



Max M. Kampelman Papers

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LINDA-
FOR BOOK IN
TO BE SENT OUT TO
THE 2 I GAVE YOU -
ALSO TO MR. NELSON
WITH A COVERING NOTE / WILL DICTATE
THE RULE OF LAW IN THE SOVIET UNION

~~DRAFT~~ ~~E~~ AS READ

FINAL

Address by

MAX M. KAMPELMAN

To The Section On International Law

American Bar Association

April 27, 1989

Washington, D.C.

✓ Our attention, and that of the world, is riveted on the dramatic changes now taking place in the Soviet Union. This is an exciting and crucial period, as we accept into our everyday vocabulary, untranslated, those two significant and inelegant Russian words, perestroika and glasnost, with the hopes for changes they bring to mind. We ask: Are they real? Are they irreversible? What are the implications for us? For peace? It is appropriate as lawyers that we address those questions within the context of what we call "the rule of law."

It was my personal good fortune to be given the opportunity, on behalf of our government, to be involved in two separate negotiations with the Soviet Union during the past decade. In 1980, President Carter asked me to serve as the Head of the U.S. Delegation at the Madrid Conference on Security and Cooperation in Europe under the Helsinki Final Act. At that time the subject of human rights was beginning to be injected as a major item on our country's international agenda. We prevailed in that negotiation, but the Soviet Union stubbornly insisted that the discussion of the subject was an improper interference in their internal affairs.

In 1985, when President Reagan asked me to return to the negotiating table as head of our nuclear arms reduction negotiating team, an extraordinary change became evident. Under the leadership of the President and the careful direction of Secretary of State George Schultz, the United States enlarged upon what President Carter initiated, and incorporated the concept of human rights as a primary and constant ingredient in the totality of our relations with the Soviet Union.


For many years now, the United States has with one voice, and with the cooperation of our allies, been urging the leadership of the Soviet Union to understand that human rights violations are a source of serious tension between us. We are

not comfortable dealing with a regime which persecutes its own people. This message appears to have come across, as has the message that a nation which does not live up to international accords in human rights cannot be trusted to live up to accords in other areas as well. We have watched carefully, therefore, as the system has begun to open. Much skepticism remains, as it should, but there is also realistic hope and increased expectation.

The first blush of glasnost has thrown new light on the Soviet legal system. Criticisms of the old ways now compete for space in Soviet journals and newspapers with proposals for revisions. Vast changes affecting the administration of justice are being advanced. President Gorbachev has resurrected a term once condemned as hopelessly bourgeoise to explain the new legal goals. That term, an empty vessel yet to be filled, is "the rule of law." The fate of that concept may serve as a weather vane for the fate of perestroika as a whole. When we evaluate a country, there are few criteria more telling than its practice of law.

In America we have enshrined individual liberty by seeing to it that our "rule of law" constrains and holds accountable all power that men hold over each other: Private power is restrained by law and competition and public opinion. Every

branch of government is held in balance and check by the Constitution. And the entire system is greased by the unhindered freedom of thought and consequent intellectual vitality that is given free rein by our guarantees of freedom.

 (As Justice Brandeis so eloquently stated;

"Those who won our independence ... valued liberty both as an ends and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. (Furthermore,) they knew that order cannot be secured through fear of punishment for its infraction; that it is haphazard to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government... Believing in the power of reason as applied through public discussion, they eschewed violence coerced by law -- the argument of force in its worst form."}



When we speak of the "rule of law" we mean not only procedural guarantees that provide specific consequences flowing from violation of well established laws, we also speak of human values. Following the rules is not enough. One of this century's most imaginative political thinkers loaned his name to the danger of adherence to rules without values -- we shudder at the word "Orwellian." There are, therefore, understandably those who believe that the term "Soviet law" is a contradiction in terms. The widespread use of terror as an administrative tool in the Soviet Union, justifies this disbelief.

Let us dwell for a moment on this alliance of might and right. The Russian word for law is "pravo". Capitalized it

also stands for the theoretical precepts of Right and Justice. And indeed the word "pravo" is related to the Russian word for truth, "pravda". Tellingly, the first collection of Russian laws in the 19th century was entitled simply "Russkaia Pravda" - Russian Truth. Roman law, the basis for the Russian legal system, has always put emphasis on the judge as a lawgiver rather than an umpire. Unlike our system of Anglo-Saxon law, an independent judiciary beholden to the strictures of due process has not been a central feature of Russian law.

~~§~~ This attitude persisted past the revolution along with other similarities that were bound to exist, because tsarist and Soviet Russia faced the same internal conditions: a vast area of open borders populated by diverse peoples of different tongues, cultures and aspirations; and a generally low standing of material and cultural life beyond that allowed to the elite. Repeated invasions left Russia a military state since the expulsion of the Mongols. Primitive medieval law prevailed for some 800 years after Western Europe had moved on in the 11th and 12th centuries. As the pre-revolutionary Russian Prime Minister Count Witte remarked in 1905 "the marvel is that the country can be held together even by autocracy." ~~§~~

The 1917 revolution that was to do away with the necessity of the state and law ended up embracing and utilizing the legal

traditions it inherited. The emigre Nicholas Berdiaev caustically noted in the 1940's, "in 1917 we believed that Communism had swallowed up Russia; today we see that Russia has swallowed up Communism." ~~While~~ While the Soviets do possess a Constitution ostensibly modeled on western examples, those who administered the laws had a different calling. Lenin, a lawyer himself, proclaimed "a law is a political measure, it is politics." ~~We~~ We can almost imagine him speaking when we read the Grand Inquisitor's bitter rant in Doestoevsky's Brothers Karamazov:

The (people) are corrupt and undisciplined, but in the end they will be the obedient ones! They will marvel at us and worship us like gods, because, by becoming their masters, we have accepted the burden of freedom that they were too frightened to face, just because we agree to rule over them -- that is how frightening freedom will have become to them finally!)

The Soviets have historically seen the role of law in society as that of a parent and teacher. ~~[(Rather than with the Western concept of the reasonable man, a Soviet citizen faces the law as a dependent youth, one who must be guided, trained and disciplined by members of the judicial vanguard seeking to move its unfinished and immature subjects towards a new and higher phase of development.)]~~ Rights are granted rather than "inalienably" held. And the keepers of the flame of ideological correctness are, of course, high ranking Party members.

It has, therefore, not been regarded as an aberration that the judiciary takes its orders from the party. Judicial autonomy has officially been long regarded as unnecessary. In an updating of a role that used to be filled by the aristocracy, local party bosses have apparently come routinely to dictate the verdicts and sentences for Soviet judges to pass down in a wide variety of sensitive cases. Soviet lawyers have long bewailed what has come to be known as "telephone justice."

These verdicts can rarely be successfully questioned, given that Soviet legislation and legal procedure is riddled with inconsistencies, ambiguities, exceptions, generalities and loopholes. These evasions become a means for bureaucrats to circumvent any law they may choose, especially in a country where no centralized reporting of opinions or legislation exists. Legislative interpretation by Soviet judges has often appeared to be inspired by Humpty Dumpty who, in Alice Through The Looking Glass, said "When I use a word, it means just what I choose it to mean - neither more nor less."

Now, under Gorbachev's perestroika, the old icons are toppling. The heavy weight of economic disintegration has led even the staunchest Soviet conservatives to admit that business as usual cannot continue and, as we all know, this has opened up

a wholesale review of the methods, if not the aims, of the Soviet system.



The new Gorbachev goals of "the rule of law" -- which we must remember has only recently begun to be discussed in official circles -- are still shrouded in ambiguity. This has been exacerbated by the way in which the new laws are drafted. For example, a new law that demands national discussion of important legal initiatives fails to define the word "important." Obviously, the drafting was the result of a political compromise to meet strong opposition to the law's purposes. This has led to the ironic situation where even the top legal scholars in the USSR are unaware of who is drafting the laws on glasnost and what the process is yielding. What is clear is that Gorbachev's Politburo is the final reviewing committee.

The Kremlin's new ideology chief, Vadim Medvedov, acknowledges that "our efforts have met with resistance and provoked suspicion and even confusion. We have discovered that we have no theory to substantiate our efforts..." This points to a central paradox. There is obviously no democratic infrastructure to institute or execute a coherent program of democratic reform. Furthermore, the current infrastructure consists of mid level managers and apparatchiks, with supporters

and sponsors in the Politburo, who quite reasonably believe that they will be the net losers under a reformed administrative structure. Gorbachev has made no significant progress in simplifying and rationalizing the governments byzantine departmental organization.

To date, President Gorbachev has been either unwilling or unable to establish the fundamental theoretical and institutional constructs to guarantee the supremacy and continuity of the "rule of law" he apparently seeks. In this connection, Vladimir Kudryaytsev, Director of the State and Law Institute, has said: "the supremacy of the law may easily turn into a reactionary force if the law itself does not reflect the will of the people, their vital interests, and democratic aspirations."

Large numbers of Soviet lawyers and others seem quite prepared to enter the fray of legislative debate. When the law on national discussions was applied to draft legislation on cooperative (private) enterprises, some 200,000 proposals for amended or supplementary proposals were sent to the Supreme Soviet. Criticism ranged over a panapoly of features and showed a feistyness of spirit that bodes well for the democratic forces of procedural reform. Perhaps this is a reason why the central authorities want to keep drafting their laws in secret.

 When we look at the challenges involved in reorganizing ministries, the new law on state enterprise, the new law on individual labor activity, the new law on private cooperatives, the new joint venture law, new long term farm leases, the new issuance of securities in state-owned enterprises -- our minds spin. We can see the temptation to work out their initial details in private rather than submitting the entire proposition to the cacaphony of public debate. 

In going through this exercise of debate and accommodation the Soviet people may well find their own distinctive voice. We were all stunned at the thought of defeating politicians by crossing their names out -- "none of the above." Many would like such an opportunity in our own country. An interesting sample proposal was: If the police are paid from tax revenue to stop crime, shouldn't crime victims be reimbursed from the public treasury when the police fail to keep their end of the deal? People seem to be thinking in ways that cut to the quick of the social contract.

The concept of an independent judiciary is beginning to get some credence for the first time in Russian history. Rules are now being drafted - albeit by hands unknown - to criminalize interference with a court's decision. Many Soviet academics

hope that the judges' autonomy will be further increased by granting them tenure for a set term so as to better insulate judges from the local party bosses. Victor Teriblov, Chairman of the Supreme Court, has pronounced that "the ultimate ruling on collected evidence can be made only in court and only by a court of law! (This is) the most important principle of justice."

Also shaking the tree of the legal establishment are proposals that the two lay assessors who sit with each judge, who are predominantly political, and almost always follow his lead, be replaced with lawyers. Procurators, who act as supercharged District Attorneys with the power to hold a suspect for the nine months allowed for a preliminary investigation, are being pressed to cede some of their power to defense attorneys who are asking to be allowed access to their client and case materials soon after arrest and not after the police investigation ends and the trial begins. The idea of independent jury trials is also being discussed.

We hope that those who lay the groundwork for vital procedural and judicial reforms, together with the small band of spectacularly newly elected reformers in the Congress of People's Deputies, can prevail. We have seen that while President Gorbachev denounces a multi-party state as "rubbish,"

many of the reform candidates for the Congress successfully ran on a slate promoting just such a vision. When the Soviets promised that the abhorrent Articles 190 and 70 on anti-Soviet activities would be repealed, there was great expectation. The proposed new law in its place, introduced April 8, which would criminalize the advocacy of overthrowing the Soviet system, brought sharp criticism, leading procurators and others to defend their product by explaining that the new law would not be strictly enforced!

Helping to build the philosophical staging ground for the attack against the status quo is the new Union of Advocates, formed in February. Arkady Vaksberg of Literaturnia Gazeta, perhaps the preeminent commentator on the rule of law in the Soviet Union, says that now this group has been "freed from the tutelage of the Ministry of Justice" after a long and bitter struggle. It represents "a qualitatively new phenomena in the Soviet Union." This organization, which I am pleased to note has ties with the ABA, is seeking the right to propose draft legislation designed to protect the rights of defendants and their lawyers. It was not, incidentally, until last September that lawyers, nearly all of whom served "walk-in" clients in "storefront operations," could set their own legal fees.

To summarize, a process has begun which is promising, but the reigning resisting orthodoxy is strong. There are no guarantees. Guarantees can only come through constitutionalism, due process, and normative integrity. This process is of immense importance to the future of the Soviet Union. On its success, I suggest, hinges the ability of the Soviet government to meet the immense economic and social challenges it faces.

Clearly economic reforms are of overriding importance to the citizens of a superpower that lags behind Mauritius and Barbados in preventing infant mortality. Even the central planners recognize that their micro-management of the endless number of one year and five year plans are hindering their ability to focus on the larger issues of economic policy setting. [Despite the optimistic targets recently released for agriculture, the Soviets will still need to import increasing amounts of food at a time when grain prices are rising. Oil, the basic Soviet hard currency export, is required to meet energy shortages at home, and its world price remains soft. ~~Lives~~ are long and consumer goods, particularly food supplies, becoming scarcer. It is estimated that the underground consumer services sector has quintupled in the past 15 years, with increasing enterprises diverting their products and services to the black market. Recent moves, such as the law on individual labor activity, attempt to bring the black and gray markets back into

the legal fold so as to be able to tax them. However, the tax system does not work. Furthermore, without checking accounts and credit cards, how can the transactions that reveal a taxpayer's net receipts be documented? Legalizing part of the black market without realistic audit procedures is an invitation for further abuse.]

It will be inordinately difficult for President Gorbachev to establish a transition towards an open economy working to increase the material well being of the Soviet people and their economy. When in Moscow recently, I was told by a Russian economist: "Many books have been written on how to transform a capitalist system into a socialist one, but not one on how to turn a socialist system into a capitalist one."

What is certainly needed is a foundation of structural reform. A precise definition of executive, judicial and legislative functions will be needed, and those institutions must be powerful enough to overwhelm the currently all-powerful administrative organs run by middle-level bureaucrats. The judiciary must hold the apparatchiks accountable for violation of statutory norms, rules and procedures. Bureaucratic norm-setting and enforcement has to be replaced by a constitutionally mandated process that will be recognized as "law" - a process that must be held to review so as to ensure

the consistency of all governmental acts and decisions with a broadly accepted "rule of law" principle. Confidence in such an evolving process can bring with it an uplift in morale and sense of purpose required to revitalize life in the Soviet Union for its citizens. The enormous strength and soul of the Soviet people should not be underestimated.

Where this leaves us as American lawyers is, for better or worse, with a unique historic opportunity. The Soviet system stands condemned and looks for a way out. As the potential for intensive exchanges, including trade between our countries, grows, we will be negotiating and understanding and inter-relating more and more. Many in our legal profession are closely following opportunities in the Soviet Union for trade and commerce. We are all earnestly looking for new signs of movement toward international responsibility.

Our effort must be to continue to call for civilized and responsible standards by and in the Soviet Union before we can agree to Soviet membership in the GATT, repeal Jackson-Vanik, or provide special economic credits or terms. The Soviets, as I see it, must earn their place at the table. But we must also be willing to acknowledge and respond to the reforms as they mature. And when we can sit with the Soviets as co-stewards in

responsible world leadership, my friends, then we will all have won the cold war. Then we will have won peace.

Thank you.

(F)

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May 19, 1989

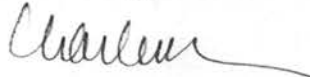
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1001 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004-2505

Dear David:

I just wanted to thank you for arranging for Ambassador Kampelman to address the Spring Meeting of the ABA's International Law Section. It was an honor to have the Ambassador as our luncheon speaker, and his remarks on the emerging rule of law in the Soviet Union were the highlight of the Spring Meeting. The program has received an extraordinary number of compliments.

Again, thank you so much for helping out on such short notice, and thanks also for the lovely introduction to Ambassador Kampelman.

Sincerely,



Charlene Barshefsky



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Washington, DC 20002-2505

Dear Ambassador Kampelman:

On behalf of the American Bar Association's
Section of International Law and Practice, I want to
thank you for addressing the Section's Annual Spring
Meeting.

It was an honor to have you as our luncheon
speaker, and your remarks on the emerging rule of law
in the Soviet Union were the highlight of the Spring
Meeting program. I cannot remember ever hearing more
compliments about a Section event. The thought and
care that went into the preparation of your formal
remarks were simply overwhelming.

It was also especially kind of you to answer
questions from the floor for such an extended period.
I only wish that the program could have continued even
longer; with interest in the internal workings of the
Soviet system at an all-time high, it is difficult to
imagine a topic more timely or thought provoking than
the one you so artfully and articulately discussed.

Sincerely,

Charlene Barshefsky
Spring Meeting Chair

6/6/89

Per Tom Mullins
mailed a copy of speech to:

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AU
Wash DC 20016
(Tel. #: 885-2962)

LJ

4/27

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February 17, 1989

The Honorable Max M. Kampelman
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Dear Mr. Ambassador:

On behalf of the Section of International Law and Practice of the American Bar Association, I write to invite you to speak during the Section's 1989 Annual Meeting, which will be held in Washington from Wednesday, April 26, through Friday, April 28. Nearly 400 persons attended the 1988 Annual Meeting, representing 29 states and 4 foreign countries. In 1989, the Annual Meeting will be held jointly with the Brussels-based Union Internationale des Avocats, so that we expect at least as many registrants as attended last spring.

Continuing the tradition of past annual meetings, we are inviting distinguished representatives of the Administration, Members of Congress, and others to provide their insights on current issues of interest to the Section's members. For example, last year our speakers included Secretary of Commerce William Verity, former Ambassador Bob Strauss, Senator Dan Evans, former Deputy Secretary Richard G. Darman, former Secretary Peter G. Peterson, and former House Budget Committee Chairman Jim Jones.

Recognizing your distinguished diplomatic service and legal career, the Annual Meeting Planning Committee hopes that you will agree to address our members at a luncheon scheduled for 12:30 p.m. on Thursday, April 27, at the Capitol Hilton Hotel. We anticipate that following lunch, you would offer opening remarks on a topic of your choosing, and then respond to questions. The program would conclude by 2:15 p.m., or earlier if your schedule so required.

Thank you for considering our request. We look forward to hearing from you.

Sincerely,

Theodore W. Kassinger
Theodore W. Kassinger

TWK:hws

343
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1 pm
50 am
2nd fl. A+B
16TH + K
1:40 start
2:15
30 min.
pulling up chairs