



Department of Justice

"THE RULE OF LAW IN THE SOVIET UNION: HOW DEMOCRACY MIGHT WORK"

THE LOUIS CAPLAN LECTURE

BY

DICK THORNBURGH
ATTORNEY GENERAL OF THE UNITED STATES

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UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

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Much attention today is focused on the remarkable changes occurring in the Soviet Union and Eastern Europe -- behind what used to be known as the Iron Curtain. Political, economic, and social upheaval have become the rule rather than the exception, as one wave of change succeeds another in a seismic disruption of that formerly monolithic empire. But, I suggest to you this afternoon, the only way that these upheavals are likely to settle into truly positive outcomes is if the changes which eventuate -- and the new systems which are created -- are grounded in the rule of law.

This is the message we at the Department of Justice carried to our Soviet counterparts early last fall -- at the very beginning of the Supreme Soviet's effort at institutional reform -- as we opened an historic, and continuing, dialogue on the rule of law at the invitation of the Soviet Ministry of Justice.

It was a remarkable experience. We met for a week with Soviet leaders in the fields of law enforcement and the administration of justice -- ministers, jurists, law students, even the head of the K.G.B. Our agenda was a full American one, devoted to topics central to what makes our democracy work: our Bill of Rights, our federal system, the principle of separation of powers, with its checks and balances, our two-party political process -- all from that curriculum of liberties we teach (but don't always learn) in our basic high school civics courses.

And I have to credit our Soviet hosts, even at that early juncture, with a bold exercise in political science. Our discussions were open and free-ranging, covering everything from our mutual interest in stopping international terrorism to their obligation -- as we see it, and they increasingly recognize it -- to allow freer emigration of Soviet Jews. But our talks still took place within an historical context that must be understood, if their present difficulties are to be fully recognized, or ever surmounted.

To summarize abruptly a great deal of history, Soviet justice derives from three legal traditions: customary law among the peasantry, the imperial law of the Czars, and, much later, the Romanist law of civil codes. Customary and imperial law have had by far the overwhelming impact, creating a government of men above the law, from the Mongols to the boyars to the Czars and beyond. Various formal codifications of imperial law did appear. But the operative legal power was still vested in what we commonly know as the ukase. "A proclamation of a Russian Czar," as Webster's says, "having the force of law."

This violently changed -- yet did not really change -- when the Bolsheviks came to power. Initially Lenin abolished imperial law, along with private property, and set up the people's courts. Judges were instructed to follow the decrees of the revolution -- or their "socialist conscience." Later, Lenin and his successors

moved to keep authoritarian sway over the courts by what became known as "telephone justice." Party officials frequently rang up the judge, who then ruled in each case according to what the party told him to do. The ukase had been reduced, by 20th century technology, to a phone call. The legalistic way was prepared for Stalin's Moscow show trials during the Great Terror and, thereafter, the habitual subordination of the law to party interests.

Against this unpromising background, the Supreme Soviet has now embarked upon an idealistic and laudable attempt to establish the rule of law -- or in Gorbachev's words, a "law-based state." Could it actually happen? So often you hear it optimistically said: remember that Mikhail Gorbachev was trained as a lawyer. Yes, but so was Lenin. The chances are certainly there -- as we saw during that week, and continue to see as Soviet lawyers visit with us at Justice. But chances of success must always be measured against these long fatigues of history -- the institutional neglect and political disrespect for what we know as the rule of law.

What is really missing is what might be called a "legal culture." Time and again, we found a naive belief that all that was needed was to pass the correct statutes, to get the right laws on the books to create a "rule of law." We did our best to try to disabuse them of this legalistic notion. Laws on the

books, we explained, must be conscientiously obeyed and impartially enforced within a structure, and through a process, recognized and acknowledged by all. . . citizen and bureaucrat alike.

The rule of law works in a democracy, we pointed out, because of the supremacy of the judiciary, because men adhere to a government of laws, and act to see that the laws are enforced, in such ways that no man is above -- or below -- the law.

Happily, the very things the Russians found most curious about our democracy let us discuss those practices in our law that really make our democratic process work. For example, one of the first, most insistent questions I was asked by nearly everyone was, inevitably, a constitutional one: how does your federal system work? How did you weld together the separate states as the United States? How do you keep things from falling apart through incessant struggles between the national government and 50 different state governments?

Obviously, they are worrying about the unrest among their own Republics. You only need look at the present stand-off in Lithuania to understand their anxiety. They are also looking to us for ways, if you will, to deal with their own diversity. We gave them a very pragmatic answer. We did our best to explain, "Look, this is the way we do it, but the central thing about our

system is its accommodation to change. Most of the mechanisms and components of our government are designed to accommodate change. And mastering that process is going to require far more than just the passage of new laws by the Supreme Soviet."

It is going to take a commitment to the lawful, democratic process, and we tried to emphasize legal process -- due process of law -- even over substantive rights, as the true safeguard of the people's liberties. Again, they asked us often, and in much confusion, about separation of powers. The idea of deliberately building in a tension between separate branches of government -- our concept of checks and balances -- was extremely puzzling to them and, to some, incomprehensible.

Accustomed to their own monolithic system, they would have to struggle hard to understand, for example, Justice Brandeis' observation that we adopted the separation of powers in 1787 "not to avoid friction, but by means of the inevitable friction incident to the distribution of government powers among the [branches], to save the people from autocracy."

So we called attention to their own guarantees of civil rights under their Soviet constitution. There they are, all fully documented, like our own Bill of Rights. Only there is also the carefully worded escape clause: "Civil rights shall be protected by law --" Just as the rule of law would hold -- but

with this kicker. "-- except as they are exercised in contradiction to their purpose in socialist society in the period of communist construction."

That, of course, admits the ubiquitous specter of party tyranny. Attempts are being made to toss this offensive language off the train by the new thinkers. But it's not litter down the tracks of history yet. And still to come is the real test as to whether the Soviet courts themselves can and will act to protect the defendant's rights. In short, will respect for legal process eliminate the prior abuses of "telephone justice"?

The Russian courts, for example, are dominated by the Procurator -- the official state prosecutor -- a far grander figure than the judge. In fact, the only court personage lower than a judge -- in pay and prestige -- is a defense attorney, the so-called "friend of the court." Soviet justice puts great emphasis on the preliminary investigation. The defense attorney is not even allowed to represent his client during the investigation. No reading the defendant his "Miranda-vich" rights. One legal reform is designed to allow a defense lawyer to represent the defendant at some earlier point during that preliminary investigation. But at what point seems still to be left to the judge's discretion -- not yet a matter of legal right, inviting possible legal abuse.

I go into this much detail to emphasize where true legal reform must focus if the rule of law is ultimately to prevail in the Soviet Union. Just last week, please note, President Gorbachev abruptly replaced the chief prosecutor in Lithuania with a more pliant Soviet prosecutor. The Lithuanian prosecutor had refused to carry out, through the courts, Gorbachev's order to disarm Lithuanian citizens -- an interesting reflection, by the way, of our own right to bear arms, under the Second Amendment. Fifty-eight Lithuanian procurators signed a letter of protest, but the replacement went forward to scotch the power of a prosecutor grown suddenly too independent. That is why I say true reform must reach down into the legal culture itself, and create an inherent respect not only for individual rights, but for legal procedure and due process.

One problem is that much of the motivation for legal reform is coming from a different direction altogether. The Soviets face one great, dire urgency -- besides national unrest -- and that is their economy. To survive, they must enter the free world marketplace. To do that, they realize they must position themselves to recognize -- and take advantage of -- the rules of free commerce.

In my view, one of the principal reasons for their great interest in the rule of law is that they have an immediate and pressing need to jump-start their participation in the world

economy, to attract foreign know-how and investment. To do that, they realize they must display the predictability and stability that can only emerge from a body of commercial law -- which, in turn, respects the sanctity of contracts and, yes, recognizes property rights as well. Fear of abrogation of contract rights or expropriation of investments can stunt otherwise attractive commercial and industrial initiatives.

This is one reason why property rights are now being so hotly debated in the Soviet Union. Indeed, on the very day we visited the Supreme Soviet -- a semi-democratically elected legislature, and a developing seat of power -- debate on this subject went on seemingly endlessly, and with very good cause. The Soviet Constitution says that property belongs to the state alone. But might such state property be legally leased to cooperative, joint ventures? And how does a Soviet citizen "act like an owner," as Gorbachev has instructed, without ownership? As we watched, the late Dr. Andrei Sakharov, among others, rose to voice his objections to the Government's bill. Finally, two bills, partially in conflict, were sent off for a further massaging which continues to this day.

Adept legal accommodation can also be seen in the liberalization of their emigration policies. We are convinced they are now doing their legal utmost to facilitate the issuance of emigration visas -- as a new exodus follows hard upon a rise

in anti-semitism in Russia -- but their interest is not wholly altruistic. They would like to meet the strictures of the Jackson-Vanik legislation in order to secure the most-favored nation status that would much enhance their prestige in world markets. Still, we must be convinced -- as in so much else undertaken in the name of Soviet legal reform -- that not just the letter, but the spirit, of the law has taken root in the Soviet Union. We are, in short, watching to see that opportunities to emigrate are institutionalized in law and practice, and are not just episodic, in the present uncertain flux of Soviet democratization.

At the same time, I do not want to downplay their efforts to achieve the rule of law, or underestimate the modern-day difficulties of democratization. Two hundred years ago, we could call upon our English, common law heritage, and an American over-abundance of legal talent, to create our written Constitution, even in crisis. Also, we were then only four million, relatively homogeneous Americans, mostly concentrated on the Atlantic Coast -- not 290 million multi-cultured Soviet citizens, spread across eleven time zones. Moreover, our Constitutional Convention deliberated in secret -- not under glasnost. Imagine, if you will, George Washington on worldwide television, in the midst of a currency crisis, trying to suppress Shay's Rebellion, letting Vermont and New Hampshire pursue Yankeeism in their own way, negotiating with Quaker Solidarity, while trying to cut an

arms deal with the British and French to put a cap on heavy frigates. George Washington, you will recall, did not say one single word while presiding at Philadelphia.

And we have kept that early American experience with constitutionalism alive by calling ourselves, from time to time, into convention among the fifty states. I still recall, in the mid-60s, going to Harrisburg as an elected delegate to our Pennsylvania Constitutional Convention. We did fine work on local government, and struggled hard to reform the judiciary -- my own particular passion. But on court reform -- though we succeeded with 75% of our recommendations -- we still couldn't eliminate political partisanship from the election of judges -- a problem which persists to this day. Win some, lose some -- as always. Next time -- as always.

The Soviets have had none of this practical, political experience. They suffer all the drawbacks of history, including their own, most recent, flawed history. But do they now recognize these flaws, particularly in law, and do they sincerely want to counter them by establishing, for example, an independent judiciary -- an institution they have never known, from Czarist times forward? The ultimate answers to those questions are unknown, but there are a few signs of an incipient legality. They are actively discussing a doubling of judicial salaries, now below the average wage. They are also allowing lawyers to charge

what they will -- instead of a scale of fixed fees (plus money under the table) -- and are taking steps to allow them, actually, to defend their clients.

They are also evolving a concept of judicial review -- perhaps a committee to rule on the constitutionality of their laws -- and instituting penalties and sanctions to stop interference in judicial deliberations. When their Helsinki delegation was in my office recently, I was told a bill covering many of these guarantees of judicial independence and integrity has already had its first reading in the Supreme Soviet.

So there appears to be a will to a rule of law, if still much wandering in pursuit of untried, democratic ways. Going for such high stakes means that it is far too early to determine their chances of success. But I do remind you of two highly successful, post-war experiments in democratic reformations: Germany and Japan. Again, there is a large difference in national circumstances -- whole histories, wartime sufferings, other relevant factors. But we have seen the political adaptability of West German democracy overcome many obstacles from the totalitarian German past, and witnessed -- sometimes to our chagrin -- the Japanese experiment's continuing, modern triumph over centuries of emperor-worship. And both experiments were undertaken in similar adversity: by an undone people -- even a conquered people -- in economic extremis, at a moment of deep

disillusionment with their own society. Could something far different, yet alike, happen again? For the sake of world harmony, we can hope so, while also providing whatever encouragement is possible.

One final, positive observation. Ten years ago, when I visited the Soviet Union as a governor, I found each official session invariably opened with an almost obligatory denunciation of the United States and our system of government. Ten years later, nearly every meeting with our counterparts began with a litany of woes -- their recitation of the shortcomings of their system -- and an almost wistful yearning for more knowledge about how our democracy works.

So I come away from my most recent visit to the Soviet Union -- and my subsequent contacts with their legal delegations -- well aware that Soviet justice does not yet embody what we know as the rule of law, but convinced that patience and example, and even some advocacy, might help certain determined Soviet officials to establish the rule of law. Like everybody else's democratic experiment, it will have to be attempted and achieved within their own society. Constitutional law will be formalized differently by the Russians -- or the Poles, or the Hungarians, or the Czechs. Nobody else but their own judges, lawyers, ministers and citizens can evolve the judicial fairness and institute the legal restraint that underpin any rule of law.

That respect for law that people are steadfastly demanding in the open squares and open parliaments and newly open societies of the formerly closed Communist monoliths.

But we will know it when, and if, it appears. By the human rights the rule of law protects, by the governmental powers it limits, by the judicial independence it preserves. We will know it, constitutionally, when we see it. After two hundred years of experiment on our own -- who better?