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A SOVIET MODEL FOR MARXIAN SOCIALIST CONSTITUTIONS

John N. Hazard†

A Soviet columnist, said to represent Kremlin views,¹ has roundly denounced² the constitution adopted by the Fourth National People's Congress of the People's Republic of China on January 17, 1975.³ The Soviet commentator sees the new basic Chinese law as a betrayal of Marxism-Leninism and proof that the Chinese leadership has, in effect, withdrawn China from the socialist commonwealth.

The current Soviet criticism raises questions about the relationship between the U.S.S.R. constitution of 1936 and constitutions of other Socialist states. Has the Soviet constitution become a model to which Marxist-oriented statesmen must adhere on pain of loss of membership in the socialist commonwealth? No formal claim of this nature has ever been made, but is current Soviet criticism introducing a new pattern of orthodoxy? This paper, written in honor of that pioneer in North America of the comparative legal method, Rudolf B. Scblesinger, is designed to explore that possibility.

I

THE SOCIALIST CONSTITUTIONAL BACKGROUND

At the very outset, a Westerner is likely to ask why constitutions within the socialist commonwealth loom large in Soviet eyes. Such constitutions are changed frequently, not only by amendment but in their entirety, suggesting that they have no lasting influence comparable to the hoary constitution of the United States. Except

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¹ James F. Clarity identifies I. Aleksandrov as "a pseudonym often appearing on articles expressing the Kremlin view on important issues." N.Y. Times, Feb. 6, 1975, at 9, col. 1.


985
for Yugoslavia, socialist constitutions provide no judicial review to hold the executive and legislative organs of government to strict observance of their provisions.\(^4\) They seem to be, in the words of a senior Western scholar, "basically action programs to be translated into political practice."\(^5\) Indeed, it is sometimes asked in the West why a political system which expresses in its legal codes a desire to preserve flexibility in the application of law\(^6\) bothers to enact a constitution at all. In Western eyes, a Soviet-type constitution is not conceived to be an instrument of restraint upon those who make and execute governmental policy.

Yet, constitutions loom large in the Marxian socialist literature. The current Soviet comment on the Chinese document reflects this viewpoint in its statement: "For every socialist country, the adoption of a constitution—the basic law of the state—is a major event because in this way the basic rights of the working people and their political and social gains on the path of the construction of a new society are consolidated."\(^7\) This is but a restatement by a political journalist of what legal scholars have been saying with increasing vehemence ever since the death of Stalin in 1953. Books and articles treat the U.S.S.R. constitution as standing above the routine codes and statutes; it is at the pinnacle of the hierarchy of legal instruments,\(^8\) a norm to which the legislature must adhere even though no institution but the legislature itself could require a constitutional amendment to validate what it wishes to do. Even a dissident who has made his way to the United States tells American readers that protesters in Moscow appeal to the leadership to conform to the constitution because they think it sufficiently revered in the Kremlin to restrain abuse of law.\(^9\)

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\(^4\) Constitutions of socialist commonwealth states as they stood in 1965 are published in English translation in CONSTITUTIONS OF THE COMMUNIST PARTY-STATES (J. Triska ed. 1968) [hereinafter cited as Triska].

\(^5\) Loewenstein, Constitutions and Constitutional Law in the West and in the East, 30 INDIAN J. POL. SCI. 203 (1969).


\(^7\) See Aleksandrov, supra note 2, at 1, col. 1 (English transl.). Chang Chun-chiao, when introducing the draft constitution to the Fourth National People's Congress on Jan. 13, 1975, quoted Mao Tse-tung as having said that "an organization must have rules, and a state also must have rules; the constitution is a set of general rules and is a fundamental charter." Hsinhua News Agency, supra note 3, at 8.

\(^8\) See M. Farber & V. Rzhevskii, VOPROSY TEORII SOVETSKOGO KONSTITUTSIONNOGO PRAVA [QUESTIONS ON THE THEORY OF SOVIET CONSTITUTIONAL LAW] 36 (1967).

Another safeguard is the “Procurator General,” appointed by the legislature, the U.S.S.R. Supreme Soviet, to protest to the legislature executive acts that violate the constitution.\(^\text{10}\) Since Stalin’s death, this official is reported to have been active in requesting offending agencies to rescind administrative orders that appear to violate the constitution.\(^\text{11}\) To date, no such protest seems to have gone unheeded; at least no refusal to rescind has been taken before the U.S.S.R. Supreme Soviet for invalidation.

Although constitutions in the socialist commonwealth are amended easily, and the legislature is its own judge of the necessity of amendment prior to enacting a law, the constitutions have become repositories of some provisions already in the codes and seemingly in no need of restatement. This suggests that in the eyes of their creators constitutions have psychological value for the general public. Thus, when the right of inheritance is guaranteed by a constitution, the draftsmen probably believe that the guarantee indicates a stable policy that will induce citizens to save without fear of sudden amendment of the code.

Numerous Marxian socialist states in Eastern Europe and Asia joined the U.S.S.R. and Mongolia after World War II in adopting constitutions. None of the published record suggests that the drafting process was fraught with conflict with Soviet colleagues over content or form. Perhaps this lack of debate stems from the respect accorded Soviet experience by the draftsmen; perhaps it stems from the presence of Soviet advisers who urged adherence to the Soviet model; perhaps it stems from the common habit of lawyers everywhere to look to other lands for models to guide them.\(^\text{12}\) Only the Yugoslavs, after their break with Stalin,\(^\text{13}\) and the Chinese, after their break with Khrushchev,\(^\text{14}\) hinted that they were pressed too hard to accept Soviet advice to make that advice palatable.

Despite these indications of the pressures exerted by Soviet advisers, and the evident similarity of many provisions of the

\(^{10}\) Constitution (Fundamental Law) of the Union of Soviet Socialist Republics art. 113 (1936), reprinted in Triska 50. See also B. Galkin, Organizatsia suda i prokuratury v SSSR [The Organization of the Court and of the Procuracy in the USSR] 174 (1967).

\(^{11}\) Such activity is reported in the Procuracy’s journal. See, e.g., 7 Sotsialistichekaia Zakonnost’ 85 (1966), in which the procuracy successfully protested the unconstitutional election of a secretary of a village soviet.

\(^{12}\) The influence of models is well known in the West. Consider the Australian and Argentinian reliance upon the model of the U.S.A. when drafting their constitutions, and the contemporary use by Francophonic states of Africa of the French constitutional model.

\(^{13}\) This information comes from a private conversation with a Yugoslav jurist.

constitutions, there has been no indication that absolute conformity to the Soviet model was required. Simple comparison of texts demonstrates this point. Structures of government differ: some constitutions create a single head of state instead of the Soviet collective head;\(^\text{15}\) some create Councils of State rather than the Presidium of the U.S.S.R. Supreme Soviet;\(^\text{16}\) some organize local government under centrally appointed officials rather than under the locally chosen executive committees of local soviets in the U.S.S.R.;\(^\text{17}\) some even introduce a two or three party system instead of the monopoly one party system of the U.S.S.R.\(^\text{18}\)

Indications of the degree of conformity required among the members of the socialist commonwealth began to emerge in 1957 when all of the twelve communist parties then in power, exclusive of Tito's renegade Yugoslavia, adopted a resolution in Moscow on fundamental principles to be observed by commonwealth members. These were not stated in the form of a recommended constitution but as "basic laws applicable in all countries embarking on a socialist course."\(^\text{19}\) They established such generalities as: guidance of the working masses by the working class, the core of which is the Marxist-Leninist party; abolition of capitalist ownership; gradual socialist construction of agriculture; national economic planning; restructuring ideology in a socialist direction; equality of ethnically differentiated peoples; and proletarian internationalism. So long as these principles were observed, the form in which they were to be expressed seems to have been left to the communist party of each of the states to work out for itself. A Soviet professor said as much in addressing an international faculty of comparative law in Belgium in 1965.\(^\text{20}\)

When Fidel Castro brought Cuba into the socialist common-
wealth as the fourteenth member in 1959, he contented himself at first with amending his country's 1940 constitution. In practice, he soon went beyond even his amendments. He had planned a new socialist constitution for years, but a draft emerged only in April 1975. This meant that for years the Soviet communist party's leaders tolerated the presence within the commonwealth of a state without a modern socialist constitution, either because the principles applied in practice conformed to those of 1957 or because they knew that an acceptable draft was in preparation.

In light of this history of constitutional variation, why is there Soviet criticism of the new Chinese basic law, and why does it attack form as well as content? In this latter respect, exception is taken at the outset of the Soviet critic's article to the abbreviated form the Chinese have chosen for the expression of their ideas. This abbreviation is noted as especially undesirable in the chapter on rights and duties of citizens, in which the original 1954 constitution's nineteen articles are reduced to four with numerous paragraphs. Outsiders may ask why length matters if the Cubans have been accepted with no socialist constitution at all.

II

THE PROBLEM OF PREAMBLES

The Soviet critic begins his denunciation with the Chinese preamble. This is hardly surprising since the Sino-Soviet rift has been characterized by tilting in ideological terms, and preambles are traditionally the place to express ideology. The Soviet model of 1936 offers no guidance, for there is no preamble. This absence was Stalin's doing, for when his militants asked for a preamble emulating the statement of Marxist principles in the first constitu-

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21 The history of the Cuban constitutional process is set out in Draper, On the Cuban Constitutional Problem, in Triska 256.

22 For the Spanish text, see Granma (Havana) April 20, 1975. The Draft incorporates several provisions similar to those suggested for the new U.S.S.R. constitution still in committee and is responsive to the Soviet criticism of the 1975 Chinese constitution. Thus, there is a preamble in the form of a revolutionary manifesto; a Chapter 1 stating the fundamental political, social and economic principles to govern the state; a Chapter 2 on citizenship, followed by four chapters of 32 articles enumerating in detail the protection to be afforded civil rights. Subsequent chapters define the state structure, including the judiciary and the procuracy. Finally, there is a seven-article chapter on elections and a chapter on amendment.

23 The number of articles has been reduced from 106 in the constitution of 1954 to 30 in the constitution of 1975. The U.S.S.R. constitution of 1936, still in force, contains 146 articles.
tion of 1918, he said it was unnecessary, arguing that a constitution was not a program but was only a vehicle to establish a state structure.

When the Eastern European states promulgated their first constitutions after the war, not all of them followed Stalin's 1936 position on preambles. No preamble was placed in the constitutions of Albania, Bulgaria, Romania, and Yugoslavia, but preambles of varying lengths appear in those of Czechoslovakia, the German Democratic Republic, and Poland. In the Far East, lengthy preambles were included in the constitutions of the People's Republic of China and North Vietnam, but there was no preamble in that of North Korea. The possibility of reversion to the 1918 style was intimated in the U.S.S.R. when Khrushchev began his revision of Stalin's document after the latter's death, and rumors persist that the draft currently in committee contains a preamble.

Preambles have varied in what they include, but the basic idea is orthodox Marxism: the state is declared to have as its purpose the elimination of exploitation of man by man; it is to establish the alliance of workers and peasants. Some preambles denounce the bourgeois or even the feudal leaders of the past. Some express the inspiration gained from the example and support of the U.S.S.R. China's first constitution of 1954 declared the victory of the Chinese people led by the communist party of China, and declared the state a people's democratic dictatorship engaged in a step-by-step transition to socialism through socialist industrialization and transformation of agriculture, handicrafts, and capitalist industry and commerce. It declared all the ethnic groups in the country united in one great family of free and equal nationalities, and anticipated the further development of fraternal bonds and mutual aid on the basis of opposition to imperialism, to public enemies within their own ranks, and to both big-nation chauvinism.

24 The 1918 constitution of the R.S.F.S.R. is published in English translation in Triska 2.


and local nationalism. A final paragraph spoke of the indestructible friendship with the great U.S.S.R. and the People's Democracies.

Departure from these principles by the current Chinese draftsmen irks the Soviet critic of 1975. He decries elimination of the declaration that the Chinese state is in step-by-step transition to a socialist society through socialist transformation of the economy. The critic thinks sinister the new declaration that the state is no farther along the road to communism than the stage of socialist revolution and the dictatorship of the proletariat, and that during the contemporary stage there will continue to be class conflicts and struggle until socialist society ends with the achievement of complete communism. Presumably, this formulation means to the Soviet critic that class warfare will be unrelenting until the state withers away with the achievement of a society in which people need no compulsion to do what needs to be done to keep society productive and orderly.

To the Soviet critic, such an attitude means that the Chinese are prepared to continue the turbulent stage of the revolution for many years without moderation of the struggle by degrees as socialist society advances through successive steps away from capitalism. It means a deemphasis of legal guarantees of fair treatment of citizens, and it represents a rejection of the 1961 program of the communist party of the U.S.S.R. which, in an announcement that the state had become a state of the entire people, had declared that the dictatorship of the proletariat had fulfilled its historic mission in the U.S.S.R.29

In contrast to the current Chinese formulation, the Soviets announce that their class struggle is formally at an end, meaning that the emphasis has changed from group repression to individual repression, and the latter is to occur only when violation of law is proven in court. This was declared in 1958 when the post-Stalin revision of the fundamental principles of criminal procedure occurred.30 While dissidents within the U.S.S.R. reveal that the ideal of legality has yet to be achieved, there is evident a moderation in the severity of Stalin's policies of mass exile to work camps on nothing more than a finding by an administrative board of "social danger," and there are no more executions based on confessions exacted through torture. China's refusal to accept this formula-

tion marking departure from terrorist methods attracts Soviet ire because at this stage, twenty-five years after coming to power, the Chinese ought to have achieved some formal stability.

The Soviet critic also attacks the Chinese policy toward ethnic minorities. His argument is that the new constitution departs from the 1954 language which pledged the state “[i]n the course of economic construction and cultural development . . . [to] concern itself with the needs of the different nationalities, and, in the matter of socialist transformation, [to] pay full attention to the special characteristics in the development of each nationality.”31 The 1975 revision says only: “We should consolidate the great unity of the people of all nationalities led by the working class and based on the alliance of workers and peasants, and develop the revolutionary united front.”32 To the Soviet critic, this again marks a change of emphasis from respect for local cultures to pressure for unity.

Quite expectably, the Soviet critic objects to the omission of the entire paragraph from the 1954 document which spoke for friendship with the U.S.S.R. and the People's Democracies, and for continuation of a firm and consistent policy toward achievement of the noble aims of peace and progress of mankind. When read with the assertion in the new preamble that there is a danger of capitalist restoration and the threat of subversion and aggression by imperialism and social imperialism, and that these threats must be opposed along with the hegemony of the superpowers, this omission is seen as ominous. It is anti-Soviet, for the Chinese have been calling the U.S.S.R. a superpower and a social imperialist for some time.33 To use the epithet “social imperialist,” according to the critic, is to conceal China's withdrawal from the socialist commonwealth.

III

THE STRUCTURES OF SOCIALISM

Article 1 of the 1975 Chinese constitution identifies China as a “socialist state of the dictatorship of the proletariat led by the

33 In discussing Soviet policy with a delegation of overseas Chinese in 1974, Teng Hsiao-ping said: “In exactly 20 years, from 1953 to 1973, the Soviet Union changed. At home, capitalism was restored. In the international arena, the Tsarist road was followed. It can be said that it has completely followed the U.S. road and contend[s] for world hegemony with it. After a metamorphosis of 20 years, it has become social imperialism which has brought great disasters to the world.” U.S. Foreign Broadcast Information Service, Daily Report: People's Republic of China, Dec. 10, 1974, at E1, E4 (transl. of Chinese text).
working class and based on the alliance of workers and peasants."\(^{34}\) This formulation looks orthodox enough, and the Soviet critic says he can endorse it, as well as the statement in Article 2 that the communist party of China is "the core of leadership of the whole Chinese people" and that through it "the working class exercises leadership over the state."\(^{35}\) However, the critic finds these correct formulations insincere in light of the reality of contemporary China in which the communist party has lost its authenticity and has become "an obedient tool in the hands of a narrow military-bureaucratic grouping."\(^{36}\)

Further, the declaration that Maoism is to be added to Marxism-Leninism to create a new triad of sources of inspiration appears to the Soviet critic to be an attempt "to unite the ununitable,"\(^{37}\) for Maoism is seen to be in principle an enemy of Marxism-Leninism. The critic bases this conclusion on the theory that class struggle continues. Under Marxist-Leninist theory, class struggle should be over or at least approaching an end. Maoism, in fostering class struggle twenty-five years after coming to power, is, in Soviet eyes, attempting to legalize terror and repression of those who are displeased with the Maoist regime. Mao has no right to speak for continuing class struggle, in the critic's eyes, when his constitution provides that private ownership of productive property shall no longer exist so that the only property ownership is that of the state and of the socialist collective, i.e., the cooperative. The critic asks, how can capitalism be restored under such circumstances? In short, the critic sees Mao defining "class" differently from the orthodox Marxist definition which relates it to ownership or lack of ownership of the means of production.

Article 13, calling for "[s]peaking out freely, airing views fully, holding great debates and writing big-character posters"\(^{38}\) as new forms of socialist revolution created by the masses, is ridiculed as approval of activities not devised by the masses to restrain the arbitrary acts of the bureaucracy, but instead to legalize Mao's campaign to destroy the communist party and the state organs modelled on the "soviet" of the U.S.S.R. Here, the critic is indirectly castigating those who ousted the late President Liu Shao-chi, who adhered closely to U.S.S.R. models for both party and state and won U.S.S.R. acclaim. Ever since Liu's removal, Soviet critics have

\(^{34}\) Constitution of the People's Republic of China art. 1 (1975).
\(^{35}\) Id. art. 2.
\(^{36}\) Aleksandrov, supra note 2, at 3, col. 1 (English transl.).
\(^{37}\) Id.
proclaimed that the entity calling itself the communist party is very different from its prototype in the U.S.S.R., as it lacks in leadership functions and is subservient to the army and to the state bureaucracy.\(^{39}\) Also, the local government system has been changed from the soviet pattern; "revolutionary committees" which govern the provinces subordinate the party to the army and completely eliminate the people themselves from having any influence on local policy-making.

There is some crowing by the Soviet critic over new constitutional provisions that suggest that the Chinese have learned a lesson from the failure of their program of egalitarian treatment of wages and from the abolition of all private incentive from the agricultural commune. Stalin declared in 1930 that egalitarianism was a petty-bourgeois utopian expectation.\(^{40}\) The Soviet system has emphasized since that time that communism can become a reality only if people are paid in accordance with what they do, not in accordance with what they need. Mao had criticized this approach, reiterating at intervals that he would allow no wide departure from egalitarianism in wage scales or in styles of living.\(^{41}\) Indeed, he criticized Khrushchev's differential wage system and uncontrolled consumerism as "opening the gates to capitalism."\(^{42}\)

The reversal of the egalitarian stand is seen by the Soviet critic in Article 9. The provision repeats the Biblical injunction, also found in the U.S.S.R. constitution, that "He who does not work, neither shall he eat,"\(^{43}\) and adds to this the socialist principle "from each according to his ability, to each according to his work," just as the U.S.S.R. constitution does.\(^{44}\)


\(^{41}\) Mao is quoted by a Soviet author as having said on April 29, 1967, "The slogan 'to each according to his work' is bourgeois." See Sladkovsky, Threat to the Economic Foundations of Socialism in China, 44 KOMMUNIST, Aug. 1967, at 92. English Translation in 6 REPRINTS FROM THE SOVIET PRESS, Mar. 1, 1968 at 3, 25. In spite of Mao's position, differentiated scales of wages had returned to factories when the Revolutionary Councils began to function in 1968.


\(^{43}\) CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 12 (1936), reprinted in Triska 60. See 2 Thessalonians 3:10.

\(^{44}\) CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS art. 12 (1936), reprinted in Triska 60.
The reversal of the policy on agricultural communes is seen in the guarantee of the new constitution that peasants may now exploit small private garden plots and own small numbers of cattle while working in the communal economy of the farm, called in Chinese parlance the "production team." This means a return to the Soviet-type incentive system.\textsuperscript{45} The critic sees added cause for rejoicing in abandonment of the large unit of the commune as the accounting unit for agriculture in favor of return to the "team."\textsuperscript{46} This is another indication that the wisdom of the Soviet system is being recognized and that without saying as much the Chinese are admitting that their claim to have advanced faster toward communism than the U.S.S.R. is false. Both now use the same structures.

IV

THE STATE INSTITUTIONS

When examining the state institutions, the Soviet critic once again returns to what he sees as the dominant role of the army, and he adds to this a comment on the commune as a replacement for the "soviet" at the bottom level of the administrative pyramid. Ever since they emerged, both the "revolutionary committee" at the province level and the "commune" at the local level have been criticized by Soviet spokesmen. The revolutionary committee is seen to have come under army dominance resulting in the subordination of the party cadres who used to guide in typical U.S.S.R. fashion at the provincial level. The critic ignores the specific language of Article 15 of the new constitution as well as recent Chinese leadership pronouncements that the party is to be restored to its dominant position, with the army in a subordinate position, albeit not removed entirely (as in the U.S.S.R.) from the governing process. Perhaps the U.S.S.R.'s intelligence sources indicate that the army remains China's supreme power despite protests to the contrary. With regard to the commune as the local governing agency, Soviet criticism has long been levelled at the fact that it combines both political and economic administration in the same

\textsuperscript{45} Constitution of the People's Republic of China art. 7 (1975). This reversion to private incentives preceded the new constitution, since the peasant communes had deprived families of private plots and cattle only briefly during the initial period of communal enthusiasm.

\textsuperscript{46} The restoration of the "team" to the position of basic unit was made in the Revised Draft Regulation on the Work of the People's Communes, dated Sept. 1962. Reference to this document appears in an article by Kuang Hual in [1963] 1 CH'ENG-FA YEN-GHUI 15. I am indebted to Dr. Lin Fu-shun of the National University, Taiwan, for this information. This being so, the 1975 constitution introduces nothing new but raises to the constitutional level that status already established by law.
unit, while the U.S.S.R. separates them. The collective farm conducts the economy; the local soviet conducts the government's other business.

The Soviet critic faults the new constitution for failing to insure popular participation in local government as under the previous constitution. The U.S.S.R. constitution devotes a whole chapter to the subject; the new Chinese constitution provides only: "Deputies to the People's Congresses at all levels are elected through democratic consultation." To the Soviet critic this means that the ordinary citizen can have no schematic input into the selection process.

Whether this criticism is mere rhetoric or actually reflects a deep sense of difference is hard for the western outsider to judge since Soviet elections occur on a one-candidate ballot prepared after a round of nominations by meetings held on farms, in factories, in educational institutions, and in state offices. These meetings forward their choices of desirable candidates (which they have made with the guidance of communist party members at the meetings) to electoral commissions, which select the single candidate to appear on the ballot. There is no need here to discuss this procedure, which has been analyzed at length by western scholars, but it may be surmised that the Soviet critic deems it to be more systematic than the consulting procedure in China.

Criticism is also directed at the top level organization of the Chinese state agencies. It is noted that there will no longer be a President. This change is seen by the Soviet critic as designed to eliminate any possibility of juxtaposing criticism of the party chiefs by a high state official. The criticism does not ring true, for in the U.S.S.R. there is no individual President, only a collective presidency in the presidium of the Supreme Soviet that is dominated by the communist party. It is hard to conceive of a President in a traditional communist system who could serve as a counterweight to the party, and it may be questioned whether the critic is engaging here in anything but polemics.

The All-China Congress of People's Representatives is seen as emasculated because nothing is said of its traditional role as implementer of the constitution, nor of its right to pardon and to

48 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics arts. 134-42 (1936), reprinted in Triska 75-76.
50 See, e.g., M. Mote, Soviet Local and Republic Elections (1965).
declare war, rights that exist within its counterpart in the U.S.S.R., the Supreme Soviet. Also decried is the elimination of guarantees of deputies' immunity and of provisions for committees of the Congress. This latter criticism springs from the increasing reliance on committees of the U.S.S.R. Supreme Soviet to review legislative drafts submitted by the government prior to enactment, and to monitor economic policies in various fields. The effectiveness of the committee system in the U.S.S.R. has been studied in depth in the West. It has been concluded that members tend to be deputies who have proved themselves reliable and professional, but that the system does open the door in some degree to popular participation in policy-making by a group larger than the Politburo of the party.\(^{51}\) The Soviet critic is saying that China's leaders are still holding the reins too tightly when they should be expanding the leadership group with the progress of socialism.

A second prong of the Soviet critic's attack on the restructuring of state agencies adds to his earlier criticism of Chinese ethnic policy as embodied in the "unification" doctrine of the preamble.\(^{52}\) He criticizes the new constitution for eliminating all provision for representation of these minorities. In the 1954 constitution, although there was no provision for ethnic republics as in the U.S.S.R., there had been created a "Nationalities Committee"\(^ {53}\) within the Congress, and there had been a chapter of six articles on the local government of ethnic areas.\(^ {54}\) The 1975 constitution eliminates the "Nationalities Committee" and abbreviates the chapter on ethnic area government to a single article, Article 4. It eliminates provision for use of the local language by government organs as well as the requirements that government assist in development of the minority and submit to the Nationalities Committee proposed regulations on the exercise of its authority. The new provisions also eliminate old Article 67, which required that the form of self-government in ethnic areas be determined in accordance with the wishes of the people of the area.

Finally, there has been what the Soviet critic describes as a "considerable deformation of the provisions on the procuracy and the People's Court."\(^ {55}\) While the 1954 constitution devoted an

\(^{52}\) See text accompanying notes 30-31 supra.
\(^{54}\) Id. arts. 67-72, reprinted in Triska 119.
\(^{55}\) Aleksandrov, supra note 2, at 4, col. 2 (English transl.).
entire chapter of twelve articles to the subject, the present constitution reduces the number of articles in the chapter to two, Articles 24 and 25. More importantly, it abolishes the procuracy, which, as originally created in the Soviet model, had incorporated a function of restraint on the illegal activity of bureaucrats along with a prosecuting function. Under the new constitution there is to be no formal institutional restraint on illegalities by the administration; even the prosecuting function is to be transferred to the police. As for the judicial system, the Soviet critic considers the elimination of the first constitution's procedural guarantees to the accused, and also the naming of the president of the court by the local revolutionary committee, to be the abandonment of restraint on illegality.

V

A BILL OF RIGHTS

Abbreviation of the 1954 bill of rights to four articles appears ominous to the Soviet critic. Probably mindful of the increasing interest of peoples of the Third World in bills of rights, the Soviet critic is prepared to use the opening provided by the Chinese not only to attack them but also to display the new attention being given human rights in the U.S.S.R. in the years since Stalin's death. In the draft of a new Soviet constitution currently in committee, there is to be new emphasis upon human rights by placing the chapter on the subject farther forward in the constitution than was the case in the 1936 document, and by expanding them to bring them into accord with the two United Nations Conventions which the U.S.S.R. has ratified.

The Soviet criticism of the Chinese constitution is not limited to the constitutional abbreviation of the traditional bill of rights; it goes both to the substance of the rights as they are set forth and to the means through which they are to be implemented. As to the substance, the new Chinese bill of rights is found wanting because it fails to restate the 1954 provisions concerning the equality of all citizens before the law and the rights of citizens to reside where they wish and to change their residences at will.

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57 See Romashkin, supra note 26.
As to the method of implementation of rights, criticism is levelled at the general departure from the provisions of the Chinese constitution of 1954 that had been similar to those appearing in the Soviet model. Thus, there is no longer included under freedom of press, assembly, association, procession, and demonstration the state’s promise to provide the necessary material facilities to permit enjoyment of these freedoms. Likewise, there is omitted from the article guaranteeing the right to work, rest, and leisure, the Soviet model’s language, used by the Chinese in 1954, promising that the state would gradually provide more employment through economic planning, would increase wages, amenities, and benefits, and would improve working conditions. Also, nothing is now said of a guaranteed eight hour day or of the state’s obligations to prescribe systems of vacations and to expand the material facilities for rest and health maintenance. The right to material assistance in old age is also shorn of its guarantee of state action to provide and expand social insurance, social assistance, and public health services. Finally, the right to education no longer includes the state’s obligation to provide and expand schools.

Two rights included in the new constitution are seen as undesirable by the Soviet critic: the right to strike, and the protection of the rights and interests of overseas Chinese. The right to strike is deplored because it appears to be directed at legitimizing Mao’s instigation of workers to break the factory leadership role of communist party cadres after Liu Shao-chi’s ouster. The attention given overseas Chinese is interpreted as an attempt to legalize intervention by the Peking government in the internal affairs of states where these emigrants live.

VI

National Tradition and the Soviet Model

With the provisions of the new constitution and the corresponding Soviet criticism revealed, the stage is set for a conclusion, tentative though it must be, as to what a professedly Marxist-Leninist state must incorporate within its constitution if it is not to be drummed out of the socialist commonwealth by the current Soviet leadership. Up to the time of publication of the Soviet criticism, adherence to traditional form in a state constitution escaped Soviet comment so long as the constitution reflected a
content compatible with the fundamental requirements established by the twelve communist parties in power in 1957. 59

Since the Soviet critic's article, the question that arises is whether traditional forms will be tolerated only when they are variations on western forms and not when, as with the Chinese, they are notoriously in contrast. The phrasing of the question rests on the assumption that the 1975 constitution is reflective of the Chinese legal tradition and that the reader knows how unfamiliar that tradition is to Westerners. To refresh memories, a few words may be appropriate.

Comparatists have long categorized the Chinese legal tradition as unfamiliar to Westerners: indeed, so unfamiliar that it deserves to be placed in a separate category among the world's legal systems, along with those of Romanist, English common law, or holy writ origin. It is agreed that, although Chinese history includes a period when Emperors ruled by decree covering minute detail, known as that of the "Legalists," the unique feature of the Chinese public order system generally is the absence of formal rules adopted either by a legislature, or created through a system of judicial precedent, or inscribed in a document inspired by a deity. The force that has held Chinese society together for centuries is the social norm accepted as a moral obligation; it is enforced not in the Western manner—through a system of tribunals applying compulsion—but through a mediator who serves to remind the errant member of society of his moral obligations. 60

Even under the rule of the Kuomintang party, which fostered revision in the 1920's of China's system of social control by the introduction of formal codes of law and formal courts as a supplement to the mediational system, there was severe resistance in all of China save in the peripheral areas of the sea coast where foreign contacts were numerous. For the interior cities and the many villages of rural China, mediation committees composed of elders continued to perform an important and recognized function. Similar committees operate in Taiwan today despite the simultaneous existence of western-style courts.

Movement in Mao's China during the early 1950's toward codification, formality in the structuring of courts, and constitutionalism suggested that tradition was being overcome. It appeared that the Soviet model had become, if not obligatory, at least

59 See text accompanying notes 19-20 supra.
to be preferred by Marxist-inspired revolutionaries intent upon establishing a new type of state system. Soviet advisers went to China to assist in the transition, and Chinese students travelled to the U.S.S.R. to study the Soviet governmental and legal system so as to return eventually to introduce Soviet concepts of legality into the Chinese system.

Not until the "anti-rightist movement" began in 1957 did the situation change. Codification was stopped; judges were dismissed if they adhered to legal formalities; the jurisdiction of the courts was severely reduced by transferring the power of resolution of many civil disputes to administrative bureaus and by conferring the power of resolution of all but the most serious of crimes on the police; and Soviet influence was reduced through cessation of translation of Soviet legal textbooks and withdrawal of Soviet advisers. The impact of these changes was that flexibility in public control became routine.

The assumption that the Chinese had reverted to tradition was questioned by those who noted the emergence of the army as a leading force, if not the dominant one, in the period after 1966. Strong evidence of the army's increasingly influential position was the rise to power of its chief, Lin Piao, who became Mao's favorite. It was speculated that the change in attitude toward institutional flexibility could be a reflection of attitudes found in many ruling armies, namely that respect for legal guarantees of citizens' rights was a hindrance to the efficient exercise of authority.

As Lin Piao's star rose, word came from Chang Kai-shek's intelligence bureau on Taiwan that a draft for a new constitution was being circulated on the mainland. This draft was obtained by intelligence officers and published in 1970. It startled the world, partly because of its extreme simplicity and partly because Lin Piao was named officially as Mao's heir in Article 2. The evidence seemed to favor the explanation that it was the army's reverence for expediency rather than for tradition that accounted for the new approach.

The expediency theory suffered a blow with Lin Piao's death in late 1971, for the post-Lin constitutional draft, discovered and

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63 A Soviet Consul in the United States told me in February 1974 that Soviet doctors had examined the corpses in the airplane which crashed in the Mongolian People's Republic in 1971 and had convinced themselves that Lin Piao had not been on the plane. He would not deny, however, that Lin Piao was dead, stating only that he had not died in the plane crash as newspapers had reported.
disclosed by Chang Kai-shek's intelligence officers in 1974, showed little change. The new draft was essentially the draft of 1970, without Lin Piao's name; it remained simple. Again the question was asked whether this could be explained solely by the theory that the Chinese leadership was reverting to tradition. When the 1974 draft materialized, with only slight changes, as the officially adopted constitution of 1975, it began to look as if the reversion theory could be believed. The Chinese communists had evidenced their rejection of the Soviet form and reintroduced Chinese tradition in a document that seemed inspired by a desire to maintain a highly flexible system of social control.

If this theory is valid, why cannot Soviet leaders accept the document as a manifestation of local tradition rather than a betrayal of the Marxist-Leninist revolution? Judging by the Soviet critic's constant reference to the continuing preeminence of the army in China, it may be that the Soviet analysts reject the explanation of those who see the triumph of tradition. They may feel that the army still wields political power. Also, they may believe that the Oriental tradition is not as pervasive as some think it is, and can cite the Korean Democratic Republic's 1972 constitution as proof. Although Korea shares China's legal tradition, the new Korean constitution essentially follows the Soviet model.

Another possible explanation for Soviet rejection of the revised document is the new Chinese constitution's attitude toward Sino-Soviet friendship. Perhaps no constitution, whether or not following the Soviet model, can be accepted when it drops a clause that had hailed the existence of friendly relations with the U.S.S.R. and the People's Democracies. If this is true, adherence to the 1954 declaration of the twelve communist parties in power is vitally compromised with respect to its requirement of acceptance of the principle of proletarian internationalism. Although this point would not seem to require a constitutional declaration of friendship, in fact it does so if a prior constitution which is being replaced made such a declaration.

 Granted that the new constitution may be unacceptable to the Soviet leadership primarily because it reflects several Chinese violations of the basic principles established in 1957 by the twelve communist parties in power (supremacy of the communist party over all other forces in the country, proletarian internationalism,

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64 English translation published in Background on China, Chinese Information Service (Taiwan), Doc. B.74-13, Sept. 26, 1974.
and equality of peoples)\textsuperscript{66} there seem to be additional reasons for rejection. These center around indication of what may be interpreted as a reversion to traditional Chinese forms in the abbreviated and inexplicit articles of the new document. Perhaps the Soviet leaders see in these forms a potential for flexibility and unpredictability which disturbs them.

While flexibility and unpredictability were noted components of the turbulent years of the Russian revolution itself, and while the Soviet leadership has seemed to be willing to grant the Chinese a similar period of grace while a new society is being structured, the Soviet critic is now saying that twenty-five years are more than enough to create stability. The Soviet communists seem worried lest the unpredictable situation in China lead to harmful results for the peoples of the U.S.S.R. What may follow for northern neighbors if the Chinese Army is not restrained, if the Chinese leaders are not committed to friendship for the U.S.S.R., and if the Chinese bureaucracy develops without the controls, which in the Soviet model provide a potential control over corruption and arbitrary practices, inherent in an office of Procurator and in mass participation in state agencies?

While structures designed to assure stability and, therefore, a measure of predictability might in practice emerge despite their absence from the constitution, the Soviet critic and those behind him seem to imply that they would be happier if such structures were established in clear language by the Chinese constitution itself. Westerners with knowledge of the history of Marxist-Leninist constitutions may well think the Soviet critic's expression of faith in the stabilizing potential of a constitution somewhat utopian. Nevertheless, post-Stalin developments in the U.S.S.R. suggest that Soviet policy makers remember the perils many of them had sensed under Stalin's unpredictable and unrestrained hand and believe that constitutional structures do have a role to play in preventing reversion to what they call the cult of the individual.

If this is a correct interpretation of current Soviet motivation, a Chinese constitution with only thirty generally phrased articles is inadequate. While the Soviet leadership no longer requires states of the socialist commonwealth to adhere closely to the Soviet model of draftsmanship, it is skeptical of those that depart significantly, especially when the departure is accompanied by extrinsic manifestations of hostility to the U.S.S.R. and portents of a future course

\footnote{\textsuperscript{66} For a full list of principles to be respected by Communist parties, see text accompanying notes 19-20 supra.}
that diverges sharply from what the Soviet leadership foresees as a proper one for a healthy Marxist-Leninist society as it comes of age. The threat to read the Chinese out of the socialist commonwealth is serious indeed, given the fraternal principles on which the commonwealth is supposed to rest; it indicates that the Chinese constitution's departure from the established norms cannot be considered a trivial matter.