1989

Models for a Gorbachev Constitution of the U.S.S.R.

John N. Hazard

W. Averell Harriman Institute for Advanced Study of the Soviet Union.

Follow this and additional works at: http://repository.law.umich.edu/mjil

Part of the Comparative and Foreign Law Commons, and the Constitutional Law Commons

Recommended Citation

Available at: http://repository.law.umich.edu/mjil/vol10/iss1/18

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlawrepository@umich.edu.
Western Sovietologists were startled when Secretary General Mikhail S. Gorbachev set his craftsmen to work in the Summer of 1988 to prepare a revised structure for the Union of Soviet Socialist Republics ("U.S.S.R."). While some hint of what was to come had been given by publications prior to the 19th Communist Party Conference, and while some of these appeared in the theses to be debated at the Conference, Westerners expected little more than a call from the tribune for change in attitudes. Basic State structures established by Leonid Brezhnev in his 1977 Constitution had not previously been questioned. Critics levelled their complaints at what they saw as distortion of the governing process by corrupt Communist Party politicians and at bureaucrats in both the Party and State apparatuses. They charged that these bureaucrats had lacked the initiative in utilizing Constitutional forms effectively during what Gorbachev called the Brezhnev era of "stagnation." Gorbachev's solution to difficulties seemed to be limited to development of new leadership that would be honest and imaginative within the Brezhnev framework. He seemed to plan no major restructuring of the legislative, executive or judicial organs of the State, nor a change in the relationship of the State to the Communist Party.

With such limited expectations of constitutional change, Gorbachev's long speech at the Party Conference seems to have come as a shock not only to Western analysts but also to the rank and file Party members who sat on the benches. Only a handful of Politburo members and Party Secretaries appears to have been aware of the extent to which constitutional structures would be changed. The public is said to have gasped as the Secretary General unfolded his plans, for

---


they departed sharply from constitutional structures developed in 1936 by Joseph Stalin in revision of Lenin's constitutional model of 1923. Gorbachev's remarks suggest that he had in mind a return in part to Lenin's constitutional structure mixed with a few innovations which had been developed in Eastern European Constitutions since Stalin's death in 1953. There were also hints that Gorbachev had glanced at structures in Western democracies as well.

As an example of the latter, a French journalist picked out the proposal to create a strong Presidency, and he thought it a reflection of deGaulle's post-World War II Fifth Republic. Likewise, a British journalist thought the proposals resulted from the fact that Gorbachev had been impressed by Ronald Reagan's political power as an independently-elected national president, which seemed attractive as creating executive strength far beyond that of the chairman of the collective head of the State in the U.S.S.R., often called a “presidency” in descriptions of the Soviet system of government.

In light of these suggestions that Gorbachev's proposals have been based on models taken from the Soviet past and from abroad, it may be appropriate in honor of the late William W. Bishop, long a colleague in activities of the American Society of International Law, to review constitutional history among the Russians and to make comparisons with some Western models. This could provide a basis for speculation as to what Gorbachev seeks to avoid and what he proposes to emulate.

THE BEGINNINGS OF CONSTITUTIONALISM IN RUSSIA

Constitutional history in Soviet Russia may be said to begin with Lenin's appointment of a constitutional drafting commission soon after the Communist Party's seizure of power in January 1918, after barring entrance to the Constitutional Assembly gathered in Russia's Capital, Petrograd. Although that step marked a formal beginning of a new era, earlier events in the Russian Empire indubitably had established a spiritual beginning of Lenin's constitutionalism, despite denials from Communists of the time. As a subject of the Tsar and a member of the Petrograd Bar, he knew what he wanted to avoid, and


5. See the unsigned analysis of Gorbachev's proposals at the 19th Communist Party Conference, entitled Gorbachev's views of a new socialist revolution, The Independent (London), June 29, 1988, at 1.
he knew what his people hoped to achieve with their new government. Constitutionalism had long been in the air in the Russian Empire. Westerners tend to forget this fact when they think of the last Tsar, Nicholas II. A tradition of constitutionalism had been developing for over a century, led at times by the monarch and supported by intellectuals and even the westernized nobility. Even the masses had been developing a craving for legality, and Lenin understood this craving. His drafting commission was appointed to respond to it, although within the framework of the Marxist program he was committed to introduce.

The popular yearning for constitutional government drew in part upon what was happening abroad. To Americans, it may come as a surprise that the fledgling United States of the 18th Century played a part in the thought of Russian leaders. Both nobility and Tsars had on their library shelves the same books as the leaders of political thought in the restless English colonies of North America. John Locke and Voltaire were being read in the palace at St. Petersburg as well as in the mansions of Virginia. The Empress Catherine is reported to have been influenced so greatly by Western thought that she commanded her scholars to prepare what has come down in history as her Bolshoi Nakaz to guide the commission in drafting a “Basic Law” for her Empire.  

This notable document was considered so liberal that the French King Louis XV banned it from his kingdom, and copies were confiscated when they reached the frontier.

Catherine’s first move toward Constitutionalism aborted when she took fright at the widespread peasant revolts of 1773-74, but the seed had been planted. In calmer times a few years later at the turn of the 19th Century, Tsar Alexander I began correspondence with Thomas Jefferson and studied the American and French revolutions. In 1809 he commissioned Count Michael M. Speranski to draft a “Basic Law.” The Count prepared a model which called for a hierarchy of popular assemblies leading up to a two-chambered parliament structured in a measure on the English model. One house was to be elected, albeit from a limited electorate; the other was to be appointed by the Tsar to become a “State Council.” In 1810 the State Council was put in place to provide the Tsar with a group of advisors on whom he could rely in developing his political programs. The other house, the Duma, did not eventuate for nearly a century, but the reform movement begun by Alexander did not die, although the general public of the time was hardly aware of its content.

This lack of knowledge became evident on Alexander's death. An incident occurred in the palace square in the form of a demonstration. It seems that the Tsar had secretly arranged for his eldest son, Constantine, to step aside in favor of his younger brother, Nicholas, in the event of Alexander's death. Nicholas had not been advised of the plan, nor had the public, which had hoped that Constantine on ascending the throne would give them the Constitution for which they yearned. Consequently, when Constantine did not step in immediately following his father's death, some hopefuls organized a demonstration in which the crowd chanted "Konstantin i Konstitutsiia." A British historian has reported wryly that some of the participants knew so little about a Constitution that they thought that the second word in the chant was the name of Constantine's wife — as well they might since it was in the feminine gender, and the Russian language knows no definite article to indicate the difference between a thing and a person.7

Humorous as this evidence of ignorance of constitutions seems, the cause of constitutionalism was not defended by know-nothings. Constitutionalism was sponsored even in the palace, for before death Alexander had commanded N.N. Novosiltsev to draft a constitution for a federal State to unite the heartland of the Russian Empire with its accessions, Finland, Poland, the Baltic Provinces, and the Cossack territories along the Don River. Novosiltsev had before him the American federal model, but his plan aborted because of new fear of revolution. This time the threat came not from the peasants, as in Catherine's time, but from the Army officers who had accompanied Alexander to Paris as his staff when he joined with the other victors over Napoleon to prepare a peace.

The staff officers had been influenced in Paris by the constitutional forms found in the West, and they chose the moment of confusion over succession following Alexander's death to demand reform. When the Military Governor of St. Petersburg advanced toward their assemblage before the palace to negotiate, he was shot. Nicholas I, the new Tsar, rallied loyal troops and suppressed the uprising, whose participants came to be known in history as the "Decembrists." Some were imprisoned, others were exiled to Siberia.8

Although constitutionalism was threatened as a goal after this event, the broaching of it was not outlawed. Nicholas I ordered his father's specialist Speransky in 1832 to gather all the Imperial re-

scripts issued since 1649. This he did, and in later years they were printed in a multi-volume set, the Polnoe Sopranie, from which they were later selected to create a classified short set of laws in effect, the Svod Zakonov. While not a constitution, the Polnoe Sopranie and the Svod Zakonov were steps toward regularization of the legal basis of Imperial power. There was to be no diminution of the Monarch’s role, for the principle of autocracy was reaffirmed.

Thirty years were to pass before major reforms were again set in motion. The dramatic event was the emancipation of the serfs in 1861 by Alexander II, in the very year of emancipation of slaves in the United States. In developing his accompanying reforms, Alexander II established local government with some independence by granting to each province authority to form a Zemstvo, which was to assume responsibility for establishing schools, medical services, and local roads. Alexander II also restructured the judiciary on Western models, introducing juries for serious criminal cases and a formal Bar.9

The Zemstvo assemblies were to be elected from the private landowners, the peasant communes, and the townspeople, each curia having its own deputies who were elected separately by the members of that curia. In 1870, the Zemstvo local government system was extended to the large cities, but the votes could be deposited only by taxpayers. Each group, as determined by the tax bracket within which its members fell, was to elect its own deputies.

Alexander II moved further in the direction of popular participation in government when he commanded his Minister of Interior, Loris Melikov, to start once more on a draft of a “Basic Law.” On March 13, 1881, the Tsar signed an Ukaz establishing a representative committee to advise the State council, which had continued to function since establishment by the Tsar’s grandfather, Alexander I. The concession was said to be an attempt to placate the moderate classes so as to gain support against the developing revolutionary activity. Again the axe fell on the plan: on the afternoon of the very same day of the Ukaz Alexander II was assassinated. When his son ascended the throne as Alexander III, he withdrew his father’s concession of a “Basic Law,” and the Ukaz was not published officially.

**REVOLUTION FORCES REFORM**

Alexander III’s reversal of the emerging trend toward Constitutionalism left his heir, Nicholas II, to face revolution without a struc-

---

ture through which he might have moderated demands for reform. By 1905 the revolutionary spirit had inspired great numbers of people to protest autocracy, and the demands for some form of limitations on absolute power were pressed upon the Tsar. Even the nobility was aroused, but the new element was emerging out of the extreme left, claiming socialism as its creed. The militant socialists, the Marxists, attempted to form a revolutionary party at a Congress called for the City of Minsk in 1898, but they were thwarted by arrest. Not until 1903 did they try again, and this time they took the precaution of meeting outside of the Empire. A "Russian Social Democratic Labor Party" was founded in London. Within it were two factions, Menshevik and Bolshevik, which were to play separate roles as the years advanced toward 1917.10

Demands for a constitution accelerated. The year 1905 began with a demonstration before the Winter Palace on January 22, led by a moderate priest, Father Gapon, whose sympathies for the problems of his parishioners had been aroused. The Tsar reacted savagely, calling out his Cossacks and making one of the greatest mistakes of his reign. Demonstrators were killed and the day came to be called "Bloody Sunday" in the pages of history. Although the effort failed, the event produced other pressures, leading the Tsar to the conclusion that he must respond to the growing unrest. In August 1905 he created by Imperial rescript an Imperial Duma patterned on Speranski's century-old plan. Yet, the franchise was to be limited to exclude the working people who paid no lodger's tax. Further it was to be only deliberative and not a Western style legislature.

In protest against these limitations, the socialist parties, which had been developing since the turn of the century, gaining in strength not only among the workmen but among peasants, called a general strike. In the cities, in order to coordinate efforts of strikers, committees, called soviets, were formed. Thus came into existence a form and a name that were utilized later in 1917 to become the mass base for an organization on which Lenin could lean to provide the popular foundation for his new government, and to which Gorbachev has turned again to provide the instrument of strengthened mass participation in the governing process.

In response to the strike which led to severe fighting at street barricades, not only in St. Petersburg but in Moscow, the Tsar's Prime Minister, Count S.Y. Witte, drafted a revised plan. On the basis of

this plan the Tsar issued a Manifesto of October 30, 1905. In it he promised civil liberties, a democratic franchise and legislative powers for the Duma; but his concessions were not enough to quell the uprising. Barricade fighting forced the issue. The Tsar again compromised, offering on December 24, as the insurrection continued, to include workmen in the franchise without limitation. Troops suppressed the revolutionaries manning the barricades, but that did not end pressure. The Tsar offered a further concession: on February 20, 1906 he proclaimed a “Basic Law” or Constitution.

Speranski’s model was at last enacted: a parliament of two chambers; one a reformed State Council and the other a Duma. The first was composed of members, one half appointed by the Tsar and one half elected by the nobility, the Zemstvos and the university faculties. The Duma, in contrast, was to bring forward representatives from each formally defined soslovie (class) in society, each voting separately. The institutions of a limited democracy were now in place, but the Tsar soon came to feel that the Duma’s deputies were abusing their newly created authority. On two occasions he prorogued the Duma and ruled by decree, as permitted by a clause he had inserted in the Constitution for such an eventuality. Then he revised the electoral law to assure election of a body that might be expected to be less radical, but he was disappointed in his expectation. World War I had broken out. With heavy defeats of the Imperial Armies, even the new right-wing Duma became restless and demanded reform. The Tsar responded by assuming personal command of the Army. In desperation, his former supporters demanded his abdication in February 1917, and received it. The Tsar, being reluctant to lose the monarchy, named his brother successor, but the latter refused to ascend the throne unless requested to do so by a constituent assembly. In refusing, the brother initiated a debate among nobility and people as to what would be the appropriate new form of government.

CHOOSING A MODEL FOR A NEW GOVERNMENT

Quite different ideas for a new form of government were being circulated among the various forces seeking change. Political parties came to the fore as spokesmen, one of the most vocal being a party which had figured actively in the Duma after the introduction of elections under the Constitution of 1906. It espoused an English model of constitutional democracy and was called popularly the “Kadet” party because of this. Its hope was to establish limits on absolute power. The written form had been popularized by the American model, with
no favoring of the British system in which restraints are created by "conventions."

With the Tsar's abdication in March 1917 and his brother's refusal to ascend the throne without a popular mandate from a constituent assembly, the road was open for something of a replay of the Philadelphia Constitutional Convention. Still, the task of choosing and assembling such a gathering was as difficult as it had been in America, if not more difficult, for in Russia power was diffused throughout what had been the Empire. The Zemstvos as local government were weak, and ineffective as organizers. To meet the situation, the Duma formed a "provisional government," but its members had to face immediately a new force in opposition, namely the socialist parties. These worker and peasant representatives had a model in mind which was neither that of the English parliamentary system nor that of the American presidential system. Many claimed to be Marxists, and the key idea absorbed from their studies was that a State is an instrument of class domination, not a benign impartial institution whose function is to reconcile conflicting views.

To the Marxist specialists, the American Constitution was drafted by a combination of wealthy landowners of the South and the industrialists of the North to protect their interests as owners of productive property. Thomas Jefferson's Declaration of Independence was seen as an appeal for liberation from autocracy on the one hand, but also a restatement of interests of the propertied classes.11 It was not acceptable as a model for the new Russia that the socialists wished to create.

The socialists were not united. Lenin faced strong opposition. He controlled but one faction of the Russian Social Democratic Labor Party, and it was not even a majority faction, in spite of its name Bolshevik, which it had acquired in one vote at the London conference in 1903 and held on to ever after. This was proved during the summer of 1917, when delegates to what became known as a "First Congress of Soviets" gathered. The moderate faction, dubbed Mensheviks, coupled with the peasant-based Socialist Revolutionary Party members, constituted the majority. All groups wanted to be rid of the monarchy, but except for this riddance their programs differed. Mensheviks, who felt themselves cousins to the Social Democrats of Western Europe, emphasized the rights of the individual and favored non-ruthless proce-

---

11. See III Vseobshchaia Istoriia Gusodarstva I Prava, Chast' (III General History of the State and Law) 193 (Moscow 1947). See also M. Tanin, Introduction to chapter on the constitution of the USA in 1 Konstitutsii Burzhuaznykh Stran: Velikie Derzhavy I Zapadnye Sozedi SSSR (1 Constitutions of the Bourgeois Countries: The Great Powers and Western Neighbors of the USSR) 7-18 (Moscow/Leningrad 1935).
dures to achieve their goals. For the peasants, the major demands were calls for distribution of the great estates, which they saw as necessary to the achievement of "socialization." The Mensheviks also wanted a form of autonomy for local government, which they expected to control. By contrast, the Bolsheviks were nationalizers and centralizers and willing to use whatever measures were required to achieve their goals, no matter how ruthless. Still, none of the groups wanted to leave untouched what they called, in Marxist verbiage, the "bourgeoisie," a term which included owners of large scale productive wealth, whether industrial or agricultural.

To press their cause against the Provisional Government established by the Duma, the socialists of all colors formed in the early spring of 1917 a competing political power built upon the model developed in 1905 as a strike committee and representing the worker and peasant classes in society. To indicate continuity, the socialists called their competing institution the Petrograd Soviet, and they encouraged the formation of similar bodies throughout the cities of Russia and even in some parts of the countryside.

The local soviets were structurally based upon "class," as defined by Marxist theorists. Their purpose was to establish a power base for like-minded workers and peasants. The soviets of 1905 had not been governments, but rather instruments of opposition. Now, in 1917, the socialists aspired to govern, and the road looked open due to the weakness of the Provisional Government. The Petrograd Soviet which held its meetings in the same place as the Duma felt cheeky enough to declare that it was maintaining a system of "dual power," and it undertook to urge public opposition to Duma policies which it disfavored.

Perhaps the Petrograd Soviet would have been no more than a nuisance to the Provisional Government had it not been for the defeat of the Russian Army in July 1917 on the front maintained against the Imperial German and Austro-Hungarian Armies. After that defeat the spirit went out of the Army, and the Provisional Government lost public support. The coup de grace is often said to have been shot when the Army's Commanding General, Kornilov, turned against Prime Minister Alexander Kerensky. Kerensky felt that he had to rely upon the Soviet to protect himself from Kornilov's troops. From that moment, victory had been won, and it was necessary only to capture the Palace and the Ministers on the night of November 7, 1917. In traditionally centralized Russia, when the capital fell, most of the country had been captured.

The battle within the socialist coalition was not yet over, for the Bolshevik extremists under Lenin's leadership were determined to take the leadership position. Because of his dominant role in the seizure of power, it was he who was able to walk on to the platform at the meeting of what was called the "Second Congress of Soviets," called in anticipation of the fall of the Winter Palace, to unite the socialists for the purpose of forming a government. He succeeded in winning the delegates so that they approved his projects, including a resolution to form a new temporary soviet-type government, which he would chair. The form was to be a coalition with his partners, the left Socialist Revolutionaries and a left wing of the Menshevik faction. He also thought it expedient to continue with the organization of the elections planned by the now defeated Provisional Government. Consequently, he was prepared to sponsor continuation of the elections being held at the time throughout Russia to elect delegates to a constituent assembly to choose a form for a permanent political system. To a degree, Lenin was following the Philadelphia model. He sensed the desirability of behaving like a partisan of constitutionalism; yet, when he feared that a constituent assembly would reject his draft for a government of the soviet type, he had his sailors bar the doors to the hall after the dinner recess. His intent seems to have been to utilize the Assembly as a rubber stamp of his policy rather than as a deliberative body devoted to debate and reconciliation.

Perhaps on this score it can be said that the American concept of constitutionalism as well as the French Declaration of Rights of Man and Citizen of 1789 had an influence upon the socialists. All types of Russian socialists evidenced at the time acceptance of the principle of mass support for a choice of government forms through a constituent assembly. No group held back from the concept of a written constitution. No one evidenced a wish to follow England's example of dispensing with a written constitution to control excesses in government through hoary tradition, which the British call "convention." Possibly, socialists thought there was no time to create tradition. To implant the radical concept of socialism in Russian society, speed was needed, lest the opposition parties unite to prevent its realization.

In spite of the coup engineered by Lenin to disband the Constituent Assembly, some of the victorious socialists seem not to have realized that the choice of government forms had been made irrevocably.

13. For a dramatic account of revolutionary events, see J. Reed, TEN DAYS THAT SHOOK THE WORLD (Moscow 1967). For an account of the conduct of elections to the Constituent Assembly, see O. Radkey, THE ELECTION TO THE RUSSIAN CONSTITUENT ASSEMBLY OF 1917 (Cambridge, Mass. 1950).
on the night of the revolution. At the "Third Congress of Soviets," called soon after the doors of the Constituent Assembly had been barred, a constitutional drafting committee was given a mandate to draft a basic law to establish a new regime. Some of its members demonstrated their lack of unanimity. Fortunately for historians, one of their number wrote on the fifth anniversary of the Third Congress's resolutions an account of the drafting committee's deliberations, and he attached drafts submitted to the committee.14

From this account it is known that the committee's members presented a variety of proposals for consideration. The variety is said to have been stimulated by the fact that the People's Commissariat of Justice was headed by Lenin's coalition partner, a Socialist Revolutionary. Later this equivalent of a Minister of Justice wrote his memoirs to disclose his fear at the time that Lenin had no intention of acting in accordance with principles of law and constitutional constraint upon absolute power.15 Consequently, because he anticipated Lenin's scheme, he had a draftsman of his Commissariat present a moderate, though socialist-flavored draft. His draft was not the only one in opposition, for one member even suggested that the Constitution of the Swiss Confederation should be considered as a model.

The various counter-proposals were put aside, however, after the young Josef Stalin rose to demand that the committee draft a constitution which would put in written and permanent form what had already been created provisionally during the revolutionary events: the soviet system whose institutions were a Congress of Soviets, a Central Executive Committee, and a Council of People's Commissars. In Stalin's view, as expressed by the historian, the Committee had only to take over the resolutions adopted by the Third Congress of Soviets, including the class-oriented Declaration of Rights of the Laboring and Exploited People, and the federal plan for a Russian Republic, as well as the administrative structures developed provisionally by the Second Congress of Soviets on the historic occasion when power had been seized.

Curiously, in view of the class approach to government espoused by Marxists, a bill of rights was inserted in rather liberal form. The need for the bill after adoption by the Third Congress of the Declaration of Rights of Laboring and Exploited People was questioned by the historian. He concluded that it was introduced for propaganda purposes both at home and abroad. He explained that when the bill was

---


brought into committee at almost the last moment, he thought it Lenin's proposal, but he was not sure. He credited Lenin with a sense of what was necessary to reduce his opposition. He supposed that the article tolerating religion was required as a tactic, for Lenin was an atheist, as was his Party. The historian concluded that the tactic had been successful, as the faithful had been pacified.

Events of the subsequent years have born out the historian's supposition. The right extended to the faithful to propagate religion through education was withdrawn, leaving only the right to conduct the cult, while the right of citizens to conduct anti-religious education was guaranteed. In view of the lack of opposition to the amendment it may be supposed that the Church, the Mosque and the Synagogue no longer were a threat to Communist politics, and so the propaganda value of the original bill was no longer required. Many years later, expediency rather than doctrine again seems to have provided the stimulus to formulation of religious policy, for during the Second World War, Stalin returned to the Church the right to educate priests, presumably to gain support for the war not only at home but abroad. Again in 1988, Gorbachev met with Patriarch Pimen, returning monasteries and Churches to the Patriarch at the time of celebration of the millennium of adoption of Christianity by Prince Vladimir. There are some who thought this step was needed to gain support for perestroika and the new thinking.

On the face of it, the decisions to include a written bill of rights in the Constitution, both in the United States and in Soviet Russia, may appear to have been similarly motivated, but the two considerations cannot be considered parallel. In the United States, the draftsmen had thought it unnecessary to insert a written bill because the principles were fully accepted as natural law. In Soviet Russia the communists, as atheists, opposed freedom of religion and negated their inner convictions when they inserted the bill. The concession to political necessity was easy in the United States, but difficult in Soviet Russia, for it ran against the grain.

The communists in making their concession evidenced in their text a fear that it might eventually return to haunt them. They inserted a well known caveat in Article 23: "Being Guided by the interests of the working class as a whole, the Russian Socialist Federated Soviet Republic deprives all individuals of rights which could be utilized by them to the detriment of the socialist revolution."
In short, the Leninist socialists planned to rely upon courts and administrators to decide in each case whether a citizen claiming protection of the Constitutional bill hoped to hamper the government in achieving its goals. Since the coalition partners had withdrawn or been ousted by July 1918 when the Constitution was adopted, this structure left the Communist Party as the sole determiner of goals. Its interpretations could not be challenged effectively.

THE NOVELTY OF THE MARXIST CLASS APPROACH

Because of this history, the first Russian Republic Constitution of 1918 and its federal (U.S.S.R.) successors of 1923, 1936, and 1977 have all been class-oriented documents. Those who drafted them and the administrators and courts who have interpreted them have rejected the often-quoted statement of Oliver Wendell Holmes, made in his dissent in *Lochner v. United States*: "[A] constitution is not intended to embody a particular economic theory, whether paternalism and the organic relation of the citizen or laissez-faire. It is made for people of fundamentally different views."

The class line of the 1918 Constitution was not left for development solely by the administration and the courts. It was stated in precise terms in the provision for election. Article 64 gave the right to vote and to be elected to the assemblies to "all who have acquired the means of livelihood through labor that is productive and useful to society and to persons engaged in housekeeping which enables the former to do productive work, to soldiers of the soviets, and to citizens of these two categories who have in any degree lost their capacity to work."

Lest the provision be misinterpreted, a following Article 65 denied the right to vote or be elected to:

- persons who have income without doing work, such as from interest on capital, receipts from property, etc.; to private merchants and commercial brokers; to monks and clergy of all denominations; to agents and employees of the former police; to the gendarme corps; to the Tsar's secret service, and also to members of the former reigning dynasty; to persons declared in any legal way demented or mentally deficient; to persons under guardianship; to persons who have been deprived by a soviet
of their rights of citizenship because of selfish or dishonorable offenses for the period fixed by the sentence.

To be sure, the draftsmen in Philadelphia were also selective in defining those with the right to vote, excluding slaves, women, and the propertyless. Jefferson is said to have expected such prosperity after independence that all male citizens would come to own property and thus qualify to vote, but until that time he and his colleagues were not confident that the propertyless could be expected to support the republic in which they had no property stake. Later, of course, all of these restraints were removed through Constitutional amendment or judicial interpretation.

The 1918 limitations were also removed when the second federal Constitution was adopted in 1936, but removal was under different circumstances. In the United States the restraints were lifted on women and those who could not afford to pay the poll tax because these groups gained political strength. In the U.S.S.R., the great bulk of those excluded had been reduced in number as state enterprises and collective farming absorbed the former private enterprisers into what was defined as the working class. Except for priests and the former police, the lifting of the restraints enfranchised no one. The former bourgeoisie who lived on returns from capital no longer existed as bourgeoisie in Marxist terms, because the 1936 Constitution forbade the private employment for personal gain of even one person and because merchandising had been declared criminal in 1932, thus abolishing legal traders. Even the priests, mullahs and rabbis who were still ministering to their flocks had been so greatly reduced in number by the application of repressive policies that Stalin himself found it possible to tell his Constitutional convention of 1936 that they could no longer be seen as a dangerous political force.20

The Marxist-inspired class bias of the 1918 Constitution had led also to the inclusion within its provisions of a clause totally foreign to anything in the American Constitution. This was the provision anticipating the eventual "withering away of the state." Article 9 restated the class orientation in these words: "The fundamental problem of the Constitution . . . involves, in view of the present transition period, the establishment of a dictatorship of the urban and rural proletariat and the poorest peasantry in the form of an all powerful soviet authority." It then added these remarkable words: "in which there will be neither a division into classes nor state authority." This phrase is to be ex-

20. See J. STALIN, On the Draft Constitution of the U.S.S.R., in LENINISM 179, 403 (International Publishers, New York 1942). Since this work is in various editions, the relevant portion may be found in any one of them as Part V, para. 13.
plained by the conclusion of Marx and Engels that, since State author-

ity was an instrument of compulsion created and used by a governing
class to repress those classes hostile to it, the state must fade away
when the entire population consists of only one class, the working
class. There would be no further need for class suppression.21

In 1918, when Lenin's draftsmen were at work, some Communists
expected the withering to begin rather promptly after the ownership of
private property was denied to individuals. Consequently, they ex-
pected the State authority established by the new Constitution to be
only of a temporary nature. Production was to be bountiful to meet
all needs for compulsion on a mass basis. Deviant individuals would
be few and they would be treated by medical doctors. At this point,
as Engels described it, there would remain only the "administration of
things."

Although the withering theme may seem totally visionary to most
Americans, its reality in Soviet minds at the time is evidenced by
draftsmen in the mid-1920s who prepared codes of law to reflect what
they expected to be the first stages of withering.22 Only in 1930 did
Stalin utter a brief sentence in a long report on other matters telling
his party colleagues that the State would wither, to be sure, but not
until it had become the strongest State the world had ever known.23
This put an end to the constitutional statements of anticipated wither-
ing, and they are not to be found in later constitutions.

American draftsmen in 1787 labored under no such conception of
the State as an instrument of a ruling class, dominating the rest of
society. The State was seen not as an oppressor of classes but as a
mediator of conflict, a force above special interests. Its task was to
insure domestic tranquility, not class struggle. That seems to be the
sense of the words in the preamble, saying the purpose was to "secure
the blessings of liberty to ourselves and our posterity." It was to be an
instrument of a populace, mature enough politically to vote rationally
in the interests of all. It would not wither away; it would be eternal.

In contrast to Mr. Justice Holmes's view of the Constitution as

21. For a development of the theme of "withering away of the State," see F. ENGELS, THE
tion of the concept, see V. LENIN, STATE AND REVOLUTION (Cooperative Publishing Society of
Foreign Workers in the USSR, Moscow 1935). Both works are in numerous editions.

22. The drafts were prepared by E.B. Pashukanis. For analysis of his reasoning, see
PASHUKANIS (P. Bierne & R. Sharlet, eds., London/New York/San Francisco 1980). For rele-
vant portions of the simplified draft codes, see Hazard, The Abortive Codes of the Pashukanis
School in 19 CODIFICATION OF THE COMMUNIST WORLD 145-75 (F. Feldbrugge, ed., Leyden
1975).

20TH CENTURY LEGAL PHILOSOPHY SERIES 235 (H. Babb trans., Cambridge 1951).
non-programmatic, Soviet constitutions have always stated a social program; they have been demonstrably programmatic. This being so, they have been displaced as programs change to make way for an entirely new constitution. Here it may be said that the French rather than the American influence has been felt. Just as the French have moved over nearly two centuries through various Constitutions to reach their Fifth Republic, so also Soviet society has been guided into new eras by a succession of Constitutions. Secretary General Gorbachev acted in this tradition in 1988 when he indicated that a revised document with a different state structure was needed to lead contemporary society into an era suited to conditions of the 21st Century.

Goals have been set forth in long preambles to Soviet constitutions with one exception, that of 1936. Stalin explained that omission: It was unnecessary to do more than mark the beginning of a new era, that of socialism, for which the Constitution was designed. His successors reverted to Lenin's model. By 1961 Nikita Khrushchev as Secretary General of the Communist Party engineered the drafting of a new Party Program to replace the Program of 1919, which had long been out of date, saying as it did, for example, that communists anticipated the eventual abolition of money, and that the State was a dictatorship of the proletariat. Khrushchev cut out the money plank, and devised a new formula for the State: it was to be an "instrument of the entire people." Some Communists outside the U.S.S.R. — notably Mao Tse-tung — gasped in disbelief, and many inside the U.S.S.R. mumbled under their breath that it was non-Marxist. Because it was of such importance as a novel formula it bears repeating:

Proletarian democracy is becoming more and more a socialist democracy of the people as a whole . . . . The dictatorship of the proletariat has fulfilled its historical mission and has ceased to be indispensable to the U.S.S.R. from the point of view of internal development. The State which arose as a State of the dictatorship of the proletariat has become in the new contemporary period a State of the entire people, an organ expressing the interests and will of the people as a whole.24

The conclusion was not illogical, granting the premise that to Marxists, there was at the time but one class in Soviet society, and, therefore, no hostile class to be suppressed. What was illogical in terms of the old formula of "withering" on achievement of a classless society was that the state obviously continued to exist as an instrument of compulsion even after the constitutional declaration of 1936 that

socialism had been achieved. To explain the ideological reason for the change something had to be said, and it was. Ideologists developed the explanation that the State was necessary to resist invasion by hostile class forces abroad and also to coordinate the work of various strata of Soviet society, which, although within a single working class, still evidenced distinctive interests which would take time to reconcile. They would be reconciled peacefully because they were not antagonistic, but no one denied that there were sufficient frictions to require reconciliation.

Some years were needed to absorb the words of the Communist Party’s formula into constitutional law, with the result that Khrushchev had been ousted before transformation occurred. It fell to his successor, Leonid Brezhnev, to set draftsmen to work on a new federal Constitution. When it was promulgated in 1977, its Article 1 read, “The Union of Soviet Socialist Republics is a socialist state of all the people.”

With this formula, interpreted as it had been by the Communist Party with changing events, the distinction between American and Soviet Constitutionalism was epitomized: the draftsmen at Philadelphia sensed that they were writing for people of all classes and all faiths; the draftsmen in Moscow wrote for a people purged by 1977 of all elements having origins outside a working class milieu.

**THE NOVELTY OF STATE STRUCTURE**

State structures in the U.S.S.R., as defined in successive constitutions, bear little resemblance to those in the American model. Of course, there are some resemblances for functional reasons: both systems of government face some identical problems, as both are federations; both were formed as federations to assure military and economic survival; both sought at the outset to induce people to join in federation voluntarily because such a structure could demonstrably benefit the participating units — although in the Soviet case there were far stronger forces influencing union than had been the case in the infant United States. In the United States there was no force comparable to the Communist Party working for union.

Lenin’s Communist Party was indeed *sui generis* as a highly disciplined, unitary militant nucleus with monopoly power. Perhaps it needed to be what it was if there were to be federation. Although there was enough hostility between the states of the American federation at the outset to suggest the need for inferior federal courts to provide a forum to hear disputes between citizens of different states, there was certainly no such historic hostility over centuries as that between
the Moslems of Central Asia and the Orthodox Christians of Russia, the once independent Ukrainians and Baltic peoples. To be sure the war between the states in the United States was bitter, but after the peace the conflict did not fester as it has festered between Armenians and Azerbaijanis. Lenin had his problems of reconciling historic conflict between peoples who had been made even angrier by long years of attempted Russification by the Tsars. Federation was his formula for reconciliation, but it was not his long term plan.

For Lenin, the ideal was Marx's concept of class affinity rather than ethnic affinity. He expected as his basis for ultimate reconciliation that hostile ethnic groups would eventually forget their ethnicity and share together as workers in a class affinity which would overcome all obstacles to union. He had constructed his Communist Party without ethnic divisions. It was one working class organization, even though some ethnic groups tried in the early days to create it along federal lines. But the State structure could be built on a compromise, in Lenin's view, and the extreme manifestation of that compromise was provision for the secession of members of the federation if they so desired. He was not happy with the idea, and he had Stalin write that the Communist Party would not support such a demand, for to secede would be to take a step away from ultimate class union. Thus he maintained his ideal as a goal, but he accepted the need for compromise.

Unity in Lenin's federation was encouraged by more than a doctrinal ideal. From the early 1920s he structured the economy in a more centralized manner than had been possible in the United States. While the Philadelphia Congress thought primarily in economic terms of maintaining the unity of interstate commerce while leaving the states free to acquire their own finances and to manage their own resources, the Soviet pattern was complete subjection to a central economic plan. No right of local taxation was left to the Republics, for taxes were to be levied by the central government and the resulting resources were distributed under the plan by the central parliament through the medium of the state budget.

Economic independence of federating units such as is fostered in the American federal system was hampered by yet another provision, albeit indirectly. This provision, written into the Constitution of 1936

25. Stalin wrote on three occasions against secession. His argument was that the right must not be exercised if the result would be contrary to the interests of the proletarian revolution. The 1913 pamphlet and the 1917 report to the 7th All-Russian Conference of the RSDLP have been reprinted in J. Stalin, Marxism and the National and Colonial Question 19, 64 (Moscow 1935). He uttered the same thought in an article in the newspaper Pravda of Oct. 10, 1920. See 4 J. Stalin, Works, November 1917-1920, 364-66 (1947).
and into subsequent constitutions, prohibits private ownership of producer's goods, except those utilized by licensed artisans working without employees. No capitalists were to be left in society to press for adoption of a *laissez-faire* policy. The central agencies had, in consequence of this economic fact, not only the legal strings attached by the Constitution to the agencies functioning at local levels, but also the economic strings available as a result of total State ownership of productive resources. There could be no economic pluralism which might have become the source of political pluralism.

Some governmental structures to implement powers conferred upon the central government were similar to both federations. Thus military policy and the levying of troops were federal concerns. So also were the services needed to provide uniformity in coinage, the post office, and standardization of weights and measures. While these functions were centralized in both systems, there was a contrast in Constitutional attitudes toward local government structures. The American model leaves each state to choose its own governmental structure except to require that they be republican in form. The Soviet model allows for no such local autonomy. The structures of not only Republic government but also of local subdivisions must conform to the model developed historically as the *Soviet*. This means each unit has an assembly, an executive committee and various administrative departments established in accordance with the types of activities carried out by the unit. The federal constitution even indicates that the assembly must meet at given intervals. Some Sovietologists have thought that the major characteristic of Soviet law is "paternalism," and indeed much can be presented in support of such a conclusion.

Although each *Soviet* at levels below that of federation is authorized to take decisions on matters of local concern, the action must conform to that established as the national pattern and plan. The budget must fit within the global limits set by the national budget for each Republic. In turn, the subdivision of budgets must fit within the Republic totals in amounts established by the Republic *soviet*. What is not said, but what all know, is that Communist Party members at the local government level "guide" the state agencies at that level in im-

---

26. In 1944, Stalin amended the Constitution to authorize Republics to create military formations, albeit under the centralized policy established by the federal government. The move occurred at the time Stalin was seeking to multiply votes in the General Assembly of the United Nations, which was being formed for post-war coordination among the nations of the world. When he was rebuffed in this effort by Roosevelt and Churchill, who would permit only the Ukrainian and Byelorussian Republics to have seats in the United Nations, the military formations of the Republic lapsed.

27. This has been the long-held view of H.J. Berman. See H. Berman, *Justice in the U.S.S.R.* Revised and Enlarged 278-384 (New York 1963).
plementation of the constitutional provision that the Communist Party is the Guiding force in Soviet politics.\(^{28}\) The word "guide" has come to mean a much more commanding directive, although the precise translation of the Russian word *rukovodit* suggests the milder form.\(^{29}\)

The attitude of hostility toward *laissez-faire* and diversity of policies has been carried into the Soviet method of drafting codes of law. Ever since federation, except for some years under the 1936 Constitution when codes of law were to be federal, a provision never implemented because of the disruption of government during World War II, the Republics have been authorized to establish their own codes of law. Nevertheless, they have been required, in so doing, to comply with the "Fundamental Principles" enacted by the federal Supreme Soviet as guides.\(^{30}\) While much is made by Soviet jurists of the flexibility offered to the Republics to depart from the federal model to meet social, climatic, and other distinctive conditions of the peoples of the Republics, practice has demonstrated that these departures from the norm have been minimally important.

While most of the distinctive features of the Soviet governmental system are not compared by Soviet authors with their American counterparts, there is one comparison that has been belabored. It is the principle of "separation of powers." Soviet authors have heaped scorn upon it, describing it as a system which has been used to strengthen the hand of the capitalist class against any possible influences the working class might bring to bear upon the legislature.

Andrei Y. Vyshinsky, Stalin's principal spokesman on legal philosophy in the late 1930s, writing in what was then the standard text on Soviet State Law,\(^{31}\) summed up an attitude which remains dominant even today:

But why did the bourgeoisie need to preserve in form in the constitutions the principle of separation of powers? For the same reason that obtained as to the formality of principles of bourgeois democracy: the principles of the separation of powers were to implant in the popular masses illusions as to the "justice" of power, the impossibility of "arbitrary" powers, the "legal state" in which no single power can by its arbitrariness solve the most important questions: that powers are supposedly "equalized" and control each other. The principle of separation of powers was

\(^{28}\) See *Konst. SSSR*, ch. 1, art. 6, cl.1 (U.S.S.R. 1977).


to strengthen the idea of bourgeois power as power elevated above classes — "popular sovereignty," supposed to distribute the functions of legislation and administration reasonably and impartially among diverse state organs.

The American will see at a glance what a contrast in attitudes toward the support for checks and balances under the United States Constitution is presented by Vyshinsky. The Soviet state is structured in accordance with the principles enunciated by Jean Jacques Rousseau: the legislature alone reflects the "general will" and nothing can be permitted to thwart that will. Vyshinsky's approach is not, of course, his invention. There is a model in the United Kingdom, where parliament is the supreme all-powerful authority, unchecked by any other "branch" of government. Indeed, the American colonists were seeking protection against just such an all-powerful authority when they devised the American system.

Of course, the parliament is not alone in the U.S.S.R. There is an executive and a judiciary at both federal and Republic levels. Soviet draftsmen did not revert to feudal times where the ruler performed all functions himself. Western models, indeed in a measure Tsarist models, were copied out with a slight difference. There is an executive in the form of a Council of Ministers, and there is a judiciary in hierarchical form.

The Council of Ministers is chaired by a Prime Minister who formally presents to each newly elected Supreme Soviet his proposal for a cabinet. The judiciary is headed by the Supreme Court of the U.S.S.R. with one set of inferior federal courts for military personnel that also has jurisdiction over espionage regardless of the status of the spy, whether military or civilian, whether Soviet citizen or foreigner. The major litigation, as in the Federal Republic of Germany, is conducted in the courts of the republics, from which matters may be presented to the federal Supreme Court through a procedure comparable in some measure to *certiorari* in the United States. Matters may be presented on "protest" by the Procurator General of the U.S.S.R., or on motion of the President of the Supreme Court. Neither the judiciary nor the executive has the right to review acts of the legislature. There are no checks and balances. Soviet jurists describe their system as one incorporating a system of "separation of functions" but not a "separation of powers."

A further departure from the American model was in the person of the head of state. Lenin rejected the Presidential system in favor of what he thought preferable as a representative of the community, namely a collective presidency. In a sense, the interim small legislative
authority chosen by the Supreme Soviet to act between sessions, called the "Presidium," is the collective head of state. But for the sake of convenience the chair of the body receives and sends Ambassadors, performs ceremonial functions, and signs with its secretary its normative acts.

GORBACHEV'S REFORM OF STRUCTURES

The gasps at the 19th Communist Party Conference may be understood when Gorbachev's proposals are compared with what had come to be accepted as an enduring Soviet model to be utilized for a long period of time. The revision of the Constitution in 1977 had been heralded as meeting the needs of mature socialism for the foreseeable future. Soviet society seemed to have settled into a permanent political and economic framework. Gorbachev now says the society had become so satisfied that it had entered into an era of "stagnation." His proposals were to revive the dynamism of earlier years, and he meant to include restructuring of the state system through such extensive amendment of the 1977 Constitution as to suggest that it might be called a new one.

The first blow in restructuring fell upon the existing legislature, the Supreme Soviet. Gorbachev's proposal seemed to have drawn on Lenin's model created by the 1923 Constitution. There was to be re-instituted a Congress of Soviets, now to be called a Congress of Working People's Deputies. From its members there would be selected representatives to sit in a full-time bicameral Supreme Soviet of smaller size than previously. It seemed to be patterned on what Lenin had called a bicameral Central Executive Committee of the Congress of Soviets. The principal legislative function would be in this body, as the Congress would meet only annually for a few days. With its proposed 1500 deputies it could not be expected to concern itself with detail, but only with general policy presented by the Communist Party's Secretary General in a new capacity. The Secretary General would, under the plan, become an official of the State, sitting as President of a new parliament. He was to be given enhanced powers to exceed the current ceremonial ones granted to the Chair of the Supreme Soviet's Presidium. In a measure his power was to resemble that of Western presidents who introduce drafts for discussion, but still his role would be different. This is because he would not be elected independently of the legislative authority, as in France and the United States, but by the Congress of the Working People's Deputies. His post cannot be interpreted as consistent with the separation of powers.
Symbolically, the model to be introduced reverted to a structure mindful of Lenin's 1923 Constitution. At that time the supreme policy making state body was a Congress of great size symbolizing the united working class, whatever its various ethnic origins. Although ethnic entities were given representation in a subordinate bicameral body designed to incorporate precision into the Congress's legislation, their position was subordinate to that of the single class. In a sense, ethnic entities such as the Ukrainians, Byelorussians, and Transcauscians, were being given a window on policy formulation; but they were not to be allowed to forget that the political system was the instrument of a class and not of the ethnics.

As in 1923, delegates to the new Congress would not be elected directly by citizens. One half would be chosen by social bodies, primarily trade unions, the writers' union and organizations representing occupational groups. In some western societies such a system is called a manifestation of "corporatism." The other half would be chosen by geographically-defined election districts through a process of selection by soviet assemblies in provinces and ethnically defined Republics. This structure suggested a return to the indirect elections of 1923 prior to the revision of electoral rules in the 1936 Constitution.

While reversion to Lenin's structure might seem to have reemphasized the centralization which Gorbachev and his colleagues blamed for "stagnation" in the past, the Politburo of the Party continued to denounce centralization. It had been placing emphasis upon stimulating local government initiative. The apparatus of the Central Planning Committee, Gosplan, had already been reduced in size so that it was incapable of directing the producing Ministries in any detailed way. Further, Ministries had been limited in their authority by a 1987 State Enterprise Law, which placed responsibility on the enterprise to conduct activities without subsidization from the center, and without directives from the planners as to what relationships they must maintain among themselves to achieve production. Only a general indication of a plan would be given as a guide to enterprise directors, who were ordered to enter what was called a "socialist market" to seek out other enterprises as partners with which contracts of supply would be negotiated.

Constitutionalism would be brought to the fore, not by establishing judicial review on the American model, but by creating a Constitutional Committee patterned somewhat after the French model. It had been suggested in pre-Conference communications to the press that the Committee's primary purpose would be to review the Ministerial orders, but it might also have been expected to receive authority to
advise the Congress and Supreme Soviet of legislation contrary to the Constitution. It was not proposed to permit the Committee to declare legislation unconstitutional. The Committee would only signal the possibility, and the supreme legislative authority would then decide whether a constitutional amendment was desirable in light of the advice of legal specialists.

The Draftsmen Implement the Program for Reform

Immediately after the end of the 19th Communist Party Conference, Gorbachev set his draftsmen to work on the implementation of his announced program of reform. The result was a draft of proposed amendments to the Constitution, which was published in all Soviet newspapers on October 22, 1988. In general, the draft conformed to the program, but there were modifications.

For example, the proposed Congress of People's Deputies would be enlarged to 2,250 deputies from the originally-proposed 1,500. Its balance in representation of different forces was changed. Instead of dividing the deputies into halves, one representing territorially defined groups and the other what might be called in Western parlance "corporate groups," the deputies would be chosen from three sources: (1) 750 from territorially defined groups of equal numbers of electors; (2) 750 from the various existing ethnically defined regions, to be represented in accordance with the following norms — 32 deputies from each Union Republic, 11 from each Autonomous Republic, 5 from each Autonomous Province and one from each Autonomous District; (3) 750 deputies from public organizations in accordance with the following norms — 100 deputies from each of the following (a) the Communist Party, (b) the Trade Unions, and (c) the Cooperatives; (4) 75 deputies each from (a) the Young Communist League, (b) the Association of Women, (c) the Association of War and Labor Veterans, (d) the Association of Scientific Workers, and (e) the Unions of Writers and Artists; and (5) 75 deputies from a group comprising such other public organizations and citizens' associations as might be formed in accordance with law.

Choice of deputies within the various groups would not be uniform. Within the territorially and ethnically defined districts, citizens were to vote directly for individuals, and the draft recommended that the former practice of reducing the ballot to one candidate be abandoned in favor of multicandidate ballots. The professional or "corporate groups" were to choose their deputies either through vote of general meetings of members or through their executive bodies. Candidates for election had to have reached 21 years of age, but voters, as
in the past, needed to be only 18 years of age. Ballots were to be secret, as in the past.

The unicameral Supreme Soviets of the various Unions and Autonomous Republics were also to be structured differently from the present system of election — only from territorially defined districts of equal population. Under the amendments, the unicameral Supreme Soviets of Republics would consist of two groups of deputies: those elected from territorially defined districts, and those sent forward by the "corporate groups." The first group would constitute two thirds of the deputies and the second the balance. A new rule was to exclude from candidacy executives (Ministers in Republics and Executive Committee members in lower soviets) except for the chairs of such executive bodies. Also to be excluded were judges, procurators and state arbitrators functioning in the soviet's territory.

Nominations, as under the 1977 Constitution, might be presented to electoral committees in each electoral district by any of a variety of organizations: general assemblies of staff in state enterprises and offices, public organizations, and citizens' meetings held in residential areas, as well as by the military in their formations. The district electoral committee, as at present, was to hear arguments in favor of candidates and select from among the nominees those who impressed the committee as qualified.

The Congress was to sit only once a year to perform its policy-making function of amending the Constitution; choosing the members of the federation, and the lesser ethnic groups to be given distinctive status as autonomous provinces or districts; establishing U.S.S.R. and Republic boundaries; approving economic plans and cultural programs; electing the Supreme Soviet and its president and deputy president; approving other prominent federal officials (the chair of the Council of Ministers, the head of the People's Control system, the Chief Justice, the Chief State Arbitrator and the Procurator General); naming members of the Committee of Constitutional Supervision; revoking legislation at the federal or Republic level deemed to have been unconstitutional; and determining the need for national referenda. A majority vote of the members of the 2,250-member Congress was to be required for action.

As expected, the plan, established by the Party Conference to place authority to enact legislation within the policy established by the Congress in a bicameral Supreme Soviet, was introduced as set in the October draft of amendments. Its members would no longer be elected directly by citizens, but would be chosen by the Congress from its own ranks. A formula was set for the selection of Supreme Soviet mem-
bers: those in the Council of the Union were to be selected from Congress deputies residing in territorially defined districts or being members of “corporate groups” functioning in those districts. Those in the Council of Nationalities were to be selected from ethnically defined districts or from members of “corporate groups” who work or reside in such districts. They varied in number: 7 for each Union Republic, 4 for each Autonomous Republic, 2 for each Autonomous Province and one from each Autonomous District. A rotation schedule was provided: one fifth of the members of the two chambers had to be renewed annually during each five-year term. The chambers were to meet separately or jointly in Fall and Spring sittings of three to four months.

As in the past, the two chambers were to elect members of a single Presidium from among their members. This body was given the familiar right to interpret laws and to issue provisional decrees, which were to be enforced immediately, but which had to be submitted to the Supreme Soviet at its next meeting for ratification. In the past, since Supreme Soviet sittings lasted never more than a week on each of two occasions a year, the Presidium, in effect, became the legislator. Under the new arrangement, since the Supreme Soviet was to be in session from six to eight months each year, the Presidium would presumably have less occasion to act provisionally during the recesses of the Supreme Soviet.

The proposed new Presidency to replace the collective Presidency of the 1977 Constitution has, since Gorbachev proposed it at the 19th Communist Party Conference, attracted attention both within the U.S.S.R. and abroad. As in the past, ceremonial functions, plus the receiving of Ambassadors and the signing of treaties would be the task of the President, who would now act on his personal authority rather than simply as the chair of the collective presidency. The proposed amendment did not create a system of separation of powers, for the President was not to be elected by the public generally, but by the Congress of People’s Deputies, thus being made significantly subordinate to the legislature which was to have the right to recall him. His term was five years and might not be extended for more than a second term. Although it was provided that he must sign laws enacted by the legislature, he was given no veto power; and since he might be recalled by the legislature, his willingness to refuse to sign a legislative act would seem to have been distinctly limited, even though he might courageously, in view of his status within the Communist Party, urge his colleagues in the legislature to withdraw their draft.

His duties were to include presentation of annual reports on the
state of the nation and other issues which he might choose to explore, and extended to presenting to the Supreme Soviet for election candidates for the posts of chair of the Council of Ministers and of the People's Control organization, as well as for the position of Chief Justice, Procurator General, and Chief State Arbitrator. He was to preside over the Defense Council and negotiate international treaties. He might issue neither laws nor decrees, but only directives which might be countermanded by the Congress or the Supreme Soviet, to both of which he was to be responsible.

The proposed new "Committee on Constitutional Supervision" has also attracted attention, since the concept of "unconstitutionality" to be found in the constitutional law of some other political systems has always — up to the 19th Communist Party Conference — been denounced as unsuited to the U.S.S.R. By the proposed amendments, members of the Committee, which would number thirteen in addition to a President and Vice President, and would be chosen for ten-year terms by the Congress from specialists in politics and law, might not be a member of a body whose acts were being reviewed for constitutionality. The model of the United States Supreme Court has not been copied, for the Committee was to be given no right to declare a law enacted by the Congress of the Supreme Soviet unconstitutional. Its role was to be advisory in that it might inform the enacting body that it had concluded that the proposed law or enacted legislation was unconstitutional. The enacting body then was expected to decide whether to revise the law or draft or to pursue the matter further, perhaps to the level of a constitutional amendment. The advisory opinion might be submitted by the Committee on its own initiative or at the request of the Congress or the Supreme Soviet. Should the matter proceed to constitutional amendment, a two-thirds vote of the entire membership of the Congress of People's Deputies was to be required. So long as the Communist Party retained the persuasive authority that it has enjoyed throughout Soviet history; the defeat of measures sponsored by it was likely to be rare.

Legislative acts of Union Republics and acts of their executive organs were to enjoy less sanctity. If the Committee thought such acts unconstitutional, it was to inform the issuing authority of that fact. The offensive act was to be suspended until revoked by the issuing authority, and if revocation did not follow, the Committee might turn to the Congress of People's Deputies or the Supreme Soviet for final determination of the issue.
REACTIONS TO THE DRAFT AMENDMENTS

Journalists reported after publication of the draft amendments that Soviet intellectuals were disappointed with it. In spite of the innovations such as multi-candidate, although not multi-party, elections to the Soviets at all levels, the institution of a Committee on Constitutional Supervision, and lengthened terms of judges, intellectuals were reported to fear that less potential for public influence upon policy formulation was offered than under the 1977 Constitution. Indirect election of the Supreme Soviet deputies seemed to insulate them from direct influence by the public. To be sure, the single candidate elections of the past offered little opportunity to prevent the seating of an undesirable person, but the potential existed; while under the proposed amendment requiring that elections to the Supreme Soviet be conducted within the Congress of People’s Deputies from its own very large assemblage, there seemed to be less potential for public influence. Further, the large size of the Congress suggested that its decisions would necessarily be guided by its leadership.

Further, the new Presidency, although clearly limited in power by the Congress’s right of recall, could be expected to provide strong influence on policy-making since it could propose legislation. The obvious advantage of this initiative seemed to be enhanced under present conditions as the holder of the presidency would be simultaneously Secretary General of the Communist Party. In this Party capacity, the president could rely upon firmly established Party discipline to assure support from Party members among Congress and Supreme Soviet members to convince the deputies that his proposals had merit.

It is this latter feature of the draft that seems to have stimulated fear in Andrei Sakharov, who is reported to have said that Gorbachev can be expecting to proceed with his campaign to bring the masses into policy making, but his successors may not be of the same mind.

THE CONSTITUTION IS AMENDED

The anticipated amendments to the 1977 Constitution were adopted by the Supreme Soviet of the U.S.S.R. at an extraordinary session on December 1, 1988. By vote of 1,344 deputies for, 5 against, and 27 abstentions, a proposal of a revision committee was accepted. The vote itself was notable, as not since its creation in 1936 until 1988 had there ever been a vote which was not unanimous in the
Supreme Soviet. The opposition testified to the unrest in some of the minority Republics, whose citizens seem to sense a great Russian desire to dominate the federation. During the discussion of the draft of October 22, it had become evident that the 1977 Constitution had come to represent a potential, if not a reality, of minority Republic influence upon the formation of policy. Demands were expressed for consultation on policy formation and for direct election of representatives to the new Supreme Soviet of deputies owing primary loyalty to constituencies in the Republics.

The extraordinary session was told that a revision committee had surveyed comments on the October draft and had attempted to respond to concerns. Although no structural changes from those proposed in the October draft were to be made, the revision committee's spokesman declared that "clarifications" were offered in the new submission in order to assure the Republics that their voices would be heard.

In evident assurance of this consideration, the re-draft submitted incorporated several changes in provisions relating to the structure and authority of the new Committee on Constitutional Control. Article 125 provides that it would be increased in size to 23 members to accommodate at least one judge from each of the fifteen Union Republics. By Article 120, Republics were authorized to appeal to the Committee for a ruling on the constitutional conformity of federal departmental acts. By Article 114, the Committee was included for the first time among the state agencies authorized to initiate legislation in the Congress of Deputies, thus gaining greater power to insist that its otherwise "advisory" opinions be adopted. Under Articles 119-125, no doubt was left in the revised draft that the Committee's advice alone could not set aside a law of the Republic of Supreme Soviets, for the list of competences granted to the Presidium of the Supreme Soviet was augmented to state that the Presidium's tasks included assurance that Republic law conform to the federal constitution.

One of the major fears of Republics was countered by a new provision in Article 119 that no declaration of a state of emergency (martial law) would be permitted by the federal authorities with regard to one of the Republics without consultation with the Presidium of the Republic concerned. To satisfy the Latvian Republic, a provision was inserted in Article 111 of the revised draft to the effect that in the Supreme Soviet's chamber representing citizens by population, the determination of electoral districts must take into consideration the number of electors (and, presumably, not persons) within the district.
Article 111 also provides that deputies representing Union Republics were increased from 7 to 11 in the chamber of nationalities.

Estonia's request to be permitted to depart from the standard model of Congress of Working People's Deputies and Supreme Soviet set for each Republic was denied. Its delegates wanted to omit the Congress, but the revision committee reported that there must be uniformity of structures in all Republics. Estonians were told that to meet their desires, they might in their Constitution establish whatever competence they might wish for their Congress, presumably to the point of limiting it to ceremonial functions.

Republics' influence may have been increased by insertion in Article 91 of the revised draft of a new provision that "most important questions of federal and local concern" might be decided not only by the federal Congress of Working People's Deputies and the Supreme Soviet, but by vote in a national referendum.

A considerable number of changes in the wording of articles, ostensibly to clarify meaning, was made, and one major change in the level of legal source was included: the specific designation of deputies to represent each of the social organizations in the Congress of People's Deputies, which had been included in the October draft, was removed. In Article 100, a sentence replaced the previous detailed paragraph to say simply that the number of seats to be assigned to associations would be set forth in the electoral law.

CONCLUSION

Two centuries of struggle on the part of the peoples of the Russian Empire and of the U.S.S.R. have demonstrated that Western concepts of constitutionalism have seeped into the consciousness of twentieth-century Soviet men and women. Models of Western constitutions have been studied and selections made, but there seems always to have been evidenced the fear of those who have governed that Jeffersonian-type democracy would spell chaos were it to be introduced. Increasingly, leaders have expressed the desire to introduce participation by the common citizen in the policy-making and administrative process. Yet, various types of controls have been established in constitutional law.

The last Tsar, when forced by public unrest to grant a "Basic Law," reserved a royal prerogative to prorogue the Duma, and he used this right. Lenin established a model in which the sovereignty of the masses was symbolized by a very large Congress of Soviets, which he could manipulate through the medium of a monopoly political party of militant, disciplined, and ideologically committed colleagues.
Stalin departed from Lenin's model in 1936 to create a bicameral legislature patterned on Western federal legislatures, but he controlled it through his Communist Party, and even wrote into the Constitution a guiding role for that Party. "Guidance" became "command," and personalized dictatorship eventually emerged. Nikita Khrushchev, who succeeded to Stalin's authority after a brief interlude following Stalin's death in 1953, denounced Stalin's methods but retained the constitutional structures established in 1936. When Leonid Brezhnev as Communist Party Secretary General introduced a new constitution in 1977, he made no change in governmental structures or in Communist Party "guidance." Indeed, he even clarified that "guidance" role by a rewording of the 1936 guidance formula.

With his draft of 1988, Mikhail Gorbachev was seen to have used his authority as successor in the Secretary General role within the Communist Party to return in considerable measure to the constitutional structures of Lenin's federal Constitution of 1923, but with a new weighting in favor of the Republics within the federation. Stalin's highly centralized system had been weakened, but not to the point — requested by some of the Republics — of creating a confederation. Central authority was to remain supreme, but there was recognition that Republics had a right to consultation in emergency situations, and to referendum votes when there was doubt as to the wisdom of centrally directed policy.

Further, the new draft included much discussion of the Communist Party's "guidance" function. No longer was it to enter into the details of state administration, as had been increasingly manifest in its activities over the years. It was being directed to return to its policymaking role alone. Gorbachev seemed to sense that by strengthening the role of the Soviets as state institutions, the public represented in those Soviets could keep Party members in the place assigned to them, even though many deputies were both Party members and Deputies to the Soviets.

Western analysts and even some Soviet critics have suggested that "democracy" is being emphasized and measures are being taken to reduce the likelihood of arbitrary government, with the help of structures which seem to enhance the potential of resumption of dictatorial practices. Outsiders can only await developments, hoping that a new dawn is approaching after nearly two centuries of efforts to create limitations on autocratic power, but fearing that exhortation of masses to participate in government cannot bring the desired limitation if institutional structures remain essentially the same as those created in 1923.