

# FUNDAMENTAL RIGHTS IN THE SOVIET UNION: A COMPARATIVE APPROACH \*

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## INTRODUCTION

The Soviet Constitution guarantees many of the same fundamental rights as are guaranteed in the Constitution of the United States, plus several others as well. Indeed, these rights are described in greater detail and appear on their face to be safeguarded more emphatically in the Soviet Constitution. However, the mere existence of constitutional provisions for fundamental rights does not necessarily guarantee that those rights will be protected. Western scholars often point to discrepancies between rhetorical phrases in the Soviet Constitution and actual practices in the area of fundamental rights.<sup>1</sup> Soviet legal scholars insist, however, that such criticism should be aimed instead at Western constitutions. Andrei Vyshinsky has stated that it is precisely in the area of fundamental rights that "the contradictions between reality and the rights proclaimed by the bourgeois constitutions [are] particularly sharp."<sup>2</sup> Soviet legal scholars claim that bourgeois laws are replete with reservations and loopholes which largely negate their effectiveness in protecting fundamental rights generally, and those of the working man in particular.<sup>3</sup>

There is undoubtedly some truth in both claims, for, as Professor Berman has stated, "The striking fact is that in the protection of human rights, the Soviet system is strong where ours is weak, just as it is weak where ours is strong."<sup>4</sup> The full impact of this statement can only be understood by comparing the different approaches which

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\* The author wishes to acknowledge the helpful comments and suggestions of Dr. Branko M. Peselj, Professor of Socialist Law at Georgetown University, Colonel Bernard Ramundo, Professor of Soviet Law at George Washington University, Alexander Orlov, former assistant prosecutor and deputy chief of the secret police in the Soviet Union, and Whitmore Gray, Professor of Communist Law at the University of Michigan, each of whom read and commented on the manuscript at some stage of its preparation. Responsibility for the content, however, remains solely with the author.

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<sup>1</sup> Peselj, *Socialist Law and the New Yugoslav Constitution*, 51 *Geo. L.J.* 651, 669 (1963).

<sup>2</sup> VYSHINSKY, *THE LAW OF THE SOVIET STATE* 538 (1948) [hereinafter cited as VYSHINSKY].

<sup>3</sup> *Id.* at 553, 631.

<sup>4</sup> Berman, *Human Rights in the Soviet Union*, 11 *How. L.J.* 333, 334 (1965).

the Soviet Union and the United States have taken in dealing with the same problems. Such a comparison reveals striking differences in the attitudes of both countries towards their constitutions, and towards individual rights, economics and the judiciary. A full understanding of these differences sheds light on the nature of the protection of fundamental rights in the Soviet Union and the United States. It is the purpose of this article to explore the reasons for the differing results in interpreting and applying similar fundamental rights in the Soviet Union and the United States.

#### FUNDAMENTAL RIGHTS IN THE CONSTITUTION OF THE U.S.S.R.

The first Soviet Constitution, adopted by the Russian Republic in 1918, contained a section on fundamental rights in which freedom of speech, association, assembly, press, conscience, unions and access to knowledge, as well as equality of civil rights and the right to asylum were explicitly mentioned.<sup>5</sup> Since, as Lenin stated: "dictatorship presupposes the application of mercilessly brutal, swift and decisive violence to strangle the opposition of exploiters, capitalists, landowners and their hangers-on . . . ." <sup>6</sup> these freedoms were not proclaimed for all citizens without exception. Rather, according to Vyshinsky, "the Soviet Constitution frankly, and openly declared that [these rights were] granted only to the toilers . . . ." <sup>7</sup> Thus, no one who lived on income not derived from his own labor (*i.e.*, a private trader or middleman) could vote, nor could a monk, priest, policeman of the former regime or member of the former royal family.<sup>8</sup> These restrictions were thought necessary to prevent the bourgeoisie from using their rights for counter-revolutionary ends. For example, it was feared that they would use freedom of speech to slander the Bolshevik Revolution, freedom of association to set up counter-revolutionary organizations and electoral rights to fraudulently infiltrate the organs of state.<sup>9</sup>

The first Constitution of the U.S.S.R., promulgated in 1923, said nothing about fundamental rights. The guarantees in the constitutions of the several republics were apparently considered adequate.<sup>10</sup> Under the Stalin Constitution of 1936, however, an entire chapter, comprised of sixteen articles, was devoted to setting down the "Fundamental Rights and Duties of Citizens." By 1936, Stalin could claim

<sup>5</sup> VYSHINSKY 557; 1 HAZARD & SHAPIRO, *THE SOVIET LEGAL SYSTEM* 59 (1962) [hereinafter cited as HAZARD & SHAPIRO].

<sup>6</sup> Lenin, in Lapenna, *The New Russian Criminal Code and Code of Criminal Procedure*, 10 INT'L & COMP. L.Q. 421 (1961).

<sup>7</sup> VYSHINSKY 557.

<sup>8</sup> RSFSR Const. art. 65 (1918), discussed in HAZARD & SHAPIRO 59.

<sup>9</sup> DENISOV & KRICHENKO, *SOVIET STATE LAW* 320 (1960).

<sup>10</sup> HAZARD & SHAPIRO 60.

that the "exploiter class had been eliminated"<sup>11</sup> and these rights and duties safely could be made equally applicable to all citizens. In addition, chapter I guaranteed the right to hold and inherit certain personal property, and to be paid for one's work;<sup>12</sup> chapter IX guaranteed certain procedural rights to criminal defendants, such as the right to a public trial and the "right to defence."<sup>13</sup> Chapter XI guaranteed universal suffrage by secret ballot irrespective of race or nationality, sex, religion, educational or residential qualifications, social origin, property status or past activity.<sup>14</sup> This Constitution is still in effect today.<sup>15</sup>

Denisov and Kirichenko divide the fundamental rights into three categories.<sup>16</sup> First are the political rights which include the freedom of speech and press,<sup>17</sup> the freedom of assembly,<sup>18</sup> the freedom of street processions and demonstrations,<sup>19</sup> the freedom to unite in public organizations and societies of working people,<sup>20</sup> the electoral rights,<sup>21</sup> the equality of citizens<sup>22</sup> and the freedom of conscience.<sup>23</sup> Second are the socio-economic rights which include the right to work,<sup>24</sup> the right to rest and leisure,<sup>25</sup> the right to maintenance in old age and in sickness or disability,<sup>26</sup> the right to personal property<sup>27</sup> and the right of collective farm households to have their holdings.<sup>28</sup> Third are the

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<sup>11</sup> VYSHINSKY 562.

<sup>12</sup> U.S.S.R. CONST. arts. 10, 118.

<sup>13</sup> *Id.* art. 111.

<sup>14</sup> *Id.* arts. 134-42. It has been suggested that all these additional rights should be included within the chapter of the Constitution entitled "Fundamental Rights" when the new constitution is drafted. Romashkin, *New State in the Development of the Soviet State*, transl. in 12 THE CURRENT DIGEST OF THE SOVIET PRESS, No. 46, p. 3, at 6 (1960).

<sup>15</sup> A new Constitution is presently being drafted, but little change is expected in the area of fundamental rights, except that the section may be placed closer to the front of the document to "emphasize . . . the high position of the individual." Romashkin, *A New State in the Development of the Soviet State*, transl. in HAZARD & SHAPIRO 33, 35.

<sup>16</sup> DENISOV & KIRICHENKO, *supra* note 9, at 320-21.

<sup>17</sup> U.S.S.R. CONST. art. 125.

<sup>18</sup> U.S.S.R. CONST. art. 125.

<sup>19</sup> U.S.S.R. CONST. art. 125.

<sup>20</sup> U.S.S.R. CONST. art. 126.

<sup>21</sup> U.S.S.R. CONST. arts. 134-42.

<sup>22</sup> U.S.S.R. CONST. arts. 122-23.

<sup>23</sup> U.S.S.R. CONST. art. 124. By "freedom of conscience" is meant freedom to believe or not believe in religion. It does not mean, as is true in the United States, freedom from governmental interference when religious beliefs are translated into action. A certain amount of freedom to worship is professed, however. See Andreeva Hransk transl. in HAZARD & SHAPIRO 68-70.

<sup>24</sup> U.S.S.R. CONST. art. 118.

<sup>25</sup> U.S.S.R. CONST. art. 119.

<sup>26</sup> U.S.S.R. CONST. art. 120.

<sup>27</sup> U.S.S.R. CONST. art. 10.

<sup>28</sup> U.S.S.R. CONST. art. 7.

cultural rights which are guaranteed by the right to education.<sup>29</sup> To these three categories should be added the personal rights which include the "inviolability of the person" from unreasonable arrests,<sup>30</sup> the "inviolability of the homes of citizens"<sup>31</sup> and the privacy of correspondence.<sup>32</sup> The Constitution also "affords" the right of asylum to foreign citizens under certain circumstances.<sup>33</sup> Finally, the same section of the Constitution also provides for certain duties of every citizen such as the duty to abide by the Constitution and observe the laws,<sup>34</sup> the duty to safeguard socialist property,<sup>35</sup> the duty of males to serve in the armed forces<sup>36</sup> and the duty to defend the country.<sup>37</sup>

Certain of these rights are spelled out in considerable detail within the Constitution itself. Two articles are devoted to equality of citizens: Article 122 provides for equality of women in "all spheres of economic, government, cultural, political and other public activity," and women are accorded an equal right to work, payment for work, rest and leisure, social insurance and education plus state assistance for certain family burdens; Article 123 provides for equality of citizens irrespective of their nationality or race, and provides for punishment by law for those who create restrictions or grant privileges in violation of this right. The detail within these provisions is perhaps best illustrated by Article 125, which guarantees freedom of speech, press, assembly, street processions and demonstrations, and concludes by stating that: "These civil rights are ensured by placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings, the streets, communications facilities and other material requisites for the exercise of these rights."

There are important rights which are not included in the Soviet Constitution. For example, the right to habeas corpus and to protection from ex post facto laws, bills of attainder and double jeopardy are absent. Nor is there any broad concept of protection from denial of liberty without due process of law. Further, numerous rights of the criminally accused, such as the right to a speedy trial, the right to be informed of the nature of the accusation, the right to be confronted with witnesses against him, the right to have compulsory process for obtaining witnesses in his favor and the right not to be a

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<sup>29</sup> U.S.S.R. CONST. art. 121.

<sup>30</sup> U.S.S.R. CONST. art. 127.

<sup>31</sup> U.S.S.R. CONST. art. 128.

<sup>32</sup> U.S.S.R. CONST. art. 128.

<sup>33</sup> U.S.S.R. CONST. art. 129.

<sup>34</sup> U.S.S.R. CONST. art. 130.

<sup>35</sup> U.S.S.R. CONST. art. 131.

<sup>36</sup> U.S.S.R. CONST. art. 132.

<sup>37</sup> U.S.S.R. CONST. art. 133.

witness against himself, are not guaranteed in the Constitution of the U.S.S.R., although many of these rights are guaranteed by codes of criminal procedure.<sup>38</sup>

To enumerate the above rights, however, is to say very little about the real protection of fundamental rights in the Soviet Union. A comparison of how a particular fundamental right is treated in the Soviet Union and in the United States would be meaningless without first understanding the difference in the underlying legal philosophies of the two countries.

#### UNDERLYING PHILOSOPHY OF THE SOVIET LEGAL SYSTEM

Marxist and Leninist economic and political philosophy has permeated the entire Soviet legal system, and the pronouncements of the Soviet government, including the Constitution, must be viewed within the framework of this philosophy. The teachings of Marx and Lenin reject the natural law theory of jurisprudence and substantially modify the positive law theory. There are no absolute laws derived from reason, nature or God upon which the legal system can be based.<sup>39</sup> Law is more than just the command of the sovereign; rather it is a product of class struggle. It expresses the will of the dominant class and is a tool to be used as that class sees fit. The real basis of the legal order is not fundamental laws, but economics.<sup>40</sup>

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<sup>38</sup> Most of the rights of the criminally accused are guaranteed by the codes of criminal procedure in the various republics or by the Fundamental Principles of Criminal Procedure of the U.S.S.R. (1958). See, *e.g.*, Articles 46 and 52 (right to be informed of the nature of the accusation), Articles 160, 162, 201 and 202 (right to be confronted with adverse witnesses), Articles 46, 72, 202 and 204 (right to have compulsory process for obtaining witnesses for the defense), and Article 20 (privilege against self-incrimination) of the Criminal Procedure Code of the Russian Soviet Federated Socialist Republic (1960), reprinted in BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* (1966). The constitutional right of the accused to a defense is apparently interpreted broadly. Article 19 of the Criminal Procedure Code of the R.S.F.S.R. provides that the accused shall be guaranteed the opportunity to defend himself by the means and procedures provided by law. See a further elaboration of these "means and procedures" in Article 202 of the same code. One familiar American concept—the right to a speedy trial—is not guaranteed by either the constitutions or the codes. Because the criminal law in the Soviet Union is based on civil law and, therefore, is quite different from the criminal law in the United States, it is impossible to give an adequate comparison of the existence of certain criminal rights in a few short sentences. For a general discussion of the topic, see BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* (1966).

Vyshinsky claimed that the inviolability of the person if applied equally to all citizens, gives the citizens greater protection than the right of liberty provided in Western countries. VYSHINSKY 629. *But see* a discussion of the highly restrictive passport law in *FACTS ABOUT THE CONSTITUTION OF THE U.S.S.R.* 51 (1955).

<sup>39</sup> See VYSHINSKY 563.

<sup>40</sup> The means of production constitute the real foundation of society. Since the control of the means of production is the main object of the dominant class, the structure of the state and the content of its laws merely reflect the attempts of this class to retain control. The legal system of a state, therefore, is a superstructure built upon the foundation of the means of production. It can be, and frequently is, changed or altered to meet the demands of continued control over the means of pro-

Contemporary Soviet political practice deviates from classical Marxist thought in its recognition of existing social classes and the role of law. Capitalist countries are viewed as dominated by the bourgeoisie who control the means of production and who impose their will on the rest of the population by manipulation of the legal order.<sup>41</sup> In Socialist countries, on the other hand, the working class is dominant (led by the Communist Party) and exerts its economic control through nationalization of the means of production. This control is utilized according to a uniform economic plan in the best interests of the working people. Socialist law, therefore, including the Constitution, represents the expression of the will of the working class as interpreted by the Communist Party.<sup>42</sup>

Nevertheless, a socialist constitution not only reflects the Socialist theory of the economic base of society, but also exerts considerable influence on the further development of the society by outlining the structure of the political, economic and social order of the state.<sup>43</sup> Further, it is the source of all other laws, decrees and orders that regulate the details of the society's organization.<sup>44</sup> Its influence on the further development and shaping of policy has been, and still is, consciously encouraged by government and party officials.

Although by 1936, according to Soviet theorists, the Soviet Union no longer contained exploiters and exploited,<sup>45</sup> the theory of law as the instrument or tool of the dominant class, *i.e.*, the workers, persisted. In 1961, however, at the 22nd Congress of the Communist Party of the Soviet Union, Khrushchev declared that class relations in the Soviet Union had "entered a new stage of their developments"<sup>46</sup> in which the workers and the peasants were friendly classes without essential distinctions or conflicting interests.<sup>47</sup>

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duction by the dominant class. The state is the apparatus devised by the dominant class to constrain others. The law is the expression of the will of the dominant class in the shape of rules of conduct. Goulunskii & Strogovich, *The Theory of the State and Law*, in *SOVIET LEGAL PHILOSOPHY* 366 (Babb & Hazard eds. 1951); Peselj, *supra* note 1, at 655.

<sup>41</sup> KELSEN, *THE COMMUNIST THEORY OF LAW* 10, 128-30 (1955); Goulunskii & Strogovich, *supra* note 40, at 365; Yudin, *Socialism and Law*, in *SOVIET LEGAL PHILOSOPHY* 284 (Babb & Hazard eds. 1951).

<sup>42</sup> Peselj, *supra* note 1, at 655. See also U.S.S.R. CONST. art. 126.

<sup>43</sup> Stalin, *Marxism in Linguistics* in 1 *GOVERNMENT, LAW & COURTS IN THE SOVIET UNION AND EASTERN EUROPE* 53 (Gsovski & Grzybowski eds. 1959) [hereinafter cited as Gsovski].

<sup>44</sup> Peselj, *supra* note 1, at 652-3.

<sup>45</sup> KELSEN, *supra* note 41, at 130; VYSHINSKY 562.

<sup>46</sup> Khrushchev, *Report of the Central Committee of the CPSU to the 22nd Congress of the CPSU*, 1 *DOCUMENTS OF THE 22ND CONGRESS OF THE CPSU* 133 (1961). This new stage was first discussed at the 21st Party Congress in 1959 but it was not fully explained or accepted until the adoption of the party program at the 22nd Party Congress.

<sup>47</sup> *Id.* at 132.

Since the tasks of the dictatorship of the proletariat were fulfilled, political dominance by a single class was no longer necessary. The state, therefore, no longer was viewed as the instrumentality of a single class, but rather as "an organ expressing the interests and will of the people as a whole."<sup>48</sup> The 22nd Party Congress declared that the original goal of building socialism had been achieved and a new goal was proclaimed—the building of communism.<sup>49</sup> Led by the Communist Party, the Soviet "state of the entire people" assumed the task of establishing a basis for communism in material goods and technology, transforming socialist relationships into communist relationships, and developing the new Soviet man.<sup>50</sup> When communism is at last fully attained, both the state and law will "wither away." The need for state coercion will gradually disappear, and the state will transfer its administrative functions "to society itself, that is, to the public organizations, the entire collective,"<sup>51</sup> resulting in "public self-government."<sup>52</sup>

#### APPLICATION OF THE SOCIALIST LEGAL PHILOSOPHY TO FUNDAMENTAL RIGHTS—SIX BASIC CONCEPTS

The application of the Socialist legal philosophy, discussed above, to the fundamental rights guaranteed by the Constitution results in constitutional concepts that differ greatly from the constitutional concepts in non-socialist countries. These six basic concepts are set out below.

##### 1. *Party Policy and Not the Constitution Is Supreme*

The Constitution of the United States is a statement of fundamental principles which are accepted as the supreme law of the land. Although the Constitution of the Soviet Union is also said to be the fundamental law of the land and is said to serve as the legal basis for all legislation,<sup>53</sup> according to Soviet theory, law itself is not the funda-

<sup>48</sup> Butenko, *The Soviet State of the Entire People*, transl. in 2 SOVIET L. & GOV'T, No. 3, p. 3, at 9 (1964). See PROGRAM OF THE COMMUNIST PARTY OF THE SOVIET UNION 103 (1961).

<sup>49</sup> Khrushchev, *Concluding Speech to the 22nd Congress*, 1 DOCUMENTS OF THE 22ND CONGRESS OF THE CPSU 242-44 (1961).

<sup>50</sup> Bratus & Samoshchenko, *The Scientific and Organizational Forms for Improvement of Soviet Legislation*, transl. in 3 SOVIET L. & GOV'T, No. 3, p. 26 (1965); Butenko, *supra* note 48, at 13.

<sup>51</sup> Romashkin, *Problems of the Development of the State and Law in the Draft Program of the CPSU*, transl. in 1 SOVIET L. & GOV'T, No. 1, p. 3, at 8 (1962).

<sup>52</sup> *Ibid.* See Khrushchev on this point, quoted in Romashkin, *New Stage in the Development of the Soviet State*, *supra* note 14, at 3.

<sup>53</sup> Denisov & Kirichenko, *supra* note 9, at 4; Fedoseev, *The Bases of the Soviet State and Law*, in HAZARD & SHAPIRO 29-30.

mental basis of the social system. The real basis of society is economics.<sup>54</sup> Law is merely a tool of the dominant class, which may use it at will to retain control over the means of production.

Because law is considered an instrument in the hands of the people to be used in obtaining the economic goals of the state, the ethical and moral compunctions against violating the law are not the same in the Soviet Union as they are in the United States or other Western countries. When law and policy, as enunciated by the party leaders, conflict, the law must yield.<sup>55</sup> Since the Communist Party controls all levels of the official structure of government, it is a simple matter to change the law or the Constitution to conform with the policy.<sup>56</sup> Nevertheless, the party leaders have on occasion neglected to go through the formality of making the change. For example, the Constitution originally provided for "the reduction of the working day to seven hours for the overwhelming majority of the workers."<sup>57</sup> On June 26, 1940, the Presidium (the executive committee of the Supreme Soviet which handles legislative matters between sessions) decreed an eight-hour normal working day which went into effect immediately.<sup>58</sup> The Constitution was not amended to conform with this decree and with the actual practice until seven years later.<sup>59</sup> Although the Constitution of 1936 called for free higher education, in 1940, the Council of Ministers (the Soviet cabinet) ordered a tuition fee collected from all students in the higher grades of secondary schools and from all students in higher education.<sup>60</sup> Again, the Constitution was not amended to conform with this order until seven years later in 1947.<sup>61</sup> The Constitution originally provided that all citizens who

<sup>54</sup> See text accompanying note 40 *supra*. See also Butenko, *supra* note 48, at 9; Ramundo, Book Review, 31 GEO. L. REV. 676, 678 (1963).

<sup>55</sup> Rusis, *Law Enforcement in Soviet Latvia*, 6 HIGHLIGHTS OF CURRENT LEGISLATION AND ACTIVITIES IN MID-EUROPE 273, 286 (1958). See also GRZYBOWSKI, SOVIET LEGAL INSTITUTIONS 77 (1962).

<sup>56</sup> The Constitution can be amended by a two-thirds vote of the Supreme Soviet (the Soviet quasi-legislature). U.S.S.R. CONST. art. 146. The Supreme Soviet meets twice a year and can be called into emergency session at any other time by the Presidium. U.S.S.R. CONST. art. 146. See also text accompanying note 70 *infra*. In a one-party state such as the Soviet Union, it is easy to obtain a two-thirds majority on any issue backed by the party.

Not a single important decision is taken by the Soviet state organs without preliminary guiding directions and advice from the Party. In this way the Communist party of the Soviet Union imparts a planned and purposeful character to the work of the entire Soviet state apparatus.

Denisov & Kirichenko, *supra* note 9, at 143.

<sup>57</sup> U.S.S.R. CONST. art. 119, reprinted in STRONG, THE NEW SOVIET CONSTITUTION 131, 152 (1937).

<sup>58</sup> Edit of June 26, 1940, VEDOMOSTI No. 20, ratified by the Supreme Soviet, Aug. 22, 1940, VEDOMOSTI No. 28, cited in GSOVSKI 22.

<sup>59</sup> Edit of Feb. 25, 1947, VEDOMOSTI No. 8, cited in GSOVSKI 23.

<sup>60</sup> FACTS ABOUT THE CONSTITUTION OF THE U.S.S.R. 44 (1955); GSOVSKI 23.

<sup>61</sup> Edit of Feb. 25, 1947, VEDOMOSTI No. 8, cited in GSOVSKI 23. Tuition was abolished by another amendment in 1956.



reached the age of eighteen were eligible for election to the Supreme Soviet (the Soviet quasi-legislature);<sup>62</sup> yet on the eve of the election of 1946, the qualifications were changed to twenty-three years of age, thereby disqualifying four million people. After the election, the action was ratified by the Supreme Soviet, and the Constitution was properly amended.<sup>63</sup>

Since the denunciation of Stalin at the Twentieth Congress of the Communist Party of the Soviet Union in 1956, considerable emphasis has been placed on what is called "socialist legality,"<sup>64</sup> which means strict adherence to the law and reform of the legal order so as to provide greater respect for the law. The doctrine has been a rallying cry for those concerned with expunging the abuses of Stalin.<sup>65</sup> Although this doctrine has undoubtedly produced more effective observance of law in the lower levels of the bureaucracy, its greatest usefulness has been as a tool for education and propaganda. Also, it has been invoked to implement party policy, whatever that policy may be. For example, soon after de-Stalinization, socialist legality was invoked to reform the punishment of criminal offenders by reducing the severity of sentences and individualizing punishment.<sup>66</sup> By 1961, however, the policy had changed and socialist legality was again invoked, this time not to mitigate punishment, but rather to increase the punishment for embezzlement, theft and dishonesty in dealing with government property.<sup>67</sup> The chameleon-like concept of socialist legality has prompted one critic of Soviet law to say that it has "little practical content."<sup>68</sup>

<sup>62</sup> U.S.S.R. CONST. art. 135.

<sup>63</sup> GSOVSKI 23.

<sup>64</sup> See, e.g., PROGRAM OF THE COMMUNIST PARTY OF THE SOVIET UNION, *supra* note 48, at 108; Zhogin, *Vyshinsky's Distortions in Soviet Legal Theory and Practice*, transl. in 4 SOVIET L. & GOV'T, No. 3, p. 48, at 55 (1965); *Jurisprudence Under the Conditions of the Building of Communism*, transl. in 2 SOVIET L. & GOV'T, No. 4, p. 3, at 8 (1964); Court Order No. 3, U.S.S.R. Supreme Court Plenum (18 March 1963), transl. in 2 SOVIET L. & GOV'T, No. 3, p. 48, at 50 (1963); *Strict Adherence to Law by Courts in Criminal Trials*, transl. in 2 SOVIET L. & GOV'T, No. 2, p. 17, at 19 (1963); Rudenko (Prosecutor General of the U.S.S.R.) Speech Introducing Draft Fundamental Principle of Criminal Law to the Supreme Soviet (25 Dec. 1958), transl. in HAZARD & SHAPIRO 10-11.

<sup>65</sup> PROGRAM OF THE COMMUNIST PARTY OF THE SOVIET UNION, *supra* note 48; Zhogin, *supra* note 64; Rudenko, *supra* note 64.

The return to socialist legality . . . had two aspects. The first step was the re-establishment of legal order on the basis of the laws in force; the second was the reformation of the laws themselves and the raising of the general standards of government operation and legal commerce. GRZYBOWSKI, *supra* note 55, at 178. See the excellent discussion of socialist legality in *id.* at 172-240.

<sup>66</sup> See generally GRZYBOWSKI, *supra* note 55, at 206-15.

<sup>67</sup> *Id.* at 214-15. See *Izvestia*, Apr. 26, 1961, transl. in 13 THE CURRENT DIGEST OF THE SOVIET PRESS, No. 17, p. 31 (1961). See also Court Order No. 3, U.S.S.R. Supreme Court Plenum (18 March 1963), transl. in 2 SOVIET L. & GOV'T, No. 3, p. 48 (1963) where socialist legality is invoked to urge increased effectiveness in the prosecution of persons guilty of "anti-social behavior."

<sup>68</sup> GRZYBOWSKI, *supra* note 55, at 215.

For this reason, it is not surprising that the emphasis on "socialist legality," has had no significant effect on the Soviet lack of deference to the Constitution. For example, Article 146 explicitly provides that the Soviet Constitution can be amended only by a two-thirds vote of the entire Supreme Soviet. Nevertheless, decrees issued by the Presidium of the Supreme Soviet on January 13, 1960 and February 3, 1960, changed the Constitution without a constitutional amendment by reorganizing the Council of Ministers. These decrees were not ratified by an appropriate amendment to the Constitution until May 7, 1960, over three months later.<sup>69</sup> After acknowledging that final decisions on the most important questions can constitutionally be made only by the Supreme Soviet, Soviet legal scholars Denisov and Kirichenko suggest the following important qualification:

Taking into account, however, that in the rather long intervals between sessions of the Supreme Soviet certain questions relating to the jurisdiction of the Supreme Soviet of the U.S.S.R. may in some cases require urgent settlement and that the convocation of extra-ordinary sessions of the Supreme Soviet for this purpose is inexpedient, the Presidium of the Supreme Soviet is empowered to decide such questions independently, subject to subsequent confirmation by the Supreme Soviet of the U.S.S.R.<sup>70</sup>

This statement openly condones a direct violation of the Soviet Constitution.

One important consequence of the disrespect for the sanctity of the Constitution is reflected in the attitude of the Communist Party leaders, who frequently believe that they are above the law.<sup>71</sup> The party has its own code of behavior, and its procedures for censure and discipline of its members take precedence over court action.<sup>72</sup> Party members and their families are often protected by the party from criminal prosecution. The importance of knowing someone with connections and influence in the party is apparent.<sup>73</sup>

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<sup>69</sup> Minutes of the Meeting of the Supreme Soviet of the U.S.S.R. (7 May 1960), transl. in HAZARD & SHAPIRO 31.

<sup>70</sup> DENISOV & KIRICHENKO, *supra* note 9, at 234.

<sup>71</sup> RUSIS, *Law Enforcement in Soviet Latvia*, 6 HIGHLIGHTS OF CURRENT LEGISLATION AND ACTIVITIES IN MID-EUROPE 273, 286 (1958); GRZYBOWSKI, *supra* note 55, at 77.

<sup>72</sup> *Ibid.* See generally DJILAS, *THE NEW CLASS* (1957).

<sup>73</sup> It appears, from numerous cases reported in the Soviet Latvian press, "that a frequent practice is that of referring to the Party for further action those cases in which a member of the Communist Party could face criminal prosecution." RUSIS, *supra* note 71, at 276. RUSIS describes the case of a local party functionary who was able to avoid criminal prosecution even though proof of his embezzlement was established beyond doubt. The chief prosecutor for the Latvian Republic (corresponding roughly to the attorney general of an American state) was forced to yield to the instructions of the Party District Committee who opposed trial on the grounds that this person had already been punished by the party. *Id.* at 273-74. RUSIS also describes several other cases of proven or suspected party favoritism. *Id.* at 275.

Favoritism, of course, is not unknown in other countries. But, in a society which lacks a legitimate opposition, such favoritism is not easily exposed and corrected. The extent of party favoritism in the Soviet Union is difficult to measure. Undoubtedly, much abuse by lower party officials is discovered and corrected by the Procuracy, especially if it involves a third party's fundamental rights. However, party leaders who occupy high government positions are generally beyond the reach of the Procuracy and are not always deterred from taking "short cuts" in accomplishing their objectives. These short cuts, besides allowing preferential treatment for those people with "connections," may well infringe on the fundamental rights of individual citizens. Thus, it is well known that Stalin did not consider himself bound by the law despite his calls for strict observance of the law by others.<sup>74</sup>

Although the Soviets have firmly denounced Stalin's atrocities and have introduced numerous reforms in the criminal law to prevent their recurrence,<sup>75</sup> it should be remembered that most of these atrocities were committed while the present Constitution was in force, the Constitution of 1936 having been promulgated during Stalin's purges. Furthermore, the attitude that party leaders are above the law has not changed. Thus, widespread denials of fundamental rights of citizens are still possible in the Soviet Union, especially if the party leaders see their leadership threatened.<sup>76</sup>

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<sup>74</sup> Stalin used an assassination of a high public official—a crime in which Stalin himself was the real instigator—as an excuse to accuse, try and execute hundreds of party officials who had fallen from his favor. These persons were forced to confess under a combination of intensive interrogation, threats, torture and trickery by the secret police, including threats of arrest, torture and execution of prisoners' children and other loved ones. ORLOV, *THE SECRET HISTORY OF STALIN'S CRIMES* 1-24, 66, 83-84, 123 (1953). Later the secret police prepared lists of 5,000 persons at a time who were secretly executed without the formality of a trial or of having charges preferred against them. *Id.* at 170. In view of the atrocities committed during Stalin's purges, it is hard to take seriously his claim that all Soviet citizens were guaranteed certain fundamental rights. Stalin, *Interview With Roy Howard* (1937), reprinted in VYSHINSKY 540; see HAZARD & SHAPIRO 5. "[The] dictatorship of the proletariat is a power not limited by any laws." WALSH, *RUSSIA AND THE SOVIET UNION* 468 (1958) (an authoritative Soviet pronouncement during the Stalin era).

<sup>75</sup> See Khrushchev's Secret Speech to the 20th Congress of the Communist Party of the U.S.S.R., in 2 *CURRENT SOVIET POLICIES* 172 (1957); Zhogin, *Vyshinsky's Distortions in Soviet Legal Theory and Practice*, transl. in 4 *SOVIET L. & GOV'T*, No. 2, p. 48, at 52 (1965); *Soviet Law Reform*, 4 *SOVIET LEGAL INFORMATION BULLETIN*, No. 1, p. 8 (Society for Cultural Relations with U.S.S.R. 1957); *Fundamental Principles of Legislation, Soviet Criminal Law and Criminal Procedure* (1958), transl. in 5 *SOVIET LEGAL INFORMATION BULLETIN*, No. 4, p. 1 (Society for Cultural Relations with U.S.S.R. 1958). See generally BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* (1966).

<sup>76</sup> Undoubtedly, in view of decreased respect for the party and looser party control over the people, it would be more difficult for the present party leaders to cover up such atrocities, especially if they were committed on such a large scale as they were under Stalin. This in itself will certainly act as a partial deterrent to a wholesale denial of fundamental rights.

## 2. *Fundamental Rights as a Statement of Achievements and Intentions*

The chapter on fundamental rights in the Soviet Constitution is largely a statement of achievements and intentions. In this regard its function as propaganda cannot be discounted.

Soviet legal scholars frankly admit that a significant function of a socialist constitution—particularly the sections dealing with fundamental rights—is to state the present and projected achievements of the society. As stated by V. F. Kotok:

[Socialist] constitutions legalize the fundamental characteristics of the socialist socio-economic system and political organization of society not only with the aid of the "typical legal norm . . . , but by posing tasks that are binding for the achievement of a specific result, and also by stating the facts with respect to what has already been achieved and signifying the legalization of the corresponding relationships."<sup>77</sup>

In discussing the need for drafting and enacting a new constitution, P. S. Romashkin has indicated:

The chapter on the basic rights and duties of citizens requires serious elaboration, taking into account the successes and achievements of recent years and *especially such great prospects for the building of communism as ensuring the working people of the U.S.S.R. in the next few years the highest living standards in the world and creating the most favorable conditions for the creative development of each member of society. It should stress that the Soviet people, who have already won for themselves a seven- and six-hour working day, are moving toward the shortest working day in the world . . .*<sup>78</sup>

Indeed, it would be hard to explain many of the provisions of the chapter on fundamental rights in any way other than as a statement of intentions. For example, Article 118 states that "The right to work is ensured by . . . the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment." Since a constitution can hardly *guarantee* full employment, economic growth or the elimination of economic crises, these provisions become more meaningful when interpreted as statements of goals. Such an interpretation perhaps sheds light on the nature of some of the other rights purportedly guaranteed in the Soviet Constitution.

<sup>77</sup> Kotok, *Constitutional Law Relationships in the Socialist Countries*, transl. in 1 SOVIET L. & GOV'T, No. 2, p. 39, at 40 (1962). (Emphasis added.)

<sup>78</sup> Romashkin, *supra* note 14, at 6. (Emphasis added.)

It is often difficult to distinguish between achievements and goals. For example, Article 119 of the Soviet Constitution, as promulgated in 1936, stated: "The right to rest is ensured by the reduction of the working day to seven hours for the overwhelming majority of the workers." On its face, this statement appears to be a statement of achievements. Actually, however, a reduction in the length of the working day had not been achieved prior to the promulgation of the Constitution, nor was the working day immediately reduced to seven hours when the Constitution was promulgated.<sup>79</sup> Provisions for the right to free higher education, paid vacations, "a wide network of sanatoriums, rest homes and clubs for the accommodations of the toilers," were all obviously statements of goals and not achievements.<sup>80</sup> At this point, the value of the Constitution as propaganda and as a method of educating the people was more important than its value as a statement of the fundamental law of the land.

As an instrument of propaganda, the chapter on fundamental rights in the Constitution of 1936 was aimed at three different groups of people. First, the Constitution was designed to convince the people of the Soviet Union themselves that their rights were being protected.<sup>81</sup> Second, the Constitution was aimed at people outside the Soviet Union. The Draft Commission was organized just months after Stalin had embarked on his second round of purges, at a time when he was very sensitive to criticism of the conduct of these "trials."<sup>82</sup> The chapter on fundamental rights was designed to show to the world that Soviet citizens were guaranteed the same rights as the citizens of any other country.<sup>83</sup> Third, and perhaps most importantly, the Constitution was aimed at future generations, for Stalin

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<sup>79</sup> FACTS ABOUT THE CONSTITUTION OF THE U.S.S.R. 40.

<sup>80</sup> *Id.* 40-44.

<sup>81</sup> The Constitution was drafted and enacted amid great fanfare. Under the leadership of Stalin, a Drafting Commission, which included the most prominent leaders of the country, was authorized by the Eighth Congress of Soviets in February, 1935, to draft the Constitution. When the document was completed, it was given the widest possible circulation. "Newspapers published the text in full, and (reputedly) 60 million copies were circulated all over the U.S.S.R. Hundreds of thousands of groups, under Party direction and orders, discussed the proposal; and it was reported that they suggested 154,000 changes." [Only 43 of these were finally adopted.] WALSH, *supra* note 74, at 469. On December 5, 1936, it was adopted unanimously by an extraordinary session of the Eighth Congress of Soviets as "the only thoroughly democratic Constitution in the world." *Ibid.*

<sup>82</sup> The Draft Commission for the constitution was authorized in February of 1935, just three months after Sergei Kirov was assassinated. Stalin's sensitivity to criticism is well illustrated in ORLOV, *supra* note 74, at 49, 171-73, 250. Propaganda for foreigners played an important role in the adoption of fundamental rights in the first Russian constitution of 1919 as well. HAZARD & SHAPIRO 60.

<sup>83</sup> In fact, the Soviets were able to convince some foreign observers that the Soviet Constitution provided even better guarantees. See Introduction and numerous Forewords to CONSTITUTION (BASIC LAW) OF THE U.S.S.R. (Draft) (Published for the Committee of the Congress of Peace and Friendship with the U.S.S.R. 1936).

was particularly concerned with his own image and the image of communism as it would appear both to his countrymen and to foreigners in the future.<sup>84</sup>

### 3. *Primary Importance Is Placed on the State and Not the Individual*

In contrast to the American system of government, where the state is given limited powers and the individual is given strong protections, in socialist countries the state and not the individual is considered supreme. As Soviet Professor Malitsky has stated:

The capitalist law is based upon the abstract "natural rights" of an individual; it places the individual in the center of the world, surrounds him with a cult and therefore establishes limits to the State . . . . However, the proletarian State sets the limits not to itself but to its citizens. A collective body called the State, rather than the individual citizen, is at the center of the proletarian law.<sup>85</sup>

Emphasis is placed on collective action since collectively the citizens can better provide for the interests of the individual. The real elevation of the individual depends upon the coalescing of his interests with the interests of the state,<sup>86</sup> and as a result it is the duty of every citizen to submit his personal interests to the collective interests of the state.<sup>87</sup>

Thus, the notion that eternal vigilance by the people is necessary to contain the arbitrary and tyrannical tendencies of government is completely inconsistent with the Soviet theory of law and government. Under such a theory there is no need for the fundamental rights to be phrased as limitations on the power of the state as they are in the United States. This view has not been changed by de-Stalinization,<sup>88</sup> and the current emphasis on the "new Soviet man" is a clear continuation of this approach. The proper combination of personal interests with those of society, claim the Soviets, is essential for the "all-round flourishing of the personality."<sup>89</sup> In the final

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<sup>84</sup> See ORLOV, *supra* note 74, at 194-95, 248-50; *cf.* the following quotation from the introduction of the CONSTITUTION OF THE U.S.S.R. published for the Committee of the Congress of Peace and Friendship with U.S.S.R. at 9: "It is notably for these stupendous innovations, unparalleled in any previous Constitution, that the new draft of the Soviet Constitution, which embodies an effective Socialism, will be regarded by the future historian as even more momentous than the American Constitution of 1787, or that of the French Republic of 1793, which gave a consecration to the Individualism of their time."

<sup>85</sup> Malitsky, quoted in GSOVSKI 26.

<sup>86</sup> UMANSKY, CONSTITUTIONAL RIGHTS OF SOVIET CITIZENS 7, 9 (1955).

<sup>87</sup> GUINS, SOVIET LAW AND SOVIET SOCIETY 242 (1954).

<sup>88</sup> Kotok, *supra* note 77, at 45.

<sup>89</sup> Ioffe, *The New Codification of Civil Law and Protection of the Honor and Dignity of the Citizen*, transl. in 1 SOVIET L. & GOV'T, No. 4, p. 37 (1963).

analysis, the actions of the individual are limited to those which assist in the development of the productive forces of the country—or, at least, which do not hinder such development.<sup>90</sup>

The determination of what the interests of the society are and which individual interests should be allowed to combine with the collective interests of society, is a function of the Communist Party.<sup>91</sup> By implication, the Soviet masses do not know their rights and duties but must be taught them by the party. This is a reflection of what Professor Berman calls the “parental conception of law.” The citizen is like a dependent child “whose law-consciousness must be guided, trained, and disciplined by official legal rules and processes.”<sup>92</sup> The Soviet lawmaker, on the other hand, is like a parent who must encourage the citizen to be loyal, hard-working, well-disciplined and virtuous.<sup>93</sup> Indeed, the Soviets themselves emphasize the educational nature of socialist law.<sup>94</sup>

The result of this parental concept of law is that fundamental rights of citizens are considered “gifts” of the government.<sup>95</sup> But these rights are given to the citizens only experimentally or conditionally and, if abused, they may be withdrawn.<sup>96</sup>

Reliance on affirmative action by the government provides the most effective means available to the citizens to protect their rights. The criminal codes of the several republics, of which the code of the R.S.F.S.R. is typical, provide for specific penalties for “hindering the exercise” of certain specific fundamental rights.<sup>97</sup> Of much greater importance, however, is the Office of the Procuracy, which is roughly equivalent to the Department of Justice in the United States. The Procuracy is charged by the Constitution with the task of supervising

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<sup>90</sup> GSOVSKI 26.

<sup>91</sup> See U.S.S.R. CONST. art. 126.

<sup>92</sup> Berman, *Human Rights in the Soviet Union*, 2 HOW. L.J. 333, 340 (1965).

<sup>93</sup> *Ibid.*

<sup>94</sup> See Golunsky, *The Creative Revolutionary Role of Socialist Law in the Period of the Comprehensive Building of Communism*, transl. in 1 SOVIET L. & GOV'T, No. 1, p. 13, at 22 (1962). (Emphasis added.) See also *Jurisprudence Under the Conditions of the Building of Communism*, transl. in 2 SOVIET L. & GOV'T, No. 4, p. 3, at 7 (1964).

<sup>95</sup> Berman, *supra* note 92, at 340.

<sup>96</sup> *Ibid.*; ARCHER, COMMUNISM AND THE LAW 111 (1963). An example of this attitude appeared in a September, 1959 issue of *Izvestia* which revealed that at the time of the Hungarian uprising three years earlier, some university students had exercised their freedom of speech and press by starting a publication criticizing the government. These students were “caught,” but because of their ages and because of other mitigating circumstances they were released after receiving a parental lecture on the seriousness of their activities. *Id.* at 107.

<sup>97</sup> See, e.g., R.S.F.S.R. CRIMINAL CODE arts. 74 (race), 132 (voting), 134 (women), 135 (privacy), 138 (labor legislation), 142 (freedom of conscience) and 143 (religious rites) (1960), in BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE (1966).

all ministries, institutions, officials and citizens to insure the strict observance of the law.<sup>98</sup>

The most significant function of the Procurator in regard to the safeguarding of fundamental rights is his duty to respond to and investigate all complaints against illegal acts of officials. Any individual who believes that his rights have been infringed may file such a complaint with the Procurator.<sup>99</sup> The Soviet Procuracy handles hundreds of thousands of such complaints annually.<sup>100</sup> For the most part this is an effective method of protecting the citizen's fundamental rights. For example, Hazard and Shapiro have collected two cases in which the Procurator-General was successful in a protest to the Supreme Court of the U.S.S.R. on behalf of a complainant who claimed his right to defense was denied in a criminal trial.<sup>101</sup> And Professor Berman tells about the protest against a decree of the autonomous republic of Mari which restricted employment in certain local industries to local residents. The Procuracy protested on the ground that there was a violation of the constitutional guarantee of the right to work, and was successful in getting the decree revoked.<sup>102</sup> The Procurator's effectiveness, however, is limited to the protection of abuses of fundamental rights by local authorities. He is powerless to enforce Soviet law against the wishes of the party leadership, and his efforts tend to be more vigorous when engaged in ferreting out abuses which the party leadership desires to eradicate.<sup>103</sup> The necessity of

<sup>98</sup> U.S.S.R. CONST. art. 113. It is the obligation of the Procurator "to see to it that no single decision of local authority deviates from the law . . . ." VYSHINSKY 525. In addition to possessing the ordinary power to present indictments and prosecute for a crime, the Procuracy also has certain supervisory powers which include the power to investigate all complaints of illegal acts by officials, to require production of documents, to inspect these documents and to require explanations, and to protest illegal acts, decisions or regulations to higher administrative authorities. Ordinance on the Supervisory Powers of the Procurator's Office in the U.S.S.R. chap. 1, 2, transl. in DENISOV & KRICHENKO, *supra* note 9, at 444; Berman, *supra* note 92, at 337. See also VYSHINSKY 526, 533. The Procurator also has the power to intervene in any court case whether criminal or civil, and to file a protest to the decision with the next higher court. Ordinance of the Supervisory Powers of the Procurator's Office in the U.S.S.R., *supra* Ch. 4, at 451; LAVROFF, *LES LIBERTES PUBLIQUES EN UNION SOVIETIQUE* 146 (1963). Furthermore, he has the power to make "proposals" to administrative agencies recommending changes in regulations; these proposals must be considered and if they are rejected he has the power to appeal the decision to the next higher governmental agency. Ordinance on the Supervisory Powers of the Procurator's Office in the U.S.S.R., *supra* Ch. 2, at 446-49; Berman, *supra* note 92, at 337.

<sup>99</sup> VYSHINSKY 537.

<sup>100</sup> Berman, *supra* note 92, at 337.

<sup>101</sup> Case of Vardanian and Tumanian (1960), in HAZARD & SHAPIRO 94-95. See also Case of S. (1961), *id.* at 95-96; Kaganovich, *Violation of the Accused's Right to Defense* (1960), *id.* at 92-93.

<sup>102</sup> Berman, *supra* note 92, at 337-38. For other cases of a similar nature in which the Procuracy successfully protested municipal action on the ground that it interfered with citizens' rights, see HAZARD & SHAPIRO 70-72.

<sup>103</sup> Berman, *supra* note 92, at 339.



relying on affirmative action by a part of the government bureaucracy to secure relief against another part would not satisfy the Western lawyer accustomed to relying on his own initiative to protest arbitrary government action. For example, there is no tradition of testing the toleration point of licensing officials in the Soviet Union.<sup>104</sup>

#### 4. *Each Right Is Conditioned on Its Non-Interference With the Building of Communism*

Each fundamental right in the Soviet Constitution is subject to the significant condition that it not interfere with the building of communism.<sup>105</sup> Fundamental rights can be enjoyed only when their exercise tends to strengthen the established political and economic system and not to threaten a change or destruction of the system.<sup>106</sup>

Words of limitation to this effect are found in nearly every provision guaranteeing a right or freedom of any consequence. In some socialist constitutions the section on fundamental rights concludes with a general provision that the enunciated freedoms shall not be used to interfere with the building of socialism or to overthrow the foundations of socialism.<sup>107</sup> Article 125 of the Constitution of the U.S.S.R. provides: "In conformity with the interests of the working people, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law [the freedom of speech, press, assembly and demonstration]." (Emphasis added.) Before these freedoms can be exercised, any proposed writing or assembly must be approved by a censor or a licensing bureau,<sup>108</sup> in order that the censorship bodies shall be able to exercise "ideological leadership."<sup>109</sup> Such ideological leadership is not merely a means of checking anti-Soviet material, but is primarily a means of limiting publication to only those works which directly contribute to governmental policy.<sup>110</sup>

<sup>104</sup> HAZARD & SHAPIRO 63.

<sup>105</sup> VYSHINSKY 547, 563; Peselj, *Socialist Law and the New Yugoslav Constitution*, 51 GEO. L.J. 651, 654 (1963).

<sup>106</sup> Peselj, *supra* note 105, at 669-70. See Ioffe, *The New Codification of Civil Law and Protection of the Honor and Dignity of the Citizen*, transl. in 1 SOVIET L. & GOV'T, No. 4, pp. 37-38 (1963); Bratus & Samoshchenko, *The Scientific and Organizational Forms for Improvement of Soviet Legislation*, transl. in 3 SOVIET L. & GOV'T, No. 3, p. 26 (1964).

<sup>107</sup> Art. 40 of the Yugoslav Constitution states: "These freedoms shall not be used to overthrow the foundations of socialist and democratic order established by this Constitution." See also the Constitutions of Bulgaria, Albania, Poland and North Vietnam. Peselj, *supra* note 105, 670 & n.85.

<sup>108</sup> Hazard, *The Soviet Union and a World Bill of Rights*, 47 COLUM. L. REV. 1095, 1109 (1947).

<sup>109</sup> Statute on GLAVLIT, R.S.F.S.R. Laws 1931, text 273, § 1, text 347, quoted in GSOVSKI 29.

<sup>110</sup> GSOVSKI 29. The impact of the limitations in the free speech and press article of the Soviet Constitution are illustrated by the application of article 70 of the Criminal Code of the Russian Republic in a well-known case. Article 70 provides:

Agitation or propoganda carried on for the purpose of subverting or weakening Soviet authority . . . or circulating for the same purpose slanderous

Article 126 of the Constitution of the U.S.S.R., guaranteeing the right to unite in public organizations, opens with the words: "In conformity with the interests of the working people, and in order to develop the organizational initiative and political activity of the masses of the people, citizens are guaranteed the right to unite in public organizations." The qualifying statement is interpreted and applied in much the same way as the qualifying statement in article 125. Thus, "the formation of any fascist or fascist-type organization, or of any other association whose aims and activities are directed against the social and state system of the workers and peasants, or against socialist law and order, is strictly prohibited in the socialist countries."<sup>111</sup> Although there are no similar qualifying statements included in the articles guaranteeing equality, freedom of conscience, inviolability of the person and the right of privacy, such a qualifying condition will indeed be applied.<sup>112</sup> Fundamental rights will not be allowed to interfere with the notion that law is an instrument for mobilizing and organizing the people for the successful realization of the task of building communism.<sup>113</sup>

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fabrications which defame the Soviet state and social system, or circulating or preparing or keeping, for the same purpose, literature of such content, shall be punished by deprivation of freedom for a term of six months to seven years with or without additional exile for a term of two to five years . . . .

R.S.F.S.R. CRIMINAL CODE art. 70 (1960) (U.S.S.R.) transl. in BERMAN, *supra* note 97, at 180 (1966). Two Soviet writers, Andrei D. Sinyavsky and Yuli M. Daniel, were recently imprisoned for violating this law by publishing books in Western countries. These books allegedly contained "anti-Soviet propaganda harmful to the Soviet people," N.Y. Times, Feb. 15, 1966, p. 1, col. 2, in the form of strange and fantastic tales which mocked the Soviet establishment and Soviet officialdom. For an excellent assessment of this case, see Slonim, *Sinyavsky-Daniel Case*, N.Y. Times, Feb. 15, 1966, p. 8, col. 1. The party newspaper, Pravda, explained the party position on the trial as follows: "The sharpest criticism of shortcomings, if it serves to consolidate our society, to purify it and strengthen it, has been, is and will be in every way encouraged. But criticism from positions of hostility and slander aimed at undermining the very foundations of our system and at sapping its strength has been, is and of course will always be rebuffed." N.Y. Times, Feb. 16, 1966, p. 8, col. 4.

The trial of Sinyavsky and Daniel was interesting for another point. Although U.S.S.R. Const. art. III provides that all court cases will be heard in public unless otherwise provided by law, entry to the trial was by invitation only and no foreign correspondents, Communist or non-Communist, received invitations. N.Y. Times, Feb. 15, 1966, p. 5, col. 1. The news reports of the trial that came from the Soviet controlled press were "colored and hostile" to the defendants. N.Y. Times, Feb. 15, 1966, p. 1, col. 2.

<sup>111</sup> DENISOV & KIRICHENKO, *supra* note 9, at 337. Under the Civil Code, the courts have the power to close down any organization which departs from its permitted aims or "infringes the interests of the State." ARCHER, *supra* note 96, at 109.

<sup>112</sup> See notes 6-9 *supra* and accompanying text. "[Vyshinsky] declared more than once that if the question is one of exterminating the enemy, we can do this without a court." Zhogin, *Vyshinsky's Distortions in Soviet Legal Theory and Practice*, transl. in 4 SOVIET L. & GOV'T, No. 2, p. 48, at 53 (1965).

Further qualifying conditions are found in the codes enacted by the various Union Republics. See, e.g., article 5 of the Civil Code of the R.S.F.S.R.

<sup>113</sup> See Romashkin, *Problems of the Development of the State and Law in the Draft Program of the CPSU*, transl. in 1 SOVIET L. & GOV'T, No. 1, p. 3, at 6 (1962). See authorities cited note 106 *supra*. See also Anashkin, *Freedom of Conscience and Observance of the Laws on Religious Denominations*, transl. in 4 SOVIET L. & GOV'T, No. 1, p. 20 (1965).

### 5. Primary Emphasis Is Placed on Economic Rights

In a Socialist country greater emphasis is placed on economic rights, such as the right to work, than on personal or political rights,<sup>114</sup> on the theory that impoverished citizens, preoccupied with obtaining physical necessities, gain little from the guarantee of political or personal rights. True freedom is release from oppressive economic conditions. As the Soviets would say, "Freedom from exploitation, oppression and want is the basis of all other freedoms."<sup>115</sup> After emancipation from bourgeois exploitation, each individual's talents, physical abilities and morality will be fully developed. Only then will the citizen be in a position to take an active part in all spheres of the economic, cultural, social and political life of the country.<sup>116</sup> Such a rationale follows logically from the Socialist theory that the basis of the legal order is economics.

The determining factor . . . in identifying true popular government is the dominance of the socialist system of economy and public forms of property in the means and tools of production. This assures the people of real power in the solution of all the problems of social and governmental life. It is this that explains the fact that Soviet citizens possess not only political rights and liberties, but socio-economic rights unheard of in bourgeois society, which are expanding constantly in a period of the comprehensive building of communism.<sup>117</sup>

The right to work is considered the most important right possessed by a Soviet citizen and "is the foundation whereon the Soviet citizen's rights and freedoms rest."<sup>118</sup> Considerable emphasis is also placed on the right to rest, paid vacations, social insurance, free medical service and education.<sup>119</sup> The Soviets believe that Socialism has made a unique contribution to human rights in this area, for only under Socialism, they claim, can full employment and adequate food, clothing and housing be insured. Only under Socialism, therefore, are

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<sup>114</sup> UMANSKY, *supra* note 86, at 14 (1955); VYSHINSKY 563; Kotok, *supra* note 77, at 45.

<sup>115</sup> UMANSKY, *supra* note 86, at 14. Soviet jurists have criticized many rights guaranteed in Western constitutions on the grounds that they are too abstract. See discussion on the advisability of adopting a law on the presumption of innocence in *On the Work of the Legislative Drafting Commission With the Draft of the Fundamental Principles of Criminal Procedure of the U.S.S.R. and of the Union Republics*, in HAZARD & SHAPIRO 83-86. See also LAVROFF, *LES LIBERTES PUBLIQUES EN UNION SOVIETIQUE* 33-43 (1963).

<sup>116</sup> UMANSKY, *supra* note 86, at 14-15.

<sup>117</sup> Kotok, *supra* note 77, at 45.

<sup>118</sup> VYSHINSKY 563.

<sup>119</sup> *Id.* at 561; DENISOV & KIRICHENKO, *supra* note 9, at 323-29.

full development of all the capacities and creative forces of the individual and his complete freedom and happiness assured.<sup>120</sup>

In both recent party programs and current legal writings, much emphasis is being placed on "the all-around flourishing of the personality,"<sup>121</sup> "the fullest extension of personal freedom and the rights of Soviet citizens,"<sup>122</sup> "the protection of . . . honor and dignity,"<sup>123</sup> and "the full blossoming of the individual."<sup>124</sup> All of these terms must be understood, however, in the context of economic freedom,<sup>125</sup> and the Soviet Union's preoccupation with economic management and collective achievements and goals. This preoccupation has "relegated the individual, his aspirations, his rights, and his liberty, to a position of secondary importance."<sup>126</sup>

### 6. *The Judiciary Is Not Truly Independent*

The right of access to an unbiased and independent judiciary has always been the most effective means of limiting the over-zealous use of power and the denial of fundamental rights. However, even though the Soviet Constitution provides that, "Judges are independent and subject only to the law,"<sup>127</sup> the judiciary is not truly independent in the Soviet Union. A truly independent judiciary would interfere with the efforts of the Communist Party to build communism. Indeed,

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<sup>120</sup> HAZARD & SHAPIRO 61; VYSHINSKI 539. Soviet delegates to the Commission on Human Rights, appointed by the United Nations to draft the Universal Declaration of Human Rights, pressed most vigorously for the inclusion of these rights. HAZARD & SHAPIRO 61. The Soviet contribution to the United Nations annual year-book of human rights always contained a report on the extent to which the economy had improved under the particular five year plan currently in effect—marked contrast to the contributions of Western countries. *Ibid.*

In addition to emphasis on economic rights, the Soviets claim they have also made a major contribution to the field of human rights by inclusion of duties as well as rights. Thus, the chapter on fundamental rights in the Constitution includes the following duties: the duty to obey the Constitution and laws, to maintain labor discipline, to perform public duties, to respect the rules of socialist intercourse, to safeguard socialist property, to serve in the military service, and to defend the country. U.S.S.R. Const. arts. 130-33. The Soviets criticize non-Socialist countries for not including duties and obligations in their own constitutions, claiming that the bourgeois enjoy most of the rights while the workers have most of the duties. They emphasize that in the Soviet Union duties such as military service and payment of taxes are borne equally by *all* citizens. DENISOV & KIRICHENKO, *supra* note 9, at 342; VYSHINSKY 547.

<sup>121</sup> Ioffe, *The New Codification of Civil Law and Protection of the Honor and Dignity of the Citizen*, transl. in 4 SOVIET L. & GOV'T, No. 1, p. 37 (1962).

<sup>122</sup> PROGRAM OF THE COMMUNIST PARTY OF THE SOVIET UNION 108 (adopted at the 22nd Congress of the C.P.S.U. 1961). See also Ioffe, *supra* note 121.

<sup>123</sup> Ioffe, *supra* note 121, at 38.

<sup>124</sup> Romashkin, *Problems of the Development of the State and Law in the Draft Program of the CPSU*, transl. in 1 SOVIET L. & GOV'T, No. 1, p. 3, at 9 (1962).

<sup>125</sup> See Khrushchev, Speech to the 22nd Congress of the CPSU, in 1 DOCUMENTS OF THE 22ND CONGRESS OF THE CPSU 135 (1961).

<sup>126</sup> Book Review, 31 GEO. WASH. L. REV. 676, 677 (1963). See also notes 64-68 *supra* and accompanying text.

<sup>127</sup> U.S.S.R. CONST. art. 112.

the Soviets did not even seek to claim that the judiciary was independent. Rather, "the court has been, and still remains, the only thing it can be by its nature as an agency of the government power—a weapon for the safeguarding of the interests of a given ruling class."<sup>128</sup> Krylenko, the leading Soviet legal authority before the purges, analogized the court to a weapon like a club or a rifle—only more efficient<sup>129</sup> and completely under the control of the Communist Party. Consequently, judges were chosen for their political rather than their legal acumen and were allowed to serve only one year terms<sup>130</sup> to further guard against any assertions of independence. Judges were subject to removal at any time by the Supreme Court acting on the recommendation of the Commission of Soviet Control, which constantly supervised their activities. Furthermore, they could be dismissed under the Judiciary Act of 1926 when their judgments were reversed by the Supreme Court as being "obviously in discord with the general meaning of the Soviet laws or the interests of the toilers."<sup>131</sup>

Under these conditions, the courts became so incompetent<sup>132</sup> that an attempt was made to improve the quality of judges and to make them appear more independent. Article 112 of the Stalin Constitution of 1936 stated, "Judges are independent and subject only to the law."<sup>133</sup> Reforms also were introduced in 1938, which, among other things, increased the term of office to three or five years, depending on the importance of the position.<sup>134</sup> The new independence of the judiciary was limited, however, to what Vyshinsky described as independence from personal and local influences. Independence from the policy of the Communist Party was not contemplated.<sup>135</sup>

After official exposure of the crimes of Stalin in 1956, another major law reform was undertaken. As a result, judges are now elected for five year terms.<sup>136</sup> They may be recalled before the expiration of their terms only by the body electing them or by force

<sup>128</sup> Krylenko, *Judiciary of the U.S.S.R.* (1923), in GSOVSKI 516.

<sup>129</sup> *Ibid.*

<sup>130</sup> GSOVSKI 518. In 1935, 99.6 per cent of the higher judiciary and 95.5 per cent of the inferior judicial appointments were party members. Legal training was not a necessary qualification; in 1947 less than 15 per cent of the judges had received legal training at the university level. ARCHER, *supra* note 96, at 39.

<sup>131</sup> ARCHER, *supra* note 96, at 40.

<sup>132</sup> Vyshinsky reported that courts not infrequently heard up to twenty cases at a time and announced all sentences at once, confusing the various prisoners and their sentences in the process. *Ibid.*

<sup>133</sup> GSOVSKI 520.

<sup>134</sup> *Id.* at 521.

<sup>135</sup> Vyshinsky, in GSOVSKI 520.

<sup>136</sup> Lohkov, *Some Questions on the Judicial System of the U.S.S.R., of the Union and of the Autonomous Republics* (1959), transl. in HAZARD & SHAPIRO 38, 40.

of a court sentence passed on them.<sup>137</sup> Supervision and disciplinary responsibility has been removed from the party and given to a special collegiate body of the Supreme Court of the appropriate jurisdictional area.<sup>138</sup> Finally, there has been much talk about the elimination of "extensive illegal interference" in the working of the courts by local party organs.<sup>139</sup> In spite of these reforms, however, the Communist Party is still firmly in control.<sup>140</sup> With supervisory bodies possessing disciplinary power constantly watching the judges to determine whether they have been "careless" or have performed acts unbecoming a Soviet judge, little independence remains. As Gsovski has stated, the Soviet judge seems to be permanently on probation.<sup>141</sup>

Furthermore, the Socialist legal system lacks the principle of separation of powers, which Western jurists view as essential to the retention of an independent judiciary. Socialist systems are characterized by a "unity of powers," which is directed towards the building of communism,<sup>142</sup> and from which radiate the various functions of government-executive, legislative and judicial. The checks and balances inherent in the Western concept of separation of powers are missing.

#### CONCLUSION

The constitutional guarantees of fundamental rights in the Soviet Union must be read in the context of the Socialist legal philosophy. Viewed in terms of Marxist concepts of class struggle, law itself takes on a new meaning. It is a political instrument to be used for the purpose of achieving the collective goals of the dominant class. Law expresses the will of the entire people, as determined by the Communist Party, in their struggle to build communism.

Because greater importance is placed on the economic goals of society than on ethical and moral compunctions against violating the

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<sup>137</sup> *Fundamentals of Legislation on the Judicial System of the U.S.S.R. and of the Union and Autonomous Republics*, Art. 35 (1959), transl. in HAZARD & SHAPIRO 41, 43. See entire legislation in 5 SOVIET LEGAL INFORMATION BULL., No. 4, p. 1 (1958).

<sup>138</sup> These disciplinary bodies can give warnings, reprimands or can recommend the commencement of removal procedures for violation of disciplinary rules, shortcomings caused by carelessness or lack of discipline and for commission of acts unbecoming a Soviet judge. Statute on the Disciplinary Responsibility of Judges, [1948] *Vedomosti Verkhovnogo Soveta USSR*, No. 31, transl. in HAZARD & SHAPIRO 44.

<sup>139</sup> Radkov, *Socialist Legality in Soviet Criminal Procedure* (1959), transl. in part in HAZARD & SHAPIRO 45-46.

<sup>140</sup> Strogovich, Kalenov & Gertsenzon, *The New Laws on the Judicial System, The Criminal Code, and the Code of Criminal Procedure of the Russian Federation*, transl. in 1 SOVIET L. & GOV'T, No. 1, p. 33, at 35 (1962).

<sup>141</sup> GSOVSKI 521.

<sup>142</sup> DENISOV & KIRICHENKO, *supra* note 9, at 189-90.

law, and because law is considered an instrument in the hands of the representatives of the people, party policy, and not the Constitution, is supreme. Hence many party leaders believe that they are above the law. The provisions of fundamental rights are included in the Constitution largely for propaganda reasons and these provisions must be read more as a statement of achievements and intentions than as an absolute grant of certain inalienable rights to citizens. Individual interests are considered of secondary importance and are required to yield whenever they conflict with the economic and political goals of the state. Fundamental rights are conditioned on non-interference with the building of Communism. Primary emphasis is placed on economic as opposed to political rights. Finally, the judiciary is not truly independent.

American lawyers would consider each of these characteristics to be a significant qualification of constitutionally guaranteed fundamental rights. Indeed, by the Soviet theorists' own admission, their constitutional provisions for fundamental rights have never interfered with the Soviet dictatorship. Furthermore, the excesses of Stalin may again return to plague the Soviet citizen should the Communist Party or its leaders find its position of leadership seriously threatened. Finally the rights enumerated in the Constitution do not include all the rights which would be considered necessary and important by American lawyers.

Nevertheless, it would be a mistake to discount the existence of fundamental rights in the Soviet Union entirely. Within the framework of the above six qualifying concepts, Soviet citizens do enjoy considerable protection of their rights, at least to the extent that the exercise of these rights does not interfere with the goals of the state or the desires of the party. Moreover, it is likely that the majority of cases arising ordinarily will not involve such interference.<sup>143</sup>

The Soviet approach to fundamental rights does have some positive advantages over the American approach. Reliance on the power of the state to protect the interests of the people collectively has resulted in a considerable amount of economic stability for *all*. First, there is a high degree of job security, medical services are freely available, higher education is open to all qualified students and legal services are inexpensive.<sup>144</sup> Second, the Soviet Procuracy effectively acts as a bureau for the receipt and investigation of all types of indi-

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<sup>143</sup> See the cases described and reported in *Cases on Criminal Law and Procedure* (Berman transl.), 1 SOVIET STATUTES & DECISIONS, No. 4 (1965); HAZARD & SHAPIRO, pt. 1, at 78-161 *passim*; KONSTANTINOVSKY, SOVIET LAW IN ACTION 10 (Berman ed. 1953).

<sup>144</sup> Berman, *supra* note 92, at 334. See also BERMAN, THE RUSSIANS IN FOCUS 63-97 (1953).

vidual complaints. The complaint of any citizen alleging unfair treatment by any level of government will be investigated and, if found to have merit, will be pursued in the courts or in proper administrative channels at the initiative and expense of the Procurator.<sup>145</sup> Thus, the ability to protest the denial of fundamental rights does not depend upon the ability of the injured party to pay attorneys' fees and court costs. Third, a much greater effort is made in the Soviet Union to inform citizens about their legal rights and duties. Law is made a part of the general education of the average citizen, lawyers frequently give lectures on the law, and law is popularized in pamphlets written for the general public.<sup>146</sup> The Soviet citizen is undoubtedly better informed as to the nature and extent of his fundamental rights and duties than the American citizen.<sup>147</sup> Fourth, unlike most jurisdictions in the United States, court procedure in the Soviet Union is speedy. Finally, to a great extent, the Soviet legal system has granted equal treatment to different ethnic groups and to both men and women.<sup>148</sup>

The individual citizen needs protection from many sides—from foreign enemies, from criminal elements in his own society, from arbitrary actions of his fellow citizens and from the economic exploitation of his employer and his economic superiors. But far more importantly, the individual citizen needs protection from his own government. Although the Soviet citizen may receive adequate protection in the first four areas, he receives almost no protection in the last. He stands unprotected against the overwhelming power of the party leaders.

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<sup>145</sup> Ordinance on the Supervisory Powers of the Procurator's Office in the U.S.S.R., *supra* note 98; Berman, *supra* note 92, at 337; VYSHINSKY 537.

<sup>146</sup> See BERMAN, JUSTICE IN THE U.S.S.R. 283-84, 299 (1963).

<sup>147</sup> Berman, *supra* note 92, at 334.

<sup>148</sup> *Ibid.*; FACTS ABOUT THE CONSTITUTION OF THE U.S.S.R., *supra* note 60, at 45.