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The Evolution of the Soviet Constitution.

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This paper is #5 in the series listed on the following page. The series is the product of a major conference entitled, *In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev*, which was summarized in a Council Report by that title authored by Donald D. Barry and distributed by the Council in October, 1991. The remaining papers will be distributed seriatim.
The Conference Papers

1. GIANMARIA AJANI, "The Rise and Fall of the Law-Governed State in the Experience of Russian Legal Scholarship."

2. EUGENE HUSKEY, "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990."

3. LOUISE SHELLEY, "Legal Consciousness and the Pravovoe Gosudarstvo."

4. DIETRICH ANDRE LOEBER, "Regional and National Variations: The Baltic Factor."

5. JOHN HAZARD, "The Evolution of the Soviet Constitution."

6. FRANCES FOSTER-SIMONS, "The Soviet Legislature: Gorbachev's School of Democracy."

7. GER VAN DEN BERG, "Executive Power and the Concept of Pravovoe Gosudarstvo."

8. HIROSHI ODA, "The Law-Based State and the CPSU."


10. ROBERT SHARLET, "The Fate of Individual Rights in the Age of Perestroika."

11. NICOLAI PETRO, "Informal Politics and the Rule of Law."


15. WILLIAM B. SIMONS, "Soviet Civil Law and the Emergence of a Pravovoe Gosudarstvo: Do Foreigners Figure in the Grant Scheme?"

16. KATHRYN HENDLEY, "The Ideals of the Pravovoe Gosudarstvo and the Soviet Workplace: A Case Study of Layoffs."

17. Commentary: The printed versions of conference remarks by participants BERMANN, SCHMIDT, MISHIN, EN'TIN, E. KURIS, P. KURIS, SAVITSKY, FEOFANOV, and MOZOLIN
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>i</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>The First Cluster of Soviet-type Constitutions</td>
<td>2</td>
</tr>
<tr>
<td>Steps taken toward Federation</td>
<td>7</td>
</tr>
<tr>
<td>Constitutions for &quot;Socialism&quot;</td>
<td>11</td>
</tr>
<tr>
<td>Post-Stalin Constitutional Change</td>
<td>15</td>
</tr>
<tr>
<td>Gorbachev’s Impact upon the Constitution</td>
<td>17</td>
</tr>
<tr>
<td>A Fifth Cluster of Constitutions?</td>
<td>22</td>
</tr>
<tr>
<td>Steps toward a New Constitution</td>
<td>25</td>
</tr>
<tr>
<td>A New Synthesis</td>
<td>28</td>
</tr>
<tr>
<td>NOTES</td>
<td>33</td>
</tr>
</tbody>
</table>
Executive Summary

Soviet constitutional structures were formulated by successive heads of the Communist Party by drafting four clusters of basic laws. Gorbachev is attempting to introduce a fifth cluster to redress the balance in favor of the Republics, upset when Stalin created a de facto "unitary" model in defiance of Lenin's efforts in 1922 to create an evenly balanced "federation."

Gorbachev's task is difficult, for six Republics have been so enraged by the centralized measures introduced by Stalin and maintained successively by his heirs as to refuse to participate in a "Union Treaty" presented in draft in March 1991 to replace the treaty of December 30, 1922.

Gorbachev seemingly seeks to preserve the U.S.S.R. by maintaining what he understands to be the minimum necessary to nation-wide functioning of the state: namely military power, foreign policy formulation, foreign trade structures, and economic viability. Republics are to be granted considerable autonomy in economic administration, even extending to authority to tax and to adopt budgets. Further, a "rule of law" state, fortified by a new Constitutional Supervisory Committee, is being established.

Gorbachev and many of the Supreme Soviet deputies still seek to preserve the features they associate with "socialism," notably state ownership of land, the "humanistic attitudes toward political policy," but in restructuring the constitution to introduce a "Presidency"
with authority to rule by decree in emergency, questions arise increasingly among the intelligentsia about Gorbachev's determination to adhere to constitutional structures and practices that can be accepted by much of the public as creating a new "synthesis" within society.
THE EVOLUTION OF THE SOVIET CONSTITUTION

John N. Hazard

Gorbachev’s thinking on constitutionalism moved far from Lenin’s, at least until he began ruling by decree in late 1990. Although both were law trained, their attitudes toward “rule of law,” supported by a constitution, have been poles apart. For Lenin a constitution was a statement of principles suggesting a program for the future to be flexibly interpreted. It was not a statement of principles to which legislators and administrators would be bound rigidly in building a new socialist Russia. Even the structures of government which it defined would be developed in practice, their competencies changing with the personalities involved and the tasks to be performed.

For Gorbachev a constitution seemed to represent a social compact from which neither he nor his colleagues might depart without obtaining popular agreement to amendment through a series of formal steps designed to make certain that there is consent to change.

The road from Lenin to Gorbachev, prior to late 1990, was long and marked by promulgation of four clusters of constitutions. For decades Soviet theorists have argued that constitutions should be kept up to date. They should be replaced when society has moved on to a new era on the long road to socialism. There is no indication that either the leaders or the Soviet peoples have ever expected a constitution to be eternal, as do the leaders and people of the United States.

Soviet constitutional history may be divided into four eras: (1) the cluster emerging in 1918 - 1922 when the foundations were laid in various Soviet-type sovereign states formerly
parts of the Russian Empire for a state-ownership economy and vanguard political party
leadership; (2) the cluster drafted to create a federal state structure to replace the unitary
concept envisioned in 1918 as the magnet to which the sovereign soviet type states of 1918 -
1922 would be drawn; (3) the cluster drafted for a new federation in 1936 to reflect the
achievement of "socialism," and (4) the cluster drafted in 1977 - 78 to mark the advent of
what Leonid Brezhnev called "developed socialism."

These four clusters are prologue to a fifth round of constitutions beginning with a
federal basic law to be followed by constitutions drafted for constituent republics. This fifth
cluster is heralded as necessary to overcome what is called the "stagnation" of the Brezhnev
era. The aim is to provide a legal base destined to stimulate investment, to enhance
productivity, to encourage savings, to recreate a concern for the care of property
maintenance as "owners," and, most importantly, to inculcate in both state officials and
citizens respect for the dignity of the person. All of this has been summed up by Gorbachev
under his slogan pravovoe gosudarstvo.

The First Cluster of Soviet-type Constitutions

Constitutional history in Soviet Russia begins with the historic meeting of the Second
Congress of Soviets on the night of November 7, 1917 (n.s.). Lenin moved to the stage
before the Congress to call for adoption of decrees, one of which was to establish a
provisional structure of government in the form of a Congress of Soviets, a Central
Executive Committee and a Council of People's Commissars.¹ The second step was taken by
the Third Congress of Soviets meeting also in Petrograd after Lenin had prevented the
Constituent Assembly from completing its session in January, 1918. That Third congress
went further to adopt a Declaration of the Rights of the Toiling and Exploited People, a plan
for federation, and a declaration making the provisional government permanent.²

In view of these declarations there seems to have been no sense of hurry in drafting a
constitution for the new state. Both the political ideology and state structure were in place.
One may wonder why a constitution was proposed, in view of Lenin’s penchant for flexible
application of law. Had the Third Congress not instructed its Central Executive Committee to
prepare a draft for a constitution, progress toward formalizing in a constitution what already
existed might have been slower than it was, the more so since Lenin’s Bolsheviks could not
yet overcome their opposition in the coalition Lenin had pulled together to stage the
revolution. The influence of the Left Socialist Revolutionaries and of the Maximalist wing of
the Mensheviks was still strong. The SR’s wanted a government of decentralized structure
because they expected to dominate the local soviets in the provinces.³ The Bolsheviks were
centralizers because their power was in the trade unions and soldiers of Petrograd.⁴ Because
of the conflict of views agreement in the drafting committee was made difficult for months.

Work proceeded slowly in the drafting committee under the chairmanship of Lenin’s
colleague, Ya. M. Sverdlov. Fortunately for historians, one of the participants in the
committee published five years later, before Stalin dominated historical writing, an account
of the committee’s deliberations.⁵ This account indicates that Lenin’s coalition partner, the
SR Commissar of Justice, I. Steinberg, instructed his representative on the committee to
present a moderate, although socialist flavored, draft. Another participant suggested that the
Swiss Confederation should be taken as a model. Later, the SR Commissar, after he had emigrated, disclosed in his memoirs that he had feared that Lenin had no intention of acting in accordance with the principles of law and constitutional restraint upon absolute power.6

Lenin rid himself formally of his opposition by a decree of June 14, 19187 expelling from the Central Executive Committee and the Congress of Soviets the Right and Center groups of SR's and Mensheviks. The decree was really unnecessary as these groups had long since ceased to support the Bolsheviks. More importantly, the Left SRs had broken with the Bolsheviks on July 6, 1918, objecting to what seemed to them to be a Bolshevik victory in the constitutional draft, which had allocated control over local government to central authorities.8

Even with these victories Lenin seems to have been reluctant to push ahead with the constitution. As late as June 26, 1918 when the Central Committee of the Bolsheviks discussed the draft, several members, including Lenin, suggested that the subject of the constitution be dropped from the agenda for the Congress.9 Sverdlov as committee chairman insisted, however, that the draft be reworked and presented for promulgation. He was successful. The draft was resubmitted to the Central Committee; last minute changes were made under Lenin's chairmanship, and the Congress gave approval unanimously on July 10, 1918.10 Final editing was left to the government's Central Executive Committee, which edited the text, published it and declared it in force immediately on July 19, 1918.11

Stalin's part in the work of the drafting committee seems not to have been insignificant. The historian recounts Stalin's intervention in discussion to stop what he thought was aimless consideration of alternatives. He argued that the structure of the state,
adopted on November 7, 1917, and the Declaration of the Rights of the Laboring and Exploited Peoples as well as the federal plan adopted by the Third Congress for the Russian Republic should provide the basis for the constitution.12

Stalin’s documents were not, however, the entire file. The historian tells that a bill or rights was somehow inserted. He questioned the need for a bill after adoption of the Declaration and concludes that it was intended for propaganda purposes both at home and abroad. He credits Lenin with a sense of what was necessary to reduce opposition.13

Lenin probably had reason to worry because the struggle for constitutional government had been long under the Tsars.14 Even during the summer of 1917, before the Bolsheviks had seized power, Lenin found it desirable to support the Kerensky government’s program of elections for a Constituent Assembly to choose the form of a new Government.15 After the victory in the “October,” Lenin permitted the elections of deputies to the Assembly to be completed and the Assembly to gather in January, 1918.

The record suggests that Lenin thought he could control the Assembly and gain from it confirmation of his “soviet” type structures. He prepared just such a resolution,16 but the Assembly showed from the outset that it would not follow Lenin’s lead. Evidently, the concept of constitutionalism was an aspiration of masses of the Russian people so strong that Lenin could not ignore it. When Lenin realized his impotence, he called his loyal sailors from the fleet, and they barred the doors to the Assembly chamber when the delegates returned from dinner.

With his coup, Lenin proceeded to finish his constitutional plan. Although the historian cited it as inspired as a propaganda document, it was not only that. it was a
practical design for government incorporating structures built along "class" lines. Lenin had been preaching the need for "class" loyalty ever since 1903 when he influenced the London conference, creating what came eventually to be the Communist Party. The constitution's Article 65 was the key to "class" politics, for it excluded elements which Lenin expected to be hostile. No one could vote or hold office who hired labor for profit, lived on what was called "unearned income," engaged in buying and selling for profit, or served a religious institution.

Dedication to socialism was demanded by Article 23, which deprived individuals of rights which could be utilized by them to the detriment of the socialist revolution. Marxist principles were enshrined in Article 3, stating the aim of the Russian Republic to be abolition of exploitation of man by man, elimination completely of the division of society into classes, ruthless suppression of the exploiter, and achievement of the victory of socialism in all countries.

Article 3 ended with an additional phrase reflecting Marxist doctrine, namely that it was anticipated that the state would eventually "wither away." This concept, which was to influence the draftsmen of laws for a decade, spelled out the implication of the Marxist dictum that law is an instrument of a ruling class, whether of slaveholders, feudal lords or capitalists, and with the coming to power of the working class, representing the masses, there will be no subordinate class to restrain through law, and law will "wither away." Although this concept was to seem visionary decades later, at the time and during the 1920's there were serious attempts to prepare the legal base for the ultimate withering.
Steps Taken toward Federation

Lenin's evident expectation that class affinity would eventually overcome ages old ethnic rivalry and conflict was demonstrated by his federal plan, adopted by the Third Congress in January 1918. Although he had preached self-determination prior to the "October" because he recognized its disruptive potential within the Russian Empire, his federal plan was to reconstitute the union of the peoples of the old Empire in a new socialist republic.

The scheme was to recognize cultural autonomy and some economic decentralization to win friends among peoples wanting to be rid of "Russification," which some had endured for three centuries. Still recognition of cultural autonomy was to lead eventually to political unity. To achieve this seemingly contradictory result he relied upon leadership by a Communist Party which he had structured as a unit, refusing to accept the request of the Jewish Bund and the Lithuanian communists to permit federation. In a word, "autonomization," he and his colleagues summed up their plan.

An astute critic has noted that local authorities representing the ethnically defined groups lacked independence as Lenin's plan was implemented in the Russian Socialist Federated Soviet Republic. Budgetary powers were restricted by the 1918 constitution; estimates of revenues were subject to approval of superior agencies. This critic concluded that in spite of the word "federated" in the title, the constitution was unmistakably designed for a unitary state. Certainly the omission of a chamber to represent ethnic minorities in the Republic's Supreme Soviet suggests that this gesture, so often made in Western federations,
was deemed unnecessary in Lenin's view.

Lenin seems to have misjudged the potential for continuing resistance among the minorities to what they perceived to be continuing Russification.\textsuperscript{22} Although he held fast to his federal plan for the minority peoples in Siberia and Central Asia, he was forced to relinquish control over four ethnically defined regions in the West: Finland on December 31, 1918,\textsuperscript{23} and Estonia, Latvia and Lithuania by peace treaties in 1920.\textsuperscript{24}

The situation developing in other areas was dissimilar: in the Transcaucasus, the Ukraine, and parts of Central Asia, Lenin's Bolsheviks were stronger but insufficiently strong to take power immediately after the occupying armies of the Central and Allied Powers withdrew. He had to call upon his small band of indigenous communists in each area to persuade the new nationalist governments to adopt "soviet" type structures on the Russian model.\textsuperscript{25} He hoped that the emerging leaders would soon conclude that they needed the military protection of the Russians to prevent return of the occupiers, and that they could gain economic advantage if their economies were again reconstituted as they had been under the Empire.

The details of the progress toward reunion are too numerous to include in this survey. Suffice it to say that by 1922 all but Finland and the Baltic states were in treaty relationships with the Russians and several "soviet" type governments had brought their economies into collaborative relationship with the Russian Republic.\textsuperscript{26}

At this point in 1922 Stalin emerges as the dominant figure in formulating a structure designed to bring the minority peoples into the Russian Federation. His role in minority relationships had been initiated by Lenin in 1912, perhaps because he was a Georgian.\textsuperscript{27}
When the Russian Council of People’s Commissars was formed provisionally in November 1917, he was named to head a Commissariat of Nationalities. He implemented a program entitled “autonomization,” and began with the Transcaucasian peoples, of which he was one. He saw to it, and one can imagine how, that the Azeris, the Armenians, and the Georgians, each of whom had already formed “soviet” type states, merged into a Transcaucasian Federation. Its constitution had a preamble declaring that during the transitional period from enemy occupation to communism, “the bourgeois landlord rightist parties of Azerbaidjan, Georgia and Armenia had stimulated national hatred and discord among the masses.” The new Transcaucasian Federation was to meet the need to establish concord and planning in restoration of the economy and defense against external and internal enemies.

How much of this attempt to unify peoples was in accord with Lenin’s wishes of the time is unclear. Some documents brought forth after Stalin’s death suggest that Lenin’s health had deteriorated so badly by mid-1922 that he was not following events. One document is the Party’s Central Committee report of 1922, which stated: “It is recognized as expedient to conclude a treaty between the soviet republics of the Ukraine, Byelorussia, Azerbaidjan, Georgia, Armenia the RSFSR on entry into the RSFSR community [sostav], leaving open to Bukhara, Khorazm, and the Far Eastern Republic the decision to conclude treaties on custom affairs, foreign trade, foreign military affairs, etc”.

Lenin’s attitude was indicated within two days when he wrote to L.B. Kamenev, asking him to look into the matter because Stalin seemed to be trying to hurry the matter somewhat. Lenin added that Stalin had already agreed to replace in the proposed resolution to be issued from the Central Committee the words “enter into” the RSFSR with the words
"formal union together with the RSFSR in a union of soviet republics of Europe and Asia."

Lenin's diary for the day the USSR was being formed, December 30, 1922, reads, "I so it seems, stand seriously guilty before the workers of Russia for not intervening sufficiently energetically and sharply enough in the notorious question of autonomization. When this question emerged during the summer, I was ill, and in the autumn I placed excessive hope in my recovery and also on the opportunity which the October and December plenums would give me to intervene in the question...but I could not be present at either and so the matter passed me almost completely by."  

With Lenin, evidently, at a low ebb, the federation was formed: a treaty was signed by the RSFSR, the Ukraine, Byelorussia, and the new Transcaucasian Federation of Azeris, Armenians and Georgians. This treaty was inserted as the first chapter of the first federal constitution, which was approved provisionally on July 3, 1923, and ratified by the Second All-Union Congress of Soviets on January 31, 1924.

In the new federation, unlike that of the RSFSR of 1918, a chamber was established within the legislature to represent the various ethnic minorities. Yet, the other side of the coin was also represented, for the bicameral legislature was subordinated to a unicameral Congress, symbolizing the unity of "class," from which the deputies to the bicameral body, then called a Central Executive Committee, were named.

Further compromise between center and republic interests was introduced in the administrative structure of Commissariats. While some necessarily centralized activities (foreign affairs, defense, foreign trade, transport, posts and telegraph) were placed under the direction of Commissariats of the federal Council of People's Commissars without
responsibility to respond to requests of Republics, other activities were organized differently.

One group, bearing close relationship culturally to the peoples of the Republics, were placed entirely within the Councils of People’s Commissars of the Republics. A third group was placed between the two extremes, and it was called the “federated” group. In this group a Commissariat was placed in the federal Council to set policy, and a second Commissariat of the same name was placed in the Councils of each Republic to execute policy. This group comprised industry, food supplies, labor, finance, and audit.34 The all-union types were to seat plenipotentiaries in the republics, but to have no obligation to share responsibilities.

The years brought amendments. Stalin moved steadily toward centralization. He moved Commissariats from the Republic group to the hybrid group to increase central control. Evidently, as he sensed less pressure from nationalists in the Republics, he took measures which seemed to him rational in terms of increasing efficiency.

Constitutions for “Socialism”

By 1927 Stalin began phasing out Lenin’s New Economic Policy which had been designed in 1922 to help in restoring a devastated economy.35 In its place Stalin introduced in full measure state ownership of means of production, national economic planning and the beginning of total collectivization of agriculture.36 By 1936 most of what he considered to be the indicia of “socialism” had been achieved. A licensing act of 1936 reduced to one the number of persons who might be employed by a private entrepreneur.37 Private enterprise was discouraged by heavy taxation, with the consequence that the number of persons
disfranchised by Article 65 of the RSFSR Constitution was being reduced. A 1934 report put these as no more than 2.5% of the adult population.\textsuperscript{38}

Stalin's next step was to name a drafting committee to prepare a constitution for "socialism." It was to provide a model for a new cluster of constitutions for the Union Republics. Although still adhering to the federal concept inaugurated under Lenin's direction in 1922, Stalin had already shown in a speech to the Communist Party in 1930 that his mind was racing ahead to unification. He expressed the view that language could be expected eventually to be Russian as a result of a dialectical process through which support of diversity of language would lead to unity. The statement attracted little attention at the time, but years later in the 1980's, when the Party's Secretary General, Y.V. Andropov, celebrated the anniversary of the federation, and said "the comprehensive development of the socialist nations of our country is logically leading to their increasing convergence,"\textsuperscript{39} there may have been some who had doubts about the permanency of a federation of the 1924 type.

Some novelties appeared in the Constitution as adopted on December 5, 1936.\textsuperscript{40} Perhaps the most important to Stalin was prohibition of all employment of labor by the small handicraft enterprises still privately owned.\textsuperscript{41} In Stalin's terminology capitalism had been ended and socialism had arrived. Secondly, the franchise was opened to all, regardless of class origin. Stalin said the former ruling class was no longer to be feared. Thirdly, the Congress of Soviets, symbolizing the dominance of class loyalty over ethnic loyalty, was abolished. Deputies to the Supreme Soviet, which succeeded the Central Executive Committee as the working legislature, were to be elected to the two chambers directly.

The Constitution also enlarged the number of members of the federation, for several
of the "Autonomous" Republics were promoted to "Union" Republics, automatically
gaining the right under the Constitution to secede. This right, guaranteed by the 1924
Constitution, was restated in that of 1936. Some foreign analysts wondered whether the
right was meaningful, as Stalin had said on three occasions that the Communist Party would
oppose its exercise, but he seemed still to consider it as meaningful, for he justified refusal
to elevate two Autonomous Republics of considerable size to Union Republic status because
as landlocked Republics they could not be permitted to secede. They would introduce into a
socialist world capitalist enclaves if they seceded. To outsiders this explanation was absurd,
but it may indicate that at the time Stalin was unsure of the ability of his Party in those
Republics to prevent secession movements from developing.

The administrative structure established in 1924 for the Council of Ministers was
retained, but there were changes in classifications. More key branches of industry were
moved to the all-union column, presumably to assure their control by the center.

The provisions for codification of law presented a surprise. All codes were now to be
federal, in contrast to the 1924 pattern in which the federal law established only
"fundamentals," and the Republics were permitted to draft their own detailed codes. In fact
this feature of centralization was never implemented, although drafts were prepared.
Presumably, the intervention of the War for the Fatherland impeded completion. After the
war an amendment restored the 1924 structure.

Once again, as in 1924, the structure of government to be incorporated in the cluster
of constitutions to be enacted by the Republics was dictated by the federal constitution. It
was to be based on the "Soviets," which were declared by Article 2 to be the political
foundation of the USSR. This meant that each republic would have a legislature in the form of a Supreme Soviet, but none followed the pattern of the USSR in forming a chamber of nationalities, although the RSFSR might well have done so because of its many Autonomous Republics, Provinces and Districts. Not until 1989 did the RSFSR introduce this feature by amendment to its Constitution.45

The administration of justice remained in the 1924 pattern, being placed primarily in the Republic courts. The federation continued to maintain a Supreme Court, military courts and transport courts to prosecute offenses disrupting nation-wide transport. The Procuracy, structured as Lenin had said it must be as a federal agency to protect it against locally corrupt officials who might attempt to influence it not to prosecute, was continued with its two functions, prosecution of crime and supervision of the constitutional legality of administrative acts. The concept of separation of powers, always rejected by Soviet theorists as a bourgeois device designed to conceal the class nature of a legal system from the workers, was not introduced.46

A bill of rights was included, as it had not been in 1924. Now rights and duties established by Republics were to conform to a federal standard. In the past the Republic bills were accepted as adequate. The 1936 bill was innovative in that it introduced economic rights—the right to work, rest and leisure, social insurance, education. Also included was a newly expressed political right to equality, which had been denied in 1918 because of the policy of discrimination against persons of "bourgeois" professions.

Although the bill's formula in 1918 had deprived persons and groups of rights used to the detriment of interests of the socialist revolution was excised, the same principle was
expressed in the article guaranteeing freedom of expression. Such rights were declared granted "in order to strengthen the social system."^47

The statement of expectation of "withering away" of the state as it had appeared in 1918 was excised. Presumably, Stalin’s declaration to the Party in 1930 that the state must first become the strongest state the world had known before it could wither^48 had made its repetition in 1936 inappropriate, the more so since Stalin in introducing the draft for the 1936 Constitution had said that "we now need stability of law more than ever." Stalin was now focusing on the practical aspects of governing and not the programmatic aspects of a Constitution. Indeed, he refused to place a programmatic preface in the Constitution because he thought it should be only an operative document.

Post-Stalin Constitutional Change

Stalin’s death in 1953 marked the end of an era which Soviet historians soon called the era of the "cult of the personality."

Although the Constitution of 1936 remained in place until 1977, there was ideological ferment, seemingly preparing the way for change. Stalin’s successor as Secretary General of the Party, N.S. Khrushchev, denounced Stalin’s brutality, had his body removed from the glass casket in Lenin’s mausoleum, and introduced in a new Party program a novel political doctrine. The Program declared the "dictatorship of the Proletariat" at an end and replaced it with the conception of the Soviet state as a "state of all the people."^49

It was not until 1977 that this concept was placed in a new constitution, for indecision
on the topic seemed general. Communists in China and elsewhere thought it a betrayal of the revolution. An equally daring change was made in doctrine relating to minorities. There was talk of abolishing the chamber of nationalities and of bringing peoples closer together. Although this talk was unsettling to many, it continued until it flowered in Khrushchev's and Brezhnev's successor's speech on the 60th anniversary of the federation, telling of his expectation of convergence.

With such startling doctrinal pronouncements, many analysts both inside the USSR and abroad awaited with anticipation the long-heralded revision of the constitution. Brezhnev named a drafting committee in December, 1966, but nothing came forth from the committee. The anniversary date of the "October" of 1917, which some expected to be an occasion for a new constitution, passed with no report. The matter disappeared from the press until December 1972 when Brezhnev unexpectedly spoke of the new constitution, but there was still no report. Not until June 4, 1977 was a draft published and public discussion invited.

Generally, there were no surprises. The constitution proclaimed the achievement of "developed socialism," and its Article 1 adopted Khrushchev's innovation of "all-people's state" to replace "dictatorship of the proletariat." The economic fundamentals, which had come to be the essence of "socialism," were restated: socialist ownership of the means of production, agricultural land use by collective and state farms; individual ownership of property limited to consumer's goods, subsidiary household husbandry, a dwelling house and earned savings. With hindsight it now seems that Brezhnev was anticipating the emergence of a new generation and a new attitude toward the fundamentals that had served him well. He
was trying to bar the way to change.

The Constitution also incorporated a new formula for the Party's role. An Article 6 revised the 1936 formula of Article 126. Whereas language in 1936 on the Party was included in the general guarantee of the right to unite in social organizations, among which was given to “the most active and conscious citizens from the ranks of the working class and other strata of the toilers” the right to unite in the communist party as the “vanguard of the toilers in their struggle to strengthen and develop the socialist system . . . and the leading core of all organizations of the toilers, both social and state,” the 1977 formula was short and direct. It made the Party “the guiding and directing force of Soviet society, the core of its political system and of state and social organization.”

Gorbachev's Impact upon the Constitution

After selection by the Party's Politburo to lead the Party and the country as Secretary General, following the interim Secretaries General, Y.V. Andropov and K.Y. Chernenko, Gorbachev approached constitutional restructuring slowly. His opening salvo was to open the doors to criticism of the past, which he called the period of “stagnation.” This he did by relieving the populace from fear of punishment by preaching glasnost and rule of law. Not until 1988 did he begin amending the 1977 basic law.

By 1988 Gorbachev's slogans were “democratization” and “marketization.” As to the first, he introduced an amendment adopted on December 1, 1988,54 creating new governmental institutions and a new electoral system. Although he retained a USSR Supreme
Soviet, as created in 1936, he introduced above it a Congress of People’s Deputies, mindful of the model created in 1918 for the Russian Republic and for the federation of 1924. There was no suggestion that there was ideological reason for the change, no argument that the Congress represented the supremacy of “class” over ethnicity. Upon analysis the change seemed to be directed toward retention of power in the Communist Party during a period of economic restructuring which was expected to call for sacrifices. Authors wrote that there could be widespread unemployment, steep price rises, and social disruption as “marketization” replaced state economic planning.

A clue to Gorbachev’s reasoning may lie in the new electoral process. The most noted innovation was to provide that a third constituency in addition to the traditional two of geographically defined and ethnically defined districts would be added to elect one third of the Congress deputies. It was to be, for the first time in Soviet constitutional history, what has been called by Western political scientists a “corporative” constituency. Deputies would be elected from social organizations, the Communist Party, the trade unions and the various scientific academies. As such deputies could be expected to be those who had been elevated to their positions of leadership through a system dominated by the Communist Party, the likelihood was that at least one third of the Congress would support the Party. As the amendment introduced the requirement that a two-thirds vote was necessary to amend the constitution, this solid block could make it difficult for any grass roots movement to surprise the Party.

Further, the former system of direct elections to the Supreme Soviet was abandoned. Deputies would now be selected from the group elected to the Congress to sit in rotation.
during the five year term in the two chambers of the Supreme Soviet. As the Supreme Soviet would now become a permanently sitting body called twice a year to sit for from three to four months, instead of meeting for one week twice a year as was the case under the 1977 Constitution, it appeared that a transfer of debate and legislative power was to be made from the bureaucratized Presidium, which had legislated during the long periods between sessions of the old Supreme Soviet, to the new Supreme Soviet. This may have suited Gorbachev's purpose to stimulate innovative measures. He need not fear widespread resistance to his leadership, since the Economic Plan and the Budget had to be confirmed by the Congress, which the Party, as indicated, had reason to expect to follow its wishes.

Later, Gorbachev and his colleagues seem to have decided that they had opened a pandora's box with their license to debate, and their attempt to channel it more to their liking probably led to introduction in 1990\textsuperscript{55} of another amendment creating the institution of the USSR Presidency. The 1990 amendment created an institution seemingly inspired by the model of the United States and French Presidencies. When Gorbachev was named President he began to use his new powers, advised by a Council of the Federation.

The suggestion of incorporation of a "separation of powers" concept into the political structure looms. Although the first President, namely Gorbachev, was exempted by the amendment from the requirement established for subsequent elections, of going to the entire nation in a campaign in which the winner must obtain a majority of the votes in which at least 50\% of the qualified voters participate and in which he carries a majority of the Republics, a president with veto power similar to those of the American Presidency cannot but be a check on the legislature.
Another potential for eventual checks on the legislature and the executive was introduced by the 1988 amendment. It created in addition to the Congress of Deputies a "Constitutional Oversight Committee." Although the 1924 Constitution had authorized the USSR Supreme Court to serve upon request as a source of advice to the Central Executive Committee on the unconstitutionality of orders issued by the Union Republics, this limited judicial review was not continued in subsequent constitutions. The only constitutional restraint was provided by the Procuracy, but its competency was limited to "protesting" administrative orders issuing from the administrative Commissariats and their subordinate institutions.

The Oversight Committee is not a constitutional court in the Western sense. It is advisory. It may submit advice on its own initiative, but otherwise moves only if the Congress or the Supreme Soviet requests the advice when a draft law or an enacted law is questioned. With administrative orders, it is more powerful. Its decision suspends an offending order until the Congress, the Supreme Soviet, or the Council of Ministers (for orders issuing from agencies subordinate to it) rejects the decision.

Within a little more than a year an amendment of March 14, 1990 broadened the circle of institutions who may initiate review. There was added a request from one fifth of the USSR People's Deputies. By the same amendment the number of judges was increased from the 23 set by the 1988 amendment to 27, so as to permit not only the 15 Union Republics each to have a judge but lesser Autonomous formations, presumably sitting in rotation.

Considerable debate developed in the Congress over two matters: (1) human rights
laws, and (2) federal-Republic matters. Deputies raised the question of expanding the Committee’s authority to declare unconstitutional a law relating to human rights no matter what its source, and striking down provisions of Republic constitutions and legislation deemed by the Committee to violate the federal constitution. Although the resolution of these matters seems yet to be tentative, the first seems to have been decided affirmatively. In the enabling law of 23 December 1989,60 accompanying the constitutional amendment authorizing creation of the Oversight Committee, the Committee’s rights were expanded to put into force immediately a finding that a normative act, other than a law of the Congress of People’s Deputies or the Supreme Soviet, loses force the moment it is declared to violate the USSR constitution or a Treaty to which the USSR is a party, if it concerns human rights.

To advance further Gorbachev’s themes of “democratization” and “marketization,” the two chapters of the 1977 Constitution defining the political and economic system of the USSR were amended at the same time as creation of the Presidency. Following decision by the Party’s Central Committee to relinquish its political monopoly Article 6 was amended to read, “The Communist Party of the Soviet Union, other political parties, and also trade union, youth, other social organizations and mass movements through their representatives, elected to Soviets of people’s deputies, and in other forms participate in working out the policy of the Soviet state in administration of state and social affairs.’’

Articles 10 to 13 defining the economic system were amended to introduce a measure of privatization and marketization. Lenin’s fundamental principle that land and natural resources be owned only by the state was retained, but use of them was transferred from central to local authorities for administration. Article 11 treating individual (lichnaia)
property was broadened beyond consumers’ goods, artisans’ tools and farm implements to work plots assigned to families by collective and state farms, to permit ownership of producers’ goods to be used for entrepreneurial activity, called ‘‘autonomous economic activity.’’ The former term ‘‘individual’’ property was renamed ‘‘citizens’’ property, presumably to dramatize the change. A law of April 14, 1990 on property clarified the right to use, by specifically permitting the employment of labor. It added a qualification, however, presumably in deference to those still holding to their Marxist faith. The property’s use must not cause ‘‘ alienation of workers from the means of production or exploitation of man by man.’’ Perhaps these words notify local soviets that they may intercede with use if local cultures and attitudes would cause citizens to conclude that the use is accompanied by ‘‘ unfair’’ employment conditions.

A Fifth Cluster of Constitutions?

A fifth cluster of constitutions was initiated with legislation on competencies of the federal and Republic authorities. On April 26, 1990 the USSR Supreme Soviet set forth in detail the relationship to be maintained between federal and Republic competencies and followed it with an enabling law of the same date declaring that the law should provide the basis for renewing the federation. The secretariat was directed to submit the law to the next session of the USSR Congress of People’s Deputies for confirmation. Curiously, the enabling law was to be put into effect immediately, and it was proposed that the Republics conform their legislation to it.
A first draft of the new federal constitution (the "Union Treaty") was published on November 24, 1990, followed by a second draft on March 9, 1991, just prior to the plebiscite of March 17, 1991. The suspicion was raised in many minds that the second draft had been speeded by the impending plebiscite. During the interval between the first and second drafts of the Union Treaty, amendments had been made on December 26, 1990 to restructure the Council of Ministers and the Council of the Federation. The Council of Ministers was reformulated as a Cabinet of Ministers and the Council of the Federation enhanced with what the chair of the Congress called "qualitatively" new powers.

The Cabinet of Ministers was made directly subordinate to the President rather than continuing to be, as previously, the implementing arm of the legislature. It was declared to be endowed with the right to resolve all questions of state administration that lie within the USSR jurisdiction, except for those within the jurisdiction of the Congress of People's Deputies, the Supreme Soviet and the Council of the Federation.

The Council of the Federation was to be more than a consultative body, as it previously had been. It was to become a special presidential body whose main function would be to coordinate the supreme bodies of power and administration of the union and the Republics in implementing domestic and foreign policy in areas in which policy is set by the Congress of Deputies. Its task was to monitor observance of the Union Treaty.

A less dramatic but influential amendment was made to the Office of the Procurator General of the USSR. The Procurator General would no longer appoint all Procurators of the Republics, but had to share with the Republic Congresses of People's Deputies the appointment of junior Procurators, although local authorities would continue to be restricted.
They were to be denied any influence by local authorities in local activities, as they have always been.

In consequence of the constitutional amendments of December 26, 1990, and the legislation on competencies of federal and Republic authorities, the draft of a Union Treaty proposed on March 9, 1991 incorporated the provisions already established, with one surprise. The draft incorporated the proposal already enunciated by several People’s Deputies, namely that the USSR Congress of People’s Deputies be discarded to remake the USSR Supreme Soviet a single legislative organ functioning through a bicameral legislature. The draft left open for Congress determination whether the Chamber of Nationalities of the Supreme Soviet should be chosen by electors directly throughout the USSR, or chosen by the supreme legislative body of each national formation through a form of indirect ballot.

The draftsmen held to their prior decision of April 26, 1990 to provide for all-union monopoly authority over activities deemed essential to the unity of economic functions, to defense, to scientific endeavors, to foreign policy, to protection of state security and to the USSR Courts and Procuratorial Office. Beyond this monopoly the Union and Republic authorities were to share authority in certain categories of activity. Most were defined in long-standing terms, as with legislation (establishing federal “fundamentals” of legislation and codification by Republics conforming to the “fundamentals.”) Perhaps the arresting novelty was that established by the law on competencies, authorizing Republics to formulate their own budgets, including taxes, so that the Republics no longer had to require action of the federal parliament to establish taxing authority.

The plebiscite of March 7, 1991 revealed serious opposition on the part of seven
Union Republics to accept the proposition that the Union be preserved. Izvestiia's correspondent revealed that the draft Union Treaty of March 9, 1991 had obtained no support from the three Baltic Republics, Moldavia, Georgia and Armenia, and the Republic of Azerbaidjan had sent only an "observer." One feature was arresting, in that 18 Autonomous Republics were reported to have signed the Union Treaty draft. The results of the plebiscite mirrored the signatures on the Union Treaty.

Steps Toward a New Constitution

With agreement between nine republics having been achieved, a document called the "9 plus one agreement" was formalized and a date for signature set for August 20 1991. The definitive document was published on August 15 1991 and President Gorbachev departed for a vacation in the Crimea. His colleagues remaining in Moscow had other plans. Under the leadership of the Vice President, Gennadi I. Yanaev, a coup was mounted in the name of the "State Committee for the State of Emergency." The Vice President gave as his authority for taking power from the President Article 127.7 of the Constitution, authorizing the Vice President and the Chairman of the USSR Supreme Soviet respectively to execute the duties of the President if the President for any reason became unable to perform his duties.

The Vice President announced that President Gorbachev was ill and that the Committee took full responsibility and would adopt urgent measures to get the country out of the crisis. The Committee pledged a nationwide discussion of the draft Union Treaty, giving every citizen the opportunity to assess the document at his leisure and to make a
decision that would shape the future of the multi-national homeland. In response to a question from the press, the Vice President responded that President Gorbachev would understand the need for action in the crisis situation. Further, the Vice President explained that the Baltic Republics, Moldavia, Georgia, and Armenia had made known their intention not to sign the Union Treaty and that the Committee accepted that decision. As to the fate of the Union Treaty, the Committee expected the country to discuss the draft and adopt a treaty acceptable to the republics.

Within days the coup failed. President Gorbachev was returned to Moscow by those of his colleagues who had remained loyal to him, led by the Russian Republic's President, Boris Yeltsin. An Extraordinary Congress of People's Deputies was assembled in Moscow, and the President of Kazakhstan was given the responsibility by his colleagues to declare that a union of sovereign states was formed between the republics choosing to do so, each state being able to define the format of its participation in the union. He asked the republics, no matter what their status, to enter immediately into an economic union to insure the normal functioning of the economy and to accelerate the conduct of economic reform. He called upon the deputies of the Congress to prepare a new constitution through an ad hoc Committee of Representatives, and he sketched, presumably in agreement with his fellow republic presidents, the outlines of an interim agreement to be incorporated in a draft.

President Gorbachev, with Russian President Yeltsin at his side, guided the Congress of People's Deputies through a debate, during which many deputies indicated their reluctance to agree to the proposed interim government arrangements. But in the end his proposals were accepted. While awaiting a new constitution, the interim government was to be
constituted as an executive and a legislature. The executive was to be formed as a State Council, chaired by the USSR President and including the presidents of those republics willing to participate in the interim government. The State Council was to take responsibility for foreign and military affairs, and to establish law and security. The President was to name a chairman to preside over an Interrepublic Economic Committee to manage the economy and social policy. Its members were to be persons named by the republics.

The legislature was to be constituted as it had been under the currently valid constitution, as a Supreme Soviet with two chambers, but with an altered structure and changed duties. What had been equal chambers were now to be unequal, one being higher than the other. The upper house would be a Council of the Republics, chosen by each republic’s leadership bodies from the members of the existing Congress of People’s Deputies. Each of the union republics would be represented by 20 persons, except for the Russian Republic, which would add to the Russian delegation one representative from each of the 32 autonomous and regional ethnic units. Those other republics with autonomous units within their borders would also be entitled to one extra representative for each such unit. But to prevent the Russian delegation from dominating the Council of the Republic, each republic would be entitled to only one vote, meaning that republic delegations would have to agree on their vote on each issue.

The lower chamber, the Council of the Union, is to contain representatives from republics based on the republic’s population. This parallels the practice under the prior constitutional provisions. Citizens would not elect representatives individually, however, but through the republic soviets, which are to choose members from among current members of
the Congress of People’s Deputies.

The law provides the two chambers with separate spheres of responsibility, with the jurisdiction of the Council of the Union clearly the more limited. Moreover, the dominance of the Council of the Republics is ensured by the following statement in the law: “Laws adopted by the Council of the Union take effect after their approval by the Council of Republics.”

The Interrepublic Economic Council, established to coordinate economic relations and implement economic change, is to prepare a treaty defining economic relations between signatories, including republics that do not join the union. This form of coordination had already been initiated by a treaty executed by Russia and the Ukraine August 29 1991. Subsequently a similar treaty was signed by Russia and Kazakhstan.

The first acts of the State Council were to declare the three Baltic republics independent and to begin formulating policies for the economy and the military.

A New Synthesis?

The constitutional evolution of seven decades is marked with frequent change, reaching a crescendo in 1988-90. So much of the novelty of the early years seems to have been lost that one is tempted to ask whether the wheel has turned and there is to be a new beginning with a replay of the Constituent Assembly of 1918. The thought is not as preposterous as one might think, for during the summer of 1989 a flyer was being distributed on the Arbat datelined “Petrograd” and proposing that the Constituent Assembly of 1918
reassemble and begin again to choose a government for a new Russia.

Hegelians would probably say that a return to 1918 is impossible. The Tsarist "thesis" was supplanted by the Soviet "antithesis." There can now only be a new "synthesis" from which the governmental process must take off again. They would deny that the Russian Provisional government's plans of 1917 could be reinstituted. Too much has been added to political and legal culture by seven decades to permit Gorbachev or his successors to create a pravovoe gosudarstvo in the image of the democrats of 1917.

There can be no doubt that the people want never to return to Stalin's brutality, but on the other hand no one wants to embark upon a road likely to lead to what many believe to be the inequality, the unemployment, the homelessness and the poverty of peoples. On every hand, there is questioning. What can be a new synthesis, satisfactory to peoples who have experienced the events of the past seven decades? What role can law play in creating a new synthesis and securing its protection? The following papers will indicate how complex the problems are and the solutions likely. There is much debate, but on one issue there is no doubt—there will be a constitution.
NOTES


5. See E. Gurvich, Istoriia Sovetskoi Konstitutsii, Moscow 1923.


7. Decree of the All Russian Central Executive Committee, 18(5) June 1918 "On Excluding from Membership in the All Russian Central Executive Committee of Soviets and Local Soviets of Representatives of Counter-revolutionary Parties - of Socialist-Revolutionaries (Right and Center) and of the Russian Social Democratic Worker Party (of Mensheviks)," SU RSFSR, Part I, 1918 No. 44, item 536.


11. Unger, op.cit. note 9, 10.

forth in Gurvich, op.cit. note 5, 24.


17. RSFSR Constitution, op.cit. note 10, Article 23.

18. Id. Article 3.


22. On 15 November 1917 (n.s.) Lenin issued a declaration stating that all nations of Russia had a right to self-determination, including independence and the formation of sovereign governments. See Istoriia, op.cit. note 2, 57-58. Originally published in SU RSFSR, Part I, 1917 No. 2, item 18.


26. For documents constituting agreements executed with the RSFSR by the Ukrainian,
Byelorussian and Transcaucasian Republics, see Istoriia, op.cit. note 2, 161-394.

27. See Joseph Stalin, Marxism and the National and Colonial Question, Moscow 1935. See especially explanatory notes at 289.


29. See Korablev, op.cit. note 23, 296.

30. For text of letter to Kamenev, see Korablev, op.cit. note 23, 297. For excerpts from Lenin's diary, see Istoriia, op. cit. note 2, 399-401.

31. The Treaty of Union took the form of a Declaration of the First Congress of Soviets of the USSR, issued 30 December 1922. In 26 articles it established the state structures, the electoral system, the division of Commissariats between the federal government and the republics, a USSR citizenship, a flag, a seal, and procedure for amendment. For text, see Istoriia, op. cit. note 2, 394-398.

32. Approved by Second Sitting of the USSR Central Executive Committee, see Ibid., 423.

33. Ibid., 457.

34. USSR Constitution, 1924, Article 52.

35. Order (Nakaz) of 9 August 1921 gave the signal for the beginning of the New Economic Policy, SU RSFSR, Part I, 1921 No. 59, item 403.

36. The New Economic Policy ended with the introduction of the five year economic plan. See resolution (undated) April, 1927 ordering the issuance of a plan. SZ SSSR, Part I, 1927 No. 21, item 239.

37. Authorization to employ one person was included in the Licensing Regulation issued by USSR Council of Peoples' Commissars on 26 March, 1936. For text, see Fin. i Khoz. Zak., 1936 No. 11, 17. When reprinted in the 1938 edition of the RSFSR Civil Code, as an annotation to Article 54 of the code, the editors appended a footnote reading, "In accordance with the USSR Constitution this Note requires change." see RSFSR Civil Code, 1938, 151. The authorization seems to have been restricted in that it required that employment must be such that it did not under the law deprive the employer of the right to elect deputies to the soviets. At the time, in 1936 prior to promulgation of the 1936 USSR Constitution, the limitation on the franchise established by the RSFSR Constitution of 1918, Article 65 (a) denying the right to vote to "persons employing hired labor for profit" was still in effect. Reconciliation of the limitation with the permission might be possible if one assumes that
employment without appropriation of surplus value by the employer could be demonstrated satisfactorily to the voting registration authorities of the local soviet.

38. See N. Denisov, Sovety-Politicheskaiia Osnova SSSR, Moscow 1940, 37.


40. For Russian language text, see Istoryia, op. cit. note 2, 729. For English translation, see Unger, op.cit. note 9, 140. The text of the Constitution was not printed in the SZ SSSR.

41. Article 9.

42. Article 4.

43. Article 17.

44. Amendment of 11 February 1957, amending Constitution Article 14 'u', SZ SSSR 1957 No. 4, item 63.


47. Article 125.


50. Article 1. See Unger, op. cit. note 9, 234.


52. Pravda, 5 December 1966.

53. For draft, see Pravda, 4 June 1977.

55. Ved. SSSR 1990 No. 12, item 189.

56. Article 125. Subsequently by amendment of 14 March 1990, Article 125 was renumbered as Article 124.

57. USSR Constitution 1924, Article 43 (c).

58. USSR Constitution 1977, Article 164.


60. Law of 23 Dec. 1989, Article 21, paragraph 3. Ved. SSSR, 1989, No. 29, item 572. See also item 573 setting 1 January 1990 as the effective date of the law, except for constitutions and laws of Union Republics, to which the law does not apply until there has been revision of the USSR Constitution as it pertains to the national-state structure of the USSR.


63. Ibid., item 330.


