The Soviet Union as a State under the Rule of Law: An Overview

John Quigley

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The policy of perestroika is generating important reforms in the Soviet legal system. The primary rallying cry of the reform stresses the need for the rule of law. The concept of a state under the rule of law has become the rubric for a series of significant changes to the Soviet legal order. This Article explores the origins and legal manifestations of this concept in the USSR.

I. The Conceptual Origins of a State Under the Rule of Law

Mikhail Gorbachev introduced the rule-of-law theme into public discourse in his address to the Nineteenth Party Conference in 1988. To achieve the “democratization of the life of the state and society,” Gorbachev said that the USSR must “move along the path of the creation of a socialist state under the rule of law” (sotsialisticheskoe pravovoe gosudarstvo). To elaborate his theme, Gorbachev focused primarily on the need to delineate functions among the executive, legislative, and judicial branches of government in order to strengthen the legislative and judicial branches.

The rule-of-law concept has been a fundamental notion in Western legal theory, particularly since the time of the French Revolution. It has signified that law is applicable to the executive authority. The executive is bound to respect established procedures of governance and may not trammel the power of the other branches of government or the...
rights of citizens. In German the term rechtsstaat, meaning "legal state" or "law-based state," describes this principle; the Russian phrase pravovoe gosudarstvo is a literal translation. In French, the corresponding term is légalité. The English-speaking world uses the more cumbersome phrase "state under the rule of law."6

In the USSR, however, the concept was viewed until recently as reflecting the false legality found in Western states. A 1956 Soviet legal dictionary defined pravovoe gosudarstvo as "an unscientific concept depicting the bourgeois state as one in which there is supposedly no place for arbitrariness on the part of the executive authority and where, supposedly, the law and legality reign."7 The concept, according to the dictionary, is used "in a demagogic way" by the bourgeoisie of many countries "in its class interests" in order "to inculcate harmful illusions in the masses, to mask the imperialist essence of the contemporary bourgeois state and its law."8 The concept as used in bourgeois states was "directed against the revolutionary movement of the working class, and from the time of the emergence of socialist states, against them."9

At the outset of the Cold War in the early 1950s, the West indeed directed the concept against the USSR and its allies. It was the rallying cry of the International Commission of Jurists, a group of judges, law teachers, and attorneys founded in 1952 to investigate justice in the Eastern European socialist countries.10 The Commission used the rule of law concept to denounce human rights violations in Eastern Europe.11

It is surprising, therefore, that Gorbachev and other contemporary Soviet jurists12 have embraced the concept of a state under the rule of law. Notably, however, Gorbachev called for a socialist state under the rule of law, an indication that the USSR was not abandoning the socialist aspects of the Soviet social order.13 Instead, Gorbachev intended to

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7. 2 IURIDICHESKII SLOVAR' [LEGAL DICTIONARY] 196 (P. I. Kudriavtsev ed. 1956).
8. Id.
9. Id.
13. Id. at 7 (stating that a predominance of socially owned property and the absence of exploitation of workers are features of a “socialist state under the rule of
introduce elements of legal process in order to enhance the effectiveness of the socialist state and to protect more fully the rights of its citizens.

One Soviet jurist, G. N. Manov, attributes three aspects to the concept of a state under the rule of law: first, the supremacy of the law; second, the division between legislative, administrative, and judicial functions; and third, the mutuality of rights and obligations between the state and citizens.\textsuperscript{14} This concept is replacing the former Soviet legal theory of a “state of socialist legality” (gosudarstvo sotsialisticheskoi zakonnosti), which Manov characterized as a notion appropriate to a “command-administrative system” of governance in which the citizenry is “law-abiding” but exercises little “active influence on social processes.”\textsuperscript{15}

II. Role of the Communist Party \textit{vis-à-vis} the State

The Communist Party of the USSR, under Article Six of the USSR Constitution, was considered the “leading and guiding force of Soviet society and the nucleus of its political system, of all state organizations and public organizations.”\textsuperscript{16} The Party set “the general perspectives of the development of society and the course of the domestic and foreign policy of the USSR.”\textsuperscript{17} Although Gorbachev called for the restructuring of the Party and the modification of its constitutional monopoly, the Party and its far-reaching influence remained one key issue in the implementation of the rule of law. The Party, at both the national and local levels, frequently governed, rather than simply setting general policy.\textsuperscript{18} The Party, in effect, undermined the role of the legislative, executive, and judicial officials.\textsuperscript{19}

Historically, the leading role of the Party was, in part, a reflection of the “directedness” of Soviet society as it industrialized. In 1988, however, the Nineteenth Party Conference called for a sharp differentiation of functions between Party and government and asked for “strict obser-
vance” of the law by the Party, \textsuperscript{20} by which it meant that the Party should not exceed its proper sphere. The Conference criticized the Party for “excessive organization” and “over-regulation of social relations,” both of which had squelched creativity among the populace. \textsuperscript{21} One Soviet jurist, referring to the impact of this over-regulation of the economy, said that Soviet economic managers “often did not know how to act in order not to overstep the boundaries of what was permitted, all of which was the worse because these boundaries, as a rule, were not clear.” \textsuperscript{22}

In 1990 the Congress of People’s Deputies amended Article Six of the Constitution \textsuperscript{23} to eliminate the Communist Party’s legally-based predominance. \textsuperscript{24} In another blow to Party power, the Congress created a state presidency with significant authority. \textsuperscript{25}

In discussing Party-government relations, Soviet jurists often refer to the doctrine of separation of powers, although that doctrine usually defines the political spheres of legislative, judicial, and executive power, not relations between a political party and the governmental apparatus. \textsuperscript{26} Nonetheless, Soviet jurists see the doctrine as relevant in the Soviet context, not only in its traditional sense, but also in the sense of separating the Party from the government. \textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
\item Nineteenth Conference, Communist Party of the Soviet Union, O demokratizatsii sovetskogo obschestva i reforme politicheski systemy [The Democratization of Soviet Society and the Reform of the Political System], Izvestiia, July 5, 1988, at 2, col. 1.
\item Id. at 4.
\item See supra note 16.
\item See supra note 16.
\item See Roundtable Discussion, supra note 13, at 386-90.
\item Zakhon ob uchredit’ posta prezidenta SSSR i vneseni’ sovetsvuiushchikh izmeneni’ i dopolnenii v konstitutsiu osnovoi zakon SSSR [Law on Establishing a Post of President of the USSR and on Making the Corresponding Changes and Amendments in the Constitution Basic Law of the USSR], Ved. S’ezda Nar. Dep. & Verkh. Sov. SSSR, no. 12, item 189 (1990), reprinted in Izvestiia, Mar. 16, 1990, at 2, col. 1. See also Roundtable Discussion, supra note 13, at 386-90.
\item Manov, supra note 12, at 7. The doctrine of separation of powers emerged in Europe in the seventeenth and eighteenth centuries as a means by which the emerging merchant classes might find a niche in governance over and against the ruling aristocracies; by juxtaposing a legislature to the monarchy and judges, the merchants secured a role for themselves. Id. See Roundtable Discussion, supra note 13, at 389-90.
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III. Restructuring Power Relationships Between Governmental Institutions To Achieve the Rule of Law

The executive branch of government in the Soviet Union, which consists of the councils of ministers at both federal and republic levels and their subordinate ministries, has concentrated and retained nearly all law-making authority. Most of the important legislation does not arise from the legislative branch of government, the federal and republic supreme soviets. One of the key aims of reformers is to give the legislative branch more lawmaking initiative and to subordinate the executive branch to legislative as well as judicial authority. Reformers seek to reach this goal by focusing on the legislative and judicial branches and by creating effective checks on executive power. Both the legislature and the judiciary have become strengthened in a variety of ways.

A. The Reinforcement of the Legislative Branch

To date, much of the Soviet legislative initiative still comes from the Communist Party and the executive branch. This may be a temporary phenomenon, however, pending the contemplated growth and pre-eminence of the Supreme Soviet.

In 1988, the Supreme Soviet enacted a constitutional amendment that created a popularly elected Congress of People's Deputies. This Congress would, in turn, elect the Supreme Soviet from among its members. The congressional elections in 1989 offered the populace a choice of candidates in most areas and ended the virtually automatic re-election of party-chosen government officials.

Before this constitutional and institutional change, the Supreme Soviet met for only a few weeks during the year. Under this new legislative system, the Supreme Soviet will act as a permanent legislative body, meeting most of the year, and requiring its members to participate full-time. It remains to be seen just what kind of parliament the Congress of People's Deputies and the Supreme Soviet will be.

Clearly, however, the governmental ministries continue to play a major role in legislative drafting. This is necessary because, for now at least, the Supreme Soviet lacks the expertise that long has been segregated into administrative bodies. For example, when faced with the need for new laws concerning property, land-holding, tenancies, taxation, enterprises, local industry and agriculture, labor disputes, trade unions, and pensions, the Supreme Soviet felt obligated to ask the Council of Ministers for help. Similarly, the Supreme Soviet looked to the Council of Ministers for help in preparing a bill on road traffic

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28. Indeed, it was the Party that initiated the call for the rule of law and much of the ensuing reform legislation. Foster-Simons, supra note 24, at 337-38.

29. Id. at 342. See Belousovitch, supra note 19, at 285-86.

Although administrative consultation on proposed legislation is not uncommon in many parliamentary systems, the success of the Supreme Soviet in establishing itself as the dominant legislative body depends upon its own initiative and development of bills.

In certain cases, the new legislative branch has demonstrated independent authority and the capacity for bold political action. When members of the Supreme Soviet objected to provisions of a decree on holidays adopted by the Presidium of the Supreme Soviet, the legislative body voted to ask its Committee on Legislation, Legality, and Legal Order to prepare a formal reaction to the decree. In another example of independence from executive control, the Supreme Soviet objected to provisions of a decree of the Presidium on the restoration of rights to victims of government repression during the 1930s, 1940s, and 1950s. Again, the Supreme Soviet asked its legal committee to prepare a response. In 1989, the Supreme Soviet addressed delicate issues such as the miners' strike and the Baltic republics' desires for economic and political autonomy. The legislature also showed considerable initiative in voting to eliminate seats in the Congress of People's Deputies that were reserved for social organizations and Party-appointed officials.


35. N.Y. Times, Oct. 25, 1989, at A13, col. 1. The proposal still required adoption by the Congress of People's Deputies, which alone has the power to amend the Constitution. The system of reserved seats was criticized as undemocratic since it gave members of the social organizations a role in electing more than one member of
The Supreme Soviet has moved away from the former practice of ratifying decrees adopted by its Presidium with little discussion. In several instances, ideas leading to legislative action have originated from individuals or citizens' groups. The Supreme Soviet substantially revised the Official Abuse Law due to pressure and opposition from the congressional deputies. Indeed, true legislative initiative has come from the elected legislative branch, enhancing its position within a system under the rule of law.

One of the aims of parliamentary reform is to turn the Supreme Soviet into a body capable of adopting basic legislation for the country. Previously, government ministries had frequently undermined laws of the Supreme Soviet by adopting contradictory regulations which prevailed over the laws. In other cases, the laws were so vague that they left room for regulations to set policy. One Soviet jurist suggested that more lawyers be elected to the Supreme Soviet to improve its ability to write legislation in precise terms.

B. The Committee on Constitutional Supervision

An important new institution in the Soviet parliament is a Committee on Constitutional Supervision. This body will advise the Congress of People's Deputies and the Supreme Soviet on the constitutionality of proposed legislation and monitor regulations adopted by government ministries to ensure conformity with the Constitution and legislation. The 27 members of the Committee are appointed to ten-year terms by the Congress of People's Deputies from among leading lawyers and political scientists.

the Congress of People's Deputies, and since the leadership of the social organizations picked themselves to serve rather than seeking out the best qualified members of their organizations. Blishchenko, *Perestroika i pravo [Restructuring and the Law]*, Sov. Iust. 16 (no. 14, 1989).


37. *See Gorbachev, supra* note 1.

38. The Official Abuse Law was drafted within the administration and adopted by the Supreme Soviet, only to be revised and re-adopted four months later. Foster-Simons, *supra* note 24, at 344.


43. *Id.*
The Committee will address issues at the request of various governmental bodies or at its own initiative, but not at the request of an individual citizen. It will render opinions regarding draft laws or laws that have already been adopted. The Committee will examine actions of the Council of Ministers of the USSR, of the supreme soviet of a union republic, or of the council of ministers of a union republic. The federal and republic legislatures may ask the Committee whether a regulation issued by a ministry or by a social organization, including the Communist Party, violates the Constitution or statutes. A republic legislature may ask the Committee whether a federal statute is unconstitutional.

Although the Committee has no power to nullify a statute, its decision that a statute is unconstitutional has considerable significance. If it decides that a statute of the Congress of People's Deputies, or a provision of a constitution of a union republic, violates the USSR Constitution, the Congress of People's Deputies must debate the matter at its next session. If the Congress of People's Deputies overrules the Committee's position by a two-thirds vote, the provision remains valid. If the Congress does not take this action, the provision loses legal force.

With any other enactment, if the Committee finds that it violates the Constitution or statutes, that finding stays its operation, and the enactment may not be enforced unless and until the body that adopted it eliminates that portion which the Committee found unlawful. If the Committee finds that a statutory act (other than one adopted by the Congress of People's Deputies, or a provision of a constitution of a union republic) violates the rights of the individual under the Constitution of the USSR, or under human rights treaties to which the USSR is a party, the act loses force as of the date on which the Committee makes the finding. If the organ that issued the act does not remove the unconstitutional language, then the Committee may take the issue to the Congress of People's Deputies, and the Committee's annulment stands unless the Congress rejects the Committee's finding by a two-thirds vote.

45. Konst. SSSR art. 125. Constitutional Supervision in the USSR, supra note 44, art. 10. See also Manov, supra note 12, at 4.
46. Constitutional Supervision in the USSR, supra note 44, art. 10.
50. Constitutional Supervision in the USSR, supra note 44, art. 21.
51. Id.
52. Id. art. 22.
While in some instances new laws are being passed to ensure the rule of law, Soviet jurists are also concerned about an overabundance of laws, which, they say, negates the rule of law. The federal and republic supreme soviets have often passed laws, and the federal and republic councils of ministers and individual ministries have frequently adopted regulations, without regard to whether they conform to other laws and regulations. Some Soviet jurists therefore argue that more effective monitoring of legislation for conformity with existing legislation and more systematic repealing of outdated legislation would go a long way toward establishing the rule of law.

C. Reinforcement of the Judicial Branch
Changes designed to strengthen the judiciary relative to the executive have moved in four directions. First, the independence of the judiciary has been bolstered through reform of the method of selecting judges and setting their term of office. Second, judges have been given greater protection from investigation and prosecution by local officials. Third, lay participants have been given a greater decision-making role in trial courts. Fourth, the courts have been given broader powers to countermand unlawful actions of bureaucrats.

1. Judicial Selection
Local officials, particularly Communist Party officials, have perennially interfered in cases before the Soviet courts. Until 1988, judges of the people's courts (the lowest level trial court) were elected for five-year terms by the public at general elections. The local Party organization typically nominated a single individual for the position. If that individual gained 50% of the votes, he or she was elected. Judges for courts above the level of people's courts were chosen by the government council (soviet) at the same level. This system gave local officials strong influence over judges, an influence they used frequently when a case arose that affected their interests.

A 1988 constitutional amendment changed the procedure for selecting judges to remove local Party and government officials from the process. By this reform, judges of people's courts and province-level courts are selected by the soviet at the next higher level of government. Thus, people's court judges are selected by the province soviet, and province court judges by the supreme soviet of the union republic. As before, judges of the supreme courts of union republics and of

53. Manov, supra note 12, at 5.
54. Id.
55. Borodin, Kogda sud'ia plachet [When a Judge Cries], 7 Ogoniok [SPARK] 16 (1989) (Borodin is the Chief Judge, Voskresensk City People's Court, Moscow Province) (account of local officials interfering in a court case). See also Quigley, supra note 41, at 66-72.
56. Konst. SSSR art. 152.
57. See, e.g., a decree of the Russian Republic supreme soviet naming ten judges to courts at the province and equivalent levels, in Ob izbranii sudei Primorskogo kraevogo,
autonomous republics, and judges of the courts of autonomous provinces and territories, are selected by the Supreme Soviet or soviet at that same level. Likewise, the Supreme Soviet of the USSR selects the judges of the Supreme Court of the USSR. This constitutional amendment also increased judges’ terms of office to ten years, with the aim of increasing their independence.

In the opinion of many Soviet jurists, one reason that judges succumbed to official interference in cases was that many judges lacked a strong sense of integrity. To improve the quality of individuals selected for judicial office, the Supreme Soviet established a system of judicial panels to review the qualifications of potential judges. The 1989 Law on the Status of Judges established judicial selection panels composed of judges to submit names to the ministry of justice and the union republic supreme courts, which in turn make the final recommendation to the appropriate soviet. The panel administers a qualifying examination to nominees for people’s court judgeships who have not previously served as judges.

2. Protection of Judges from Criminal Prosecution

Judges have on occasion been criminally prosecuted on questionable charges after angering local officials. The Supreme Soviet provided some protection against retributive criminal charges in the Law on the Status of Judges. Under this law, a judge may be prosecuted only upon the authorization of the supreme soviet of the union republic, and a judge of the Supreme Court of the USSR only upon the authorization of the Supreme Soviet. A decision to commence a criminal case against a people’s court judge may be made only by the procurator general of the union republic, and against a judge of a higher court only by the Procurator General of the USSR. If a criminal case against a judge proceeds to trial, only the supreme court of the union republic (for a people's


59. Konstr. SSSR art. 152.


61. Id. arts. 14-15.

62. Id. art. 9. A similar procedure was established for selection of judges to the Supreme Court of the USSR. See Polozhenie o kvalifikatsionnykh kollegiakh sudei sudov Soiuza SSSR [Statute on Qualification Panels for Judges of the Courts of the USSR], Ved. S’ezda Nar. Dep. & Verkh. Sov. SSSR, no. 22, item 421 (1989).

63. Law on the Status of Judges in the USSR, supra note 60, art. 16(1).

64. Temushkin, Mysli o pravosudii [Thoughts on Justice], Sov. Iust. 4 (no. 16, 1988).

65. Law on the Status of Judges in the USSR, supra note 60, art. 6(1).

66. Id. art. 6(2).
court judge), or the Supreme Court of the USSR (for a judge of a higher court) may hear the case. Under this law, the militia (police) may not detain or incarcerate a judge. The combined effect of these limitations is to afford judges considerable protection from retributive prosecution initiated by local officials.

3. Lay Participation in the Trial of Court Cases

Gorbachev himself suggested the introduction of the jury system into criminal trials. Under the system long used in the USSR, two lay persons sit with one professional judge in civil and criminal cases, jointly deciding issues of both fact and law. The bench then reaches its decisions by majority vote. This system has been criticized on the grounds that the lay assessors typically defer to the professional judge.

In 1989, the Supreme Soviet instituted a jury system for the most serious criminal cases. It provided that “in cases of crimes for which the penalty is death, or deprivation of freedom for a term over ten years, the question of the guilt of the defendant may be decided by a jury (an expanded group of people's assessors).” The jury will decide only the question of guilt; if the defendant is guilty, the people's judge will determine the sentence. The Supreme Soviet did not specify the number of jurors, leaving that determination to each republic. The evident purpose of instituting trial by jury is to improve the rule of law by providing further insulation from outside interference in court decisions.

4. Judicial Override of Bureaucrats' Decisions

While there is no active discussion of permitting courts to override legislation, the courts have been given broader powers to override unlawful actions of bureaucrats. Previously, the courts had jurisdiction over

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67. Id. art. 6(3).
68. Id. art. 6(4).
69. Gorbachev, supra note 1. The proposal has also been urged by Vengerov, supra note 24, at 17-18.
70. Osnovy zakonodatel'stva Soiuza SSR i soiuznykh respublik o sudoustroistve v SSSR [Fundamental Principles of the Legislation of the USSR and of the Union Republics on Court Structure in the USSR], arts. 7-8, 31-36, Ved. Verk. Sov. SSSR no. 27, item 545 (1980). Criminal Procedure Code, UPK RSFSR art. 15. Civil Procedure Code, GPK RSFSR art. 6. See also Quigley, supra note 41, at 72-74.
71. Boliak, Judge, Gor'kii Province Court, Chto porozhdает passivnost' narodnogo zasedatel'ia? [What Is the Cause of the Passivity of People's Assessors?] Sov. Iust. 22 (no. 23, 1988).
73. Id.
unlawful acts of bureaucrats only when legislation gave the courts jurisdiction over a specific category of acts. For example, the courts had the power to countermand a decision by a factory manager to dismiss a worker if the dismissal was not based on a grounds for dismissal specified by law.\textsuperscript{75}

The 1987 Law on Appeals, however, gave the courts the general power to countermand a bureaucrat's unlawful decision.\textsuperscript{76} This law included one significant limitation: it permitted appeals only against the decision of an individual bureaucrat, not against the decision of a government body.\textsuperscript{77} This restriction severely limited the law's utility, and citizens did not invoke it in large numbers. As an additional reason why the law was infrequently used, one analyst suggested that Soviet citizens whose rights were violated more readily turned for redress to the local Party office or to the press.\textsuperscript{78}

In 1989, the Supreme Soviet amended the Law on Appeals to permit appeals not only against decisions of individual bureaucrats, but against collegial decisions by governmental bodies as well.\textsuperscript{79} It also created a new crime of "intentional non-compliance by an official with a decision, judgment, ruling, or decree of a court or interfering with their execution."\textsuperscript{80} This offense carries a penalty of a fine between 300 and 1000 rubles.\textsuperscript{81} This criminal liability should increase the pressure on bureaucrats when a court rules in favor of a citizen appeal.


77. Law on Appeals, \textit{supra} note 76, art. 1. See also \textit{O rassmotrenii sudami zhalob na nepravomernye deistviia dolzhnostnych likh, ushchemliaiushchih prava grazhdan \[Consideration by Courts of Complaints Against the Unlawful Actions of Officials Violating Citizen Rights\] \[Decree No. 14 of the Plenary Session of the USSR Supreme Court, Dec. 23, 1988\], \textit{BULL. VERKH. SUDA SSSR} 4-6 (no. 1, 1989), \textit{reprinted} in Izvestiia, Dec. 29, 1988, at 6, col. 5 (the Court construed the Law on Appeals to limit the ability of bureaucrats to avoid the Law on Appeals by issuing decisions they make as though they were collegial).

78. Manov, \textit{supra} note 12, at 6.


81. \textit{Id.}
IV. Reforms in Criminal Procedure

Reformers also contemplate limits on the executive’s conduct of the pre-trial investigation in criminal cases. One of the weaknesses of the pre-trial investigation system in the USSR is that the investigators, who have legal training, are subordinate to the procuracy, the body which conducts the prosecution at trial. This subordination, some people believe, gives the investigation a pro-prosecution bias. The Nineteenth Party Conference proposed that the investigators who prepare a criminal case for trial be removed from the jurisdiction of the procuracy so that they may operate apart from prosecutorial influence.\(^2\) They would be placed instead under the jurisdiction of the Ministry of Internal Affairs as a separate branch within the Ministry and subordinate to the Ministry at the federal rather than the local level.\(^3\) Some Soviet commentators, however, fear that the Ministry of Internal Affairs, which already controls the investigation of less serious cases, is more interested in showing a good clearance rate for investigations than in ensuring that only the right persons are prosecuted.\(^4\)

Another reform addresses the time at which a detained person has the right to an attorney.\(^5\) In 1989, the Supreme Soviet decided that this right should attach as soon as a person is taken into custody.\(^6\) Previously, the right attached only when the investigator had completed the investigation.\(^7\) This change will have a major impact on the pre-trial investigation. Formerly, investigators had a period of days or weeks to interrogate the suspect before the suspect spoke with an attorney. The early participation of an attorney will make it more difficult for investigators to extract incriminating statements from suspects. The new rule is more permissive than comparable laws in many other civil-law countries, where the authorities have a period of a day or two to interrogate a suspect before the right to counsel attaches.

Soviet lawyers commonly complain that judges are biased in favor of the prosecution, and in particular that judges are reluctant to acquit persons, even those against whom evidence of guilt is weak.\(^8\) The


\(^4\) Shcherbinskii, O meste sledstvennogo apparata [The Position of the Investigative Staff], SOTS. ZAK. 22 (no. 11, 1988).

\(^5\) Resolutions of the 19th All-Union Conference, supra note 82, at 3, col. 1.

\(^6\) Fundamental Principles of the USSR and the Union Republics on Court Structure, supra note 72, art. 14.

\(^7\) Criminal Procedure Code, UPK RSFSR, art. 47. Certain categories of accused persons were given a right to counsel earlier—at the time a formal charge is presented. These are minors, dumb, deaf, and blind persons, and others who as a result of physical or psychological defects are deemed unable to protect their own interests. Id.

\(^8\) Gamiunov, supra note 74. See also Quigley, The Soviet Bar in Search of a New Role, 13 L. & Soc. INQUIRY 201, 206 (1988).
Supreme Court of the USSR acknowledged the validity of the assertion when it called for an end to "the current practice in some courts of remanding cases for additional investigation when evidence is lacking to positively confirm the indictment and [when] it is impossible to obtain new information through conducting an additional investigation. Under such circumstances the court, in accordance with the law, is obliged to acquit the accused."89

The Supreme Court reported that the situation has improved, with acquittals per year up from the previous level of only a few hundred to 2,395 in 1988.90 Trial courts are now less frequently sentencing those convicted to prison and more frequently using such non-incarceration alternatives as a monetary fine deducted from wages; whereas in 1983 Soviet courts incarcerated 52.9% of those convicted, in 1988 they incarcerated only 34.1%.91

V. Reforms in Individual Rights

One of the major areas of reform is improvement in protecting individual rights.92 Gorbachev characterized prior practice as promoting "the primacy of the interests of the state over the interests of people. In zeal over state interests[,] arbitrariness was often justified, in violation of the Constitutional rights of citizens."93 The conceptualization of human rights has moved from the prior position, which viewed rights along with law in general as transitory and dependent on the particular stage of history, to a position that views rights as a firm and enduring phenomenon.94 Manov wrote, "[u]ntil recently in the Soviet doctrine of socialist democracy, inalienable rights were recognized only for social groupings, but not for an individual person."95 The "natural law doctrine" of individual rights, he said, was declared "an idealistic fiction" that was not based on a class analysis.96 Now Soviet doctrine embraces the proposition that certain rights are axiomatic.97

One of the mechanisms used to restrict freedom of speech has been a statute prohibiting anti-state speech. As it existed until 1989, this statute penalized "agitation or propaganda undertaken to undermine or

91. Id.
94. Lichnost’ v sotsialisticheskom pravovom gosudarstve [The Individual in the Socialist State Under the Rule of Law], SOV. GOS. & PRAVO 45 (no. 9, 1989).
95. Gorbachev, supra note 1.
96. Id.
97. Id.
1990 Soviet Union Under Rule of Law

weaken Soviet authority” or to “disseminate for such purposes defamatory fabrications besmirching the Soviet state or social system.” This language was narrowed in April 1989 to punish only “public calls for the overthrow of the Soviet state or social system or for its change by methods that violate the Constitution of the USSR, or for blocking the implementation of Soviet laws for the purpose of undermining the political or economic system of the USSR.”

This language drew criticism as well. The law still prohibited speech too broadly. A new version appeared in July 1989 that further limited the offense. This last version punished only “public calls for the violent overthrow or change of the Soviet state or social structure as consolidated in the Constitution of the USSR, or disseminating for this purpose materials of such content.” Under this version, presumably, a person could not be prosecuted for merely criticizing the government.

Another aspect of the current approach to individual rights is greater attention to human rights as defined in international treaties. Gorbachev said that “our legal standards must comply with international treaties.” The USSR has shown an increased receptivity to international monitoring of human rights by outside agencies. In international human rights bodies associated with the United Nations, Soviet representatives have eschewed their previous reluctance to discuss Soviet practices. The USSR has withdrawn objections it filed earlier to the jurisdiction of the International Court of Justice in disputes arising...

98. Ob ugovolnoi otvetstvennosti za gosudarstvennye prestupleniia [Criminal Liability for Crimes Against the State], art. 7, Ved. Verkh. Sov. SSSR no. 29, item 449 (1982). The USSR Supreme Court construed this provision narrowly in a 1988 case in which the accused persons, convicted under the provision, had written about an “absence of democracy” in the Soviet Union and had written “sharp criticism of the policies of Stalin and Brezhnev.” The Court reversed the conviction on the ground that it had not been proved that the accused had an intent to undermine Soviet authority. Case of F. F. Anadenko and V. S. Volkov, BULL. VERKH. SUDA SSSR 5, 6 (no. 2, 1989).


102. Gorbachev, supra note 1.

ing under a number of human rights treaties. In 1989 the USSR ratified Protocol I to the 1949 Geneva conventions on warfare. The USSR, by a special declaration, subjected itself to the fact-finding procedures of the Protocol, which provide that if another state party alleges a violation by the USSR of the conventions or of the Protocol, an international fact-finding commission may investigate.  

As part of the promotion of pluralism, a law has been drafted that would abolish prior censorship of the mass media. Statutes have been adopted for the first time in several cities and republics on procedures for obtaining permits for street demonstrations. Although the new demonstration laws are often not very specific, they offer legal rules where none existed previously.

The Soviet Union considers departure by a citizen from the USSR without permission for permanent residence abroad to be treason. Vengerov said that the new pluralism requires that individuals have the freedom to choose in which country to live. In 1989 the Supreme Soviet gave preliminary approval to legislation to remove several legal obstacles to emigration. Jurists have suggested that since the prior view that a citizen who leaves is an “enemy of the people” is obsolete, the USSR should consider itself responsible for its citizens who take up residence elsewhere and should grant them such rights as the right to


106. Foster-Simons, supra note 24, at 358-59.

107. Criminal Liability for Crimes Against the State, supra note 98, art. 1; and Criminal Code, UPK RSFSR, art. 64 (“flight abroad” considered treason).


vote in Soviet elections. The USSR, however, does not renew the passports of citizens who leave to live abroad. Thus, emigres must seek citizenship elsewhere and cannot easily return to live in the USSR.

VI. Reforms in the Law Regulating the Economy

Much of the most important legislation of the early perestroika period was aimed at decentralization of economic activity. The old system, which involved extensive administrative discretion of the ministries, was replaced with a new system involving greater independent action by economic actors. A new Law on the State Enterprise gave state-owned factories greater rights vis-à-vis their ministries. In particular, state-owned factories gained a right to compensation if the ministry violated the enterprise’s rights. This right became enforceable by an action before a state arbitration body. This law also gave workers the right to elect enterprise directors.

A 1989 Law on the Procedure for Settling Collective Labor Disputes (Conflicts) was the first Soviet statute to provide procedures for strikes. Before this reform, the limits on what officials might do to suppress a strike were unclear. The 1989 law declared a strike legal if workers follow certain procedures, including an arbitration process for grievances. This process, under the law, would take a minimum of one week, and thus preclude “wildcat” strikes. A strike would be legal only if two thirds of the workers voted to strike. The Supreme Soviet of the USSR or the supreme soviet of the union republic may intervene by deciding to “postpone” the strike. During a legal strike, the strike committee would be recognized as the bargaining agent for the workers. The factory administration, however, may go to court to have the strike declared illegal based on failure to meet the indicated requirements. If the court makes such a declaration, the workers must end the strike. This outcome would render the workers liable to adminis-

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111. Blishchenko, supra note 35, at 17.
113. Id. art. 6. O poriadke izbraniia sovetov trudovykh kollektivov i provedeniia vyborov rukovoditelei predpriatii (ob’edinenii) [The Procedure for Selecting Councils of Worker Collectives and for Conducting Elections of Directors of Enterprises (or Combines)], SPSSSR no. 9, item 24 (1988).
115. Id. art. 5 (arbitration body has up to 7 days to make a decision).
116. Id. art. 7.
117. Id. art. 9.
118. Id. art. 8.
119. Id. art. 12.
120. Id.
trative penalties,\textsuperscript{121} including dismissal.\textsuperscript{122} The new law thus introduced complex legal procedures where none previously existed.

VII. International Aspects of the Rule-of-Law Approach

The rule of law as currently advanced in the USSR also has significant international implications. Gorbachev has put new emphasis on Soviet participation in international organizations. As discussed above, the Supreme Soviet has implemented a number of human rights monitoring mechanisms.\textsuperscript{123} In addition, Soviet officials have shown new concern for ensuring that Soviet legislation is in line with Soviet treaty obligations.\textsuperscript{124} The USSR has also taken initiatives on disarmament and on resolution of regional military conflicts.\textsuperscript{125}

More broadly, the USSR has advanced the view that the hostility which has characterized post-World War II East-West relations should no longer exist, and that greater international regulation is in order to confront such problems as pollution, disease, and poverty.\textsuperscript{126} The USSR is promoting the concept of rule of law not only for itself but for the world community.

VIII. The Legal Profession as a Guarantor of Reform

According to Vengerov, a newly activated bar is needed to guarantee pluralism.\textsuperscript{127} The notion of state under the rule of law will endure only if it is supported by strong institutional guarantees. Practicing attorneys (advocates) in the USSR have emerged as major proponents of the rule of law and have established for the first time a nationwide bar association. In 1989, they formed a Union of Advocates whose stated goal was to promote the concept of a "socialist state under the rule of law."\textsuperscript{128} At its first session, the Union’s governing board adopted a resolution on individual rights, which criticized both the July 28, 1988 decree of the Presidium of the Supreme Soviet on street demonstrations, and the April 8, 1989 decree revising the criminal code and laws on anti-state speech.\textsuperscript{129}

\textsuperscript{121} Id. art. 14.
\textsuperscript{122} Osnovy trudovogo zakonodatel'stva SSSR i soiuznykh respublik [Fundamentals of Labor Legislation of the USSR and Union Republics], arts. 17, 56, Ved. Verkh. Sov. SSSR, no. 29, item 265 (1970).
\textsuperscript{123} See supra notes 103-04 and accompanying text.
\textsuperscript{124} Pustogarov, supra note 110, at 4 (citing a discussion of that topic at a 1988 conference of the Ministry of Foreign Affairs).
\textsuperscript{125} Quigley, Perestroika and International Law, 82 Am. J. Int'l. L. 788 (1988).
\textsuperscript{126} Gorbachev, Oktjabr’i perestroika: revoliutsiya prodozhaetsia [October and Re-Structuring: The Revolution Continues], Izvestiya, Nov. 3, 1987, at 2, col. 1.
\textsuperscript{127} Vengerov, supra note 24, at 18.
\textsuperscript{128} See Ustav Soiuza advokatov SSSR [Charter of the Union of Advocates of the USSR], art. 4, Sov. Iustr. 29 (no. 14, 1989).
\textsuperscript{129} V Soiuz advokatov SSSR [In the Union of Advocates of the USSR], Sov. Iustr. 10 (no. 11, 1989).
According to the chairperson of the governing board, the Union plans to take an active role in proposing bills to the Supreme Soviet on issues affecting the bar and the courts. It also intends to protect the bar from the Ministry of Justice, which regulates the bar in various ways. For example, the Union objects to the Ministry's practice of coercing collegia (local bar groups) to accept as new attorneys those who have served as criminal investigators or procurators, but who have not done well in that work and are in need of other employment.

In 1989, the Union of Jurists of the USSR, a professional organization for all law-trained persons, was formed. It included not only advocates but also judges, law teachers, legal research institute staff, jurists (salaried staff counsel), criminal investigators, and procurators. Like the Union of Advocates, the Union of Jurists also promotes the rule of law and individual rights. It too plans to propose legislative changes to the Supreme Soviet and has formed a legislative committee for that purpose.

Soviet legal scholarship is playing an important role in the reform process. Scholars have been interviewed in newspapers about the rule of law and have discussed its implications in their journals. Their work has strongly supported the new initiatives.

To be sure, their work is in the style that Soviet legal scholarship has taken in the past, using the current Party position as a point of departure. Now, however, the Party position is the jurists' position. Although many legal scholars held their tongues in years past in the face of illegal state action, their written work promoted a rule-of-law approach. Gorbachev comes from their midst, having been exposed to the concept of the rule of law as a law student in Moscow. To a considerable degree, legal scholars are providing the theoretical infrastructure for the rule of law.

130. Voskresenskii, Soiuz advokatov SSSR [The Union of Advocates of the USSR], Sots. Zak. 16, 17 (no. 6, 1989).
131. Id. at 17. Another concern is that the Ministry limits the numbers of advocates, a fact that led, beginning in 1988, to the formation of legal cooperatives, independent of the collegia and the Ministry. Pravovye kooperativy: "za" i "protiv" [Legal Cooperatives: "For" and "Against"], Sov. Iust. 6 (no. 12, 1989). Skitovich, Iuridicheskii kooperativ: kakim on dolzhenny byt? [The Legal Cooperative: What Should It Be?], Sov. Iust. 7 (no. 13, 1989).
132. Na s'ezde iuristov SSSR [At the Congress of Jurists of the USSR], Sov. Iust. 7 (no. 16, 1989).
133. Ustav Soiuza iuristov SSSR [Charter of the Union of Jurists of the USSR], art. 1, Sov. Iust. 12 (no. 16, 1989). See also Interview with A. A. Trebkov, Chair of the Union of Jurists of the USSR, in Soiuz iuristov SSSR sozdan [A Union of Jurists of the USSR Has Been Established], KHOZIAISTVO I PRAVO [THE ECONOMY AND THE LAW] 3, 4 (no. 8, 1989).
134. Charter of the Union of Jurists of the USSR, supra note 133, art. 3. Names of the four-member legislative committee are given in Sov. Iust. 11 (no. 16, 1989). See Roundtable Discussion, supra note 13, at 394 for Professor Hausmaninger's view on the role of Soviet law professors.
Conclusion: Prospects for the Future

The implementation of the concept of a state under the rule of law faces substantial hurdles in the Soviet Union. One obstacle is historical. The rule of law can flourish in a country only if the citizenry continuously demands it. If it does not, executive authority will expand. The USSR has been organized heretofore on a model of "directedness," rather than on one that emphasizes citizen initiative.\textsuperscript{135} Although not all analysts agree why this model emerged in the USSR, it had its advantages in the 1930s, when the government sought radical transformation of the economy to achieve industrialization. The "socialist legality" model sought to mobilize the citizenry to build factories where none existed, to create a base for heavy industry, and to create economic and military strength capable of withstanding the anticipated invasion from Germany. The government's methods were not always effectively directed to achieve its ends, to be sure, but the ends were clear and, to a considerable degree, the model worked. The USSR achieved the status of a world power.

After World War II, however, the goals were not so simple. No longer was the USSR trying to build industry where none had existed. It sought instead to achieve the more complex goals of improving what had been created and of improving the basic conditions of existence, such as housing, that had been given short shrift during the race to industrialize. The government tried to break out of the "command-administrative" model as early as the 1950s with reforms initiated by Nikita Khrushchev and Aleksei Kosygin to decentralize the economy.

While those efforts enjoyed some success, they did not change the basic direction of governmental activity from the "command-administrative" model. The seed had been planted, however, and in the mid-1980s it flourished again when Mikhail Gorbachev assumed the Communist Party leadership. By that time, the negative consequences of the "command-administrative" model had become clear.

The switch to a "state under the rule of law" model thus responds to objective tendencies in Soviet society. The model is more appropriate for the contemporary period than the "command-administrative" model. While this does not ensure success, it does suggest that the advancement of the "state under the rule of law" concept is more than a temporary tactical move.

A second obstacle to implementation of the concept of state under the rule of law is the lack in Russia (and in some other component regions of the USSR) of a tradition of active citizen involvement in government. The French Revolution passed Russia by, and while Europe moved to representative government in the nineteenth century, Russia retained a strong monarchy. Under the tsars, no representative institutions of any consequence were established, and the courts did not exercise any significant control over the monarchy.

\textsuperscript{135} Manov, supra note 12, at 3.
According to Soviet proponents of a state under the rule of law, the submission to authority that was the rule under tsarism has not been eradicated. The population still regards improvements in public life as a gift from the state, and not as a fulfillment by the state of its obligations to the people. In this area, the role of the Soviet bar may be central, for it has promoted and demanded enforcement of individual rights and has pursued restrictions on the executive.

Strong signs of citizen support for the rule of law can be seen, however. A number of recent developments indicate a move toward popular involvement in the government: the formation of so-called “informal organizations” concerned with various public issues, the voters’ support for reform candidates to the Congress of People’s Deputies in the 1989 elections, the development of small-scale cooperatively owned businesses, and the emergence of a more robust press. Although the rule of law idea was initiated at the highest level of government, it responded to a widely felt need in the USSR. Once the rule of law is firmly established, the citizenry is unlikely to willingly give it up.

137. Id.