The work leading to this report was supported by funds provided by the National Council for Soviet and East European Research. The analysis and interpretations contained in the report are those of the author.
This report summarizes the work of a major conference on the title subject, the separate papers from which (Contents, Part III) will be distributed individually. They will also be published by M. E. Sharpe in "Toward the 'Rule of Law' in the Soviet Union? Political and Legal Reform in the 1990's" Donald D. Barry, Ed. forthcoming 1992.
Executive Summary

I. Three Paragraphs of Basic Conclusions

The major conclusion to be drawn from this set of reports is that the Soviet Union has gone a considerable distance toward eliminating those features of its legal system that have long been considered most objectionable—its almost total lack of independence from political influences; its failure to protect the rights of private parties; its general arbitrariness. This is the most important result of the effort to create a pravovoe gosudarstvo—a law-based state—in the USSR. But this process is in mid-passage, and so in every report one finds a cataloging of law reform accomplishments accompanied by a set of problems that still exist. Individual authors differ in their assessments of the current status and direction of law reform, but all agree on the mixed character of the present picture.

Frank assessments of the Soviet legal system—e.g., the cataloging of "most objectionable features" listed above—were, until recently, the exclusive province of non-Soviet analysts. One of the remarkable aspects of the era of glasnost and perestroika has been the harsh criticism of Soviet law from
inside. Recent contributions by Soviet observers have greatly enriched our assessments of Soviet law, and this was certainly the case at the present conference. The tone and content of the contributions of the seven Soviet jurists were consistent with those of other participants, and if anything somewhat more critical of recent developments (reports by the seven Soviet participants are found in the "Commentary" section of Part III of this Report).

The research reports and conference proceedings were completed more than two months before the attempted coup of August 1991. Reflections on the coup, in light of the conference findings, are addressed in a Postscript placed at the end of Part II of this Report. The two basic conclusions of the Postscript: a) the movement toward a pravovoe gosudarstvo engendered among the anti-coup leaders and the part of the population that supported them a heightened sense of the importance of constitutional and legal processes; b) on the other hand, the chaotic post-coup atmosphere, the desire to rout the coup plotters and their supporters, and the sense that the immediate post-coup period was the time to move decisively led to some questionable legal practices among anti-coup forces (e.g., searches of homes of Communist Party members and others--including some persons with parliamentary immunity--that were probably beyond the law; the continued broad use of executive branch edicts, rather than parliamentary legislation, to establish policy). Thus, the post-coup period manifests the same
mixed character found in developments in Soviet law up to the
time of the coup: a generally heightened respect for legal and
constitutional process, but with pockets of legal practice where
political expediency still outweighs the even-handed application
of the law.

II. Historical and Conceptual Background

The term pravovoe gosudarstvo, from the German Rechtsstaat,
enjoyed over six decades of popularity in pre-Revolutionary
Russian jurisprudence. But it had little impact on legal
developments per se. Bolshevik leaders rejected the concept as
alien to Soviet law, an attitude that held sway for about seven
decades. But its presence in the legal heritage of Russia made
its reception during the perestroika period easier.

In part because of its origins and in part because of the
context of Soviet law into which it was introduced, the concept
of pravovoe gosudarstvo has embraced the positivist notion of the
state as the highest source of law. Only recently have Soviet
jurists begun to grope toward a view that places certain
individual rights beyond the reach of the state.

III. Pravovoe Gosudarstvo and Soviet Society

One of the spillover effects of the glasnost era has been a
heightened legal consciousness in the USSR. With the failure to
control legal reform from above, this legal consciousness has taken on a life of its own, and is to some extent related to the aspirations for ethnic and territorial autonomy in the country. Thus, the meaning of pravovoe gosudarstvo in the Baltic states is strongly linked with national independence.

Future constitutional developments also increasingly depend on the fate of ethnic-territorial issues. The Union Treaty was to be the basic document defining union-republic arrangements, but even at the conference it was clear that a number of republics would not sign the treaty.

The new governmental structures created since 1988 got mixed reviews from conference analysts. The new-found authority of the national legislatures took power away from former policy makers (especially the Politburo and other parts of the Communist Party), but some hold that the new bodies were not up to the tasks thrust upon them. This immobilisme led to the creation of the USSR Presidency in 1990 and its acquisition of further powers later that year. But these developments only took the governmental system further from a true separation of powers. All analysts agree that even before the August 1991 coup, the legal powers of the CPSU were rapidly diminishing and needed to be curtailed further.

IV. Substantive and Procedural Law

The parts of the law reform process examined in this section
are the following:

The impact of international law on domestic law;
Individual rights;
The rights of political groups;
Criminal law and procedure;
The independence of the judicial system;
Three aspects of economic-legal relations: law and marketization; the role of foreign economic interests in Soviet law; the legal rights of Soviet workers.

For details on these matters, the reader should examine Part I-III of this Report and the individual papers themselves, which are found in Part III of the Report. As a general observation, it can be said that the major conclusion described in the first paragraph of this Executive Summary may be found in all of these papers: the view that considerable progress has been made in moving Soviet law from its authoritarian past; but a picture of a process in mid-passage, in which further development is still crucial.
FINAL REPORT

Contract #805-01

"In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev"

by Donald D. Barry
Professor of Government and Director, Center for International Studies
Lehigh University

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


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

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Part I. Conception and Organization of the Project

The idea for this project began to develop in early 1989. By that time the concept of a pravovoe gosudarstvo (a "law-governed state") had been in use in Soviet legal and journalistic writing for about a year. Given its earlier castigation by Soviet spokesmen as a "bourgeois" concept, the acceptance of the term at the end of the 1980s was interesting in itself. But it also appeared to symbolize something larger than just a change in terminological usage. It suggested a willingness on the part of some segment of the Soviet political and legal elite to consider a broader and more open approach to legal reform than had been possible in the past. Since this could have important implications for political and social development in the Soviet Union in general, it was decided to attempt to undertake a broad examination of the development and meaning of the concept of pravovoe gosudarstvo.

A first draft of a proposal was developed by the Principal Investigator (Donald Barry) during the summer of 1989. It was taken to a conference on Soviet law held in Berkeley, California.
in August, 1989 (conference on The Codification of Soviet Law, held August 3-5, 1989—a project also sponsored by the National Council). It was discussed and revised at informal evening meetings which several conference participants attended. Also at this conference, a number of participants were enlisted to participate in the project, and an informal organization committee was created to help Barry prepare the proposal and select a full list of participants.

During the Fall of 1989 the proposal was revised and other participants were recruited. The proposal was submitted to the National Council before the November 1 submission date. At the same time, a parallel proposal was prepared for the East-West Forum. This proposal was basically to provide honoraria for the paper-writers. News that the proposal to the East-West Forum had been funded was received before the National Council made its decision, and so a revised budget was submitted to the National Council.

Announcement from the National Council that the proposal had been approved came in January, 1990. One change in the budget was made thereafter, a supplement of $8,600 to cover the expenses of Soviet participants to the conference. This was applied for in a letter of November 5, 1990, and was granted in a letter of December 26, 1990. In the event, seven Soviet lawyers/scholars attended the conference, five of whom flew from the USSR to participate.

The period from January, 1990 to the Spring of 1991 was
taken up with planning the conference and with the conducting of research by the sixteen paper-writers. The papers were prepared in two versions. Preliminary drafts were prepared and submitted in the Fall of 1990. These were edited by Barry and returned to the authors with comments. Second versions were submitted in the Spring of 1991, in time to be reproduced and sent to conference participants before the conference (several authors failed to meet the deadlines, and arranged to send copies of their papers directly to conference participants; all papers were received by conference participants prior to the conference).

Negotiations with prospective publishers were conducted during 1990, and a contract was signed in August, 1990 with M.E. Sharpe, Inc. of Armonk, NY to publish the papers of the conference.

The conference was held at Lehigh University, Bethlehem, PA from May 30 through June 1, 1991. Most of the paper-writers made further revisions to their papers after the conference. The post-conference versions of the papers are being submitted to the National Council as Part III of this report. It should be noted that many of these papers contain coding conventions used by the publisher in preparing the typescripts and disk files for printing.

All paper-writers attended the conference except Frances Foster-Simons, who was ill. But Professor Foster-Simons did prepare a fully-acceptable paper, which was formally discussed at the conference. On the basis of written comments sent to her,
Professor Foster-Simons prepared a final version of her paper, which appears in Part III of this report.

In addition to the paper-writers, fifteen other specialists in Soviet law (including the seven from the USSR) participated as discussants. Nine of these discussants, including all seven from the Soviet Union, subsequently contributed commentaries or other written statements based on their participation in the conference. Copies of these are included in Part III of this report, and their contributions will be referred to in Part II. Since the conference was open to the public, a number of undergraduate and graduate students, professors, area attorneys, and members of the local community also attended.

One further comment about the proceedings of the conference is in order. On the basis of discussions with Professor Stanislaw Pomorski, Trustee Representative of the National Council, a somewhat different format for discussion was decided upon. Given the large number of papers to be discussed (16) and the somewhat limited amount of time available (two and one-half days), it was decided to allow no opening statements by the authors of the papers. We began each session with commentaries by designated discussants and proceeded to a general discussion of the paper. Only then did the paper-writer make his remarks. Having the papers available in advance allowed for the use of this format, and avoided the duplication of effort involved in having the paper-writer make a long formal presentation. While some in attendance expressed some regret about providing no
time at all at the beginning for authors, the general response of participants was overwhelmingly positive.

The participant list provided below is divided into two parts: authors of papers and general discussants.

List of Participants

A. Paper Authors and Titles

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

DONALD BARRY, University Professor of Government, Lehigh University: "The Quest for Judicial Independence: Soviet Courts in a Pravovoe Gosudarstvo."

FRANCES FOSTER-SIMONS, Associate Professor of Law, Washington University: "The Soviet Legislature: Gorbachev's School of Democracy."

GEORGE GINSBURGS, Distinguished Professor of Foreign and Comparative Law, Rutgers University, Camden: Domestic Law and International Law: Importing Superior Standards."

JOHN HAZARD, Nash Professor of Law Emeritus, Columbia University: "The Evolution of the Soviet Constitution."

KATHRYN HENDLEY, Ph.D. candidate, University of California, Berkeley: "The Ideals of the Pravovoe Gosudarstvo and the Soviet Workplace: A Case Study of Layoffs."
EUGENE HUSKEY, Associate Professor of Political Science, Stetson University: "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990."

DIETRICH ANDRE LOEBER, Professor of Law, University of Kiel: "Regional and National Variations: The Baltic Factor."

PETER MAGGS, Corman Professor of Law, University of Illinois: "Substantive and Procedural Protection of the Rights of Economic Entities and Their Owners."

HIROSHI ODA, Sir Ernest Satow Professor of Law, University College, London: "The Law-Based State and the CPSU."

NICOLAI PETRO, Visiting Professor of International Relations and Soviet Politics, University of Pennsylvania: "Informal Politics and the Rule of Law."

ROBERT SHARLET, Professor of Political Science, Union College: "The Fate of Individual Rights in the Age of Perestroika."

LOUISE SHELLEY, Professor, Department of Justice, Law & Society, American University: "Legal Consciousness and the Pravovoe Gosudarstvo."

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

PETER SOLOMON, Professor of Political Science, University of Toronto: "Reforming Criminal Law Under Gorbachev: Crime, Punishment, and the Rights of the Accused."

GER VAN DEN BERG, Faculty of Law, University of Leyden: "Executive Power and the Concept of Pravovoe Gosudarstvo."
B. General Discussants

HAROLD J. BERMAN, Woodruff Professor of Law, Emory University
VLADIMIR ENTIN, Senior Researcher, Institute of State and Law, USSR Academy of Sciences, Moscow
YURI FEOFANOV, senior legal correspondent, Izvestia, Moscow
SUSAN HEUMAN, Assistant Professor of History, Baruch College, CUNY
KAREN KNOP, Research Fellow, Faculty of Law, University of Toronto
EGIDIJUS KURIS, Faculty Lecturer in Law, Vilnius University, Lithuania
PRANAS KURIS, Former Minister of Justice, Republic of Lithuania; Professor of Law, Vilnius University
LEON LIPSON, Professor of Law, Yale Law School
AVGUST MISHIN, Professor of Law, Moscow State University
VIKTOR MOZOLIN, Head, Sector on Civil Law and Procedure, Institute of State and Law, USSR Academy of Sciences, Moscow
STANISLAW POMORSKI, Distinguished Professor of Law, Rutgers University, Camden
SARAH REYNOLDS, Visiting Professor, Harvard Russian Research Center, Harvard Law School
VALERY SAVITSKY, Head, Sector on Problems of the Administration of Justice, Institute of State and Law, USSR Academy of Sciences, Moscow
ALBERT SCHMIDT, Professor of Law Emeritus, University of
Part II. Substantive Comments Based on Conference Papers and Conference Proceedings

A. The Concept of Pravovoe Gosudarstvo

As law-reform discussions proceeded in the Soviet Union after the mid-1980s, it gradually became clear that the spirit of glasnost had pervaded this arena as it had so many others. The ground rules for discussion were relaxed, and issues that were previously ignored or approached only cautiously began to be debated more openly. What also emerged at this time (about 1987) was the increasing use of a new—or, more accurately, a revived—term to denote the general objectives of legal perestroika: the concept of a "law-governed state" (pravovoe gosudarstvo). This "bourgeois" concept, which had previously been banned from use with regard to Soviet law, became the central theme under which a wide spectrum of legal reform initiatives were subsumed.

This law-reform movement differed from its predecessors in at least three ways:

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1 These passages are based in part on the proposal for funding submitted by the Principal Investigator to the National Council for Soviet and East European Research, October 25, 1991.
1). The term "law-governed state" (pravovoe gosudarstvo) itself. Its use amounts to an acknowledgement, often explicitly stated in writings on the subject, of a debt to both pre-Revolutionary Russian law and Western law. The willingness to indicate that "bourgeois" law might have something to offer to Soviet law was a new phenomenon. It suggested both a lowering of ideological barriers and a confidence in the changed political atmosphere in the USSR, which would allow the pragmatic use, from diverse sources, of innovations that might prove useful to the Soviet system. It also laid the basis for improving prospects for Western investment in the USSR: if Soviet law was prepared to embrace some of the key concepts of Western law, this suggested that Western economic interests could operate in the Soviet Union with increased confidence.

2). The fundamental change in emphasis that the idea of a pravovoe gosudarstvo embraced. Basically, this involved a transformation of the role that law would play in the system, a change in the relationship between the state and private parties (both individuals and groups), with the balance shifting more in favor of the rights of private parties. This sense of change could be found in many statements, both official and unofficial. It is captured concisely in this 1989 statement by the legal scholar Valery Savitsky, a participant in the conference: "The defense of individual rights is the keystone of the law-governed state" (Izvestiia, January 5, 1989, p. 6).

3). The sense that there was something basically wrong with
the way Soviet law had operated in the past. The concept of pravovoe gosudarstvo was seen as a fresh start, a break with many previous practices. This was implicit in almost every discussion of the concept and was occasionally made explicit, as in this 1988 statement by an enthusiastic supporter of pravovoe gosudarstvo:

> It is not an empty question: why in particular is it necessary to introduce a new term? . . . Weren't there words having to do with strengthening legality, the development of democracy, the broadening of participation of the masses in state administration, etc.? There were all of these. But the main thing wasn't there—the recognition of the higher value of human freedom . . . There were not effective barriers against sliding back to a regime of personal power. Therefore, the formation of a pravovoe gosudarstvo presupposes the introduction of fundamentally new principles of legal and state operation which possess the character of democratic guarantees (V. Baglai, Izvestiia, September 1, 1988, p. 3).

B. The Research Proposal

This brief analysis of the concept of pravovoe gosudarstvo served as the starting point for the project when it was begun in 1989. It was the basis of the proposal submitted to the National
Council, and the focus around which the plans for the individual research assignments were conceived. The plan called for sixteen individual essays, arranged in three broad topical categories:

1). Historical and Conceptual Background: two papers, on pre-Revolutionary and Western influences; and on the historical development of the contemporary Soviet concept of pravovoe gosudarstvo.

2). Pravovoe Gosudarstvo and Soviet Society: six papers, on legal culture; the Constitution; the new executive branch structures; the new legislative structures; regional and national variations; and the place of the CPSU in the system.

3). The Impact of Substantive and Procedural Law on Individuals and Organizations: eight essays, on the impact of international law on domestic law; individual rights; the rights of political and social groups; criminal law; the judicial system; the rights of business enterprises and organizations; the role of foreign business interests in Soviet civil law; and labor law.

These papers were all prepared and presented at the conference. In addition, as indicated in Part I, several other presentations by participants were prepared in publishable form and are included in Part III of this report. In the analysis that follows, reference will be made to the whole body of research included in Part III.
C. Discussion of Research Findings

I. Historical and Conceptual Background

1. The scholarly debate about the notion of pravovoe gosudarstvo occupied Russian jurists over a period of at least six decades prior to the October Revolution. But according to Professor Ajani, it had little real impact on legal developments in the country. By the time of the Revolution, it had been largely superseded in the views of leading jurists by such doctrines as sociological jurisprudence and Marxist orientations toward law. But its existence as an element of Russian legal history eased the way for its reception in the Soviet Union when the political atmosphere of perestroika permitted it.

2. As Professor Huskey has shown, Bolshevik leaders saw the notion of pravovoe gosudarstvo as integrally related to the class nature of capitalist society. As long as the ideological orthodoxy based on this attitude held sway, this "bourgeois" concept was seen as alien to Soviet law and unacceptable. During parts of the period from 1917 to the late 1980s, however, some elements of a law-based state continued to be advocated by Soviet jurists. If this advocacy was not often translated into working principles of Soviet law, at least it indicated that impulses toward genuine legal reform within the Soviet legal community had not died out completely. Also during this period, however, significant segments of the Soviet strategic elites continued to
defend a variety of institutional barriers to genuine legal reform. In this sense, the present movement for legal reform is a continuation of past conflicts: advocates of a pravovoe gosudarstvo still face some of the traditional problems that legal reformers in the Soviet Union have long contended with.

3. At the present stage of its development, the concept of pravovoe gosudarstvo has more in common with the notion of Rechtsstaat (the German term from which it was derived) than with the Anglo-American "rule of law." The concept of Rechtsstaat is based on the positivist law assumption that the state itself is the highest source of law. Pravovoe gosudarstvo, then, as Berman put it, "is rule by law, but not rule of law." Rule of law is considered as embracing an implicit theory of natural law, the idea that there is a higher law than mere statutory law that ought to be binding on society and on those who administer society. In the United States, this higher law is seen as embodied in certain constitutional principles, particularly those protecting the individual from abuse by governmental authority. It is true that Soviet law traditionally has not recognized constitutional principles as higher law, and has required the adoption of supplementary legislation in order to implement constitutional guarantees. It is interesting to note, however, that some Soviet jurists, in urging the creation of a pravovoe

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On the basis of a discussion of this matter at the conference, a consensus developed that a more appropriate translation of pravovoe gosudarstvo would be "law-based state," rather than "law-governed state." "Law-based state" is the translation used in the manuscript sent to the publisher.
gosudarstvo, have advocated the direct application of human rights guarantees in the USSR Constitution. Moreover, advocates of the creation of constitutional courts at the union and republic levels see as one of the functions of these courts the protection of constitutional rights. In this sense, these Soviet jurists are going beyond the narrow conception of pravovoe gosudarstvo as Rechtsstaat described above. This expanded view was presented at the conference by the Soviet jurist Valery Savitsky, among others.

II. Pravovoe Gosudarstvo and Soviet Society

1. What has been the effect of the perestroika period on popular attitudes toward law? In the view of Professor Shelley, it is probably not realistic to talk about the development of a country-wide legal consciousness for the Soviet Union as a whole. Yet the era of glasnost has fostered an awareness of law--and of the depth of law-related problems in society--that did not exist before.

The growing legal consciousness is based largely on several phenomena: the emergence of democratic forces in society; the effort to restructure the economy and to provide a legal basis for the new arrangements; and the move by territories and ethnic groups to assert greater autonomy from the center. Early in the Gorbachev era, the central authorities assumed that they would be able to control these processes. As that has proved to be
increasingly impossible, the emergent legal consciousness based on these factors has taken on a life of its own. Its eventual character will be based on the factors that have shaped it, and since ethnic and territorial autonomy are likely to be salient features of what is now the USSR, the legal consciousness that emerges will surely be both complex and diffuse.

2. Thus, the case study of the Baltic states shows an immense literature on the subject of pravovoe gosudarstvo. While this literature is diverse in the values espoused (those of West Europe, East Europe, and national values are mentioned by Professor Loeber), the most striking finding, according to Loeber, is that "pravovoe gosudarstvo is inextricably linked with independence." This view is strongly supported by E. Kuris, who writes principally about Lithuania. Kuris argues that the creation of a pravovoe gosudarstvo in the Soviet Union is not possible until the Soviet Union extends the genuine right of self-determination to the ethnic groups that compose the countries.

Other parts of the USSR were not given the focussed attention at the conference that the Baltic states received. So it is difficult to make judgments about attitudes toward the concept of pravovoe gosudarstvo in other parts of the country. Recent events indicate, however, how powerful a force the interest in ethnic autonomy has become. It may be that the Baltic states have taken the lead in a growing legal consciousness that links a pravovoe gosudarstvo with national
3. Much easier to analyze than the abstract notion of legal consciousness are the concrete developments in Soviet public law: the new constitutional, legislative, and executive branch structures. Four clusters of basic laws were adopted through the course of Soviet history up to the Gorbachev era, and constitution-making is again going on at the national level and in the republics. As Professor Hazard points out, the present task is complicated by devolution of power in the political system, especially to the republics. The Union Treaty, in the process of promulgation in mid-1991, was to be integrally related to the new constitutions, union and republic. But a number of republics will not sign the Union Treaty, since they are seeking complete independence from the USSR. Even for those republics that remain in the union, significant differences in constitutional documents are likely. For instance, Gorbachev has consistently sought (at least until the coup attempt in August 1991) to preserve some features associated with socialism, features that would find reflection in a new USSR Constitution. In at least several of the union republics, it is unlikely that such provisions would be written into republic constitutions.

The old revolutionary slogan "all power to the soviets" was revived at the end of the 1980s. The plans initiated at that time for the reorganization of political power included a considerable infusion of authority into newly-constituted legislative bodies, which would be at least partly popularly
elected. At the national level, the new bodies began to function in May 1989. The results of their first year of activity received mixed reviews, with some analysts seeing the new legislatures as, on balance, positive forces and others concluding that they had not shown the ability to address the country’s problems efficiently and with dispatch. These varying views were expressed by participants in the conference.

Professor Foster-Simons believes that the legislatures developed a sense of independence that increasingly threatened Gorbachev’s authority. It was, she asserts, the success, not the failure, of the federal legislature that led to Gorbachev’s move to establish more authoritarian methods of rule through the creation of the USSR Presidency in early 1990 and further constitutional amendments later in the year.

Soviet jurists Vladimir Entin and Avgust Mishin take a more negative view of legislative achievements. Entin puts the problem in perspective by noting that “all parliaments suffer from executive encroachments on their territory of law-making.” He sees the real problem of legislative activity in his country, however, not in legislative-executive relations, but in the contention between the center and the republics.

Too much was expected of the new legislative bodies when they began operation in 1989, according to Entin, and several built-in defects prevented them from living up to their promise. These included the flawed selection process for some deputy seats, the lack of legislative experience of deputies, and the
inability of the legislature to control subsidiary acts by other governmental bodies. The two most important tasks of law-making in the future are: finding an accommodation between the federation and the republics for sharing legislative tasks; and raising individual rights to the highest level of legal protection.

Mishin's contribution augmented Entin's, adding further critical commentary about legislative performance. But he also saw a motive behind the flaws Entin described. He concluded that the "huge and clumsy" Congress of People's Deputies was deliberately designed that way in order to preserve Communist Party control. He sees the need, in the coming new constitutions, to create new legislative structures elected in truly democratic fashion that can exercise genuine legislative power. To Mishin, this means "abandoning the system of soviets" and creating "normal parliamentarism."

5. In van den Berg's view, the 1988 and 1989 constitutional amendments loosened the grip of the CPSU on policy-making, but they left a void with regard to executive power. This was the reason for the March 1990 constitutional amendments, which created the Presidency, and the December 1990 amendments, which further strengthened the President's hand.

But these changes did not result in a reasonable balance of political power. Although the concept of separation of powers has entered the vocabulary of politicians and analysts, the principle has been imperfectly achieved in practice. One of the
major problems is the uncertain status of the President’s power to issue edicts having the force of law. Their relationship to legislative acts of parliament has yet to be worked out, and the same is true of general parliamentary oversight of presidential acts. Moreover, the courts do not yet have sufficient authority to constitute an effective check on executive power.

There are several positive developments in this area, however. The amount of "secret legislation" has diminished, although it has not disappeared completely. The issuance of joint government-Communist Party decrees has virtually disappeared. And scholars continue to push for the implementation of a genuine separation of powers, accompanied by a strengthening of the judicial and legislative branches against the executive.

6. The shift in law-making power from the CPSU to the state (including the drop in issuance of Party-state decrees) was mentioned above. Equally important has been the depoliticization of the legal system, a process still in its early stages at the time of the conference. Most important in this respect was the elimination from the Constitution, early in 1990, of the leading role of the CPSU. But other developments merit attention too. The dropping of the politically-laden slogan "socialist legality," for instance, was a move of considerable symbolic significance.

But the Party has sought to maintain influence over the legal system and the state apparatus, and at the time of the
conference its role was still significant. The dismantling of the nomenklatura system in legal organs had only been partly achieved. And the related issue of "departyization" (the elimination of CPSU bodies in governmental and other organizations) still had a long way to go. The failed coup attempt of August 1991 is bound to affect developments in many of the subjects covered in this report, but probably none so much as the CPSU's role in the operation of governmental and legal organs. It now appears that CPSU influence will be swiftly removed from all aspects of governing activity throughout much of the country.

III. The Impact of Substantive and Procedural Law on Individuals and Organizations

1. Where does the content of Soviet law come from? One obvious source is international law. But although the USSR proclaimed adherence to many international agreements over the years, it is fair to say that this practice had little impact on Soviet domestic law.

During the Gorbachev period, the situation has changed significantly, at least on a theoretical level. The primacy of international law over domestic law is now espoused, with particular emphasis on embracing international principles in the human rights field.

Ginsburgs believes, however, that moving from good
intentions to actual practice on this front will require time and effort. A mechanism needs to be found to convert international law norms into valid and binding rules of domestic law. And judicial personnel capable of accomplishing this task need to be trained. He believes that the short experience of the Constitutional Oversight Committee in creating a culture of respect for individual rights constitutes a promising example. But that institution was not established to bring international legal principles into domestic law.

Professor Pranas Kuris, in commenting on Ginsburgs' paper, agrees that to move beyond the realm of slogans, a mechanism for importing international standards into domestic practice is needed. In order to lend the greatest authority to the effort, he advocates raising to a constitutional principle the priority of international law over domestic law. Given his particular interest in Lithuanian independence, Kuris emphasizes the need for Lithuania too to bring its legal system into compliance with international law.

2. The need for guarantees and a greater sense of permanence in the human rights field is emphasized by Professor Sharlet. While acknowledging the considerable progress made in this area during the perestroika period, he finds that a number of problems continue to exist. As long as the new rights are considered as "granted" by the leadership, rather than being inherent entitlements of individuals, they can be seen as impermanent and potentially reversible. Moreover, the atmosphere of contra-
individualism long characteristic of the Soviet system has facilitated the adoption of restrictive legislation and practice. The conclusion is reached that in the field of individual rights, "state-ruled law" still challenges the development of a law-based state.

3. Political rights received significant legitimation through the adoption of the law on public associations, which went into force at the beginning of 1991. In effect, the law sanctions the creation of a multi-party system in the country. It was an early beginning step in challenging the dominant position of the Communist Party. In fact, as notes Professor Petro, neither the Communist Party nor socialism is mentioned anywhere in the law. And the dramatic changes between the draft version and the final version of the law demonstrated the growing influence of new civic forces.

But Petro believes that the adoption of this federal-level legislation may have come too late: the republics and other units are moving to establish their own structures and party systems, which undermine the rationale for a unitary state.

4. If political considerations are important in the development of individual and political rights, they are also significant in other areas of substantive law, including criminal law. The perestroika atmosphere has made the consideration of liberalized criminal law possible, but it has also unleashed other factors that may complicate the achievement of liberalization. Glasnost has permitted greater knowledge about the danger of crime in the
country, and economic, ethnic and other problems associated with developments of the past few years have exacerbated the crime problem. Moreover, conservative forces in society have not been above manipulating a crime scare in order to slow down the liberalization of substantive and procedural law.

Still, a number of positive developments in the past several years can be pointed to, and Professor Solomon sees evidence suggesting that further liberalization of criminal law is likely. Since the onset of glasnost, Soviet courts have been among the most criticized of governmental institutions. Their constitutionally-guaranteed independence recognized as a fiction, reformers have set about to insulate courts from a variety of improper influences, which have been painstakingly cataloged by critics. And widespread agreement is voiced for the view that a pravovoe gosudarstvo cannot be created without a truly independent and effective court system.

Changes in the constitution and the adoption of a number of new laws provide the framework for asserting this independence. But, as Professor Barry notes, like so many other developments in Soviet law, it is unclear whether these good intentions can be translated into genuine living law. Although the picture is a mixed one, a number of signs point in positive direction. Among these are a greater willingness of courts to check illegal acts by governmental agencies against citizens and a rise in acquittals in criminal cases.

Soviet commentators at the conference extended the analysis
Soviet jurists. In this category would be a variety of laws designed to protect the interests of investors. Until these mechanisms are put in place and made to operate in practice, it will be difficult to create a healthy climate for market activity and investment.

Soviet law professor Viktor Mozolin echoed these views. In spite of the considerable efforts at economic reform in the past, real marketization was not possible as long as the state remained the owner of all property and means of production. A variety of laws of the past two years have altered the situation considerably, but more remains to be done. The laws on privatization of state ownership, now being prepared at the union and republic levels, promise to be one of the most important steps in this development.

7. William Simons picked up on these themes, concentrating on the legal position of foreigners in Soviet civil law. He finds that the position of foreigners--both natural and juridical persons--has over the years amounted to little more than nominal equality. Even during the early phases of perestroika the situation changed very little. It is only with "advanced perestroika" (from late 1989 onwards) that the legal basis for the equal treatment of foreigners in Soviet civil law began to emerge. Key laws were those on leasing, land, ownership, and joint stock companies. But because this legislation was adopted so recently, its impact on foreign investment has been minimal so far.
8. In her study of law and policy regarding layoffs in the workplace, Kathryn Hendley found a considerable gap between the liberal worker-oriented provisions of the law and its more restrictive application in practice. She traced this disparity to two principal factors: manipulation of the law by management; and workers' contempt for the law. Of the two, she finds the second the more serious, because it involves not willful evasion of the law, but a lack of faith in and alienation from the legal process. She believes that institutional changes established on paper must be made to work in practice, and that these changes need to be carried down to the level of the workplace.

IV. Postscript: The Coup Attempt of August 1991

The research reports and conference proceedings were completed more than two months before the attempted coup of August 1991. This final report was begun before August 19, was continued through the three days of the crisis, and was completed during the immediate aftermath of the coup. The reader will note that except for a couple of passing references, the coup attempt has not been discussed in this Report. Yet it is clear that this event has important implications for all of the aspects of Soviet law that have been analyzed in this project. So in conclusion a few observations will be made about the impact of the coup on Soviet law and on the analysis of Soviet law made by me and my colleagues.
The events of August 19-22 affected some aspects of Soviet law more than others. It appears now, for instance, that the process of "departyization" of legal organs analyzed by Hiroshi Oda has been essentially completed. Communist Party organizations have been dismantled, their property seized, and their influence over the administration of justice largely eliminated. Oda’s paper describes an earlier stage of what is now a radically-altered situation.

The failed coup also changed the picture with regard to the future federal structure of the Soviet Union. Perfectly reasonable assumptions made about the Union Treaty by several authors now seem questionable, as relations between the center and the republics continue to evolve. But if some aspects of Soviet law were altered more by the coup and its aftermath than others, that event left nothing in the Soviet legal edifice completely undisturbed, because the plot by the State Committee for the State of Emergency was an attack on the law itself. And the response of those who opposed the coup was in large measure expressed in terms of the law. As Anthony Lewis put it in a post-coup analysis, "law was a major theme in the resistance to the coup" (New York Times, 26 August 1991, A19). Boris Yeltsin repeatedly attacked the acts of the Committee as "anti-constitutional" (see, e.g., his first presidential edict of 19 August 1991, no. 59), a sentiment echoed in many interviews with regular Soviet citizens. And the actions of hundreds of thousands of demonstrators, exercising their right of assembly in
supporting anti-coup leaders, manifested a level of civic courage that was unknown a few years ago but has become characteristic of the more open politics of the Gorbachev era. These actions appear to demonstrate the growth in legal consciousness in the populace discussed in several conference papers (particularly Professor Shelley's).

If these developments are evidence of respect for the law and the growth in its significance, other aspects of the fallout from the coup indicate the down side of the picture. In the course of efforts to find persons implicated in the coup attempt, searches of homes of suspects--some possessing parliamentary immunity--were carried out, apparently in violation of the law. Newspapers and Communist Party premises were summarily closed without benefit of legal process. And the immediate post-coup period was characterized by the issuance of a flurry of presidential edicts (principally by the USSR and RSFSR Presidents), with little action from the legislative branch. This only heightened the imbalance between executive and legislature commented on by several conference participants.

Thus, the post-coup period of Soviet law has manifested the same mixed character found before the coup: a generally heightened respect for legal and constitutional processes, but with pockets of legal practice where political expediency outweighs the even-handed application of the law.

In terms of some of these questionable practices, several observations are in order. The post-coup period by its nature
has been a chaotic time. The anti-coup forces have seen the need to rout the coup plotters and their supporters, and have sensed the importance of moving decisively. Respect for legal procedures is often one of the first victims of times of political chaos. There are some signs that a sense of order and respect for the law are being restored, however. The USSR Supreme Soviet has aired complaints about illegal searches, the closing of institutions, and other apparent violations of the law. Calls for tightening the provisions of the law on emergency situations have been made, and the law giving the USSR President supplementary law-making power (described in Dr. van den Berg's paper) has been rescinded. These positive signs lead the author to the conclusion that at this point in the post-coup period, the qualifiedly optimistic assessment of Soviet law made by most conference participants still obtains.

Donald D. Barry
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