

## NOTES

# SOVIET REPUBLICS' DEMAND FOR AUTONOMY: THE NEED FOR CONSTITUTIONAL REFORM AND THE INSTITUTION OF CANADIAN-STYLE JUDICIAL REVIEW\*

## INTRODUCTION

The Union of Soviet Socialist Republics (USSR) purports to be a federal, multinational state that upholds the principles of self-determination and voluntary association of its republics. Yet, in the past several months, while its republics have rallied for greater independence and sovereign rule, the USSR has resisted their bids for autonomy. Despite Moscow's threats and false promises, the Union's republics appear determined to gain control over their ethnic nations. The USSR, faced with national disintegration, must decide whether it is willing to implement a genuine federal system to provide the autonomy its republics demand.

Focusing on the Republic of Estonia and the foreign trade monopoly, this note explores the issue of federalism within the USSR and suggests Canada as a model for restructuring its federal system. Section I relates to the dilemma that the once omnipotent Moscow faces as republics, like Estonia, take steps toward secession. Looking at the government's foreign trade network, Section II describes how the Union's central control prevents the republics from exercising any meaningful authority over their affairs. Section III discusses both the ideology of a true federation and the barriers confronting the Soviet politicians who would implement the necessary reforms. In recognition of the demographic similarities of Canada and the USSR, the note suggests that the USSR can learn from Canada's success in dealing with independence-minded provinces like Quebec. Section IV examines how the existence of judicial review in Canada has played a pivotal role in allocating federal power over foreign trade in a response to provincial demands. Section V suggests that to achieve a genuine federation, the USSR needs to begin systematic reform by restructuring its Constitution and establishing a new Union treaty.

## I. SOVIET DOMESTIC POLITICAL CRISIS

In accordance with the Soviet Union's attempts at political and economic restructuring, the Union continues the battle to keep its nation intact. All but one of the fifteen Soviet republics have formally expressed their desires to attain greater autonomy, or even independence, from Moscow, because they view *perestroika* as slow and unrealistic.<sup>1</sup> President Mikhail S. Gorbachev realizes that

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1. Every republic in the Soviet Union, except for Kirghiz, has declared some type of independence or sovereignty, defined as the right to overrule national laws. *The Union of Soviet Sovereign Republics*, St. Louis Post-Dispatch, Nov. 2, 1990, at 2C, col. 1.

if he issued complete independence to even a few of these republics it would at least create an illusion that his *perestroika* is failing.<sup>2</sup> Yet, his only preventive measures—the use of force or the issuance of economic sanctions—are doomed to failure in the long run. Mr. Gorbachev's best solution is to negotiate a new treaty which will allow the republics greater autonomy within a new power relationship. The demands of the republics will not likely subside until Moscow effects significant and authentic changes of this nature.

#### A. Estonia's Aspirations for Autonomy

Technically, the USSR Constitution affords the republics significant rights, such as the rights to control alteration of their territorial boundaries<sup>3</sup> and to enter into relations with other states.<sup>4</sup> Moreover, the Constitution officially grants to the republics a constitutional right to freely secede from the Union.<sup>5</sup> However, until recently, this "right" had never been asserted by any of the republics.<sup>6</sup> Although the Estonian Parliament ultimately called for its independence through secession, the Parliament initially resorted to less drastic means of professing its sovereignty from Moscow. Lithuanian officials - like those in the neighboring Baltic republics, Estonia and Latvia - refuse to follow the new law, saying they were annexed in 1940 and thus are not legally bound by the Soviet Constitution.

In any case, the Lithuanians contend that the law creates so many hurdles and gives Moscow so much leverage that it would be almost impossible for a republic to secede if Moscow was bent on preventing it.

2. Parks, *Loss Raises Questions on Perestroika*, St. Louis Post-Dispatch, Mar. 14, 1990, at 1C, col. 2.

3. KONST. SSSR art. 78 (1977).

4. KONST. SSSR art. 80 (1977).

5. KONST. SSSR art. 72 (1977). When the 1936 Constitution was drafted, Stalin raised several of the ethnic groups from the level of Autonomous Republic to Union Republic, giving them the formal right to secede. J.N. HAZARD, W.E. BUTLER, & PETER B. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980'S* 26 (1984).

6. The Soviet Constitution provides for secession, but the Communist Party has always discouraged the concept through the use of firing squads and prison camps. Manor, *Observers Mull Future For Soviets*, St. Louis Post-Dispatch, Feb. 8, 1990, at 1C, col. 5. When Lithuania finally became the first republic to assert this right, President Gorbachev ruled the landmark declaration of independence "illegal and invalid" and refused any negotiations with Lithuania over its claim of sovereignty. Parks, *supra* note 2, at 1C, col. 5. Soviet officials now maintain that a republic is entitled to exercise its constitutional right to secede; however, it must first abide by a new procedural law which requires, *inter alia*, a referendum on the issue. St. Louis Post-Dispatch, Apr. 17, 1990, at 14A, col. 1. Technically, Lithuania declared its independence prior to the passage of this law.

Nevertheless, Gorbachev warned in April 1990, that rapid independence of Lithuania or other republics could lead to "civil war and bloodshed" and could not be tolerated unless the republics obeyed the new law on secession procedures. St. Louis Post-Dispatch, Apr. 19, 1990, at 16A, col. 4.

The new law [(Law on the Procedure of Secession)] requires referendum approval by two-thirds of the republic's eligible voters, a transition period of up to five years during which the republic must satisfy the financial and territorial claims of other Soviet jurisdictions, and final approval by the Soviet Congress of People's Deputies, a legislature dominated by Russians and others opposed to Lithuanian independence.

Keller, *Sole Oil Refinery in Lithuania Shut by Soviet Embargo*, N.Y. Times, Apr. 24, 1990, at A6, col. 5. Estonian officials have refused to follow the new law, saying they were annexed in 1940 and thus are not legally bound by the Soviet Constitution. They also contend that the law creates so many hurdles and gives Moscow so much leverage that it would be almost impossible for a republic to secede if Moscow was determined to prevent it. *Id.*

Invoking the constitutional authority of Article 76,<sup>7</sup> Estonia passed a constitutional amendment in November, 1988, which demonstratively asserted the sovereignty of the republic. The amendment afforded Estonia the right to refuse to apply future Union legislation. The amendment required that all Soviet laws and acts be endorsed by the republic's parliament before they would be recognized as having the force of law in Estonia.<sup>8</sup> In addition, the Estonian parliament approved a declaration which stated that its own laws had supremacy over those of the Soviet Union.<sup>9</sup> In this unprecedented act of defiance, the leaders demanded a new treaty with the Kremlin.<sup>10</sup>

In response, Soviet authorities initially invoked Article 74<sup>11</sup> and required Estonia to revise the amendment because it varied from the USSR Constitution.<sup>12</sup> Estonia's parliament then countered by affirming its right to veto laws passed in Moscow.<sup>13</sup> This conflict remains unresolved, however, for Estonia has yet to utilize its new veto power.<sup>14</sup>

Estonia is still discontented with its illegal incorporation into the Soviet Union<sup>15</sup> and, among other things, central control by Moscow over its international trade. In response, the republic initiated even bolder endeavors in its movement towards greater autonomy. In March 1990, the republic's Communist Party voted overwhelmingly to split with the national party, but decided to use a six-month transition period to avoid irritating Soviet authorities who strongly opposed the move.<sup>16</sup> Just five days later, the Estonian republic's Parliament effectively declared

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7. Article 76 recognizes a republic as a sovereign socialist state and provides for independent, republican authority on its own territory.

8. Lodge, *Estonian Parliament Defies Kremlin Constitution Plans*, REUTER LIBR. REP. (Nov. 16, 1988).

9. Daily Telegraph, Nov. 17, 1988.

10. *Id.*

11. "The laws of the USSR shall have the same force in all Union Republics. In the event of a discrepancy between a Union Republic law and an All-Union law, the law of the USSR shall prevail." KONST. SSSR art. 74 (1977).

12. TASS, November 19, 1988. The Presidium responded by instructing the Commission for Legislative Proposals to look into the legality of Estonia's amendments since they affected fundamental principles. Fundamental principles in a republican constitution must parallel those of the USSR Constitution.

In a related matter, the Soviet Congress of Peoples' Deputies adopted a law on constitutional compliance. The law created a committee which will "recarve" republican constitutions and bring them into compliance with All-Union law. The legislation also includes provisions that invalidate any law or act that violates human rights as provided for in the USSR Constitution or in international treaties. Most of the new law's provisions became effective on January 1, 1990. TASS, Dec. 23, 1989. Parliamentary deputies from the Baltic States, including Estonia, have not supported this law, because it infringes their rights. TASS, Dec. 22, 1989.

13. *Estonian Parliament Stands Firm on Right to Veto Moscow Laws*, REUTER LIBR. REP. (Dec. 7, 1988).

14. Cornwall, *Soviet Daily Prints Secret Clauses of Molotov-Ribbentrop Pact*, REUTER LIBR. REP. (Aug. 16, 1988).

15. Estonia was forcibly incorporated into the Soviet Union in 1940 along with the Baltic republics of Lithuania and Latvia and parts of Moldavia after the foreign ministers of the USSR and Germany, Molotov and Ribbentrop signed a secret treaty dividing Eastern Europe into spheres of influence. Gorbachev has publicly denounced the pact.

16. *Party in Estonia Votes Split and also a Delay*, N.Y. Times, Mar. 26, 1990, at A7, col. 1. Estonia followed its fellow Baltic republic of Lithuania, whose Communist party broke with the CPSU before the republic declared its independence from the Soviet Union on March 11, 1990. (The declaration of independence was subsequently suspended on June 9.). The vote to establish an independent Communist Party in Estonia was 432 to 3, with seven abstentions.

independence from the USSR.<sup>17</sup> While at first Estonia approved a slower, more deliberate path toward restoring full sovereignty,<sup>18</sup> it adopted a different stance a few months later. In May 1990, Estonia drafted a Declaration on the Renewal of Independence, which emphasized that the republic has always been independent.<sup>19</sup> This move was designed to exempt the republic from the USSR's new secession law which posed procedural barriers to secession.<sup>20</sup>

## B. Moscow's Predicament

Top Soviet officials realize that they must exercise extreme caution when dealing with secession-minded republics. Many foreign leaders perceive that these republics are only following the 1989-90 political trend of Eastern Europe, and they would disfavor any aggressive action by Moscow which would deny these republics their inherent right of self-determination.<sup>21</sup> Soviet officials must therefore provide concrete incentives for the republics to remain as one Union. Their job will become increasingly difficult as the nation continues to experience overwhelming economic and social difficulties.<sup>22</sup> The fate of *perestroika* will depend on their success in this endeavor.

Gorbachev realizes that he cannot allow Estonia to break from the Union. He understands that his reforms will fail if Estonia secedes without punitive action from Moscow, for this would probably be followed by the rapid secession

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17. The Estonian Parliament declared Soviet rule over its territory to be illegal and began what it described as a transition toward re-establishing its independence. On March 30, 1990, in a statement on its own move for independence, the Estonian Parliament said in part: "The Supreme Soviet of Estonia does not recognize the legality of state authority of the USSR on the territory of Estonia." Clines, *Moscow's Forces Seize Two Key Sites From Lithuanians*, N.Y. Times, Mar. 31, 1990, at 5, col. 1. On March 3, 1991, the Estonian people voted overwhelmingly for independence as about 75% backed a move to secede, with a 80-90% turnout. Wall St. J., Mar. 5, 1991, at A11, col. 2.

Russians, Poles, and other ethnic groups, who make up 40% of Estonia's 1.6 million people, strongly oppose secession. N.Y. Times, Mar. 26, 1990, at A7, col. 1. The Baltic state's large Russian ethnic population fears persecution by the Estonian majority. They cite measures giving Estonian primacy as the republic's language, and they express particular concern over a recent unofficial pro-independence congress of Estonians that pointedly excluded Russians. Denver Post, Mar. 17, 1990, at 6A, col. 4.

18. In the same proclamation, the Estonian Parliament stated: "The Supreme Soviet declares a beginning of a period of transition that will culminate in the formation of the constitutional organs of state power of the republic of Estonia. The restoration of the republic of Estonia has begun." N.Y. Times, Mar. 31, 1990, at 5, col. 1.

19. Weller, *Law: Soft Centre of an Ailing Constitution; Radical Shifts in the Balance of Legal Power Between the Soviet Union and its Republics Could Leave the Kremlin Little to Rule Over*, INDEPENDENT (June 15, 1990) at 17. A number of essential provisions of the pre-1940 constitutions were put back into operation. Only those parts of Soviet legislation that did not conflict with these basic laws would continue to apply until independence was achieved. *Id.*

20. See *supra* note 6, for more detail of the Law on the Procedure of Secession.

21. The classic case of self-determination is "the international recognition of the right of the inhabitants of a colony to choose freely their independence or association with another state." L. HENKIN, R.C. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW 282 (1987).

22. In the words of President Gorbachev himself, "[t]he situation in the people's economy is growing worse. The volume of production is decreasing and economic ties are being disrupted. Separatism is growing. The consumers' market is devastated. The budget deficit and solvency of the state have reached critical levels. Anti-social phenomena and the crime rate are on the rise. Life is becoming more difficult. People are losing interest in work and confidence in the future is tumbling down. The economy is at a very dangerous stage. . . ." *Excerpts From President Gorbachev's Program for New Soviet Economy*, N.Y. Times, Oct. 17, 1990, at A9, col. 1.

of other Soviet republics.<sup>23</sup> Furthermore, Moscow covets Estonia's geographic location along the coast of the Baltic Sea. Much of the Soviet air defense system is located within this coastal area, and granting Estonia independence could significantly alter Soviet national security. The political cost to President Gorbachev of Estonian secession might be even greater than the criticisms he would encounter abroad if he chose to intervene with tanks or economic coercion.<sup>24</sup>

Gorbachev is aware that imposing force on Estonia<sup>25</sup> would jeopardize his standing domestically and internationally.<sup>26</sup> On the domestic scene, a military crackdown<sup>27</sup> would likely destroy all credibility the Union has attempted to earn from its republics over the past seventy years. From a broader perspective, foreign leaders would accuse the Soviets of aggression and of violating international law. More importantly to *perestroika*, any significant military action against Estonia would indirectly damage the Soviet Union's credit rating,<sup>28</sup> and thereby quash further Soviet plans to recover economically.

Gorbachev's only other alternative to keep the status quo would be to cease deliveries of exportable goods to Estonia in an attempt to intimidate the Baltic nation into withdrawing its aspirations for independence. This option would damage the Estonian economy<sup>29</sup> and also harm the Union interests in the long run.<sup>30</sup> At the same time, it would also be likely to impair Soviet foreign relations.<sup>31</sup>

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23. Opening the door to dissolution of the Soviet empire might also have a personal effect on the President, because the Soviet political establishment and the Soviet military could remove him from power. O'Rourke, *Bush's View of Gorbachev*, St. Louis Post-Dispatch, Apr. 17, 1990, at 1B, col. 1.

24. St. Louis Post-Dispatch, Mar. 14, 1990, at 1C, col. 4.

25. Estonia presents a graver threat of Soviet military action than did Lithuania. Estonia's population is only 60% Estonian, while Lithuania's is 92% Lithuanian. Russian-speaking people make up at least 40% of Estonia's population of 1.6 million. These differences in ethnic concentration could help justify bold military steps in Estonia. Dine, *Baltic Trouble Could Topple Gorbachev*, *Buechner Believes*, St. Louis Post-Dispatch, Apr. 18, 1990, at 13A, col. 3.

26. *Independence, Not Anarchy*, St. Louis Post-Dispatch, Apr. 17, 1990, at 2B, col. 1.

27. In Moscow, some fear the possibility of martial law. Gorbachev might attempt to use troops to open blocked roads and railways, break up strikes, and compel goods to come to market. N.Y. Times, Oct. 20, 1990, at 14, col. 2. Gorbachev personally believes that any republic's secession, even after an elaborate referendum and negotiation process, could invite bloodshed. Clines, *Gorbachev's Plan for a New Union: A Central Government Still in Charge*, N.Y. Times, Nov. 25, 1990, at 8, col. 2.

28. Flanigan, *Bucks Will Win Over Bullets in Lithuania*, St. Louis Post-Dispatch, Mar. 30, 1990, at 1C, col. 1. In an attempt to ease popular complaints, the Soviets have been borrowing to import consumer goods. The USSR has been borrowing heavily—\$6 billion in both 1988 and 1989—and it now owes at least \$49 billion to Western banks. Violence in Estonia would thwart Soviet chances for further loans, just as the invasion of Afghanistan in 1979 halted Soviet access to Western capital markets. This situation may spell the end of *perestroika*, the program of economic and political change that has entered a critical period. *Id.*

29. Estonia's economy would be adversely affected in the short run, just as Lithuania's was during the economic blockade initiated by Moscow in April 1990. Lithuania previously had received 75% of its energy from the Soviet Union. Besides for all of its oil and gas, Lithuania depended on the USSR for metal, machinery, chemicals, cotton, fertilizer, repair parts, and automobiles, all of which were vital for the functioning of the Lithuanian economy. St. Louis Post-Dispatch, Apr. 16, 1990, at 1A, col. 5; Apr. 14, 1990, at 8A, col. 1. The sanctions cost Lithuania a quarter of a billion rubles in lost production. *Id.*, May 23, 1990, at 8A, col. 3.

30. As a result of the Lithuanian economic blockade of materials such as oil and gas, many Russian factory workers lost their jobs in forced layoffs. St. Louis Post-Dispatch, Apr. 16, 1990, at 6A, col. 1. In addition, Soviet plants stopped receiving parts which were formerly manufactured in

Accordingly, if the Kremlin is serious about keeping the Union intact, it must seek a compromise and provide the republics with significantly greater freedom within a restructured Soviet federation. Perhaps Moscow's best solution would be to quickly form a loosely linked confederation or commonwealth, where Estonia and its fellow republics would be assured of political and cultural autonomy, as well as the freedom to trade independently in international markets. To date, the USSR has found it difficult to relinquish such power, given the entrenchment of Union control over the republics' activities as exemplified by the Soviet foreign trade monopoly.

## II. CENTRALIZED CONTROL IN PRACTICE: THE SOVIET FOREIGN TRADE MONOPOLY

It is consistent with the high degree of control constitutionally afforded to the federal government that throughout the nation the Union has historically monopolized dominion over foreign trade. The USSR Constitution gives the Union considerable power in the area of international commerce.<sup>32</sup> Traditionally, the control of the central government over trade and commerce has been so pervasive that it permits only properly authorized Union organizations to engage in foreign trade transactions.<sup>33</sup>

Notwithstanding the Council of Ministers' continued jurisdiction over foreign trade, the Soviet Union has instituted several *perestroika*-inspired reforms since 1986. For example, in an attempt to actively promote foreign trade, the USSR

Lithuania. The sanctions cost the Soviet Union several billion rubles in Lithuanian products that it did not receive. St. Louis Post-Dispatch, May 23, 1990, at 8A, col. 3.

31. Before increasing economic pressure on Lithuania, Gorbachev said himself that he was aware that it might jeopardize relations with the United States and the West. St. Louis Post-Dispatch, Apr. 19, 1990, at 16A, col. 3.

32. Not only does the Constitution specifically delegate to the Union jurisdiction over foreign trade in Article 73(10), but Article 74 provides that any federal law will prevail over a law of the republic. KONST SSSR arts. 73(10), 74 (1977).

"The jurisdiction of the Union of Soviet Socialist Republics, through its highest organs of state power and administration, encompasses. . . representing the USSR in international relations; the contacts of the USSR with foreign states and international organizations; establishing a general procedure for and coordination of the relations of union republics with foreign states and international organizations; foreign trade and other forms of foreign economic activities on the basis of the monopoly of the state. . . ." KONST SSSR art. 73(10) (1977).

"The laws of the USSR have equal force within the territory of all the union republics. In the event of a discrepancy between the law of a union republic and all-union law, the law of the USSR prevails." KONST SSSR art. 74 (1977).

33. MODERN LEGAL SYSTEMS CYCLOPEDIA 395. For example, the Soviet rules of foreign trade have required that each contract made by a foreign trade organization be signed by two representatives of the organization who have the power of attorney. This is to ensure mutual control by Soviet officials in the realm of foreign trade. The rule has been considered imperative and to be observed literally in all cases. OLYMPIAD S. IOFFE & PETER B. MAGGS, SOVIET LAW IN THEORY AND PRACTICE 4 (1983).

As Estonia moves towards greater autonomy, the USSR has taken measures to tighten its grip on local organizations. In an attempt to keep enterprises subordinate to the Union and to preserve the ditkat of central departments, last year the USSR Council of Ministers signed an order creating a new association which made Union enterprises located on Estonian territory part of the "Integral Association." The Integral Association is under the direct jurisdiction of the USSR. Current Digest of the Soviet Press, Aug. 22, 1990, at 25. The decree instructed most of Estonia's main enterprises to join the Integral Association; by gaining control of these organizations, Moscow in effect confiscates much of Estonia's capital stock and provides the Kremlin with a powerful weapon to be used against other independence-minded republics. INDEPENDENT, Aug. 5, 1990, at 11.

created the State Foreign Economic Commission and extended to production cooperatives and state enterprises the right to directly trade with foreign entities. However, despite the liberalization of trade policies, the Union government continues to reserve powers that allow it to maintain control of foreign trade.

#### A. Soviet Governmental Structure

In order to understand the republics' demand for greater independence regarding foreign trade, it is important to understand the tight-fisted control that the central government has historically exercised over international commerce. The Soviet Union, presently consisting of fifteen Union republics, was created by an international treaty in 1922. The governmental structure of the USSR consists of a powerful, central, All-Union government and the governments of each of the Soviet Socialist Republics. As members of the Union federation, the republics participate in the central government through representation in various Union governmental organs. In addition to its participation in the Union government, each republic also has its own governmental bureaucracy. The governmental organization of the Union is very similar to that of the republics; in fact, the republican bureaucracies replicate those of the central administration.

The Union government primarily consists of the Supreme Soviet,<sup>34</sup> its Presidium,<sup>35</sup> and the Council of Ministers.<sup>36</sup> Each republic has similar bodies on a smaller scale. In the present Union governmental structure, the authority to regulate foreign trade rests with the Council of Ministers. The Council is the highest governmental body responsible for determining overall national economic policy and approving the country's economic development plans.<sup>37</sup>

As mentioned, the governmental structures of the republics parallel the organization of the Union, including the structure of foreign trade regulation. A republic's Supreme Soviet appoints its Council of Ministers, its highest executive and administrative body. This republican Council, which is subordinate to the

34. The Supreme Soviet, the 542-member legislature, meets eight months a year and transacts most of the nation's business. Goldberg, *A More Perfect Union Part I: A Lawyer in Moscow*, 76 A.B.A. J. 59 (Oct., 1990). It is the "supreme organ of state power of the USSR" and "is empowered to decide all questions assigned to the jurisdiction of the USSR by the present Constitution." KONST SSSR art. 82 (1977). The Constitution vests in the Supreme Soviet the authority to adopt and amend the Constitution, admit new republics, confirm state plans of economic and state development, and create and pass laws. KONST SSSR art. 137 (1977).

The other Soviet legislature, the Congress of People's Deputies, meets annually and, *inter alia*, elects one-fifth of its members to the Supreme Soviet. Goldberg, *id.*

35. The Supreme Soviet elects a Presidium, which acts as the effective head of State when the legislature is not in session. The Presidium is a 33-member body which makes policy decisions. Its vice-chairs, which are composed of the chairs of the republic presidiums, reflect Union integration.

Decisions of the Supreme Court may be reviewed and overturned by the Presidium. KONST. SSSR art. 121 (1977)(amended 1981).

36. The Supreme Soviet also elects the executive branch of government, the Council of Ministers. W.E. BUTLER, *SOVIET LAW* 45 (1988). Like the Presidium, the Council of Ministers is accountable to the legislative branch of government. Its primary duties include drafting legislation, issuing decrees, and executing laws. B.B. GUPTA, *COMPARATIVE STUDY OF SIX LIVING CONSTITUTIONS* 184-86 (1974). One of the constitutionally stipulated functions of the Council of Ministers is to direct foreign trade, which is done through the Ministry for Foreign Economic Relations. Butler, at 158.

37. 174 INT'L TRADE REP. (BNA), No. 1696, at 8 (Sep. 23, 1987). Gorbachev's Union treaty draft of November 1990 sought to change the Council's name to "Cabinet of Ministers." Clines, *supra* note 27, at col. 3.

Union's Council, coordinates and directs the work of the various republican ministries, including the ministry responsible for foreign trade.<sup>38</sup>

## B. Organization of the Soviet Foreign Trade System

The foreign trade system is composed of various specialized organizations which have begun to escape from the tight control customarily exercised by the central government. Structurally, the Council of Ministers oversees several specialized committees<sup>39</sup> and ministries. In turn, these ministries supervise the various entities which each have specific responsibilities in the foreign trade hierarchy. Traditionally, the central government has retained a great deal of control over foreign trade. For several years, the State Committee for Foreign Economic Relations (SCFER), which was subordinate to the Council of Ministers, administered Soviet foreign trade through its Ministry of Foreign Trade (MFT).<sup>40</sup> These agencies historically controlled the Foreign Trade Organizations (FTOs) and Associations (FTAs) and their Foreign Trade Firms, which are the entities that actually negotiate and conclude foreign trade transactions.<sup>41</sup> This hierarchy has recently undergone a significant reorganization and has begun to loosen its grip over foreign trade.

Recognizing the problems of a closed internal economy and attempting to utilize the advantages of the international division of labor,<sup>42</sup> the Soviet government in the last decade instituted several significant reforms in the foreign trade

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38. ESTONIA SOVIET SOCIALIST REPUBLIC 23-5 (1972).

39. For example, the State Planning Committee (GOSPLAN) is responsible for drawing up short-term and long-range economic development plans, of which foreign trade is an integral part. After consulting with various organizations, GOSPLAN devises general foreign trade plans which are given to the Ministry directly responsible for foreign trade (e.g. the Ministry of Foreign Economic Relations). As necessary, this Ministry modifies the plan and executes it. INT'L TRADE REP., *supra* note 37, at 8.

40. *Id.*

41. Butler, *supra* note 36, at 383-5. FTO's are legal artifices that enable state trading. They have a dual character; the FTO is a juridical person, but it acts in accordance with State authorization. Each FTO is apportioned a component of the State foreign trade monopoly. The legal status of the FTO can place it within either the MFER or one of its branch ministries. If FTO's are within the system of the MFER, not only are they confirmed by the MFER, but the MFER participates on their governing board. Foreign Trade Firms exist within FTO's and transact export-import operations for the FTO.

The MFER and its FTO's have been perceived to be closely related, despite their legal separateness. For example, the Soviet Foreign Trade Arbitration Commission has held that the denial of a Soviet export license by a superior agency will excuse a Foreign Trade Corporation from performance or liability under its foreign trade contract on the grounds of *force majeure*. ENCYCLOPEDIA OF SOVIET LAW 282 (F.J.M. Feldbrugge, ed.) (1973).

Although the FTO's can exercise some discretion over certain matters when negotiating contracts, almost all Soviet contracts contain a provision invalidating the contract if the FTO oversteps the authority provided to it. THOMAS W. HOYA, EAST-WEST TRADE, COMECON LAW, AMERICAN-SOVIET LAW 19, 243 (1984). As a member of the Council for Mutual Economic Assistance ("Comecon"), FTOs typically can exercise discretion over matters that are not covered by the Comecon General Conditions and/or pertinent bilateral trade agreements and their protocols. While there may be no legal effect if the contract departs from the General Conditions, this does not necessarily hold true for departures from trade agreements or protocols. Soviet jurists say that by allowing the protocol to control, its integrity is preserved and the central planning is undisturbed. Although this may not apply to past Soviet FTO's, partly out of a desire to prevent the disruption of relations between the Comecon FTO negotiators, the trend is to uphold the contract. *Id.*

42. ABEL AGANBEGYAN, INSIDE PERESTROIKA: THE FUTURE OF THE SOVIET ECONOMY 173-76 (1989).



area.<sup>43</sup> For example, since 1986, foreign trade has been administered by the State Foreign Economic Commission (SFEC), a new agency created to promote the expansion of foreign trade.<sup>44</sup> Although the government had relied on strong, central control for years, the reforms began to provide local entities with greater independence.<sup>45</sup>

Still, several republics, including Estonia, desired even greater reforms.<sup>46</sup> Such moves towards independence appeared to pose a threat to the Union's supremacy over its territories. Attempting to maintain Union control over the republics, President Gorbachev called for approaches that paved the way for experimentation, yet were still in line with the existing national constitution.<sup>47</sup>

Regardless of the recent reforms, in reality the republics can exert only limited authority in the area of foreign trade. Despite language in the USSR Constitution that features the free self-determination of the republics,<sup>48</sup> Article 73(10) affords the Union control over foreign trade.<sup>49</sup> A Soviet republic is permitted to exercise its independent state authority on matters that are within its own territory.<sup>50</sup> However, matters deemed to be of great importance fall within the jurisdictional power of the All-Union government.<sup>51</sup> These include the

43. In a move toward decentralization, the government gave republican ministries responsibility for approximately one-hundred export-import houses and authorized about one-hundred ministries and major enterprises to trade directly with foreign firms. Quigley, *Legal Implications of the Dismantling of the Soviet Foreign Trade Monopoly*, 7 INT'L TAX & BUS. L. 281 (1989). The government also introduced a system of contracts that enabled enterprises to negotiate with import-export houses in an attempt to make exporting through the MFER more attractive. *Id.* at 282. While exporting is still done on the basis of state plans, the contracts replaced the use of production orders.

44. *Id.* at 281.

45. In December 1988, the Council of Ministers passed the Law on Enterprises and instituted even greater modifications: it liberalized the Soviet rules for joint ventures, changed the valuation of the ruble, and further reformed the Soviet trade regime. *Id.* at 275. Through this decree, the Union gave every Soviet privately-owned cooperative and state-owned enterprise the right to export and import directly.

In 1989, laws were enacted that provided significant rights to enterprises engaged in foreign trade. As of April 1989, all organizations were afforded the right to trade on foreign markets. Reuters News, Aug. 11, 1989. In August 1989, new legislation that amended the Law on State Enterprises guaranteed the right to trade with foreign firms, further released industry from bureaucratic control, and provided the right to independently carry out export-import operations. *Id.*

46. The Estonian prime minister recommended a "pay-your-own-way" system and updated methods to regulate market economics. TASS, July 26, 1989.

47. *Id.*

48. BORIS TORPORNIN, *THE NEW CONSTITUTION OF THE USSR* 152 (1980). See also KONST. SSSR art. 70 (1977). Article 70 defines the Union as a "unitary, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics."

49. See *supra* note 32.

50. KONST. SSSR art. 76 (1977). "A union republic is a sovereign Soviet socialist state which has united itself with other Soviet republics in the Union of Soviet Socialist Republics. Outside the limits indicated in Article 73... a union republic independently exercises state power within its territory." *Id.*

51. ESTONIA SOVIET SOCIALIST REPUBLIC, *supra* note 38, at 43. Although republican constitutions and codes give the impression of broad sovereignty, this is erroneous. As asserted in Article 75 of the Constitution, the dominion that extends throughout the territory of the USSR means that the Union has paramount authority. Torpornin, *supra* note 48, at 155-6. This dominion is manifested in the constitutional requirements that the republics' constitutions must conform to the Union Constitution and that a law of the USSR prevails over a republican one in the event of a discrepancy. KONST. SSSR arts. 74, 76 (1977).

While republican legislation is broader than its All-Union counterparts, it repeats the fundamental

approval of economic plans and foreign trade.<sup>52</sup> The Union ministers, who have authority over these areas, have constitutionally-based control over republican ministers.<sup>53</sup> Therefore, the Republican Minister of Foreign Economic Relations, who administers the foreign trade in the republic, is subordinate to the USSR Minister of Foreign Economic Relations.<sup>54</sup> Accordingly, republican legislation concerning foreign trade may be issued only if it is based and executed on the acts of the superior agency.<sup>55</sup> Although certain republican ministers are technically part of the Union's administrative structure,<sup>56</sup> control over foreign trade will remain with the central government as long as the Union deems the republic subordinate.

### C. Foreign Trade in a Central Economy

The USSR's commitment to central economic planning and socialist ownership of resources and production have motivated the central government to control foreign trade. The present Constitution dictates that the government be managed on the basis of a single economic complex.<sup>57</sup> The central economy requires that the units of this federation be tied together more firmly than in many other federations in order to implement the concept of state planning.<sup>58</sup> Concentration and specialization of republican resources are purposefully sought through central planning and, in a concerted effort to facilitate the interdependence of the republics, are exchanged within the federal state.<sup>59</sup> Although the USSR Constitution posits considerable cultural autonomy for the ethnic groups constituting the republics, to achieve a successful central economy the republics' economic programs have had to conform to a national plan.<sup>60</sup>

The Constitution has also afforded priority to the primacy of state ownership.<sup>61</sup> The Union not only owns the land and its resources, but it controls the production of goods, transportation, and communication, as well.<sup>62</sup> Indisputably,

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principles of USSR legislation verbatim. Two primary reasons account for the limited sovereignty of republican law: constitutionally, republics cannot exercise control over areas that are vital to an autonomous state, and republican legislation is classified as "podzakonnyi" or subordinate acts. Ioffe & Maggs, *supra* note 33, at 46; Butler, *supra* note 36, at 43.

52. KONST. SSSR art. 73 (1977).

53. Ioffe & Maggs, *supra* note 33, at 24; KONST. SSSR arts. 137-42 (1977).

54. KONST. SSSR art. 140 (1977).

55. Butler, *supra* note 36, at 43.

56. The republican ministers have the opportunity to participate on a limited basis in Union decision-making. By virtue of their office, the chairmen of the republics' Council of Ministers are members of the USSR Council of Ministers. KONST. SSSR art. 129 (1977).

57. A plain reading of Article 16 presents a commitment to the principle of central economic planning. It calls for a single economic complex that is managed on the basis of Union economic and social development plans. While it acknowledges territorial principles and the economic independence of operative entities, the constitutional rule requires deference to the imperatives of maintaining a centralized leadership. See, KONST. SSSR arts. 16(1), (2) (1977); F.J.M. FELDBRUGGE, *THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS* 34 (1979).

58. Hazard, Butler, & Maggs, *supra* note 5, at 25.

59. Parming & Jarvesoo, *A Case Study of a Soviet Republic, The Estonian SSR* 174 (1978). Historically, the USSR has needed to consolidate its unity within the framework of a federal socialist state. *ESTONIA SOVIET SOCIALIST REPUBLIC, supra* note 38, at 30.

60. Parming and Jarvesoo, *id.*

61. Butler, *supra* note 36, at 147.

62. In the USSR, the economy belongs to the State. See, KONST. SSSR arts. 10-18 (1977). Land was taken over by the State and collectivized in the late 1920's and early 1930's under Josef Stalin's regime.

unlimited political power accompanies such centralized control and ownership.<sup>63</sup>

### 1. *Positive Effects of the Foreign Trade Monopoly*

Sustained by the concept of centralized control, the State (or Union) foreign trade monopoly has endured since 1918<sup>64</sup> and has served many useful purposes. It has permitted the USSR to fit foreign trade into economic plans and has allowed a more precise direction of trade, including deciding which goods can be most advantageously marketed abroad. The monopoly has allowed foreign trade specialties to concentrate in their areas of expertise.<sup>65</sup> It has also provided the advantage of economies of scale and has permitted the USSR to obtain lower prices for imports. Furthermore, central control has allowed for the easy export of items, despite domestic shortages.<sup>66</sup> Nonetheless, such pervasive control has also been counterproductive.

### 2. *Negative Effects of the Foreign Trade Monopoly*

The monopoly system has produced significant adverse side-effects, namely bureaucratic delay and the harmful separation of the foreign trade function from the production function.<sup>67</sup> The separation has insulated end-users from valuable information that would have normally been shared among trade partners, and it has impeded the introduction of foreign technology into the country.<sup>68</sup> In addition, product-specialized import-export houses have missed trading opportunities, because they have not been sufficiently aware of Soviet products that could be marketed abroad. The inefficiency of importing at state expense has often caused industries to receive too many or too few of an item.<sup>69</sup>

Despite obvious problems, the Union government has not successfully reformed the system. Several factors have inhibited needed reform. For example, the foreign trade monopoly concept has been deeply entrenched in the minds of Soviet political and economic officials.<sup>70</sup> In addition, until recently, little pressure was placed on the system to improve its functioning, balance-of-payments considerations, and the market power of such a large system.<sup>71</sup> Practically speaking, although laws and administrative actions have introduced reforms, the central government still retains a significant amount of control over foreign trade.

### D. *Superficial Reforms of the Foreign Trade Monopoly*

On their face, the reforms of the foreign trade monopoly appear to facilitate the decentralization of the Moscow-based system. For example, trade contracts

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63. Ioffe & Maggs, *supra* note 33, at 133. In the USSR, state ownership is a well-knit collective body of ruling people who know that the wider their ownership, the stronger their economic might. Likewise, the stronger their economic might, the less vulnerable their political supremacy. *Id.* at 156. Under Gorbachev, however, laws have been passed which allow farmers to lease land for virtually a lifetime, but these have stopped short of granting full private property rights. St. Louis Post-Dispatch, Sep. 18, 1990, at A9, col. 2. Gorbachev has declared that he is "resolutely against private ownership of land." St. Louis Post-Dispatch, Dec. 4, 1990, at 12A, col. 5.

64. QUIGLEY, *THE SOVIET FOREIGN TRADE MONOPOLY* 3 (1974).

65. Hoya, *supra* note 41, at 286.

66. Quigley, *supra* note 64, at 174-5.

67. *Id.* at 175.

68. Quigley, *supra* note 43, at 278.

69. *Id.*

70. Quigley, *supra* note 64, at 191-2.

71. *Id.*

can now be concluded in the republics instead of solely in Moscow.<sup>72</sup> In theory, this move should be politically and economically favorable to the republics. Yet, despite allegations of systematic reforms, a great deal of authority continues to remain with the Union.

While the reforms indicate a shift of power to private and local entities, certain Union control mechanisms remain. The government reserves the power to control foreign trade through limiting or forbidding certain items to be exported and imported,<sup>73</sup> licensing exports and imports deemed to be of "state importance,"<sup>74</sup> prohibiting or restricting trade in certain products,<sup>75</sup> and having the power to suspend the trade operations of a production cooperative or enterprise.<sup>76</sup> The Union also exercises its control through laws which require all import or export contracts to be signed by two "properly authorized" persons.<sup>77</sup> Exacerbating this problem is vague statutory language which adds to the confusion about who is authorized to act on behalf of the organization.<sup>78</sup> Presently, an enterprise's government ministry retains the power to decide which individuals are authorized to enter into contracts on behalf of the enterprise. In such ways, the Union subtly retains control over the reformed foreign trade system.

In spite of the recent reforms, Soviet foreign trade practices are unlikely to change significantly in the immediate future. Soviet economic managers have been unable to decipher exactly what the new legislation has authorized them to do.<sup>79</sup> Soviet ministries, which historically have resisted decentralization, may try to limit enterprise autonomy and influence its trade activities.<sup>80</sup> Also, the export-import houses of the MFER are likely to retain a significant role in the purchase and sale of items in quantity, since an economy of scale is particularly advantageous.<sup>81</sup> Nonetheless, if the Soviets were to engage in direct foreign trade

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72. Quigley, *supra* note 43, at 289. Such contracts are governed by *lex loci* (the republic's civil code). However, in reality, this is not very significant. In accordance with Soviet law, the republic codes do not reflect a great deal of autonomy, as they incorporate the Union's fundamental principles verbatim. Furthermore, because the republic codes are construed by courts that do not follow "stare decisis," decisions are not binding on future cases.

73. *Id.* at 283. "The Council of Ministers keeps a list of items forbidden for export, and another list of items forbidden for import. The two lists include approximately the same range of items: weaponry, explosives, nuclear technology, precious metals. . . ." *Id.*

74. *Id.* at 284. The Council of Ministers decides which items are of "state importance" and compiles a list. "A cooperative or state enterprise that wishes to trade in a listed item must apply for a license to the responsible agency as specified in the list." For example, the MFER issues licenses for the export of oil, minerals, cotton, and grain; the only import item needing an MFER license is construction by foreign firms that is financed by the central government. *Id.*

75. *Id.* at 285. For a defined period of time, the SFEC may take such action "if necessary to: (1) regulate supply and demand on the Soviet market; (2) fulfill treaty obligations of the USSR; (3) fulfill obligations undertaken by the USSR in international trade negotiations; (4) respond to discriminatory trade measures taken against the USSR by other countries; or (5) limit trade for balance of payments reasons." *Id.*

76. *Id.* at 285-6. For example, the SFEC can stop trade by a cooperative that engages in "unconscionable competition" in foreign trade or in conduct harmful to "state interests." *Id.*

77. *Id.* at 292, citing The Procedure for Signing Foreign Trade Transactions, SSP SSSR 1970, No. 6, item 35, art. 1.

78. *Id.* at 292-3. Since the applicable statute was promulgated before the 1988 liberalization, it is unclear who is authorized to sign binding contracts for production cooperatives.

79. *Id.* at 297 (citing Rosenberg, *Caution: This Bear's No Teddy Bear*, AM. BANKER, Mar. 6, 1989, at 20).

80. *Id.*

81. *Id.*

practices—such as sending factory personnel abroad to explore trade possibilities or encouraging foreigners to understand Soviet law—these practices could indirectly, substantially benefit both Soviet politics and Soviet foreign trade in the long run.<sup>82</sup> Inevitably, the central government will be forced to surrender more actual control to the republics and local entities.

Until recently, the Soviet economic ministries have had consummate control over foreign trade. As reflected in the administrative precepts of the Ministry of Foreign Trade,<sup>83</sup> such control allowed for the unity of political and economic management, the conduct of all activity according to plan, and socialist legality.<sup>84</sup> Naturally, an organization that is based on such principles effectively serves the interests of its federal system.<sup>85</sup> Yet, as suggested by the wave of reforms, the USSR must respond to the republics' demand for a shift of power to the local level. Operational autonomy of republican foreign trade organizations appears to be irreconcilable with the USSR's traditional political system. Productive use of these organizations requires decentralization.<sup>86</sup> In accordance with affording the republics greater economic and political independence, the Soviet Union must dismantle its foreign trade monopoly.

### III. THE NECESSARY DEGREE OF FEDERALISM

#### A. The Ideal Soviet Federal System

In the hope of retaining the republics within the Union, Gorbachev has proposed a "renewed confederation" through which these republics would achieve some kind of "special status" within the USSR.<sup>87</sup> These republics, though, will not sacrifice sovereignty<sup>88</sup> or independence unless Moscow takes overt steps to devise and implement a genuine federal system for the USSR.

The government of a genuine<sup>89</sup> federal nation-state "recognizes major regional differences while also recognizing, through a general government, the need for common institutions and policies."<sup>90</sup> A federal government attempts to reconcile these differences by distributing authority between one coordinate central unit and a number of provincial governments.<sup>91</sup> Accordingly, under a perfect federal

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82. *Id.* at 297-98.

83. The Ministry of Foreign Trade was abolished in 1988. Many of its functions are now the responsibility of the Ministry of Foreign Economic Relations.

84. Quigley, *supra* note 64, at 92-94.

85. As the axiom of political and economic unity suggests, trade can be used to serve political objectives. *Id.* at 92.

86. Ioffe & Maggs, *supra* note 33, at 131-34.

87. Fein, *Evolution in Europe: Toughening Stand, Moscow Cuts Back Gas for Lithuania*, N.Y. Times, Apr. 20, 1990, at A6, col. 3. Gorbachev, though, did not specify what "special status" means.

88. This term is used in the Soviet Union to mean autonomy in most internal decisions, not independence.

89. "There can be a wide range of differences between and among federal systems; knowing that a political system is federal does not tell us about precise structural or policy-related mechanisms to be found in that particular system." GREGORY S. MAHLER, *NEW DIMENSIONS OF CANADIAN FEDERALISM* 31 (1987).

90. A.E. SAFARIAN, *CANADIAN FEDERALISM AND ECONOMIC INTEGRATION* 1-2 (1974).

91. Mahler, *supra* note 89, at 22.

system, both levels of government possess the sovereign power to make certain decisions independently of the other.<sup>92</sup>

Individual states that comprise federations often vary considerably in their ethnicity, language, religious beliefs, and political ideology.<sup>93</sup> Despite their desires to remain segregated along cultural lines however, collections of autonomous states have yearned to be united for "certain purposes, because of a community of outlook or the expectation of common benefits from union."<sup>94</sup>

A major goal that federalism seeks to accomplish is a reasonable balance "between national unity and subnational diversity. [T]he constitutional division of power makes the central government and the territorial units of self-rule coordinate rather than subordinate to each other."<sup>95</sup> Under the current Soviet system, though, Estonia's interests are subordinate to those of the Union.

If the Union is to survive, the USSR must recognize that Estonia and the other republics demand a federation that fits the proper definition of the term. The republics will insist on the implementation of a system that is similar to that presently found in Canada. Unlike the Soviet federation, the Canadian federal system operates with much more authenticity. Canada's ten provinces exercise a broad range of powers independently of the federal government. Effective political authority rests with the democratically elected parliamentary majorities, organized in political parties, at both federal and provincial levels.

Canada's governmental structure can be distinguished from the Soviet Union's "quasi-federal" system, which lacks some of the most basic criteria of federal systems. The simplest way to characterize the particularly Canadian brand of federalism is to refer to it as a reasonably decentralized federal system.<sup>96</sup> The ruler(s) of a "decentralized" federation often can make decisions only after obtaining the approval of the rulers of the constituent units.<sup>97</sup> This basically depicts the federal-state relationship of Canada, and is the type of association the Soviet republics are demanding.

## B. Political Barriers to a Renewed Soviet Confederation

In September 1990, Gorbachev nearly complied with the republics' wishes. When faced with two competing economic reform programs—a radical proposal drafted largely by economist Stanislav Shatalin<sup>98</sup> and a moderate plan proposed by Prime Minister Nikolai I. Ryzhkov<sup>99</sup>—Gorbachev publicly supported Shatalin's

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92. *Id.* at 21-22.

93. *Id.* at 28. The Soviet Union is "a collection of 15 dissimilar republics, whose inhabitants stretch from Europe into Asia, speak different languages, use different scripts, worship different gods, and owe greater allegiance to local heroes than to Lenin, Stalin or Mikhail Sergeevich Gorbachev." *Goodbye to the Nation State*, *ECONOMIST*, June 23, 1990, at 11.

94. Mahler, *supra* note 89, at 28. Some examples of "common benefits from union" include subsidized prices, a centralized militia, and protection of ethnic minorities in each republic from persecution by the dominant culture.

95. *Id.* at 22.

96. *Id.* at 159.

97. *Id.* at 22.

98. Shatalin's plan was to begin a 500-day period of transition from the centralized command economy to a market system. *St. Louis Post-Dispatch*, Sep. 12, 1990, at 10A, col. 4.

99. Ryzhkov wanted to retain central control over the economy and make a much slower transition to a market-based system. *Id.*

pro-sovereignty plan.<sup>100</sup> The plan would have transferred most economic authority from the Union government to the republics.<sup>101</sup> It envisioned a voluntary commonwealth of sovereign republics that would have moved at their own pace and decided which powers to delegate to Moscow.<sup>102</sup> Among other things, the republics were to attain authority over foreign trade.<sup>103</sup>

Ultimately, though, Gorbachev was not willing to risk the degree of shock therapy and the surrender of economic control embodied in Shatalin's plan.<sup>104</sup> Instead of forwarding much-needed sovereignty to the republics, he sought to soften the radical plan by keeping the authority over taxation, monetary policy, and foreign exchange in Moscow's hands.<sup>105</sup> In the end, he convinced the Supreme Soviet to adopt a "compromise plan," which effectively combined the proposals by Ryzhkov and Shatalin.<sup>106</sup>

Dubbed "The Main Directions for Stabilization of the People's Economy and the Transition to a Market Economy," the compromise economic reform program ostensibly calls for dismantling the Union's economic monopoly.<sup>107</sup> Gorbachev's program does not, however, extend nearly as far as the republics demand. Despite his assertions to the contrary,<sup>108</sup> it is vague about the economic rights and powers of republican and local governments.<sup>109</sup> On the other hand,

100. In a speech before the Supreme Soviet, Gorbachev told the delegates, "If you ask me, I like the Shatalin plan better. . . . If there is a real plan to stabilize finances, money circulation, the ruble and the market, then we should adopt the Shatalin idea." *Id.* at col. 5.

101. *Id.* at 1A, col. 2.

102. Keller, *Evolution in Europe: Gorbachev Offers His Plan to Remake Soviet Economy, But Includes No Timetable*, N.Y. Times, Oct. 17, 1990, at A9, col. 5.

103. Clines, *supra* note 27, at col. 1.

104. Keller, *supra* note 102, at A9, col. 3. Other risks, according to the plan's critics, included rocketing inflation and large-scale unemployment, economic chaos, and political anarchy. Shatalin's plan also encountered some resistance from the military and the K.G.B. *Id.*

In retrospect, the rejection of the "500 day plan" by Gorbachev was a politically decisive move, marking a significant shift to right wing politics. Since early October, 1990, Mr. Gorbachev has surrounded himself with a new team of tough apparatchiks and started a campaign to restore central control over the Russian federation and the other secessionist republics, the chaotic economy, the crime-ridden streets, the anarchic politics, and the press. N.Y. Times, Feb. 8, 1991, at A4, col. 2. Ever since Gorbachev opted for the illusory safety of the status quo by rejecting the Shatalin plan, *perestroika*-type reform has been in reverse: *Glasnost* is in retreat, most liberals who once surrounded Gorbachev—including Eduard Shevardnadze, his chosen foreign minister—have abandoned him, and Gorbachev has been relying ever more visibly on the army, the K.G.B. and the Communist Party. *Going Yeltsin's Way*, *ECONOMIST* Mar. 23, 1991, at 13.

105. Broder, *Which Tragic Figure Will Gorbachev Be?*, St. Louis Post-Dispatch, Sep. 28, 1990, at 3C, col. 1.

106. The Supreme Soviet voted 333-12, with nine abstentions, in favor of Gorbachev's plan to free most prices of government control, to end most government monopolies, and to encourage free enterprise. Keller, *Gorbachev's Economic Plan Is Approved*, N.Y. Times, Oct. 20, 1990, at A1, col. 6.

107. N.Y. Times, *supra* note 102, at A1, col. 6. The republics are to set the pace for deregulating prices, transferring state enterprises and farms into private hands, and governing wages and social security. N.Y. Times, *supra* note 106, at A6, col. 1.

108. In his speech on October 19 to the Supreme Soviet, Gorbachev spoke of the unprecedented rights his plan afforded the republics: "For the first time, the republics are being given such broad rights, including in the area of property, prices and incomes, social protections of citizens, formation and use of the budget, development of the credit system, and many other things. . . ." *Excerpts From Gorbachev's Speech On Making Economic Plan Work*, N.Y. Times, Oct. 20, 1990, at 6, col. 5.

109. Keller, *Soviet Plan in the Middle*, N.Y. Times, Oct. 18, 1990, at A1, col. 3; *see also* Keller, *supra* note 102, at A1, col. 6. For example, the compromise plan retains Union control over export

the plan is more clear on what powers the Union government will retain.<sup>110</sup> The success of Gorbachev's program largely depends on republican officials, who must enact it through local legislation. However, if the plan is not further modified toward decentralization, these officials are unlikely to cooperate.

Moreover, any plan that lacks the blessing of Boris N. Yeltsin, president of the Russian republic, will likely encounter popular resistance. Mr. Yeltsin, arguably the most trusted man in the Soviet Union at this time,<sup>111</sup> has described Gorbachev's reform program as a "catastrophe," which will drive up prices and the budget deficit and decrease the ruble's purchasing power.<sup>112</sup> Of course, these effects may be unavoidable under any reform plan as the Soviet Union transfers to a free market. But Yeltsin believes that a plan with such side-effects will not win the necessary public support unless Moscow turns over more power to the republics in the process.<sup>113</sup>

Soviet economists have said that future cooperation between Yeltsin and Gorbachev is crucial to solving the nation's economic problems.<sup>114</sup> In short, they must agree on the definition of this "renewed confederation" and together specify what "special status" the republics will actually receive. Cooperation of this nature, if attained, may help prevent a disintegration of the Soviet Union.

#### IV. CANADA AS A MODEL FOR A NEW SOVIET CONFEDERATION

Canada is a logical choice for a Soviet model, because both nations are closely comparable in terms of geographic size and ethnic diversity. Amidst the Canadian confederation, the ten provinces possess unusual flexibility in foreign

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of natural riches like oil, gold, and diamonds. But several republics insist that these resources belong to them. The Union government must ultimately negotiate with the republics about the control and profits from these key commodities. Keller, *Proposal By Gorbachev Wins Committee Votes*, N.Y. Times, Oct. 19, 1990, at A4, col. 3.

110. The Union government would retain control of transportation, communication, defense industries, energy, credit and monetary policy, customs, and price regulation. Economic policies would be overseen by a committee with representatives of the republics. Keller, *supra* note 102, at A1, col. 6.

111. N.Y. Times, *supra* note 109, at A4, col. 1. Yeltsin has been Gorbachev's chief political rival for more than a year, and he consistently ranks above Gorbachev in public opinion polls. St. Louis Post-Dispatch, Nov. 17, 1990, at 10A, col. 2. A *Moscow News* poll showed that Gorbachev's approval rating plummeted from 52% to 21% over the course of 1990. Trimble, Stangun, & Corwin, *Death of a Nation*, U.S. NEWS & WORLD REP., Nov. 19, 1990, at 39.

Furthermore, Yeltsin has a mandate from the people that Gorbachev lacks. First elected as Communist Party general secretary in 1985 by a small circle of Communist leaders, Gorbachev has yet to stand for popular election. Without an opponent, he was then elected to a five-year term as president of the nation by the Congress of People's Deputies. Yeltsin, on the other hand, has won two stunning landslides in popular elections. He won 80% of the vote for a seat in the national Congress from Moscow in 1989 and again when he ran for the Russian parliament. Mitchell, *Battle of Titans is Shaping Up*, St. Louis Post-Dispatch, May 31, 1990, at 1C, col. 2.

112. St. Louis Post-Dispatch, Nov. 6, 1990, at 12A, col. 3.

113. Keller, *supra* note 102, at A9, col. 6. Yeltsin believes that the Union should retain jurisdiction over areas like state security and defense. INDEPENDENT, May 31, 1990, at 1. He also thinks, however, that the republics need to attain control over natural resources, banking, taxation, budgets, and international trade. St. Louis Post-Dispatch, Nov. 14, 1990, at 11A, col. 4.

114. St. Louis Post-Dispatch, Nov. 13, 1990, at 8A, col. 2. In an open letter published November 15, 1990, several Soviet intellectuals told Gorbachev that an agreement between him and Yeltsin would be a big step to keeping the nation intact at a time when most republics want to cut their links with the center.

St. Louis Post-Dispatch, Nov. 16, 1990, at 16A, col. 1.



trade.<sup>115</sup> The provinces appreciate Canada's historic allegiance to judicial review, which over time has strengthened and protected their position vis-a-vis the federal government, despite a constitution originally drafted to create a strong central government. Unlike the present Soviet system, the Canadian system uses its judicial branch to respond to the needs and desires of its member states. As a result, the nation has remained intact with little dissention<sup>116</sup> for over 120 years.

Similarly, the Soviet Union needs to create for its republics a constitutional right to trade in international markets independently of the central government. To protect this right in future years, the Soviet system must increase the influence of its judicial branch by authorizing its Supreme Court to integrate an aggressive approach to judicial review. Such an emergence of the Supreme Court will serve to curb any future abuses that may arise from a more conservative Supreme Soviet or the new dictatorial power given to the president.

### A. Demographic Similarities

Canada and the Soviet Union are similar in that both have diverse ethnic populations and language barriers within their borders. In addition, both countries have been molded by conquest, not consent. History shows that people bound together by conquest learn to voluntarily live with each other only if a national identity emerges that is stronger than their sub-national identities.<sup>117</sup>

Rather than be daunted by ethnic unrest, Canada has remained distinct among federations by recognizing its cultural dualism. The dualism of culture has been slowly woven into the political fabric of the nation since 1867.<sup>118</sup> Like Estonia, the Canadian province of Quebec has been a force to be reckoned with by its federal government. Quebecers have wished to maintain their "Frenchness" and deflect all English influences, whether they be British, American, or Canadian. In this desire to assert their identity, Quebecers differ little from Estonians, or from people of any of the other rebellious Soviet republics.<sup>119</sup> Both Estonia and Quebec have fought for genuine federalism to protect their own

115. In almost all federal states, the central government has maintained exclusive control over international trade. Canada, though, has acted differently. Its central government has a flexible policy in the field of international relations, and it allows freedom of action on the international scene to their provinces. After a province negotiates directly with a foreign firm and reaches an agreement, federal approval is then given, usually by means of a diplomatic note to the foreign government. Cadieux, *Quebec in World Affairs*, in *CANADIAN FEDERALISM: MYTH OR REALITY* 379, 382-84 (1968).

116. The Commission on the Political and Constitutional Future of Quebec has been holding meetings to decide whether the province of Quebec should renew its federal ties to Canada or seek some form of independence. *Hous. Chronicle*, Nov. 9, 1990, at 28A, col. 1. The Commission was created in September 1990 as Quebec's answer to Canada's failure to approve the Meech Lake Accord. The Accord was a package of constitutional amendments that would have incorporated Quebec into the 1982 Constitution (which Quebec has never signed). The pact died June 23, 1990, after it failed to win unanimous support from the provinces, mostly because of its provision granting Quebec's demand to be recognized as a "distinct society." *Id.*

117. *Goodbye to the Nation State*, *supra* note 93, at 11. With respect to the USSR, "[i]t is Mr. Gorbachev's misfortune that his republics neither came together voluntarily, surrendering sovereignty in the process, as the American colonies did, nor are they cemented by a central idea that has any enduring appeal." *Id.* As a result, not many wish to put the Soviet Union's identity above their own republic's.

118. Brady, *Quebec and Canadian Federalism*, in *CANADIAN FEDERALISM: MYTH OR REALITY* 337 (1968).

119. *Goodbye to the Nation State*, *supra* note 93, at 11.

cultures. Their tactics range from insisting that their native languages be used in the conduct of government affairs to demanding sufficient autonomy.<sup>120</sup>

### **B. Judicial Review: Offering the Potential to Transform a Nation Into a Looser Confederation.**

In the hierarchy of Soviet law, constitutional law and its amending legislation rank the highest. Although the USSR has a Supreme Court, the constitutionality of laws passed by All-Union bodies escapes judicial review. Despite a provision in the Constitution for appeal of these laws, there is no procedure for constitutional control.<sup>121</sup> The lack of judicial review has provided the Union government with a great deal of power and has left the republics powerless to challenge any executive and legislative actions that they have found unconstitutional.

Unlike in the Soviet Union, judicial interpretation in Canada has been an important source of its constitutional law.<sup>122</sup> Over time, Canada's judiciary has played a significant role in shaping the power and jurisdictional relationship between Parliament and the provincial legislatures. Judicial institutions—including provincial courts, the Supreme Court of Canada,<sup>123</sup> and the Judicial Committee of the Privy Council (which no longer has jurisdiction)<sup>124</sup>—have gradually expanded provincial powers. They have done this through interpretations of Section 92 Clause 13<sup>125</sup> of the British North America ("BNA") Act. Similarly, they have limited the federal powers implied in Section 91 of the same constitution.<sup>126</sup>

Canada's balance of power today sharply differs from what the framers of the BNA Act contemplated in 1867. The Canadian Founding Fathers originally planned a strong central government. In fact, the language of the BNA Act gives the provinces only certain enumerated powers to make laws, granting the residue of power to the federal Parliament.<sup>127</sup> Judicial interpretation of Canada's

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120. Brady, *supra* note 118, at 337-8.

121. Butler, *supra* note 36, at 161; see also Goldberg, *supra* note 34, at 64. A newly-formed Committee for Constitutional Supervision can enjoin certain laws if they conflict with the 1977 Constitution. But that is not nearly the same as a court that can hear actual cases in controversy. *Id.*

122. Butler, *supra* note 36, at 161.

123. The Supreme Court of Canada was not developed until 1875, and even then it did not become the highest court in the Canadian judicial system. ALEXANDER SMITH, *THE COMMERCE POWER IN CANADA AND THE UNITED STATES* 27 (1963). Instead, the Judicial Committee of the Privy Council (in Britain) remained as Canada's court of last resort until 1949. Mahler, *supra* note 89, at 35. Today, the Supreme Court is the "highest court in the land," with appellate jurisdiction in all civil and criminal cases.

124. Up until the passage of the British North America Act of 1949, the Privy Council could hear cases on appeal directly from the provincial courts, bypassing the Supreme Court completely. *Id.* Not only was this process cumbersome, but it seemed imprudent, for Canada faced the anomaly of having judges trained in British law and its role in a unitary state trying to comprehend and interpret the nature of Canadian conditions and the evolving pattern of Canadian federalism. *Id.* This system ceased in 1949, when cases no longer could be appealed from the Supreme Court of Canada to the Judicial Committee.

125. CONSTITUTION ACT, § 92, cl. 13 (1867). "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, . . . (13) Property and Civil Rights in the Province. . . ."

126. See *infra* note 130.

127. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 86-7 (1985).

Constitution<sup>128</sup> has, however, gradually redefined the division of powers between the federal government and the Canadian provinces.<sup>129</sup>

The Canadian Constitution distributes powers and responsibilities through two lists of categories: one list for the federal parliament and the other for each of the provincial legislatures. Section 91 of the BNA Act enumerates the powers of the federal government, and most noteworthy is the central control over "the regulation of trade and commerce."<sup>130</sup> Concurrently, section 92 provides the provincial legislatures with power over "property and civil rights in the province"<sup>131</sup> and "generally all matters of a merely local or private nature in the province."<sup>132</sup> Over time, provinces sought to expand their authority and challenged the federal control over trade and commerce on constitutional grounds. In response, the Canadian judicial system has had to perform the rather difficult task of interpreting the Constitution by assessing the competing federal and provincial powers.

Certain commercial transactions can bring the two sections into conflict.<sup>133</sup> From a literal reading of the text of section 91(2), the Canadian Federal Parliament has the power to regulate "trade and commerce" without qualification.<sup>134</sup> Yet, as Lord Atkinson stated in *Montreal v. Montreal Street Ry.*,<sup>135</sup> this

128. In contrast to the Constitution of the USSR, the 'living' Constitution of Canada cannot be found in a single document. It consists of a series of written documents, judicial pronouncements, unwritten customs and usages, and other sources. Of the written documents, by far the most important are the British North American Act (later renamed the Constitution Act), passed by the British Parliament in 1867, its amendments, the Constitution Act of 1982 and the Canadian Charter of Rights and Freedoms.

Despite the 1982 implementation of a new constitution, the text of the BNA Act of 1867 still comprises the bulk of what we today know as the Canadian Constitution.

129. After more than a century of Privy Council and Supreme Court decisions, the Constitution's distribution of powers is "much less favourable to the federal power than would be suggested merely by comparing the text with that of the United States or Australian Constitutions." Hogg, *supra* note 127, at 89-90.

130. CONSTITUTION ACT § 91(2) (1867). This Act also provides:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; [including]. . . The Regulation of Trade and Commerce. . . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. *Id.*

131. *Id.* at § 92(13). See *supra* note 125.

132. *Id.* at 92(16).

133. For purposes of this Note, we are principally concerned with the problem created by granting federal authority over the regulation of trade and commerce, while simultaneously reserving to the provinces the power over matters of property and civil rights in the province.

134. Hogg, *supra* note 127, at 87. By contrast, the United States Congress had been granted the more limited authority to regulate "commerce with foreign nations and among the several states and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. In the same vein, whereas the BNA Act provides the provincial governments with enumerated powers and leaves the residuary powers in the central Parliament, the Tenth Amendment of the United States Constitution reserved powers not delegated to the federal government "to the States respectively or to the people." These differences are not coincidental. The founders of the BNA Act fashioned the commerce clause as a great instrument of centralization. Smith, *supra* note 123, at 176.

135. A.C. 333, 344, 1 D.L.R. 681, 687 (1912).

power, taken in its widest sense, "would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in s. 92, and would seriously encroach upon the autonomy of the province." Accordingly, nearly any federal use of the commerce power was countered with the charge that such use invaded the provincial power over "property and civil rights," or that it was a matter of a "merely local or private nature in the provinces."<sup>136</sup> As a result, Canadian courts have invalidated much of the social and economic legislation passed under Parliament's commerce power as encroaching on provincial rights.<sup>137</sup>

In the early part of the Canadian federation, the Privy Council decided several "trade and commerce" cases and interpreted the federal-provincial conflicts that arose from the BNA Act. Original high-court cases granted exclusive power to the federal government with respect to interprovincial and foreign trade matters. Soon thereafter, though, the Privy Council began to increase provincial power over trade and commerce.

According to the Council's reasoning, the provinces' authority over trade stemmed from their constitutional jurisdiction over matters of "property and civil rights." In *Citizens Insurance Company of Canada v. Parsons*,<sup>138</sup> the Council set a precedent for the further development of provincial control in the area of trade and commerce.<sup>139</sup> For the first time, the Lords held that "property and civil rights" in the provinces included rights arising from contracts.<sup>140</sup> The *Parsons* decision greatly increased provincial power, because it meant that if there was trade in a province it included the province's "property and civil rights." Therefore, Canada's highest court arguably allowed the provinces to maintain jurisdiction over any activity that involved a contract, including, of course, domestic and foreign trade.<sup>141</sup>

The *Parsons* case demonstrates how an active Supreme Court can prevent unrest from developing among a federation's member states. When such member states are denied, for a prolonged period of time, freedom to participate in their economic and political undertakings, they find the options of seeking independ-

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136. RICHARD E. JOHNSTON, *THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES* 233 (1969). See also, *supra* note 125.

137. Johnston, *supra* note 136, at 246. Such legislation includes the following:

... legislation for the abolition of the liquor traffic, regulation of "through traffic" over provincial and Dominion railways, prohibition of monopolies and fixing of maximum prices of commodities, regulation of the grain trade and of the business of grain dealers, regulating egg sales and deliveries within a province, regulating market transactions in natural products, validation of agreements between persons in industry as to competition in trade within a province, regulating the licensing of fish canneries and fish processing, regulation of the business of non-Dominion insurance companies, regulations to prevent strikes and lockouts and for settlement of industrial disputes, and regulations relating to minimum wages and limitations of hours of labor.

*Id.* at 246-7.

138. 7 A.C. 96 (1881). The validity of the Ontario Fire Insurance Policy Act was at issue in *Parsons*. The Council needed to decide whether the regulation of insurance contracts was a federal matter of "regulation of trade and commerce" or a provincial matter of "property and civil rights in the province."

139. Mahler, *supra* note 89, at 37.

140. *Id.*

141. *Id.*

ence and engaging in civil war increasingly more appealing. Such has been the case with the Soviet republics. To prevent a complete dissolution of the Union, therefore, Soviet officials must expeditiously allow the Soviet judiciary to seize the power of judicial review as John Marshall did in *Marbury v. Madison*.<sup>142</sup> Not only will this political move establish an avenue through which the republics can be heard, but it will provide them an attractive alternative to the risky endeavor of declaring independence from the Union.

The beauty of the Canadian system lies in its flexibility, derived primarily from judicial review. This is precisely why the Soviet Union must develop its Supreme Court's role in settling disputes between Moscow and the republics. The Canadian framers originally thought the nation needed a strong central government. Yet, over time, the demographically diverse provinces demanded otherwise, and gradually the Privy Council and the Supreme Court of Canada provided them with increasing powers vis-a-vis the federal government. If not for its flexible and progressive judicial branch, Canada may not have survived this many years. Along a similar vein, although the drafters of the original 1917 Soviet Constitution envisioned a centrally controlled system that would govern forever, the member republics have since threatened secession if decentralization is not attained. If Soviet officials neglect to follow the Canadian example discussed here, the federation will face imminent danger of destruction.

Confronted with the threat of national disintegration, the Soviet Union must permit its Supreme Court to hear actual cases in controversy that involve issues of federalism. For instance, it should allow the Supreme Court to disentangle the competing Articles 73(10) and 76 of the 1977 USSR Constitution, much like the Canadian high courts have done with Sections 91(2) and 92(13) of the BNA Act.

Let us suppose, for example, that Estonia strongly desires to seize full control over the extraction and export of its plentiful shale reserves. Under the current system, Estonia has no legal means through which it can wrest control from the central government of the natural and industrial resources within its boundaries. If, however, the Supreme Court was empowered to hear actual cases in controversy, an enterprise from Estonia could appear before the high court and argue that, by virtue of Article 76,<sup>143</sup> the republic has independent jurisdiction over the use and trade of all natural resources "within its territory." The prospect of a continued Soviet federation would be enhanced if the republics could gradually attain control over their respective natural resources in this manner.

The emergence of a Soviet Supreme Court with judicial review authority will also protect the republics from the extraordinary powers now bestowed upon President Gorbachev.<sup>144</sup> The Supreme Soviet voted to consolidate executive power in one set of hands, and in doing so, effectively rendered the republics powerless

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142. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

143. See *supra* note 50.

144. On September 24, 1990, the Supreme Soviet voted 305-46, with 41 abstentions, to delegate sweeping powers to Gorbachev to rule by decree and take personal control of virtually all sectors of the national economy and public order. St. Louis Post-Dispatch, Sep. 28, 1990, at 1C, col. 2. Yeltsin declared that Gorbachev's receipt of additional powers was "unacceptable," because it would allow him to infringe on the republics' sovereignty. St. Louis Post-Dispatch, Sep. 25, 1990, at 12A, col. 2.

to attack an unconstitutional order issued by Gorbachev. Furthermore, given the present pro-Union state of the Soviet Constitution, Gorbachev can issue many decrees which would discriminate against the republics, yet remain technically constitutional.<sup>145</sup> Hence, before judicial review can be effective in the USSR, reform must begin with modification of the 1977 Brezhnev Constitution.

## V. THE NEED FOR CONSTITUTIONAL RESTRUCTURING

Following the demise of the Communist Party, genuine reform should begin with restructuring the Soviet Constitution. In the hierarchy of Soviet law, constitutions rank highest, as they are "fundamental law."<sup>146</sup> Nevertheless, while the Union Constitution has been the supreme legal norm, the Program of the Communist Party of the Soviet Union ("CPSU") has traditionally exerted the greatest influence over the nation. Co-existing with the written Constitution was an unwritten one; controlling law could be found in secret instructions from Communist Party leaders as well as in unwritten rules of custom.<sup>147</sup> The Constitution was the supreme law of the land only if there was parallel existence between state law and Party law. Any conflict between the two was resolved in favor of the law of the CPSU.<sup>148</sup>

Through a constitutional amendment of Article 6<sup>149</sup> in March 1990, the Party's monopoly on the country's leadership was eliminated. With the CPSU effectively rendered powerless over the execution of law, the remaining text of the Union Constitution should accordingly take on new meaning, i.e. as the unqualified source of Soviet law. Yet, the Constitution will regain influence only if new drafters delete current inconsistencies in its language and create significant republican powers that cannot be trumped by central authorities. Thereafter, if the Soviet Union wants to advance its goal toward a genuine federal system, it must revere its constitution as the pinnacle of Soviet law and structure the executive and judicial branches around it.

In late 1989, Gorbachev appointed a group of scholars, party officials, and legislators to draft a new constitution.<sup>150</sup> This constitution needs to be completed

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145. On September 27, 1990, Gorbachev issued his first decree under the enhanced powers, threatening businesses with fines unless they fulfilled supply contracts to government retailers. The decree gave government ministries a month to restore normal production of goods. Enterprises that failed to meet their contractual obligations faced fines of up to 50% of the cost of undelivered supplies. St. Louis Post-Dispatch, Sep. 28, 1990, at 1C, col. 2. At this point in time Gorbachev is not constitutionally barred from issuing such a decree.

146. MODERN LEGAL SYSTEMS CYCLOPEDIA 42.

147. Ioffe and Maggs, *supra* note 33, at 15.

148. MODERN LEGAL SYSTEMS CYCLOPEDIA 340.

149. Article 6 has historically provided:

The Communist Party of the Soviet Union shall be the guiding and directing force of Soviet society and the nucleus of its political system and of State and social organizations. The CPSU shall exist for the people and shall serve the people.

Armed with Marxist-Leninist teaching, the Communist Party shall determine the general perspective for the development of society and the internal and foreign policy line of the USSR, direct the great creative activity of the Soviet people, and impart a planned, scientifically well-founded character to its struggle for the triumph of communism.

All Party organizations shall operate within the framework of the USSR Constitution.

150. Goldberg, *supra* note 34, at 62.

and implemented rapidly, and unlike its predecessors, it must prescribe actual rights and powers. Obviously, in accordance with the national trend toward decentralization, it must remove Article 74,<sup>151</sup> which allows any federal law to prevail over a republican law. To increase the likelihood of prolonged national cohesiveness, Soviet legislators should also expand republican jurisdiction by adding an enumerated list of powers to Article 76. In reality, though, this process of revision will take many months, if not years, to complete.

Because no one expects to see a finished constitutional product anytime soon, a more immediate priority is the drafting of a new Union treaty—the first since 1922—that will redistribute powers between the republics and Moscow. The original treaty failed to establish a genuine federal system, because it gave the Union virtually unlimited power over economic planning, education, legislation, foreign relations, defense, transportation, and emigration.<sup>152</sup> Obviously, the new treaty will have to transform the nation into a confederation of sovereign republics, and in doing so, it must respond to republican demands for increased local control of the nation's wealth.

On November 24, 1990, Gorbachev offered the republics a draft treaty which he proclaimed gave greater sovereignty to the republics. Realistically, the draft guaranteed no reduction of the central government's powers. For this reason a majority of republics rejected it immediately.<sup>153</sup> Under Gorbachev's draft, Union laws would have continued to take precedence over resolutions passed in major republics that had proclaimed their own laws as dominant.<sup>154</sup> Moreover, the central government would have kept the nation's gold and diamond reserves while using them "in agreement" with the republics.<sup>155</sup> This latter provision deviated dramatically from the republics' demands for increased control over the export of natural resources extracted from their territories.

Gorbachev's next attempt at a draft treaty will have to reserve greater powers for the republics. He must recognize that superficial reforms, such as those of the foreign trade monopoly, will not suffice in this age of republican revival. The two levels of government can coexist only if the new Union treaty eliminates federal domination, introduces bona fide republican powers, and allows the governments to coordinate rather than subordinate to each other.

### CONCLUSION

In light of the republics' official actions toward sovereignty and independence, Soviet officials should take immediate steps to decentralize Union control over republican governments. In doing so, they must win the political cooperation of the fifteen republics by achieving a balance between national unity and subnational diversity. To maintain its vitality as a country, the Soviet Union must respond to the republics' reasonable demands: authentic reforms and the

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151. KONST. SSSR art. 74 (1977). ("The laws of the USSR have equal force within the territory of all the union republics. In the event of a discrepancy between the law of a union republic and all-union law, the law of the USSR prevails.").

152. Goldberg, *A More Perfect Union Part II: The Center Cannot Hold*, 76 A.B.A. J. 73 (Nov. 1990).

153. St. Louis Post-Dispatch, Nov. 25, 1990, at 1A, col. 2.

154. Clines, *supra* note 27, at 8, col. 1.

155. *Id.*

dismantling of its suffocating foreign trade monopoly. Through its effective utilization of judicial review, the Canadian federation has shown that it is possible to both maintain a degree of federal control and provide its provinces with autonomy over foreign trade and other areas. Before the Soviet Union can enact a similar system of judicial review, it must initiate legislative reform to eliminate constitutional provisions that undermine the republics' authority and to establish enumerated republican powers. National disintegration can be avoided only by the establishment of a new power relationship which will provide the republics with nothing less than the benefits of the genuine federation currently enjoyed by Canadian provinces.

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