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By B N Topornin

Translated by Elspeth Reid

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Foreword

In this publication The David Hume Institute continues the recent discussion under its auspices of the situation in Russia, a matter of continuing interest and concern. The emphasis in the present paper is on the future; on the legal and constitutional reforms which are still necessary if Russia is to complete a successful transition from the command to the market economy. Drawing on comparative study of modern Western constitutions and legal systems, B N Topornin stresses the importance of appropriate constitutional provisions, the law of property, freedom of contract and business organisation, and limiting the role of the State. He notes the conflicting views within Russia itself on how these legal reforms are to be achieved, and affirms the need for action based on sound principles reaching far beyond what has been achieved to date under either Gorbachev or Yeltsin. Academician Topornin writes with insight and vigour reinforced by the elegant translation of Elspeth Reid of the Faculty of Law at Edinburgh University. His theme, that the law has a crucial role to play in establishing the conditions in which a market economy may flourish, is close to that espoused in other publications of The David Hume Institute. On behalf of the Institute, however, it must be stated as usual that the views expressed in this Occasional Paper are those of the author alone, and that the Institute, as a charity and non-political body, holds no collective view on the matters under consideration here.

Hector L MacQueen
Executive Director
March 1993

In the extremely complex circumstances of economic reform in Russia, the law must take on an important and crucial role. There has been a good case for making the transition from the administrative command system to a system regulated by the law since the very beginning of the period of *perestroika,* when the concept of a state based on the rule of law was being advanced. If we are to learn from the lessons of the past, it is now vital that we should abandon generalisations and empty rhetoric. We must instead try to develop and implement concrete measures, which would help the law to function in a more normal way, and to be used as an effective instrument of fundamental social transformation. If there is no radical reappraisal of the existing legal system, then the process of establishing market relations will be delayed, and hindered by laws and regulations enacted under the highly centralised, planned economy. The situation cannot be saved by the legislation enacted during the period of *perestroika.* This legislation represented something of an attempt to restructure the economy, and much of it was progressive in character. However, with hindsight, the "law of *perestroika*" appears clearly inadequate.

Legal regulation in the economy obviously cannot be considered in isolation from the rest of the legal system. But all the same, in the economic sphere, the law has its own specific characteristics. In order to establish new relations in this area, we must "clear a space" -remove the old, and adopt new laws. Otherwise, an unofficial, shadow economy will arise, not so much as the result of the criminal activities of clandestine manufacturers, traders and financiers, but more as a consequence of mistaken strategy and tactics on the part of those in power, their conservatism, or inability to move with the times. In the final analysis, the need for economic progress will force its own way forward, and society ignores it at its peril.

In Russia today, legal reform is urgent and important as never before. The situation which has developed in the economy is after all extraordinarily complex, and as yet only the top layer of reform has been uncovered, and that with difficulty. The bulk of production facilities and the system of distribution remains in state ownership, as in the past. Although decentralised government, and redistribution of powers have helped to strengthen the independence of state enterprises and other commercial

organisations, nevertheless the specific gravity of the state sector clearly exceeds the logical limits to be expected in a model even of a weak market economy. Neither the cooperatives nor the leased enterprises, far less private capital, have so far become significant and powerful components in the economy.

In such circumstances, the state must give increased attention to new law. It is not possible to leave the situation in its present form, to wait passively for new developments to emerge from practice. This would prolong the legal instability of economic reforms. It would create a real threat of legal anarchy, leading to the growth of social tensions and conflicts, and the collapse of the whole programme to rebuild Russia.

The Renewal Of Constitutional Legislation

Major economic reform in Russia cannot be accomplished independently, in isolation from other spheres of social development. Only one route is viable, the transformation of the whole system, in the political as well as in the economic spheres. We are talking of the transition from state socialism to an open society, at the basis of which lie three fundamental principles:

1 a democratic form of government, which guarantees basic human rights and fundamental freedoms;

2 a market economy based upon all forms of ownership;

3 pluralism in political life, ideology and culture.

Such reform, comparable with the revolution in terms of its scale and the profundity of social processes, requires to be backed up by the Constitution. What has happened so far is that changes and amendments have been made to the 1978 Constitution of the RSFSR. But the possibilities of this method of patching old clothes are limited. Moreover, the combination of old with new hinders progress. At present, society is unclear what the purpose of the state should be, and what its basic functions should be, what is required to free society from state interference. In place of the total subordination of everything in the life of society to the state, as instanced in the refusal to classify rights separately as public and

private, we now have a situation in which some would categorically reject the idea of the state, including its positive potential.

History has shown us that the paternalistic concept of the state could not be justified. Moreover, in our present circumstances, it had clearly grown out of all proportion. Society and its economic structures in particular require to be liberated from the shackles of the state. The economy must be structured not on the basis of subjective decisions, but on the basis that the optimum level of self-regulation must be struck. The state must now help to reinforce the free economy, which cannot force its way through on its own. The first priority is the legal regulation of the processes which bring it into being, and also the creation of diverse means of supporting and protecting it. Even after the reforms are complete, significant economic potential will remain in the state sector. Another consideration is that society needs the state at the moment, for without it, we cannot ensure not only the success of reform, but also future progress. It is absolutely essential that social programmes on a wide scale should be implemented, in order that they can render assistance to certain sections of the population: children, the elderly, the sick, those in education, and so on. These programmes, as the experience of the rest of the world has shown us, have been, and will remain primarily a state concern.

Which of the economic issues should be dealt with in the new Constitution, and how should they be regulated? The answer to this question is still the subject of lengthy and penetrating discussion, for the obvious reason that the limits of constitutional regulation attract the attention of academic lawyers and practitioners alike. If we are to follow our previous course, then the Constitution must encompass virtually all aspects of the development of society, and in particular the economy. Strictly speaking, this was the case in the 1977 USSR Constitution, which provided even for the instruments to direct the planned economy, including *khozraschet* (the accounting system whereby Soviet enterprises were required to balance their books without extra state support). If the Constitution makes no provision for economic matters, then the foundation for an open society will not be assured at the highest legislative level.

We have tended recently to come back to the idea that the Constitution should be the Fundamental Law not only for the

purposes of the state, but for all of society. This idea is far from new. To a significant extent, its influence can be detected in the 1977 USSR Constitution, in which the first section was devoted to the foundations for the social and political structure. It dealt with political and economic systems, social development and culture, foreign policy and the defence of the Fatherland. Indeed, the opening chapters placed the greatest emphasis upon the ideological aspects of the Constitution, and derived more from political rather than legal considerations. But this was a logical consequence of a state structure which was based on the unlimited power of the Communist Party, and which recognised only the ideology of Marxist-Leninism. Now we have the task of purging the law as a whole, including Constitutional law, of its ideological and political elements.

How is this sort of issue dealt with by the most recent Western Constitutions? Unlike in the nineteenth century and the first part of the twentieth, in recent decades a much wider range of relations integral to the development of a free society have been regulated at constitutional level, including those involving the economy and the social sphere. Constitutions, as a rule, enshrine the right to private property, freedom to engage in business activity, and other principles of the market economy. Moreover, Chapter III in the first section of the 1978 Spanish Constitution, for example, is entitled "On the guiding principles of social and economic policy", and reflects the idea of universal prosperity within the state. Many articles in the Italian and Portuguese Constitutions are drafted in a similar vein. The West German Constitution advances the principle of a state in which social concerns are paramount.

The right to private property has no absolute meaning. In the first place, property involves obligations, and its use must at the same time serve the common cause (Article 14.2 of the West German Constitution). The social function of the right to private property and right to inherit it are limited by what the property actually is (Article 33.2 of the Spanish Constitution). Second, requisitioning of property is permitted. It does not of course happen arbitrarily, and is restricted to a series of specific circumstances. Property may be requisitioned "in the common interest" in the sphere of basic public services or sources of energy (Article 43 of the Italian Constitution).

Property may be requisitioned only according to the law, or on the basis of the law (Article 14.3 West German Constitution), for reasons justifiable in terms of public utility or social interests (Article 33.3 Spanish Constitution). In all cases, compensation is paid when property is requisitioned.

It is absolutely essential that human rights and freedoms should be central to the economic principles in the Constitution. "Civil society", which is so much talked about today in connection with the forthcoming constitutional reform in Russia, cannot possibly be reduced simply to the economic, social, and political infrastructure. It has to encompass safeguards for wide-ranging human rights and freedoms. It is the well-being of the individual which must be recognised in the Constitution as the greatest priority for society. We are, however, talking of the individual as an active participant in social relations. This is particularly true of economic matters, in which the individual takes on various personae, businessman, worker, client, consumer and so on.

The problems of ownership, including the different forms it may take, employment, and social security, are inextricably linked with the position of the individual in society. Under state socialism, the measure of his autonomy was more or less reduced to nothing. The state at any given time encroached at will upon the economic sphere. In a market economy, the state abandons the role of the overlord with unlimited powers, and takes on the obligation to protect and safeguard the individual's economic rights and freedoms.

It is particularly pertinent to consider how far constitutional regulation should go in economic matters. The first thing that should be said on this matter is that our attitude towards foreign experience requires serious reappraisal, taking into account our present circumstances and requirements. It is clear, in principle, that the Constitution must deal only with the most important essentials, leaving current legislation to deal with the more concrete expression and development of the principles which it proclaims. Ideally, the number of constitutional provisions devoted to economic issues should be as few as possible. But there is no template or all-purpose model to follow in this regard. All the same, we cannot fail to acknowledge the vital need for constitutional regulation in the transition to the market economy, and for the enshrinement of its

principles at the highest legislative level. We have to take full account of inertia in the social consciousness and in behaviour; the retention of structures which are a legacy of the command economy; and the laws which established the rigid planned regulation of the national economy.

Only abstract theorising, in the Russian situation at least, could produce a variant, which would leave regulation of the economy entirely to current legislation as opposed to the Constitution. The importance of constitutional regulation in economic affairs is conditioned by the need to optimise the relations between state and society, to determine the limits of permissible state intervention in the economy. If we allow current legislation to take the place of the Constitution in deciding this type of issue, it is from both a theoretical and a practical point of view hardly less dangerous than allowing the Constitution to take the place of current legislation. The extent to which the Constitution can provide the basis for the economic system is determined by concrete historical circumstances. However, in each specific case, it is important to have a sense of proportion, the ability to see the underlying general pattern of the legality of constitutional development. In this connection, it is interesting to consider the different forms of property ownership, and the ways in which a legal basis can be provided for them.

Russian legislation provides for four types of property, private, state, municipal, and the property of social organisations. In turn, private property can take two forms, individual and collective. State property, on the other hand, can exist in the form of the property of the Federation, the republics, autonomous regions and districts, and regions. These provisions are scattered through various pieces of legislation, mainly in the laws of property and privatisation. The present Constitution retains as Chapter II, "The Economic System", in a heavily amended form.

However, although the Constitution has abandoned the previous tendency to bring everything under the control of the state, the past has still left its mark. It provides that the state creates the conditions necessary for the development of diverse forms of property and guarantees equal protection for all forms of property (Article 10). In addition, the concept of state property remains central to the Constitution, and it is regarded as the property of the multinational

population of the Russian Federation (Article 11). Land is declared to be the property of the peoples which inhabit a given area. The different types of ownership over and are established by the Congress of People's Deputies (Article 11). The concept of "private property" is not used in the Constitution. It talks of the property of citizens and the right to inherit (Article 13). It is made clear that the property of citizens derives from, and is increased by, their wages from participation in public enterprise, from the conduct of their own business, and from other income received by other legal means.

How can the Constitution provide a more rational basis for the right of property, taking into account what has now been learnt and also concrete historical circumstances? It is obviously not essential to enumerate all the forms of property in the Constitution. This task should be left to current legislation. Otherwise, as new forms of property appear, and such a probability is difficult to exclude, it will be necessary to amend the Constitution each time. The counterargument is that this introduces a legal question mark over the diversification of forms of property. The Constitution can at this point turn itself into a conservative force which preserves the old rules.

It is far more important to include in the Constitution provisions on the diversity and equality of forms of property, and also on state protection for these. The right to private property requires additional state support and protection in order to ensure that in reality all owners begin on an equal footing. We have to reckon with the fact that state property has for decades enjoyed a monopoly over many advantages and privileges, and the stereotype cultivated in the social consciousness has been of a negative, often hostile attitude to private property.

The first constitutional drafts prepared by the Constitutional Commission attempted to enumerate the basic forms of property. It was provided that property can be in the private ownership of citizens and associations, and also in state ownership (Article 13). In one variant, two forms of property, state property and municipal property, were joined in one concept, "public property". After further discussion and amendment, this method of enumerating forms of property, even in a very basic way, was eventually rejected in the draft Constitution.

The last variant of the official draft Constitution deals in the first instance with the right of ownership in relation to the social market economy, which is declared to be fundamental to the economy of the Russian Federation. This section guarantees freedom of economic activity, enterprise and labour, and, we should emphasise, diversity and equality of forms of property, their equal right to legal protection (Article 9.1). Second, the right of ownership is considered as a means for everyone to exercise their economic freedom (Article 34), an essential condition for the individual and the citizen to realise his or her rights and freedoms (Article 35). It is also stipulated that ownership rights must not be exercised in a way which is contrary to the common good. As is apparent, the draft Constitution includes only the most general provisions, found generally in legal systems.

The draft put forward by the parliamentary faction "Communists of Russia" is noteworthy for its attempt to combine old and new approaches. On the one hand, it affirms freedom of ownership and economic activity (in the preamble), diversity of forms of property, equal rights for all types of owner, and freedom to compete (Article 11). On the other hand, the basis of the economic system is declared to be public ownership of the means of production (Article 11), and the main form of property is acknowledged to be the property of the people (Article 12). The property of the people is understood to mean the property of Russia as a whole, of the peoples of the republics which make up the RSFSR, autonomous regions and districts, and the various regional, district town and village Soviets.

The draft put forward by the Russian Movement for Democratic Reform (RDDR) begins with the chapter, "The Citizens of Russia", which makes provision *inter alia* for the right to own property, to use and dispose of it at will (Article 3.13). The draft affirms the concept of "private property". It is acknowledged "as the inalienable right of the individual, the natural source of his well-being, business and creative activity, the guarantee of his economic and personal independence" (Article 5.1).

There is a further interesting draft Constitution which has emerged from the presidential staff. This draft establishes that the economic basis of the constitutional order is diversity of forms of property, which are equal before the law. Only private ownership over land is

singled out (Article 45.1). The subsequent provisions of this article go into some detail as to how state property should be regulated, stipulating first that it should serve the interests of the whole of society. The content of this draft obviously reflected one way or another the disputes over the question of ownership of land, and the role of the state sector in the economy.

We can draw extremely general conclusion. Russia as a whole recognises the necessity of creating a free market economy, and of rejecting state centralised control of the national economy. But the form the transition should take is still causing disagreements, which undoubtedly influence the process of constitutional reform. Past experience, however, has already shown us long ago the pointlessness of marking time, of half-measures, and also of trumpeting slogans whose content is correct but which are not being achieved. The Constitution cannot ignore the demand for social transformations which are essential by any standards.

A few words on the new economic role of the state. It was not so long ago that the provisions concerning the state as the owner of the basic means of production, the direct distributor of materials and labour resources, and as the manager of the whole economic development of society, became fundamental to Soviet juridical science. The link between the state's role in the economy and taking production into common ownership was considered axiomatic. The increase in the scale and complexity of production, cooperation and specialisation in the work force, and all other such processes, were all interpreted in the same way as requiring constant growth in the economic role of the state.

Experience over the years, including developments under Soviet power, forced a major reappraisal of the premises for this theory. Denationalising the economy became an important precondition for social transformations. This means, in the first instance, the process of privatisation in order to guarantee the transfer of most state property to private ownership. Second, the state must be relieved of its direct managerial role, and the corresponding organisational structures must be dismantled. Third, the state's role in economic affairs must be concentrated upon the creation of the legal and other conditions which will assist the establishment and development of the market economy. This is not achieved by command or

administrative procedures, but by the law, a system of legal regulation.

It is extremely important that the new role of the state should be affirmed in the Constitution, in order that we can put behind us the attitudes of the past, and inertia in social consciousness and behaviour, to enable us to achieve a new, more scientific understanding, based upon the experience of the rest of the world. There is a danger lurking behind the nostalgia for the past, and the tendency to cling to the ideas and management practices of the command economy. At a time when projected reforms are being shelved because of particular circumstances, or they are producing slow results, or being held up, attempts to return to the command economy are equally dangerous. The new Constitution must provide a legal foundation for the role of the state, which will meet the needs of a major transformation in society.

The new economic role of the state, however, is inconsistent with the present tendency for the state to distance itself from reform and from the consequent regulation of economic relations which would basically be those of a market economy. It cannot seriously be expected that the necessary economic processes will develop spontaneously, and that they will inevitably establish themselves. The passivity of the state will mean that the legislation retains conservative statutes, structures and mechanisms for administrative management, which have only in some cases either changed or modernised their title. We lack the essential state support which derives from the institutions of a market economy, including financial institutions. Vital transformations, including privatisation as the first priority, are in effect impossible, or at least extremely problematic, without the state.

At the same time, the Constitution should definitely not be placed on a par with a state programme for economic development, a list of concrete aims and tasks, a political-economic document. The Constitution must be concerned with proclaiming a neutral stance with regard to the change of course in domestic and foreign policy, as determined by state organs in accordance with the reality of social development. It is essential that the political course marked out should not depart from the system of coordinates set down in the Constitution.

If we imagine the legal regulation of the state's economic role in terms of a large collection of laws, then the constitutional provisions form a relatively small part of it. However, the significance of these provisions separates them from the rest; they appear as the legal foundation on which current legislation is based. Current legislation is more dynamic, flexible and close to the realities of economic affairs. The Constitution, on the other hand, provides a model which can be regarded to a certain degree as representing the ideal. Constitutional regulation of the state's economic activities is on the gradual increase. The West German Constitution of 1949 contains no separate section or subsection on such a subject. The most important element in that Constitution is the introduction of the concept of the "social market economy". Constitutions in recent decades have not stopped at acknowledging the principle that the state should be active in economic affairs, but have gone on to develop this in various provisions.

Does this tendency mean that in the developed countries of the West states are increasingly exercising the function of directing the economy? Such an assertion is not backed up either by legislation or in practice. The articles in the Constitution which deal with the economic role of the state are worded extremely carefully. The terms which are most used are "assistance", "support", and never "management" and "direction". Thus the 1978 Spanish Constitution talks of "public powers to assist the creation of conditions of well-being for the social and economic process, more equitable distribution of regional and private incomes within the framework of the policy of economic stability. Particular attention is given to policies aimed at reaching full employment" (Article 40.1).

In modern constitutions, the state's economic role is closely linked with the formulation and implementation of social policy. The development of an economy, particularly a market economy, has its own logic, its own order of things, which sometimes has nothing to do with the social needs of the population. It is in fact the state which is called upon to protect such needs, to strike the necessary balance between economic and social development. The instruments of state policy in this regard would be the systems of taxation, and state social programmes, including education, health care, and culture. The experience of the rest of the world shows that, although

private sponsors and patrons, or private funds, can play a significant role, they cannot take care of the main problems of social policy.

As Russia attempts to transfer to the market economy in complex circumstances, the state has a unique role to play in the economy, both in terms of what it must do and how it must do it. What lies ahead is the completion of the privatisation process on a massive scale, the total freeing of prices, the removal of remaining administrative controls over economic links and trade, the stabilisation of finances and the monetary system, the expansion of enterprise and the establishment of normal competition, and the integration of our economy into the world economy. Without the state's active participation, a rapid and effective resolution of the problems of the transitional period would be practically impossible. In effect, we are talking of the complete dismantling of the old economic system, and the formation of a new economic system, which will function according to the requirements of self-development and self-regulation.

The processes of transformation of the Russian economy will most probably depend to a large extent on circumstances. In some areas of reform, the desired results will be achieved earlier, and in others, later. Consequently, the state's economic role will take different forms in different areas, and it will pass through various stages of development. It is extremely important for this process that the state should pursue a single strategic course, and should not shirk its reformist responsibilities.

In the transitional phase, particularly when there are powerful and critical factors at work in the economy, and there is a long way to go before the economic situation stabilises, far less begins to recover, the state must be flexible and manoeuvrable in the way it acts. This does not, however, imply a return to the past or disregard for the logic and natural progression of economic development. It must constantly be in touch with social processes on the ground, the opportunities for society, the extent of its economic potential, and other factors.

We do not need to reproduce constitutional formulae of our own for these times, when in the West concepts of the state as a kind of "night watchman" have prevailed. For instance, in the USA, the

absence of adequate constitutional provisions has not prevented a significant reinforcement of the state's economic role. As far back as Roosevelt's New Deal, state intervention in the economy and the social sphere was supported by Supreme Court decisions, exercising constitutional control at the highest level. Comparatively few provisions in other countries (on the social orientation of the economy, the relation between property law and the interests of society and so on) have been intepreted as the legal foundations for activating state regulation in the processes of economic and social development.

However, we should note that constitutional development in the West is not influenced in the same way by the experience of the Soviet period, during which the model was of the state as the omnipotent owner. It should be emphasised, first that the functions of the state need to be stated in the Constitution, not just in order to stimulate state regulation of the economy and social spheres, but also in order to determine the limits of such intervention. Second, the balance of power is changing between the legislature, the administration and judiciary, and similarly between the centre and the regions, including relations between the federation and its members. Many of the old instruments of state regulation are being discarded, and new ones are appearing.

The Constitution in principle should map out a system of coordinates, within which the state plays its own economic role. This would undoubtedly include universally acknowledged values, the basic aspirations of social development, the principles of democracy and the supremacy of the rule of law. The Constitution may provide for instruments of state regulation such as the budget, taxes, export-import incentives and so on.

The current Russian Federation Constitution mixes different approaches, which are sometimes mutually contradictory. On the one hand, it retains the ideas of state socialism, the paternalist concept of the state's role in the life of society. On the other hand, it introduces changes and additions which are aimed at separating society at large from the state, allowing the opportunity for self-development and self-regulation in the economy, and the establishment of market relations.

The first approach can be illustrated in Article 15 of the Constitution. It declares: "On the basis of the creative activity of the workforce, socialist competition, and the achievements of scientific and technical progress, the state perfects forms and methods of economic management, and ensures growth in the productivity of labour, increased effectiveness in production and the quality of work, the dynamic, systematic, and measured development of the economy."

The role of the state is defined differently in Article 10 of the Constitution:

> "The State creates the conditions essential for the development of diverse forms of property and guarantees equal protection for all forms of property."

Direct state intervention in economic affairs has thus given way to indirect methods of support.

In the drafts of the new Constitution, the question of the state's economic role is dealt with in different ways. This is conditioned by different approaches to the future constitutional structure of Russia, and also by the diversity of views on the limits of constitutional regulation.

In the draft produced by the Constitutional Commission, the basic idea is formulated briefly and at the same time rather obliquely. "State regulation of economic affairs is exercised in the interests of the individual and of society" (Article 9.2). It is, however, necessary to take into account the draft Chapter IV, "Economic, social and cultural rights of the citizen." On the one hand, it affirms the right of ownership on the part of the individual and the right to engage freely in business activity (Article 34). On the other, it maintains that "the exercise of the right of ownership must be consistent with the common good of society" (Article 35.1).

The draft produced by the Russian Movement for Democratic Reform gives priority to the attempt to limit state intervention in the economy: "The activity of the state in guaranteeing the social needs of the population must not mean that state protection takes the place of economic freedom and activity, commercial and business initiatives, opportunities for the citizen himself to achieve economic

well-being for himself and his family" (Article 16.1). But this provision in the Constitution is rhetorical in character, in that it is easier to talk of its ideological import than of its legal content.

In the draft from the parliamentary factions "Communists of Russia", "Fatherland", and the "Agrarian Union" the state takes on an active economic role. "The RSFSR creates conditions and encourages commercial initiative of the part of workers' collectives and citizens, which are directed towards the dynamic development of production, the growth of work productivity, and the improved well-being of society and each individual" (Article 21). This draft, on the one hand, points to the necessity of developing the market mechanism, and the unacceptability of a monopolist economy. On the other hand, it talks of the planned regulation of the economy. The state's activities in formulating and implementing state directives take on constitutional significance. It talks of the state creating people's enterprises and transferring state property to the possession of workers' collectives with full management powers. But in some cases, as the law provides, it will administer them directly.

The framework of constitutional regulation in this draft is excessively wide. Even those passages which attempt to outline the role of the state, directing, for example, that it will "provide the participants in economic life with information on the condition of the economy and perspectives for development, the state of the market". This seems more as if it is taken from instructions on the spheres of activity of different institutions, than from a constitutional text. The attempt to fit the planning and regulatory role of the state with the development of the market economy is problematic. And to a lesser extent it is contentious that the economic role of the state should take on a paternalistic aspect, dominant force.

The drafts are still being drawn up and revised. But we have enough material to allow us to judge the basic tendencies in the development of Russian constitutional thought following the debate on the new Constitution at the Sixth Congress of People's Deputies of the Russian Federation. The following conclusions can be drawn. At the present time, the tendency is to go along the road of separating society at large from the state. Constitutional drafts are becoming increasingly neutral as regards the state's economic role, although not all to the same extent. The state acknowledges the market

economy as a necessary element in the economic system, and gives it its support.

The Constitution And Current Legislation

If we accept the premise that the new Russian Constitution will restrict itself to very general provisions setting out the framework of the economic system, then we must accept that current legislation is of more practical significance. Its function is to regulate the everyday social processes, and it reflects and takes into account real life.

The Constitution must offer society freedom of choice, the right to decide one's own way of doing business. Certain basic, universally acknowledged human values must mean that there are various constraints. The rest must inevitably be left to current legislation, which is more dynamic, flexible, and responsive to social developments. Current legislation allows previous decisions and economic policy to be reconsidered, and new structures and instruments of regulation to be introduced. The legislation which predates current reform has become not only inadequate, but also largely unsuitable for this new era. Such legislation recognised the right of state socialist property as the most important institution in Soviet law. Consequently, state ownership encompassed much material wealth, including, most importantly, the means of production (Articles 20 and 21 of the Fundamental Principles of Civil Legislation, and Articles 94 and 95 of the RSFSR Civil Code). In the legislation, the concept of highly centralised economic management was closely related to the concept of socialist competition.

One of the main features of legislation before current reforms was the development of those areas of law relevant to the command economy. In this way, the legal system developed unevenly, and certain areas of law were downgraded. Soviet banking law, in essence, represented a sub-category of administrative law, for it only ever dealt with state banks. The possibility of private banks being set up had earlier been excluded. The same was true of insurance law. Private insurance organisations were not permitted to operate. Many of those areas of law which are of major significance in a market economy were more or less absent, including the law on stock exchanges, shares and tax.

Economic reform marked the beginning of a major redrafting of Russian law, and in particular of its legislative foundations. A new legal infrastructure, directed at the development of market relations, had to be created in an extremely short timescale. If not, achieving even the most modest results would become extremely problematic. And as the reforms reached wider and deeper, changes in the substance and nature of the law, its structure and mechanisms, became more necessary. We are talking not only of new laws, but of ensuring that they should be equal to their purpose, that they should severely restrict the right of government departments to make law, and that they should exert genuine control over the law-making process.

The development of private property became a priority. The legal foundations for this process were already established in the law "On Property in the RSFSR", adopted in December 1990. This law put forward the same idea as the Constitutional amendments, namely that property could be in private, state and municipal ownership, or also in the ownership of social organisations (Article 2). The law provides that all types of owners should have equal rights, and no restriction or advantage should attach to the right of ownership on the basis of the character of the owner.

The law undoubtedly played a significant role in the development of the right of ownership as a whole, and the right of private ownership in particular. But many important questions were not adequately resolved. The political problems faced by the Russian leadership thereafter deflected attention from the establishment of private rights. A gap opened up between, on the one hand, the law and, on the other, the subordinate legislation, which should have been adopted as soon as possible. There was no clear distribution of state property between the Federation and its members republics, districts and regions. Placing municipal property in a separate category led to many disputes and contradictions.

The answers to these unresolved questions had to be sought in the domain of public as opposed to private law. The distibution of state property between the Federation and its members was determined by the status, powers, and constitutional structure of the republics within the Federation, its districts, regions, and autonomous units.

This called for constitutional reform, an important element in which was the negotiation of the Federation Treaty. It was also necessary to review those administrative law provisions which governed the power to possess, use and dispose of property as between ministries and other central departments, and also as between executive committees of district Soviets on the one hand, and state enterprises on the other.

The question of private ownership over land merits particular attention. In this sphere, current legislation is closely connected with constitutional reform. We have to reckon with the negative attitudes towards the right of private ownership over land, which run through all the constitutions of the former USSR. At the same time, there was increasing pressure to reconsider old ideas, in the interests of establishing a market economy and developing private agriculture. Characteristically, it has been a gradual process: it was provided that plots of land for agricultural production could be granted by the state for use, lifetime possession capable of being transmitted on death, or outright ownership. However, for a ten-year period after the right of ownership over land was acquired, purchase and sale was forbidden (Article 12 of the Russian Constitution).

There was an unsuccessful attempt at the Sixth Congress of People's Deputies to amend this article. The position adopted by the Congress may or may not have been correct, but it reflected the real disposition of the forces reacting in different ways to the right of private ownership over land. The decision to retain the ten-year moratorium was a clear disincentive on the one hand to the development of farming businesses, and on the other to the influx of foreign investment. Capital investment by foreign investors in the development of production was perceived as having insufficient safeguards without the land on which enterprises were situated or were to be established.

The Second Generation Of New Legislation

The laws adopted in the initial stages of economic reform certainly played an important role in the dismantling of the command economy and the establishment of market relations. Moreover, they

did not merely have a narrow economic significance, but also influenced substantially the development of the social structure, political attitudes within Russian society, and foreign relations. However, to the extent that they fostered economic reforms, the laws of the first generation became more and more inadequate. Instead of leading the economy, these laws began to fall behind the times, new social conditions and needs. Many areas in new economic relations, for example the banking industry, were not in fact covered by such laws. Thus, there was a lack of clarity in questions involving credit relations and the banks. Despite the objective need for an influx of foreign investment, the legislation in some ways continued to reflect the old negative attitudes, and it provided for the possibility of nationalisation.

In general terms, the first generation laws were insufficiently clear in their conception, in their own type of ideology. This led to anomalies and direct contradictions between different items of legislation. At the same time as one group of laws was aimed at establishing the market economy, another tended to hold back reform and harked back to the days of universal state ownership. The privatisation legislation, for example, was based upon the market philosophy, but it retained provisions which allowed the State Committee for Property *(Goskomimushchestvo)* to combine, at one and the same time, the functions of owner and of the organ which administered property.

Another notable defect of the first generation legislation was that laws were insufficiently systematic. Laws must encompass if not all, then at least a wide spectrum of regulation in any given area. The more comprehensive a system of legislation, the more successfully can a new right be established. Moreover, laws of purely economic significance will work more successfully, if the whole network of legislation is in harmony with it. Many aspects of public rights, as well as private rights, are closely connected with the process of establishing the market economy.

We have already mentioned the significance of developing a new Constitution and renewing the whole system of constitutional legislation. In a market economy, many branches of administrative law require review, particularly those which concern the organisations and activities of government services. The criminal

law must provide protection for the rights of owners, individuals and businesses. At the same time, we must provide reinforcement for the fight against corruption, bribery, forgery and other crimes.

The legislation on property requires substantial revision. The task of the second generation legislation is not to establish a monopoly for the private sector alone, but to provide for equal legal rights in all sectors of the economy. In principle, no hierarchical differences should be permitted in the right of ownership, based on the emergence of one or another class of owner. It must be the same for all. State property can successfully exist and develop in a market economy, with one essential condition: there should be no formal advantages and privileges for state property in comparison with the rest.

The status of state enterprises requires to be more clearly defined. On the one hand, up until now there has been no clear classification of state enterprises according to the different types of property involved: that of the federation, of the republics within the federation, of the districts, regions and autonomous units, and of the towns of Moscow and St. Petersburg. The status of municipal property, in many respects practically indistinguishable from that of state property, is unclear. On the other hand, state enterprise needs to have an adequate guide as to the degree of its autonomy, its freedom of action in market conditions. Legislative barriers must be provided which will prevent ministries, departments and the administrative structures created by them from directing state enterprises as in the past.

We should look more closely at how businesses are organised and how they operate. For the time being, many questions concerning the formation and activities of joint stock companies, companies with limited liability, mixed (command) and full partnerships, still have no clear answers. The Federal state organs have in the recent past found joint stock companies of the open type the most attractive. In laws and presidential decrees this business medium is regarded as the most desirable, and in many cases it is given preference. The other types have still not received due attention, which in theory ruins the unified approach to business activity, and opens up the possibility of preferential treatment for the "chosen" forms of business activity.

The lack of enthusiasm for collective forms of ownership reflects a certain disenchantment with models of workers' self-management. There is a growing conviction that in cases where a workers' collective becomes the owner of an enterprise, it can almost always be expected to crash. Where there is collective ownership, interests are divided. The suggestion is that the desire to make a quick profit will hinder the development of production, the renewal of technology, the transition to more complicated types of output, and other innovations requiring major expenditure. However, the experience of the rest of the world is fairly diverse. Alongside negative examples of collective ownership, positive examples can be adduced, including some in countries with developed market economies. It should also be borne in mind that collective ownership is perceived by a significant section of the public as diametrically opposed to private ownership. For many years private ownership was portrayed only in the negative sense, as the source of exploitation, social inequality between employer and worker. In capable management, collective ownership can come into its own not only to ease privatisation of state property, but also as a component in the market economy.

In the new economic system, cooperatives also have their place. Although the dramatic increase in their numbers during the years of *perestroika* did not, unfortunately, produce the expected results, and, in addition, caused a certain amount of damage to the economic, social and moral life of the country, there is great positive potential in cooperatives, including production potential. The main thing is that they should adhere to the demands of democracy and economic effectiveness in the way they organise themselves and in the things they do.

Substantial developments in contract law are a precondition for the transition to the market economy. At the moment it still harks back to the past, when, in essence, a contract entailed the affirmation of administrative arrangements relating to the Plan. The state dictated not only the form, but also much of the content of contracts. Mandatory standard rules operated for the drafting of contracts, suggesting bureaucracy and formalism. For example, no contract was given effect unless it had been reduced to written form.

It is not so hard to distance ourselves from the basic principles of the past. It is much more difficult to establish complete freedom of contract. We can expect the new legislation to provide that the parties to an agreement should be allowed to proceed on the basis of their own interests. There is no question that freedom of contract should have its limits, but those limits should not be influenced by the *apparat* or by concerns alleged to be those of the state, but by the public interest. No-one should interfere in the rights and freedoms of other individuals, including the right of ownership, or in the common good. Nor should they act in such a way as to undermine the rights of others.

Liberalisation of succession law is an extremely important element in the new legislation. The basic trend is evident in the opening up of possibilities for individuals to inherit, and at the same time, the sharp reduction of instances in which property is transmitted to the state. In a market economy, such legislation not only allows the right of succession to take on wider significance, but also ensures active use of property in the private sector.

One very important aim of Russian legislative reform is the creation of the conditions which will attract foreign investors. However, in this area, we have to reckon with two circumstances specific to Russia. On the one hand, we have the influence of many subsisting laws from the recent past, when Soviet legislation was like a closed system which the foreign businessman could not penetrate. There was relatively little in the way of regulations governing relations with foreign citizens, and business in foreign states. However, the incidence of this type of activity was not great, and it did not affect the basic position of the planned and strictly centralised economy. On the other hand, the present situation creates difficulties. The current exchange rate for the rouble is so meaningless that it allows foreigners of average means to buy major enterprises in Russia without much effort. In order to prevent this happening as foreign capital begins to penetrate, administrative barriers have been erected which significantly restrict freedom of action for foreign investors. The situation is further complicated by the fact that allowing disputes to be resolved at the discretion of the state leads to instability and uncertainty.

Meanwhile, there is obviously mutual interest in foreign investment in the Russian economy. From the Russian point of view, this is extremely important in order to revive and strengthen market relations, and to develop production. From the point of view of foreign investors, it opens up huge new horizons, in terms of the size of the Russian market. This is the real basis for legislative reform, and the essential point of reference for the Russian economy becoming more involved in the world economy.

Priority must clearly be given to special legislation on foreign investment, which can develop and be redrawn in the light of new circumstances. The main problem is providing the desired legal infrastructure for foreign capital, which is not so very different from that created for Russian businesses. This means that the law must clarify beyond doubt the legal relationships connected with the acquisition of property and its disposal, the conduct of business activity, and the financing and taxation of production and trade. Apart from anything else, the foreign investor can often compare the legal systems of various countries, and take his choice on this basis.

Russian legislative developments are by no means restricted to solving the problems listed above. Besides, current developments go beyond subject matter alone. There is another, purely formal side of things, the significance of which should never be underestimated. We are talking of raising the jurisprudential standard of legal regulation. It is extremely important that a given law should in full measure fulfil its purpose in the system of sources of law, and that the correlation between a given law and subordinate legislation should not be destroyed in order to serve the needs of the most recent developments. Internal contradictions in the legal system always lead to disaster not only for the legal system itself, but for the economy and society as a whole.

It is extremely important to have a strictly scientific, regulated state legal policy. Our concern is to ensure that the legislation should be consistent in reflecting the principles underpinning reform of Russian society, and the renaissance of Russia as a democratic state based on the rule of law with a highly developed legal culture. Our legal policy represents the conceptual basis for legislation. It also provides the starting point for the development of the potential in all

branches of the law. We must go on to determine in what order legislation is to be developed, and to formulate a highly structured system for its reform. Finally, our legal policy focuses attention on areas which require special concentration of effort.

The Law In The Period Of Transition

At the present time, Russian law is heavily influenced by the fact that we are experiencing a period of transition in society. The features of the command economy are no longer appropriate for the present legal system, but the features of law in the market economy have yet to find their place. Like the rest of society, the law finds itself in a process of profound transformation, substantive as well as formal. It is extremely dangerous to hold back this process, which reflects the struggle between progress and conservatism, to bring it to a halt half way. The present situation requires yet more penetrating reform, for in the final analysis, everyday life is highly relevant to economics as well as freedom of choice in the market.

Of course, it would be no less undesirable to have a law-making process which was divorced from the realities of everyday developments. If we attempt hurriedly to construct new law broadly comparable with that which is established in the countries with developed market economies, we are more likely to miss our target than to reach it faster. Western legal systems can and must serve as points of reference, and we should do all that is necessary to bring ourselves closer to them. But if we can understand clearly that economic reforms will take significantly longer than was first thought, and that they will take not months but years, this would greatly assist us to match concrete social processes to the desired results.

Even the most optimistic government forecast envisages several stages in the creation of a market economy. Society will remain in a state of crisis for some time to come: the fall in production will continue, inflation will not be brought down, and levels of unemployment will rise. Measures to help the development of business activity and competition will allow this critical situation gradually to recede and the economy to be re-established. And only at the third stage should we expect the economic upsurge and the

final elimination of the crisis. At best estimate, a normal market economy will become firmly established towards the beginning of the twenty-first century. It has to be said that there are many other forecasts which are considerably more restrained and cautious, and even openly pessimistic.

The law of the transitional period by its very nature is less static and less stable than could have been envisaged. On the one hand, the principles of the market economy will become more deeply rooted. They will lead to a large number of legal rules being promulgated over a wider and wider area. On the other hand, the features of the law which have survived from the administrative-command system will gradually recede.

One distinctive aspect of law in the transitional period is that many laws have a predetermined life span. Their purpose is indeed to fulfil concrete functions in establishing the market economy. As soon as this is accomplished, the necessity for such laws is automatically removed. At the top of the list, the privatisation legislation will have just such a fate, as it gradually becomes obsolete in the years to come. It is paradoxical that the better the privatisation laws work, the shorter their life span, and this is clear illustration of the present situation in our legal development.

Another feature of the transitional period is that the legislation is subject to extremely frequent amendment. There are two factors at work here. First, as reform gets under way, economic conditions change, and new circumstances emerge which the current laws had not envisaged. Second, in the light of the experience which is gained, more sophisticated rules and mechanisms for legal regulation can be applied. For instance, on 10 June 1992, the Russian Supreme Soviet adopted a Law amending the existing tax regulations. It made expenditure on technical refitting of production tax-free. Another change was introduced because of the depreciation in the real value of personal incomes. The minimum tax threshold for personal income was increased, and the maximum rate of income tax was brought down.

The frequency with which current legislation is amended is unarguably a weakness. Legal stability has been destroyed, and negative consequences flow from that, in particular the undermining

of the authority of the law. Moreover, the legislative process is in principle dependent upon the normal functioning of the legal system, and it is significantly less effective in these extraordinary circumstances. The parliamentary system requires additional mechanisms and procedures, aimed at analysing the legal situation and formulating swift reaction.

Any debate on the instability of the law cannot, however, halt the introduction of changes and amendments, when this is what is required on the ground. It is much more important to find real, effective measures which reduce to a minimum the possible drawbacks of changing the law so frequently. Such measures would be useful at each stage of the legislative process, beginning with reconsidering the right of legislative initiative right up to the procedures for signing and implementing laws. In the transitional period, a certain redistribution of powers between the legislature and the executive is permissible, and the grant of additional powers to the President. It is also acceptable to remove certain emphases in the approach to the law. It is entirely permissible to adopt a kind of skeleton law in the situation where the law on a given subject is being drafted and only the most general provisions are certain, on the basis that the answers to the more concrete questions can only emerge from practice. Such a law will map out the main coordinates of legal regulation. This enables the legislature to give legal force to principles which can later be developed, given concrete form and backed up by amendments introduced in subsequent legislation.

In such circumstances, it is more expedient to make more active use of subordinate legislation, including Presidential Decrees and government regulations. With such legislation, it is possible to resolve the concrete problems of legal regulation, working on the basis of the coordinates set out in the principal laws. In so far as subordinate legislation allows legal norms to be laid down and then amended much quicker than primary legislation, the executive is better placed to deal more flexibly and responsively with the demands of economic reform.

Much hangs on two factors. The first is the executive itself. The complex and diverse conditions of the transitional period have made greater demands upon its organisation, and the internal coordination of different structures, their style of activity. The

combination of scientifically-based strategy with an understanding of everyday life is particularly important. Second, the increased promulgation of subordinate legislation need not cause an imbalance in the relations between the executive and legislative powers, or destroy the principles governing the separation of powers within the state.

It would be extremely undesirable if both the legislature and the executive had a distorted perception of the need to activate subordinate legislation. After all, what we have is a situation of a temporary nature. It should not in any way be seen as an attempt by the executive to steal the initiative, to pre-empt the legislature in the sphere of legal regulation. Even in the situation where there is no law on a particular subject requiring immediate legal regulation, the executive remains in its corner, leaving the legislature to make the first move.

Another factor affecting the law of the transitional period in Russia is that the laws of the former USSR operate in the same way as purely Russian laws, if they have not been superseded by Russian law. The attempted repeal of all previous Union legislation at one stroke when the USSR collapsed, was on the basis of impulse than reason, and did not find support subsequently. This is understandable. Otherwise, a legal vacuum would have been left in many spheres, particularly in economic affairs, and there would have been a danger of a breakdown in the organisation of production, supplies, transport, trade, and money supply.

In instances where a Russian law operates alongside Union legislation, the former, as a rule, has priority. This derives from the awareness of the sovereignty of Russia, which thereby affirms its self-determination and independence. But there can be exceptions to this rule, especially in cases where Union legislation is not only newer but also more modern and progressive. It might then be expedient to make an exception to the general rule. In practice, it would be possible to apply the Union law in place of the Republican for a certain period, and at the same time proceed with redrafting the Russian legislation.

For example, many provisions in the RSFSR Civil Code dating from the command economy now not only do not facilitate reform, but

also directly hinder it. The USSR Fundamental Principles of Civil Legislation were adopted in the years of *perestroika*, using parameters more suitable for present circumstances. It has been suggested on numerous occasions not only by academics, but also by practitioners, that the USSR Fundamental Principles should remain in force until a new Russian Civil Code is drafted and brought into force. The Presidential Decree on this subject provides that the Fundamental Principles of Civil Legislation remain in effect to the extent that they do not conflict with Russian laws. Such an approach is unquestionably correct if Russian laws not only embody the sovereignty of the state, but are also superior to Union laws in terms of their content. But how about those cases where the Russian laws are out of date, and more recent Union legislation is superior and more in touch with present needs? Clearly, the principle that Russian law should have priority over Union legislation can be modified by certain exceptions.

Is it appropriate in the transitional period to undertake codification of the law, or would it be expedient to postpone this until economic reforms are complete? This question has not only theoretical but also practical significance, in so far as work has begun in various places on the preparatory work for new codes, and the draft framework for the Civil Code is already been considered by specialists. Of course, new Codes are necessary for Russia to the same degree as new law as a whole. Perhaps the role of the Code in the economic development of society is particularly significant in that it reflects the inter-relationships in the system of legal rules and regulations, on the basis of which the ideology of market relations is structured. The present situation is plainly unsatisfactory in that the current Codes have lost touch with real life, and are being modernised by being patched up. However, it is no less obvious than the positive qualities of the new Codes can be shown off to best effect when a market economy is functioning normally. It is barely worth preparing Codes based on the transitional period, which, by their very nature, become unstable in a short period of time.

Doubts on the necessity to accelerate codifications, and in particular the drafting of a new Civil Code, in no way reflect a negative attitude towards the very concept of codification in the new conditions. The evidence from foreign experience, which is

sometimes interpreted as exhibiting a growing tendency to decodification, is insufficiently convincing. It is true that in the USA and other Common Law systems, Codes, as a rule, do not exist. Moreover, in these countries, there is no intention to introduce codification in the near future. However, Russia is following a path similar to that of the continental systems (Germany, France, Italy, and so on). In these countries, Codes have not only been retained, but they also play a major role in legal regulation, and are actively applied in judicial practice. The significance of codification should not, of course, be over-estimated. Other laws can and should be developed alongside the Code, and in close relationship with it. These laws can deal with changing circumstances so that the "black hole" in the law can be closed. Even the most perfect Code cannot make advance provision for the diversity of social developments.

Another concern is the relationship between the powers of the Russian Federation and its members in the sphere of codification. When the Federation Treaty was concluded and changes introduced to the current Russian Constitution, various complicated problems emerged. At the top of the list is that concerning the hierarchy of law-making bodies. This relates in the first place to the competence of the federal organs of state power, and in the second place to the joint competence of the federal organs of state power and the organs of state power in the member republics of the Russian Federation. Similar questions arise concerning the organs of state power in the autonomous regions and districts within the Federation, the organs of state power in the districts and regions, and in the towns of Moscow and St. Petersburg.

If we analyse the relevant articles in the current Russian Constitution (Articles 72, 81, 84), they are principally concerned with the Federation's right to adopt Codes not on all branches of the law, but only on those within their exclusive jurisdiction. This applies primarily to Civil Law, and also to the establishment of the legal basis for the single market: financial, currency, credit, and customs regulation. As far as legislation on land, housing and natural resources is concerned, this is within the concurrent jurisdiction of the Federation and its members from republican down to local government level. The legislative powers of the republics in the Russian Federation are to a certain extent wider than those of other

members of the Federation. Employment law, family law and the regulation of intellectual property are all matters for the concurrent jurisdiction of the republics and the Federation. The other members of the Federation (the regions, districts and so on) apply on federal laws on these subjects.

As is obvious, the logical framework for private law has in this way been destroyed. Certain branches of the law have become federal, and others are within the concurrent jurisdiction of the Federation and its members. Undoubtedly, such a situation makes it substantially more complicated to overcome inconsistencies in the system of laws, which is sometimes like a war of laws. The danger of the situation is increased by the fact that many issues are determined not so much by the legal theory as by political realities. The Federation Treaty and the new version of the Constitution to a significant extent represent a compromise reached by forces representing all-Russian, national and regional interests.

Thus, in those areas of the law within the jurisdiction of the Federation, it has the exclusive right to undertake codification. At the same time, the Constitution provides that the organs of power in the different parts of the Federation should participate in the exercise of federal powers as set out both in the Constitution itself and in the federal laws. In particular, the Law "On changes and amendments to the Regulations of the Russian Federation Supreme Soviet" (adopted in 1992) allows the Praesidium of the Supreme Soviet to send draft legislation on subjects within its exclusive jurisdiction for completion by the organs of power within the members of the Federation.

The situation becomes more complicated when we consider the codification of areas of the law listed as being within the concurrent jurisdiction of the Federation and its members. The Constitution is very general in its terms. It indicates only that in such areas the federal organs of state power issue the Fundamental Laws, in accordance with which the organs of power in the different parts of the Federation enact their own legal regulation. The new version of the Regulations of the Russian Federation Supreme Soviet provides that, as in all other questions of joint jurisdiction, the draft versions of the Fundamental Laws must be sent to the organs of power of all the Federation members.

It follows from the articles of the current Constitution that the Fundamental Laws tie in with a number of the federal laws, and the Fundamental Laws are directly enforceable throught the Federation. Consequently, provisions found in the Fundamental Laws do not require further legislation on the part of the Federation members to bring them into force, and cannot be amended by such legislation. In this way, the Fundamental Laws are of primary importance, and the legislation of the Federation members is of secondary importance. Clearly, the member republics of the Federation will begin to adopt their own Codes. This has to do not only with the formal status of the republics but also with the genuinely distinctive nature of their social and economic development. As far as the districts, regions, autonomous regions, and autonomous districts, and the towns of Moscow and St. Petersburg are concerned, it is entirely legitimate for them to adopt legislation to deal with the circumstances peculiar to that particular part of the federation.

The concept "joint jurisdiction", in the sense in which it is used in the Federation Treaty and the new version of the Russian Constitution, reflects a very general approach to the distribution of powers between the Federation and its members, and it undoubtedly requires further elaboration. It is impossible to imagine a mechanism of government operating effectively without the appropriate fine tuning of each of the components in this mechanism. Otherwise we end up with parallel decision-making, lengthy and fruitless agreements, and worse conflicts between the different participants in the decision-making process. It would obviously be pointless, apart from general provisions, to have strict regulation on each subject of joint jurisdiction, and completely clear-cut roles for all involved in the different stages of the legislative cycle (concerning the right of initiative to prepare drafts, the range of subjects for discussion, decision-making, responsibility for implementation, the ways and means of resolving disputes which ensue, and so on).

The Relationship With Foreign Systems

In so far as a market economy is being created in Russia largely based on the principles similar to those characteristic of Western

developed countries, we are being compelled to consider more closely the problem of how far we should model ourselves on foreign systems. Virtually no-one would now insist that we should keep to our own particular course, and that we should adopt a position of juridical abstraction to create new Russian law completely different from the models found in the rest of the world. This would lead to self-imposed legal and also economic isolation, greater complications in trade relations with other states, and loss of contact with the processes of development in the rest of the world.

It is equally unacceptable to assume that all our problems can be removed by returning to pre-revolutionary legal procedures. There is clearly no basis for the assertion that Russia departed from the mainstream of the rest of humanity in October 1917, and therefore we have only to cancel out everything which has happened in the last seven decades or more. Without in any way denying the importance of studying pre-revolutionary Russian law, we must at the same time understand that history does not allow us to turn back a page and begin with a clean sheet. In the first place, life has progressed too far. In the second, the intervening decades have left too marked an impression on society and the economy. It is therefore impossible to produce any solution which are adequate for modern conditions and needs without analysing and taking account of their legacy.

If we imagine the law not as a monolith, but as a kind of complicated system of categories and sub-categories, then we can see that the tendency to affiliate ourselves with other systems is variable. It is more noticeable in the sphere of private rather than public law. Clearly, the explanation lies in the nature of different branches of the law, the degree to which they are affected by political considerations, and the manner in which they reflect the character and features of state power. Public law is more independent of external circumstances, particularly the economy. One reason for this is that the specific character of one country or another does not seriously affect international political relations. In contrast, private law systems inevitably have more in common when economic inter-relationships are becoming more and more extensive and profound. However, even within private law, the situation changes from one branch of the law to another. There is a measure of affinity in the

regulation of relations significant for the development of regional or international trade links. In general terms, we are concerned with the basic areas of private law, for if they are not in harmony in the different countries, this would have a serious impact upon the trade, financial, transport, production and other operations in which foreign partners participate.

In the countries of the West, as we know, there are two basic models: common law and continental law. The latter, in turn, divides into two branches: German law and Roman law. For this reason, it is essential that right at the beginning we should analyse the world legal situation, strong and weak examples of each of the models which operate. Moreover, it is necessary to draw upon Russian legal history, which allows us to judge how prepared our legal base is to receive the example of one model or another.

The differences between legal models are certainly not so great today as they were in the past. Moreover, there is clearly a growing tendency to become more similar and less extreme, in the way we address comparable problems of legal regulation as well as in the way we resolve them. This is a direct consequence of states drawing closer together, and contacts at all levels and in all spheres of international life becoming more extensive and more profound. The world is becoming a "common home", particularly with regard to economics. However, the distinctive and unique character of different legal systems has been retained and their separate existence will continue for a long time to come.

The comparison of two basic legal models shows that the positive qualities of common law derive principally from the fact that it is developed primarily through the use of precedent. This is like an individual approach to the matter in hand, which progresses to the general from the particular ruling. Its focus is a particular person, and it protects his private interests. With the introduction of new technology to the law, particularly with computerised processes for information retrieval, a common law system becomes considerably more accessible and user-friendly. It takes much less time to determine the legal position and to uncover the relevant legislation or precedent. There is no longer the same gulf between it and the way the continental systems operate.

Continental law systems, on the other hand, are characterised by the way they establish general rules which have to be applied to concrete cases. The general is placed before the particular, and rules of general nature must be applied to the details of the individual case. It is as if continental systems set out beforehand to determine the coordinates of human behaviour, and place emphasis on the structure of social relations. At a time when society is making the transition from one stage of its development to another, and is moreover implementing major reforms, the application of a continental-type system would produce faster results, and would be effective over a wide range of relations. This is an extremely material consideration.

It has to be said that Russian law has developed right from the beginning in a way which has been, in theory, more characteristic of continental law. This tendency remains to the present day. Preference is given to the ideas, constructions, and concrete decisions which are characteristic of continental law, for the obvious reason that it is easier to grasp, implement, and safeguard. Its basic principles have taken root in the structure of our law, in the law-making process, in the mechanisms for its application, and in our legal culture. This last factor plays an influential role in legal development.

Of course the historical affinity between Russian law and continental systems does not exclude the possibility of using the experience of common law, and indeed other models of legal development. Besides, in present circumstances, continental countries with common law systems often deal with similar problems in different ways. This applies primarily to regulation to the economic sphere, particularly that concerning new phenomena which are not just of a narrow domestic significance, but have an impact on a regional or international basis.

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