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Advising the Neocapitalists

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IN THE EARLY 1920s, Angelica Balabanoff, Secretary of the Soviet Comintern, wrote that all of the left-wing Westerners who had come to the Soviet Union after the Revolution of 1917 fell into one of four categories: "superficial, naive, ambitious or venal." The fall of communism has brought a new group of Westerners to Russia. Unlike the visitors of 1922, these are from the right, not the left, but they may still fall into comrade Balabanoff's four categories. I am one of the new right-wing visitors to Russia.

who have gone there to advise on drafting free market law, and I am not unique. Eastern Europe, Russia, and other countries that were formerly Soviet Republics are crawling with Western Europeans and Americans with advice about Western commercial, constitutional, and other law. I write to reflect on what American lawyers can and will do for these emerging free market economies. I am more skeptical than most.

With the destruction of the Berlin Wall and the decline and ultimate dissolution of the Soviet Union, free enterprise has spread eastward across Eastern Europe and into Asia, to Kazakhstan and beyond. China has seen a similar but more covert rise in capitalism. This rise of the free market has brought a call for free-market law. Laws on contract, sale of goods, negotiable instruments, mortgages, personal property security, and a variety of other things are needed of a kind never required in the controlled economies which formerly existed in Eastern Europe, the Soviet Union, and China.

Americans, British and Western Europeans have offered their laws as models. Organizations such as the American Bar Association, the United States Agency for International Development, and the Ford Foundation have held out helping hands to these countries. As an American expert on commercial law I have participated in these efforts. In 1993, Deborah Pritzman, a New York lawyer, and I spent a week in Beijing with Chinese drafters of the law on negotiable instruments. In a series of meetings since 1993 held in Ibaca, New York, and Moscow, Cornell University Law Professor Bob Summers and I have worked with the drafters of the Russian Civil Code. We worked under the auspices of the Institutional Reform and the Informal Sector program (IRS) of the University of Maryland and at the invitation of one of its directors, David Fagelson, J.D. '85.

I write not to praise the work of Americans abroad but to note some of the difficulties I see for a "helper" who comes to a distant Asian or European country armed with experience about American law. While I have considerable optimism about the quality of law that will grow up in many of these societies, my work with the Russians and Chinese makes me skeptical about the benefits that Westerners provide.

Consider the barriers that face an American who would help another country revise its laws. A first problem is well known. It is the explosion that can occur when American chauvinism and arrogance is mixed with home country pride and defensiveness. It is a serious mistake to think the Chinese or Russians are ill informed about traditional law and it is easy for an American commercial lawyer to exaggerate our law's influence on the success of our mercantile economy. (I suspect assertions about the influence of our law have it backward — in fact, our law is probably successful because of the mercantile economy and because of our stable and effective judicial system, not vice versa.)

Chauvinism is a problem, but there is a fine line between odious chauvinism and appropriate forcefulness. Faced with conservative drafters who do not fully embrace the free market, one may need to push hard to accomplish even a little. Home-grown drafters may simultaneously feel defensive about and superior to Americans — defensive because of the success of our commerce but superior...
because of our ignorance of their language, laws, and history. I naively assumed that the Russians would base their new sales law on the United Nations Convention on the International Sale of Goods or an American or Western European model. Not so; they started with the pre-Revolutionary Russian civil law! So the advisor must push — but not too hard.

A second challenge for a foreigner is to understand the experience, authority, and motivation of the local drafters. In Moscow, Bob Summers and I dealt with a committee that was composed mostly of people with professorial titles. Several members of the committee were also arbitrators or judges and some might be called research scholars. There were no business people, nor anyone who was or had been a private practitioner. In China, on the other hand, the committee was composed of professional drafters who worked for the legislature, but also of bankers from the central bank and from commercial banks. In both cases, I was impressed with the doctrinal knowledge of the legally trained persons.

The Russians reminded me of nineteenth-century American law professors; they had deep understanding of legal doctrine but no association with and limited concern for commercial transactions that were to be governed by the doctrine. For example, the Russians could easily hold their own on doctrinal performance of a sales contract. But they were not much interested in how that rule might affect the behavior of business people, nor were they much concerned with lawyers' manipulation of their rules. As Americans—deeply affected by legal realism—we instinctively ask: How will a lawyer attempt to manipulate this rule? To what transactions should this be applied? To what transactions will it be applied that I do not now contemplate? How might lawyers and business people modify their behavior in response to this law?

A third problem for an American advisor is his ignorance of local business practice. For example, a large part of Articles 3 and 4 of the Uniform Commercial Code are devoted to the allocation of risk arising upon theft by check. Many of the most interesting American cases under those articles and much of what is taught in law school about them arise out of embezzlements in which corporate employees steal money by forging checks. The absence of roads, trucks and even used the paper transactions particularly unsuited to Russia and China.

Local conditions, such as persistently high inflation, may also intrude; inflation in Russia is a barrier to any system of speeded payments, electronic or other- wise. One of the greatest obstacles for the persistence of checks in the American economy is that drawers of checks can experience is an artifact of the business practices and even used the paper transactions particularly unsuited to Russia and China.

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