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NCSEER NOTE

This paper is #11 in the series listed on the following page. The series is the product of a major conference entitled, In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev, which was summarized in a Council Report by that title authored by Donald D. Barry, and distributed by the Council in October, 1991. The remaining papers will be distributed seriatim. This paper was written prior to the attempted coup of August 19, 1991.
The Conference Papers

1. GIANMARIA AJANI, "The Rise and Fall of the Law-Governed State in the Experience of Russian Legal Scholarship."

2. EUGENE HUSKEY, "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990."

3. LOUISE SHELLEY, "Legal Consciousness and the Pravovoe Gosudarstvo."

4. DIETRICH ANDRE LOEBER, "Regional and National Variations: The Baltic Factor."

5. JOHN HAZARD, "The Evolution of the Soviet Constitution."

6. FRANCES FOSTER-SIMONS, "The Soviet Legislature: Gorbachev’s School of Democracy."

7. GER VAN DEN BERG, "Executive Power and the Concept of Pravovoe Gosudarstvo."

8. HIROSHI ODA, "The Law-Based State and the CPSU."


10. ROBERT SHARLET, "The Fate of Individual Rights in the Age of Perestroika."

11. NICOLAI PETRO, "Informal Politics and the Rule of Law."


15. WILLIAM B. SIMONS, "Soviet Civil Law and the Emergence of a Pravovoe Gosudarstvo: Do Foreigners Figure in the Grant Scheme?"

16. KATHRYN HENDLEY, "The Ideals of the Pravovoe Gosudarstvo and the Soviet Workplace: A Case Study of Layoffs."

17. Commentary: The printed versions of conference remarks by participants BERMAN, SCHMIDT, MISHIN, ENTING, E. KURIS, P. KURIS, SAVITSKY, FEOFANOV, and MOZOLIN
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INFORMAL POLITICS AND THE RULE OF LAW

Nicolai N. Petro

Executive Summary

As of January 1, 1991 the USSR has a multi-party political system. This civil society had been anticipated by dissident appeals to Soviet leaders during the 1970s to "respect your own constitution," but it was not until Gorbachev's "new legal thinking" that the rule of law began to have an obvious impact in promoting civil society.

The new law on public associations which went into effect that day specifies the right of associations to participate in the electoral and administrative process; to participate in the decision-making process of elected and administrative officials; to initiate legislation; and to publish their materials. Nowhere is the Communist Party or socialism even mentioned. Indeed, Article 4 makes it illegal for government officials to discriminate on the basis of membership in any public association (including the Communist Party). Furthermore, all political parties are equal before the law, and there is an implicit assumption that they may hire professional staffs.

The dramatic change between the draft versions of the law and its final version are evidence of the growing influence of new civic forces. Independent social and political groups have been able to channel skepticism of authority, particularly widespread among the young, into new political outlets.

But while the new law is a positive step toward the establishment of the rule of law, it may be too little too late. Political initiative has already passed into the hands of republican
and local legislatures. A new multi-tiered legal edifice is arising within the different republics more rapidly than it is being established for the Union as a whole, undermining the rationale for a unitary state. At the same time, however, the prospect of the disintegration of the USSR has hastened the maturation of alternative political infrastructures. New legislation at every level of government now seems far less concerned with the maintenance of socialism than with establishing a durable, democratic, post-communist legal framework.

While Gorbachev’s apparent political turnabout may exert pressure for greater legislative conservatism, it will also heighten conflict with local and republican governments. The latter process has taken on a life of its own, independent of official perestroika a la Gorbachev. It can only be set back by a direct, all-out assault against the very notions of civil society and the rule of law.

Legal scholars will therefore strive to cautiously undermine the old totalitarian order through the gradual subordination of the CPSU to the rule of law, while aggressive political newcomers will use whatever legal mechanisms are at their disposal to jump-start the new order of political pluralism. While there is considerable risk that the existing political and legal structure will disintegrate before a new one is firmly in place, it is important to note that the parameters of the political debate have also changed. For the first time in Soviet history there is a widespread consensus on forging a new social contract between rulers and ruled, one in which the rule of law will be firmly established.
INFORMAL POLITICS AND THE RULE OF LAW

Nicolai N. Petro

"Parties, expressing the political will of their members, as their basic function participate in the formation of organs of government authority and administration, and realize such authority through their representatives elected to the Congress of People's Deputies . . . . Parties are equal before the law."


As of January 1, 1991 the USSR has a multi-party political system. Well before this date, however, it had become increasingly difficult to describe the Soviet Union as a single-party system. Socio-political organizations independent of both state and party control numbered in the tens of thousands. Political parties too numerous to count were registering in city councils across the country. The emergence of civil society had begun to fundamentally change the way Soviet citizens view their government.¹

This civil society had been anticipated by dissident appeals to Soviet leaders during the 1970s to "respect your own constitution," but it was not until Gorbachev was well established in power that the notion of a "law-based state" became a centerpiece of perestroika.² Under his prodding, Soviet legal scholars began to refashion the assumptions underlying the corpus of Soviet law, incorporating ideas that are clearly of bourgeois origin, alien to orthodox Soviet concepts of law and government.³ The central component of
Gorbachev's "new legal thinking" was the Germanic concept of Rechtstaat, commonly translated as a law-based state, or state based on the rule of law.

Still, it is important to remember that these two processes--the re-emergence of civil society, and the rediscovery of legal constraints upon government--have distinct origins. These distinctions emerge clearly when one examines the evolution of the concept of the law-based state. The discovery of the rule of law by Soviet officials is the result of a political calculation by a small, reform-minded coalition within the Soviet political leadership that emerged victorious in the struggle to succeed Konstantin Chernenko. Their mandate for change was far from certain (even within the Communist Party leadership) and, given the magnitude of the problems they faced, they needed every bit of leverage they could use against the conservative party/bureaucratic apparatus. The creation of new governmental institutions and legislative procedures through which to channel their policies thus became an important weapon in the arsenal of perestroika. The law was seen as a convenient vehicle for change because, though subordinate to the communist party, it had the potential to constrain the most egregious aspects of its dictatorship. As the late Leonard Schapiro, dean of British sovietologists and a practicing barrister for sixteen years, noted,

"if there is one thing which is incompatible with the totalitarian way of rule it is legal order of any kind--and a legal order, however severe, however repressive, however illiberal, nevertheless recognizes some limits to the powers which the rulers can exert over the ruled, and is to that extent better than totalitarianism."

Despite the potential danger to party rule, reliance on the law as an ideologically neutral lever seemed to Gorbachev and his allies greatly preferable to reliance on the more
potent but unpredictable cultural symbols of religion and history, with their clear anti-
communist past.

By contrast, the spontaneous eruption of tens of thousands of new socio-political
formations highlighted the country's longing for change, as well as the vitality of Soviet
society. New political actors most often arose in outright defiance of Party-sponsore d
attempts to guide them into the "socially productive" channels charted by perestroika. They
mistrusted the political good will of the reformist elite and have little confidence, even now,
in the legal reforms proposed by the government. From the outset many rejected the
traditional Soviet legal framework, and sought to establish alternative political parties to the
CPSU.

The situation resembles the construction of a transcontinental railroad. Each side is
rushing to meet the other, but is uncertain about where and when they will meet. Still, both
sides seem supremely confident that they will eventually merge and transform the political
landscape. They trust that when this occurs, the resultant union between the reform-minded
elites and popular political activists will be more than just the consolidation of a new legal
structure; it will form the basis for a new social contract between the rulers and the ruled.

The Traditional Role of Law in Soviet Society

Western observers of the Soviet legal scene before 1985 often concluded that the law
served merely to ensure communist party rule. As Soviet jurist Eugene B. Pashukanis
observed in 1935, "Revolutionary legality is for us a problem which is ninety-nine per cent
Hence the striking flip-flops in party doctrine regarding the ultimate purpose of the law. According to early Bolshevik orthodoxy, law under socialism was to suffer the same fate as the state. Pashukanis termed this "the gradual disappearance of the juridical element from human relations." According to another prominent early Soviet legal theorist, P. I. Stuchka,

Communism means not only the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether.⁸

Stalin, however, eventually concluded that it was not to his interests to relegate such a powerful mechanism of social control to the dustbin of history. An enhanced legal regime could be used to manipulate both social and economic development. The 1936 Soviet Constitution therefore completely reversed Bolshevik legal thinking, sanctioning the idea that the purpose of the law was to provide for the stability of the state.

A new group of Stalinist jurists, headed by the notorious Andrei Vyshinsky, now claimed that "under socialism . . . law is raised to the highest level of development."⁹ The law was to serve as the Party's weapon in the struggle to eradicate the remnants of capitalism, and instill "socialist discipline" in the minds of millions. From one extreme to the other, the one constant feature of Soviet law has been its subordination to the Communist Party leadership.

Even a regime that blatantly manipulates the law, however, needs some consistency in its application. In day to day activities, therefore, Soviet legal practice has quietly adopted many of the same pragmatic functions that characterize "bourgeois" law. After Stalin's death
arbitrary intervention by political authorities into a citizen's daily routine was gradually reduced. Of course, such intervention remained a possibility, and this in itself undermined public confidence in the law, especially in matters involving political or administrative authorities. The result was a paradoxical mix of arbitrariness and highly detailed regulation of common aspects of a citizen's daily life. Each year, along with 20-25 laws and ukases adopted by the USSR Supreme Soviet, a thousand governmental decrees and tens of thousands of ministerial decrees having the force of law are issued at the All-Union level.10

Looking at this bewilderingly complex matrix, it is no wonder that some Western observers concluded that Soviet law serves an essential function in preserving the Soviet system. Carefully tailored to prevent independent initiative by citizens, it educated and, when necessary, coerced generations of Soviet citizens into the norms of accepted social behavior. Writing in 1985, Dutch legal scholar Ferdinand J. M. Feldbrugge concluded that the legal order could not liberate itself from political influences since its fundamental purpose is to preserve the political system. Hence, he termed Soviet law: the system's "efficient life-support machine."11 As such, he felt it would be a poor vehicle by which to attempt system-wide reform. Market oriented economic reforms would have to be well established before the current constitution could be replaced. Until such time, Soviet law could serve only as hand-maiden to the political elite.

By contrast, scholars like Georg Brunner and Soviet emigré Olimpiad Ioffe believe that the law qua law can be used to undermine the totalitarian regime. It is not so much the
content of the law as its spirit (in mutilated form) which sustains the regime. As Brunner puts it:

It is the Communist Party pretending supernatural wisdom and not any specific legal provisions that must disappear in the first place if the constitution is to start fulfilling its proper normative function.\textsuperscript{12}

Also writing in 1985, Brunner and Ioffe agree that an evolution of Soviet law toward something resembling a law-based state is highly unlikely without a prior repudiation of the ideological foundations of the system (something inconceivable at the time). Yet they also felt that for the most part the letter of Soviet statutes could accommodate a new spirit of the law. Thus, their view left some hope that modifying existing legislation could assist in the transition to a law-based state.

The intervening six years have confirmed both the dissonant spirit of the law in totalitarian states and the need to replace most existing legislation. It is not too surprising to find both Soviet and Western legal scholars suggesting that changes should occur incrementally, within the context of the existing political structure—legal structures after all yearn for stability. The pace of the social transformation, however, has so far outstripped the pace of legal reforms.

It is to Mikhail Gorbachev's lasting credit that he recognized early on the importance of creating a new legal structure and that he has encouraged the concept of a law-based state. But five years of sputtering perestroika have shown that reforms cannot simply be decreed from above. The growing pluralism that Soviet society displays at the grassroots must also become an accepted part of the restructuring process. Indeed, in a widely discussed article
in the journal *Neva*, the young publicist and political candidate Sergei Andreyev hinted darkly at the consequences if this does not occur:

If today people are not allowed to govern themselves, if they are not helped to set this process in place democratically, tomorrow the people will take their right by force destroying all obstacles in their path. We cannot ignore this--time does not stand still and people have already understood what they can accomplish, and what they can be deprived of.13

**Perestroika and the Emergence of Civil Society**

Perestroika was conceived as a revolution from above. While appealing for greater civic initiative, perestroika intended to channel that initiative into socially productive ventures that would strengthen the popular appeal of socialism. Gorbachev summed up the significance of the reforms in his book *Perestroika*:

To put an end to all the rumors and speculations that abound in the West about this, I would like to point out once again that we are conducting all our reforms in accordance with the socialist choice. We are looking within socialism, rather than outside it, for the answers to all the questions that arise. We assess our successes and errors alike by socialist standards. Those who hope that we shall move away from the socialist path will be greatly disappointed.14

Since then he has often stressed his strong belief in socialism.15 The objective of strengthening socialism was no doubt foremost in Gorbachev’s mind when he moved to enhance the rule of law and establish a "law-based state" (*pravovoe gosudarstvo")." Initial public discussions clearly linked this new legal concept to the strengthening of
socialist legality. The new legislative proposals, as the editor of the Soviet legal journal Chelovek i zakon noted, seemed more designed to restrain the emergence of independent civic initiative than to give it encouragement. The controversy surrounding the government's first draft law on voluntary public associations confirmed this suspicion.

Igor Virabov, an enterprising young reporter for Komsomolskaia pravda, describes the strenuous efforts of the authors of this draft (the USSR Ministry of Justice, the Trade Union Council, the Central Committee of the Communist Youth League, the Supreme Court of the USSR, the State Procuracy, Ministry of Internal Affairs, and the KGB) to prevent it from "falling into the hands of the wrong people," as one senior consultant to the Ministry of Justice put it. When asked by Virabov just whom that meant the consultant responded, "Why the 'informals,' of course."

The first draft, drawn up in late 1987 and early 1988, anticipated the creation of three categories of public associations--voluntary societies, organs of independent public activity, and independent public associations--broadly corresponding to the traditional categories of non-Party organizations in Soviet society. Although a wide variety of legitimate purposes were foreseen for public associations, their existence was firmly anchored to "the all-around improvement of socialist society, the further extension of socialist democracy and socialist self-administration of the people." Article 3 specified that "Their activity shall not be detrimental to the interests of socialist society and the State . . . ."

The proposed law further stipulated that, voluntary societies shall conduct their activities in cooperation with State agencies, trade union, Komsomol, cooperative and other public organizations
and labor collectives... The Soviet of People's Deputies and their executive and administrative agencies shall... guide the activities of voluntary societies, ensure that they comply with the law and support their work.  

In order to better "guide the activities" of these independent groups state organs were given the power to extract payments for the State budget, and to terminate the activities of non-complying organizations. As a result many "voluntary" associations would have been mere appendages of local government.

In sum, while encouraging the formation of civic organizations, the first draft did not endow them with any real rights vis-a-vis the existing Party and state structure. One participant in the drafting acknowledged as much when he commented that the proposed law "ignores such important political rights of voluntary societies as the right to initiate legislation and nominate candidate deputies, as well as questions of material, economic, and publishing activity."  

Some of the conservatism displayed in this initial draft can be attributed to uncertainty about its relationship to existing statutes and to the resistance of important ministries. But the constrained view of the law during the early phase of perestroika must be considered an equally serious impediment. Many political and legal experts apparently believed that democratization could be decreed from on high, and did not even consider that views outside the bureaucracy would want to have their say.

The vehement public criticism that erupted arose after the draft was "smuggled" out to the unofficial and official Soviet press caught them completely by surprise. Following an unprecedented barrage of opposition in the media, the first draft was tabled before it even...
reached the Soviet parliament. Reform deputies in the USSR Supreme Soviet subsequently submitted their own draft, authored by a young scholar of the American constitution (now Vice-mayor of Moscow), Sergei Stankevich. In a foretaste of things to come, Stankevich’s draft allowed for the formation of groups that do not acknowledge "the leading role of the communist party" envisioned in Article 6 of the USSR Constitution, thus suggesting the eventual legalization of alternative political parties. Although hotly debated in the fall 1989 session of the Supreme Soviet, the reformers lacked the numerical strength to see their version passed.

On June 4, 1990, however, Pravda published a second version of the law that substantially revised the premises of the earlier draft. Under the new proposal, which passed its first reading in the USSR Congress of People’s Deputies on May 20, public associations would no longer be subdivided into categories. For purposes of the law, public associations would now include political parties, mass movements (including popular fronts), professional, veterans, youth, women’s, and children’s associations, creative unions, funds, and any other type of association of citizens excluding religious, commercial, and governmental associations.

Remarkably, nowhere in this document is the communist party or socialism even mentioned. On the contrary, Article 4 made it illegal for government officials to discriminate on the basis of membership in any public association (including the Communist Party). It further defines as illegal any request by an employer of government official to provide such membership information. If taken seriously, these provisions could seriously undermine the Party’s nomenklatura system.
Taking into account the criticism of the previous draft, the authors of the new draft specified the right of associations to participate in the electoral and administrative process; to participate in the decision-making process of elected and administrative officials; to initiate legislation; to defend the legal rights of their members; and to publish their materials. The new draft also provided an important legal safeguard against arbitrary government action against associations by stipulating that the individual, rather than the organization, would be held accountable for criminal activity.

It was this draft, with a few significant amendments, that was passed into law on October 9, 1990. Overall, the final version of the law is much improved, yet despite the notable shift in emphasis in the final draft toward the rights of public associations, a few disturbing provisions remain. The most important one is that the procurator's office must still supervise the legality of all actions undertaken by public associations. The government organization registering the public association, usually the Ministry of Justice, also supervises how well an association's actions correspond to its statutes. In the fulfillment of this obligation the ministry may demand an explanation of the activities of the association, send observers to participate in its activities, and request an explanation from any member of the association about their compliance with the association's statutes.

The ministry or the public prosecutor may issue a written warning to the association if it is deemed to have acted in a manner "exceeding its goals and objectives." Unlike the second draft, however, which gave them the power to terminate offending associations after a second violation, the final law reserves this power for the courts.

The state can also terminate the existence of a public association if it is deemed to be
acting to "overthrow, forcibly alter the constitutional structure or forcibly disrupt the
territorial integrity of the USSR, union and autonomous republics or autonomous regions;
propagandize war, violence, and cruelty, inflame social, racial, national, and religious
conflict, including class conflict, and other criminally punishable acts. The creation of
public para-military units and military formations is prohibited." It is worth noting that term
"class conflict" had been absent in all previous drafts. Its inclusion in the final version is a
clear signal that the framers intend to terminate the law's subservience to the traditional
concepts of Marxism-Leninism. Still, this sweeping catalogue of social ills can also be cited
to justify the repression of a wide variety of nationalist or separatist groups.

The law also contains new guarantees of due process absent in earlier drafts. For
example, registration of new organizations can only be refused if the organization's statute
contradicts the specific points in articles 3, 4, or 10 of the law. Even then, this refusal may
be appealed to the courts.

All political parties are presumed equal before the law, and there is an implicit
assumption that they may hire professional staff, but not make a profit or pay the staff from
any profit-making ventures.

One of the more unusual restrictions is the stipulation that while public associations
will be registered if they have a minimum of ten members, all-union political parties must be
active on the territory of "all or the majority" of the fifteen union republics, must have
organizations in the republics, and must have no fewer than five thousand members to be
registered. However, this does not preclude the registration of such parties at the republic
level or lower, subject to local statutes, nor does it preclude parties from acting as "public
political associations" at the all-union level, until such time as they are registered. While this figure is significantly higher than the one thousand stipulated in the second draft, it is unlikely to seriously impede political activity. Again, events have already overtaken the law—at least three new political parties, the Democratic Party of Russia, the Republican Party, and the Christian-Democratic Movement, apparently already meet these criteria.33

Finally, there is a caveat of enormous potential significance to the development of effective political pluralism. While associations are given the right to receive funds from abroad and to have members who are not citizens of the USSR, political parties and social movements [obshchestvennye dvizheniia] that pursue political objectives are prohibited from receiving any financial or material support from foreign organizations or citizens.34 If passed and stringently adhered to, the first victim of this law could be the CPSU itself, which would have to divest itself of all foreign holdings and assets.

While the new law is a positive step in the establishment of the rule of law, it may already be too little too late. Support for legal recognition of independent political associations at the top of the political pyramid has been much too slow in coming, most notably from Gorbachev himself. The initiative has therefore passed into the hands of republican and local legislatures. While the USSR Supreme Soviet debated how to revise the Soviet Constitution, the republics have declared their own laws sovereign and supreme. While the All-Union legislature debated the appropriate wording of Article 6 of the USSR constitution, the Moscow city council went ahead and registered several alternative parties, among them the Democratic Party of Russia, the Christian Democratic Union of Russia, and the Organizational Committee of the Russian Party (Democratic Platform).35
The dramatic changes between the draft versions of the law and its final version are evidence of the rapidly growing influence of these new civic and political organizations. Their influence has been enhanced by growing public skepticism regarding the ability and desire of central authorities to implement reforms. Independent social and political groups have been able to channel some of this skepticism of authority, particularly widespread among the young, into a creative political outlet. Their ability to galvanize public support into legislative initiative, most visibly at the local level, has proved to be decisive in shaping the direction of the final legislation.

The Rise of Informal Politics

More than his appeals to increase civic initiative, it was the emptiness of Gorbachev’s rhetoric, and his indecisiveness in the face of more radical reform strategies that encouraged the emergence of "informal organizations." The term, by now somewhat dated, originally referred to groups that had formed without official sanction. In December 1987, Pravda noted the existence of over 30,000 such associations; a year later it doubled this estimate to 60,000.37

Originally apolitical, many of these groups entered the political arena as a result of conflict with the local bureaucracy. This process has accelerated in response to the structural and moral disintegration of the CPSU. Given the Party’s traditional role in supervising the law, this disintegration has had a liberating effect on local legislatures.

In this context the newly found prominence of the slavophile strand of Russian
political culture, with its noted reluctance to rely on the law for stability and guidance to the body politic has been cited with concern. In his first speech to the USSR Congress of People's Deputies, Sergei Averintsev chided his more conservative colleagues by citing B. N. Almazov's satirical verses directed at the famous nineteenth century slavophile Konstantin Aksakov:

For reasons entirely organic  
We have not been endowed with at all  
That quality wholly satanic--  
Common-sense in the matters of law.  

Russian natures broad and wide  
Seeking truths eternal,  
Cannot be constrained inside  
Lawyers' rules infernal

Yet, while such views cause apprehension among Soviet reformers and foreign observers, they may be a blessing in disguise. In today's uncertain legal and political environment the new social forces may feel less constrained in challenging the old order and in setting up an entirely new one. Unlike the dissidents of the 1960s and 1970s, whose appeal was a cautious "respect your own constitution," many of today's new legislators have concluded that it is precisely the existing legal system that lies at the root of society's problems.

Their strategy to dismantle this repressive legal structure proceeds at many levels. First, of course, they support the passage of new all-union legislation, even if ultimately committed to national independence. Meanwhile at the local level, while trying to avoid contravening existing laws, the democrats strive to "get a bit ahead of the nascent democratic
legislation," as the head of the Lvov oblast Soviet, Vyacheslav Chornovil, put it. Thus new political parties are registered, public religious observances authorized, and other civic matters regulated in anticipation of the new legislation. Finally, particularly offensive past legislation, such as those permitting secret administrative decrees, are challenged (often successfully) in the courts on the basis of their inconsistency with newly passed legislation.

Perhaps even more importantly, these new political actors now have the ability to appeal directly to public opinion. In response to competition and to the stringent demands of public opinion, it is no longer unusual for publications with circulations in the millions to offer their pages to opposing political points of view. For others, there are the over seven hundred independent (samizdat) Russian language journals being published.

The result has been a rapid politicization of Soviet society. In the spring of 1990 the popular weekly Sobesednik published its own two page "political atlas of Russia" listing over a dozen different political organizations active in the Russian republic, among them the CPSU. In the new Russian parliament elected earlier this year members of the opposition "Democratic Russia" coalition captured over 35% of the seats. Under its aegis several new parties took their place in the RSFSR Supreme Soviet. A founding member of the Russian Christian Democratic Party, Viktor Aksyuchits, was even nominated for the RSFSR Presidency and, in keeping with the tenor of the times, his stirring anti-communist speech was televised nationally, right after the evening news program Vremya.

In Moscow, Leningrad, Pskov, Novgorod, Sverdlovsk, Lvov, Chernigov, Omsk, Nizhnyi Novgorod, Vladivostok and some seventy other cities the Democratic Russia coalition won absolute majorities in the local city councils. In many of these cities
opposition parties have already been registered. The Moscow city executive committee and
presidium of the city soviet have decided to set up a commission to expedite the registration
of new political parties and public organizations. Registration allows them to "open a bank
account, enter into relations with law enforcement bodies and have their own publications
and letterhead." Once registered such organizations will also be able to receive funds from
abroad and legally hold hard currency. This final point sets Moscow in direct conflict with
the new All-Union law.

The ability to appeal to the court of public opinion has given these organizations real
political clout. Pravda, for example, recently carried a lengthy article detailing how CPSU
officials in Orenburg oblast are coming to terms with the existence of multiple parties in their
region. Despite the legal and political mismatch between the two sides--on the one hand the
CPSU obkom leadership, on the other regional leaders of the newly formed Social
Democratic Party of Russia--the negotiations scarcely seemed to reflect this disparity. As
reported in the Soviet press, the protracted negotiations resembled the tedious closed-door
congressional budget negotiations Americans are so familiar with:

Each side keeps its own minutes, and then an agreed upon report is drawn up
for the mass media. Each side refrains from commenting on the questions on
which the sides failed to reach agreement. At the same time each side's
representatives seek to hold the meetings constructively, refrain from impolite
expressions, and use in their arguments only verified objective information and
data. The basic principle is to reach a consensus.

Most importantly, the obkom agreed to grant all political parties equal access to the
mass media, until they had established media outlets of their own.
Conclusions

The Soviet version of the law-based state is developing under conflicting impulses. On the one hand it is being asked to establish the proper conditions and restraints under which a pluralistic society can flourish; on the other hand it must first catch up to existing social realities before it can begin to establish meaningful criteria for the application of the law. Soviet legal scholars and judges thus face a "catch-22" situation: they can only undertake the most serious aspects of legal reconstruction after the political transformations that give them that ability have taken place. The efficacy of new legislation is contingent upon prior political reform in Soviet society, the reverse of what is commonly true in the United States and other "rule of law" societies, where legislation usually drives political transformation.

Helping legislative and popular support for political decentralization to proceed apace will be a crucial test for the nascent democracies of the region. For now, though, there seems to be an inverse relationship between a legislature's electoral size and its ability to implement radical reforms. Several well known reformers in the USSR Congress of People's Deputies, Anatoly Sobchak, Gavriil Popov, and Sergei Stankevich among them, have shifted their efforts from the All-Union to the local level. People's Deputy Stankevich explains why:

"The city is the level at which we can truly show the difference between the current methods of administration and democratic administration. At the regional level this is not yet possible, and at the level of the RSFSR it has already become impossible. And it will be a long time yet before it will be
possible to illustrate this difference by referring to the USSR Supreme Soviet—
I know this quite well. By contrast in Moscow, while we do not promise to
create some sort of paradise, it will be possible to give people the feeling that
this is a different kind of authority [vlast]."48

The problem, however, is that a new legal edifice is arising within the different
republics more rapidly than it is being established for the Union as a whole. As a result the
USSR Congress of People's Deputies, the cornerstone of Gorbachev's new governmental
structure, risks losing its ability to shape policy, thereby imperiling the stability of the Union
and the legitimacy of Gorbachev's experiment in democracy. While the expansion of
legislative decentralization is certainly a good thing for Soviet democracy, it is a mixed
blessing for the Soviet state, for it raises serious questions about the competencies and,
ultimately, the need for a strong central government for the USSR.

But the prospect of decentralization (or, more bleakly, disintegration) of the USSR
has likewise hastened the maturation of an alternative political infrastructure. In the absence
of pertinent legislation, many independent political organizations have simply gone ahead and
acted as if endowed with the right to do so, thereby forcing the hand of local legislatures.
Consequently, the intellectuals' debate over how quickly these new political associations
would be capable of assuming political leadership has become a moot point. Multiple
political parties (nearly all of which aspire to national prominence in the future) are now a
fact of life. And, as Boris Yeltsin has pointed out, many republics (including the RSFSR)
will be forced to hold multi-party elections within the next two years simply because people
will demand the opportunity to judge their elected officials.

There is every reason for urgency, therefore, in reconciling the implementation of
popular and legislative initiatives, particularly in the face of mounting public impatience with the All-Union legislature’s half-hearted approach to reform. From the citizenry’s perspective legal reforms seem to be responding to change at a glacial pace. Indeed, the few examples where local reformers have acted to assert their judicial independence, as in the widely publicized case of the judge Leonid Kudrin, have tended to confirm popular suspicions that the political establishment is as a whole highly resistant to change. Judge Kudrin dismissed charges of illegal assembly brought against three members of an informal association in Sverdlovsk. Though his ruling was upheld by two other judges, and supported by the local state procurator, Party officials forced him to resign from the bench and find more congenial work in a vegetable warehouse.\textsuperscript{49}

But despite setbacks there is also reason for optimism. The emergence of civil society is not only gradually changing the behavior of local government officials and legislators but also bringing the initial, rather limited conception of the rule of law into line with public expectations. Recent legal writings and legislation seem far less concerned with the maintenance of socialism than with establishing a durable, democratic, post-communist legal framework.

Gorbachev’s apparent political turnabout in early 1991 is not likely, by itself, to preclude further progress toward the institutionalization of political pluralism. While his political retrenchment may exert pressure on constitutional rulings to be more conservative, it will also heighten conflict with local and republican governments. This is already evident in the refusal of seven republics to conduct the March 17th referendum on preserving the Union.
It is important to remember, however, that the end of totalitarian rule is not the same thing as the establishment of democratic rule. While these two tendencies reinforce each other, it is quite possible that in the near future the end of the Party's monopoly on power is met not with the triumph of democracy, but with anarchy and chaos because effective democratic institutions have not yet been taken root. It is this catastrophic scenario that Gorbachev now appears most concerned about, though if it occurs he must also bear considerable blame for it.

But while perestroika may stall at the top, and even retreat somewhat, civic institutions at the grassroots level are likely continue to exert pressure for change. This process has by now taken on a life of its own, independent of official perestroika à la Gorbachev. It can only be set back by a direct, all-out assault against the very notions of civil society and the rule of law.

For the foreseeable future, therefore, Soviet law and society will continue to be fraught with contradictions. Legal scholars will cautiously undermine the old totalitarian order through the gradual subordination of the CPSU to the rule of law, while aggressive political newcomers will try to use whatever legal mechanisms are at their disposal to jump-start the new order of political pluralism. There is considerable risk that the existing political and legal structure will disintegrate before new ones are firmly in place. In the final analysis, however, the deleterious effects of temporary legal chaos should not obscure what has already been achieved--for the first time in Soviet history there is a widespread consensus on forging a new social contract between rulers and ruled, one in which the rule of law will be firmly established.
NOTES

1. A poll conducted by the All-Union Center for the Study of Public Opinion, for example, reveals that today only eleven percent consider in inappropriate to discuss "replacing our system with a capitalist one" only nine percent consider it wrong to publicly doubt "the correctness of Lenin's political course," and only 5.5 percent oppose public discussion of "the Party's responsibility for the present crisis-like state." "Homo Sovieticus: A Rough Sketch," Moscow News 18 March 1990, 11. An even more recent survey of Russian youth shows an even more dramatic abandonment of ideological icons: 74% feel that socialism has been bad for the Soviet Union, 50% feel it has no future in the USSR, 85% support private land ownership, 70% support private industries and commercial firms, 51% now feel that Gorbachev is an obstacle to political reform, and six times as many young people prefer Boris Yeltsin (39%) to Mikhail Gorbachev (6%) as their political leader. David Satter, "What Young Russians Really Think," Reader's Digest March 1991, 49-54.


3. Barry, op. cit., note 2. As People's Deputy Igor Gryazin points out in a letter to Novyi Mir ("Pravovoe gosudarstvo," 1988, No. 8, 266), for some this was a reason for indictment, while for others it was a cause for celebration.


6. All the legal scholars contributing to the Shtromas and Kaplan volume (op. cit., note 4) agree on this point, including F. J. M. Feldbrugge, Alice Erh-Soon Tay, George Brunner, and Olimpiad Ioffe.


8. ibid., 26.

9. ibid., 54

10. See the letter by the members of the Institute of State and Law at the USSR Academy of Sciences, V. Guliev et al., "O verkhovenstve zakona," Izvestia 20 February 1989,


Barry, op. cit. note 2.

"Vlast i pravo," Chelovek i zakon 1988 10, 10.


Preamble. An unofficial English language translation of the draft law is available in Toward the Rule of Law, A Helsinki Watch report, Washington 1989, 168-80. All subsequent citations refer to this text.

Article 7, op. cit. note 18.

Article 18; Article 12, op. cit. note 18.

Toward the Rule of Law, op. cit. note 18, 82.

Oleg Rumiantsev, "Demokratiya bez razresheniya," Strana i mir 1988 No. 47, 47.

"Ob obshchestvennykh organizatsiiakh," Pravda 4 June 1990, 5. All subsequent citations refer to this text.

Article 1, op. cit. note 23.

Article 18, passim, op. cit, note 23.

Article 20, section 2. op. cit. note 23.

29. Articles 21, 22, _op. cit._ note 27.

30. Article 3, paragraph 2, _op. cit._ note 27.

31. Article 17, article 2, _op. cit._ note 27.

32. Article 6, paragraph 2, _op. cit._ note 27.


34. Article 17, _op. cit._ note 27.


36. For a discussion of current informal organizations in Russia see Nicolai N. Petro, "Perestroika from Below: Voluntary Socio-Political Associations in the RSFSR," in Rieber and Rubinstein, _op. cit._ note 2.


40. "O pravilakh, dopuskaiushchikh primenenie neopublikovannykh normativnykh aktov o pravakh, svobodakh i obiaazznostiakh grazhdan" _Ved.SSSR_ 1990 No. 50, item 1080.

41. If any confirmation were needed, the September 1990 offer by both _Komsomolskaia pravda_ and _Literaturnaia gazeta_ to unconditionally open their columns to anti-communist exile Aleksander Solzhenitsyn should dispel any doubts.

42. Konstantin Mikhailov, "Politicheskii atlas Rossii," _Sobesednik_ 1 April 1990, 4-5.
43. His address to the RSFSR Supreme Soviet was delivered 18 May 1990.


45. V. Vorontsov, "Diskussionnyi listok nomer 59" Pravda, 15 August 1990, 3.


47. Ibid.
