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Reforming Criminal Law Under Gorbachev:
Crime, Punishment and the Rights
of the Accused

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This paper is #12 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. This paper was written prior to the attempted coup of August 19, 1991.
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?"

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17. Commentary: The printed versions of conference remarks by participants BERMAN, SCHMIDT, MISHIN, ENTIN, E. KURIS, P. KURIS, SAVITSKY, FEOPANOV, and MOZOLIN
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Executive Summary

It is ironic that while the Gorbachev Revolution has made radical reform in criminal justice possible, the same process has also made its realization uncertain. Dislocations in the economy and the beginning of the private sector have fueled an increase in criminal activity. Glasnost has made crime highly visible, instilling in the public a fear of crime that made the liberalization of criminal law of questionable wisdom. And changes in the rules of the political game complicated the process of reforming criminal law: legislatures gained power at the expense of executives (including Communist Party executives), and the disintegration of central political power made it unclear which legislatures and whose laws would govern the situation.

Still, the period since the late 1980s has seen the adoption of a number of liberalizing measures in the field of criminal law. Developments concentrated on in this paper are the adoption of a significantly broadened right to counsel and preparatory work on a range of substantive changes in criminal law, including criminal penalties.

The paper concludes that the political context will be all-important in the fate of criminal law reform. Particularly noted are the "crime scare" of 1989 and thereafter and the unravelling of the Soviet federation.
REFORMING CRIMINAL LAW UNDER GORBACHEV: CRIME, PUNISHMENT, AND THE RIGHTS OF THE ACCUSED*

by Peter H. Solomon, Jr., University of Toronto

During the late 1980s Soviet jurists began preparing a far-reaching reform of criminal law and justice in the USSR. By mid-1990 the new Supreme Soviet had approved parts of the reform program. Much of the agenda for this reform came from the past. Extending the right to counsel and limiting pretrial detention were planks in the platform of legal reformers that Soviet leaders rejected in the 1950s. In the 1970s the liberalization of punishment and narrowing of the scope of the criminal sanction joined these issues as causes for reformers of the criminal law in the USSR. However needed or overdue, such reforms had no chance for adoption as long as the Brezhnev leadership remained in place. Even the discussion of these issues stayed within academic circles. The promotion of major changes in criminal justice became possible only because of the commitment by the Gorbachev regime to exposing wrongs of the past and supporting legality and human rights, in short, to building a "law-based state."

The irony is that while the Gorbachev Revolution made radical reform in criminal justice possible, the same process also made its realization uncertain. Dislocations in the economy and the beginning of the private sector fueled an increase in criminal activity. Glasnost made crime highly visible, instilling in the Soviet public a fear of crime that put liberalization out of step with reality. At the same time, dramatic developments in the system of government changed the rules of the political game. As legislatures (soviets) took power away from executives (party buros and presidents), outcomes in policy-making became
less predictable. Thus, in its first year the USSR Supreme Soviet (new vintage) acted inconsistently, rushing ahead with changes to enhance the rights of suspects while at the same time responding to the cause of law and order. Worse still, the impending disintegration of the centralized federal system made it unclear which legislatures and whose laws would govern the situation. And, in any power vacuum, the agencies of law enforcement were likely to gain autonomy and pursue their customary modes of conduct.

This chapter examines the struggles to date over (1) the admission of defense counsel to the pretrial phase and curtailment of pretrial detention; and (2) the liberalization of punishment and limiting of the scope of criminal responsibility. It concludes with analysis of two obstacles to the realization of criminal law reform--the crime scare of 1989-1990 and the unravelling of the Soviet federation. (For related reforms on judicial independence, see the chapter by Donald Barry).

The Rights of the Accused

Until 1990 most persons accused of crimes in the USSR had no right to counsel until the end of the preliminary investigation, just before the file of the case went to court, often months after the accused had been detained and charged. The absence of counsel during the pretrial phase represented a serious deprivation for the accused. As in other countries using inquisitional procedure, the evidence collected during the preliminary investigation was admitted directly into trial proceedings and subject to confirmation only at the discretion of the judge. As a rule, guilt was established before trial, and the hearing revolved around
qualification of the offense and choice of punishment. The right to counsel during the crucial
pretrial phase was established in France in 1897 and in Italy in 1945.¹

More than once, jurists had tried to remedy this defect in their system of criminal
justice.² The most recent attempt began in the fall of 1986, when, after the initial publicity
of abuses in the administration of justice, Academician Vladimir Kudriavtsev and Professor
Alexander Iakovlev advocated admission of counsel during the pretrial phase. The Chairman
of the USSR Supreme Court, Vladimir Terebilov supported their proposal, on the grounds
that only early involvement of counsel could undercut the cycle of abuses. As the movement
for judicial reform gained momentum, expansion of the role of the advocate emerged as a
central theme. In June 1987 the Central Committee approved consideration of the issue and
the 19th Party Conference in July 1988 adopted the principle of early involvement of
counsel. The Party Conference did not, however, indicate just how early and with what
rights.³

Whether counsel entered cases at the start of the preliminary investigation or even
earlier, say at the time of arrest or the presentation of charge, mattered. For decades
juvenile offenders in the USSR had benefitted from the advice of counsel during the
preliminary phase, and since 1970, even some adults, when the procurator so chose. But
investigators usually rendered this early access to counsel meaningless by delaying the start
of the preliminary investigation after they had conducted an unofficial preinvestigation and
prepared the case. Sometimes, investigators reduced the official preliminary to a single day!⁴

During the 1980's a number of East European countries started admitting counsel to
criminal cases from the initial detention, but in the USSR most leading law enforcement officials resisted this radical step. As of spring 1989 the commission preparing changes in criminal procedure could agree to admit counsel only at the start of the preliminary investigation. This position contrasted with that adopted by scholars at the Institute of State and Law drafting new Fundamental Principles of Criminal Procedure (hereafter Principles of Procedure) and with the opinion of some rank and file law enforcement officials. The Institute scholars supported right to counsel from the initial detention or charge. Survey research suggested that opinion among a substantial minority of procurators and investigators and a majority of judges had reached the same conclusion.  

Another obstacle was the ambivalence of the advocates themselves. Although committed in principle to improving the defense of clients, they worried about the implications of earlier access. One concern was financial. According to rules set in the 1970's, advocates received less pay for work during preliminary investigations than during trials (eight as opposed to fifteen rubles per day), and there were limits set upon their total income. To pave the way for reform, the USSR Ministry of Justice changed the payment scheme (as of Sept. 1988), ending the discriminatory fees for preliminaries and increasing the new standard rate of recompense to 20-25 rubles per day. However welcome, this change did not allay the fears of the advocates. In June 1989 the deputy procurator of the city of Moscow wrote to the Moscow Bar offering to grant suspects the right to request and consult lawyers from the moment of detention. But the Bar's leaders refused the offer on the grounds that it was unclear who would pay counsel for their work during the preliminaries and which lawyers would be available to report to police stations at short notice.
In the fall of 1989 observers could not say when the issue of right to counsel would be decided and exactly how. At this point Professor Alexander Iakovlev made a decisive move. Acting in his capacity as a deputy to the Congress of Peoples Deputies and members of the Supreme Soviet's Committee on Legislation, Iakovlev proposed to the Committee that the Fundamental Principles of Court Organization then under consideration be amended to include a guarantee of right to counsel at the earliest possible moment. To his amazement, the committee approved this proposal without objection, paying heed neither to the tenuous relationship of right to counsel to the law in question nor to the suddenness of the proposal. In November Iakovlev introduced the changes on the floor of the Supreme Soviet, and that body approved them by a large margin. The new provision guaranteed the right of defense to "suspects" as well as accused, through the participation of counsel "at the moment of detention, arrest, or indictment."

The legislation of a broad right to counsel, framed in such vague language, left practical questions. Just when did the right to counsel begin and how would it be implemented? The Committee on Legislation of the Supreme Soviet took up these questions days after the passing of the law on court organization. While some deputies favored requiring access to a lawyer from the moment of detention, others insisted that such a rule would be impossible to implement. Outside the capital cities, there were too few lawyers; none would be available for summoning to the police station each time a suspect was detained. The Committee reached a compromise. The right to counsel would begin no later than 24 hours after arrest (earlier if a charge were delivered). For those first hours the police would have exclusive access to the suspect and the right to question him. Although
this compromise fell short of the standards of reformers like journalist Yuri Feofanov, it
represented a major breakthrough. Russia had established full right to counsel for anyone
accused of a crime! In April, 1990, further legislation clarified that once admitted to a case,
defense had the right to unlimited private meetings with his client and to attend all further
questioning of the accused, witnesses and experts.8

Soviet lawyers, however, continued to worry about the practical meaning of this
reform. Apart from Moscow, Leningrad, and Kiev, there were too few lawyers to handle
the additional task of servicing clients during the pretrial phase. (A lawyer from Estonia
estimated that an eight-fold increase in the number of lawyers was needed). The demand for
lawyers posed by other legal reforms and the emerging market relations in the USSR
compounded the problem. There was also the related issue of establishing a system of duty
counsel, to render assistance to suspects and accused on nights and weekends or when the
suspect’s choice of lawyer was unavailable. Moreover, the system of paying lawyers for
work in the pretrial needed elaboration, notwithstanding a provision in the law of April 1990
that the state cover costs for indigent suspects.

Another concern of lawyers was the failure of the new law to provide them with
access to the files of cases until the end of the preliminary investigation. This failure
represented a setback, for it took away the existing legal right of advocates to review the
documents from the moment of accusation in cases involving juveniles and also contradicted
informal arangements that had developed among veteran advocates and investigators in
Moscow in cases where the accused was an adult. Infuriated by the loss, the lawyers
attending an all-union conference of advocates decided to bring a complaint to the
Constitutional Supervisory committee, alleging that this abridgement of access violated the constitutional right of defense.

Finally, the new legislation failed to provide the defense with an explicit right to question witnesses independently (of the investigator) and collect evidence. To be sure, such acts were not forbidden in law, and the renowned proceduralist Professor Strogovich had insisted that they were not illegal. But these actions ran counter to tradition within the USSR and the spirit of the inquisitorial tradition, according to which the investigation was a neutral search for truth rather than a partisan contest. Some Soviet lawyers thought that interviewing witnesses on their own was improper.\textsuperscript{9}

Apart from inadequate representation by counsel during the preliminary investigation, the most serious violation of the rights of the accused under Brezhnev was the overuse of pretrial detention. Of persons accused and subject to pretrial inquiries in 1983, 48% were held in custody before trial, and most sat waiting for many months (some even years). The fact of pretrial detention increased the already high probability of conviction and made a custodial sentence almost certain (at least to the time already served). Soviet law permitted law enforcement officials to place the accused under arrest (as opposed to police detention of uncharged suspects for up to 72 hours) with the approval of the procurator alone. Judges did not take part in the decision. The main ground for holding the accused was the dangerousness of the offense charged, and the law allowed an arrest as long as the punishment upon conviction would exceed one year of confinement. No categories of accused benefitted from exclusion. Moreover, officials made maximal use of pretrial detention. Their superiors treated the presence of an accused person behind bars as an
official sign that the crime had been "solved"!

Worst of all, there were in practice no limits upon the length of pretrial detention. To be sure, since 1958 Soviet law stipulated that after the first two months of arrest it was necessary for the investigator to obtain extensions—to three months from an oblast procurator, to six from the republican procurator, and to nine by the Procurator-General of the USSR. In addition, the Presidium of the USSR Supreme Soviet issued special edicts extending the arrest of particular accused beyond the nine month limit, and a new nine-month clock began ticking whenever the trial judge or cassation panel returned a case for supplementary investigation. In the Brezhnev era, investigators, often new to the job and ill-equipped, made much use of the opportunities to hold accused in detention while conducting lengthy investigations.10

Soviet authorities themselves recognized the overuse of pretrial detention. Dramatic reductions began even before changes in legislation had been planned. Thus, the share of accused held before trial fell from 48% in 1983 to 30% in 1984 and 1985, 22% in 1986 and 17% in 1987.11 All the same, the crusaders for reform of Soviet justice sought changes in the law on pretrial detention that would protect the accused.

Leading the way was Igor Petrukhin, the scholar at the Institute of State and Law responsible for drafting new provisions on pretrial detention for the Model Principles of Criminal Procedure. Petrukhin came up with three proposals: (1) limiting the use of pretrial detention to accused whose offenses called for punishments exceeding two years confinement and excluding entirely from eligibility for detention all persons charged with negligent offenses, the seriously ill, pregnant women (over five months) and women with children.
under two; (2) curbing the length of pretrial detention by eliminating the extensions by the
Presidium of the Supreme Soviet and removing the provision of extra time for supplementary
investigations; and (3) most importantly, introducing judicial review of the initial decision of
the procurator to institute pretrial detention.\textsuperscript{12}

As of summer 1990 the prospects for Petrukhin’s proposals looked good. With the
exception of the removal of extra time in custody for the conduct of supplementary
investigations, the Institute of State and Law had accepted all of his proposals for its draft
Principles of Criminal Procedure. More striking was the inclusion of an identical proposal
regarding judicial review of pretrial detention in the competing draft Principles produced at
the Procuracy Institute under the lead of A.D. Boikov, a draft that on other issues took more
conservative positions than the draft from the Institute of State and Law. The Committee on
Legislation of the Supreme Soviet also accepted the idea of judicial review of the
procurators’ decisions on arrest. In November, 1989, the Committee also discussed the more
radical idea of requiring judicial approval of arrests.

To be sure, the proposed changes in the system of pretrial detention in the USSR had
flaws. It did not eliminate the possibility of stays in confinement for over a year (because of
the effect of supplementary investigations). Nor did it confront the fact that time
awaiting trial after the end of the investigation (because of court delay) did not count toward
any of the time limits.\textsuperscript{13}

Any significant improvement in the position of the accused-- including protection
from lengthy pretrial detention and better representation by counsel--depended upon not only
changes in the law but also upon the fate of the overall reform of criminal justice. Without
the separation of investigators from the MVD and Procuracy and a deemphasis upon achieving prosecutions and convictions at all cost; without significant supervision by judges of the conduct of pretrial investigations; and without sufficient judicial independence to make such supervision meaningful--the improvements in the legal right of the accused were unlikely to prove meaningful.¹⁴

Punishment and Crime

The reform of the criminal law from 1987 focussed upon reducing the use of the death penalty and imprisonment and lessening the reach of the criminal sanction. Both of these emphases reflected the larger goal of humanizing the criminal law. Both dated back to model legislation written by scholars in Moscow, the Model Fundamental Principles of Criminal Legislation (completed in 1985, published in 1987) and the Model Criminal Code of the RSFSR (completed in 1986, not published).¹⁴

The process of reforming the criminal law was far from tidy. Codification played an important part. On direction of the Central Committee Plenum of Jan. 1987, drafting commissions began to work on new Fundamental Principles of Criminal Legislation of the USSR and Union Republics (hereafter Draft Principles) and a new RSFSR Criminal Code. The former was published in December 1988; received public discussion in 1989; and was revised for submission to the Supreme Soviet in 1990. The latter remained unpublished. Both pieces of draft legislation reflected the model legislation prepared earlier by scholars. The mechanism of influence was direct. The commission that prepared the Draft Principles
included some of the authors of the Model Principles--Vladimir Kudriavtsev, Sofia Kelina, Isaac Galperin--along with representatives from the law enforcement agencies.\textsuperscript{15}

Yet, while codification proceeded, the reform of the criminal law also evolved both through individual laws and changes in the practice of justice. For example, amendments to the Statute on State Crimes in 1989 (as modified in August) eliminated the crimes of circulating anti-Soviet propaganda and circulation of falsehoods about the Soviet state--offenses used for the prosecution of dissidents in the past. Actual prosecutions for these offenses (per articles 70 and 190.1 of the RSFSR Criminal Code) ceased earlier in 1987, probably on instruction from the highest authorities.\textsuperscript{16} Likewise, the reduction in the use of imprisonment--a major goal of the drafters of the Principles and Criminal Code, began in judicial practice well before any legislation had been passed. Between 1983 and 1985 judges in the USSR reduced the share of custodial sentences by 11% and between 1985 and 1987 by one third. As a result, while in 1983 52.9% of convicts were imprisoned, in 1987 the share was 33.7%.\textsuperscript{17}

A central theme in the Draft Principles was humanization of the criminal law, and the reform that most symbolized this thrust was the restriction of capital punishment. The death penalty had a long and checkered history in the USSR, marked by some periods of abolition in law, though never in practice.\textsuperscript{18} Some authors of the Model Principles, such as Kelina and Sakharov, personally favored the abolition of capital punishment, but even they recognized that neither public opinion nor politicians were ready for this step. As a result, the Model Principles only restricted the use of the death penalty. The Model Principles (1) narrowed the use of capital punishment to persons convicted of especially dangerous state crimes
(treason, spying, terrorist acts) and premeditated murder in aggravated circumstances; and
(2) excluded from this sanction altogether both women and men over sixty (juveniles were
already excluded). The first version of the Draft Principles took over this formulation,
adding one more offense (rape of a minor) to the list of crimes to which the death penalty
could apply; the second draft added genocide.\textsuperscript{19}

The Commission rendered its decision on capital punishment against the backdrop of
sharp public debate on the issue, in the press, on television, and even in the movies.\textsuperscript{20}
Lining up against abolition were not only most of the public as a whole but also many
educated and articulate persons. These included representatives of Russian nationalism, who
objected to the argument that abolition would bring Russia into the "civilized" world of the
West.\textsuperscript{21} The important point, though, is that there was little, if any, opposition expressed to
restricting the death penalty, particularly to eliminating its use for economic crimes. What
reformers wanted most of all was an end to the execution of managers convicted of theft of
state property or bribery in large amounts, liability for which was established by
Khrushchev. By fall 1988 executions for these offenses had virtually ceased, and the
direction of economic reform made them obsolete.\textsuperscript{22} Some participants in the debate did
object to the exclusion of old men (they could be "used" by younger persons), but the
reformers insisted that in practice, even under Brezhnev, judges had almost never sentenced
an old man or a woman to death. By putting this element of practice into the law, the
reformers could achieve further legal restriction of capital punishment and provide a basis, so
the Draft Principles stated, for its eventual elimination.\textsuperscript{23}

The published version of the Draft Principles allowed for the establishment of the
death penalty for other crimes at time of war. But in response to objections that this provision undermined the authority of the Principles, the Commission removed it from the second version. 24

For most offenders in the USSR restriction of the death penalty was less important than curtailing the use of imprisonment and reducing its length. In the 1920s and 1930s judges in the USSR had relied more on non-custodial sanctions than on custodial. During and after World War II the balance shifted, and in the Brezhnev period both the amount and length of imprisonment increased, in law and practice. As we have seen, after Brezhnev’s death imprisonment started to decline, but the challenge remained to give this shift a basis in law and with this some degree of permanence. 25 The specification of punishments for particular crimes belonged in the criminal codes. The Draft Principles could deal only with the available choices.

To begin, the Draft Principles stated that wherever possible noncustodial sanctions should be the first choice. To encourage this, provision was made for setting large fines and matching the level of fines to the earning capacity of the convict. Secondly, the Principles reaffirmed the ten year maximum sentence of imprisonment for most crimes, allowing fifteen years only for offenses that used to receive the death penalty (serious economic crimes) and twenty years for commuted death sentences. Thirdly, the Principles encouraged shorter terms of imprisonment by establishing a new sanction called "arrest". Arrest called for one to three months in jail and was designed as a response to habitual petty thieves, many of whom were receiving terms of a year or more. 26

Perhaps the clearest sign of the authorities’ commitment to continuing the reduction of
custodial sentences was the policy of closing corrective labor colonies (especially in the Far East) and granting amnesties to inmates where necessary. As of May 1990 the population of the Soviet corrective labor colonies stood at less than half of the level of four years earlier. Penal officials were discussing the need to decentralize the prison system and assure that convicts served their terms in local institutions, close to their homes.27

The Draft Principles also put some order into semi-custodial punishments. Eliminating exile and banishment, which as punishments for crimes (as opposed to administrative measures) had fallen into disuse in the post-Stalin period, was an easy choice. More problematic was the penal innovation of the Brezhnev period, "suspended sentences with compulsory labor assignment," a measure used to send many convicts to construction sites in places where there were no colonies. The drafters decided to convert this disposition into a proper punishment named "limitation of freedom." Not only did this move eliminate any pretenses about suspended sentences, but the new punishment also became available for conversions from custodial sentences (after the convict had served part of his term), thereby allowing the elimination of "early release with compulsory labor assignment," a widely used form of release that had made a mockery of the carefully devised system of parole.28

For the drafters of new all-union legislation the means available for achieving their long-standing goal of restricting the scope of the criminal law were limited. The decriminalization of specific offenses (like homosexuality) belonged in the hands of republican governments; only state crimes belonged to federal jurisdiction. In the main, reformers working through the central government had to address the principles of criminal responsibility.
The onset of the policy of glasnost made the reform of state crimes an urgent matter. Offenses once used against dissidents, like "anti-Soviet agitation and propaganda" and "spreading distortions harming the state and social structure," had become relics of the past, and in January 1987 the Central Committee decreed that legislation of the USSR be updated to conform with glasnost. The result of this mandate was a set of amendments to the Law on State Crimes. As originally promulgated in April 1989, these amendments did replace "anti-Soviet propaganda" with a much narrower offense "public appeals for the overthrow of the Soviet state and social system." However, instead of eliminating the offense of "spreading distortions" (the infamous Art. 190.1 of RSFSR Criminal Code), the law replaced it with a vaguer one of "discrediting state agencies and public organizations." This new offense was apparently introduced at the initiative of Chebrikov and other party officials who wanted to retain legal weapons for managing the boundaries of speech.

The new offense of "discrediting state agencies" did not survive the outcry that its establishment generated. Reform minded persons in the USSR and abroad (including lawyers) denounced the measure as a retreat from glasnost and violation of human rights. For damage control the USSR Supreme Court jumped into the breach with an interpretation narrowing the scope of the provision to "deliberate public dissemination of slanderous fabrications." This might have been the dénouement, had not the new legislative politics intervened. The first session of the new Congress of Deputies discussed the new offense on national television; and in the end it decided to repeal the provision. The result was that the main weapons of the criminal law that had been used against dissidents in the Brezhnev era were eliminated.
The framers of the Draft Principles dealt with the reach of the criminal law by restricting criminal responsibility in four areas. First, they limited the responsibility of citizens for failing to report crimes to the most serious offenses and excluded this responsibility entirely for members of a suspect's family. (The Model Principles had gone further and eliminated all criminal responsibility for failing to report). Secondly, the Draft Principles established limited liability for persons mentally ill but still held to be responsible for their acts. (This provision from the Model Principles was omitted in the first version of the Draft Principles, but restored in the second). Thirdly, the Draft Principles established that confession of a crime and restitution supplied not only a mitigating circumstance justifying a lower punishment but also grounds for the removal of criminal responsibility by an investigator, procurator or judge. (Commentators complained about both the ambiguity of two possible consequences of confession and the allocation of authority to waive responsibility to anyone other than the judge).

Finally, the most original new limitation on criminal responsibility was the concept of professional and economic risk. Already in the spring of 1986 reformers questioned the need for the prosecution of managers who violated the law not for personal gain but to fulfil the plan or improve the production process. Fulfilling the plan could require extending bribes and arranging the accounts to cover up the misuse of funds. Improving product or process could involve violating instructions of the agencies, for which criminal liability was also available (through Article 170 of the RSFSR Criminal Code). As a rule, authorities overlooked these pecadilloes, and when prosecutions were initiated, they often elicited intervention by politicians. On the basis of proposals by reformers, the examples of Poland
and Hungary, and the text set out in the Model Principles, the drafters included in the Draft Principles the exclusion of criminal responsibility for managers whose violations of the criminal law represented "justified professional or economic risks for the achievement of a socially useful goal." Risk would be considered justified "if the action corresponded to contemporary scientific-technological knowledge and experience," and the goal "could not be achieved by actions not connected with risk," and "the person allowing the risk took all possible measures" to avoid violating the law.\(^{35}\)

Although reformers of the criminal law had pressed for this innovation, many were disappointed by the wording of the text in the Draft Principles. The conditions defining justified risk seemed so difficult to fulfil as to undermine the purpose of the norm. Critics offered various alternative formulations, but curiously none eliminated the reference to technological change, which excluded from the norm's protection managers who committed offenses merely to fulfil the plan. The conservative formulation of the principle of "professional risk" reflected a lack of consensus about the wisdom of its introduction.\(^{36}\)

The thousands of managers convicted of economic crimes in the past, before the current transformation of the economy began, have also demanded attention. In the spring of 1990 a "Group for the Defense of Convicted Managers" received the approval of a subcommittee of the Supreme Soviet for its goal of achieving moral and juridical rehabilitation for the entrepreneurial activities of its members.\(^{37}\)

Limiting the criminal responsibility of managers could improve the operation of the state sector in the Soviet economy. But it was clear that steps toward privatization and marketization would require further decriminalization. In summer 1990 as discussions of a
transition to a market economy in the USSR became serious, economic reformers challenged the continuation of crimes that had defined the socialist economy and supplied tools for its management. Thus, a draft law introduced by radical economists into the RSFSR Supreme Soviet in early October, called for the complete decriminalization of such offenses as the production of defective goods, commercial middleman activities, and operations in hard currency. The law would also limit the crime of speculation to situations involving preliminary agreements with employees in trade.\footnote{No doubt the development of a market economy would require the elimination of these offenses and others besides, but neither the Soviet public nor politicians at the all-union level were prepared for this move. Quite the opposite, they were all too ready to blame the unfolding economic crisis on the activities of speculators and "economic saboteurs", and this had implications for the criminal law.}

Already in March, 1990, a new all-union law had increased the penalties that could be imposed for hiding goods from purchasers for the purposes of speculation. In late October, another law tightened and extended the restrictions against speculation and other violations in trade (such as "selling products from warehouses" and "nonregulated buying and selling"). And, in January 1991 a Presidential edict of dubious legality (contradicting the RSFSR code of criminal procedure) granted the police new powers to enter the premises of state and private firms alike and conduct searches without warrants in pursuit of "economic saboteurs", a category not even defined in the law!\footnote{With the economy in the USSR in disarray, the status of economic offenses in the criminal law was bound to remain a controversial issue, subject to changes in various directions. Initiatives could stem from different levels of government and come on occasion even from courts. Thus, in December, 1990, an appellate...}
panel of the Moscow city court took the unusual step of both acquitting a man who had sold wooden dolls (matreshki) in Izmailova Park for hard currency and declaring obsolete the offense of violating the rules of hard currency operations (Article 88 of the RSFSR Criminal Code). Through its decision the court was extending to private citizens a July edict of the Council of Ministers that permitted firms to trade for hard currency, and the court did so at the request of the procurator!  

**The Political Context of Reform**

Securing agreement among experts and representatives of law enforcement agencies on particular reforms did not assure that they would become law. The new USSR Supreme Soviet acted with considerable autonomy and paid heed to the trends in public opinion and politics beyond the realm of criminal justice. When the Draft Principles of Criminal Legislation and Draft Principles of Criminal Procedure eventually reached the legislature, whether in spring 1991, or later, their approval was bound to be influenced by two developments--the crime scare that started in 1989 and the unravelling of Soviet federalism.

Any crime scare encourages a punitive rather than a lenient or humane approach to criminals. The question was whether reforms emphasizing the rights of the accused and humanization of criminal law would be adopted in this unfavorable atmosphere.

The crime scare of 1989 had roots in a real increase in violent acts, but it was also a product of the new openness about crime and exploitation of the issue by conservative officials and journalists. To a degree the social panic was manufactured.
During 1988 and 1989 the rates of murder, rape and assault in the USSR rose dramatically. The causes of this increase included the renewed availability of alcoholic beverages, the release on amnesty of hundreds of thousands of convicts, and the new self-confidence of organized criminal groups. Reputable criminologists insisted that the rise in violent crime represented nothing more than the resumption of a trend that had started in the late 1970's, but this did not make the violence less real. On the contrary, with the help of glasnost, the public became more aware of violent crime in 1988 than it had been in 1985 when it was more frequent.

Journalists exacerbated the situation by reporting the most egregious examples in sensational ways and putting the spotlight on a previously hidden dimension of Soviet crime, organized criminal groups. A whole series of articles from 1988 informed the public about various mafia that reigned in particular regions of the USSR, kept officialdom at bay through payoffs, and extracted protection money from the new cooperative businesses. The rise in organized crime dated from the Brezhnev era, but only with perestroika did the public become aware of its scope. As if this were not enough, the Ministry of Internal Affairs (MVD) began releasing hard data on crime and in February 1989 published figures showing the dramatic rise in crimes of violence between 1987 and 1988. The Ministry went on to supplement these data with periodic reports on trends (monthly, quarterly) and "briefings" by top officials.

Almost as soon as the figures were released, conservative law enforcement officials started connecting the crime rise with legal reform. They attacked the new protections of the rights of defendants; the "humanization" of the criminal law, as embodied in the Draft
Principles; and even democratization in general. Thus, the police chief of Moscow, P. Bogdanov, equated concern about the presumption of innocence with softness on crime and described the implementation of this principle as "the presumption of all-forgiveness." (Within two months Bogdanov was promoted to Deputy Minister of Internal Affairs).

Investigator Nikolai Ivanov speculated in the Moscow youth newspaper that the authors of the new criminal legislation must have been paid off by criminals to have introduced such leniency into Soviet law. In an election speech in Moldavia the Politburo member supervising legal matters, Chebrikov, complained about the discouragement and passivity of law enforcement officials, who, he claimed, were afraid to stop crimes in progress, lest they be accused of violating the democratic rights of citizens.\textsuperscript{44}

All these arguments came together in a sensational article in Pravda in March 23, "I'm Buying a Pistol." The author Georgii Ovcharenko started with the story of a cooperative owner who had given up on the police and decided to protect himself from "racketeers." A friend on the police assured Ovcharenko that this was not unusual. "The population is arming itself. People are making pistols and bombs right at their workplaces... for self-defense." The author went on to blame this situation and the rise in crime that produced it on democratization and glasnost in general, and judicial and criminal reform specifically. "Somehow it often happens, and not without help from the press, that humanizing the administration of justice turns into protecting the lawbreaker's rights rather than the victim's." The result of the new concern with "fair" investigation and trial was that "the law enforcement agencies have lost their bearings. Afraid of going too far, they aren't going far enough." And, according to a leading conservative spokesman in the Procuracy,
the investigator E. Myslovskii, his colleagues had lost heart when they read the Draft
Principles. Ovcharenko agreed that the law paid too much attention to helping the
"criminals" and did nothing for the victims of crimes.\(^{45}\)

For its part, the public responded quickly to these charges, swamping the Central
Committee and newspapers alike with letters confirming its concern with crime and readiness
to connect its rise with democratization and humanization.\(^{46}\)

Put on the defensive, the promoters of reform in criminal justice mounted a
counterattack. The chairman of the USSR Supreme Court, Vladimir Terebilov, denounced
the current passions about crime as "artificially" created by interested persons, and a chorus
of scholars and legal officials came to the defense of the reforms. They reminded readers of
the importance of legality, noting how easy it would be to slip back into Stalinist practices.
And they urged the public to reject the emotional appeals of the fear-mongerers, especially
the "tendency to use the real growth in crime to attack the administration of justice, discredit
the democratic principles of judicial reform, and undermine the democratic basis of the law-
based state."\(^{47}\)

At their first meetings the new legislative bodies had to address the issue of crime. In
the confirmation hearings at the Congress of Peoples Deputies and Supreme Soviet, deputies
challenged Anatolii Lukianov, nominee for deputy chairman of the Supreme Soviet, to
explain the flourishing of organized crime and demoralization of the law enforcement; and
the new Minister of Internal Affairs, Vadim Bakatin, to defend his agency's record in
fighting crime.\(^{48}\) Under pressure from the deputies, the Soviet established in August 1989 a
Temporary Commission for the Struggle against Crime (with similar commissions for the
republics and provinces). In January 1990 the Congress replaced the Commission with a permanent committee of the Supreme Soviet.49

Another way of confronting the crime scare was to tackle its most frightening aspect, organized crime. Already in 1988 and 1989, legislation in the RSFSR had created the crime of organizing gambling and raised the sanctions for extortion (known as "rakety").50 In fall 1989 high police officials began lobbying for the legalization of eavesdropping on telephone lines. They proposed allowing eavesdropping in the investigation of any serious crime with the approval merely of the procurator. Legal reformers expressed shock at this reduction in the legal protection of citizens, and at the Committee on Legislation of the Supreme Soviet critics insisted that courts rather than procurators should sanction eavesdropping, as in "civilized states" like the USA.51 Their objections did not win the day, for in June 1990--after the Council of Nationalities had twice voted down the tapping of phones--the whole Supreme Soviet finally authorized the practice for periods of up to six months with the approval of a procurator or a judge.52

While the law and order mood generated by the crime scare stimulated opposition to the liberal direction of criminal law reform, the unravelling of the Soviet federal system in 1990 made the realization of a national level reform uncertain. Since 1957 criminal law and procedure had been areas of joint responsibility between the all-union and republican governments, with the former supplying basic principles of legislation and the latter codes. The plans for a new "union treaty" would maintain this arrangement.53 But even if most republican governments agreed to the treaty and to keeping criminal law under joint responsibility, the implementation of reforms on a national basis might still prove difficult.
To begin, the governments of some republics objected to the traditional form of power-sharing in criminal law. In its official reaction to the Draft Principles the Presidium of the Supreme Soviet of Latvia called for the removal from federal jurisdiction of the specification of types of punishments, bases for suspended sentences, grounds for excluding criminal responsibility, ways of handling juvenile cases, and medical measures. Two other republican governments submitted similar proposals. Division of powers was also an issue in criminal procedure. The Draft Principles of Criminal Procedure from the Institute of State and Law defined the rules for search and seizure; the competing version from the Procuracy Institute left this task to the republics. As a result of these conflicts, the Presidium of the USSR Supreme Soviet decided to delay legislative consideration of both sets of Draft Principles until the conclusion of negotiations on the Union Treaty.  

To secure agreement on a renewed federation even from the less independence-minded republics forced union authorities to decentralize power in the legal system more than they had anticipated doing. The second published draft (March 9) eliminated the subordination of republican procurators to the all-union procuracy in the enforcement of republican criminal law, a step of major import for the administration of criminal justice. Moreover, separatist jurists, from Estonia and elsewhere began insisting that the Treaty should also deprive the USSR Supreme Court of its power (since 1938) to review court decisions based upon republican criminal codes. Working in the same spirit, the editorial drafting committee established by the USSR Supreme Soviet to supply new versions fo the Fundamental Principles of Criminal Legislation and of Criminal Procedure legislation began paring down the earlier drafts, omitting many details and leaving the determination of
specifics to the republics. Thus, republican legislators gained the right to determine the circumstances mitigating or aggravating criminal responsibility; the age of juvenile responsibility (but not below 14); the criteria for designation as a specially dangerous recidivist; the size of fines; the criteria for parole eligibility; the conditions for elimination of criminal responsibility; and the responsibility, if any, for failing to report an offense. In the face of wholesale decentralization in the criminal law, leading jurists began discussing the establishment of a federal criminal law analogous to that existing in the USA, covering such matters as narcotics trafficking, ecological despoilation, and political crimes.

Furthermore, whatever jurisdiction the center retained over fundamental principles, the newly assertive republican governments might still produce distinctive codes of criminal law and procedure. After all, in 1990 most republican governments (including that of the RSFSR) assumed the power to decide which new all-union laws would apply on their territory. Some had already begun to exercise this power. Thus, the Presidium of the Supreme Soviet of Latvia has supported abolition of the death penalty, ahead of other governments. Reform-minded jurists hope that the government of the RSFSR, under Boris Yeltsin and the young Minister of Justice Nikolai Fedorov, will support positions at odds with conservative moves taken by the all-union government. Accordingly, the Institute of State and Law of the Academy of Sciences sent to the RSFSR Supreme Soviet a draft code of criminal procedure that "fails to incorporate the new USSR law on the tapping of telephones". Of course, republican governments could also adopt positions more conservative than those pursued by the center. One should look to the governments in Central Asia for examples.
Apart from the influence of the crime scare and the shift of power to republican governments, the reform of Soviet criminal law and procedure faced an unpredictable course as it proceeded through the new USSR Supreme Soviet. The quixotic conduct of the deputies changed the content of draft laws more than once in 1990-1991 and promised to do so again in the future. Thus, in the winter, deputies on the Committee on Legislation decided to drop rape of a minor and terrorism from the lists of crimes eligible for the death penalty. In May, 1991, the same committee expanded the applicability of capital punishment by dropping the exclusion from this sanction of men over the age of sixty! This change resulted from an initiative on the part of A.S. Pavlov, Head of the Department of State and Law of the CPSU Central Committee, and A.P. Trubin, USSR Procurator General. They argued that the exclusion would hinder the prosecution of war criminals.\textsuperscript{58} Deputies introduced other significant changes in the draft Fundamental Principles of Criminal Law and the draft Fundamental Principles of Criminal Procedure.\textsuperscript{59} The frequency of the changes and ease with which deputies rejected products of years of deliberation bewildered and dismayed some of the scholars who wrote the initial legislative drafts.

Afterword

The realization of any major reform in criminal justice is difficult. For implementation usually calls for changes in the conduct of public officials, if not also new understanding of their missions and responsibilities. Bringing reform of Soviet criminal justice to fruition in the 1990's requires overcoming another large obstacle, the instability of
public life as a whole. Revolutionary changes and struggles already engulfing the economy and government are likely to continue into the 1990’s, and developments outside of law promise to influence its evolution in basic ways.

To give just a few examples: will conflicts in economy and policy lead to more disorder, even violence, and intensify the public’s urge to make punishments more severe? Will the political transformation produce republic governments and successor states insistent on shaping their own criminal law and justice? Will the shift toward a market economy deprive criminal law of its utility as a tool for administering the public sector and result in substantial decriminalization? Will economic recovery give governments new resources to train and support public defenders and increase the number of judges?

The fate of reform in Soviet criminal law and nature of criminal justice in tomorrow’s Russia depend upon the larger course of events.
NOTES

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4. Ibid; Huskey, op. cit. note 2.


april 1990, "O vnesenii izmenenii i dopolnenii v Osnovy Ugolovnogo
Some liberal advocates have reportedly challenged the legality of the 24 hour period
between arrest and the start of right to counsel, as contradicting the Law on Court

9. Interview with Igor Petrukhin, April 20, 1990 (in Moscow); Feofanov, op. cit. note
8; G. Sokolov, "Khotia zakon i priniat," Pravda, 3 January 1990, 1; "Nuzhna li
zashchita advokatu," Izvestiia, 4 January 1990, 3; Meeting of the "Obshchestvennyi
Naucho-Issledovatelskii Institut Advokatury," April 15, 1990, in Moscow, to discuss
the model criminal procedure legislation, especially appearances by V. Savitskii, G.
Pavda, Boris Abushakhmin, G. Move, and Gofshtein. The session was attended by
the author of this chapter; see also George Fletcher, "In Gorbachev's Courts," New

10. I.L. Petrukhin, "Zaderzhanie i arest (okhrana interesov lichnosti)," SGiP 1989 No. 9,
73-82; I.L. Petrukhin, Neprikosnovennost lichnosti i prinuzhdenie v уголовном
protsesse, Moscow 1989, 169-194. See also, Yuri Feofanov, "Vozvrashchenie k


12. Ibid., 169-194, 249-253. Although Petrukhin would have preferred to transfer the
initial sanctioning of pretrial arrests from the procuracy to the courts, he recognized
that this could occur only in the context of a transformation of the role of the courts
and the procuracy in Soviet criminal justice, an idea promoted by one group of radical
reformers, but not feasible as of 1989. For a proposal to introduce "investigatory
judges" to supervise the whole pretrial phase, see S.V. Bobotov, et al., "Puti
sovershenstvovaniia sistem y уголовноi iustitsii," SGiP 1989 No. 4, 87-96.

13. Ugolovno-protsessualnoe zakonodatelstvo Soiuz SSR i RSFSR. Teoreticheskaia
model V.M. Savitskii, ed., Moscow 1990; "Osnovy ugolovno-protsessualnogo
zakonodatelstva;" A. Boikov and I. Demidov, "Konseptualnye voprosy izmeneniiia
zakonodatelstva ob уголовном sudoproizvodstve," Sots. Zak. 1990 No. 1, 26-28;
"Zakon nuzhno sovershenstvovat, no ne ukhudzhat," Sots. Zak. 1990 No. 1, 29-32;
Feofanov, op. cit note 8; Petrukhin, op. cit. note 11, 188-190.

sledstvennomu apparatu," SGiP 1991 No. 1, 30-39; Peter H. Solomon, Jr., "The
Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal

15. Ugolovnyi zakon. Opyt teoreticheskogo modelirovaniia (V.N. Kudriavtsev and S.G.
Kelina eds.) Moscow 1987. In May 1986 the author attended a meeting of the team of scholars preparing the model criminal code of the RSFSR.


24. "Predlozheniiia i zamechaniiia, vyskazannyie po proekty Osnov Ugolovnogo Zakonodatelstva...narodnymi deputatami SSSR i Prezidiumami Verkhovnykh Sovetov soiuznykh respublik," na 5 marta 1990 (unpublished); Interview with Kelina op. cit. 
note 16; Fletcher, *op.cit.* note 9, 13-19.


34. "Osnovy (Proekt), 1989" *op.cit.* note 16; "Osnovy (Proekt), 1990," *op.cit.* note 16; Zagorodnikov, Naumov and Sakharov *op.cit.* note 25. Among the promoters of


"Iazykom tsifr," Argumenty i fakty 1989 No. 28, 7.


53. "O vnesenii izmenenii i dopolnenii v Osnovy Ugolovnogo Sudoproizvodstva Soiuza
SSR i Soiuznykh Respublik," Izvestiia 21 June 1990, 2. The only protections placed in the law were a requirement that irrelevant phonograms be destroyed and a reminder of the penalties for spreading privileged information.


56. "Dogovor o soiuze suverennykh respublik: Proekt," Izvestiia, 9 March 1991, 2, Article 19; Igor Grazin (professor of constitutional law, Tartu University), speech at the Tenth Annual Baltic Symposium, "The Politics and Economics of Baltic Independence," Toronto, 23 March 1991; T. Shamba and G. Kolbaia, "Nuzhen li Soiuzu Verkhovnyi Sud?" Izvestiia 25 March 1991, 3; "Osnovy ugolovnogo zakonodatelstva Soiuz SSR i soiuznykh respublik," Proekt dorobotan podgotoviteinoi komissiei s uchetom vsenarodnogo obsuzhdeniia, zamechanii i predlozhenii postupivshikh iz soiuznykh respublik, a takzhe vyshkazannyh na zasedaniakh komitetov Verkhovnogo Soveta SSSR po zakonodatelstvu, po voprosam pravoporiadka i borby s prestupnostiu, unpublished (Moscow, 1991); Interview with S.G. Kelina, in Moscow, 18 May 1991. Interview with Valerii M. Savitskii, 22 January, 1991 (conducted in New York by Todd Fogelsong). According to Savitskii, the editorial commission comprised one half deputies and one half expert jurists. The latter included three scholars form the Institute of State and Law, two from the Procuracy Institute, and officials from the Ministry of Justice, and, for the first time, a defense counsel representing the Union of Advocates.

57. "Vnimanie! Vas podslushivaiut!" Beseda Iu. Slavin s V. Savitskim, Argumentyi i fakty 1990 No. 38, 7. For both sides of the continuing controversy over the tapping of telephones see "Sviditel--telefon?" Chelovek i zakon 1990 No. 9, 24-35 and 42.


59. Changes in the Fundamental Principles of Criminal Legislation introduced in May 1991 included a provision indicating that illegal actions of managers could not represent justified economic risk if they posed a threat to the ecology or the lives of masses of people (a post-Chernobyl provision) and a new section on crimes by juveniles. The version of the draft Fundamental Principles of Criminal Procedure
circulated in early 1991 gave advocates the right to collect evidence during the pretrial phases (but not access to case files) and supplied two versions of the timetable for pretrial detention and its extensions. Interview with Kelina; "Osnovy ugolovno-protsessualnogo zakonodatelstva SSSR i soiuznikh republik," Proekt (unpublished, Moscow, 1991).