

THE FUTURE OF SOVIET LAW*

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Two notable events affecting the future of Soviet Law have occurred during the past two years: the 25th Congress of the Communist Party of the Soviet Union in March of 1976, and the Extraordinary session of the Supreme Soviet of the U.S.S.R. promulgating a new federal constitution on 7 October, 1977. The first foreshadowed the second, for Secretary-General Leonid Brezhnev used the occasion of his Party's Congress to announce that a new constitution was in preparation and to indicate the Party's thoughts on what needed to be accomplished in the field of law.

To Brezhnev in 1976 the task ahead was "improvement of legislation and consolidation of the Soviet legal order". In particular he saw the need for expanding legislation on environmental protection, for revising labour law to meet the new conditions created by the advance of the scientific and technological revolution, and for strengthening legislation regulating the state enterprises, presumably to codify the numerous regulations which are said to require systematisation.

Brezhnev's call for "consolidation" is not new. Ever since Joseph Stalin's death in 1953 there has been evident a strong desire to codify and develop Soviet law, to eliminate the excesses for which his regime was noted, and to bring order into a sometimes chaotic body of amendments to codes adopted originally in 1922 and 1923 to regulate the neo-capitalism introduced by Lenin at the time to restore the economy of a country torn for years by revolution and civil war. Outward manifestation of this recodification programme caught the attention of comparative lawyers of the world with publication in 1958 of new federal fundamental principles of criminal law and criminal procedure, on the basis of which new detailed codes were promulgated in the republics in the early 1960's. A veritable torrent of legislation has followed with new civil, family, labour, civil procedure, corrective labour, health care, land use, and environmental protection codes enacted in the 15 republics on the basis of fundamental principles establishing guide lines for republic draftsmen. Brezhnev's call for more codification seems, therefore, to be recognition of a need to fill a gap which still exists for the law of state enterprise, and to extend what has already been done for the environment

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and for the employment relationship.

Brezhnev went farther than his call for "improvement of legislation". He told his Party colleagues of the rank and file that the Party planned a new *Svod Zakonov*. The Russian title brings to mind the historic compilation of Tsarist rescripts in the early 19th Century by Alexander I's noted lawyer, Michael Speransky. Just as in Alexander I's time, decrees have been piled upon decrees for decades in the U.S.S.R. so that even judges, procurators and advocates have difficulty determining what law is currently in force. Attempts have been made since Stalin's death to publish laws revoking relevant former statutes as new laws are enacted, but no general compilation of all Soviet law arranged in accordance with a systematic pattern has been made. "Collections" of materials necessary to those who practice in various fields, such as labour, housing, and civil law have appeared under the editorship of specialists, and codes have been republished in various editions at two or three year intervals with annotations to relevant new legislation or judicial decisions, but Soviet lawyers have continued to complain about lack of system. The promised *Svod Zakonov* is to be a multi-volume marshalling of the law in force at the time of publication, and it is presumed that it will not only help the practitioner but emphasise to the public in general that the accent of the 1980's will be upon stability of law with a slower pace of change than in Stalin's time, or even during the regime of his successor, Nikita Khrushchev. Presumably, the new volumes will not be obsolete soon after publication.

Brezhnev's attention to law was not limited to revision of tests and systemisation. He turned his Party's thoughts to implementation as well. While anticipating no revision of the structure of the institutions which enforce the law, Brezhnev called for improvement of courts, procurators' offices and the street police. He even assured his listeners that there would be "unflagging control" by the Communist Party over the security police (the K.G.B.). Perhaps his assurance was needed to satisfy those of his listeners who recalled the attempt by Stalin's security police chief, Lavrenti Beria, soon after Stalin's death, to seize power, an attempt which was thwarted by his colleagues under circumstances which remain mysterious to the outside world. In short, Brezhnev was saying that there would be safeguards against a return to Stalin's apparatus of "terror", led by a security police under no control by any but Stalin. Millions had perished during the great "purges" of 1935-37 in circumstances so outrageous that Stalin's heirs had found it desirable to rehabilitate many personalities posthumously, most notably two who had headed the pre-purge legal establishment, E. B. Pashukanis and N. V. Krylenko.

Finally, Brezhnev turned to the mass organisations which he defined as agents of "control". He reminded his audience that social organisations provided the masses with instruments of participation in creating respect for legality on the part of bureaucrats as well as citizens generally. The trade unions, the governing councils at various levels of the state

apparatus (the soviets), and the Young Communist Youth League (the Komsomols), were available to see that state administrators obeyed the law, and that unruly citizens were reminded of their social obligations through social pressure. His listeners would not have had to think hard to remember that all of these institutions had been more or less moribund under Stalin. The trade unions had become little more than an arm of enterprise management pressing their members toward higher production rates. The governing councils (soviets) met seldom, especially at the local level, and, when they did meet, they were so regimented by their Executive Committees that in some regions members of the council did not bother to attend meetings because they felt themselves impotent. The Komsomols were turned into agencies to propagandise youth. They had no role in keeping order as auxiliaries to the street police in places where youth congregated.

Even though Brezhnev assured his listeners that a new constitution was in committee at the time of the 25th Congress, there seemed to be little activity following the Congress until the spring of 1977, when some new names were added to the constitutional drafting committee which had been in formal existence ever since Krushchev set it up in the early 1960's. Action soon followed, and in June of 1977 the Central Committee of the Communist Party approved a draft for submission to the public for comment. Throughout the summer, the general and specialised Soviet press published selected proposals for revision of the drafts; many of these coming from Soviet lawyers who made concrete suggestions not only for improvement in legal language but for substantive change as well. Most of the substantive proposals seemed designed to enhance the attention given to principles already in the codes by elevating them to the level of the constitution. Following the summer months, the Supreme Soviet of the U.S.S.R. met to hear Brezhnev's report on the draft, and with one hundred revisions, it was promulgated.

From the lawyers' point of view, the new constitution gave impetus to the campaign to strengthen legality. Perhaps most notable was Article 160 which read: "No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by the sentence of a court and in conformity with the law." At first glance an outsider might not sense the novelty of the Article, for it seems to restate a principle of nearly universal application. Still Soviet lawyers could not but look at it with eyes which had witnessed the functioning of Stalin's "Special Boards". These agencies, created by decree in 1934, had been authorised to banish to labour camps in remote regions persons found by them to be "socially dangerous", and to do so without regard to the provisions of the criminal code or the code of criminal procedure. This meant that they were permitted to be their own judge of what constituted "social danger", and to hold their proceedings in secret, without permitting the accused to have counsel. Millions were "convicted" by these Boards during the great purge, and even after the Second World War. Solzhenit-

syn's *Gulag Archipelago* has told the world of the consequences for those sentenced by these Boards to the labour camps. For Soviet citizens they were the primary instruments of Stalin's terror, so much so that his heirs, six months after his death in 1953, abolished them by special decree, presumably to assure the public that a new leaf had been turned in the book of Soviet legal history. Article 160 of the new constitution was then, in the eyes of lawyers and citizens alike, a reaffirmation of the leadership's promise to avoid harsh administrative procedures and to abide by the new codes designed to give the accused a chance to prove innocence in court. Probably no one expected trials to be conducted always in such a way that only the guilty would be punished, for there were still "blind spots" before the eyes of leaders conditioned by long years of experience to look without compassion upon those accused of political crime. Still, the new constitutional provision suggested that the scope of arbitrary decision would be narrowed. While this fell far short of what western lawyers had hoped for, especially since there was no revision of the code of criminal procedure to permit counsel as a matter of right in all hearings before preliminary investigators prior to the trial itself, it marked what Soviet lawyers took to be a step forward toward the legality which many of them espoused.

The second notable feature of the new constitution, as it concerned the law, was the revision of the Bill of Rights. Lawyers for years had been asking that there be an indication in the constitution of the post-Stalin emphasis being given to human rights by Stalin's heirs. They began in the 1960's to urge that the Bill of Rights be moved forward in the constitution to indicate its priority among principles of government. In the constitution of 1936 it had been inserted near the end of the document. While the positioning of a Bill of Rights would seem to be immaterial to Westerners, especially to those who recall that the Bill in the United States constitution is not within the body of the document at all, but only in amendments, to Soviet lawyers positioning was important, and they urged that they be heard. The 1977 constitution has met this desire: the Bill of Rights has been placed near the beginning in Part II, immediately after the Part which defines the principles of social structure and policy, which for Marxists are the foundation of their entire political and social system.

As to the content of the new Bill, it reflects the recent ratification by the U.S.S.R. of the two Covenants on Human Rights drafted by the United Nations. This means that the old 1936 Bill has been augmented to fit the new obligations assumed by the U.S.S.R. with ratification of the Covenants. Since the structure of the two Covenants follows the long-established Soviet practice of dividing human rights into two groups, the economic and the political, no radical change in the structure of the Soviet Bill was necessary. Still, some rights defined by the Covenants were novel to the Soviet system, such as the right to housing and to enjoy cultural benefits, and these had to be taken into the new documents.

The marvel to Westerners is that in spite of the obligation assumed by ratification of the Covenants, the draftsmen of the new Soviet constitution have adhered to familiar limitations on some of the rights, as they have appeared in all Soviet constitutions since the first of 1918. Also, some of the rights established by the Covenants have been omitted entirely. For example, there is no incorporation in the constitution of the Covenants' rights to strike, to emigrate, and to propagate religion. The principle of the right to own property is limited by the long-established rule that citizens may not own productive property, except as artisans duly licensed for the purpose and denied the right to employ labour. The right to associate is limited by the provisions of Article 6 of the new constitution which permits association for political purpose only to those admitted to the Communist Party. There can be no other political parties in competition with the Communists.

The right to expression is limited by Article 39, paragraph 2, in which it is said: "Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state, or infringe the rights of citizens." Much has been made by Western commentators of this provision, but it is not new to Soviet constitutions. The first constitution of 1918, adopted by the Russian Republic with a Bill of Rights said by a Soviet historian to have been introduced into the draft by Lenin himself, provided in its Article 23: "Guiding itself by the interests of the working class as a whole, the Russian Socialist Federated Soviet Republic deprives of political rights those individuals and specific groups who use their rights to the detriment of the interests of the communist revolution." Clearly, the new constitution enshrines no general principle of freedom of expression, and this position is made even clearer by articles of the criminal code which punish not only "agitation and propaganda for the purposes of overthrowing or weakening Soviet authority" (Art. 70), but also, "systematic circulation in oral form of deliberately false fabrications defaming the Soviet state and social system . . ." (Art. 190-1). Judicial practice has indicated that intent under Article 70 is imputed from circumstances, as is defamation.

With these limitations placed upon dissent, it is evident that the new constitution is not a charter of freedom for citizens who think like Solzhenitsyn and Sakharov. Still it is seen by Soviet lawyers as opening the gates to the exchange of information and what they call "constructive criticism" as an essential component of improved administration of the state. Thus, the new freedoms are utilitarian in inspiration, or so it would seem to Western observers of Soviet activities.

If utility is the explanation of the new constitution's emphasis upon law and legality as creating a climate for more effective administration of the Soviet economy and for appeasement of a populace grown restive after years of exhortation to sacrifice individual desires in the interest of community welfare, can other deeper roots be uncovered to the new constitutional tree? Some students of Soviet affairs think they see evidence

of such roots. As inspiration for their thinking they turn to extrapolation from well-known facts: namely, the ageing state of Soviet leadership; the emergence among some Communist Parties of the concept of "Communism with a human face"; and the reports of emigrés from the U.S.S.R. that neo-Stalinists wishing for a return to some at least of Stalin's type of discipline as necessary to progress are emerging within the Soviet Communist Party.

The age of Party leadership is an undisputed fact, and the expectation that change of leadership is soon to come has been enhanced by widely circulated reports that Brezhnev is not in good health. With these facts, it is argued that a leadership, many of whom are over 70 years of age, is thinking of the succession, and is disturbed by what it sees as tendencies emerging among the younger Party members waiting for their turn at the wheel. If it be true that there are neo-Stalinists wishing to return to repressive measures to control dissent, to reopen the Gulag Archipelago, to disregard the new procedures for court trials, even to reinstitute some features of Stalin's system of terror, it is not hard to imagine that Brezhnev and his ageing colleagues who struggled to escape from these methods after Stalin's death to avoid the never ending blood bath, which his repeated purges of leaders occasioned, do not want this wing of the Party to gain ascendancy. If it also be true that there is a wing of opposite persuasion who, like Dubcek in Czechoslovakia in 1968, think it time to relax pressures even more than Brezhnev has done so as to introduce communism with a human face through readmission to the political process of political parties of socialist persuasion prepared to compete with communists for leadership, and to lift restraints upon freedom of expression, it is equally easy to imagine that Brezhnev's generation is fearful of what may come from this quarter after their departure.

Brezhnev's call for "consolidation of the legal order" appears to be a call for "stability"; not a stability of stagnation since Marxists have been taught to believe that social forces at work will require constant change to create the truly communist society of abundance and lack of state compulsion, but a stability nevertheless. Codification appears to be directed toward a new approach which rules out frequent amendment of law. Even the Communist Party is required by the new constitution "to function within the framework of the constitution" (Article 6). This cannot be recognition by the Party that Soviet law has taken on the character of "natural law" to which all must adhere, for Soviet legal philosophers have continued to cite the Communist Manifesto's position that "your jurisprudence is but the will of your class made into a law for all". Communists are positivists, not natural lawyers, so the requirements that the Communist Party function within the framework of the constitution cannot mean that it can no longer "lead". Indeed the same Article 6 reaffirms the Party's leadership position. The outsider can only assume that the new phraseology will require the Party to pro-

ceed with measured tread and to introduce new policies only through the constitution's amendment procedure and, perhaps, after referenda, which are provided for by the constitution (Article 48) for the first time. This means public discussion, under Communist Party guidance of course, but at least without the secrecy surrounding Stalin's frequent unexpected changes of line. If this assumption is sound, "stability" is the order of the new day, and the constitution is the instrument of this policy.

Under this theory the constitution is designed to preserve the Soviet model of government created by the Brezhnev regime, building upon the experience of Soviet leaders over 60 years, from attacks from both the neo-Stalinists and the Soviet equivalents of Dubcek. It is looked upon as a bulwark against radical change in either direction; it is to preserve a middle position. Westerners may well wonder how Communists who have not exhibited over the period of their tenure a reverence for written law can have convinced themselves that a constitution can be a bulwark against pressures of any kind when those pressures are exerted by powerful wilful men and women. The recent post-Mao Tse-tung experience in China suggests that constitutions do not last; they cannot preserve a system. But the evidence is there that Mao thought his second Chinese constitution could save his non-bureaucratic system from reversion to a model closely resembling the Soviet one, and his military commander, who shared in the early stages of the drafting process of the second constitution, seems to have had such confidence in the power of constitutions to guide leaders after Mao's death, that he had the draft insert his own name as heir to Mao.

Marshall Tito of Yugoslavia has seemingly taken the same position. Being fearful that the distinctive mark he has put upon the Yugoslav model of socialism with inauguration of the self-management concept in industry and government might be washed away in a post-Tito reversion to the Soviet model, he caused to be drafted one of the most detailed constitutions in the world to set forth the basic principles of his system. Time will tell whether his hopes will be dashed as were Mao's, but as of this moment, the Yugoslav constitution appears to be seen as a foundation for stability.

With such precedents, the interpretation of Brezhnev's position in like terms takes on the colour of probability. The year 1977 was suitable for its promulgation because the ageing leadership saw its tenure coming to an end, and it feared forces were emerging within the U.S.S.R. on either side of it politically. Perhaps also it sensed a threat to adoption of the Soviet type model abroad. Brezhnev has indicated on occasion his faith in the model as a useful instrument to be used in achieving the lasting success of a Marxist inspired system in Western Europe, Asia and Africa. Indeed, he gives the impression that he thinks adherence to it necessary to win the battle against the bourgeoisie and its influence upon the minds of all men, including workers. He has no words of welcome for what others call "Euro-communism". He is willing to accept

the idea of various roads to socialism, but it is clear that to win his approval any Communist Party claiming to be "scientific socialist" in its inspiration and methods must preserve as the core of its programme features of creed and method characteristic of the Soviet model.

Reviewing the record suggests that Brezhnev and his colleagues promulgated a new constitution to assure stability of Soviet law as the framework of a system designed after much experimentation to lead to abundant production and social order of a kind personifying the communism preached by Marx and Engels. They chose the year 1977 as the year for action because they began to see approaching the end of their tenure as leaders and to anticipate transfer to younger hands in whose wisdom they lack confidence. They evidenced a belief in constitutions as a bulwark against radical departure from the model they have created.

An important feature of their model has been expanding interest in human rights, not only to pacify a citizenry surfeited by Stalin's methods of social control, but also to win friends and emulators abroad. Yet, there are limits to what they will accept as human rights. In no event will they permit their exercise to unseat the Communist Party, or to change radically the Soviet system's underpinnings as established by Part I of the constitution. This requires them to exclude from their new bill of rights some of the rights established by the United Nations Covenants of Human Rights even though they have ratified these Covenants. Law continues to be for them an important instrument of policy, not a force above the state to which they must adhere as a value in and of itself. Yet, in spite of rejection of natural law concepts, they espouse legality and stability of law, and this they do for reasons of utility.

Westerners may ponder the question whether lawmakers and those that implement the law as judges, procurators or advocates, can be expected to preserve stability of law as rigidly when it is espoused for utilitarian reasons as when adherence is based upon natural law concepts. Certainly all who practice law know that in every country stability is sacrificed when crisis conditions are thought to require flexibility in the law's application. Up to the present, the Soviet leadership appears to have sensed great danger both from within and without, for it has made exceptional provisions of law to permit it to meet such crises. Stalin used these exceptional provisions to create his personal dictatorship. His heirs seem determined to prevent any successor from assuming his role, and their emphasis today on respect for and stability of law manifests the extent to which they are willing to depart from exceptional procedures to achieve this objective.

Soviet leaders are not, however, willing to move forward to any political, economic or social structure that could smack of pluralism in the Soviet system, or even to open the gates to criticism and dissent moving outside the confines of the system they have created. This being so, they tend to find danger in words and ideas thought to be harmless

in societies saturated with ideas and words and committed to an open road to all suggestions for social reform.

The Marxist creed and Soviet practice over more than sixty years have created a pattern of thought intolerant of deviation. The 1977 constitution reflects this position, for it defines the grand lines from which no one can be permitted to depart. At the same time it preserves for those willing to keep within the grand lines, while offering what is called "constructive criticism", an opportunity to speak, either individually or collectively through established social organisations. In the light of this situation, it can be expected that the Soviet law of the future will reflect a new balance between freedom and restraint, with greater emphasis upon freedom than in the past, but with far less emphasis than is the rule in the Western democracies.