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Commentary: The Printed versions of Conference Remarks by Participants

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This paper is #17 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 were distributed seriatim. This paper was written prior to the attempted coup of August 19, 1991.
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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."

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Harold J. Berman (Professor of Law, Emory University)
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The author traces the history and legal philosophy of pravovoe gosudarstvo, examines various Soviet draft constitutions in that light, and concludes that what is lacking in current Soviet legal thought is sufficient awareness that both legislation and equity, to be effective, must be adapted to and integrated with the law-consciousness of the peoples which comprise Soviet society. Finally, he suggests that for lack of a sufficiently developed legal culture in the Soviet Union the time is not yet for constitutional proclamations of the rule of law. To the extent that a pravovoe gosudarstvo is necessary for successful economic, political and other reform of the society, this paper implies but does not state that the civilization is insufficiently developed.

Vladimir Entin (Senior Researcher, USSR Institute of State and Law)
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While parts of the author’s comments have been overtaken by events since June 1961, they present a useful sample of Soviet legal thought. For him, the rule of law posits the importance of human rights over all other considerations. On that basis he makes a variety of points about law in the USSR, among them (a) sovereignty of the republics, derivative federal authority, and the sphere of joint competence could become a juridical nightmare; (b) Soviet society is dominated by a public bureaucracy that increases manyfold thanks to decentralization processes; (c) its power is built upon the system of administrative distribution of social benefits; (d) the introduction of economic principles and considerations into the numerous closed-circuit distribution systems and subsystems only consolidated their grip on society; and (e) for progress toward a law-based society legislation must promote order, be legitimate in the eyes of all population sectors, and provide remedies and mechanisms for implementation.

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The author decries the weakness of Soviet courts in protecting citizens against abuse of their rights by power, using the Kalugin case (unsettled at the time of writing) in illustration. That weakness persists in the presence of multiple legislatures and political parties because, he believes, they too wish to be above the law.

*Prepared by the staff of the National Council for Soviet and East European Research.
Egidijus Kuris (Faculty Lecturer in Law, Vilnius University)

"The Baltic Case and the Problem of Creating a Law-Based State in the Soviet Union ....................................................... 4

For the most part this paper presents the legal case for the independence of the Baltic States from the USSR. By way of introduction it points out that the recent first appearance of the notion of pravovoe gosudarstvo was in the Theses for the 19th Conference of the CPSU prepared by the Central Committee as a slogan designed as part of the political reform of the state and legal system and as a new ideological basis for demanding strict compliance with the law by citizens and organizations. As such it was a part of the original intent of perestroika not to replace the Soviet system with a kind of Western type democracy but to modify it so it could effectively continue to exist. The author also postulates that, if there is to be a Westernization of Soviet law, legal culture and legal consciousness, it must be gradual rather than radical.

Pranas Kuris (Professor of Law, Vilnius University)

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Valery Savitsky (Chief, Sector on Problems of the Administration of Justice, Institute of State and Law, USSR Academy of Sciences, Moscow)  
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A brief, succinct inventory of measures needed for the reform of the courts and procuracy, boldly stated.

Albert Schmidt (Professor of Law Emeritus, University of Bridgeport)  
"Soviet Legal Development 1917-1990: A Comment"

The author identifies many components by which attainment of a pravovoe gosudarstvo should be measured: independence of the judiciary; the right to counsel; protection from bureaucratic abuse; law's role in mediating disputes; a legislative process that reflects societal aspirations; precise and workable legislation; constitutional government; as well as international human rights - social, economic, ethnic, and political. He points to the necessity for an underlying culture that is receptive to legal reform; and to the agreement among many that the improbability of a pravovoe gosudarstvo in the USSR is the consequence of its seeds having fallen in a barren legal culture - the legacy of stultifying economic stagnation, scarcity, repression, and a broadly shared experience of incarceration.
The expression "law-based state" (in German, Rechtsstaat; in Russian, pravovoe gosudarstvo), which since 1988 has been one of the principal slogans of the Gorbachev administration, is often mistranslated in English as "rule of law" or "state based on the rule of law." In this essay I shall explore the theoretical implications of the expressions "rule of law" and "law-based state" in the context of their historical origins and shall examine ways in which both concepts are reflected in recent Soviet legal thought.

Prior to the accession of Gorbachev, the concept of a law-based state, which had been hotly debated by pre-revolutionary Russian writers (who themselves had derived it from nineteenth-century German jurists), was uniformly denounced in published Soviet political and legal literature. In theory, it conflicted with the Marxist-Leninist doctrine that law in all societies is a reflection of the will of the ruling class and that the state is ultimately bound by that will and not by any laws. In practice, it conflicted with the ultimate supremacy of the Communist Party leadership over the state itself. Only at the Nineteenth Party Conference in 1988 was pravovoe gosudarstvo added to perestroika, glasnost, and demokratizatsiia as a fundamental dimension of the new thinking called for by the Soviet leadership.

In numerous subsequent discussions of the theoretical and practical meanings of the concept of a law-based state, Soviet jurists have, for the first time since 1917, expressly linked themselves with a tradition of political and legal thought that goes back to Plato and Aristotle and Cicero, on the one hand, and to Locke and Kant, on the other. Pre-revolutionary Russian and German writings on pravovoe gosudarstvo or Rechtsstaat have also been referred to with respect. Nevertheless, despite occasional nods in the direction of a theory of natural law, Soviet jurists have thus far generally ignored, or else rejected, the concept of a law that is higher than, or even separate from, the laws that have been promulgated or acknowledged by the state.

In the Western legal tradition, the concept of a law that is higher than the state goes back to theories of divine law and natural law that were first systematically expounded in the twelfth century, and were resorted to in disputes between subjects of ecclesiastical law, between subjects of ecclesiastical and subjects of secular law, and between subjects of secular (royal, feudal, urban, and mercantile) law
themselves. Indeed, the competition of jurisdictions between ecclesiastical and secular authorities and among secular authorities in the same territory was a powerful source of the search for a source of law higher than that of any political sovereign.2 The scholastic theologians and canon lawyers were the first to use the expression "positive law" (jus positivum), referring to law that is laid down ("posited") by the lawmaker, as distinct from divine law (jus divinum), derived from the Ten Commandments and other sources of divine revelation, on the one hand, and natural law (jus naturale), whose source is human nature, and especially human reason and conscience, on the other.3 In the sixteenth and seventeenth centuries, however, due partly to the subordination of the church to royal domination, the belief in a source of law superior to the will of the ruler was for the first time seriously challenged. It was not denied that there existed both a divine law and a natural law to which the supreme ruler of the state ought to submit his will, but new philosophical and scientific concepts made a sharp distinction, in law as in other spheres, between the "ought" and the "is," and at the same time (and perhaps in connection therewith) a new political theory of sovereignty denied to anyone the right to challenge on grounds of the law that "is" any law or command of a sovereign ruler. Thus divine law and natural law were removed from the realm of existing law to the realm of morality, leaving as the only prevailing law, the only legally binding law, the positive law of the state. It was partly against sixteenth and seventeenth century concepts of the absolute sovereignty of the monarch that the seventeenth-century English and the eighteenth-century American and French Revolutions were fought.

Paradoxically, perhaps the earliest published use of the English expression "rule of law" in the sense of reign of law, or supremacy of law was by King Charles I, who in 1649 was tried and condemned to death for treason by a special tribunal established solely for that purpose by the Puritan Parliament. Charles contended in his own defense that Parliament had no legal authority to try him and that the proceedings violated "the fundamental laws of the land." He charged that under the Puritan regime "power reigns without rule of law, changing the whole frame of that government under which this kingdom hath flourished."4

In more recent times it was the English legal scholar and statesman A. V. Dicey who brought the phrase "rule of law" into widespread use in England and America through his analysis of it in his book Introduction to the Study of the Law of the Constitution, first published in 1885.5 For Lord Dicey the rule of law meant that certain basic principles of justice may not lawfully be infringed even by the highest lawmaking authority. Like King Charles I, he found the source of those basic legal principles in the
fundamental laws of the land or, more precisely, in the English Constitution, which, though called 
unwritten, is embodied in historical monuments such as the Magna Carta of 1215, the Petition of Right 
of 1628, the Habeas Corpus Act of 1677, and above all the Bill of Rights of 1689, in the historically 
evolving English common law. In sharp contrast, however, to the conception of the early Stuart 
monarchs, the basic principles of the English Constitution identified by Lord Dicey include, on the one 
hand, the sovereignty of Parliament and, on the other hand, certain inviolable rights of the subject such 
as the right to a fair hearing, equality before the law regardless of rank or condition, the right not to be 
deprived of one’s life, liberty, or property without due process of law (in the procedural sense of that 
phrase), and also certain political rights such as freedom of discussion and the right to hold public 
meetings. In the English conception, Parliament itself, although supreme over every other political 
agency, is nevertheless considered to be constitutionally bound by fundamental principles of justice 
embodied in the historical traditions of the English people.6

The phrase "rule of law" came to be used in the United States in a different sense. Americans 
added to the English emphasis on the historical foundations of legality an emphasis on its foundations in 
written federal and state constitutions that proclaimed such civil liberties as freedom of religion, speech, 
press, and assembly. Moreover, the American concept of due process of law, embodied in the Fifth and 
Fourteenth Amendments of the United States Constitution, came to include not only procedural but also 
substantive justice. In addition, the Americans, unlike their British cousins, introduced a governmental 
system of checks and balances, entrusting to the judicial branch of government (rather than to Parliament) 
supreme authority to guard the Constitution. This added a new dimension to the concept of the rule of 
law, since it meant that in appropriate cases it can be invoked against the legislature itself by any citizen 
in any court. New words, "constitutionalism" and "constitutionality," were invented in the United States 
to embody these various principles.

The underlying philosophy of American constitutionalism rests not only on a historical 
jurisprudence, as in England, but also on an implicit theory of natural law. It is presupposed that certain 
kinds of moral principles, rooted in reason and conscience, have binding legal force. Their basic terms 
are expressed, to be sure, in written form in a legal document, the Constitution, and thus they are 
embodied in positive law, but they are ultimately derived (in the words of the Declaration of 
Independence) from "Nature and Nature's God," and their meaning transcends their written form. This 
means that they can be consciously and deliberately adapted by the courts to new situations from
generation to generation. In the French Revolution, the attack upon arbitrary rule by the monarchy and oppressive and unjust privileges of the aristocracy was made principally in the name of "the rights of man and citizen," which were to be protected by a strict separation of legislative, executive, and judicial powers. Although the first written constitution of 1791 contained a list of the "natural rights" of the individual, and declared that the legislature had no legal power to interfere with their exercise, nevertheless there was no appeal to an ancient historical tradition, such as was made in England, to bind the legislative branch nor was the judiciary given the power, as in the United States, to annul legislative acts. Thus in the French conception the ultimate source of law is the legislature, and the only external control on the legislature's lawmaking power is the political control of the electorate. The executive and the judicial branches are not supposed to check or balance the legislative branch, but rather to execute and apply, respectively, the enacted laws. The French state is considered to be ultimately responsible not to a higher law but rather to the public opinion of the nation.

In jurisprudential terms, this reflects a positivist theory, according to which law (droit, Recht, pravo) consists of a body of legal norms or rules (lois, Gesetze, zakony) enacted (or acknowledged) by the state and enforced by coercive sanctions. There is nothing in the French constitution that permits the laws enacted by the National Assembly in the name of the people of France to be challenged in the name of some higher legal authority, whether derived from history or from morality. The natural rights of the individual person inhere, to be sure, in human nature and human reason, but these do not constitute or themselves produce a natural law that can overrule the will of the legislature.

The term Rechtsstaat, which was introduced into German legal and political thought in the early nineteenth century, also reflected a positivist jurisprudence. Although the term came to be used in various senses, its original proponents identified law with the state. Rechtsstaat meant that not the nation, the Volk, in its historical development, and not natural reason and conscience, but the will of the supreme political authority, the will of the lawmaker, was both the ultimate source and the ultimate sanction of the law. Nevertheless, the supreme political authority was to be law-based; the state was to constitute a "law-state," and not a state ruled by the arbitrary will of an absolute monarch as in earlier centuries. Nor was it to be a Polizeistaat—a "policy" or "welfare" state ruled by a benevolent autocrat. The Rechtsstaat was to govern by law and was to be bound by, and not absolved from, the law which it makes. It was not to apply its law inconsistently or otherwise abuse it. This concept of the Rechtsstaat influenced, though it did not dominate, not only German but also Russian legal and political thought in
The concept of Rechtsstaat, or pravovoe gosudarstvo, is consistent, at least, with the assumption that the state itself is the highest, if not the only, source of the law through which it operates. Rechtsstaat, or pravovoe gosudarstvo, is rule by law, not rule of law; it does not presuppose a fundamental law which is derived from a source outside the state and which the state is legally powerless to change. Theoretically, a fascist or other dictatorial regime can constitute a Rechtsstaat. Indeed, under German national socialism jurists defended the sentencing of persons to concentration camps on the ground that the German state was a Rechtsstaat. 14

It is characteristic of the Rechtsstaat that it considers the basic form and source of law to be legislation, rather than custom and precedent (as in historical jurisprudence) or equity (as in natural-law theory). Custom, precedent, and equity are assimilated, in the positivist theory, to legislation; what makes them law is that they are accepted by the legislative authority and are enforced by state sanctions. It is therefore characteristic of the strong positivist tendency of legal thought in nineteenth-century Europe that it fostered the embodiment of the law of the state in a coherent and complete legislative codification of its various branches. To the extent that the entire legal order of the state is embodied in legislative enactments, law in the large sense (Recht, droit, pravo, jus) is identified with law in the narrower sense of a specific legal rule (gesetz, loi, zakon, lex), and the Rechtsstaat may be viewed as a Gesetzesstaat, that is, a state that rules by laws. This, indeed, is what pravovoe gosudarstvo meant when it was first proclaimed as a slogan of the Gorbachev Administration. In accordance with the extreme form of positivism which had been officially endorsed in the Soviet Union, and which until now has dominated Soviet legal thought, the pravovoe gosudarstvo has been identified with the supremacy, or reign, of enacted law (verkhovenstvo zakona, gospodstvo zakona) rather than of law in the larger sense, law as a whole, implying right, or justice (pravo). Even Soviet writers who in recent years have moved away from a rigid positivism have identified the law-based state with the reign (gospodstvo), or rule (pravlenie), of zakon rather than of pravo. 15

One should not minimize, however, especially in the context of Soviet history, the importance of the principle of the rule of laws, even though it falls short of the principle of the rule of law. It means, in the first place, that the state rules by laws and not by mere force or fiat. It means, secondly, that the state is bound by its own laws, that is, it may not arbitrarily disregard them but may only change them by the legal procedures which it has established for changing them. And thirdly, it means that
hitherto all-powerful state executive and administrative agencies, including the Council (now renamed Cabinet) of Ministers and its subordinate ministries and departments, may not issue decrees or regulations which conflict with statutes enacted by the legislature, and that courts or other agencies may not enforce such decrees or regulations. Under Stalin, the Soviet state systematically violated its own laws, and under Stalin’s successors it has done so frequently, though not systematically and not with Stalin’s brutality. Also, both under Stalin and his successors many thousands of administrative regulations were issued that contradicted statutes promulgated by the union and republican supreme soviets, and these regulations, though illegal, were enforced by administrative authorities and by the courts as substatutory "legislation" (zakonodatel'ство). 16

An important modification of the conventional Soviet theory of law was made in an article published in 1988 in the Communist Party monthly journal Kommunist, in which two prominent jurists—one of them a vice-president of the USSR Academy of Sciences—gave a new dimension to the Soviet concept of the law-based state by tracing its origins to Plato, Aristotle, Cicero, Montesquieu, Locke, and Kant. Although still referring to the rule of zakon, rather than the rule of pravo, they quoted Plato as stating that only "where law (zakon) is master over the rulers and they are its slaves" is there "salvation of the state . . . ," and Aristotle as stating that "where the power of law (zakon) is absent, there is no place and no kind of form for the state order," and Cicero as asking "Yes, and what is a state other than a general legal order?" "The philosophical basis of the theory of the law-based state," they wrote, "was formulated by Kant, who viewed the state as 'an association of the multitude of people who are subject to legal rules' and who considered that the legislature should be governed by the requirement: 'what the people cannot decide for itself, the legislator cannot decide for the people.'" 17 The authors did not wholly abandon a positivist theory of law; on the contrary, they identified law with the state. On the other hand, they also proclaimed the validity of universal moral norms of human dignity and, in connection therewith, universal legal norms of procedural and substantive justice. Without using the expression "natural law," they invoked—for the first time, certainly, in the history of the journal Kommunist—the authority of classical exponents of natural-law theory. At the same time, they stressed the subordination of the state to society, and the dependence of legal institutions on the legal consciousness of the people—and not just society and the people in general, but Soviet society and the Soviet people, tracing in broad outline the "extremely painful and difficult process" by which legality became established in the historical development of the Soviet State from October 1917 to the present. 18 Thus they added to positivism not
only an embryonic theory of natural law but also an embryonic historical jurisprudence.\textsuperscript{19}

The distinction—and the tension—between a positivist theory of the relationship of law to the state and both a natural-law theory and a historical theory was put sharply in 1988 by V. F. Iakovlev, a leading Soviet legal scholar who subsequently became the USSR Minister of Justice, in the course of a round-table discussion among Soviet jurists concerning the meaning of a law-based state. "The specific question," he stated, "is: what over what? The state over the law or the law over the state?" Although he used the word pravo throughout, and not zakon, he answered the question in positivist terms: "Despite the fact that the law is born of the state, and has its sources in state institutions, the state nevertheless becomes truly law-based when it places the law above itself."\textsuperscript{20} Here it is postulated that there is no higher source of law than the state itself, which may, however, or may not, "place the law above itself."

In 1990, I had the opportunity to ask Minister Iakovlev, "If there is to be in the Soviet Union a law higher than the state, what will be the source of that law?" He replied, "As in the United States, it will be the Constitution the spirit of the Constitution." When I asked, "Do you mean the spirit of the 1977 USSR Constitution?" he replied, "Well, there are some good things in that Constitution." Presumably, he hoped that a new USSR Constitution, then being planned, would add many more "good things."

The 1977 USSR Constitution does indeed proclaim certain fundamental principles of legality and certain fundamental rights of citizens. These principles and rights are presented, however, as commitments and grants made by the state. There is nothing in that Constitution that prohibits the state from retracting those commitments and rights. Amendments to the Constitution require only a two-thirds vote of the supreme legislative body. Moreover, the Constitution is not self-executing, that is, it is not directly applicable but must be implemented by legislation in order to become operative. This is obvious in those provisions which expressly provide that the powers of official agencies or the rights of citizens shall be exercised "in a procedure [to be] established by [statute] law." Even in the absence of such a limitation, the 1977 Constitution, like the 1936 Constitution before it, and like the fifteen republican constitutions that were adopted in imitation of them, is essentially a directive to the legislature to enact laws corresponding to its provisions. In the absence of such legislation, it has only occasionally happened that a court or other state agency has directly applied a provision of the Constitution. Moreover, courts have no legal power, under the 1977 Constitution, to refuse to apply a statute on the ground that it violates a constitutional right.\textsuperscript{21}

Yet even if all these limitations on the authority of the Constitution were removed, could it be
said that it constitutes a body of law that is higher than the state itself, or could it only be said that the state which gave birth to the law had placed the law above itself—and could presumably at any time lawfully place itself above the law?

That the state is itself not only a creator but also a creature of law, that the state is born of the law and therefore has power to create new law only within the limits of the law which gave birth to it were truths widely accepted in the West until the nineteenth and twentieth centuries. A group of persons armed with sufficient instruments of power may, indeed, subdue a large number of other persons and compel them to act in certain ways. No state comes into existence, however, unless it is postulated that the subduers have not only the power but also the right to govern their victims and that the victims have not only the necessity but also the duty to obey. Once the relation between ruler and ruled is conceived in terms of a correlative right and duty, then it becomes apparent that power (contrary not only to Marxian but also to current non-Marxian political theory) is not a unilateral but a bilateral relationship. Thus not only domination but also citizenship is involved in the establishment and maintenance of a state. Conversely, toward citizens a state has not only rights but also duties, and toward a state citizens have not only duties but also rights. It is the reciprocity of rights and duties, or law, not mere power, that constitutes a state in its internal relations. Similarly, it is law that determines its character as a state in its external relations. Indeed, in the Western political and legal tradition, a state is defined in the first instance by its membership in a legal association of states. As late as 1827 Chancellor Kent started his Commentaries on American Law with a chapter on the law of nations, implying at the outset that it is the law of nations which gives the United States the right to create a system of national law.\(^22\)

That Soviet statesmen and jurists have begun to think in terms of a law that is higher than the state is apparent from a Draft Constitution of the Russian Federation, published in November 1990, which was to be submitted to the Supreme Soviet of the RSFSR.\(^23\) The Draft Constitution proclaimed a law-based state, a pravovoe gosudarstvo, but it also proclaimed "the supremacy of law (pravo) and of the Constitution," stating that the state and all its agencies and officials are bound by law (pravo) and by the constitutional order" that "the Constitution of the Russian Federation is the highest law (zakon) of the Republic," and that "laws and other legal acts that contradict its provisions shall not have juridical force." It states that "a law (zakon) must be lawful (pravovym)," and that citizens "exercise their rights independently," that is, their rights are not grants from the state, although they may be restricted (within constitutional limits) by the state.
The 1990 Russian Federation Draft Constitution provided further that "norms of the Constitution shall have direct application." A court that is asked to apply a law which it considers to be unconstitutional was to suspend the proceeding and submit the matter to the consideration of a special Constitutional Court, which was to have the power and the duty to annul all laws, decrees, or other normative acts that violate the Constitution. It was expressly provided, moreover, that any decision or action of any state agency or official that violates the constitutional rights of citizens may be appealed to a regular court. Thus provision was made both for constitutional review of legislative acts and for judicial review of the constitutionality of official actions.

The 1990 Russian Federation Draft also contained an extensive list of specific civil and political as well as social, economic and cultural rights. It prefaced the list with a general declaration that "man [человек, the person], his life, honor, dignity and freedom, personal inviolability, [and] his natural and inalienable rights constitute the supreme value," and further, that "human rights and liberties belong to a person from his birth," and that the enumeration of "the rights and liberties in the Constitution and in laws shall not be used to reduce other human rights and liberties." Thus a conception of natural rights was embodied in the Draft Constitution. This conception was reinforced by the provision that if an international treaty to which the Russian Federation is a party (which would include the Human Rights Covenants of the United Nations) contains rules that differ from those contained in legislation of the Russian Federation, then the rules of the international treaty shall be applied. Thus the state, bound by the Constitution not to infringe certain natural and inalienable rights, was also subjected by the Constitution to an overriding international obligation to protect those rights, an obligation that could only be avoided by a formal denunciation of the international treaties to which the state had previously adhered. It is scarcely enough, of course, simply to proclaim various civil and political and social and economic and cultural rights to be natural and inviolable. It is necessary also to provide a machinery for protecting those rights against violation. The 1990 Russian Federation Draft Constitution took an important step in that direction by vesting in the judiciary the power and the duty to annul any legislative or administrative act that conflicts with the Constitution and any official action that violates constitutional rights. Yet even judicial supremacy is not a complete guarantee, since in judging the constitutionality of legislative and administrative acts or official actions the judiciary must weigh against the protection of the rights of citizens the legitimate interest of society in the protection of public order as well as various other public interests that are also proclaimed in the Constitution. In the spirit of the eighteenth-
century Enlightenment, the Draft Constitution seeks to establish a self-regulating legal order within the state structure by combining the (French) concept of the separation of powers with the (American) concept of checks and balances and a strong presidency, and by providing for a multi-party political system with democratic elections of the parliament and of the president. Yet it provides no opening for a challenge on legal grounds to a norm that has been approved by all three branches of government, even though the norm violates what in England would be called the fundamental law of the land and in America due process of law. Thus the state has agreed to be bound by a law which, to be sure, it has proclaimed to be higher than itself but of which in fact it is itself the creator, not the creature. The "natural rights" of man and citizen, though said to be inalienable, are nevertheless from a legal standpoint conceived to be a product of positive law.

The 1990 Russian Federation Draft Constitution does attempt, however, in one of its parts, to establish a source of law which is outside the Constitution itself and from which the Constitution itself is derived. That source is called "civil society," and one of the principal chapters of the Constitution is devoted to it. It proclaims (1) "the inalienable natural right to be an owner," the right of workers to form trade unions and conclude collective labor agreements, and the freedom of private persons and of associations to form business enterprises. It also proclaims (2) that "the family is a natural cell of the society," that children born out of wedlock shall have the same rights as children born of registered marriages and that parents shall be obliged to take care of their children and adult children of their parents. In addition, it proclaims (3) that culture and science, research, and teaching "shall be free," and that "pluralism in the intellectual and spiritual sphere is guaranteed;" (4) that "the mass media shall be free [and] censorship is prohibited;" (5) that "religion and religious associations shall be separate from the state" and that "the state may not give preference to any religion or to atheism;" and (6) that political parties and other voluntary public associations may be freely formed. Each of these six sub-sections of the chapter on a "civil society" is elaborated and qualified in various ways. Here it must be noted that the term "civil society" has been widely invoked in recent years by proponents of fundamental change in Eastern Europe and the Soviet Union. The term itself first came into wide use in England in the seventeenth century to signify the political order as contrasted with a hypothetical state of nature. In the late eighteenth and early nineteenth centuries, "civil society" acquired new meanings, first in France and then in Germany. In France société civile came to mean, both in the political sense and in the cultural sense, a society characterized by individual liberty and (to a lesser extent) equality and (to a still
lesser extent) fraternity among the people who comprise it. It was related to the French concept of civilization. In German, the word "civil" is rendered as burgerlich, meaning "pertaining to the citizen," and in Russian, too, "civil society" is rendered grazhdanskoe obshchestvo, "citizens' society." The German burgerliche Gesellschaft and the Russian grazhdanskoe obshchestvo have a strong link with citizenship, that is, with membership in the political order. Thus they are linked with the state, although they are separate from it. The French société civile, on the contrary, is sharply distinguished from the state. It is more like the nineteenth-century German concept of Kultur than like burgerliche Gesellschaft.26

Marx, following Hegel, identified civil society (burgerliche Gesellschaft) with relationships of civil law (burgerliches Recht), that is, the private law of property, contract, tort, inheritance, family relationships, and the like, as contrasted with the public law of state power and state administration. Marx, of course, in contrast to Hegel, viewed such "bourgeois" legal institutions as a mere facade for the protection of the interests of the ruling capitalist class, resulting in the exploitation of the proletariat, alienation of the worker from the means of production, and an economy based on the exchange of goods rather than production to meet needs, and he denounced "bourgeois society" for its ideology of individualism and self-aggrandizement. Under socialism, a classless society was to prevail, and individualism would be replaced by collectivism. A socialist society, therefore, could not be a "civil" society. Following this reasoning, Soviet Marxist-Leninists rejected the notion of a socialist civil society as a contradiction in terms. Instead, they used the single word "society" as Marx did to denote the entire range of socio-economic relationships, but nevertheless contrasted "society" with "the state," which, though it arose on the basis of society, would continue to stand over society as a necessary instrument of coercion until the final achievement of a classless society. In the post-Stalin era, the Communist Party leadership proclaimed that the functions of the Soviet state were gradually to be assumed by the voluntary actions of society. Yet the truth was that the state, though it was, to be sure, slowly becoming more democratic, hardly yielded the substance of its power over the lives of the Soviet people. The great Polish writer Czeslaw Milosz has said that "in the twentieth century, the state has eaten up all the substance of society."27 In this perspective "society" means the primary associations in which a person acquires his character as a social being: family, church, school, neighborhood, workplace, business enterprises, professional organizations, literary societies, and other voluntary social and economic associations, that constitute a civilized people, a "culture." The decline of the vitality of these
autonomous community relationships in the twentieth century has been closely connected with the enormous expansion of the central political authority of the state: each is a cause of the other. It is a virtue of the 1990 Draft Constitution of the Russian Federation that under the heading of "civil society" it identifies and gives legal protection to a broad range of basic social activities and associations: individual and group property relations, labor relations, voluntary economic and other enterprises, marriage and the family, intellectual and spiritual activities, communications media, religious activities and religious organizations, political parties and other public associations. Also ethnic and linguistic communities are to be given autonomy.

If, indeed, the source of the law that defines the powers of the state, that is, the source of the law of the Constitution, is understood to be the entire community of individuals, voluntary associations, and autonomous groups that comprise a civilized people, then the Marxist doctrine that the state is a political superstructure built on an economic base, in which class relations of production play the decisive part, must be rejected. The whole of society, including its family units and its language, and not merely its social-economic component, forms the basic substructure. Moreover, if community relations as a whole, and not only class relations, define state power, then the Marxist doctrine that law proceeds only from the state must also be rejected, since society as a whole inevitably has a legal dimension, a built-in unofficial legality, and in addition the various types of associations and activities that make up a society have their own distinctive unofficial legal aspects. Thus in this version of a civil society the state is formed partly in response to the law that governs people in their social relations identified as customary law by adherents of historical jurisprudence, and as natural law by adherents of a natural-law theory. In this concept, the process described by Czeslaw Milosz is to be reversed: civil society, including its legal dimension, is not only to be liberated from domination by the state but is itself to become dominant over—"higher than"—the state. State law, official law, is to be subject to social law, unofficial law, the law-consciousness of the civil society.

Consistent with this theory is the provision of the 1990 Russian Federation Draft Constitution that the fundamental principles identified in its first chapter may only be changed by a universal referendum. These include the inviolability of basic human rights, political and ideological pluralism, separation of powers, supremacy of law, a social market economy, a state based on social democracy, and a federal structure.

Nevertheless, the Draft Constitution does not go so far as expressly to identify the source—or
sources—of a law that is higher, or other, than the state. Moreover, it does not indicate the difference, if any, between "civil society," to which it devotes forty-one separate articles, and just plain "society," without a preceding adjective, which is at various places juxtaposed with the state. Thus the Constitution is declared in the Preamble to be "the fundamental law of our society and our state," and "society and the state" are required under various articles "to protect" the interests of consumers, the family, and the cultural and intellectual heritage, "to secure" the development of basic scientific research, "to contribute to" the improvement of international relations in the sciences, culture, and education, and so forth. Finally, in declaring "the goals and tasks of the state," the Draft provides that the state "shall be the official representative of society, whose will it shall represent through its agencies and institutions." This assertion of the relationship between the state and society is undoubtedly intended to enjoin the state to be responsible to society and to represent its interests. Yet it postulates a unitary political order, a single "state," which alone may speak and act for society "officially," and also a unitary social order, a single "society," which is distinct from the "state" and is officially represented by it. Thus the theoretical possibility is left open that the state, to which "the people" has delegated a monopoly of lawmaking authority, may once again, in Milosz's image, eat up all the substance of society, albeit in a democratic fashion.

Taken as a whole, the 1990 Russian Federation Draft Constitution goes beyond the positivist concept of a law-based state, and tentatively embraces the natural-law concept of the rule of law, that is, the subjection of the state to a law that is superior to it, a law embodying universal moral principles to which every citizen may have recourse in the courts. It does not, however, give a clear indication of the source of that higher law in reason and conscience, that is, in human nature itself.29 Nor does it invoke a historical tradition of legality. It says nothing about achievements of the past except to refer in the Preamble to "the memory of our ancestors who through disasters and sufferings preserved and transmitted to us a bright faith in goodness and justice." No reference is made to the struggle for law waged in the past against heavy odds by individual Soviet citizens as well as by groups of citizens, or of previous law reform movements in the Soviet Union, or of the "good things" in previous Soviet constitutions. The word "socialism" does not appear in the Draft. The drafters seem to have disregarded the injunction of the great nineteenth-century Russian religious philosopher Vladimir Soloviev that "in order to defeat what is false in socialism one must recognize what is true in it."30

It may be useful to compare briefly the 1990 Draft Constitution of the Russian Federation with
another draft constitution, published simultaneously, called the Draft Constitution of the Russian Soviet Federation Socialist Republic (RSFSR), which was also intended to be submitted to the RSFSR Supreme Soviet and ultimately to the entire population of the Republic. The latter Draft was prepared by a group of deputies to the RSFSR Supreme Soviet who call themselves "Communists of Russia." The most striking difference between the two drafts is that the Russian Federation Draft makes no reference whatever to the USSR and, indeed, declares the exclusive authority of the Russian Federation over its entire territory, including the land, natural resources, air space and water, currency, foreign policy, defense, and similar matters. The RSFSR Draft, on the other hand, while declaring the sovereignty of the RSFSR throughout its territory, provides also that it is part of the Union of Soviet Socialist Republics, with the right freely to secede but also with participation in the armed forces and the military defense of the USSR and also, together with other republics, in various stated common tasks. One implication of such acceptance of membership in the USSR is that the RSFSR Constitution will be compatible with the constitutions of the other republics that comprise the USSR, and that the RSFSR conception of sovereignty, and of the relation of law to the state, will not be fundamentally inconsistent with that of the others.

The RSFSR Draft differs to a considerable extent from the Russian Federation Draft in style and language, but much less so in substance. Its Preamble declares that it "seeks to create a soviet socialist law-based state," and it refers to socialism at several other points, but the Preamble adds, after "law-based state," the words "a multiparty system based on principles of democracy, [and] an efficient economy based on various forms of ownership [and] on the development of market relations in the interests of securing the welfare of the people." The Preamble also defines "a democratic socialist order" as one characterized by "separation of the legislative, executive, and judicial powers."

Also the RSFSR Draft Constitution, like the Russian Federation Draft, proclaims a long list of "natural and inalienable rights" and contains a general declaration that "all rights and freedoms secured by the Constitution of the RSFSR shall be protected by the court." As in the Russian Federation Draft, the power to challenge the constitutionality of statutes and other normative acts is vested in a Constitutional Court, and if in a concrete case any court finds that a normative act which it is asked to apply contradicts the Constitution it must discontinue the proceeding and submit to the Constitutional Court a proposal to declare the act to be invalid.

Nevertheless, the provision of the Russian Federation Draft that "laws" (zakony) which do not
correspond to "law" (pravo) are not valid is omitted, and various general limitations on citizens' rights are stated. Thus private enterprises are permitted, with individual or group ownership of means of production, but only "within the limits of [enacted] laws [zakony]." Also protection is provided against the use of individual or collective economic enterprises to exploit or otherwise cause disadvantage to other persons. In addition, there is a strong emphasis on the duties (and not only the rights) of citizens, and a great emphasis is placed upon social and economic rights.

In general, the RSFSR Draft is more traditionally Soviet in its language. The concept of a "civil society" is not introduced. Thus the impression of an effort to liberate society from domination by the state, which may be derived from the Russian Federation Draft, is much less apparent in the RSFSR Draft.

Yet the similarities between the two drafts are undoubtedly more significant from a jurisprudential viewpoint than the differences. They both represent a substantial implementation of the concept of the law-based state. Neither of them represents an introduction of the rule of law.

From the perspective of the rule of law, the strongest feature of both drafts is their reliance on the judiciary to supervise the constitutionality of statutes, decrees, and regulations of the legislative and executive or administrative branches of government. In the case of the Russian Federation Draft, this is to some extent strengthened by the inclusion of broad criteria of justice that are to guide constitutional interpretation and thus to enable the courts to make the letter of the Constitution conform to its spirit. This would give an opening to the development of judicial principles based on reason and conscience by which the will of the legislative branch and the practices of the executive branch could be restrained and educated.

On the other hand, natural law itself requires consistency and predictability in the judicial interpretation and application of constitutional principles; and here the enormous length and complexity and often contradictory tendencies of each of the drafts constitute serious drawbacks. These draft constitutions, like the existing 1977 Soviet Constitution, attempt to regulate the entire political, economic, and social life of the country. Like much of traditional Soviet legislation, they constitute a gigantic, all-embracing program.

In fact, from the perspective of Soviet history the heavy reliance on the judiciary to help carry out this program is also the weakest feature of both drafts, since the judiciary has been the weakest branch of the Soviet state. (I do not count the pre-Gorbachev Supreme Soviet, since prior to 1989 it was
the apparatus of the Central Committee and the Politburo that constituted the de facto legislative branch.) Historically, one must go back to the pre-Soviet Russian judiciary and legal profession from the time of Alexander II's great reform of 1864 in order to find roots from which a competent, honest, and independent judicial branch could grow. This would suggest the need for a more cautious, step-by-step approach to Soviet constitutional reform.

In terms of an understanding of the relationship between the concept of the rule of law and the concept of a law-based state, Soviet experience teaches the inadequacy of both a positivist theory that identifies state and law with each other and of a natural-law theory that sets law above the state or in opposition to it. Both of these theories need to be integrated with each other and with historical jurisprudence. The pravovoe gosudarstvo, or Rechtsstaat, is, to be sure, a great advance over both the absolute state and the policy state, in which the supreme political authority is considered to be above the law rather than being identified with it. On the other hand, since the law-based state remains the final source of the law with which it is identified, its commitment to law lacks the moral force that is invoked by the concept of a law that derives from the higher qualities of human nature itself, including, above all, human reason and human conscience. Yet the human sense of justice and fairness is itself an unruly guide. "Equity," John Selden complained in the seventeenth century, "is as long as the Chancellor's foot." An abstract legal morality may be as arbitrary in practice as the legislation enacted by the supreme political authority. Both of these sources of law need to be rooted in the historical experience and the social institutions of the people whose law it is.

Lacking in current Soviet legal thought, it would seem, is sufficient awareness that in the long run both legislation and equity, to be effective, must be adapted to and integrated with the customary law— the law-consciousness—of the peoples that comprise Soviet society. Indeed, from the point of view of historical jurisprudence one might argue—as the great founder of the historical school, Friedrich Carl von Savigny, argued in the early nineteenth century with respect to codification of the civil law of the German confederation—that in light of the lack of a sufficiently developed legal culture the time is not yet ripe in the Soviet Union for constitutional proclamations of the rule of law.
NOTES

1. The American periodical Current Digest of the Soviet Press, for example, habitually translates "pravovoe gosudarstvo" as "rule of law." William E. Butler recognizing the distinction between "law-based state" and "rule of law," has chosen to use the phrase "rule-of-law state" because, as he writes, it "gives the benefit of the doubt to those who advocate the broader and more fundamental concept of law," that is, those who believe in a law that connotes "right and justice, consistency with moral principles that prevail always and everywhere, that may not be transgressed by citizen or state . . . " William E. Butler, "The Rule of Law and the Legal System," in Developments in Soviet Politics (Stephen White, Alex Pravda, and Zvi Gitelman, eds.), London 1990, 104-105. Many Soviet translators also prefer the broader translation. Other Soviet and English speaking translators use the more literal translation "law-based state" or "law-governed state" or "legal state." The same problem exists, of course, in the translation of Rechtsstaat.


3. See id., 145-146.


5. Dicey's book went through eight editions from 1885 to 1915, during his lifetime, and two editions (1939 and 1959) after his death, edited with an introduction by E.C.S. Wade. The expression "natural justice," which is often used by English courts and writers, although not discussed by Dicey, has a meaning very close to his concept of the rule of law; it is not natural justice in the abstract but natural justice (or, as Americans would say, due process of law) as construed historically by the English courts in light of their precedents.


7. The doctrine of separation of powers is generally traced to Montesquieu's L'esprit des lois (1748). Montesquieu himself, in that work, mistakenly attributes the doctrine to the English Constitution. See Livre XI, Chapitre VI, "De la constitution d'Angleterre."

8. The French Constitution of 1791 states: "The legislative power cannot make any law that would infringe or impede the exercise of the natural rights recorded in the present chapter and guaranteed by the Constitution." Later constitutions (of which there were many) ceased to list natural rights. See the discussion in Andre Hauriou, Jean Gicquel, and Patrice Gelard, Droit constitutionnel et institutions politiques, 6th ed., Paris 1975, 195-197. At one point, the authors of this leading work, in a footnote, associate the constitutional movement in France in the late eighteenth and early nineteenth centuries with the transition from a policy-based state (l'Etat de Police) to a law-based state (l'Etat de Droit). Id., 177, note 9. They do not, however, use any expression that suggests the supremacy of law over the state. See below notes 10, 11, 12.
The 1791 Constitution declared that there is no authority in France superior to that of the loi, that is, the legislative enactment. This reflected the Enlightenment concept, expressly stated in the Massachusetts Constitution of 1780, of a "government of laws, not of men." This concept is often confused with the rule of law, to which it is, of course, related, but with which it is hardly identical.

The term Rechtsstaat seems to have appeared first in 1829 in a work of Robert von Mohl. It is often traced, however, to Immanuel Kant, who advanced a similar concept without, apparently, using the term. Friedrich Darmstaedter, in Die Grenzen der Wirksamkeit des Rechtsstaates, Heidelberg 1930, distinguishes between what he calls the "classical theory" of the Rechtsstaat, which goes back to the Middle Ages and which culminated in Kant's work, with the modern theory. See below note 11.

Otto von Gierke devotes the last chapter of his great work on Althusius to "the idea of the Rechtsstaat," tracing it back through Althusius to the twelfth century and treating it as a natural-law theory. Otto Friedrich von Gierke, Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien Aalen, 6th ed., 1968, Chapter Six. This, however, is justified only if the term Rechtsstaat is given a broader meaning than that which it actually had when it was first used by von Mohl and others. Darmstaedter shows that throughout the nineteenth century Rechtsstaat presupposed a positivist jurisprudence which identifies law with the state and asserts the primacy of the state over the law. Op. cit. note 10, 84 ff., 129 ff. Joseph Lalive, Politics Within Nations Englewood Cliffs, N J 1974, 106, makes the distinction very clear: "[T]he difference between the Rechtsstaat and constitutionalism is that the rule of law in the former is based on a concession from the rulers. The concession implies that the State has elected to engage in self-limitation in the exercise of power. But under constitutionalism the limitation is found to be a matter of right established by a combination of historical tradition and philosophical principle. While the distinction may sound legalistic, its impact is very real. It is like the contrast between an all-powerful father, who from time to time may refrain from tyrannizing over his children and even give them certain areas of freedom and independence to act, and a family where certain freedoms to act and take decisions are claimed and accepted as inherent in the family members."

See Darmstaedter, Op.cit. note 10, 23 ff. The term Polizeistaat, which is applied to the German principalities in the sixteenth to eighteenth centuries, is often translated as "intervention state." It should certainly not be translated "police state."

As is well known, German legal thought in the nineteenth century was dominated by the historical school, founded by Friedrich Carl von Savigny. In Russia, the movement to collect and codify the laws of the Empire in the nineteenth century was understood at the time less in terms of a positivist jurisprudence (such as was expounded by Jeremy Bentham) and more in terms of a historical jurisprudence, an evolving tradition of legality (such as was expounded by Savigny). This point is elaborated in H. J. Berman, "Some Jurisprudential Implications of the Codification of Soviet Law," The Soviet Sobranie of Laws: Problems of Codification and Non-Publication (Richard M. Buxbaum and Kathryn Hendley, eds.) Berkeley 1991, 173 ff.

Walter Otto Weyrauch, Book Review, Ius Commune, 1989, 569, refers at page 571 to a 1935 report of a German court to the Ministry of Justice concerning a case involving commitment of a person to a concentration camp for educational purposes, in which the court stated that
"in a Rechtsstaat the court has not only the right but the duty, when the interest of the state, and especially state security, so requires, to recognize and carry out exceptional provisions." Similarly, a Soviet jurist, in discussing the concept of the supremacy of "laws" (as contrasted with the supremacy of "law"), stated recently that "it is enough to recall what kinds of laws were adopted in periods of mass repression." R. Z. Livshits, "Pravo i zakon v sotsialisticheskem pravovom gosudarstve," SGI 1989, No. 3, 15, at 17.

15. See V. Kudriavtsev and E. Lukasheva, "Sotsialisticheskoe pravovoe gosudarstvo," Kommunist 1988 No. 11, 44. Livshits, however, above note 14, states that "the law-based state should be linked not with zakon (this is simply a self-restriction, and an inadequate one) but with pravo, with society's concepts of justice [spravedlivost]."

16. One aspect of the illegality of many of the administrative regulations classified as "legislation" was their secrecy. That is, they were not published but instead circulated to agencies or officials directly affected by them. See The Soviet Sobranie, op.cit, above note 13. This practice has now been denounced as a violation of the law-based state, and it is argued that no unpublished regulation can have the force of law.


18. Id., 46.

19. The authors do not, however, refer expressly to these traditional schools of jurisprudence. Moreover, they do not make any reference to the rich pre-revolutionary Russian heritage of jurisprudential writings on these subjects. In fact, various schools of thought concerning the nature of the law-based state were represented by pre-revolutionary Russian thinkers such as Chicherin, Soloviev, Petrazycki, Novgorodtsev, Kistiakovskiy, Mikhailovsky, Hessen, and others. An excellent account of their writings is given in Andrzej Walicki, Legal Philosophies of Russian Liberalism, New York 1987. Walicki states on page 1 "that the liberal intellectual tradition in pre-revolutionary Russia was in fact much stronger than is usually believed, that the main concern of Russia's liberal thinkers was the problem of the rule of law, and that the most precious legacy of Russian liberalism was precisely its contribution to the philosophy of law, as well as to the controversy about law, the debate in which the value of law as such was seen as ... something in need of defence, and not something to be taken for granted." Since contemporary Soviet legal theorists are entirely familiar with this pre-revolutionary heritage, the failure of almost all of them to take it into account must be deliberate.


21. Prior to 1989 the 1977 Constitution empowered the Presidium of the Supreme Soviet of the USSR to exercise constitutional supervision over laws and decrees of all-union and republic supreme soviets and councils of ministers. The 1936 Constitution contained a similar provision. However, this power was almost never exercised during more than fifty years of its existence. A constitutional amendment of 1989 established a USSR Constitutional Oversight Committee to review the constitutionality of laws and decrees of the USSR Supreme Soviet and other bodies, though not of the newly established USSR Congress of People's Deputies. The Committee is not a court and does not decide concrete cases.
22. James Kent, Commentaries on American Law, New York 1826, 12th ed. by O. W. Holmes, Jr. (1873), vol. 1, 1. Kent starts his four-volume work with the statement: "When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law." Kent implies, although he does not state expressly, that the law of nations is the source of the lawmaking power of the states that are subject to it.


24. The distinction between the two kinds of review is not easy to express in English. In German legal terminology the word Verfassungsstreitigkeit is used to refer to the power of a court to decide in the abstract, so to speak, that a certain law violates the constitution, and the term richterliches Prufungsrecht is used to refer to the power of a court in a concrete case to refuse to apply a law because to apply it in that case would violate the constitution. See Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, Durham, North Carolina 1989, 4-5. The latter power was asserted by Chief Justice Marshall in 1819 in Marbury v. Madison. The former power has been asserted by the United States Supreme Court in recent decades, although always in the context of concrete cases.


28. This is one of the main themes of H. J. Berman, Justice in the USSR, Cambridge, MA, rev. ed. 1963. See 275-282.

29. The Draft uses the word "conscience" at one point, stating that "judges shall be independent
and subject only to [statute] law [zakon] and to the voice of conscience." The draft immediately preceding the final draft had placed the word "their" before the word "conscience," suggesting a more subjective concept.

30. The Draft does provide, however, in Article 1.8 that "the state shall operate on the principle of social democracy and [social] justice in the interest of the welfare of its citizens and of society," and shall "create conditions for proper living standards of all people," and that "the securing of equality of opportunities to each citizen of the Russian Federation shall be carried out by means of a developed system of state social services."

Law-Making Under Gorbachev Judged By
The Standards of a Law-Based Society

Vladimir Entin

Having the honor and pleasure of participating in the stimulating conference dedicated to the problems of building up a law-based state in the USSR, I use this opportunity to express my gratitude and satisfaction with the high academic and organizational quality of the event made possible by the efforts of Professor Donald Barry and the Lehigh University staff.

Asked to comment specifically upon the paper "The Soviet Legislature: Gorbachev's School of Democracy," presented by Frances Foster-Simons, I would like to note that traditionally all parliaments (the USSR Supreme Soviet is no exception) suffer from executive encroachments upon their territory of law-making. But they present a united front towards outside threats to their authority. From that standpoint, the relationship between the President of the USSR and the Supreme Soviet might be compared to that of a married couple. They might grumble or quarrel sometimes with each other, but the public considers them a single entity. And this is truly the case, because both of them are treated, at least in terms of the Soviet politics, as institutions of the central political system. The rivalry in the law-making process has shifted to a struggle between the bodies of the federation and those of the republics.

Nevertheless, the current state of affairs should not overshadow the fact that it was the federal parliament--the Supreme Soviet of the USSR, that started the process of transferring real power from the Communist Party to the state.

During the initial stages of perestroika, we witnessed the beginning of genuinely representative parliaments, with deputies asserting their independence vis-a-vis other centers of power (e.g., the CPSU Politburo and the Central Committee). That was done through rejecting the draft laws prepared for them by party bodies and opting in favor of alternative proposals, and through introducing substantial changes into the structure and wording of proposed laws. All this has amounted to something like a revolution or a sort of a mutiny on board the ship of state, since the Supreme Soviet used to operate as a mere rubber stamp for party decisions.

However, too much hope and popular expectation was pinned on the USSR Supreme Soviet,
Everybody expected miracles from this offspring of the first really contested elections during the Soviet period. Unfortunately, the Supreme Soviet of the USSR had a number of built-in defects that prevented it from taking a vigorous stand in shaping and promoting radical legal reform. I will try to name some of them. Every third deputy was quasi-appointed to the Congress of People’s Deputies through the mechanism of internal selection within the all-union social organizations that had deputy mandates reserved for them. In many instances, the elections were not really contested even in the territorial districts. There were territorial districts with only one candidate or cases where not much choice was presented among the available candidates. So an “aggressively obedient majority”—to use a phrase coined by Yuri Afanasiev—was widely represented in the Supreme Soviet. One should keep in mind that there were very few lawyers in parliament that the deputies lacked experience in law-making technique and procedure. They had only their drive and intuition to go on. The services and staff support vital to the day-to-day drafting of laws were under the strict control of the functionaries of the Supreme Soviet Presidium. One could add to this list the traditional ministerial pressure that is rather hard to resist, especially when it is combined with the impatience of democratic public opinion. Nevertheless, the Supreme Soviet was carried away by the general upsurge in the moods and attitudes of perestroika.

All that brought about the adoption of progressive-minded but rather loose and contradictory laws. The demise of the ruling ideology required the construction of a new conceptual framework to serve as a reference point for law-makers.

The idea of a law-based state was invoked as a sort of trade-mark to label the new legislative efforts. Considered quite compatible with the socialist choice, the law-based state concept has turned out to be a yardstick to measure what has already been accomplished and a criteria to be applied to future legislation. Later on, the standards deduced from theoretical assumptions became a basis for breaking away from the negative legal experience of the past.

The very fact that the avalanche of sub-laws and other legal instruments had distorted, as a rule, the letter and spirit of USSR Supreme Soviet acts made it possible to put the problem in a theoretical context. Thus, in one sense, the rule of law is understood as the dominance of rules introduced through parliamentary enactments over other norms. But this involves only the proper structuring of the legal norms, and thus corresponds to the principle of legality. The rule of law concept goes further, however, and introduces the idea of the importance of human rights over all
other considerations. It further emphasizes the juridical completeness and reliability of law. The
number of juridical requirements vary. But there are certain traits that are bound to be present. One
may cite among them the following:
1. Granting to all the bearers of separate interests the status of subject to the law, and providing for
their formal independence outside the scope of administrative relationships.
2. Establishing fair rules of the game as opposed to the ancient practice of setting up mechanisms for
decision-making on a case-by-case basis. This should guarantee the necessary openness and
credibility of legislation.
3. Providing for the stability of officially-recognized relationships and the accountability of
administrative bodies.

Soviet legal doctrine distinguishes the Rechtstaat, which limits the discretion of administrative
bodies, and the rule of law, which obliges the legislator himself to respect human rights, to adhere to
the constitutional law and order, and to act in compliance with parliamentary procedure. In addition,
the judicial system checks not only arbitrary implementation of law by the executive, but legislative
encroachments upon individual rights and freedoms as well. The ideal looks too good to be true.

There are two sets of major complications standing in the way of coherent and non-
contradictory law-making. The first one is connected with the delimitation of competencies between
the Union (and the federative structures that represent it) and the republics that are going to sign the
Union Treaty. They have managed to suspend the war of laws and to agree upon the principles of the
Union Treaty. The sovereignty of the republics, the derivative nature of the federal authority, and the
sphere of joint competence (which embraces all of the economic and political power that neither side
has agreed to delegate authority to the other) could become a juridical nightmare if a workable
solution is not found.

One of the possible models that might work is this: The federal parliament would adopt
fundamentals of the legislation that would have no direct effect, but would be applied only through
republican legislation. This model was tested in the laws on foreign investment. Observers noted
that for the first time, all-union law and that of the Russian republic were not at loggerheads.

Nevertheless, it was agreed in the Union Treaty that inevitable conflicts of interest between
the federation at large and the sovereign states that created it are to be reconciled through negotiation.
The framework for the reconciliatory procedure is determined by the Union Treaty. The authority to
arbitrate is vested in the proposed Constitutional Court.

This delicate system will have to endure the tensions and social outbursts that will be inevitable in the transition to a market economy.

The law-based state is the specific organizational and political form designed for relationships of social exchange where individual property owners are juridically free, equal and guided by their private interests. In the present-day Soviet situation, all subjects of legal economic activity are immersed in or otherwise connected with the bureaucratic structures running the economy.

Something similar emerged out of the legislation aimed at safeguarding political freedoms: of association, of expression, of conscience. In order to exercise the rights provided for by law, an individual has to enter into a much closer relationship with the bureaucratic structures than if he abstained from exercising his rights. Thus, legislation that claims to be inspired by the rule of law ideal needs to have safeguards against administrative distortions of the rules of the game to the bureaucrat’s advantage, to serve as a legitimization vehicle for the values not only explicit but implicit in the market economy, and at the same time to neutralize the drive toward levelling developed by the population during the years of Soviet power.

One needs to keep in mind that Soviet society is dominated by a public bureaucracy that increased manyfold thanks to decentralization processes. Its power is built upon the system of administrative distribution of social benefits. The introduction of economic principles and considerations into the numerous closed-circuit distribution systems and subsystems only consolidated their grip on society.

So the test for any law to be passed is whether or not it helps an individual to escape from the administrative embrace and guarantees the autonomy of physical and juridical persons.

Legislation of the law-based state should solve the most intricate puzzle of real socialism—to turn nominal property owners into real ones, thus bridging the gap of alienation separating the producer from the results of his labor.

It is impossible to create a full body of new legislation overnight. For the time being a huge number of legal acts adopted during the administrative and command system retain their juridical force. But their moral authority is withering away. Their legitimacy is openly questioned. That attitude is also rather often extended to new enactments which amount to only half-hearted attempts at reform.
Both federal and republican legislation alike is being adopted to satisfy the pressing needs of the moment and to attain long term objectives. Nevertheless, it is necessary to single out some reference points that will permit us to judge whether we are following the path leading to a law-based society or are going astray.

1. Legislation needs to promote order in a turbulent society. The war of laws undermines compliance with law and makes legislative efforts futile.
2. Legislation needs to be legitimate in the eyes of all sections of the USSR population. That means it should be properly differentiated, flexible, and should open up possibilities for local norm-setting activities.
3. It should provide adequate remedies and mechanisms for implementation.

Only on that basis can human rights values and the achievements of world civilization be incorporated into the fabric of Soviet law.
REJECTION OF JUSTICE
by Yuri Feofanov

When Mikhail Gorbachev was only the General Secretary of the Communist Party, when its monopolistic role was only beginning to be questioned and the movement toward reform materialized, people started to speak openly about a multiparty system. It was daring and exciting: if it were possible to organize other parties, it seemed that democracy might become a reality. The General Secretary said at the time that dictatorship can exist even if there is a multiparty system. These words were regarded as an attempt to preserve the unlimited power of the Party, but he turned out to be a true prophet.

We probably now rank first among countries in the number of parties. But in terms of defending the rights and freedoms of citizens, if we don't occupy the last place in the world then we are very far from the top of the list. We are concerned and we wonder why this is so. But the answer is quite obvious. Creating political parties with ease, achieving sufficient freedom for political activities, glasnost, rejecting idols of the past—all of this "democracy" is based on the bureaucratic command state, on a low level of legal consciousness both among the people as a whole and among its "best parts," the people's deputies. All the parties and movements began fighting for power, and moreover, started struggling against each other. Nobody knows what they are fighting for. There are very few people who are really concerned about the state system and the civilized arrangement of the three powers, especially the third one—the judicial power. Only the judicial power, if it is really independent and sovereign, will be able to defend the constitutional rights and freedoms of citizens and to stand against administrative and governmental arbitrariness.

Before perestroika the Communist Party was the sole legislative power in the country (the Supreme Soviet only formalized the draft laws whose substance had been worked out by the CPSU Central Committee). And the party set up all judicial organs and exercised strict control over them. Now parliaments issue laws, but they still do not "give any freedom" to the court. The new democratic power doesn't want to have an independent court working alongside it. About a year and a half ago, the USSR Supreme Court discussed the problem of controlling crime and decided to organize Temporary Committees as coordinating centers. Included in them, along with the police, were the courts. One deputy said: "Courts should not be under control of the Temporary
Gorbachev, who was the head of the parliament at that time, hesitated. But there came some shouts of objection from the audience, and Gorbachev gave in and said: "Let's include the courts." And this is the head of a legislature! Doesn't he realize the essential character of courts? It seems more likely that he hasn't thought about the significance of the court system. The deputies didn't support their colleague's hesitations—because they were not concerned about formation of a "third power." And this is not accidental.

The present mayor of Moscow, Gavriil Popov, is a recognized democrat. Once, when answering a question of a Muscovite on TV, he said: "Your case is judicial, and only the court has the right to judge it. You should take it up with the Court. If the Court makes a wrong decision, we shall recall the judge." I responded to these words, writing an article in the Moscow News. To Popov's credit, he admitted that he was in the wrong. I recall this episode only because I wanted to mention the "command thinking" of the best representatives of the democratic wing of our public.

In light of everything that was mentioned above, it is necessary to examine the core question of the legal reform: will the rights of Soviet citizens be reliably protected? Not by the party benefactors, nor by people's deputies, who are being overwhelmed by voters' complaints. And not by the President's office, to which thousands and thousands of desperate people apply. But by going to court. Any complaint about the abuse of power that is made to a higher level in the administrative hierarchy is always an entreaty for grace. A judicial suit is a claim for justice. And the right to independent and just treatment—this is one of the most important aspects of a democratic society. Without this right all the other rights and freedoms are a fiction.

I want to examine one case which, it seems, has received world-wide attention: the case of Oleg Kalugin. Dismissed from his position as a KGB general, he published a number of articles on the methods of surveillance of citizens in his own country, the fabrication of charges against dissidents, and some other very unpleasant activities of his agency. Though Kalugin was not found guilty of any illegal acts, the President deprived him of all orders and medals, and the Chairman of the Council of Ministers deprived him his military rank, which automatically led to losing his pension. Despite its negative attitude toward the KGB, the public reacted indignantly to these actions. Kalugin was nominated for a seat in parliament and won a convincing victory.

And what about his rank and state rewards? The disgraced general instituted a legal action against the head of the government, Nikolai Ryzhkov. A member of the Moscow City Court issued a
judgement holding that the decision in question was by the USSR Council of Ministers (on the basis of a document presented) and according to the law, the Court had no right to consider the case.

Here I need to provide a bit of explanation. Article 58 of the Constitution of the USSR of 1977 provides citizens the right to appeal to a court against the illegal acts of officials (before this period the judicial defense of citizen rights was not provided for). But no court accepted such a suit because there was no corresponding law to implement the constitutional provision. For 10 years, democratically-minded lawyers fought for such a law, and in 1987 it was at last adopted. But nothing changed. For example, a powerful chairman of an executive committee or a minister would formulate his private decision in the name of the executive committee or the collegium—and again court jurisdiction would be excluded. As of July 1, 1990 the law was expanded: it became possible to sue not just an individual official but also an organ of state administration. But the decisions of an organ of state power are still above the law. Thus, now if an executive committee of a soviet issues a decision that infringes the right of a citizen, the citizen may turn to the court. But if the soviet itself makes the decision—whether it be a rural, regional, district, or other soviet—the individual’s rights are not subject to judicial defense. As I have already mentioned, power fears the court. It doesn’t want to be subordinate to the law, which is, as is well known, one of the basic principles of the law-based state about which we have talked so much.

Now, I’ll return to the Kalugin case. His first round was the suit against the head of government. The plaintiff and his lawyer, Boris Kuznetsov, asserted that the suit was lawful even prior July 1, 1990, as there was no decision of a collegial organ (the Council of Ministers). Nikolai Ryzhkov committed a forgery, issuing his personal decision as if it were a decision of the Council of Ministers. Kalugin’s lawyer collected the written testimony of twelve ministers, who stated that there was no meeting of the Council on the day in question.

In short, there was a controversy, which could be objectively reviewed only by a court. But the authorities wouldn’t allow this to happen. When the Civil Chamber of the RSFSR Supreme Court determined that the suit should be considered in court, the Procurator General protested. The Presidium of the Supreme Court rejected his protest, and the Procurator General protested to the Supreme Court of the USSR. Unfortunately, here the court denied the citizen his right to justice. The argument was that there is a piece of paper (the decree of the Council of Ministers), officially registered (signed by the chairman and the administrator, with a seal attached), so there can be no
judicial proceeding. This, if you please, is a typical characteristic of the inquisitorial process, based on the principles of formal proof. Alas, the highest court in the country was guided by these principles.

Kalugin's suit against the President of the country, regarding his orders and medals, followed a similar path in the beginning. The Moscow City Court and then the collegium of the RSFSR Supreme Court denied Kalugin the right to defend himself in court. As I was writing these lines, the Presidium of the Supreme Court of Russia gave its judgement: the suit is subject to court review. Will this be followed by the Procurator General's protest? One can only guess.

But if we assume that the judicial examination will follow... The law on the USSR President makes no provision giving him the right to deprive citizens of their orders and medals--this, one could say, is "the letter of the law." Nobody has proved, in addition, that Kalugin violated any law, when he came forward with his disclosures. He was not even officially accused of anything. Under these circumstances, any court might find it difficult to reject his bringing a suit. At present there is no precedent of a court finding the actions of the head of state to be illegal. The Moscow City Court declined to review Kalugin's suit against the President, and stated quite frankly: "The President of the USSR is the head of state, and complaints about his acts are not subject to court jurisdiction." On the other hand, the law on the President states that he is the highest official in the country, and the law provides that officials may be sued in court.

I'd like to hope that the court will still review the Kalugin case. This would be a great victory for justice: the mere fact that the President of the USSR is found to be subject to the law and not above it would say something about progress in the direction of placing the state within the law. If the President lost this case, it would certainly be a blow to his prestige. But far more significant would be the advantages of a just resolution of the conflict--this would testify to the fact that legal reforms in the USSR have reached a point where power is put under the control of law, and the court achieves independence.

This is the crucial point at which our justice finds itself at present. On the one hand, the court is acquiring strength, and political power is forced to take it into consideration and is beginning to fear it. On the other hand, the court as yet is not "the third power," the arbitrator between citizens and the other powers. It doesn't actually keep power in check, and doesn't limit the abuse of power. The court should act as an arbitrator between citizens and the other powers. That is one of the
fundamental principles of a law-based state. But this principle doesn’t exist yet. Up to now we have built only an unsteady, transitional footbridge from a totalitarian regime to a democratic one.
THE BALTI C CASE AND THE PROBLEM OF CREATING
A LAW-BASED STATE IN THE SOVIET UNION

Egidijus Kuris

The problem of the law-based state and its relationship to the Baltic states—Lithuania, Latvia and Estonia—is too broad to be fully covered in one report, even a long one. Professor Loeber has discussed some very important aspects of the problem. In addition to commenting on Professor Loeber’s paper, I shall sometimes go beyond the issues discussed there.

General Remarks

Professor Loeber’s Report is remarkable in several respects. First, it is important to note that though the problem of the transformation of the Soviet Union to a law-based state (Rechtsstaat), or even to a state under the rule of law, has been hotly debated in numerous publications during the last three years, only in a very few studies has an emphasis been put on what may be called the geopolitical aspect of this transformation (or the national factor, to use a narrower term). It is commonly known that the uniqueness of the Soviet Union is in many respects determined by its multinational character. Still, little attention is normally given to the idea that based on geopolitical and ethnic conditions, the development of a law-based state could differ in various republics and regions of the Union. Professor Loeber has attempted to address this matter with respect to the Baltic states.

Second, most of the studies of the problem of establishing a law-based state in the Soviet Union and in the Baltic states deal with purely institutional matters, e.g., with the examination of what is new in USSR and Baltic legislation, and with how these issues correspond to a theoretical concept of a law-based state. Thus, for example, knowing that the core feature of the Rechtsstaat is the supremacy of the law (statute, or zakon) over administrative regulations, the examination of the hierarchy of normative acts and of the whole mechanism of law-making is helpful in determining whether a given legal system resembles the “ideal” legal system of Rechtsstaat, and if so, to what extent. To use another example, knowing that one of the basic features of the law-based state is an
independent judiciary, the examination of the legal status of judiciary in the Soviet Union, or in the
Baltic states, can help to determine how far these entities are from becoming law-based states. No
doubt this is very important. Still, it is an advantage of Professor Loeber’s paper that he did not limit
himself to an examination of the formal aspects of the relationship between the real legal situation and
the ideal of the Rechtsstaat, or the ideal of the rule of law, but gave us an overview of attitudes of the
legislators of Lithuania, Latvia and Estonia towards the idea of law-based state, and concentrated on
the cultural and historical premises for creating such a state in the Baltic countries.

Third, certain specific issues, deriving from the ambiguous status of the Baltic countries,
affect the development of a law-based state. Lithuania, Latvia and Estonia consider Soviet rule (and,
consequently, the Soviet laws that operate in these countries) to be illegitimate. The political conflict
between the Soviet Union and the Baltic states on the question of their independence has not come
any nearer to solution in recent months. At the same time, this conflict has attained the character of
an international, rather than internal, conflict, as both parties seek political support from the
international community. The party that effectively introduces the norms and principles that constitute
a law-based state is more likely to get that support. Thus, the examination of the problem of
establishing a law-based state in the Baltic countries contributes to the solution of the whole Baltic
case.

Two Aspects of the Baltic Factor

The title of the paper contains the term “Baltic factor.” In the paper, Professor Loeber has
spelled out the premises for establishing a law-based state in the Baltic countries. He has shown that
Baltic legislators, lawyers and executives, while advocating both the necessity and the possibility of
moving towards a law-based state, look for inspiration in what he calls “the Baltic heritage.” The
concept of the Baltic heritage includes West European, East European, and national values. In
reality, the heritage is so rich that it alone could serve as a guarantee of success in building a law-
based state. As far as I can judge, Professor Loeber sees the possibility of establishing a law-based
state in the Baltic countries independently of that in the Soviet Union. Though he has not stated it
directly, I surmise that this is Professor Loeber’s conclusion.

In this regard, two aspects of the Baltic factor appear to be worthy of discussion. First, there
is a Baltic factor which influences the ways in which Lithuania, Latvia and Estonia themselves move (or could move) towards a law-based state. This is the Baltic heritage. This aspect of the problem was exhaustively discussed in Professor Loeber’s paper.

The second aspect has to do with the complicated political situation that exists at present. As indicated, the Baltic states do not consider themselves to be legitimately a part of the Soviet Union. Thus, in the effort to build a law-based state in the Soviet Union, the Baltic factor could be considered a key element: the solution to the Baltic case could be seen as one of the steps in the development toward a law-based state.

How do these two aspects of the Baltic factor fit together? In the first case, the Baltic factor influences the domestic legal situation in the Baltic States themselves. In the second case, the Baltic factor relates to legal development in the Soviet Union. This latter consideration is of interest both for political and for theoretical reasons. The Soviet Union declares that it wants to create a law-based state. But at this point this concept is no more than a theoretical concept. If a future USSR constitution declares the Soviet Union a law-based state (such a statement regarding Russia appears in the draft constitution of the Russian Federation), this would not necessarily mean that such a state had come into existence. The constitutions of Germany, Spain, and other countries refer to themselves as law-based states. But such constitutional statements are only the starting point. What conditions must obtain before the Soviet Union can really claim to be a law-based state? It is the author’s conclusion that one of the conditions is a reasonable solution to the Baltic case.

**Pravovoe Gosudarstvo as Rechtsstaat**

Professor Loeber has noted that the difference in how the essence of the law-based state is interpreted in Western democracies and in the Baltic states is not great. I would add that, in fact, there is also no great difference between how the law-based state is described and analyzed in the Baltic states and in the USSR. In both cases, *pravovoe gosudarstvo* is equivalent to the German *Rechtsstaat* rather than to the Anglo-American rule of law. Both the *Rechtsstaat* and the state under the rule of law are two "types" of law-based state. At the same time, the concept of the state under the rule of law includes in itself the features of *Rechtsstaat*, such as supremacy of the constitution, respect for the laws (*uvazhenie k zakonu*), and compliance with them, mutual duties of the state and
its citizens. But it goes beyond the limits set by the latter concept. The main difference between the rule of law and the Rechtsstaat is that the rule of law accepts the existence of some law (pravo) which is superior to the positive law created by the state. We shall hardly find any provisions in the valid laws of either the Soviet Union or the Baltic states indicating that legislators should go further than the concept of Rechtsstaat permits. Both in the Soviet Union and in the Baltic states there have been attempts to go beyond the limits of Rechtsstaat; for example, the draft constitution of the Russian Federation states that the "law" (zakon) must be "lawful" (pravovym); similar ideas are expressed in the draft law on the Constitutional Court, which is on the agenda at the Supreme Council of Lithuania. However, these drafts have not yet becom laws.

Professor Loeber subscribes to the opinion of Estonian scholar E. Ridmae that "we (the Balts) probably do not know what a pravovoe gosudarstvo actually means." If Professor Ridmae meant that the Balts had not yet examined and perceived the whole "Baltic heritage" (all the three groups of values mentioned above), this may be true (especially when it was written in 1989). Still, there may be a deeper reason for him to state that the Balts did not know what a pravovoe gosudarstvo really was. This statement could be based on some dissatisfaction with the idea of pravovoe gosudarstvo, interpreted as Rechtsstaat. The Baltic movements for independence (Popular Fronts in Estonia and Latvia, and Sajudis in Lithuania) have expressed in their programs their intentions to move towards civil society—a concept more akin to a state under the rule of law than to a Rechtsstaat. When those movements achieved victory in the elections to the Supreme Councils of Lithuania, Latvia and Estonia, they faced all of the difficulties connected with the transformation of theoretical concepts into political, social and legal institutions. Dissatisfaction with the idea of law-based state is a result of the contradiction between the perceived limitedness of the idea of Rechtsstaat and the practical incapability of going beyond its limits.

In one sense, it doesn't matter that the Baltic heritage provided a good basis for the development of a law-based state. The very idea of the law-based state in Lithuania, Latvia and Estonia emerged in 1988 not from this heritage, not from the West European, national, or even pre-1917 Russian values, but from the slogans proclaimed by the Communist leadership of the USSR. It is an interesting paradox of Soviet reality that certain ideas, even the most progressive of them, have emerged as political slogans, "from above," and were handed down to society. This served as a guarantee that reforms, whatever they might be, would not undermine the basis of the Soviet system.
It was up to the political leadership to interpret the content of the ideas expressed as slogans. This was the case, for instance, with the concept of people’s self-government (samoopravlenie naroda), the idea of great democratic potential that preceded the idea of pravovoe gosudarstvo but was never adequately implemented into practice.

The idea of pravovoe gosudarstvo, as is often said, is an element of the larger policy of perestroika. The political goal of perestroika was not to replace the Soviet system with a kind of democracy of a Western type, but to modify it so it could effectively continue to exist. Whatever changes may have taken place later, perestroika was initially designed to alter but preserve the old system. Therefore, I would argue that the idea of pravovoe gosudarstvo was initially proposed as a political slogan rather than a political program. To support this thesis, the following can be said. The notion of pravovoe gosudarstvo appeared for the first time in official Soviet documents not at the 19th Conference of the C.P.S.U., as is usually stated, but about a month earlier—in the Theses for the Conference prepared by the Central Committee. The initial wording, as it appeared in the Theses, differed substantially from how the idea of pravovoe gosudarstvo is formulated today: "zavershit' formirovanie sotsialisticheskogo pravovogo gosudarstva," i.e. "to complete" the creation of the socialist law-based state. Let us note that it was in May, 1988, when Article 6 of the Soviet Constitution was still in force, when judicial control over the constitutionality of statutes did not exist, when the citizen’s right to appeal to the court to review bureaucratic decisions was significantly limited, etc. Still, the task was deemed as “completion” of the creation of a pravovoe gosudarstvo—the creation of which, in fact, has not yet been started. Moreover, all previous Soviet practice, as well as legal theory, was hostile to even the term “law-based state.” This brings me to the conclusion that the political leadership intended to introduce the title, but not the content of Rechtsstaat, to apply the concept to the political and legal realities of the Soviet Union at the time.

But when the magic lamp was rubbed just slightly, the genie began to appear. In a discussion involving several leading Soviet legal scholars and journalists, published in Literaturnaja gazeta, A.Vaksberg expressed the idea that putting the term “completion of creation of pravovoe gosudarstvo” into the Theses was simply an attempt to deceive. The idea of the law-based state generated such a response in society, especially among lawyers, that in the final Resolutions of the 19th Conference of the C.P.S.U. it was simply impossible to maintain the initial wording.

Whenever a slogan appears, it needs to be filled in with some concrete content. Since it was
admitted that the USSR was not even partly a law-based state, the actual content of the concept had to be discussed. Lawyers and officials began looking to the experience of the past, as well as to the experience of other countries. It was then that the Baltic states started re-discovering "the Baltic heritage." At that time, the terms Rechtsstaat and "rule of law" were used as synonyms. Of course, some time needed to pass before the difference between the two could be discussed. But whenever the difference between the rule of law and Rechtsstaat was mentioned, it became necessary to determine whether the Soviet Union was moving towards the Rechtsstaat or towards the rule of law.

If we admit that the Westernization of the Soviet law today is already under way, it is also necessary to find out to what extent Soviet society and the Soviet legal system are able to accept the Western idea of law-based state. When the idea was officially proposed, respect for, and compliance with, the laws in the Soviet Union were extremely low (among numerous examples that might be cited, the favorable public opinion towards the persons who have committed so called "unselfish economic crimes"—beskorystnye khoziaistvennye prestuplenia—is just one). Those crimes, such as bribery of officials by managers in order to get materials, spare parts, etc., for state-run enterprises, formally, were directed against the establishment. But paradoxically, they aimed at maintaining the functioning of the establishment. In the field of substatutory legislation, the laws (zakony) were dominated by subsidiary acts, many of which were not accessible to the public. The Soviet Union's leadership, while proposing the slogan of a law-based state, intended to give a "second breath" to the policy of strengthening the legal basis of state and public life (ukreplenie pravovoi osnovy gosudarstvennoi obshchestvennoi zhizni), which was proclaimed in 1981, at the 26th Congress of the CPSU. Under such conditions, movement towards a Rechtsstaat, but by no means towards a state under the rule of law, towards "gospodstvo zakona," but not towards "gospodstvo prava," was a very realistic objective. Given the situation in the economy and society, the Soviet Rechtsstaat could be seen, at first, only as a new term for the old Soviet concept of a state operating under strictest legality ("gosudarstvo strozheishei zakonnosti").

The political leadership, when proposing the idea of a pravovoe gosudarstvo, aimed to combine both sides of the concept. On the one hand, the introduction of a pravovoe gosudarstvo was a part of the political reform of the state and of the legal system. On the other hand, the new concept was intended as a new ideological basis for demanding that citizens and organizations strictly comply with the laws.
If there is to be a Westernization of Soviet law, as well as of Soviet legal culture and legal consciousness, it has to be gradual rather than radical. To become a rule of law state, the USSR, first, has to fulfil the requirements of the Rechtsstaat. And even with regard to Rechtsstaat there are still many hurdles. All recent major changes in the Soviet political system, including the amendment of the Article 6 of the Constitution, have been met by strong resistance. The new representative legislative bodies—the Congress of People's Deputies and the Supreme Soviet—have been established by violating the principles of direct and equal elections. The President, through the issuance of edicts has set limitations on the exercise of basic political rights such as freedom to peacefully assemble and freedom of speech. These several examples alone indicate if the Soviet Union is moving towards a pravovoe gosudarstvo or Rechtsstaat, it is moving very slowly.

The Baltic states, in addition to having a "Baltic heritage," also have a heavy "Soviet heritage," which also influences their political and legal practices. The legal doctrine in the Baltic States today does not differ essentially from the legal doctrine in the Soviet Union. It still holds to the same extreme positivist position. The judiciary is deemed capable only of applying the law (pravo), and the law is still seen basically as the rules set forth by parliament. The parliament itself is considered to express the will of the voters. Under these conditions, Rechtsstaat may be the only possible type of a law-based state for Lithuania, Latvia and Estonia.

As in the Soviet Union, there are also many obstacles to the development of a Rechtstaat in the Baltic states. Some of them stem from the unfavorable "starting position" the Baltic states find themselves in, with the rampant disrespect for the law that presently exists. Another problem has been the Soviet presence in the republics, particularly the violence committed by the military. But the main obstacle to a law-based state in Lithuania, Latvia and Estonia is the difference between the Baltic and Soviet attitudes towards what law is supreme in the Rechtsstaat, or towards the limits on the state to arbitrarily create laws. This difference in attitudes involves a conflict between international and national law.

The Baltic Case

The parliaments and governments of the Baltic states as well as mass media and public opinion in these states, claim that Lithuania, Latvia and Estonia de jure are independent states. It
does not matter that the Soviet Union has exercised, and in a lot of spheres, continues to exercise, a factual power over the territories and peoples of these three republics. To support their position, the authorities of the Baltic states refer both to history and to international law.

From 1918, Lithuania, Latvia and Estonia were independent countries. This independence was recognized by most countries of the world. Lithuania, Latvia and Estonia were the members of the League of Nations. The independence of Lithuania, Latvia and Estonia was also recognized by the Soviet Union (then-Russia) in its mutual treaties with Lithuania, Latvia and Estonia of 1920. For example, the peace treaty between Russia and Lithuania of July 12, 1920 stated: “Russia recognizes without reservation the sovereign rights and independence of the Lithuanian State with all the juridical consequences arising from such recognition, and voluntarily for all times abandons all sovereign rights of Russia over the Lithuanian people and their territory.” Similar provisions were included in the treaties of 1920 between Russia and Latvia, and Russia and Estonia.

However, in 1939, the Soviet Union signed a treaty of nonaggression with Nazi Germany, together with a supplementing secret protocol. According to the protocol, Latvia and Estonia were included in the Soviet “sphere of interests” and Lithuania—in the German “sphere of interests.” A month later, by a new secret protocol, Lithuania was also included in the Soviet “sphere of interests.” This latter protocol foresaw that the government of the USSR was to exercise “special measures” to protect its interests in the territories of the Baltic states. As a consequence of these secret agreements with Germany, in June of 1940 the Soviet Union invaded Lithuania, Latvia and Estonia and occupied them, incorporating them shortly thereafter into the USSR. By doing so, the Soviet Union committed an act of aggression, as the actions of the Soviet Union against Lithuania, Latvia and Estonia fell under the definition of aggression as stated in the treaties between the Soviet Union and Lithuania, Latvia and Estonia. For example, Item 3, Article 2 of the Convention between Lithuania and the USSR of July 5, 1933, stated that a state would be considered an aggressor if it committed “invasion by its armed forces, with or without a declaration of war, of the territory of another State.”

The Soviet authorities denied the very existence of the secret agreements with Nazi Germany for 50 years. However, on December 24, 1989, the Congress of People’s Deputies of the USSR, by its Resolution on the Political and Legal Assessment of the 1939 Soviet-German Treaty of Nonaggression, finally admitted the existence of the protocol of August 23, 1939, and recognized it as having no basis in law and invalid from the very moment it was signed. Thus, the Congress also
confirmed that the Soviet Union had thereby breached its treaties with Lithuania, Latvia and Estonia. The Soviet Union has never officially renounced those violations, including the occupation and annexation of the Baltic states. Most countries of the world never recognized the forcible annexation of Lithuania, Latvia and Estonia. The non-recognition of the lawfulness of the Soviet rule over Lithuania, Latvia and Estonia is one of the most serious testimonies to the legitimacy of their striving for independence. From the point of view of international law, these countries continue to exist as states whose sovereignty has been suspended by force, as they have never ceased to exist as independent states de jure.

The claim that Lithuania, Latvia and Estonia are de jure independent states has its "sharper" and "milder" forms, distinguishing these states from each other in their understanding of the status of their relationship with the Soviet Union. Legal acts of the supreme state bodies (Supreme Councils) of Lithuania, Latvia and Estonia contain different statements concerning the idea of independence. For instance, the Supreme Council of Lithuania, by its Act of March 11, 1990, on Restoration of Independent Lithuanian State, has declared that "the realization of the sovereign rights of the Lithuanian State, that were defied by alien force in 1940, is being restored and, from this point in time, Lithuania again is an independent state." The Supreme Council of Estonia, in its Resolution of March 30, 1990, on the State Status of Estonia, has declared the state power of the USSR in Estonia "as unlawful from the moment of its establishment" and declared "the beginning of the restoration of Estonian Republic (restitutio ad integrum)" which marked the final goal of the announced transitional period. The Supreme Council of Latvia, by its Declaration of May 4, 1990, on the renewal of Independence of Latvian Republic, has also resolved to restore Latvia's independence by declaring the validity of Article 1 of its Constitution of 1922, according to which "Latvia is an independent democratic republic." But at the same time it has stated, in Item 5 of the Declaration, that transitional period needed for re-establishing the state power of the Latvian Republic de facto is to run until the convocation of the Saeima (Parliament) of the Latvian Republic. These minor differences, notwithstanding, all three Baltic states reject the legitimacy of Soviet authority on their territories.

In their acts on restoring independence (and other laws), the supreme state bodies of Lithuania, Latvia and Estonia declare their recognition of the priority of international law over the national law of any state. Thus, beginning with the Declaration of the Supreme Council of the
Estonian SSR of November 16, 1988, which proclaimed republican laws superior to union laws on its territory and resolved that amendments to the Soviet Union's constitution were subject to ratification by the republican parliament,\textsuperscript{12} the Baltic parliaments have declared that the starting point for exercising their sovereign rights is international law. Among several international accords referred to are the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of December 16, 1966.\textsuperscript{13} Article 1, Part I, of both Covenants states, inter alia, that "(a)ll peoples have their rights to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The Baltic states also refer to the Final Act of the Conference on Security and Co-Operation in Europe, adopted at Helsinki on August 1, 1975.\textsuperscript{14} The Supreme Council of Lithuania, by its Act on Restoration of the Independent Lithuanian State, has declared that the Lithuania adheres to generally recognized principles of international law and to the recognized inviolability of frontiers, as formulated in the Helsinki Final Act\textsuperscript{15} (see Article III, Final Helsinki Act). Latvia’s Supreme Council (Declaration on the Renewal of Independence, Item 1) has also recognized the priority of the main principles of international law over the norms of national law.

According to the Helsinki Final Act (Article IV), the parties thereto oblige themselves not to recognize as legal any occupation or territory acquired forcibly or through the threat of force. Thus, the incorporation of Lithuania, Latvia and Estonia into the USSR was illegal. Thus, Soviet laws have no legal basis in these states, although some of them are used to the extent that they do not contradict the national independence of Lithuania, Latvia and Estonia. This was clearly expressed in Item 6 of the Latvia’s Supreme Council’s Declaration of May 4, 1990, which stated that the Supreme Council considered it possible, during the transitional period, to apply the norms of the Constitution of the Latvian SSR and other laws that were in effect in Latvia at the moment of adoption of the Declaration, to the extent that they did not contradict Articles 1, 2, 3, and 6 of the Constitution of 1922.\textsuperscript{16} A similar provision was contained in the Law on the Temporary Fundamental Law of the Republic of Lithuania (Item 4) of March 11, 1990.\textsuperscript{17} Thus, certain Soviet laws and regulations technically can be applied in the Baltic states.

The problem of the independence of the Baltic states, then, is a problem of international law. The striving of the Baltic states for independence is often linked to the right to self-determination.
Even if this is viewed as correct, the Balts themselves do not consider it to be their main legal argument in their dispute with the Soviet authorities on the issue of independence. The main argument is that there is no statute of limitation in international law. However long ago the Soviet Union committed the acts of aggression against the Baltic States, the forcible maintaining of those republics as part of the Soviet Union is still a violation of international law.

From the point of view of international law, Soviet actions that violate the laws of Lithuania, Latvia and Estonia can also be seen as violations of international law. Thus, Soviet actions involving forcibly taking the youth of Lithuania, Latvia and Estonia to serve in the Soviet Army constitute a violations of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949, Article 51, which states that an occupying power "may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted." Similarly, the use of force by Soviet troops against civilians, and the capture of governmental and other buildings in Vilnius and other places in Lithuania, was deemed by the Lithuanian Parliament to be a new act of aggression against an independent state.

Under the Soviet Constitution (Article 72) "every union republic retains the right freely to secede from the Soviet Union." The same provisions were contained in the Constitutions of the Lithuanian, Latvian, and Estonian SSRs (all of 1978), as well as in various laws and documents of 1940, according to which Lithuania, Latvia and Estonia, while "joining" the Soviet Union, retained the right to freely secede from it. The official Soviet constitutional doctrine has until recently supported this thesis; for example, the official commentary on the USSR Constitution (the co-author was Anatolii I. Luk'ianov, now the Chairman of the Supreme Soviet of the USSR) stated as follows: "The norm on the right to secede legally establishes the principle of free will... This right of a union republic is indisputable. Neither the assent of the supreme bodies of state power of the Soviet Union, nor of the other union republics is needed for its implementation."

Today, the Soviet Union's position is different. It can be briefly described as follows: no matter how the republics became a part of the USSR, they are part of it, with all the legal consequences arising from this status. So the question of independence of the Baltic states is seen by the Soviet side as having nothing to do with the historical events of 1939-1940, and, thus, with international law. Even if the incorporation was not voluntary on the part of Lithuania, Latvia and Estonia, it does not change the essence of the conflict, which by its very nature is a conflict within
the USSR, and, from the legal point of view, a conflict between the union and the republics. The mechanism for resolution of such conflicts is set forth by the union laws. Any republic wishing to secede from the USSR has to satisfy several conditions, according to the Soviet law of April 3, 1990, on the Procedure for Solving Questions Related to Secession of a Union Republic from the USSR. However, the procedure for secession is construed in such a manner that the whole idea of secession becomes a fiction, for the seceding republic has to hold up to two referendums in five years, in which the votes of ethnic minorities are counted separately (which threatens the territorial integrity of the republic). Moreover, the republic is obliged to pay "compensation" (in fact, payments that amount to reparations to the union). It is also worth noting that, according to this law, the final decision on whether any republic is allowed "freely" to secede from the union is left to the state bodies of the union, but not those of the republic. This appears to contradict the clear intent of the USSR Constitution. Nevertheless, being guided by this law, the Soviet authorities do not recognize unilateral decisions of Lithuania, Latvia and Estonia to restore their independence. In the cases of Lithuania and Estonia, this law was applied ex post facto since these two republics had already moved to declare their independence by the time the law was adopted.

According to the Soviet Constitution (Article 74), the laws (zakony) of the USSR have identical (or equal—"odinakovuiu") validity on the whole territory of the USSR. The Constitution (Article 74) also states that in the case of a conflict between the republican law and the law of the whole union, the latter should be superior and only it should be applied. Indeed, the Soviet laws do not set forth any other mechanism of resolution of conflicts between the union republics and the union as a whole. So, since the Soviets view Lithuania, Latvia and Estonia as integral and legitimate parts of the Soviet Union, they apply the constitutional provisions mentioned to all cases when Lithuanian, Latvian and Estonian laws and other legal acts contradict or do not correspond to the Soviet Constitution and laws.

The above is a general analysis of the main legal considerations of the Baltic case. It is true, of course, that the conflict between the Baltic states and the Soviet Union is much more political than legal. If the solution to the problem depended only on lawyers, it could have been solved long ago. What makes the Baltic case important from the jurisprudential point of view is that it is directly related to the development of a law-based state in the Soviet Union. Since the Soviet Union, in its dispute with the Baltic states, uses legal arguments, it is up to lawyers to take note of the
incompatibility of these arguments with the idea of Rechtsstaat.

The Baltic Factor and the Creation of a Law-based State in the Soviet Union

My view is that the Soviet position on the question of independence of the Baltic states constitutes one of the main hurdles in its movement towards a Rechtsstaat. The idea of Rechtsstaat recognizes the supremacy of the positive law of the state, as expressed in the statute. A Rechtsstaat assumes strict obedience to the positive law, not only by citizens and organizations within the state, but also by the state itself. At the same time, the statute is not the only source of state's legal duties, as the state has obligations arising from international law as well. Theoretically, a state that does not recognize certain international legal provisions can be considered a Rechtsstaat. But a state that recognizes certain international legal instruments, but still does not comply with their requirements in its own activities within the country, can never be considered a law-based state. By defying the right of Lithuania, Latvia and Estonia to freely establish (in fact, re-establish) independent states, the Soviet Union is also violating its own legal obligations arising from such international instruments as Charter of the United Nations, the Helsinki Final Act, etc.

A Rechtsstaat also demands that the law (zakon) is the sole standard in evaluating behavior, both of the citizens and of the state. Such laws should be recognized as supreme authority, both by the state and by the population. If respect for laws and compliance with them are to become the highest principles of social behavior in the Soviet Union, they have to dominate all the spheres of social life. A Rechtsstaat, as a theoretical concept, is indivisible: the concept could not be applied to the state in which compliance with the laws is the highest principle in some spheres, but not in others.

The situation in the Soviet Union is complicated in this respect by the open resistance of some republics to officially proclaimed union laws. But even if the supremacy of the USSR constitution and respect for USSR laws could be achieved—and these are essential features of a Rechtsstaat—I would argue that the Baltic states, if they were forced to remain in the Soviet Union against their will, would constitute an exception. Soviet rule is seen by them as illegitimate, and thus, no real compliance with Soviet laws (no matter how progressive and democratic they might be) is possible in the Baltic states. In this regard I recall a remark by Professor Stanislaw Gebethner of Poland, who, at a conference in Oslo in December 1990, explained why was it so difficult for the Eastern European
countries to move towards a law-based state. He said that, in these countries, for decades, not to obey the laws was a kind of a "patriotic duty": these were alien laws, laws that were imposed on these nations, and not chosen or created by them voluntarily. Thus, the laws (zakony) were not seen by citizens as law (pravo). Regrettably, this "patriotic duty" turned into a habit not to obey any laws. Today, the new non-socialist governments face a situation in which the people who were hostile to socialist, or Soviet-like, law (even if they did not express it openly) are not much more favorable toward the new national laws.

The Baltic states face the same problem. The legal atmosphere in these republics for the past few decades provides serious cause for skepticism about the possibility of establishing a rule of law in the Baltic states in the near future. Thus, in addition to the problems of creating a pravovoe gosudarstvo that the Soviet Union faces, the Baltic states also face this additional obstacle on their way towards a Rechtsstaat--the image of an "alien law" on Baltic soil. However, the starting position for establishing a Rechtsstaat in the Baltic states is probably no worse than it is in the Soviet Union, since the Baltic states have the advantage of what Professor Loeber has called "the Baltic heritage." Though Lithuania and Latvia, and, to a lesser extent, Estonia, before their incorporation into the Soviet Union, were far from being truly democratic, they had many features of the law-based state. When the time comes that the peoples of the Baltic states get a chance to create an authentic legal order by making their own laws, there is a likelihood that the disrespect for, and non-compliance with, these laws will gradually be reduced.

Conclusion

It could be argued that legal practice in the Baltic states does not always correspond to the concept of a Rechtsstaat. For example, the residents of Lithuania, Latvia and Estonia do not enjoy in practice all the rights that the laws of these states declare. I shall mention just few examples. Article 28 of the Temporary Fundamental Law of Lithuania, of March 11, 1990, provides Lithuanian citizens (and other residents) with the right to gather and disseminate information on all questions, except on matters that are state secrets or that infringe upon the dignity and honor of the personality. However, it cannot be said that all information is really available, especially in the case of state secrets, which are not specifically defined. Article 27 of the same law provides citizens with the right
of petition, i.e., the right to address the agencies of state power with a demand to solve—through legislation or by other means—socially important questions (such a right is absent in the Soviet Constitution). But it has not yet been determined how many signatures are needed to satisfy this provision. Until this is done, citizens will not enjoy this right in practice. In the present deteriorating economic situation, residents of Lithuania, Latvia, and Estonia also do not fully enjoy a number of social and economic rights, including the rights to work, rest, home, social and medical care, etc. that are provided by their laws. To really become law-based states, the Baltic states have a long way to go.

The Baltic states could be considered law-based states only if all rights and duties, of citizens, organizations, and of the state itself, stemming from laws and from the international instruments that these states adhere to, were adequately implemented in legal practice. The Soviet Union can become a law-based state only by adhering to its domestic law and to the international legal instruments that it has signed. This requires that the Baltic states achieve true independence. The Baltic factor for building a law-based state in the Soviet Union cannot be ignored. Otherwise, the concept of a law-based state can be applied to the USSR only at the expense of the meaning of the concept itself.
NOTES


2. "Kakim dolzhno byt' pravovoe gosudarstvo?," Lit.gaz, 8 June 1988, 11.

3. In 1982, in his preface to the Russian edition of the Bulgarian scholar Neno Nenovski's book The United and Interconnection of State and Law, Sergei Alekseev, one of the most prominent Soviet legal scholars, opposed Nenovski's thesis that a true socialist state had to be a pravovoe gosudarstvo. N. Nenovski, Edinstvo i vzaimodeistvie gosudarstva i prava, Moscow 1982. Professor Alekseev argued that the term gosudarstvo strozheishei zakonnosti was more appropriate. Paradoxically, in 1988 Professor Alekseev published his own book entitled Pravovoe gosudarstvo—sud'ba sotsializma (The Law-Based State--The Destiny of Socialism).


24. Ibid.
IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS STANDARDS
IN THE LITHUANIAN LEGAL SYSTEM
AND THE PROBLEM OF THE LAW-BASED STATE

Pranas Kuris

Since 1988, legal development in the Soviet Union has been discussed from the point of view of how certain legal issues correspond to the declaration that the USSR intends to become a law-based state. Indeed, the idea of a law-based state may be considered a milestone in the development of the whole Soviet legal system. Although speculation as to whether or not this declaration reflects a true intention of the government can shed some light on the problem, it is more worthwhile to examine how reality corresponds to the declaration.

Given the whole variety of attitudes and activities of different segments of society in today's Soviet Union, it is not surprising that there are varying opinions regarding the ways by which this non-law-based state could become a law-based state. Some of the ideas that differ substantially from those officially-proclaimed have already begun to be implemented in the republics, especially in those republics that do not see their future development within the Soviet Union. As is known, the first republic that officially declared itself not to be a part of the Soviet Union, and perhaps the most radical of all the Baltic states in its pace towards independence, was Lithuania. Like the Soviet Union, Lithuania has also declared its intention to create a law-based state. It is worth comparing the development toward a law-based state in the Soviet Union and in Lithuania.

The concept of a law-based state is related closely to the problem of the relationship between international law and the domestic law of the state. Of course, the concept of a law-based state, by itself, alone, does not necessarily demand that such a state, being a sovereign on its territory, should be bound by all the norms and principles that constitute the international legal system. However, given the obvious fact that the very content of the concept of the sovereignty of a state today has undergone substantial change because of the increasingly complicated mutual interdependence of states, it is really important that the state that claims to be law-based should comply strictly with international legal provisions. Thus, under today's international situation, the priority of international law over the domestic law of the state can be seen as an essential feature of a law-based state. This standard should be also applied when determining whether the Soviet Union and Lithuania are law-based states.
Two possible answers usually are given to the question of what the relationship is between international law and the domestic law of the state. The first is that international law is superior to domestic law. The second is that international law does not bind the state in making its domestic law. For decades, the Soviet science of international law was dominated by the view that both doctrines were reactionary and characteristic to the "bourgeois" science of international law. The doctrine of priority of international law over the domestic law was criticized in that it allowed interference by other bodies (other states, international organizations) in the domestic affairs of a sovereign state. The doctrine of the superiority of domestic laws was considered to be fascist because it overestimated the significance of the domestic law. Soviet international legal doctrine argued that neither of the extreme positions mentioned was acceptable, since both ignored the dialectics in the relationship of international and domestic law. According to the Soviet doctrine, international law had to include everything what was progressive in domestic law, and the latter should include everything what was progressive in international law. The fact that Soviet doctrine, in inventing its own solution to the problem, substituted for actual international law its subjective views as to what international law should be was not the main flaw of the doctrine. Holding to such positions, the determination of what was progressive, and what was not, in both international and domestic law, depended to a great extent the criteria chosen, which, in turn, depended on the ideology dominant in the state. Such doctrine served as the theoretical basis for creating a double standard, to be invoked when political expedience required it. In fact, the practice of Soviet foreign relations basically amounted to maintaining the priority of the Soviet domestic law. Thus, the science of international law was designed basically to explain and justify the practice, especially when it involved the rights of citizens and organizations under international law.

The ideological criteria shifted when the leaders of the Soviet Union, in the era of perestroika (M. Gorbachev, E. Shevardnadze, A. Iakovlev), declared that the USSR, in its international relations, recognized the priority of general human values over class values. It enabled Soviet international legal doctrine to come much closer to acknowledgment of the priority of international law over Soviet domestic law. One couldn't, though, say acceptance of the idea of the priority of international law by Soviet doctrine was caused only by changes in the political environment. In fact, some legal scholars advocated the priority of international law even before the official "start signal" was given. In that respect, the most valuable work was published by Professor R. Miullerson.
Professor Ginsburg's paper does not strike an optimistic note in evaluating Soviet legal practice concerning conflicts between international law and Soviet domestic law. There is serious ground to argue that the idea of the priority of international law has not gone beyond the sphere of mere political slogans, has not yet become a firm practice. To allow the idea of the priority of international law to be implemented into practice, a special legal mechanism is needed, including a firm guarantee that the international legal obligations that the Soviet Union has imposed on itself will be implemented into the norms of domestic law. Today, such a mechanism is incomplete, if not absent altogether. In fact, the only element of such a mechanism is a formulation used in most of the newly-adopted laws. This formulation states that in cases where certain provisions of an international treaty, of which the USSR is party, sets forth an order or regulation other than the domestic law provides, the international norm must be applied. Theoretically, this formulation provides the legal basis for applying the provisions of international treaties. But it appears that, in practice, courts don't apply the provisions of international treaties to the settlement of disputes. The necessary legal mechanism mentioned above should include certain other features. First, all Soviet laws that are in effect now should be reviewed from the standpoint of their correspondence with international standards and the international legal obligations of the USSR. Of the state bodies already in existence, the Committee on Constitutional Supervision should play a major role. But given the amount of the legislation subject to review, it is evident that it will take a long time to complete such a task. That is why the Soviet Constitution should be amended to include a new provisions establishing the priority of international law over the Soviet domestic law. In other words, the priority of the international law over the Soviet domestic law should be raised to the level of a constitutional principle. This would serve as confirmation that the state considers itself to be bound by the international provisions that it has already adhered to. Until all legislation is made to accord with international law, the new constitutional principle should be applied directly by the courts. This would demand fundamental changes in the Soviet constitutional doctrine. Until now, this doctrine has not allowed direct application of constitutional provisions, even in the cases when such provisions involve human rights that are violated by subsequent legislation (for example, a code of laws).

The priority of international law concerns both the domestic legislation of the state and its relations with other subjects of international law. In the latter sense, the priority of international law imposes two types of duties on a state. The state has an obligation to comply with international legal
provisions. On the other hand, the state that claims to be law-based has to strive to liquidate the consequences of violations of international law, especially if those violation were committed by that state. In this respect, the case of the Baltic states should be recalled. The Soviet Union, as a law-based state, has to recognize that the restoration of independence of the Baltic states is, in the first place, an international problem, and not a Soviet internal problem. This view is supported by the policy of non-recognition of the forcible incorporation of the Baltic states into the USSR. For example, in connection with signing of the Helsinki Final Act, which established a principle of the inviolability of frontiers in Europe, the United States of America, on July 25, 1975, stated that with respect to this document, the position of the United States as to the incorporation of Lithuania, Latvia, and Estonia into the Soviet Union remained unchanged. Similar reservations were made by France, on July 31, 1975, by the United Kingdom, on December 5, 1975, and by other states. In a legal sense, for Lithuania, Latvia and Estonia, World War II is not yet over.

Lithuania chose a peaceful parliamentary way for restoration of its independence. It emphasizes the significance of negotiation with the Soviet Union on the issue of independence. From the point of view of international law, negotiation is one of the generally recognized means of peaceful settlement of disputes (Helsinki Final Act, Article V). The Soviet Union’s position that Lithuania, in its "secession" from the USSR, should comply with the domestic laws of the Soviet Union, has no basis in law: Lithuania is not "seceding" from the USSR but rather is restoring its independence, of which it was deprived in 1940 by military force and political pressure by the Soviet Union. The attempts of the Soviet Union to impose Soviet domestic law on Lithuania bear witness to the fact that the priority of international law, as well as the concept of a law-based state, are still not applicable to the Soviet Union. And other Soviet actions in Lithuania, including the unsuccessful coup d’etat on January 13, 1991, and numerous violations of human rights by the Soviet military, also contribute to this conclusion.

Clearly the Soviet international legal doctrine that dominated all these decades could not serve Lithuania’s aspirations for independence. Lithuania’s position on the question of the relationship between international law and domestic law initially was based on the idea of the priority of international law over domestic law. If the re-acquisition of independence is based on the idea that the domestic law of the Soviet Union is inferior to international law, then the only logical conclusion for Lithuania is that its own legal system should comply with international law too. Given this view
it is understandable that Lithuania aims to bring its legislation and legal practice into line with international legal provisions, most importantly with human rights standards.


The adherence by Lithuania to the international instruments on human rights poses two main problems: (1) the statehood of Lithuania according to international law; (2) the establishing of a mechanism to ensure conformity of laws enacted with international standards and obligations.

Theoretically, the first problem may be solved by invoking the generally recognized criteria of statehood, which Lithuania possesses according to Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States: "The State as a person of international law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other states". However, in practice, Lithuania does not possess, for example, the necessary criteria for the adherence of a state to the International Covenant on Civil and Political Rights, i.e., membership in the United Nations or in its specialized agencies, or participation in the Statute of the International Court of Justice (Articles 48, Paragraph 1).

But there are no obstacles preventing Lithuania from implementing the human rights standard, provided, for example, by the International Covenant on Civil and Political Rights. This is possible even when a state is not a State-Party to the Covenant and to the Optional Protocol to it, and even if it is not possible for the Committee on Human Rights to examine complaints by inhabitants of Lithuania against the state.

The second problem is more complicated because of the lack of an effective internal mechanism in Lithuania to ensure the conformity of domestic law to international obligation. First, as
in the Soviet Union, the principle of priority of international law needs also to be established in the Constitution. Second, a competent agency needs to be established to ensure the conformity of enacted laws to international obligations and standards. Third, a direct application of international treaties by Lithuanian courts needs to be ensured. Again, as in the USSR, Lithuanian courts are not applying the standards of, say, the International Covenant on Civil and Political Rights.

The effective implementation of human rights standards in domestic law is connected with the international bodies of control, such as the new structures and institutions established by the Conference on Security and Cooperation in Europe, the European Human Rights Committee, or the Court. For Lithuania, this possibility is connected with the necessity to obtain observer status in the C.S.C.E., or special guest status in the Council of Europe. Although it is true that the European Convention for the Protection of Human Rights and Fundamental Freedoms is open only to the members of the Council of Europe, there is no reason to believe that this obstacle cannot be overcome in future.

Lithuania is still not recognized as a member of or party to the major agreements on human rights. It is concentrating its efforts at present in particular on the conclusion of bi-lateral treaties involving human rights issues. Examples of the attempts of bilateral co-operation between Lithuania and its neighboring countries are the draft treaties with Russia and Poland that contain provisions concerning the protection of rights of persons belonging to the Russian and Polish minorities in Lithuania.

The integration of Lithuania (as well as the other Baltic states) into the Nordic Council, and the treaties between the Baltic states on human rights, including the rights of the persons belonging to national minorities, could, in a parallel way, serve the purpose of implementing international human rights standards in Lithuania too.
Notes

CONSTITUTIONAL REFORM IN THE USSR
by Avgust Mishin

The process of dismantling barracks socialism, and the difficult transition to a market economy which followed this process, created the necessity for deep constitutional reforms. The Constitution of 1977 has demonstrated its complete inadequacy. Soviet society became convinced of the necessity of implementing traditional principles of democracy, such as the separation of powers, the law-based state, political pluralism, human rights, and constitutional supervision. In none of the previous four Constitutions, of 1918, 1924, 1936, and 1977, was there anything of this kind.

The first broad constitutional reform was undertaken at the end of 1988. On the basis of initiative from above, a new representative system was established. The former Supreme Soviet, which consisted of two chambers, was first introduced in the Constitution of 1936 and was preserved without any practical changes by the Constitution of 1977. It was a purely decorative organ, which existed for about 50 years and adopted unanimously whatever it got from the ruling party. This pseudo-representative organ was completely discredited, both in the USSR and abroad.

"The founding fathers" of the constitutional reform of 1988 tried to combine several elements of the congress system introduced by the Constitution of 1924, and some elements of North-American and French (I have in mind the Constitution of the Fifth Republic) parliamentarism.

Since December 1988, the Congress of Peoples’ Deputies has been the highest organ of state power in the USSR. It consists of 2250 deputies, and, as is known, they are chosen in several different ways. One third of the deputies is elected by territorial electoral districts of approximately equal population; another third is elected by national-territorial districts in the following proportions: 32 deputies from each union republic, 11 deputies from each autonomous republic, five deputies from each autonomous region, and one deputy from each autonomous district; the last third of the deputies is chosen from all-union public organizations, according to norms established by the law on election of people’s deputies.

The Supreme Soviet continues to exist, but as a different body. According to the Constitution of 1977, it was the highest organ of the state power, but that has been changed. Article 111 states: "the Supreme Soviet is a permanently-acting legislative, administrative and control organ of state power in the USSR." Prior supreme soviets (which have always been two-chamber), were popularly
Gorbachev's Supreme Soviet is elected by secret ballot by the Congress of People's Deputies of the USSR. Moreover, the Congress of People's Deputies annually renews one fifth of the members of both chambers of the Supreme Soviet—the Soviet of the Union and Soviet of Nationalities. A strange arrangement for constituting both the Congress of People's Deputies and the Supreme Soviet is supplemented by two very important constitutional provisions: first, according to Article 111 of the Constitution, the Supreme Soviet of the USSR is accountable to the Congress of People's Deputies of the USSR; secondly, Article 113 reads: "The laws and resolutions, passed by the Supreme Soviet of the USSR cannot contradict the laws and other acts passed by the Congress of People's Deputies of the USSR."

Representative institutions, which were established as a result of the reform of 1988, were condemned to political helplessness from the very moment of their creation. The huge and clumsy Congress of People's Deputies simply did not work. One third of its deputies were not elected, but were appointed by the bureaucracy. Huge representative institutions inevitably turn into public meetings. The same is true of the Supreme Soviet. It could not become a parliament in the proper sense of the word for two main reasons: first, it is deprived law-making sovereignty, because all its decisions can be overridden by the Congress of People's Deputies; second, the deputies of the Supreme Soviet are elected not by people, but by the Congress of People's Deputies. It is reasonable to regard it as a large committee of the Congress of People's Deputies, which is accountable to the Congress and is under its control.

It has now become evident that the authors of the constitutional reform of 1988 had other goals than creating a strong and representative parliament that was capable of working effectively in a system of separation of powers. Their aim was to create legal-consultative bodies that could give legal character to the dictates of the Communist Party. In practice these institutions turned out to be incapable of exercising legitimate power. The reason for this is not only their structural flaws. The presently-existing electoral system, notwithstanding the fact that it has some positive characteristics (e.g., allowing competitive elections) doesn't correspond to our present multi-party arrangements. This has led to the extremely low professional level of the deputies, to fractionization, and to impeding the activities not only of the union, but also of the republic legislative organs.

There is no doubt that when the Union Treaty is signed, a new Constitution, which is being worked on now, will be adopted. We need to abandon the system of soviets and move to normal
parliamentarism. To do this, we have to establish a two-chamber parliament and separate the areas of competence of each chamber; give up the medieval imperial mandate and the right to recall the deputies; implement a proportional electoral system. Of course, changing outward appearances will not of itself change the essence of state operations, but without these changes nothing is possible. The procedure for adopting the new constitution is very important too. The most democratic procedure at present would be to have a draft of the constitution worked on by a constituent assembly and then submitted for approval to the parliaments of the republics that have signed the Union Treaty.

Establishing the office of president on the union level has been of great importance for the development of constitutionalism. It was furiously opposed by both the right and the left. Some people regarded it as an encroachment on the “Leninist principle of the sovereignty of the soviets,” others as a preparation for the establishment of a personal dictatorship.

In fact, the transition to the presidency grew out of practical political problems. The fact is that the paralysis of the existing executive power had become quite obvious. Implementation of radical economic and other reforms was opposed and undermined by the Supreme Soviet and the Congress because most of the deputies were under the control of the partocracy. Nevertheless, constitutional reform proceeded, but with some reservations. The first president of the USSR was elected not by the people, but by the Congress. This was probably the result of Gorbachev’s "fear of the people." Then followed measures to strengthen and expand the president’s authority and give him the right to issue normative edicts. However, normal relations between the executive and legislative powers were not established. The Soviet model of presidential power failed to work as harmoniously and efficiently as its French prototype did.

The establishment of presidential power in the Russian Republic in 1991 was of tremendous importance for the development of the presidential form of government. Especially important is the fact that the first President of Russia, Boris Yeltsin, was elected by direct and competitive voting. Wide powers and the status of an elected representative of the people fortified the position of the President of Russia in his struggle against the imperial center and the partocracy.

It is worth saying that the introduction of presidential power on the union and republican levels was preceded by the establishment of a constitutional innovation, the post of chairman of the supreme soviet at both the USSR and RSFSR levels. The uselessness and absurdity of this surrogate for presidential power is now quite obvious.
The constitutional reforms on the union and republic levels have not yet reached full strength. This is likely to take place after the Soviet version of the Great Compromise, the Union Treaty, is signed (or is not signed). We expect that both the USSR and the republics that have signed the Union treaty will adopt new constitutions. It is difficult now to predict all of the details of the coming process, but we believe that its main features will be the transition to a market economy and, associated with that development, a genuine democratic system.
SOVIET ENTERPRISES ON THE DIFFICULT PATH TO A MARKET ECONOMY
(Legal Aspects)

by V.P. Mozolin

The legal status and the limits of economic independence of enterprises in the economy are determined by two basic factors: their position in ownership relations and the general type of economy existing in the country. Both of these factors are interdependent. The type of economy depends directly on the ownership relations used in social production. And, on the other hand, the viability of ownership relations depends on the nature of the general state of the economy functioning in the society.

This statement is fully applicable to Soviet enterprises. The concept of an enterprise is used in the present article in its generic sense. Enterprises are defined as any organizationally separated production-operational formations acting externally as legal persons. These may be state enterprises, cooperatives, joint-stock companies, business companies, etc.

In the period of prevalence of the administrative-command economy in the USSR and of the state monopoly (when over 90% of all means of production were under state ownership) the dominating producers of output (goods and services) were state enterprises. They were and still are in the position of operating subjects in the area of production with the rights of a legal person. But state enterprises are not the owners of the property attached to them. Before the Law on Ownership in the USSR went into force, they had only the right of operative administration of this property, which continued to be owned by the state.

Naturally, therefore, in their production, commercial, and financial activity, state enterprises never enjoyed the autonomy, independence, and legal protection which were available to owners. The state enterprises always were subordinate to superior state agencies (ministries, departments, the State Planning Committee, the State Committee on Supply, etc.), which exercised powers of authority in the name of the state as owner. Moreover, however paradoxically it may sound, state enterprises, acting in the system of the plan-directive economy, in the absence of an economic market, needed this

1. Translated by Peter B. Maggs.
sort of "administrative guardianship." Without it they could have been left without the material
resources necessary in production, without financing, and without money for wages for workers and
employees. This situation is in effect even now, despite the fact that the country's plan-directive state
system has fallen into a semi-destroyed condition to a significant degree.

In the course of the 1965 economic reform, in 1979, and finally, in the period of
"perestroika" begun in 1985, measures were taken for the broadening of the rights of economic self-
sufficiency of state enterprises and to limit the powers of superior agencies of the state to interfere in
the operational-economic activity of the enterprises (see, for instance, the Decree of the USSR
Council of Ministers of October 4, 1965, "The Statute on the Socialist State Production Enterprise";
the Decree of the Central Committee of the Communist Party of the Soviet Union and the Council of
Ministers of the USSR of June 12, 1979, "On Improving Planning and Strengthening the Influence of
the Economic Mechanism in Improving the Effectiveness of Production and the Quality of Work"; the
USSR Law of June 30, 1987, "On the State Enterprise (or Amalgamation)"; and the USSR Law of
June 4, 1990, "On Enterprises in the USSR"). Enterprises were transferred to full economic
accountability and self-financing. They also obtained the right to turn to State Arbitration to contest
higher state agencies' administrative acts adopted in violation of the law, and to recover damages
caused by these acts. This was a significant step forward on the way to the creation of a mechanism
for broadened economic independence and protection of state enterprises from actions by the
administrative structure of the state not based on law.

However, the state did not cease to be the owner. Therefore the movement in the direction of
broadening the freedom of enterprises to administer and dispose of the means of production and the
product had its limits. In fact, concentration in the hands of the state of the economic power of
ownership and the political power of sovereignty led to the situation where state enterprises that were
legally owners in fact could not exercise their powers. Recall the numerous examples of the
transformation of collective farms into state farms, the liquidation of the handicraft cooperatives, the
issuance of directive plan tasks to collective farms for the conclusion of agricultural supply contracts
for the sale to the state of agricultural production, and other similar acts that ignored the rights of
owners by the state. All this together led to the situation that in the area of social production,
relations of ownership practically did not function. As a result, material stimuli based on ownership
were committed to oblivion. This, finally, led to the decline of the whole of social production and to
the serious economic crisis afflicting our country today.

* * *

The legal preconditions for guaranteeing the rights of enterprises to independent conduct of entrepreneurial activity started to be created after the adoption of the Law on Ownership of the USSR of March 6, 1990 and of laws on ownership in the union republics. The Law on Leasing also made a certain contribution to the creation of these preconditions. But however significant the changes in the legislation may have been, they have remained merely preconditions so long as the system of property relations has not become an irremovable part of social production, i.e., until the privatization of the major part of state ownership. In this legislation are the concrete expressions of these legal preconditions for strengthening the economic independence of enterprises functioning on the basis of different forms of ownership.

The first precondition. The law proceeds from the necessity to privatize ownership and increase citizen’s share of ownership and of collective ownership in social production. Of course, the Law on Ownership does not speak of what percent of ownership of the means of production now belonging to the state must be privatized. This must be done in special laws and decrees adopted in the course of privatization. The size of the critical mass of state property transferred to the ownership of citizens and their collectives which is necessary for the beginning stage of establishment of market relations is the subject of different estimates ranging from 30% to 70% of the value of the overall fund of state ownership. It is a matter of transition to a mixed economy in which the state keeps its position in the basic branches of the national economy. "We are not setting the goal of the full liquidation of state ownership of the means of production, as some suppose," stated USSR Prime Minister V.S. Pavlov in a speech at a session of the USSR Supreme Soviet on April 22, 1991. "This does not even exist in Western countries. Moreover, taking into account our size, tradition of collectivism, and state system, such an approach is completely inapplicable." (Pravda, April 23, 1991, p. 3.)

One should note that in the Law on Ownership in the USSR, the concept of social property is no longer used. Likewise, such forms of social ownership as all-the-people’s and collective-farm-cooperative ownership are not used. Instead of personal property, the law introduced a broader concept of ownership by citizens, which may serve as the economic base for engaging in entrepreneurial activity.
The Law on Ownership of the RSFSR of December 24, 1990, went still further when it proclaimed the introduction in the republic of private ownership by citizens and legal persons.

The second precondition. The Law on Ownership in the USSR envisions a system of non-state enterprises functioning in the area of collective ownership. These are the leased enterprise, the collective enterprise, the cooperative, the business company and partnership, the stock company, the business association (or amalgamation), and the enterprise of a societal organization (or fund). In addition, there is a reference to the small enterprise and in the area of application of ownership by citizens—the labor-based business, the peasant farm and personal subsidiary farm. There could be differences of opinion with respect to the legal status of individual types of the above-listed enterprises, but the fact remains indisputable that all in their entrepreneurial activity have the rights of subjects of law independent of the state. Their relations with the state are constructed on the scheme: the enterprise is an independent owner, while the state is an organization exercising state power.

The third precondition. In the Law on Ownership in the USSR the legal status of property attached to a state enterprise is redefined. According to Article 24, Paragraph 1, "property which is under state ownership and is attached to a state enterprise, belongs to it under the right of full economic management . . . The rules on the right of ownership shall be applied to the right of full economic management, unless legislative acts of the USSR, the union republics, or the autonomous republics provide otherwise."

The law defines the limits, within which the state has the right to exercise its powers of ownership. The competence of the respective state agencies consists of the decision of questions connected with the creation of an enterprise and the determination of the purposes of its activity, its reorganization and liquidation, the exercise of verification of the effective use and preservation of the property entrusted to it, and also other powers defined by legislative acts of the USSR or the republics on the enterprise. However, the Law on Ownership of the RSFSR gives a closed list of named powers of the state as owner, which should be considered more correct.

As a whole, the new construction of the right of economic management is capable of having a positive effect, in our opinion at such time as the enterprise will function under conditions of real competition with enterprises based on other forms of ownership. Only then will the state be forced to be guided in its economic activity by the laws of the market and accordingly not to interfere in the commercial activity of state enterprises. The fourth precondition. Foreign firms will become
participants in production and economic relations on the territory of the USSR with equal rights. In addition to joint enterprises with the participation of Soviet and foreign legal persons and citizens, which have existed on the territory of the USSR since 1987, the Law on Ownership in the USSR also permitted the production and commercial activity of foreign legal persons in our country. An Edict of the President of the USSR, "On Foreign Investments in the USSR," of October 26, 1990, provided the possibility of creation on the territory of the USSR of enterprises fully belonging to foreign legal persona and citizens and also for reliance for these purposes on Soviet legislation. At present within the USSR, the Statute on Joint-Stock Companies and Companies with Limited Liability, approved by the USSR Council of Ministers, June 19, 1990, is in effect. These rights of foreign legal persons and citizens are expressed in the Law on Foreign Investments in the USSR, which was recently adopted by the Supreme Soviet of the USSR, and also in the respective laws on foreign investment of the republics.

It goes without saying that, with respect to joint enterprises and foreign legal persons having capital investments on the territory of the USSR, no problems exist involving the interference of the state in their entrepreneurial rights provided by law.

The fifth precondition. The Law on Ownership of the USSR has established material and procedural guarantees of the right of ownership. Such guarantees are provided both in the case when intrusion by the state in the sphere of interests of the owner is done through the legislature and when it occurs as the result of the actions of administrative agencies of the state.

The first case is covered by Article 31, Paragraph 2 of the Law. "In case of adoption by the USSR, by a union republic or an autonomous republic of legislation terminating the right of ownership," it states, "damages caused to the owner as the result of the adoption of these acts, by decision of a court shall be compensated to the owner in full by the USSR, the respective union republic, or the respective autonomous republic."

The second case involves the termination of the right of ownership in connection with a decision on the taking of a land parcel on which there is a building, other structure, installation, or planting (with compensation to the owner of damages), with obligations of the owner, requisition (with payment to owner of the value of the property) and confiscation (Article 33). Moreover, according to Article 34, an act of an agency of state administration or of a local agency of state authority, not corresponding to law and violating the right of ownership is to be recognized as invalid.
upon suit by the owner. The taking of property in these cases is conducted by decision of a court, arbitration court, third-party arbitration tribunal, and, in the case of confiscation, also by any other competent state agency (or official).

The law does not directly mention the possibility of nationalization of ownership. Apparently nationalization falls under Article 31, Paragraph 2 of the Law, i.e., nationalization may be conducted only by legislation.

Speaking of the guarantees of the right of ownership provided by the Law on Ownership in the USSR, one should express doubt with respect to the possibility of recovering full damages including lost profit. It would be correct, as is provided in legislation, to compensate the former owner the price of property taken from him.

It is interesting to note a new feature contained in the Law on Ownership of the RSFSR. According to Article 30, Paragraph 3, "Injury caused to an owner by a crime shall be compensated by the state upon decision of a court. The expenses borne thereby by the state shall be recovered from the guilty party by judicial procedure in accordance with the legislation of the RSFSR."

Finally, one additional important question arises. This involves the guarantees of the right of economic management for state enterprises. It seems that since such a right is equated to the right of ownership and no exceptions in any case are made by special legislation, all of the above guarantees of rights of ownership also apply to state enterprises.

All these preconditions will receive real embodiment in the economy after the privatization of state ownership.

In the conditions of the transition period that our country is going through, privatization of state ownership fulfills two basic functions: demonopolization of state ownership in the area of payment for social production, and creation of the infrastructure of a market economy. In this is its special nature in distinction from countries with a market economy. Laws on privatization of state ownership have been adopted both at the USSR level and in individual republics. The problem of privatization is the most important new development in our legislation. But it will have to be the subject of a separate discussion.

Conclusion
The broadening of the material and procedural rights of the producers of goods, work, and services in the area of social production depends directly on progress in creating and establishing a market economy in the USSR. Accordingly, the law must also be based on new ideas within the framework of the construction of a modern law-governed state in our country.
WHAT KIND OF COURT AND PROCURACY FOR THE USSR?

by Valery Savitsky

My participation in the Lehigh University conference was as a discussant on the reports by Professor Peter Solomon ("Reforming Criminal Law Under Gorbachev: Crime, Punishment, and the Rights of the Accused") and Professor Donald Barry ("The Quest for Judicial Independence: Soviet Courts in a Pravovoe Gosudarstvo"). I should mention first of all the satisfactory discussion in both reports of the factual material (the names of various laws, the dates when they were adopted, the main content of legislative and other legal acts, citations, references to the literature, etc.) and also the general accuracy of the analyses of the changes taking place my country. The reports emphasize the progressive and democratic character of reforms in the areas of court organization and activity, the procuracy, and procedural guarantees of individual rights. At the same time, also noted are the half-way measures and inconsequential character of the reforms, and the fact that they fall short of fully eliminating the scornful and nihilistic attitude toward law, which was characteristic of the previous party and state authorities and from which the present leadership still hasn’t delivered the country.

I respond with great respect to American scholars who, analyzing the inertia and slow pace of judicial reform, do not consider it appropriate to make recommendations to correct the situation. In his report Donald Barry accurately sketched the sorry situation with regard to the courts and the procuracy, but out of modesty he limited his comments. I, on the other hand, am not known for my modesty, and so I’d like briefly to spell out my views on how to correct the situation.

First, about the courts. Justice is a very sensitive and accurate indicator of the social maturity of a society. The higher the role and authority of the court and the administration of justice as a part of state activity as a whole, the higher the level of legality and democracy, and the more fully the rights and freedoms of citizens are protected from possible encroachments. Unfortunately, because of the policy cultivated in the past of undervaluing the importance of the regulative possibilities of the law, the substitution of arbitrary decisions for legal acts, and the naked use of administrative mechanisms, the prestige of the courts is still very low. The courts in my country still do not occupy the particular and unique place that should be theirs in a law-based state. In its present form judicial power is not on the same level as legislative or executive power, either nominally or in practice. Its situation is characterized by limited competence, insufficiently democratic procedural operations, and
limited independence.

A combination of political, organizational and economic measures are need to raise the prestige of the courts. Only by achieving them fully and simultaneously will it be possible to provide the administration of justice with qualitatively new characteristics, to raise it to a higher level and thereby to strengthen significantly legal order and legality in the country.

It is necessary, first of all, to provide the courts with independence, which will guarantee its success. The first step in this direction was taken in December 1988, when changes and additions to the USSR Constitution were adopted. To transform independence from a declaration to reality, it is necessary to provide by law that:

♦ the judges of the Supreme Court of the USSR be appointed by the President with the consent of parliament, and all other judges be appointed by the presidents of the republics with the consent of the republic parliaments. In addition, all judges should be appointed for life and should be removable only in cases precisely provided for in the law. The deputies approved this procedure for selecting judges in principle, but amendments to the Constitution still need to be made;

♦ judges not be obliged to explain their activities to anyone. The Constitution of the USSR of 1977 required the Supreme Court of the USSR to give an account of its activities to the Supreme Soviet of the USSR. However, in December 1990 this was abolished. Nevertheless, the Law on the Status of Judges in the USSR, which was adopted on August 4, 1989, preserves the rule: "judges and the people's assessors are responsibility to the bodies that elected them and to the voters, and report to them."

♦ carrying out judicial duties be incompatible with membership in any political party. At present, 80% of the district judges and 98% of higher court judges are communists, and therefore are subject to party discipline, which in our situation gives rise to so-called "telephone law." To rid the administration of justice of party influence, a lawyer who has been appointed a judge should withdraw from the party. It goes without saying that there should not be any kinds of organizations within the court (such as bureaus, committees, political parties);

♦ the jury, provided for in the all-union Principles of Law on Court Structure, which was adopted on November 13, 1989, not be an extraordinary form of the legal procedure, but a civilized way of fairly deciding the most difficult legal conflicts that arise between the citizen and the state. This arrangement should be adopted in the legislation of every republic. Unfortunately, the republics
are not in a hurry to introduce the jury system. There are two reasons for this: underestimation of
the jury's role and lack of money to reimburse members of the jury for the earnings which they lose
while in court.

It is necessary to continue the present tendency of expanding the competency of the court.
This would strengthen the judicial protection of citizens against any illegal acts that infringe upon
their rights. The law of 1987, which established the right of citizens to appeal to a court only against
individual actions of officials, was replaced in 1989 by a law which made the illegal actions of the
organs of state administration also subject to court review. But this is insufficient. A citizen must have
the right to appeal to a court against the illegal actions of public organizations (parties, trade-unions,
informal groups, etc.). He must have the right to appeal to a court not only against an individual
illegal deed, but a normative act as well, if it infringes upon his rights (e.g., the rules of a
cooperative, the instructions of a ministry). In principle there should be a rule that any act of any
official, right up to the president, can be appealed by a citizen to a court. This measure would
"equalize" the situation by threatening with judicial liability anyone who would infringe upon the
rights of citizens. And it would reflect the changes in the political situation taking place in the
country.

In the context of the problem of broadening judicial control over the observance of legality, a
suggestion that deserves careful attention would provide courts of all levels, (or, perhaps, at the
beginning, only the Supreme Court of the USSR and the supreme courts of republics) the right in
civil and criminal cases to declare laws and departmental normative acts to be in conflict with the
Constitution and therefore inapplicable.

In any case, the Constitutional Court of the USSR and the constitutional courts of the republics should
enjoy this right.

From my point of view, the judicial system of the USA is the most effective model of judicial control
of the constitutionality of legislative-type acts.

It is necessary to improve the training of judges, their staffing, and the conditions of work.

For this reason, it is advisable, in particular:

♦ to involve experienced judicial workers in carrying out the professional selection of high
school graduates interested in going to law school.
• to strengthen the specialized training of future judges, giving particular attention to their acquiring, during their studies, an understanding of the main principles of the judicial system and legal procedure, judicial ethics, judicial psychology, the theory of applying decisions, etc.

• when replacing judges, preference should be given to candidates who studied in departments of law as full-time students. Unfortunately, 70% of law students study by correspondence at present; that is why their professional level is very low;

• to raise age qualification for judges (a people's judge should not be younger than 30, a member of a higher court—not younger than 40). At present, any citizen from age 25 on may be a judge in any court;

• to work out and put into practice work and productivity norms for courts. The aim would be to eliminate the present extremely heavy work load of judges, which prevents them from giving sufficient care and attention to the civil and criminal cases that they hear.

• to provide the courts with decent premises, fitting the magnitude of the power of the state, on behalf of which the courts act.

• to supply the courts with new-type equipment: means of communication, duplicating, reproducing, and tape-recording apparatus, which they don't have now;

• to provide the courts with the formal accessories of judicial procedure (judicial robes, etc.), which could give the procedure the solemn and ritual character that it presently lacks.

To promote the role of the court in criminal trials, it is necessary to emphasize still more, through the law, that among all of the procedural stages, the one of principal, decisive significance is the judicial hearing. It should be possible for a court to check on the propriety of any act (decision) which is carried out in the preliminary investigation. To achieve this, it is necessary:

• to provide the court the right to examine an appeal of an accused (or suspect) or his defense counsel about the validity of the procurator's decisions concerning incarceration;

• to provide the accused the right, if he disagrees with the reasons for dropping a case during preliminary investigation, to demand, in order to achieve rehabilitation, that the case be heard in court. This should be possible in all cases without exception;

• to provide the victim and other interested parties the right to appeal to the court against a decision made during the preliminary investigation not to bring a criminal action or the decision to
quash an action.

Now, on the procuracy. To my mind, the system of procuratorial supervision in the USSR is in a state of deep crisis. All spheres of the state system where there is procuratorial supervision are developing and reorganizing themselves.

The procurator's office doesn't have any positive influence either in the sphere of state administration or in its traditional sphere of fighting crime. The prestige of the procuracy has declined to a great extent. In all of this, of course, the fault is not just the leadership of the procuracy, which has committed more than a few unfortunate errors, but also the truly complicated present situation, which is often and correctly characterized as a "paralysis of power." When political power is in an overheated state, the illness spreads everywhere, including to the field of supervision of the law. This supervision should help legislators to get out of crises with minimum losses, possibly through narrowing the spheres of control and concentrating efforts on the most important things. This, I think, should be the focus of the new conception of procuratorial supervision. It will be an extraordinarily difficult task. I have not yet come across in the literature any more or less satisfactory new concept of procuratorial supervision. I cannot explain why, but procuratorial supervision at present turns out to be the part of law enforcement activity that is most conservative and least oriented toward perestroika. It is clear that it cannot continue in this state for long.

In examining the essential character of procuratorial power, we usually employ traditional and accepted concepts. They are stereotyped and are of little use at present, but, alas, it is still hard to abandon them.

Of course, the function of the procuracy does not fit with the well-known concept of separation of powers into three branches, legislative, executive and judicial. When this concept was formulated (it is often attributed to Aristotle and Montesquieu), nobody considered that in a future socialist state a controlling and supervising power like the procuracy would appear.

The establishment of the procuracy in 1922 was based on the urgent need to provide legality in a semi-collapsed state. The procuracy in other countries is, as a rule, an organ of criminal investigation and prosecution, with some supervisory functions. Procuratorial supervision of this kind existed in pre-revolutionary, or, to be more exact, pre-reform (1864) Russia. In the way in which the procuracy operates in the USSR, of course, the power that it exercises is neither legislative nor executive nor judicial. It is power of a special kind, power \textit{sui generis}. The procuracy could be
defined as a supervising or controlling organ of the legislative power. Does it need to be preserved any longer as this kind of organ? This is one of the main questions we face during the radical transformation of our state and social structure.

I believe the procurator's office should without doubt continue to be the organ of criminal investigation, that is, of finding criminals, of initiating criminal proceedings, of supervising their investigation, of supporting the accusation in court, of supervising the execution of court sentences. But a basic reformulation of that branch of procuratorial activity that we call general supervision should take place. This supervision, as is known, has not demonstrated its value in practice. This is because the decades-long efforts to burden the procurator with supervision of everything and everybody was doomed to failure.

If the supervisory functions of the procuracy in the sphere of administrative and state operations are to be preserved, then they need to be limited to a narrow but important sector of activity. In the field of general supervision, this would be protecting the rights and legal interests of citizens. Whenever citizens' rights are at stake, particularly constitutional rights, I would consider the procurator's intervention indispensable. Any supervision of the legality of acts of administrative organs, local Soviets, leaders of enterprises, organizations, institutions, ministries and departments, if these acts are not directly related to the rights and legal interests of citizens, should be beyond the sphere of the procuracy. Incidentally, the market economy will immediately demonstrate the uselessness of many present forms of procuratorial supervision in the administrative and economic spheres. In market conditions, when enterprises become independent and start running economic risks, which might cost them dearly, they will make all the necessary decisions by themselves, and the procurator's intervention will not be required. If the entrepreneur himself commits a crime, then it's a different matter—the procurator should use his authority. Evaluation of legality or illegality of any act in the field of economics should be under departmental control, through the Cabinet of Ministers or the Ministry of Finance.

The current more sober evaluation of the role of procuratorial supervision explains the changes introduced in December 1990 in Article 164 of the USSR Constitution. As is known, in all laws, starting with the 1936 Constitution, the term "highest" (vysshii) was always used in connection with procuratorial supervision. This caused confusion, because the term "highest" should more properly have been applied to constitutional supervision, which in those years was the responsibility of the Presidium of the Supreme Soviet of the USSR. I presented arguments against calling
procuratorial supervision "highest" in my book *Ocherk teorii prokurorskogo nadzora* (Moscow, 1975). But only recently have legislators become attuned to this view, and in 1990 the term "highest" was taken out of Article 164 of the Constitution. As they say, better late than never . . .

At present, a so-called ecological procuracy is in operation. In my view, this is an ignorant approach to the problem. Ecological supervision should be carried out first and foremost by ecological specialists, specialists in the fields of economics, science, defense, and related fields. They should work in special ecological organs, provided with wide powers. This would be an effective ecological service and would not lead to amateurish procuratorial activity in this complex field. The procuracy should serve the law and not any party. However, in the one-party system which existed, 90% of the procuracy staff consisted of communists and komsomol members. This was one of the unavoidable costs of a one-party monopoly. I think that the organs of the procuracy should be departyized. Otherwise, there is no sense talking about supervision to achieve precise application of the law. As long as they are employed in the procuracy, procurators and investigators must not belong to the party. While this kind of arrangement may seem improbable now, I am sure that soon this idea will be taken as given, a truism accepted by most people.

I would like to raise the question of relations between the procuracy and the court. The procuracy should in no way limit the power of the court. As has already been mentioned, under the new conditions now being created, the central role in the whole legal system will belong to the court. In order for people to feel protected from arbitrariness in a law-based state, the court should be put in its proper place in the state structure. All other law-enforcement organs should exist as if in the light reflected from the court. The brighter the light, the more weighty the role of the court, the more authority the procuracy will have in supporting an accusation in court. But if the procurator, by his actions and authority, puts pressure on the court, it abases not only the court, but also procuratorial power. When the procurator wins a case in a weak and dependent court, this is not to his credit. This is why the traditional concept that the procurator's presence in court as an organ overseeing the legality of judicial activity is absolutely unacceptable and outdated. The court that is supervised by the procuracy cannot be a Court with a capital "C." This is a matter not only of politics, but of science as well. The former concept of procuratorial supervision over the work of the court, which I and many other scholars approved of, is incorrect under the new conditions being created. I have already said this many times in public, and I consider it necessary to mention it here again.
A few words about the structure of the procuracy. Of course, it should be defined by the structure of our state. Federation or confederation of states, or a conglomeration of some other state formations, will require a corresponding structure for the procuracy. The fate of the union and republican organs will depend first of all on the way the Union Treaty correlates the powers of the center and the republics. I hope that we shall have a union of sovereign states, that is, a renewed federation. Under such conditions the procurator's office will, most probably, be a union-republican organ, subordinate to both the highest bodies of the union republics and of the center. It is probable that the republican procurators should be given their authority by the supreme soviets of the republics and that no consent from the center should be necessary, since that would infringe upon republican sovereignty. But when the supreme soviet of a republic has approved the procurator, the latter should be subordinated both to the supreme soviet of the republic and to the Procurator General of the USSR. True, subordination to the Procurator General should be limited. In what ways? This will have to be thought about and discussed. But the previous extreme subordination of all the procurators to the center is at variance with present realities. A republican procurator has to follow the instructions of the Procurator General, if they are not at odds with the laws of the republic, which, in carefully defined cases will have priority over USSR laws.

The most important thing is a reasonable combination of interests of the center and the republics. It must be admitted that under the new conditions, preference would be given to the republics. We should proceed from this assumption when we consider the ways in which the structure and activity of the procuracy should be radically altered.

In conclusion, I'd like to express my sincere gratitude to Professor Donald Barry for giving me the opportunity to express some of my ideas about the law-based state in the Soviet Union at such an impressive and important forum of American scholars.
A symposium on the law-based state, pravovoe gosudarstvo, may by its very nature evoke chronological as well as analytical approaches to the subject. That the former should occur is fortuitous, for histories of Soviet law are lacking.1 Eugene Huskey’s paper—well-written, coherent, and historical—focuses on pravovoe gosudarstvo in a generally familiar context. His concluding remarks about the Soviets’ having professional and technical problems and various institutional, cultural and philosophical impediments for creating a law-based state are, in some respects, detailed in other papers.

What more should be said about nearly three-quarters of a century of Soviet legal development and the place of pravovoe gosudarstvo in it? Clearer and fuller definitions for one thing. Huskey appears to define pravovoe gosudarstvo in essentially positivist terms—"independence of the judiciary, the right to counsel, and the protection of citizens from bureaucratic abuse." Perhaps more ought to be said. Sharlet, elsewhere, sets forth five points, which generally are broader in scope: 1) law’s mediating role in disputes; 2) a legislative process reflecting societal aspirations; 3) carefully crafted, workable legislation; 4) an independent judiciary; and 5) constitutional government.2

Huskey has engaged the subject as much in Soviet as Western positivist terms—law as zakony, or legal rules, absenting reference to a higher authority such as natural law and to the historical school. Harold Berman, who has treated this and related matters in two recent papers, will doubtless speak to them at this conference.3

Related to these jurisprudential niceties is the question of justice. Are a law-based and just state one and the same? Not really, if we stick to a narrowly-defined positivist definition. Justice is quite as forthcoming in a "primitive" society where law likely is based on custom as in an "advanced" one where legislation is sacred. Susan Reynolds has written convincingly on this theme in assessing European law as it functioned between 900 and 1140, in accord with intelligent collective activity.4 Soviet legal positivist thinking on the other hand, is amply shown in V. Savitsky’s response to the question why a new [criminal] law: "Any law—whether it regulates society’s political, economic or cultural life—inevitably becomes outdated. Philosophically speaking, a law becomes obsolete the day it is enacted."5
This notion of a just state is certainly pertinent to any assessment of праvовoe государствoe. Three or so decades ago Harold Berman suggested that "the Russian revolutionaries were not interested in creating, ultimately, a new legal order in the external positive sense; they were interested in creating, ultimately, a new sense of justice, as between man and man."6 Huskey has shown us that such utopian notions, however officially abandoned, periodically resurface.

Should human rights, ethnicity, environment and health, and the myriad of other issues that affect the Soviet quality of life and figure into the notion of a "just state" serve as criteria for judging праvовoe государствoe? The relationship between human rights and a law-based state is obviously a crucial one. Louise Shelley in her present paper credits Andrei Sakharov for contributing to a legal culture so necessary for a law-based state. Are the ingredients for a human rights program and a law-based state one and the same? Peter Juviler recently catalogued 1) social and economic rights; 2) those of nationalities; 3) a political culture capable of spawning democratic rights; 4) acceptance of a legal theory of human rights; 5) engagement in international human rights cooperation; and 6) protection of political and civil rights. Juviler’s enumeration and Sharlet’s of the necessary ingredients for a Soviet civil society—the existence of a market and a less "interventionist" state as its guarantor—show how inextricably intertwined concepts of a "law-based society," human rights, and "civil society" really are.7

Huskey’s paper did not mention ethnicity and federalism; yet they are of crucial importance for Soviet law. At this very time (late May 1991) nine republics—Russia, the Ukraine, Byelorussia, Kazakhstan, Azerbaijan, Tadzhikistan, Turkmenia, and Kirghizia and probably Uzbekistan—are hammering out an agreement that may fundamentally change the structure as well as the name of the USSR. The resultant decentralization and redistribution of authority and dropping of "socialist" from the state title—a resounding retreat from both Leninism and Stalinism—still leave unanswered the future of the remaining six republics. Andre Loeber has articulated the relationship between international law and a law-based state when he quoted in his present paper those who see a fundamental incongruity between a law-based state and one (i.e. the Baltics) built on illegal foundations. Paul Gobel’s comment that "two sets of rights are coming into conflict: the individual rights of citizens and the collective right of nationality groups to self-determination" carries implications for appraising the law-based state and the prospects it holds for Soviet federalism.8 In a related matter, Soviet law scholars generally have not troubled themselves to distinguish between all-
union and union republic law and constitutions because the differences were slight if they existed at all. This, too, will pass as republics acquire greater sovereignty.

Social justice with its implications for pravovoe gosudarstvo awaits resolution of the catastrophic environmental and health problems, continuing housing and food shortages, and rising crime—all of which testify to the failure of the grand Soviet scheme to change human nature and create a just society. What we are talking about here is a Soviet culture that is receptive to legal reform, for in the final analysis, the recipients of the law are no less important than the law-givers and practitioners.

Louise Shelley, especially, among others at the present conference, has spoken to this matter of a legal culture. They agree that the improbability of pravovoe gosudarstvo’s taking root is the consequence of its seeds having fallen in a barren legal culture. Charles Radding, a medievalist, has dealt with such a problem by attempting to assess the mentalities—the quantified measurements of attitudinal change which have cultural implications. He has drawn on the cognitive thinking of Jean Piaget and Lawrence Kohlberg. Should we, as Radding has done with regard to a medieval legal culture, ask questions about the cognitive theory of moral development—i.e., the cognitive/intellectual level of Soviet law? Does Piaget’s dictum that a lack of interest in intent as characterized by children carry over into law? Is there a parallel when a people are subjected to a willful “parent” and required to obey external rules without any possibility of ascertaining the motives that generated them? Radding believes so: "The reliance of young children on objective moral criteria carries over into their attitudes toward rules. Unable to grasp the intention of the rule maker, they interpret rules literally and do not vary them to meet circumstances." Only in maturity are the rules of the elders replaced by law emanating from a sovereign people. Lawrence Kohlberg suggests several stages beyond Piaget—stages in which the young adult substitutes respect for others’ opinions and, eventually, concern for human rights and universal principles of justice for the earlier stages of moral reasoning.

Can such cognitive theory for individuals be translated into societal ones? Is it accurate to state that totalitarianism’s legacy of stultifying economic stagnation, scarcity, repression, and a broadly shared experience of incarceration will inhibit Soviet citizens’ achieving a pravovoe gosudarstvo? Unquestionably, a pervasive cynicism and perhaps malaise has appeared in the aftermath of the Great Experiment’s failure.
Finally, papers in this symposium appear not to have scrutinized the shifting sands of Soviet legal reform since 1985. Robert Sharlet once called Gorbachev's legal policy "hesitant and improvisational," one having a "frequent ad hoc quality and retrograde motion." More needs be done to show how Gorbachev initially appeared to follow Brezhnev, then retreated, and finally began curbing the Party and by doing so sanctioned the drive toward a law-based state.

It is appropriate to conclude on the manner in which President Gorbachev followed an uncertain course at the outset of his general secretaryship. Lately, we seem to have more of the same. Throughout the spring of 1991, it appeared that this conference theme was passe, that Gorbachev had cast his lot with the conservatives and old Party stalwarts who had little use for pravovoe gosudarstvo. Now after an historic reconciliation (Will it always be thus?), the president has turned to the reformers once again and by implication breathes new life into the notion of a law-based state.
NOTES

1. See also Robert Sharlet, "Soviet Legal Reform in Historical Context," Columbia Journal of Transnational Law, 1990 No. 1, 5-17. Under the rubric of "Delegalization and Relegalization in Soviet Legal Reform" Sharlet shows the historic tensions between the two.

2. Ibid. 14-15.


10. For recent comment on health and environment see Murray Feshbach, "Social Change in the USSR Under Gorbachev: Population, Health and Environmental Issues," Five Years that Shook the World, 49-60. For the same on crime and criminal law reform, see Robert Rand, Comrade Lawyer, Boulder 1991.


12. Ibid, 582-583,