Crisis in the USSR: Are the Constitutional and Legislative Changes Enough

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Roundtable Discussion

Crises in the USSR: Are the Constitutional and Legislative Changes Enough?

[The Cornell International Law Journal hosted the Symposium conference on February 16 and 17, 1990, in Ithaca, New York. The Roundtable Discussion, the finale of the conference, brought together European, Soviet, and American voices to comment on the most recent changes and the viability of Gorbachev's legal reforms. Less than two weeks before the Symposium, the Communist Party announced it would eliminate article 6 from the Soviet Constitution, which provided for the Communist Party's political monopoly within the Soviet system. Gorbachev continued to enlarge the powers of the constitutional presidency. In this atmosphere of reform, the depth and speed of which continued to surprise the world, the participants gathered to debate.

Whereas the articles of the Symposium focus on both new laws as well as the constitutional amendments, the Roundtable Discussion heavily emphasizes the latter. The amendments to the 1977 Constitution of the USSR provide a new structure under which laws may be promulgated. To what extent is this new constitutional structure linked to Gorbachev's success as a leader?

The Soviet Union is learning to operate as a State under the rule of law. How viable is such a concept in the Soviet context? Can the Soviets develop a legal culture? Can Soviet Communist ideology withstand such a culture? Gorbachev has laid the political path for democratization and now must find ways to harness new freedom through law. Will these laws have meaning beyond the paper on which they are printed? The panelists delve into history to find parallels. They speculate on the future. They examine the present.

All the authors contributing articles to the Symposium participated in the Roundtable Discussion. In alphabetical order they were: Igor N. Belousovitch of the U.S. Department of State, Vlad...
mir N. Brovkin from the Kennan Institute, Herbert Hausmaninger of the University of Vienna Law School, Serge L. Levitsky of the University of Leiden College of Law (the Netherlands), Leon Lipson of Yale Law School, Peter B. Maggs of the University of Illinois College of Law, John Quigley of Ohio State University College of Law, and Robert Sharlet of the Political Science Department at Union College.

[Olga A. Diuzheva, Professor of Family and Civil Law at Moscow State University Law School, joined them and added insight as a Soviet legal scholar as well as a Soviet citizen. Myron Rush, Professor of Government at Cornell University, served as moderator. Professor Alfred C. Aman, Professor of Law at Cornell Law School, provided introductory remarks.]

PROFESSOR AMAN: Welcome to the Roundtable Discussion, the finale of this very exciting conference. I would like to take this opportunity to thank all of our participants, the most distinguished international, interdisciplinary panel. They have provided us with a number of stimulating papers. They have, indeed, been shooting a moving target, but I think those of you who have been with us from the beginning can say the participants provided us also with an intellectual framework that will help us to assess the changes in the past and the changes yet to come.

Our moderator today is Professor Myron Rush. Professor Rush has been with the Government Department of Cornell University since 1964. He is a world renowned expert in Soviet Studies. He has written several books and has been a consultant to the State Department and the CIA. Without further ado, I'll turn it over to Professor Rush.

PROFESSOR RUSH: Thank you. We have had the benefit of very knowledgeable discussion of the legal perestroika and the whole reform process over the last two days. We now need to consider a series of polarities which may determine how successful these reforms will be.

On the one hand, there is the attempt to set up a Rechtstaat, a rule of law. On the other hand, we are witnessing to some extent a breakdown of law as evidenced in the daily papers. There is pragmatism and counterposed ideology in Gorbachev's approach, as we were told this morning.

1. Alfred C. Aman, Jr., Professor of Law, Cornell Law School. Director, Cornell International Legal Studies Program, Faculty Advisor to the Cornell International Law Journal, 1989-90.
We should also consider whether Gorbachev may have a goal in mind and whether that goal is not only different from that envisaged by Marx and Lenin, but maybe even radically opposed to it.

Finally, I think it is one of our central purposes in this panel discussion this afternoon to try to bring things together and to consider the wider socio-political context in which the legal perestroika has to be enacted.

I’ll pose certain questions which I think should help us to get to this central issue and simply ask for volunteers from the panel for contributions in discussing those questions.

The first question I thought we might begin with is whether legal perestroika is compatible with the other broad goals of perestroika. This includes the question of ideological continuity and discontinuity and whether there is a Party line which can still be followed. I’ll ask for volunteers to begin the discussion. Professor Sharlet?

PROFESSOR SHARLET: Apropos to the first part of the question, Professor Rush, is legal perestroika compatible with the other goals of broader perestroika? I would say yes, not only compatible, but absolutely essential.

Gorbachev, a lawyer, a graduate of Moscow University Juridical facility who has as his right-hand man Lukyanov, has said repeatedly in the last five years that it is absolutely essential to build a juridical scaffolding around the broad process of perestroika in order to institutionalize it.

The problem I was talking about yesterday is that the scaffolding is not really in place effectively and, as a result of institutionalization, is lagging behind. Gorbachev does see legal reform as essential to the institutionalization, or what he would like to call the irreversibility of his broader reforms.

One final comment to this effect, I can’t think of another Soviet leader who has such a high sense of legal efficacy. That is, efficacious use of law to achieve change. That’s hopeful and that’s interesting. That’s against administrative control methods but the other side of it is that Gorbachev, who after all has been away from law for many years, doing agricultural work, Komsomol work, doesn’t seem to have any sense of the limits of legal action. He seems to feel, as you may know, every time a crisis occurs and he gives a speech, he’ll drop a phrase, “We’ll pass a law on this.” As if that alone will suffice to deal with the problem.

3. Robert Sharlet, Professor of Political Science, Union College, Schenectady, New York.
5. Komsomol is an acronym for Komunisticheskiy Soyuz Molodyozhi, the Communist Party Youth Union.
PROFESSOR LEVITSKY: I would like to address the second part of the question, namely whether there is an ideological continuity or aberration.

I think that the question itself begs other questions. Namely, an aberration from what? What is a Party line here? Marx's ideology stopped with the overthrow of the old regime and the proletarian revolution. As to what happens afterwards, he did not say, except in broad outline.

In that sense we can say that Lenin's, Stalin's, Khrushchev's, and Gorbachev's Party lines were all legitimate because Marx didn't give any instructions. As long as the General Secretary kept his own Party line, whichever he chose, he did not specifically contradict anything that Marx said.

Since Marx left no blueprint as to what happens after the overthrow of the bourgeoisie, you cannot speak of an ideological continuity if everybody is on his own. Gorbachev right now is following his own Party line which he himself admitted has to be subject to change. Life itself will formulate the changes in the Party line.

PROFESSOR RUSH: I wonder if I can pose a follow-up question. You counter-posed pragmatism and ideology, which suggested that Gorbachev does not have a design for the emerging state of society. This is certainly one possible interpretation of what's been happening. His programs have been very fluid. It is possible, as you suggest, that he's simply adapting his program to developments as they occur. But I would wonder if, perhaps, in light of some of the recent developments in the last several months, it might not be considered whether he doesn't have a goal and perhaps has been working towards it quietly for several years, a goal quite distinct from the goal of Marx and Lenin.

Lenin's idea of a vanguard Party is clearly now inconsistent with the program that Gorbachev has put forward. So, is it possible, do you think, that Gorbachev has been a crypto-anti-Leninist for some time and has in view a program that's basically inconsistent with the Leninist program?

PROFESSOR LEVITSKY: I think that Professor Lipson put it best yesterday when he said that Gorbachev is formulating a program and maturing on the job. He started out without a set program. He was almost a classical apparatchik, with higher intelligence than the average apparatchik, with a certain amount of discontent, and with ideas about what should be done. He dis-

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6. Serge L. Levitsky, Professor of Law, University of Leiden, School of Law, The Netherlands.
7. Leon Lipson, H. R. Luce Professor of Jurisprudence, Yale Law School.
cussed it with his classmates and, even then, was not quite in agreement with what was going on.

So definitely, he had some reforms on his mind. Whether they were organized at that time as they are now, or seem to be, I doubt very much. As Gorbachev progresses though, he certainly has tried to create a new model for political and ideological circumstances which continue to change.

I refuse to believe that when Gorbachev came back from Lithuania and stated, “Well, it’s not a tragedy,” he was referring to the abolition of the constitutional status of the Party. I refuse to believe for him it was not a tragedy because, after all, his original idea of renewing socialism included Party supremacy.

Now, if the Party can no longer have a say, then he will have no longer have a say as to which direction it will take and what kind of niche it will assume and, therefore, he doesn’t know where it’s going to go. He’s pragmatic enough to go along with it, but whether he can be very happy about it is unclear. It’s something that was not part of the original perestroika.

I don’t think he had the basic agenda which he is now trying to fulfill, nor could he have foreseen everything. The first wave of reforms — the traditional reforms to correct shortcomings in Soviet society, reform of labor discipline, policies on drunkenness, the extraction of unearned income — were traditional concerns addressed initially by the Party. Gorbachev did the same thing.

PROFESSOR LIPSON: My memory goes back to November 7, 1967, the fiftieth anniversary of the Bolshevik revolution. In the main corridor of the Sterling law buildings at Yale Law School, someone, not I, had put up a large poster saying “The Yale Law School congratulates the Politburo of the Central Committee of the Communist Party of the Soviet Union on the achievement of fifty years of the union of politics and law.” Their irony was directed perhaps more at some ideology in Yale Law School than at ideology in Moscow, but there it was.

Certainly, at least until now, the idea of a legal order above the vicissitudes of Party politics, a legal order in which it is the business of politics at some level to protect against politics, has not taken root in the Soviet Union. Law as a means of ordering the society, of regulating conflicts, even of carrying out policy has not been one of the most vigorous vectors in the Soviet State. That’s shown by the resources devoted to the training, housing, promotion of, and attention to persons in the law. It’s shown in the way non-lawyers behave toward the law.

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We mentioned yesterday the way in which rule of law for a long time in the Soviet Union, when it was attended to it all, was thought of as administration by means of law. That is regularity, law as a more efficient way of promoting uniformity and calculability, reliability, Weberian rationality in the carrying out of policy. That is, they had no room for the Western or North Atlantic myth of individual rights and legal constitutional order transcendent over the policy leadership of the country.

Let me, if I may, Mr. Chairman, make a few other little comments bearing on this. First of all, in addition to what we have heard yesterday and today, very thoughtful comments from all of the speakers, it seems to me with Gorbachev we have to bear in mind that he needs time to adjust the level of expectations and demands so that he doesn’t seem to be losing, so that he can give, ground without having to admit that he’s giving ground or adjusting the line.

In War and Peace, there is a general whose chief merit is that he seems to have planned everything. No matter what happens, he can adjust it to fit what seems to be his stance. So, he’s an element of rationale, an ostensible or apparent rationality or planfulness. There’s something like that about Gorbachev. Though at the same time, he did take office impatiently and wanting to, if I may, borrow a Kennedy cliché “get this country moving again.” The law is a way he thinks of to get it done.

The last thing I want to point out, Mr. Chairman, at this stage is we have to allow — it’s so obvious a fact that it tempts us to forget it — that they have an enormous country, very large population, very large area. All of the resources of technology are stretched to their limits and they don’t have unlimited resources of technology in order to simply get and keep control over what’s happening in the country, even apart from a crisis period such as we can all see that’s going on now.

The Soviets have been very attentive to centralizing devices. Look at all the importance attached to the procuracy, to the army, to, above all, of course, the Party, to control instruments often multiplied one on top of another. Some people would like the law to be used in a modernizing state as one of those centralizing cohesion-promoting mechanisms, especially if Party control is weakened as we have all heard it may be.

The regime’s attitude toward the law and the role of legal perestroika in the many competing policies and tendencies now jostling one another in the Soviet Union is a very complex relationship. They don’t want the law to interfere with policy. They are beginning to think of the second order policy of promoting the law for the sake of the first order policies. They want to keep control of

the law in order that the law will control the centrifugal tendencies in the country. It's difficult.

PROFESSOR BROVKIN: I want to come back, if I may, to the question that was raised earlier concerning two aspects; first, whether the current ideology is an aberration or shows continuity; and, second, whether Gorbachev had a plan, whether he had an actual strategy.

Back in 1986, we posed the same questions at one of the discussions at the Russian Research Center in Harvard, and at that time the consensus was that he didn't have any plan, that Gorbachev was experimenting with some cosmetic changes and nothing substantive was going to come out of it.

I did believe then, but now I even more strongly believe that he had a plan. It seems to me that if we imagine how Gorbachev must have felt about things in 1984, it wouldn't be too much of a speculation to suggest that he saw pervasive corruption.

He was very much informed about what was happening. He knew that the system was stagnant, corrupt, and unmanageable. He was brought in by Andropov with a kind of iron-fist team to clean up the mess and make the system move again without knowing where or how. But at least it was a group of people who were perceived as disciplined, incorruptible, and energetic. He was jumping on tractors and shaking the hands of collective farmers even then.

It seems to me that Gorbachev was already then pretty much thinking how to destroy the Party bureaucracy and the corrupt officialdom that had a grip on the economy. That, I think, is quite clear. In that sense, in response to Professor Levitsky, he was out to destroy the Party apparatus when he came to power.

What comes after that I believe he didn't know and that he started the process of shaping as it went along. Then the question of a multiparty system arose. It was not a surprise to me that he announced two weeks ago that he is going ahead with the abolition of article 6, and I do not think this was simply a response to the Lithuania initiative.

12. Vladimir N. Brovkin, Resident Scholar, Kennan Institute 1989-90. Assistant Professor, Harvard University.
13. See supra p. 379.
14. See id.
15. See supra p. 380.
The abolition of article six fits into Gorbachev’s plan to introduce a multi-party system, the temporary substitute of which has been glasnost.

I remember a couple of years ago Gorbachev gave a speech that somehow went unnoticed where he said, “Comrades, some people” — he didn’t say he believed it — “really think it’s actually very useful and productive to have a multiparty system. Opposition parties play a very vital role, very useful role, because there is a counterbalance there and maybe the comrades wish to think about that, too.” And then he said, “Of course, historically it so happens that Russia has a one-party system. So, since we cannot have opposition, we are going to have glasnost play the role of an opposition.” And that reasoning was present already. The evaluation of an opposition party is something positive and necessary and good. Since there are none, we are going to use glasnost as a substitute for the real thing.

That brings me to my conclusion. It just seems to me in a sense there’s continuity in Gorbachev’s growth. He came out as an anti-corruption apparatchik, but then he kept on moving towards — as paradoxical as it may sound — towards pure Leninism in the sense of Lenin and The State and Revolution.\(^\text{17}\) Give power back to the people, the Soviets. In that sense, he was a Leninist.

But then, when he started building the legal reform, he grew out of Lenin, he became a Martov. He realized that Lenin was the author of the monstrous system that he emerged out of. So he came more to sound like a social democrat. It seems to me that now he’s on the verge of abandoning social democracy and moving towards constitutional democracy and accepting capitalism. Thus, Gorbachev’s reform amounts to an aberration, a complete break with the Leninist tradition.

PROFESSOR DIUZHEVA:\(^\text{18}\) This is very interesting to compare Gorbachev first with Lenin and then with Martov. I never heard about it before. I like it. There’s something in it. In the USSR, a lot of people who are now in opposition to Gorbachev consider that he was an anti-Leninist, even when he started perestroika. They considered that he was prepared enough and wise enough to know how the events will develop. When he started the perestroika, he realized that he was going to produce some kind of state which would be far from a socialist state. Well, I don’t agree. Yet, I do agree that his views and expectations changed during this very sophisticated process of perestroika.

He just treasured Leninism. He considered it and he really believed that this theory works, and will work in our country. When he changed his mind, it was difficult or impossible for him to declare that he doesn’t consider that this Leninist way is the best for our country now.

\(^\text{17}\) V. I. Lenin, The State and Revolution, (2d ed. 1943).

\(^\text{18}\) Olga A. Diuzheva, Professor of Law, Moscow State University, School of Law. Visiting Scholar, Cornell Law School, Fall 1989.
His situation is so sophisticated that it is difficult for him now to say, "I have been mistaken up to now." Our society likes a strong leader who just has a hardline opinion on all issues and pursues his policy in just the same way. The biggest problem for Gorbachev now is just to declare — to show everybody — that his expectations and our common expectations of perestroika failed; that we are starting a new phase based on some other ideological basis.

It is sometimes very difficult to tell the truth. He is faced with many moments when he must do it. He must assess events as they really are. He must declare that now, perhaps, for this period of time, Leninism doesn't work. We must look for something else. Not forever, but just for this period of time.

PROFESSOR RUSH: Professor Brovkin suggested that Gorbachev now appears to be a constitutional democrat. That provides a lead into the next question: whether Gorbachev's efforts to strengthen his personal power pose dangers to legal perestroika? Are his efforts to build up the presidency and to acquire special powers for this office consistent with his program for legal perestroika? More particularly, are those goals consistent with the idea that he may be a constitutional democrat?

MR. BELOUSOVITCH: Two weeks ago at a roundtable, just as this one we are having here now, Professor Mishin of Moscow University made the following observation: "[w]hat is the role of power here? Our people who grow up under conditions of totalitarianism or absolutism have grown accustomed to thinking of strong power as one which lashes, beats, and jails. But this is a very weak power." Then he goes on to criticize the legislative assembly as being an imperfect concept which needs further development. And he concludes with the remark, "Let us state bluntly, the country needs a president with full rights."

Now, the Soviet media refers to Gorbachev as president in a routine way. But it seems to me that that office is a very imperfect presidency. Although it has a five-year term, he's not elected by the people, and he can be removed by the Congress of People's Deputies at any time, his five-year term notwithstanding.

So, it's only a halfway step towards a presidency. Now, I'm sure that all of us appreciate the fact that there is a wealth of difference between parliamentary politics and presidential politics. Technically speaking, the Soviet Union has a parliamentary model, although it's been run by a single party. But a shift to a presidency would have the immediate effect of diminishing the role and the power of the Communist Party itself. The president, even if he is a member of a majority party, once he is in office may dis-
cover that there is a distance between himself and his own party. He will become an independent political agent with specific constitutional powers. It would mean, really, the end of the Communist Party and this authority as we know it today.

In addition to diminishing the role of the Party, it would transfer the authority from a Party concept to the state itself. If, as it seems at present, Gorbachev is trying to shift the base of his power from the Party to the state, it's not only a difficult political maneuver, but also a unique political maneuver. I was thinking what would be the closest historical analogy to this and it occurred to me that perhaps it would be when Constantine the Great shifted his capital from Rome to the city that ultimately took his name; it's a watershed of that magnitude. The institution of a real presidency would terminate the revolutionary period and open a new chapter in the history of the Soviet Union.

Now, this course of action is not without risk. No matter which way he turns, he faces horrendous risks, but it seems to me that this is a step in the right direction. If we are talking about Gorbachev's efforts to strengthen his personal power, I assume that what is meant here is precisely this shift to a presidency where he would be directly elected by the people and be accountable to the people. The power that he would exercise would be a constitutional power as spelled out by the future Soviet Constitution.

PROFESSOR RUSH: Your comment suggests that there's real compatibility and that the shift of his political base to the new office of President is consistent with the furtherance of legal perestroika. I wonder if there might not be some grounds for concern. For example, there's been discussion in the Party platform of a need for a separation of powers. The principle has been accepted and at the same time, it's suggested that the president will be responsible to the Congress of People's Deputies, which conflicts with the notion of the separation of powers. As yet, there is no really independent legislative body. The present Congress of People's Deputies, which is supposed to stay in office for another four years, is not a wholly independent body.

PROFESSOR MAGGS: Well, certainly the shift to a constitutional presidency has been in the works even longer than that which Professor Brovkin called the destruction of Party power. It is not a plan which by its nature you can announce with the old Party apparatchiks in place and I think there are a number of signs that Gorbachev formed that plan early and quietly and took its early stages rather quietly. I don't think there was any other way one could go about destroying Party power.

20. Peter B. Maggs, Corman Professor of Law, University of Illinois, College of Law, Champaign, Illinois.
To take an example of a quiet plan, the provision for worker election of factory managers clearly contradicted the old nomenklatura system where Party officials were supposed to appoint managers, and so forth. There were studies published in the leading Soviet legal journal around 1985-86 which examined semi-democratic elections in Eastern Europe. One study looked at Hungary where there had been a sort of reserved block for Party bureaucrats, and the legislature studies how big a majority they needed to do this and that, which obviously didn't matter in the old Supreme Soviet because you always got 100 percent.

So, someone was conducting studies. I think one of the things that Gorbachev did early on was try to assemble a Franklin D. Roosevelt type brain trust. Sometimes it may have been people in his brain trust who did the study, and they would later adopt it.

If we look at the transfer of the power in the system, we are going from a parliamentary system to a presidential system. The first step was the post-Brezhnev step from a Politburo plus dummy system to a Politburo plus real leader system, which was one intermediate stage that occurred really with Gorbachev. It might have occurred with Andropov if he had not been so sick, but that stage already occurred as the first stage. The next stage which moved the leader from the role of cardboard figure to real leader was the presidential stage. This could be an intermediary position toward a parliamentary stage some time in the future. But you can't get to parliament until you get rid of the Politburo and Party secretariat as central power authorities.

Creating a multi-party system, I think, is very much like planning a war or winning a football game. You just can't reveal too much of your strategy in advance. It's like saying the enemy commander has no plans because he hasn't told us what they are.

PROFESSOR HAUSMANINGER:21 I agree with Professor Maggs up to a point and this point is that the presidential system might be the only viable route for political development in the Soviet Union.

I think Gorbachev exploited the parliamentary system to its full extent during the past year. He was able to make use of the spirit of democratization. He was also capable of shifting responsibility to the Congress, telling people, look it's not all my fault, turn to your elected representatives, tell them what they should do. But this will go only for so long.

Now, he is faced with a crisis of the Party; his power base is crumbling under him. He is faced with elections that are coming up that will change the entire political landscape. And what is the

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21. Herbert Hausmaninger, Professor of Law, University of Vienna, School of Law, Vienna, Austria. Visiting Professor, Cornell Law School, Spring 1990.
future of the Party and the parliamentary system? What is the future of Gorbachev in a parliamentary system?

The way I see it is that the Communist Party will be one in a landscape of, perhaps, a dozen or more groups. A parliamentary system, given the European experience, has only a chance when there is a limited number of strong parties capable of forming viable, durable coalitions, and I think this is not going to happen in the Soviet Union. There will be something like the Fourth French Republic, and if you do not have the constitution of a Fifth Republic, you will run into deep trouble. Therefore, I think Gorbachev, in his art of staying a little ahead of times, is realizing the crisis of his political base, the Party, and the impending crisis of a parliamentary system and is moving towards a system of checks and balances with a strong presidency. This system will enable him to continue his political input and will necessarily be based on law. Therefore, I think, that law will be the basis of his power and that the further legal development will protect his power in a system that is closer to the Roman mixed Constitution and the present American presidential system than to Athenian parliamentary democracy which has taken root under different political conditions in European history.

PROFESSOR SHARLET: Just one further minute on this because I know we have other questions to discuss. I was just going to make the same observation, Herbert, that I think the model that they may have in mind is the French Fifth Republic. Before Gorbachev went to Lithuania, Soviet diplomats were already invoking the attitude of Lincoln. What did Lincoln do when Fort Sumter was fired upon and South Carolina left the union? Of course, we were all thinking at that time that Gorbachev would block any secession attempt.

He's changed his position. I would guess Charles de Gaulle would be a more apt role model. In 1958, de Gaulle was asked to come back during the Algerian crisis to rescue the Fourth Republic which was in shambles in France. He would not come back and preside over such a chaotic government; he insisted on a single seat, strong presidency modeled on the American presidency. And, of course, it works very well today with Mitterand, a socialist president with a separate parliamentary power. I think we're going to have a hybrid, an American-type presidential system with considerable power and a more traditional European parliamentary system.

But, I would add that there's probably one other role model that the Soviets may not have in mind, but whom they could favorably cite, and that would be George Washington. If you read the American Constitution and the documents of the Founding Fathers, they did not envision the presidency the way it's shaped today. We give Washington initial credit for enlarging, symboli-
cally and ceremonially at least, the conception of the presidency. The conception of the American presidency has grown organically over time as it has met challenges and overcome crises and I would guess that once he gets the presidency Gorbachev is going to add incrementally to his power, to create, in a sense, a stronger and stronger institution which will not be incompatible with our notion of things, except that we have a legal culture and the Soviets don’t.

PROFESSOR RUSH: Since I see a consensus emerging here that the shift towards the presidency and Gorbachev’s second request for increased powers for himself in a state office, I would like to take a contrarian position just for a moment and raise a question as to whether there may not be some tension between his notion of the presidency and his program for legal perestroika.

One point I would call attention to is that apparently the intention is to elect him to this position not on the basis of universal suffrage or a popular election, but rather to have him elected again by the Congress of People’s Deputies, which is not a wholly independent body. It raises some question as to what kind of mandate would be attached to the presidential office.

PROFESSOR LEVITSKY: I strongly support plans to endow the Soviet President with greater powers. Mr. Gorbachev, as Chairman of the Supreme Soviet, is in an anomalous position. First, he is not expressly designated as head of state by title. Second, his current position is incompatible with the principle of separation of powers. As head of state he should not also be the head of the legislative assembly. Third, under article 13(18) of the amended Constitution, the resolutions of the Chairman of the Supreme Soviet can be annulled by the Supreme Soviet itself. Furthermore, the Congress can annul the acts adopted by the Supreme Soviet under article 108. Thus, the president can currently be technically paralyzed in the exercise of his duties.

Fourth, I do not see why his present position is not that of the more powerful Chairman of the Congress of People’s Deputies which has wider jurisdiction than the Supreme Soviet. He currently presides over that latter body with the misleading title of Chairman of the Supreme Soviet. If the Chairman of the Supreme Soviet is also the “President” or “Head of State,” then his present position is not really compatible with a parliamentary government. Despite the constant references to “parliamentary government” which we have heard here today, “parliamentary government” simply means that the ministers and the head of government, the prime minister or chancellor, for example, are politically responsible to parliament. The head of state, the president, king, or

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emperor, for example, is not accountable in this way. Mr. Gorbachev does not, at present, have the rights and attributes reserved for heads of state for most European countries, including Great Britain, Germany, and France. And, certainly, he does not enjoy the powers of U.S. presidents.

Finally, and perhaps incidentally, many European democracies have adopted the practice of electing the head of state by the parliament, rather than by the entire population. This did not make the countries any less democratic. The supremacy of the legislative branch is often taken for granted, particularly in France under the Third and Fourth Republics. But nowhere was one person both the head of state and head of parliament, as in the Soviet Union today, at least de facto.

PROFESSOR RUSH: I think I'll pose one last question for the panel because we do want to open up questions to the audience. The question is in a sense the bottom-line question. What are the prospects for legal perestroika? How much progress can be expected in the next several years?

PROFESSOR QUIGLEY: I think there is a great deal of support for the concept of the legal perestroika. As I said this morning, I think the legal profession in the Soviet Union is probably playing an important role here. Lawyers have advocated these ideas for some time and now you have legal people at the top of the governmental system: Ryzhkov, Lukyanov, Gorbachev. These are people who I think absorbed the concept of the rule of law through their legal studies. That's not to say, of course, that the concept will necessarily prevail, but I think that the Soviets are moving to a point where the people are going to begin to see the rule of law as an important thing for the society to have.

Professor Lipson said that the Soviet people haven't yet developed the idea that law is above politics. I think there is a lot of history to overcome to develop that concept. Others here have alluded to the social democratic tradition, the "Cadet" tradition of politics in the early part of the century in Russia. There seems to be some drawing on that tradition at this point.

I think that Dr. Levitsky has raised an interesting question. I think that it is important to consider the role of the parliamentary body. In effect, the power is split between the Congress of Peo-

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23. John Quigley, Professor of Law, The Ohio State University, College of Law, Columbus, Ohio.
25. See supra pp. 381-82.
people's Deputies and the Supreme Soviet. Does that weaken the parliamentary body to the point that it can't really perform the function that we normally think a parliament should perform?

MR. BELOUSOVITCH: Professor Brovkin, I think, in his presentation made a very convincing case for the unpredictability of events during the next few years. I tend to agree with that. The Soviet State and society are in an extraordinarily fluid condition right now. We can formulate several scenarios of what may happen and we can make a plausible case for each one. But I honestly do not know, and I don't think anybody can say with any degree of certainty, the direction of future events. It's a fascinating period of history and all we can do is stand by and watch.

PROFESSOR MAGGS: Well, I see two great problems that legal perestroika faces. One, the economy and, two, the relation of the center to the republics.

For the economy, there is a sort of five-year plan already outlined in various government statements. The first step has to be a price reform because you can't set individual entities loose without reasonable prices. First comes price reform and then the creation of operational entities. Next is the move toward a market system. The big unknown, of course, is will they get there?

I think everyone is quite certain, for instance, that East Germany will get to a market economy within five years. How to construct a working market economy is rather well known in the legal profession. You know you need stock corporations, et cetera. The law I talked about this morning shows that there is no real secret as to what the legal institutions you need are.

In the case of the relation of the center and the republics, I think if the Soviet Union is to be preserved, a great deal of legal creativity is going to be needed. Here is really uncharted territory. I was reminded reading the gossip column at a newsstand about a famous couple where apparently the husband liked to think of himself as single but wanted the wife to think of herself as married. They need a similar situation for some of the outlying republics and the center to reach a compromise which will at least save face and manage to maintain something short of a horrendous divorce proceeding. But whether they can get it or not I don't know.

PROFESSOR LIPSON: I'd like to say a couple of words about the problem that occupied us a few minutes ago in the conflict between presidential and parliamentary government. A little bit of the difficulty, it seems to me, comes from the practice which we've


Lipson finds no inherent contradiction between a leader elected by parliament and presidential control of the government.

I remember the well known criminal law jurist Nikiforov who used to say, "We don't need to pass good laws so much as we need to follow the laws that we've already passed, good or not so good." The same point was made by a very different sort of man, the legal journalist Arkadiy Vaxberg, who foresaw that a number of the statutes that had been passed were in conflict with one another and, sooner or later, they would have to be regularized. Some statutes would perhaps turn up better forgotten.

With respect to the presidential-parliamentary conflict, it seems to me there is nothing inherently absurd or contradictory about a leader elected by the parliament, perhaps even having the title of the Chairman of the Parliament or the Parliament's Presidium, who nevertheless controls the government in a presidential way.

The formal reconciliation of these apparent contradictions could lie in the relationship between the terms of office of the members of the parliament and the president, the legislation or rules with respect to a vote of confidence, whether the president is subject to being brought down by a vote of no confidence, and perhaps also the rules with respect to impeachment. All this illustrates, in a way, the historical problem of the illegitimacy of the regime, the disorderly succession procedures, and the Party control or lack of control which, of course, is one of the main items on the agenda now. And it will take some time for that formal reconciliation to be regularized.

With regard to the intermittent mania for legislation, I recall a notorious speech made at a scholarly conference years ago by the then holder of the chair of criminal law in the faculty of law of the University of Leningrad, Mikhail Davidovitch Shargorodski. He got into trouble in that speech. One of the things he said was that the duty of the scholar is to tell truth to powerholders, even though it happens not to be the truth that the powerholders want to hear.

For example, said Shargorodski, suppose that the authoritative leaders in our country were to ask the splendid scientists who are in charge of our magnificent outer space program, "Can you take us to Mars next month?" The scientists would certainly answer, "no, we can't. The scientific principles are known, but the technology needs a lot of perfecting. There are problems of guidance and propulsion and disposal of wastes and physiological difficulty and re-entry problems, and all of those may, perhaps, be resolved with time and effort and expense. But, if you ask us, can we do it next month, we can't."

29. See supra p. 379.
But, what happens in the law? Politically authoritative leaders are rightly incensed at the practice of farmers feeding bread to cattle. And so they say pass a law making it a crime to feed bread to cattle. We don’t tell them that that’s not going to stop the practice. We work up the law and the law is enacted and it doesn’t stop the farmers. Shargorodski got into a lot of trouble with that.

My last point has to do with the way in which all of us are wrestling with the difficulty of predicting the fate of Gorbachev. I’m reminded of a pleasant little story from the early 1960s. A child asks mother, “Mama, tell me, when Lenin was alive, he was good. And then later, he was still good. He’s good now. When Stalin was alive, he was good. But now it turns out he’s bad. And now we have Khrushchev, he’s good. Will he always be good?” And the mother says, “When he dies, we’ll find out.”

PROFESSOR SHARLET: The prospects for legal perestroika will continue whether or not Gorbachev remains in power because the basic trend in the Soviet Union since the death of Stalin has been to greater and greater juridization of everyday life.

But, as to the prospects, I’m filled with a mixture of hope and despair: hope because the Soviets are visibly growing a legislative, legal culture and the new legislative bodies are becoming prolific producers of law; despair because of doubts as to whether Moscow’s writ runs beyond the suburbs in present circumstances. If it does run beyond the suburbs, is anyone out there listening to the new law given the prevalence of legal nihilism and the shallowness of legal culture among the mass public?

Finally, as we know, the courts in the Soviet Union have been dominated by political power for decades, via the telephone from Party headquarters. John Quigley has rightly outlined some important steps they took in December to try to insulate the courts from these pressures, but I’ll be the skeptic. I’m wondering if they really can disconnect telephone law.

PROFESSOR DIUZHEVA: I’m not sure that legal perestroika will be successful without Gorbachev. We just get used to living in our country in the shadow of a cult of personality. The attempt of Gorbachev now to strengthen his power is good because the duties and responsibilities of the so-called president, who is really president only of the Supreme Soviet, are not defined. Gorbachev is now this president. He is a very strange political figure because the job of president of Supreme Soviet was not a powerful one. Sometimes the Secretary General of the Communist Party also had the duties of this presidency.

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30. Professor Quigley spoke at the Symposium on February 17, 1990. See Quigley, supra note 24.
The president, by himself, was a powerless figure and his duties were only to sign the decrees of the Supreme Soviet and to meet new ambassadors of different countries.

Now Gorbachev doesn’t have any legal basis for his presidency and he needs to strengthen his position. If he will succeed in doing so, I am quite sure that our legal perestroika will progress rapidly without any problems because Gorbachev initiated it and he’s personally interested.

I wish Mr. Gorbachev to live a long life but we are all human beings. If something happened to Mr. Gorbachev and another person, some hardliner, took his place, with all the broad duties of a president, I’m not sure that legal perestroika would be successful at all. We can’t imagine Yeltsin being a president. I would fear for legal perestroika if, for instance, Yeltsin became president or a hardliner. So, I’m not so optimistic as you are, Professor Sharlet.

PROFESSOR HAUSMANINGER: Professor Lipson remarked very aptly yesterday\(^3\) that the rule of law may be too important to be entrusted to the lawyers. He must have been thinking of practicing lawyers, not the law professors.

The leading European legal scholar of the 19th Century, Friedrich Karl von Savigny, exhibited the same sort of distrust towards the legislatures. Law, according to him, was to be developed by the judges and the professors. I have mixed feelings about Russian judges. I feel more secure with Russian law professors.

They have in mind a pravove gosudarstvo which is a direct translation from the German Rechtstaat, a notion of nineteenth century German legal scholarship that rests on the shoulders of two thousand years of European law made and shaped by the universities, by the law professors. And, indeed, it takes the enthusiasm of the law professor to nurture and promote this unpopular idea. They have been successful up to a point.

Take such an unlikely prospect such as an international law developing. Where would it be today without professors believing that it does, in fact, exist without constantly projecting their wishful thinking ahead of the political development and forcing politicians to follow and fit the mold? A Soviet legal culture will not be created overnight, but I place my trust in the Soviet law professors and Gorbachev’s ability to follow their lead.

PROFESSOR BROVKIN: I would like to end on a note of caution and skepticism. To put it in colorful terms, can you imagine President Bush coming to the United States House of Representatives or the Senate and interrupting Congressmen and Senators, telling them you have one minute, you have half a minute? No, you’re not going to talk about this, yes, you’re going to

\(^{31}\) See Lipson, supra note 8.
talk about that, and acting in the fashion Gorbachev acts in the so-called Soviet legislature?

What worries me about constitutional reform, in general, is that Gorbachev, as a politician, seems to regard everything as a process, and that has been very much a key to his success. Everything could be changed at any time. Everything is a process and you never know what the next step of the process is. Now, facing these law professors here, I dare not say much about the law, but it seems to me that there's something sacred about constitutions. You don't change them every day. A constitution is something there to stay, something to be respected, something that you guide your morality on. And it seems to me that if you regard a constitution as something that could be changed at any time, at any convenient moment — today Gorbachev is the chairman, tomorrow he wants to be a president — who knows, maybe when two terms of the president are up, he wouldn't want to be the "President" or the "Chairman," or some other term that will be invented to suit his purposes. So, I don't like the personal approach of Gorbachev. He seems to shape institutions around his needs.

It reminds me, for example, in 1962, Chancellor Konrad Adenauer also wanted to promote his stay of power and was playing with the idea of turning the German chancellorship into a French presidency. And the German politicians and parliamentarians told him, no, you can't do that. We are not going to play with our Constitution to such an extent. We have created institutions that are there to stay. Chancellor is chancellor, president is president.

The final note is that it seems to me that the Russian tradition, if there was any tradition, at least in 1917, was that you had a legislature, you had a minister-president on the Prussian system who was pretty much a prime minister in the British sense, and a government responsible to the legislature. The head of the legislature, like Gorbachev now is, has no precedent in the Russian tradition. It seems to me the reason Gorbachev likes the French or the American presidency is that it makes him free from control. In America, though, there is a strong 200-year tradition of division of powers. The president cannot do certain things to the Congress. It's just not done. It's unacceptable.

Gorbachev allows himself all kinds of things in regard to the legislature. I think it's a dangerous trend if he creates what we would perceive as an American presidency in Russian conditions. It would be an uncontrollable, powerful position that would make it possible for Gorbachev to exercise dictatorial powers.

PROFESSOR LEVITSKY: I wonder, if I may, make just two brief remarks. One, Professor Brovkin's attitude towards constitutions, of course, reflects very much the American view towards the
The flexibility of the Soviet constitution under Gorbachev can be viewed in the context of frequently changing European constitutions.

An amendment of December 1988 reduced the Presidium's power and created broader powers for the Chairman of the Supreme Soviet.

Constitution, where nothing should be changed unless there is an amendment, which is very difficult to achieve.

However, this is certainly not the traditional attitude towards constitutions in Europe. In France, by the time de Gaulle came to power, there already had been thirty constitutions since the revolution. The standard joke was that if you wanted to consult a text of let's say the fifth French constitution, you went to the Bibliothèque Nationale, the national library, and they would direct you to the periodical section. The idea was that a constitution should be amended to reflect the current trends of society, not to continue something that has outlived its usefulness and its meaning. I would not be as rigid on constitutions and on the meaning of constitution. The Soviet Union may elect to follow the French example and not necessarily the American example.

Second, I think there is some misunderstanding about Gorbachev's present position. Until December 1988, the official title of the Soviet chief executive was Chairman of the Presidium of the Supreme Soviet. The Presidium was an important body because it actually was the embodiment of the collective leadership. And the Chairman of the Presidium was only the primus inter pares, the first among equals, and he had to consult with the others.

This changed in December 1988. An amendment was introduced under which the role of the Presidium was downgraded. So the Presidium still exists, still has internal powers within the country and within the parliament, but it no longer has the comprehensive powers that the Presidium had before the amendment.

The Chairman, often referred to as President of the Soviet Union, is no longer the Chairman of the Presidium, but the Chairman of the Supreme Soviet.32

PROFESSOR RUSH: At this time, we will take questions from the audience.

PROFESSOR BARCELÓ:33 No one has made any reference throughout the day to the Soviet military. I am curious about what role they could conceivably play as things unfold in the Soviet Union. What could one say about the role the military might play? It's clear the farmers don't listen to the law, does the military listen to the law? How does the military decide what authority to respect?

PROFESSOR BROVKIN: The Soviet military is as divided as the rest of Soviet society. We know more about them now than we have for some time. I have just a couple of brief points.

32. Article 120, paragraph 1, of the amended Soviet Constitution states that the Chairman of the Supreme Soviet of the USSR is the highest official of the Soviet State and represents the Union of Soviet Socialist Republics with the country and international relations. Konst. SSSR, article 120, para. 1, (1988).

First, the Soviet military is weaker than it has ever been throughout Soviet history. Its esteem in the population is the lowest it has been; its resources, its morale, its disarray, the humiliation of defeat in Afghanistan, the low pay, and the lack of equipment are all problems. Most importantly, national strife is really tearing the Soviet Army apart. The soldiers group by nationality in the Soviet military: Ukrainians stick with Ukrainians, Belorussians with Belorussians, Russians with Russians, let alone non-Slavic people. The hostility between all these ethnic groups is tremendous. The horrifying stories in the Soviet press about the hard-to-translate gettovshchina, which is the abuse of young soldiers by junior sergeants and others for all sorts of purposes, including exploitation of their labor, and in some cases, sexual exploitation, as well. In other words, the Soviet military is in a deep crisis. It is hardly a fighting force.

Another important statistic: forty percent of recruits, conscripts, are from central Asia, which makes them practically unusable and unreliable in seven of the fifteen Soviet republics. Now, I think all this indicates that in any protracted struggle, the Soviet military is going to fall apart like the Romanian military did. However, in a very short strike operation they could be used and could be effective, as long as it’s short, as long as it’s not more than a week long. But, if it does extend to anything more than that, it’s going to crumble into pieces, like everything else.

MR. BELOUSOVITCH: I have just one comment, if I may to add to what you said. There was a very interesting statement made by Marshall Yazov in connection with the suppression of ethnic conflict in the Caucasus. He said that he does not welcome the use of the armed forces for the restoration of internal order.

The army does not have the stomach to be used to fire on its own people. I think Yazov understands full well that this would lower morale still further. There were already some instances reported of troops refusing to fire. And the same thing happened in Romania at one point.

I think the army realizes that the use of the armed forces to repress their own people would have a devastating effect, both on the unity of the army, on the relationship between commanders and enlisted men, and on political unity of the country. I think this statement by Yazov was both unusual and very suggestive as to the dilemma of the armed forces.

PROFESSOR DIUZHEVA: I’m not sure that our army forces are so weak as Professor Brovkin considers them to be. The events in Tbilisi this spring showed that the army is good enough to destroy this national movement, to smash any demonstration, to kill people, and to frighten people. It works. It did a job in a very bad way in Tbilisi; the army showed that it can used in these events and can achieve very sad success.
Yes, there are problems among the soldiers. There are problems in the military bureaucracy, but there is one interesting feature. When Gorbachev started to reduce the armed forces, the senior officers were expected to retire. But, the young officers of the Soviet army applied to be retired. All the old men wanted to stay in the army. All the young officers didn't want to continue their careers as military men, and it was very surprising. Nobody expected it. But still Gorbachev reduced the army.

In addition, he managed to maintain very good contact with the army. He is supported by the army. That's why his position is not so weak as some people consider it to be. If he encounters some problems from the opposition, the army is in his arms and it is strong enough to take care of all these national movements.

I don't know whether it's good or not, perhaps it is bad. It's not in the mainstream of perestroika. But if the President will want some help from army, he will get this help.

PROFESSOR RUSH: At this point I must call on Ms. Benjamin to make concluding remarks.

MS. BENJAMIN: When the Cornell International Law Journal planned this symposium beginning back in April of last year, we certainly couldn't have predicted the volatile situation in the Soviet Union today. Similarly, we cannot predict the legal nor political future of the Soviet Union. The Journal hopes that it has provided this audience with a basis for understanding future events in the Soviet Union. I would like to thank the participants for laying the foundation of that understanding and I would also like to thank you all for coming.

34. Pam Benjamin, Symposium Editor, Cornell International Law Journal.