, 2d. ed. (Dobbs Ferry: Oceana Publications, Inc., 1987), p. 24.

28 See Andrei Y. Vyshinsky, "The Fundamental Task of the Science of Soviet Socialist Law" (1938), in *Soviet Legal Philosophy*, op. cit., note 26, pp. 303-41.

29 See Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes* (Cambridge: Harvard University Press, 1966), p. 91

document seemed to express confidence that further amendments would be unneeded. The regime was satisfied with what it had achieved.

The Communist Party's Politburo was encouraging stability of law, and Brezhnev in 1981 called for implementation in practice. After extensive study in the USSR, Professor Alice Tay of Sydney's Law Faculty voiced the opinion that the Soviet Union and East European countries had brought law and reality closer by fusing Western legal concepts with the bureaucratic interpretation of law as an instrument for molding society.³¹ She seemed to imply that the Soviet leadership had concluded that orderly legal procedures could far better manage change than decisions made on the basis of ad hoc expediency.

Gorbachev Emerges

In the mid-1980s law came to be studied by students aspiring to positions of political responsibility. Law schools multiplied until annual graduation reached 15,000. The event coincided with the emergence in 1979 of a candidate member of the Politburo who had been trained in law at the Law Faculty of Moscow University, namely Mikhail S. Gorbachev. In 1980 he was advanced to full membership. He had studied both agriculture and law, and, of course, had proceeded through the lower ranks of the Communist Party's training school. His elevation was hailed by the legal profession as a sharp break from the preference for education in engineering that had marked the period of the five-year plans. Law teachers and students thought they saw emerging a new generation who wanted to move into political science and law to take their place in the administration of the local soviets and in management generally. Lawyers seemed to be moving into elite circles, rather than being relegated to what might be called careers among the "journeymen of the law." Law had not previously been considered a prestigious career.

Gorbachev's rise to power is too well known to require further recital. In 1985 he finally reached the pinnacle of the secretaryship of the Party. In that role he innovated so as to introduce new concepts into law as stimulus to production and manage-

ment. The key, so it seemed, was to discard the long-held position that productive property could be owned only by the state. He seemed reluctant, however, to move quickly from this position, for it was considered one of the primary pillars of socialism, the other being guidance by a Marxist-Leninist party.

Although the new Party General Secretary still held to the view that the land, as the traditional source of wealth in a peasant society, had been the core of Russia's power, he was prepared to introduce various new forms of property use. His decree of 13 January 1987 opened the door to a torrent of enactments of new legal norms. At first he showed caution: ownership of property of a productive nature was to remain the preference of the state policymakers, but the door was left open a crack. Property might be leased; it could be utilized to a very great extent by cooperatives, and finally, use could be shared with capitalists in "joint ventures."³²

This opening of industry and services to joint ventures shocked Marxist purists. It made possible the employment of labor by partners who need not be state enterprises. To a Marxist, employment by private owners constituted exploitation of the labor of others. Allowing private owners to exploit labor would open the door for the creation of a "bourgeoisie." This had been permitted under the crisis of NEP, but it now seemed to many Soviet Party leaders that the economic situation had become so unfavorable that a retreat to NEP was required.

In light of such attitudes, Gorbachev's bold move to introduce joint ventures caused outsiders to wonder why the step had been taken. The explanation seemed to be that the Chinese had found that through introduction of joint ventures state industry could be updated with state of the capitalist world technology, and capital to finance renovation could be obtained from the Western capitalists. Those who had a glimpse of Soviet thinking through contact with Soviet economists concluded that the practical advantages of joint ventures outweighed the threat of domination by a new bourgeoisie that might take the bait offered by Gorbachev's team.

30 See Unger, *op. cit.*, note 18, pp. 232-66.

31 Quoted in John N. Hazard, *Managing Change in the USSR: The Politico-Legal Role of the Jurist* (Cambridge: Cambridge University Press, 1983), pp. 46-47.

32 See Butler, *op. cit.*, note 21, pp. 235-461. Professor Butler has assembled the key laws of Gorbachev on the Soviet economy.

The caution with which the team moved suggested the lingering fear of capitalists. The 1987 law opened the gates to capitalist investment in joint ventures with Soviet state enterprises only if the capitalist partner owned no more than 49% of the venture, and if both the chairman of the board and the director general of the enterprise were Soviet citizens. Additionally, purchase of raw materials and sales of products could be conducted only through the state appointed foreign trade organizations controlled by the Ministry of Foreign Trade. Finally, personnel were to be "mainly" Soviet citizens, and Soviet labor law would apply to employment, although expatriates could be employed in small numbers and on such terms as the employer might wish.

Economic planning by the state, which had been the pride of the Soviet system since the introduction of the state plan in 1928, was in part to be correlated to the foreign trade activity of a joint venture. This restriction discouraged potential foreign partners, and relaxed restrictions were introduced time and again as it became evident that foreign investors were not interested in what was being proposed. Thus, by a decree of October 1987, the Central Committee of the Communist Party and the USSR Council of Ministers relaxed centralized economic decisionmaking to permit state enterprises to sign on their own initiative contracts envisioning single-time delivery of production by enterprises, including joint ventures, and ministries were authorized to shortcut the centralized bureaucracy when a capitalist firm participated in a joint venture on Soviet territory.³³

The compulsory contracting with other state enterprises, which had been a feature of the "state contract" system, was also not to become a straight-jacket on commerce, although the "state order" system was to be permitted when necessary to assure unconditional fulfillment of international commitments. Enterprises that were able to exceed planned production were authorized to export products over and above "state orders" when the market was favorable.

In spite of the increased inducement offered foreign investors sought as partners with state enterprises, the expansion of industry through joint ventures fell short of Soviet expectations. A new wave of inducements was dangled before foreign-

ers. A decree of 2 December 1988 removed the previous limitation on sales and purchases to foreign trade organizations. Joint ventures would now be permitted to conduct foreign trade directly through any external economic organization, as well as through producer cooperatives, associations and other economic organizations. Additionally, the restriction placed on joint-venture officers was relaxed to permit a foreign national to be named either a board chairman or a director general. Secondly, the 49% limitation on foreign ownership of joint ventures was eliminated. This meant that a joint venture would qualify if only 1% of the stock were held by the Soviet owner. To retain Soviet influence, the decree required that stockholding directors be unanimous on "fundamental questions."

With the opening of joint-venture ownership to producer cooperatives of all types, a major step was taken toward expansion of Soviet participation. No longer would the Soviet party be limited to a state enterprise. The cooperatives were, however, limited to those engaged in production. Marxist leadership could not yet stomach the participation of middlemen in joint-venture ownership.

The theme of prohibited activity by brokers was restated by the Council of Ministers in its accompanying decree of 2 December 1988, limiting joint-venture partners engaged in foreign trade to export of their own products and services and to import only of those products necessary to produce, unless given permission by the Ministry of Foreign Economic Relations. Lest export denude the market of scarce materials, the decree listed types of goods requiring licenses.

Privatization Proceeds Steadily

Following the cautious steps taken to introduce joint ventures, privatization took on momentum. A USSR law on enterprises of 4 June 1990 enacted a corporation law to be used as a model intended to introduce private large-scale ownership.³⁴ The expectation was that state enterprises would become privatized, but Kaj Hobér, a Swedish specialist on Soviet law, thought this unlikely because the law established no statutory minimum on the number of shares to be purchased by non-state entities. Mr.

33 For the statutory materials initiating joint ventures, see *Foreign Trade* (USSR Ministry of Foreign Trade), nos. 5 and 12 (1977) and no. 2 (1989).

34 Law on USSR Enterprise, *Vedomosti SSSR*, no. 25 (1990), item 460.

Hobér concluded that the state in such a case might be left with 99% of the stock, and the firm would hardly be "privatized." Further, in his opinion the law left the position of foreign investors unclear.³⁵

Together with the corporation law there was enacted in August 1990 a "small enterprise" law.³⁶ Its purpose was to stimulate formation of new or existing enterprises to form firms in production, servicing, scientific and even retail trade, but only of limited size. Not more than a maximum of 200 employees were to be permitted in industry, and a reduced number was set for other activity, the least favored being the trading firm, where the limitation was 15 employees. The rationale for this law was said to be recognition by the government of consumer need for products and services. Restraint on private business of 100% private ownership was maintained by the requirement that wages and social security benefits for employees correspond to rates set for those of state-owned enterprise.

The Russian Republic began in January 1991 to move beyond the limitations set by all-union legislation.³⁷ Michael Spagat of Brown University commented that the law on entrepreneurial activity was the first to discard completely Soviet ideology. The law's Article 1 defined entrepreneurial activity as that which is pursued for profit. Professor Spagat distinguished the January law from the federal small enterprise law, because the goal had become profit and not satisfaction of public need.

The federal parliament took its first steps towards entrepreneurship in April 1991. Richard Ericson of Columbia University's Harriman Institute characterized the law as a first step toward providing a framework for private enterprise.³⁸ The law's major premise was recognition of three basic principles: equality of all forms of property, freedom of disposition of property, even in inheritance, and compensation for loss without state caveats and constraints.

To cap the climax in transition from state ownership to private enterprise, Gorbachev signed a law on 31 May 1991, establishing Fundamentals of Civil

Law,³⁹ designed to provide a model to civil law codes of the republics. Sarah Reynolds of the Harvard Law School concluded that there had been a profound transition in law from ideologically oriented socialism to the private law of property, contract, tort, intellectual property, inheritance, and the application of foreign law.⁴⁰ In a sense, private law was no longer colored with public law, as Lenin had said it must be in a socialist system. It had returned to the foundation established centuries ago in Rome and reborn in Bologna.

The End of the Soviet Empire

The fresh breath inhaled by Gorbachev and his colleagues had reached farther than had been expected. All agree, both in the Eastern lands and abroad, that Gorbachev had expected no more than the renewal of the élan of communists, the humanization of the basic principles of socialism, and the decentralization of much of the activity of the Soviet state. With New Thinking, society would be renewed with a modernized version of Lenin's thinking of 1922. A return to Lenin's goals would entail reconstruction of the state as a federation quite different from Stalin's of the late 1930s, so as to restore Lenin's vision of a federation attractive to Ukrainians and Georgians.⁴¹ His diary of December 1922 presents clues to his goal of a loose federation.

Over the years, Lenin's vision faded under Stalin's drive for "autonomization," by which he narrowed state authority to introduce what came to be known as rigidly enforced command-administrative structures. With Stalin's death in 1953, followed by the deaths of his disciples, and the emergence of a new generation who had rejected Stalin's brutality and Brezhnev's stagnation, the public took a fresh breath. Outsiders may wonder whether the people realized how much attitudes had changed. Perhaps it was the thwarting of the old guard's attempted coup of August 1991, perhaps it was the realization of production failures, perhaps it was the sense that the "humanization" of

35 See *SEEL* (Soviet and East European Law), vol. 1, no. 7 (September 1990), p. 5.

36 Council of Ministers Decree on Small Enterprise, *Sob. Post. SSSR*, no. 19 (1990), item 101.

37 Law of 25 December 1990, *Ekonomika i Zhizn'*, no. 1 (January 1991), p. 16. Commentary by Michael Spagat, *SEEL*, op. cit., note 35, vol. 2, no. 1 (February 1991), p. 7.

38 Law of 2 April 1991, *Izvestiya*, 10 April 1991. Commentary by Richard Ericson, *SEEL*, vol. 2, no. 4 (June 1991), p. 5.

39 Law on Fundamentals of Civil Law USSR, 31 May 1991, *Vedomosti SSSR*, no. 26 (1991), item 333.

40 *SEEL*, op. cit., note 35, vol. 2, no. 6 (August 1991), pp. 5-6.

41 In his diary, not published until the death of Stalin, Lenin wrote, "I, so it seems, stand seriously guilty before the workers of Russia for not intervening sufficiently energetically and sharply enough for the notorious question of autonomization...." For full excerpt, see *Istoriya sovetskoy konstitutsii (v dokumentakh) 1917-1956* (Moscow: Gos. izd. Yuridicheskoy Literatury, 1957), pp. 399-401.

society must be stimulated by reintroduction of what was becoming valued as "nineteenth-century" literature, as had been suggested by a noted Russian jurist in his address to the New York City Bar Association in the autumn of 1990.⁴² All of these influences on society were in place when Boris Yeltsin mounted the tank to defy the coup's leaders, and the people in the street, and even army formations, summoned up their courage to topple the statue in front of the KGB building, to build the barricades to protect their leader, and to reject their commanders.

Political structures were changing fast under Gorbachev. Leaders in the republics were demanding that their "sovereignty" be recognized; that the command-administrative structure be relaxed; that lawmaking be placed in the hands of elected legislators rather than narrow circles of leaders organized as "presidia" to issue decrees. The most vocal dissent from the traditional leaders came from the three Baltic republics, who dared even to denounce the Hitler-Stalin Pact of 1940, and in fact denied the legality of their accession to the Soviet Union.⁴³

With the abortive coup of August 19,⁴⁴ Gorbachev's hope that the new union treaty would satisfy the demands of the restless republics was dashed. When he was able to reassemble the USSR Congress of People's Deputies as the only representative body authorized constitutionally to speak for the nation as a whole, he was unable to reconstitute the group of republic leaders which in the main had agreed to sign the treaty of union planned for August 20. He could only form an "interim" government, dominated by a hastily drafted "State Council."⁴⁵ The erstwhile Chamber of Nationalities was renamed the Chamber of the Republics, while the previous Chamber of the Union kept its former name. Its companion Chamber was reduced in number of deputies to limit votes to one only for each of the republics instead of the 32 authorized to the former Chamber of Nationalities. The autonomous republics and autonomous regions and areas, formerly authorized to seat 11, 5, and one deputy respectively, were deprived of any representation

in the Chamber, except as companions of the sole deputy representative accorded to the Union republic in which smaller ethnic units resided.⁴⁶ Further, the Chamber of Republics was enhanced in stature: instead of being equally responsible with the Chamber of the Union for developing legislation, the Chamber of the Republics was now to have veto power over the other Chamber's legislative acts.

The State Council was to be directed in its work by the USSR President, chosen by the Congress of People's Deputies under the 1990 amendment of the 1977 constitution.⁴⁷ The State Council was to become the principal decree-issuing body, playing the role of coordinator of interests common to the republics. On economic matters the interim government was to form an Interim Economic Committee, chaired by a nominee of the USSR President who was authorized, together with members of the State Council, to make decisions on questions of defense, security, law and order, and internal affairs.

As its last act, the USSR Congress of People's Deputies issued a Declaration of Human Rights and Freedoms, intended to reaffirm its previous recognition of various rights and freedoms until a new constitution could be brought into effect. This declaration of 5 September 1991 incorporated in 31 articles the principles of the United Nations Covenants of Political and Social Rights. Its purpose was stated as incorporation of common principles of democracy, humanism, and social justice. As a final word it was declared that it was proceeding from the lessons of the Soviet Union's history.⁴⁸

Although seven of the Union republics agreed in mid-November to work toward a new "Union of Sovereign States," Ukraine held back, saying that it awaited its referendum scheduled for 1 December 1991. In spite of the seeming agreement in November, the draft was returned on November 25 to the republic parliaments for reconsideration, even though the State Council was reported to be in agreement with the draft. At that point Gorbachev's vision of maintaining some sort of Union vanished.

42 Aleksandr Yakovlev, Speech to Association of the Bar of the City of New York, The Coudert Lecture. *Record of the Association of the Bar*, vol. 46, no. 2 (March 1991), pp. 129-31.

43 The original of the protocol of 23 August 1939 is said to be missing from the files, both in Moscow and in Berlin. A carbon copy is published in *Vestnik*, USSR Ministry of Foreign Affairs (March 1990), pp. 59-63.

44 For English translations of documents issued during the coup, see *CDSP*, vol. 23, no. 33 (1991), pp. 1-3. For Russian original, see *Vedomosti SSSR*, no. 37 (1991), item 1082.

45 *Izvestiya*, 16 October 1991, p. 2. English translation as "Transitional Government Gives Republic More Power," *CDSP*, vol. 43, no. 37 (1991), pp. 11-12.

46 The ratio of deputies allotted to ethnic entities was set by the Constitution of 1977, Art. 110. See Unger, op. cit., note 18, pp. 253-54.

47 The amendment of 14 March 1990 created the "presidency" in the 1977 Constitution as Art. 127 et. seq.

48 *Vedomosti SSSR*, no. 37 (1991), item 1083. For English translation, see *New York Times*, 7 September 1991, p. 5.

A New Commonwealth Emerges

When Ukraine's referendum resulted in both a strong vote for independence and support for Leonid Kravchuk as president, the impasse caused by Ukraine's hesitancy to commit its legislators evaporated. To the surprise of many both at home and abroad, the leaders of Russia, Ukraine, and Belarus found it possible during a long weekend to forge a new agreement. The accord was achieved hastily, so hastily that the Islamic leader of Kazakhstan could not be reached. On 9 December 1991, the press carried news of the founding of a Commonwealth (*sodruzhestvo*) of Sovereign States.⁴⁹ In the accord's first paragraph the three founders declared the Union of Soviet Socialist Republics "as a subject of international law and geopolitical reality" was "ceasing its existence." Shortly thereafter the Kazakh leader agreed to join the Commonwealth as a fourth partner.

The haste with which the founders acted probably explains the paucity of provisions in the accord. Except for the decision to declare the Belarus capital of Minsk to be the capital, no coordinating institution was established, but perhaps the founders were not yet ready to think of institutions. They limited themselves to "principles" to be applied. Thus, they committed themselves to confirm the goals and principles of the United Nations, the Helsinki Final Act, and the Conference on Security and Cooperation in Europe, and the bill of rights adopted on 5 September 1991 by the Congress of People's Deputies, augmented to add a guarantee of equal rights of nationality or of other cultural differences, and of civil, political, social, economic and cultural rights and freedoms "in accordance with common international norms and human rights." Clearly, they were worried lest the larger republics dictate to the others.

Progress toward an expansion of the Commonwealth was recorded soon after the Minsk Accord,⁵⁰ for the Islamic republics followed the lead of Nazarbayev in joining the founders. The idea caught fire, so that all but Georgia joined the group, leaving outside only the three Baltic states that had been recognized as independent by the Congress of People's Deputies on the final day of their 6 September 1991 session. Under the Accord of Alma Ata of

December 21, the Commonwealth became an Accord of 11 republics, fleshed in with a skeletal institutional structure, evidently influenced by the structure adopted by the Treaty of Rome for the European Economic Community. A Council of Heads of State would set policy, and a Council of Heads of Government would become the executive body, charged with the duty of submitting proposals for coordinating institutions to the Council of Heads of State.

Guidance in formation of institutions appears in the Minsk Accord, for by Article 7, the parties agreed to coordinate foreign policy, a common economic space, a common European and Eurasian policy, a customs policy, common transport and communications systems, ecological security, environmental protection, an immigration policy, and a fight against organized crime.

By Article 9 the parties seem also to be planning to establish a dispute resolution procedure at all levels of government. Most importantly, a united strategic armed force is to be formed with a coordinated policy on control of nuclear weapons, this policy being elaborated in a protocol of the Alma Ata Accord.

The Red Flag Comes Down

On 25 December 1991 Gorbachev signed his last decree, attempted to obtain a vote of dissolution of the Supreme Soviet but failed for want of a quorum, and broadcast his farewell address. With this the red flag came down from the Kremlin, and the flag of the Russian Federation was hoisted.⁵¹

To the end, Gorbachev evidenced his concern for law. In his televised comments on the last day, George Kennan recounted a conversation with a Soviet lawyer, who had told him that some of the events of the past six weeks could be explained by Gorbachev's legal training in the Moscow Faculty of Law. In this informant's opinion, Gorbachev had been imbued with his professors' respect for both the content and form of law, which they had preached even during the dark days of Stalinism. Zbigniew Brzezinski followed Kennan on the program to suggest that one of the influences on Gorbachev had been his youth in the Cossack lands,

49 *New York Times*, 10 December 1991, p. A-19.

50 *New York Times*, 23 December 1991, p. A-10.

51 The final events of 25 December 1991 have been set forth in the *New York Times* of 26 December 1991.

where the people had been descendants of escaped serfs, militantly defending their freedom.

The chairman of the criminal law department in the Institute of State and Law of the USSR Academy of Sciences had already given his explanation of the Russian people's emerging resistance to the repression of the pre-Gorbachev years: it was the reading of nineteenth-century Russian classics. Those classics had never been censored when much else had been, so that the youth of Russia could absorb the enlightened thinking of a Tolstoy, a Chekhov, a Turgenev, a Pushkin, and a Dostoyevsky.

Whatever the explanation, the desire for freedom had been nurtured, and Gorbachev sensed his people's readiness to support a "rule of law" soci-

ety; they were ready to support Boris Yeltsin when he jumped on the tank to give the call to resistance to those conservative leaders who sought to turn the clock back to pre-Gorbachev years when "fear" permeated the land.

No one supposes that there is no trouble ahead as the new Commonwealth pursues its new policies, but one senses that a fresh breath is being taken, especially among those who make and administer the law.

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