

**The Legal Dimension in Cold-War Interactions:  
Some Notes from the Field**

*Edited by*

Tatiana Borisova and William Simons

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# **The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy**

*Paul B. Stephan*

## **Introduction**

Twenty years out, the impact of the Cold War on US and Soviet, then Russian, law deserves a reappraisal. How much did the Cold War affect developments in each legal system and was the impact symmetrical? This chapter takes a broad-brush view, emphasizing highlights rather than carefully analyzing systematic changes. It argues that the effect of the Cold War on both country's laws and legal institutions was not all that great but that the impact was greater on the United States.

During the course of the Cold War, one can detect some significant developments in US law that reflected at least indirectly that country's perception of the pressures of the superpower competition. Symmetrically, the unwinding of that conflict had a notable impact on the United States, both in its participation in international institutions and its approaches to international law as well as in its domestic legal reforms. The Soviet Union and Russia were different. Although consciousness of the superpower rivalry was broad and acute in the Soviet Union, important developments in law can mostly be laid at the feet of domestic forces. Symmetrically, although the collapse of the Soviet system had an overwhelming and largely disorienting impact on Russia, the legal changes there responded largely to domestic imperatives rather than foreign pressure (the presence of foreign technical advisors notwithstanding).

What explains this difference? For the United States, the challenges that coalesced into what became the Cold War coincided with a striking new stage in its history. Internationally isolated for most of its history, that country suddenly found itself saddled with broad geopolitical responsibilities and concerns. Peacetime international engagement in the role of a superpower was an entirely new task for the United States and required investment in new institutions and legal strategies. The Soviet Union, in contrast, experienced its struggle with the United States more as a continuation of the existential crisis that the Soviet state had faced since its inception.

Sometime between May 1945 and December 1946, the US people recognized—for what amounts to the first time in its history—that their country could emerge from open, unlimited warfare and still find itself engaged in an international struggle that challenged its identity as a nation and threatened its

continued existence.<sup>1</sup> The Soviet Union, by contrast, had known only fundamental threats and (both real and imagined) baleful foreign influence since its inception.

During the Cold War, the United States responded to its new place in the world by reexamining and, in some cases transforming, its fundamental institutions. Although the ensuing story was complicated and US actions varied, the country never lost its sense of the importance and difficulty of its competition with the Soviet Union and its allies. When that competition ended, the United States believed that the world had changed and that it had triumphed, with predictable if regrettable consequences. During the same period, the Soviet Union underwent several profound institutional transformations, but none had a direct link to what was officially depicted as the capitalist menace. When the Soviet regime collapsed, many inside—as well as outside—the country perceived the outcome as the result of internal forces rather than foreign pressure. The legal changes that followed reflected an internal struggle for power and control over the nation's wealth, rather than a response to what the United States believed it was holding out as new models for Russian society and politics.

This chapter begins by sketching the main developments in US and Soviet law through the Cold-War period and showing the ways that they were and were not tied to the superpower competition. In each country, it divides this time into periods corresponding to the tenure of particular leaders. One might argue that this focus on the political leadership misses too much to be helpful. But in the case of Russia, for much of the twentieth century Moscow dominated the country—much as Paris still monopolizes the French sense of self. Prime Minister Putin's rather risible effort to shift institutions and resources to St. Petersburg exposes exactly how important Moscow remains. Within Moscow, a company town not unlike Washington, DC, the moods and decisions of the top reverberate throughout society. And for most of the Soviet period, the top meant one prominent leader and a small clique of associates. This was especially true for law, which—at least in the formal sense—responded largely to top-down direction, with only interstitial reactions to local or sectoral influences. In the case of the United States, Washington's influence on the country as a whole may have been less significant. But the national elections that produced particular Presidents bore at least some relation to broader changes in the culture that in turn influenced legal change.

After reviewing the impact of the Cold War proper on the two countries' legal systems, the chapter looks at how both the United States and Russia responded once peace broke out. Put broadly, the United States reveled in what it believed

<sup>1</sup> The impact of the immediate postwar period on the broader US legal culture, as well as on the Supreme Court in particular, is discussed in Paul B. Stephan, "Treaties and the Court, 1946-2000", in William S. Dodge, Michael D. Ramsey and David Sloss (eds.), *International Law in the US Supreme Court: Continuity and Change* (Cambridge University Press, New York, NY, 2011).

to be a great victory—only to come back to earth a decade later. Russia struggled through a period that Muscovites compared to the ‘time of troubles’ that scarred the country so badly in the early seventeenth century. The chapter concludes with a review of Russian arguments that the Cold War has not yet ended and nostalgia among a handful of Western legal scholars for the Soviet system.

### **Reaction under Stalin and Truman’s Internationalism (1945-1953)**

For the United States, the Cold War represented a sharp break with the past. The United States never before had maintained a large military establishment—much less a worldwide network of foreign military bases—during peacetime.<sup>2</sup> The specter of subversion by undisclosed agents of a foreign power was not quite so unique, but the extent of the reaction to the perceived threat was. The Korean War underlined both of these trends, even as it suggested limits to both US international power and the feared domestic threat. The dominant trend in the legal culture was one of consolidation of Executive power, with only minimal pushback from the judiciary.<sup>3</sup>

The flip side of this anxiety about foreign threats was the undertaking of great international projects, principally the United Nations and the Marshall Plan. In these early years, the United Nations had not yet become the place where dreams of international cooperation went to die. Most significantly, because of the Soviet decision to withdraw from Security Council activity just as the crisis on the Korean peninsula got under way, the United States was able to obtain the United Nations’ blessing for its expeditionary force to repel the North’s invasion. President Truman in turn used the UN endorsement as a ground for not seeking a declaration of war from Congress.<sup>4</sup> The Marshall Plan at one point consumed one-tenth of the national budget. The seeds of the global institutionalism that seemed so promising during the 1990s were sown during this period.

As for the Soviet Union, it faced the consequences of its terrible triumph in what it called the Great Patriotic War. On the one hand, through conquest and

<sup>2</sup> American imperialism, at least in the formal sense of direct management of foreign states, emerged as the aftermath of the Spanish-American War. But the occupation of the Philippines and the sporadic takeover of Cuba and Haiti in the years before World War II paled in comparison to the military as well as diplomatic presence that arose after 1945.

<sup>3</sup> See Stephan, *op.cit.* note 1, 321-326; *Chicago & Southern Air Lines v. Waterman SS Corp.*, 333 US 103 (1948) (recognizing unreviewable presidential discretion in international negotiations); *Dennis v. United States*, 341 US 494 (1951) (upholding convictions of accused Soviet-influenced subversives); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952) (requiring legislative authorization of seizure of steel production assets); and *United States v. Reynolds*, 345 US 1 (1953) (recognition of official secrets privilege).

<sup>4</sup> See UN Security Council Resolution 82, S/RES/82 (1950); UN Security Council Resolution 83, S/RES/83 (1950); UN Security Council Resolution 84, S/RES/84 (1950); and UN Security Council Resolution 85, S/RES/85 (1950).

a series of concessions at international conferences, it had acquired suzerainty, if not sovereignty, over a wide strategic corridor in Central and Eastern Europe, in addition to a significant adjustment of its borders at the expense of Poland and Romania. On the other hand, the nation had absorbed great casualties, certainly many more than the twenty million officially claimed as war dead. Moreover, its subjects, as soldiers in the Red Army, had wandered well outside the borders of the Soviet Union and in many cases had fraternized with members of the Allied armies. Each of these circumstances produced a reaction, which in the loosest sense one might call a component of the Cold War. But the reaction seemed much more about general Soviet fear and anxiety than about any specific threat from the West.

*First*, the Soviet Union had to devise a legal structure to manage its relations with the territory of Europe that had come within its control, but not within its boundaries. What the Soviet leadership, first and foremost Stalin, saw as pressing security concerns greatly limited the range of options, but the exact form of domination and control was not foreordained. There is a basis for the argument that active involvement of Soviet security organs in the domestic affairs of the subject countries and the liquidation of non-Communist elements in the coalition governments that initially governed Bulgaria, Czechoslovakia and other conquered nations was as inevitable as was, twenty-some years earlier, the rise of the *Cheka* and the expulsion of the left Social Revolutionaries from Lenin's ruling coalition. The actual architecture of the postwar control system, specifically the creation of the Warsaw Pact (1955) and the Council for Mutual Economic Assistance (1949), doubtlessly owed something to an inclination to mirror the institutions created in the West, namely NATO (1949) and the European Coal and Steel Community (1952). But the firmness of the Soviet guiding hand, orchestrating murderous show trials and vicious repressions as well as rigid barriers against Western contamination, was remarkable and disproportionate to Western actions.

Indeed, the extension of Soviet power outside of Soviet borders, in particular through the establishment of the Eastern Bloc and the provision of military assistance to North Korea in its conflict with South Korea and the United Nations (1950-1953), did not lead to any significant conceptual breakthroughs in Soviet theories of international law. Rather, the late Stalin regime pragmatically addressed what it regarded as its fundamental security interests. The more important changes in the legal environment involved the domestic consequences of the late war. These fell into two categories: retribution and decontamination.

Because the Germans had occupied a large part of the western Soviet Union and in some instances had enjoyed initial popular support as liberators from the Stalin regime, there existed a host of candidates for punishment as collaborators, traitors and war criminals. Some had thrown in their lot with the Nazis to the point of participating in the administration of the terror and genocide that became Nazi occupation policy. Others had simply struggled to survive.

The Soviet regime dealt with this task in various ways. Especially prominent individuals met justice through war crime trials, an institution that continued up to the 1980s. The regime famously participated in the Nuremberg tribunals, now hailed as the birth of international criminal justice and a worthy blow against the culture of impunity. National tribunals, however, both in the Soviet Union and the subject states, absorbed a far greater burden, and produced a much larger number of trials. Soldiers who had become German prisoners of war either were shot or went to the camps, normally for a ten-year sentence. Officers and soldiers who had fraternized with British or US troops fell under a cloud, and often ended up in the camps as well. One can see weak parallels with the fate of the officers of the Russian army that had invaded France in 1815. The distinctive contribution of the later Stalin regime to the law of postwar retribution, however, was the identification of entire nationalities as traitors subject to group punishment. People classified as Crimean Tatars, Chechen, Ingush, Volga Germans, Meskhetian Turks and other ethnic groups in the North Caucasus and Crimea were deported *en masse* from their native lands to Central Asia and other points east. The transport killed hundreds of thousands, with the harsh conditions that greeted the survivors killing more. Some won the right to end their exile under Khrushchev, while others regained their civil rights only during the Gorbachev period.

The link between retribution, decontamination, and nationalist consciousness was both explicit and deeply disturbing in the case of the Jews. On the one hand, during the immediate postwar period the Soviet Union presented itself to the outside world as the state that had done more than any other to protect European Jewry from the Nazis, an image burnished by its being the first country to recognize Israel.<sup>5</sup> On the other hand, the leadership perceived Jews as having links to a wider community outside the enlarged boundaries of the Soviet empire. The ‘fatherland’ (*otechestvo*) for which the Great Patriotic (*Otechestvennaia*) War was fought seemed, after the fact, to require blood identity that excluded outsiders—especially those who seemed more European than Russian. A vicious and deadly campaign against Jews ensued. Signs of a new program of official anti-Semitism—including the arrest of high-level party cadres with Jewish backgrounds—appeared in 1946, but a fully fledged campaign against ‘rootless cosmopolitans’ did not get under way fully until 1948. Show trials of prominent academics, including leading members of Moscow State University’s law faculty, followed, culminating in the notorious ‘doctors’ plot’ of 1952.

Masha Gesson, in her remarkable essay about her two grandmothers, conveys something of the strangeness of this period. One grandmother, the daughter of Zionists, had good Hebrew and, after the War, needed to support an infant and an invalid husband. One day in 1948 she showed up for a job interview with the

<sup>5</sup> Cf. Ben-Cion Pinchuk, “Was There a Soviet Policy for Evacuating the Jews? The Case of the Annexed Territories”, 39 *Slavic Review* (1980), 44.

Jewish Anti-Fascist Committee, only to discover that over the previous weekend the state security forces (at that time the *MGB*, the immediate predecessor of the *KGB* and the descendent of the *Cheka* and the *OGPU*) had arrested everyone associated with that organization. She went home, resigned to the inevitable, and when the phone call came dutifully reported to the designated entrance of the *MGB* headquarters, carrying winter clothing and stale toast to survive the train ride east. The guard at the entrance laughed at her: she had been summoned to the entrance for prospective employees, not the one for persons subject to repression. It turned out that the *MGB* indeed had uncovered her job application in the course of its crackdown on the Committee, but decided that it needed to hire a Hebrew linguist in support of espionage and covert action responsibilities generated by the Soviet Union's relationship with the new State of Israel.<sup>6</sup>

The arrests and trials, centered in Moscow, had implications for the several million Jews who lived in the Soviet Union after the War. During this period, the authorities gave renewed attention to the Jewish Autonomous Region in the distant and inhospitable borderland with China. The Soviet Union had created this entity before the War as a potential buffer against the notoriously anti-Semitic White Guards and Cossacks who had settled in Manchuria in the wake of the Revolution. After the War, newspapers carried stories explaining that Soviet Jews wanted to settle in the Autonomous Region to ensure their protection from unspecified forces that threatened them. As Gesson's memoir indicates, many Jews of the time believed that the authorities' real intentions were to use the Autonomous Region as a platform for liquidating the Soviet Union's Jewish population. According to these accounts, Stalin's death cut short an extermination campaign that would have rivaled the Holocaust.

It is tempting to personalize and displace these grotesque events as simply a manifestation of Stalin's increasing dementia, brought on perhaps by atherosclerosis and presenting itself as acute paranoia. For the purpose of this chapter, what matters is that the traumatic efforts to punish groups seen as insufficiently loyal and to cauterize the 'wound' of foreign contamination, themselves a reflection of the terrible dislocations and suffering of the War, created an environment that made both constructive engagement with the West and legal innovation at home extremely difficult. An event that epitomizes Soviet behavior under these constraints is its aforementioned boycott of Security Council meetings during the summer of 1950—as the legalities of the conflict in Korea were being sorted out. Rather than wielding a veto that would impede the formation of a Western alliance in aid of the South, the Soviet delegation simply refused to engage.

Some argue, I think implausibly, that the Cold War brought about Stalin's reactionary policies by creating a sense of danger.<sup>7</sup> Rather, an ongoing foreign

<sup>6</sup> Masha Gessen, "My Grandmother, the Censor", *Granta* (1998) No.64, 165, 176-179.

<sup>7</sup> E.g., Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1989* (Pantheon Books, New York, NY, 1994), 230-233.

threat provided justification, not inspiration, for these policies. The leaden atmosphere and general anxiety that the repressions produced in turn contributed to a downward spiral in relations between the Soviet camp and the United States, if only by shaping US apprehensions, both reasonable and irrational, of its adversary. This trend made cooperation through international institutions, first and foremost the United Nations, virtually impossible, thus stunting the development of any kind of a common international law.

### **The First Reforms (1953-1964): De-Stalinization and Desegregation**

In the United States, the period from Eisenhower's inauguration to Johnson's election was one of profound social reform, especially with respect to race. The Supreme Court brought down *Brown v. Board of Education* in 1954.<sup>8</sup> Over the next decade the Warren Court issued a number of far reaching decisions in criminal law, free expression, and election law, with restructuring of racial relations a common thread. The rest of the country gradually got behind the project, if never completely or wholeheartedly.<sup>9</sup>

The connection between the civil rights struggle in the United States and the Cold War is a matter of controversy. One scholar has made her reputation by characterizing the domestic reforms as primarily the product of the international context, describing desegregation as a 'Cold War imperative'.<sup>10</sup> A less monolithic view might concede that the Justices of the Supreme Court themselves were conscious of the international costs of the existing system of racial apartheid in the South, but that in the broader polity arguments about international pressure impeded rather than advanced efforts to dismantle segregation.<sup>11</sup> More generally, one can trace the influence of the superpower competition in these fundamental developments in US law without asserting strict causality between the one and the other.

The question of reform in the Soviet Union was of a different order of magnitude due to the extreme social and political deformities of the Stalinist legacy. The Soviet people greeted Stalin's death in March 1953 largely with grief

<sup>8</sup> *Brown v. Board of Education*, 347 US 483 (1954).

<sup>9</sup> See *Mapp v. Ohio*, 367 US 643 (1961) (establishment of exclusionary rule in state criminal cases); *Baker v. Carr*, 369 US 186 (1962) (creating principle of proportionality in election districts); *New York Times Co. v. Sullivan*, 376 US 254 (1964) (First Amendment limits on civil suits for libel of public officials); and *Miranda v. Arizona*, 384 US 436 (1966) (mandated warnings to criminal suspects).

<sup>10</sup> Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press, Princeton, NJ, 2000).

<sup>11</sup> See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press, New York, NY, 2004), 182-184, 375-376.



and anxiety: they had learned to fear change. Within a few months, however, some of the political figures jockeying to take over the leadership signaled an intention for others to see them as reformers willing to break with the Stalinist system. Ironically, the first to do so was Lavrentii Beria, who as head of the security organs had more blood on his hands than did any of his competitors for power. Khrushchev—after putting Beria and his closest associates to death—eventually adopted reform and dismantling of the most extreme aspects of Stalinism as the platform for his claim to the status of supreme party leader. This struggle came to its climax with the suppression of the ‘Anti-Party Group’ (*i.e.*, Stalin’s most loyal lieutenants) in 1957, a year after the CPSU Twentieth Party Congress had introduced the theme of de-Stalinization (cryptically called the Struggle against the Cult of Personality). In the course of reconsidering the historic destiny of the Soviet Union, the leadership gave new attention to legal architecture.

One instance where the reformist spirit extended into legal practice involved the doctrine of international law that Soviet scholars packaged as the Theory of Peaceful Coexistence.<sup>12</sup> Leon Lipson wrote (and spoke) brilliantly about this development.<sup>13</sup> He saw PCX—as he called it (so as to avoid confusion with peace or coexistence)—as a second-order theory of international law. PCX opened the door to binding customary norms, a concept that prior Soviet approaches had ruled out, but maintained that no norm could arise unless it represented the coordinated wills of the two opposing camps in the international struggle. PCX, in other words, gave the socialist bloc a veto over all international law norm formation while admitting the existence of a process that could proceed alongside positive treaty law.

Compared to the bizarre combination of isolationism and belligerence that preceded it, PCX represented a more rational form of reengagement with the non-socialist world. Indeed, Lipson and others feared that people in the West might make too much of this change in direction, and in particular might misjudge the extent to which the Soviet leadership still saw its interest as adverse to that of the United States and its allies. Lipson also questioned the strength of the intellectual foundations for this supposed break with the past, which replaced one form of conceptual unilateralism (no international obligations without the express consent of the Soviet state) with another (no international norms that conflicted with PCX, which required the approval of the socialist camp).

On the domestic front, law reform reflected and drew spirit from the cultural ferment associated with the ‘thaw’. A program to rewrite the 1936 Stalin Constitution got under way, although it failed to make much headway. A kind

<sup>12</sup> G.I. Tunkin, “Coexistence and International Law”, 95 *Recueil des Cours* (1958), 1; and N.S. Khrushchev, “On Peaceful Coexistence”, 38 *Foreign Affairs* (1959), 3.

<sup>13</sup> Leon Lipson, “Peaceful Coexistence”, 29 *Law and Contemporary Problems* (1964), 871; and *id.*, “The Rise and Fall of ‘Peaceful Coexistence’ in International Law”, *Papers on Soviet Law* (1977), 6.

of formalistic federalism appeared as part of a broader law revision project. The Soviet legislature would enact ‘fundamentals’ (*osnovy*) in fields such as civil law, criminal law, criminal procedure, and the like, leaving it to the fifteen Republics to enact law codes that filled in the gaps. This approach marked a slight loosening of the bonds of centralization that had prevailed under Stalin. Finally, a number of discrete law reform projects came to fruition, including the re-legalization of abortion (then the principal family planning device) and the renunciation of administrative imposition of criminal punishment.

Under Khrushchev, the authorities also undertook various administrative changes—largely to address internal agendas. The Crimea, previously a part of the Russian Soviet Federated Socialist Republic, became the possession of the Ukrainian Republic. A Russian bureau appeared within the CPSU structure, and the position of regional party leader became bifurcated into a first secretary for industry and another for agriculture. Khrushchev changed his job title from General Secretary to that of First Secretary to create semantic space between himself and Stalin. None of these reforms directly affected the legal system, but each hinted at an underlying administrative instability that—as it progressed over three decades—eventually brought down the Soviet Union.

One might interpret the thaw and the associated legal reforms as an effort to compete more effectively with the West along the ideological dimension of the Cold War. Khrushchev, so the argument would go, sought to create a kinder, gentler Soviet state so as to present a more appealing face both to the Soviet people and to the non-aligned world. But to reach this conclusion, a defender of the foreign-competition thesis must pull off three improbable moves: (a) posit some sort of mechanism through which the Soviet people held their leaders accountable for their shortcomings in comparison with the West; (b) assign to Soviet law a significant role in ideological competition outside the Soviet Union; and (c) disregard the various domestic factors that explained these reforms. While the ultimate judgment of history remains unformed, the most plausible conclusion is that Khrushchev sought to make a break with the more arbitrary and violent aspects of the Stalinist system principally because the political élite wanted more security—not to gain any advantage over the West. Compare this with desegregation in the United States, where Cold-War concerns helped shape elite support for reform, even if they did not have much effect on the broader public.

### **Retrenchment under Brezhnev and a Crisis of Confidence in the United States (1964-1982)**

In the United States, the period from Johnson’s election through Reagan’s first term saw waves of first cultural, then economic and political ferment and disorder, marked by a shattering of confidence in the capacity of traditional élites to manage government generally and foreign policy in particular. One dimension of this conflict was a debate over the validity of the Cold War. Much of the drama

and deepening sense of dismay stemmed from growing disgust with the Vietnam War—perhaps the nastiest and most disillusioning of the country’s sallies into superpower competition. Opposition to that intervention led to many voices arguing either that the Soviet Union never had presented a serious threat to the United States or that it had ceased to do so. Skepticism about national security claims grew in the wake of the Vietnam disaster. Both the legislature and the judiciary asserted wider control over national policy, including foreign relations, as confidence in the Executive’s capacity to manage US national interests collapsed.<sup>14</sup>

This crisis of confidence in the United States may have contributed to the retrenchment in the Soviet Union that later became known as the ‘period of stagnation’, but domestic factors seemed far more important. Khrushchev’s efforts to push the Soviet system in various directions, subsequently known as his ‘hare-brained schemes’, ended up alienating almost every interest group with a say in Soviet politics—but none more so than the leading cadres of the CPSU. His reforms, although not as dangerous to them as was Stalin’s terror, undermined their authority and the stable if informal patronage relationships that they had built up. Accordingly, he became in 1964 the only Soviet leader ever to be overthrown by the Party organization.

The new leadership brought about changes in legal policy both internationally and at home. As Lipson noted, the Brezhnev period witnessed the decline—although never the denunciation—of the theory of peaceful coexistence. PCX never had addressed relations among socialist states, but until 1968 one might have hoped that socialist internationalism, the doctrine that explained intra-camp affairs, might accommodate a modicum of sovereign independence on the part of socialist states. True, the invasion of Hungary in 1956 had coincided with Khrushchev’s critique of Stalinism at the Twentieth Party Congress, but one might have cabined that episode both as premature and as extreme (towards the end the Hungarian leader Nagy had tried to throw in his lot with the West). The 1968 invasion of Czechoslovakia—and the subsequent enunciation of the Brezhnev doctrine to justify it—put an end to any hope of reconciling socialist internationalism with national independence. From then on, the rules of the game seemed clear: any state that sought to deviate too greatly from a line set in Moscow could expect armed intervention if other corrective efforts failed. Henceforth, from the socialist end of the international spectrum, PCX seemed dubious if only because it promised the capitalist world so much more than the Brezhnev doctrine permitted.

And for the West, something new was on offer. The concept of *detente*, first worked out with the Germans and French and then extended to the United States, implied both a more cooperative relationship than mere coexistence

<sup>14</sup> See, generally, Paul B. Stephan, “Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States”, 44 *Virginia Journal of International Law* (2003), 33.

and the transition to yet another, presumably higher state of cooperation and interdependence. This policy had its apotheosis in the 1975 Helsinki Conference, which ratified the post-War *status quo* in Central and Eastern Europe at the price of a more explicit international commitment to human rights. The leading legal science research center—the Institute of State and Law of the USSR Academy of Sciences—dutifully created a new human rights section to buttress the Soviet side in a new realm of ideological combat. These scholars and other official intellectuals attacked the lack of positive rights in capitalist countries while loudly insisting on the principle of noninterference in domestic affairs to insulate from international scrutiny their practice with respect to negative rights.

In retrospect, the bargain struck by the Soviet leadership at Helsinki may have given it cause for regret. Ratification of the post-war *status quo*—and in particular of the incorporation of the Baltic states into the Soviet Union—was not meant to and did not produce any legal consequences. When independence movements began to stir in Central and Eastern Europe during the late 1980s, the United States felt no obligation to withhold its support. But by arguing that the ‘Basket III’ human rights component of the Helsinki Accords interpreted and developed preexisting legal instruments, in particular the UN Charter and the Universal Declaration on Human Rights, the West managed to suggest that the Soviet side had conceded something significant and potentially transformative.<sup>15</sup> Many thinkers and activists within the Eastern bloc began to use Basket III as a rallying point for their efforts to challenge the system, and Western governments relied on the same provisions to justify their involvement in these domestic struggles.

Outside the sphere of international law, the retrenchment period witnessed several important developments. The Brezhnev regime undertook a certain degree of cultural repression, including the use of show trials to excoriate prominent dissident thinkers. This tendency culminated in acts of parliament expelling from the country Aleksandr Solzhenitsyn, an especially dangerous personality because of his Russian nationalism, and exiling to a remote backwater Andrei Sakharov, a critic whose ideas resonated more with the West than with Soviets. An especially cruel innovation was the use of forced psychiatric hospitalization to discredit opponents of the regime, including General Grigorenko, a war hero who had taken up the cause of the Crimean Tatars. But unlike the Stalin period, people did not automatically pay for dissent with their lives, and the repressions were more targeted than massive.

Ironically, the Brezhnev era also saw a major increase in the resources devoted to lawyers and legal institutions. Most of the growth occurred in the ranks of

<sup>15</sup> The Helsinki Accords, more formally known as the Final Act of the Conference on Security and Cooperation in Europe, contained three ‘baskets’ of consensus: a statement on European borders and noninterference in internal affairs, a statement on economic, scientific and environmental cooperation, and one on humanitarian cooperation, including respect for human rights. The last was the third basket that took on a life of its own.

*iuriskonsults*, legally trained specialists assigned to state-owned enterprises with the task of reining in the more freewheeling managers who used creative accounting and informal patronage ties to evade the rigors of state planning. But legal education and the prestige of law professors also rose as the political authorities sought to impart a sense of stability and formal coherence to a system that had lost whatever inspirational force it once enjoyed. A milestone in this kind of legalization of Soviet society occurred in 1977 when the Supreme Soviet adopted a new constitution for the Soviet state. The Brezhnev Constitution produced no significant institutional changes or legal breakthroughs, and critics noted that it used a sloppy and ungrammatical Russian that was far inferior to that of the 1936 instrument, but the new law did signify the desire of the leadership to present the regime as formalized, law-based, and stable.<sup>16</sup>

The other important story of the Brezhnev years was a Sisyphean effort to restructure the organization of the national economy to improve control and performance. Gertrude Schroeder aptly named this a ‘treadmill’ of reforms, all of which promised to exploit new information and management technologies to improve the economy, and all of which foundered on the shoals of the informal relationships that the bureaucracy had developed to keep things running to its satisfaction. Some in the West saw these efforts as signs of a struggle between market-oriented reformers and old-fashioned central planners; but others, including Schroeder, believed that the necessary structural changes that the economy demanded to reverse declining productivity and extravagant environmental waste were not within the range of policy debate.<sup>17</sup>

As with the Khrushchev reforms, one might tie the regime’s legal policy to Cold-War competition with the West, but the position that they were largely unrelated is stronger. US blunders in Southeast Asia and the triumph of Soviet allies in Africa, Latin America and Asia might have given the Soviet leadership freer rein to impose its will on domestic dissidents and restless democrats and nationalists in Central and Eastern Europe. The formalization and legalization of the domestic order might have helped the Soviet Union present itself as a more acceptable model for non-aligned countries to emulate and as a less threatening partner for its friends and supporters in the West. One could depict the attempts to reform economic administration as indicating responsiveness to the economic dimension of Cold-War competition, and in particular to the emergence of new information technologies. All this is true but attenuated in the extreme.

On balance, it seems impossible to ignore the important domestic imperatives—unrelated to the Cold War—that shaped these policies. The leaders that replaced Khrushchev confronted an increasingly unruly political and

<sup>16</sup> On the linguistic infelicities, see Stanislaw Pomorski, “The Language of the Soviet Constitution of 1977: A Note”, 7 *Review of Socialist Law* (1981), 331.

<sup>17</sup> See, e.g., Gertrude E. Schroeder, “The Soviet Economy on a Treadmill of Reforms”, in 1 *US Congress Joint Economic Committee. Soviet Economy in a Time of Change* (1970), 312.

economic administrative system, where informal accommodations undercut the formal chain of command. Those at the very top felt frustrated by their inability to exercise the kinds of authority that a centralized system should permit, but faced widespread opposition within the political élite to any fundamental change. The crackdown on dissidents reassured the élite; the reorganizations challenged them but also gave them an opportunity to renegotiate their patronage ties in ways that further insulated them from centralized control. The closer one looks at these events, the less important the Cold War seems to have been. At the time there was nothing comparable to Vietnam—a Cold-War event that transformed the United States—to cast a shadow over Soviet politics or law.<sup>18</sup>

### **Final Soviet Reforms and US Resurgence (1982-1991)**

The last decade of the Soviet Union framed a period experienced in the United States as one of renaissance and triumph. Political divisions remained sharp and heated, but the ascendant position combined celebration of the leading international role of the United States with advocacy of tax cuts, privatization, and reduced government regulation.<sup>19</sup> Some part of the impetus for deregulation in turn came from the negative example of the Soviet Union, which had come to give command-and-control economic policies a bad name. Successful military interventions in Grenada, Panama and Iraq, depicted as responses to incursions by the Soviet Union and its allies in Angola, Mozambique, and Afghanistan as well as to its earlier victory in Southeast Asia, reinforced the sense that the superpower competition had turned in the United States' favor.

Looking closely at legal changes during this period, one is hard pressed to find specific steps that reflected the general sense of optimism and accomplishment. Deregulation had begun earlier, during the Carter Administration. In the field of international law, perhaps the most significant development was the emergence of human rights as a concrete and important project. At least in the United States, however, lawyers invoked international human rights largely to oppose particular actions of the government, rather than to bolster it. In the United States, the rise of the human-rights project constituted a significant step toward the privatization of international lawmaking at the expense of the Executive.

The decade also was heady in the Soviet Union. In terms of legal institutions and doctrine, the most momentous period in Soviet history was the last. The changes began under Iurii Andropov, who instituted potentially important economic reforms (although not political ones) in the brief period before illness

<sup>18</sup> One might cite to Afghanistan, but this unhappy adventure belongs mostly to the last period of Soviet history, which I discuss in the next section.

<sup>19</sup> Not, let me be clear, great fiscal probity. These years may have witnessed impressive growth of the domestic US economy, but also a remarkable increase in the overall claim of the federal government on the product of that economy.

overtook him. After the parentheses that was the Chernenko regime, General Secretary (from 1990, President) Gorbachev and his supporters sought to dismantle the vestiges of the repressive apparatus, to open up Soviet political organs to genuine democratic accountability through multicandidate elections, and to introduce elements of private property and market relations to the creaky command-and-control economic system, all while maintaining the fundamental institutions of the Soviet system. The task proved impossible, but many people in the West (although few in Russia today) gave these reformers high marks both for their aspirations and for their success in largely avoiding bloodshed during a traumatic transitional period.

To be sure, the ‘rule-of-law state’ (*pravovoe gosudarstvo*) of which the reformers spoke sounded much more like a *Rechtsstaat*; that is, a principle of executive accountability to the legislature, and not so much like a system of negative liberty protecting the subject from the state. The commitment to political and economic liberalism often was greater in the eyes of Western beholders than on the ground. And the events surrounding the *denouement* of the Gorbachev regime, in particular the August 1991 coup, remain a subject of intense speculation and controversy. But no one can deny that the Gorbachev team took important steps that made the Soviet Union a more decent society—including opening up the political process, releasing political prisoners from both the camps and mental hospitals, cutting back on the use of capital punishment, and laying out the rudiments of a legal private economy.

The question that confronts us is the extent to which these reforms reflected the dynamic of the Cold War. Of course, no one can give a definitive answer. As part of *détente*, large numbers of people within the Soviet Union’s political, intellectual and technocratic élites had received some exposure to Western ideas, images, and people. A kind of cultural competition ensued. It seems fair to assume that the Gorbachev team understood that to win the support of the Soviet Union’s *intelligentsia* they had to discard some of the more obvious absurdities in their public life, including the broad ban on public criticism of the *status quo*. Hence *glasnost*, the one unqualified success among the reforms. But the other parts of the program reflected forces that had emerged in the 1950s—especially the increasing inability of the central administrative organs to maintain control over the local bodies that conducted economic activity.

Some in the West have argued that United States-led efforts to improve the NATO military capability forced the Soviet Union to launch broad reforms, because the command-and-control system could not compete technologically. Others have suggested that the liberal values of decency and respect for the individual, if you will the undeniable appeal of basic human rights, ultimately swayed the Soviet people. Reasons exist to doubt both these claims, at least as comprehensive explanations for what happened.<sup>20</sup> First, it remains unclear why

<sup>20</sup> See Paul B. Stephan, “The Fall: Understanding the Collapse of Soviet Communism”, 29 *Suffolk University Law Review* (1995), 17.

weapons procurement in the West, which has large elements of central planning and command-and-control, worked so much better than did the Soviet approach. *Second*, the liberal and humane values that the West identifies with itself had been on offer well before the 1980s. More to the point, neither story takes into account the fundamental administrative and organizational problems that confronted the Soviet leadership at the beginning of the 1980s, which had bubbled up even during the later Stalin period. The weight of the evidence suggests that the 1980s reforms of the Soviet system, in large measure, resulted from a breakdown in the command system that had frustrated those at the top who had expected to reap the benefits of being in charge, and not a liberal effort to improve the lot of the average Soviet citizen.<sup>21</sup>

### **The End of the Cold War?**

For the United States, the first decade following the collapse of the Warsaw Pact and the death of the Soviet Union saw the birth of a new international order based on democracy, the rule of law, economic liberalism, and strong international institutions to promote the aforementioned values.<sup>22</sup> Great resources (although nothing like those deployed by the Marshall Plan) went to promote these values in the former socialist countries, Russia above all others. The legacy of this aid was mixed: the states of Central and Eastern Europe eventually adopted the *acquis communautaire* of the European Union as their legal structure, while Russia came to identify Western intervention with the economic and social nightmares of the 1990s.

After September 2001, the United States went in another, darker direction, winning itself no friends in the process. New arguments about international law, as well as greater awareness of its relevance to contemporary problems, arose, but without the creation of a new synthesis.<sup>23</sup> The financial crisis of 2008 put an exclamation mark on the obituary of the ‘Washington consensus’.

In Russia, symmetrical transformations proceeded. In the immediate aftermath of the collapse of the Soviet Union, a new generation seized the formal reins of power in Russia, buttressed by holdovers from the old *nomenklatura* such as President El'tsin. With Moscow seemingly co-opted into the Washington consensus and a wide range of arms control agreements and economic pacts

<sup>21</sup> Paul B. Stephan, “Toward a Positive Theory of Privatization: Lessons from Soviet-type Economies”, in Jagdeep S. Bhandari and Alan O. Sykes (eds.), *Economic Dimensions in International Law* (Cambridge University Press, Cambridge, 1997), 324.

<sup>22</sup> See Paul B. Stephan, “The New International Law: Legitimacy, Accountability, Authority, and Freedom in the New Global Order”, 70 *University of Colorado Law Review* (1999), 1555.

<sup>23</sup> See Paul B. Stephan, “Symmetry and Selectivity: What Happens in International Law When the World Changes”, 10 *Chicago Journal of International Law* (2009), 91.



indicating closer ties between West and East, the great competition between the two superpowers seemingly had come to an end.

Yet even in the early years one heard dissonant notes. As the economic reforms of the 1990s unfolded, the criticism became more widespread. By the end of the decade, the large majority of Russians had come to see the disintegration of the Soviet Union and its planned economy as a disaster comparable psychologically, if not materially, to the seventeenth century's 'time of troubles'.<sup>24</sup>

With troubles came a search for scapegoats. Rather than look at the mistakes and misery as an inevitable consequence of decades of Soviet misrule, influential voices began to pin the blame squarely on the West. In 1999 Sergey Kortunov—a prominent foreign policy intellectual and a member of the Russian international relations establishment—published an article in a leading Russian foreign relations journal that reassessed the Cold War.<sup>25</sup> The struggle, he asserted, never was between capitalism and socialism, because neither society truly embodied either of those ideals. Rather, the United States had stepped into the shoes of Nazi Germany in its rejection of the historical legitimacy and moral worth of the Russian idea, as manifested in a multinational state. Many of those who initially came to power at the end of 1991, he claimed, failed to appreciate the extent to which they had served the interest of the West in its effort to destroy Russia. He perceived a dawning recognition on the part of the Russian leadership that the 'long twilight struggle' between Russia and the West had not come to an end, and would continue until the Russian idea and Russia's historic destiny finally had been realized.

Within a year, a man sharing Kortunov's world view became Russia's leader. Although cautious at first, President Putin seized the twin opportunities fate had dealt him—lush oil revenues and the United States' disastrous entanglement in a second Iraq war—to stake out a position that bemoaned the collapse of the Soviet Union and blamed the United States for its losses. In his state of the nation speech to the Federal Assembly in April 2005, he declared:

"First of all, it is necessary to admit—I have already spoken about it—that the Soviet Union's collapse was the biggest geopolitical catastrophe of the century. For the Russian people, it was a true drama. Tens of millions of our compatriots and co-citizens found themselves outside Russian territory. The epidemic of disintegration spread to Russia itself. The savings of our citizens were depreciated and old ideals were ruined. Many institutions were disbanded or reformed hastily. The country's integrity was impaired by terrorist intervention and the Khasavyurt capitulation that followed. Oligarch groups, while having unlimited control over information flows, served exclusively their own, corporate, interests. Large-scale poverty was regarded as a norm. And this was happening against the background of a grave economic

<sup>24</sup> See Allen C. Lynch, *How Russia Is Not Ruled: Reflections on Russian Political Development* (Cambridge University Press, Cambridge, 2005).

<sup>25</sup> S.V. Kortunov, "Kholodnaia voina: paradoksy odnoi strategii", *Mezhdunarodnaia Zhizn'* (1998) No.5, 23, translated as "Is the Cold War Really Over?", *International Affairs* (1998), No.5, 141.

decline, unstable finances and paralysis of the social sphere. Many believed at the time that our fledgling democracy was not a continuation of Russian statehood, but its total collapse, that it was a protracted agony of the Soviet system. Those who thought this way were wrong.”<sup>26</sup>

Although he did not speak as explicitly as did Kortunov about the role of the United States, Putin did not hesitate to single out the country’s former adversary for new and forceful criticism:

“Today we are witnessing an almost unrestrained hyper-use of force—military force—in international relations, a force that is plunging the world into an abyss of permanent conflicts. As a result we do not have sufficient strength to find a comprehensive solution to any one of these conflicts. Finding a political settlement also becomes impossible. We are seeing a greater and greater disdain for the basic principles of international law. One country, the United States, has overstepped its national borders in every way. This is visible in the economic, political, cultural and educational policies it imposes on other nations.

This force’s dominance inevitably encourages a number of countries to acquire weapons of mass destruction. Moreover, threats such as terrorism have now taken on a global character. I am convinced that we have reached that decisive moment when we must seriously think about the architecture of global security. And we must proceed by searching for a reasonable balance between the interests of all participants in the international dialogue. Especially since the international landscape is so varied and is changing so quickly.”<sup>27</sup>

As Putin saw it, grave security threats—terrorism and nuclear blackmail—arose not because the United States was too weak but because it was too strong. A strong Russia acting in opposition to US hegemony was the prescription.

To complete the irony undergirding these reversals, a kind of nostalgia for the Soviet *weltanschauung* recently has popped up in western legal academic circles. To be fair, nothing like a critical mass of legal scholars seeking meaning and legitimation in the Soviet past exists. But, as Dr. Johnson said about dancing dogs, what is remarkable is not how well they do it, but that they do it at all.<sup>28</sup>

## Conclusions

The tendency of observers, whether historians, social scientists, or law professors, to see the ‘other’ in terms of their own issues and problems should be familiar to everyone. Alexander Dallin observed long ago that even the closest and most knowledgeable students of Soviet politics saw their judgments change in the face

<sup>26</sup> Federal News Service, Official Kremlin International News Broadcast (25 April 2005), President Vladimir Putin’s Annual Address to the Federal Assembly.

<sup>27</sup> Vladimir Putin, “Unilateral Force Has Nothing To Do with Global Democracy”, *The Guardian* (13 February 2007).

<sup>28</sup> For instances of this nostalgia, see Bill Bowring, “Positivism v. Self-determination: The Contradictions of Soviet International Law”, in Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, Cambridge, 2008), 133 (defending Lenin and Stalin’s approaches to international relations); and Eric A. Engle, “Socialist Legalism in the Early USSR: A Formal Rule of Law State?”, 3 *Journal of East Asian and International Law* (forthcoming) (defending early Soviet conceptions of legality).

of, and apparently in response to, shifting Western foreign policy imperatives.<sup>29</sup> Thus, when we set out to review the complex history of the Cold War and its impact on legal institutions, those of us grounded in the US experience struggle with a natural inclination to tell the story in terms of what seems striking from the US side, namely newness and transformation.

A contrarian by nature, I have tried instead to emphasize the elements of continuity in Soviet and Russian legal culture in the years since World War II. I do not mean to deny the importance of the ongoing struggle with the West as a force shaping Soviet life. I maintain, however, that the daunting—and ultimately impossible—task of taming and rationalizing the Stalinist legacy, both administrative and cultural, mattered at least as much to those who made Soviet legal policy and organized the Soviet legal system. If we want to learn about ourselves by studying Soviet society, we must try hard not to impose the assumptions and norms we have acquired at home on this strange, terrible and inspiring history.

<sup>29</sup> Alexander Dallin, “Bias and Blunders in American Studies on the USSR”, 32 *Slavic Review* (1973), 560.