

## Party and Public Ideals in Conflict: Constitutionalism and Civil Rights in the USSR

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## Party and Public Ideals in Conflict: Constitutionalism and Civil Rights in the USSR

### Introduction

The Soviet system is presently in transition from what Gorbachev has termed the "old" Constitution to the "new" Constitution.<sup>1</sup> In the area of civil rights during this interregnum, populist action is outstripping legislative initiative with the result that *de facto* rights "from below" are in collision with *de jure* rights "from above." In effect, Communist Party and mass public ideals are in conflict in the USSR.

During the past five years, Gorbachev and the Party have lost control of the legal reform process, as well as the "restructuring" program in general. Gorbachev has promoted the ideals of "*glasnost*," or openness, and "democratization," or greater civic participation in the public arena, which were initially ill-defined and sloganistic.<sup>2</sup> The Soviet leader promised legislation to institutionalize these ideals. An ambitious legislative agenda was published in 1986 and timetables for various projects were announced.<sup>3</sup> However, the legislative process dragged on and projected deadlines passed, while Gorbachev's "hot" rhetoric continued to raise the public's political, economic, and legal expectations. Consequently, diverse activists from below began to translate *glasnost* and democratization into actual practice without awaiting legislative institutionalization. In effect, the Party has been confronted with street democracy and spontaneous legal reform as the public continues to appropriate promised rights without formal empowerment. In the process, Gorbachev and the reform leadership soon found the limits and boundaries of their vague conceptions of *glasnost* and democratization

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1. See *Excerpts From a Speech by Gorbachev Before the Lithuanian Communists*, N.Y. Times, Jan. 15, 1990, at A9, col. 4.

2. See M. GORBACHEV, *PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD 75-80* (1987).

3. See *PARTY, STATE, AND CITIZEN IN THE SOVIET UNION: A COLLECTION OF DOCUMENTS 30-36* (M. Matthews ed. 1989) (English translation of the agenda).

being tested, probed and, more recently, even exceeded by questing citizens throughout the Soviet Union. All of this has engendered a conservative backlash among Party members, the bureaucracy, and legal professionals which has further delayed certain key new laws in the area of civil rights.<sup>4</sup> Currently, the conflict between the Party and the public over the scope and meaning of the new revolutionary ideals is becoming progressively more acute and, in some parts of the country, even violent.<sup>5</sup>

Constitutionally and legislatively, the USSR changed very little from the late 1970s to 1990; yet actual application of the existing laws has changed dramatically under Gorbachev since 1986. This Article examines the recent Soviet movement toward constitutional government and codification of basic civil rights by first identifying the historical methods of social and political control prevalent since the time of Stalin. Although Stalin's jurisprudence of terror evolved into Brezhnev's more subtle forms of administrative and judicial political justice, both instilled fear in the general populace and held it in check. Part II of this Article discusses causes and effects of both Gorbachev's push for *glasnost* and democratization and the overeager response of the general populace to new freedoms. The gradual erosion of fear among the masses substantially contributed to the expansion of civil rights. Gorbachev's legitimization of aggressive social and political behavior also encouraged the current conflict between law and public ideals. Finally, the Article suggests that *de facto* rights from below are outpacing the *de jure* rights granted by the authorities. The Soviet regime is losing influence within its borders as social behavior swirls out of control.

## I. Civil Rights in the USSR: Soviet Control of Social Behavior

### A. Background: Theoretical Underpinnings and the Jurisprudence of Terror

#### 1. *Theoretical Underpinnings of Civil Restrictions on Speech and Assembly*

Flowing from the Marxian emphasis on historical materialism founded on the precedence of thing over idea and base over superstructure, Soviet human rights theory has always given preeminence to economic and social rights over the political and civil rights favored by democratic societies. The USSR Constitution of 1936 incorporated this perspective into Soviet constitutional doctrine. This document, the Stalin Constitution, guaranteed the citizen a broad spectrum of economic and social rights, offering only a limited and qualified list of political and civil

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4. As of early 1990, the promised statutes on *glasnost*, the press, the archives, and the "informals" (as the new independent groups are called) were several years behind schedule.

5. Since the inception of *perestroika*, there have been serious outbreaks of violence in the following union republics: Armenia, Azerbaijan, Georgia, Kazakstan, Moldavia, Tadjikistan, and Uzbekistan.

rights.<sup>6</sup> The latter, inscribed in article 125, included the familiar rights of speech and assembly, but were abridged by the requirement that their legitimate exercise had to serve to “strengthen the socialist system.” This requirement was another way of saying that the citizen who chooses to be venturesome must reinforce the status quo through his or her civic behavior. The Party, as the sovereign authority and ultimate legislator, defined the status quo. Nonconforming civic behavior during the Stalin era meant courting long imprisonment or even death; hence, the vast majority of people remained silent and assembled only in approved places under official auspices.

The Stalin Constitution with its truncated “bill of rights” remained in effect for over four decades, well beyond Stalin’s death in 1953. Khrushchev eventually established a constitutional commission to draft a new constitution; however, the work was still incomplete upon his ouster from office in October of 1964.<sup>7</sup> The new Brezhnev leadership adopted different priorities, so the constitutional work continued sporadically for years in rather desultory fashion, finally producing a new Constitution in 1977.<sup>8</sup> The Stalin Constitution’s assumptions about human rights priorities remained intact in the Constitution of 1977. While the new Constitution amplified the range of guaranteed material rights, the only change in the civil rights language was detrimental. The old Stalinist article 125 became new article 50, but with an additional criterion further encumbering the enumerated rights. Now a citizen had to not only “strengthen,” but also to help “develop” the socialist system through any exercise of his/her right of speech, assembly, press, mass meetings, or demonstrations.<sup>9</sup>

## 2. *The Birth of Public Activism in the Post-Stalin Years*

In the intervening years prior to the new Constitution, social attitudes changed and a small number of citizens, mainly the well-educated and working intellectuals, began to assert themselves by speaking or writing critically about public affairs and even occasionally demonstrating in protest of a Party policy.<sup>10</sup> Khrushchev’s political demise, signalling the end of any hopes for reform for a generation to come, was in large part the catalyst for the new Soviet human rights activism. Though tentative and modest in scope in the latter half of the 1960s, the activism grew into a loose yet discernible movement in the 1970s, with a mainstream of political and civil rights dissent fed by tributaries of ethnic and religious dissidence. Although they generally operated as individuals or in

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6. Compare articles 118-22 of the 1936 USSR Constitution (socio-economic rights) with article 125 (civil and political rights), *reprinted in* A. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE USSR: A GUIDE TO THE SOVIET CONSTITUTIONS* 155-56 (1981).

7. *See Events Leading to Khrushchev’s Ouster Reported*, Foreign Broadcast Information Service [FBIS], JPRS Report, Soviet Union: Political Affairs, Dec. 20, 1989, at 72.

8. *See* R. SHARLET, *THE NEW SOVIET CONSTITUTION OF 1977*, at 1-6 (1978).

9. *Id.* at 93.

10. *See* L. ALEXEYEV, *SOVIET DISSIDENT* 3-18 (1985).

small groups, the activists gained visibility (at least in the West) well beyond their numbers by surreptitiously circulating uncensored information among themselves and abroad through an elaborate clandestine network of unofficial journals and other publications called "samizdat."<sup>11</sup> Soviet authorities needed new ways to deal with this activism.

### 3. *The Machinery of Social Control*

Using the machinery of justice for political purposes dates back to the inception of the Soviet system in 1917. Lenin, and later Stalin, created a "jurisprudence of terror"<sup>12</sup> which dominated Soviet public life well into the mid-1950s. As the Party under Khrushchev diminished the use of terror as a routine instrument of governance, a post-Stalin paradigm for social control and repression began to emerge.<sup>13</sup> This paradigm included four broad policy types designed to protect and defend the political and social status quo from any unauthorized internal attempts at change. For the masses, there were first policies to promote "social pacification through consumption," e.g., subsidized and fixed prices for certain basic foodstuffs and an array of social welfare programs. Implicit in the pacification process was an unwritten social contract between the Party-State and the citizen by which the former granted economic and social rights in return for the consensual waiver of political and civil rights; in effect, the tradeoff was economic goods for political quiescence. The second line of defense, specifically addressed to the creative intelligentsia, was "repressive tolerance," an arrangement through which creative expression was confined within politically-defined parameters in return for generous creature comforts.<sup>14</sup> The rationale for these policies on the arts was to control, exploit, and buy-off an articulate and influential, and therefore potentially troublesome, part of the population.

The remaining two policies of the post-Stalin paradigm involved more active measures of social control in instances when pacification or repressive tolerance failed to completely contain their respective target constituencies. First, "differentiated political justice" was primarily fashioned to deal with citizens, especially intellectuals, who insisted on crossing the intangible line between private complaint and public criticism. This group of citizens was never large, hence political justice was meted out differentially depending on the offender, the intent, and the

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11. See F. FELDBRUGGE, *SAMIZDAT AND POLITICAL DISSENT IN THE SOVIET UNION* ch. 1 (1975).

12. See Sharlet, *Stalinism and Soviet Legal Culture*, in *STALINISM: ESSAYS IN HISTORICAL INTERPRETATION* 163-68 (R. Tucker ed. 1977).

13. See Sharlet, *Varieties of Dissent and Regularities of Repression in the European Communist States*, in *DISSENT IN EASTERN EUROPE* 10-14 (J. Curry ed. 1983).

14. The term was conceptualized by the late Western Marxist philosopher Herbert Marcuse. For the best analysis of the concept as government policy, see M. HARASZTI, *THE VELVET PRISON: ARTISTS UNDER STATE SOCIALISM* (1987).

offense, in contrast to the generally standardized political justice of the Stalin era.

The final line of defense of the ideological realm existed to resist aggregate unrest and mass action. This was the use of troops or large-scale paramilitary action to carry out "suppression through main force," which was rarely resorted to in the post-Stalin, pre-Gorbachev years. Such infrequency evinced the general effectiveness of the first three policies in muting, muffling, and occasionally repressing challenges to the status quo. Those who did fall victim to differentiated political justice or main force were usually attempting to exercise civil rights — disapproved speech in a censored society and/or unlawful assembly in a closed public arena.

## B. Political Justice Under Brezhnev

The Brezhnev regime did not remain impassive in the face of challenges to the Party's monopoly on political thought and expression, be they spoken, written, or imagined. To contain the problem, a diverse set of policies was gradually developed and perfected in the spirit of differentiated political justice. Whereas the prior Stalinist political justice was metaphorically a blunt instrument applied with few distinctions to all who fell within its purview, Brezhnevist political justice was a complex mechanism which could be fine-tuned to apply to the wide variety of dissidents and dissent appearing in the twenty years spanning the mid-1960s to the mid-1980s. Brezhnevist political justice can be divided into its administrative and judicial components.<sup>15</sup>

### 1. *Administrative Political Justice*

Administrative political justice was predominantly carried out by the state bureaucracy. It took the form of an ad hoc, arbitrary bureaucratic action against an individual or group deemed politically deviant from the prevailing norms of Soviet society. There were four patterns of administrative action: bureaucratic deprivation, official hooliganism, psychiatric internment, and forced expatriation.

#### a. Bureaucratic Deprivation

*Bureaucratic deprivation* was the most commonly used form of retaliation against dissidents and other nonconformists, including Soviet Jews seeking to emigrate. Official actions ranged from petty harassment, such as the suspension of telephone service, to more consequential deprivations such as job dismissal, eviction, and preventing a dissident's child from entering the university. These actions were usually carried out anonymously as if by the "invisible hand" of bureaucratic arbitrariness; hence, it was difficult if not impossible to identify a responsible official for the purpose of petitioning for relief. If available and necessary, the authori-

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15. Sharlet, *Dissent and Repression in the Soviet Union and Eastern Europe*, 33 INT'L J. 763, 775 (1978).

ties would invoke an appropriate law for their action.<sup>16</sup> In most such cases they did not and there was no recourse to the courts. Although article 58 of the 1977 Constitution provided for judicial review of administrative action,<sup>17</sup> the necessary enabling legislation was never enacted in the Brezhnev or immediate post-Brezhnev eras.<sup>18</sup>

#### b. Official Hooliganism

*Official hooliganism* was sometimes employed as follow-up retaliation when one or another bureaucratic deprivation did not deter the intended person from an offending pattern of behavior. This action entailed the use of the police, either uniformed or plainclothes, to openly or surreptitiously intimidate an individual. The intimidation could take the form of a physical threat or assault, a covert mugging without robbery, or in a few impossible-to-prove cases, extra-judicial execution. The government's objective was to mask this form of deterrence as common "hooliganism," and to deny the victim's recourse of a criminal complaint by having official personnel carry out the actions.<sup>19</sup>

#### c. Psychiatric Internment

*Psychiatric internment* was a third option available to the authorities in their quest to contain political deviance. This option involved arranging the commitment of an individual to a hospital for the criminally insane.<sup>20</sup> Such a commitment required a hearing in a criminal court, which by pre-arrangement became a judicial formality. Once committed, the mentally healthy victim was inevitably subjected to a cruel and painful pharmacological "treatment" until the "patient" either recanted the politically unhealthy views or was released through the persistent intervention of international human rights organizations or Western political parties or governments.<sup>21</sup>

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16. For instance, job dismissal was a common administrative sanction for dissidents or would-be emigrants. On these occasions presumably, so-called "instructive law" from behind the scenes directed the administrator's interpretation of articles 17, 51, 52, and 56 of the federal labor law principles as implemented in the individual labor codes of the union republics. See *THE SOVIET LEGAL SYSTEM: LEGISLATION AND DOCUMENTATION* 588, 596-97 (W. Butler comp. & trans. 1978). In a politically-motivated dismissal, there was almost invariably no hope of redress in the courts, which in such cases would receive their instructions via the telephone.

17. R. SHARLET, *supra* note 8, at 94-95.

18. See Barry, *Administrative Justice and Judicial Review in Soviet Administrative Law*, in *SOVIET LAW AFTER STALIN — PART II: SOCIAL ENGINEERING THROUGH LAW* 257-59 (D. Barry, G. Ginsburgs, & P. Maggs eds. 1978).

19. For the relevant experience of Valery Panov, a Soviet Jewish ballet dancer who had expressed the wish to emigrate, see V. PANOV, *TO DANCE* 323-24 (1978).

20. See S. BLOCH & P. REDDAWAY, *PSYCHIATRIC TERROR: HOW SOVIET PSYCHIATRY IS USED TO SUPPRESS DISSENT* chs. 3 & 5 (1977); H. FIRESIDE, *SOVIET PSYCHOPRISONS* chs. 2 & 3 (1979).

21. On the *Grigorenko* case, see P. GRIGORENKO, *MEMOIRS* ch. 26 (1982).

#### d. Forced Expatriation

*Forced expatriation* was a fourth and more exclusive method of administrative political justice. This method was usually only utilized against dissidents who had been undeterred by bureaucratic deprivation and/or official hooliganism, but were too prestigious or highly visible in the West to be subjected to psychiatric internment or to be bound over for judicial political justice. *Forced expatriation* involved an edict by the Presidium of the USSR Supreme Soviet depriving the individual of citizenship, thus setting the stage for expulsion from the country. Another variation involved allowing the person to travel to the West on business and carrying out the denaturalization while he/she was abroad, effectively preventing re-entry into the USSR. Some of the most notable victims of this form of administrative retaliation are the physicist Chalidze, the cellist Rostropovich, and the novelist Solzhenitsyn.<sup>22</sup>

#### 2. *Judicial Political Justice*

For those political deviants who could not be discouraged by the administrative methods or whose offense was considered egregious, the Brezhnev regime reserved judicial political justice. Judicial political justice was achieved either through the use of a criminal trial as a surrogate political trial, or by means of a direct political trial.<sup>23</sup>

Just as higher political authority directed the application of administrative political justice, such authority secretly directed the judges and prosecutors in both venues of judicial political justice. This surreptitious manipulation of the machinery of justice for the purpose of neutralizing a challenger to the status quo was called "telephone law," since it usually involved a Party official fixing the trial by telephoning a directive to the court.<sup>24</sup> Predictably, the trial result was always a guilty verdict and, often, a pre-determined sentence as well.

#### a. Criminal Trial

The criminal trial approach to stifling dissidence was perhaps the most pernicious and most difficult for the accused to defend against. This route of judicial persecution was usually taken against obscure dissidents or would-be emigrants. Occasionally, however, the authorities would press criminal charges against the better known activists in order to deny them the more visible public platform of a full-scale political trial. In either case, the authorities' purpose in bringing criminal

22. For an account of his expatriation and denaturalization, see A. SOLZHENITSYN, *THE OAK AND THE CALF: A MEMOIR* 397-450 (1980).

23. On the two types of trials as political justice, see O. KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 47-53 (1961).

24. For example, in the *Pinkhasov* case, the judge had obviously already received his instructions. He directed one of the people's assessors, or co-judges, to offer the accused a covert plea bargain during a recess. The deal offered (and rejected) was renounce the desire to emigrate to Israel and the (false) criminal charges would be dropped. T. TAYLOR, A. DERSHOWITZ, G. FLETCHER, L. LIPSON & M. STEIN, *COURTS OF TERROR: SOVIET CRIMINAL JUSTICE AND JEWISH EMIGRATION* 56-58, 168-69 (1976).



charges for political activity was to deny the activist the high moral ground of peaceful protest by demeaning the individual with common criminal charges. In all of these cases, the charges were based either on technical violations of the criminal law<sup>25</sup> or, more commonly, on false charges of criminal behavior.<sup>26</sup> While the former type of charge was difficult to defend against, the latter was virtually impossible given the fact that witnesses were suborned to give false testimony against the accused.<sup>27</sup>

## b. Political Trial

### 1. *Applicable Code Provisions*

Whereas various ordinary charges, such as hooliganism or even rape, were used in the criminal trials of the politically deviant, the main political trials relied on just two articles of the criminal code.<sup>28</sup> To use as a referent the Russian Republic Criminal Code, the model for other republican codes, the articles pertaining to political crime were article 70 and article 190-1.<sup>29</sup>

The regime's most formidable legal weapon against dissent was article 70 of the RSFSR Criminal Code and its equivalents in other republican codes. Entitled "Anti-Soviet Agitation and Propaganda," article 70 was a broadly-written subversion law encompassing a wide variety of oral or written speech deemed by the authorities to be hostile to the state or to the social system of the USSR. This article also embraced anti-Party criticism, since the Communist Party's classification as a social organization qualifies it as part of the Soviet social system. Regardless of the form of the unlawful behavior, the prosecution theoretically had to prove there was an intent to subvert or weaken the

25. On the *Liubarskii* case, see CHRONICLE HUM. RTS., nos. 5-6, at 42-47 (Nov.-Dec. 1973).

26. In the *Stern* case, the judge privately said to the accused during a recess, "Dr. Stern, you are not guilty, but I am forced to convict you. I have a family and children. I want to live too." THE USSR VS. DR. MIKHAIL STERN 2 (A. Stern ed. 1977) (emphasis added).

27. See *The Trial of Chornovil*, A CHRONICLE OF CURRENT EVENTS, no. 57, at 95-98 (1981).

28. In addition, trials of purely religious dissidents were usually processed under two other articles. These are the Russian Soviet Federated Socialist Republic Criminal Code [RSFSR CC] article 142 ("Violation of Laws on Separation of Church and State and of Church and School"), and article 227 ("Infringement of Person and Rights of Citizens Under the Appearance of Performing Religious Ceremonies"). See SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 169, 192 (H. Berman 2d ed. 1972).

29. *Id.* at 153-54, 180-81. Less frequently used was RSFSR CC 190-3 entitled "Organization of, or Active Participation in, Group Actions which Violate Public Order." *Id.* at 181. Article 190-3 was intended to prevent and, if necessary, punish those involved in the occasional vigil or small-scale demonstration outside of a courthouse by sympathizers of a dissident who was on trial inside. The charge was not brought in most such cases, and since there were rarely, if at all, any other unauthorized public demonstrations in Soviet society up to the mid-1980s, the law was not used on a regular basis in the regime's struggle against political deviance.

"Soviet regime."<sup>30</sup> Once guilt was established by the court, a foregone conclusion in political cases, the sanctions were relatively severe by Soviet norms. The maximum penalty for a first offender was seven years imprisonment followed by five years internal exile in a remote, isolated place.

Prosecutions for subversion produced many prisoners of conscience from among the ranks of the human rights activists in the late 1960s, the 1970s, and the early 1980s.<sup>31</sup> In 1984, during Andropov's brief term in office, the government amended the subversion law by enlarging its scope. The amendment added a new aggravating circumstance which mandated stricter punishment for first offenders when the subversion was "perpetrated with the use of financial means or material valuables received from foreign organizations or from persons acting in the interest of those organizations."<sup>32</sup> The amendment was aimed at the unofficial liaison people in the USSR who served as vital links between Western supporters and Soviet Jewish *refuseniks*,<sup>33</sup> fundamentalist Christians, and mainline political dissidents.

The companion law used to restrain political activism was article 190-1 of the RSFSR Criminal Code and its equivalent in the other republican codes. The Soviets introduced this article into the criminal law in 1966 by way of amendment in order to facilitate political prosecutions. The new law, entitled "Circulation of Fabrications Known to Be False Which Defame the Soviet State and Social System,"<sup>34</sup> was designed to punish seditious behavior. It alleviated the task of the prosecution and the court in political cases because it did not require proof of intent for conviction. The prosecution merely had to proffer evidence that the citizen had engaged in seditious speech, or that the citizen had prepared or merely circulated material considered by the authorities to be politically defamatory. While prosecution and conviction of dissidents under this law presumably required less investigative energy than subversion cases, the permissible sanctions were also less severe. The maximum penalty was three years incarceration. However, since numerous dissidents and others were involved in typing and covertly distributing *samizdat* or unofficial literature, the sedition law added substantially to the number of political prisoners in the USSR.

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30. *Id.* at 153-54.

31. Amnesty International, which has rigorous standards of verification before "adopting" a prisoner of conscience, worked on approximately 350 political cases in the USSR during 1978. See AMNESTY INT'L REP. 1978, at 244 (1979).

32. See R. Sharlet, *Human Rights and Repression in the USSR Under Andropov*, U.S. Information Agency Wireless File, ADDENDUM, no. 32, at 7 (Apr. 6, 1984).

33. *Refusenik* was an informal term coined to describe a Soviet Jewish citizen who applied to emigrate to Israel and was refused permission several times.

34. SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES, *supra* note 28, at 180-81.

## 2. Comparison to Criminal Trials

The twin laws of political repression nearly always resulted in a political trial for either subversion or sedition. Occasionally, a charge of sedition was combined with an ordinary criminal charge, producing a hybrid criminal-political trial.<sup>35</sup> Most often, though, the government indicted offending individuals exclusively on political charges. A political trial differed from a criminal trial *qua* political trial in several ways. First, the regime had decided to accord the offender the status of a political opponent rather than to debase the person as a common criminal. Secondly, because the accused had actually behaved in a politically unacceptable way, the charges under the relevant law were not grossly falsified. Finally, because the political activist usually took pride in and responsibility for his actions, he had a better opportunity to mount a defense (at least symbolically since guilt was politically predetermined) than the political victim of a criminal trial.

## 3. Illustrations

Many celebrated cases could be cited, but a brief discussion of only a pair should suffice to demonstrate political prosecutions at work in the pre-Gorbachev period. In August of 1968, a small band of intrepid Soviet dissidents gathered in Moscow's Red Square to conduct a peaceful protest demonstration against an official Soviet policy, at that time an unheard of event. The occasion was the recent USSR-Warsaw Pact invasion of Czechoslovakia to bring an end to the reform communism program of Alexander Dubcek, General Secretary of the Czechoslovak Communist Party. The Soviet dissidents, Pavel Litvinov and others, chose to protest the invasion by displaying several unauthorized placards and signs containing critical speech. The KGB plainclothesmen who routinely patrol Red Square moved in quickly to forcibly break up the demonstration, which was over in a matter of minutes. The government brought charges comprised of a combination of RSFSR CC articles 190-3<sup>36</sup> and 190-1. The protestors had participated in a group action which violated public order (hence art. 190-3), and in the process displayed such seditious slogans as "Down with the Occupiers," "Freedom for Dubcek," and "For Your Freedom and Ours" — which were considered false and defamatory (hence art. 190-1).<sup>37</sup>

The second case demonstrates one avenue of defense frequently adopted by bold and determined political defendants. The Soviets usually did not engage a political trial for just any human rights activist. As indicated above, the regime had at its disposal a number of methods for deterring aberrant behavior. The political trial route, which tended to consume enormous amounts of investigative energy, was normally reserved for the better-known political offenders whom we might

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35. CHRONICLE HUM. RTS., *supra* note 25.

36. See *supra* note 29.

37. See UNCENSORED RUSSIA: PROTEST AND DISSENT IN THE SOVIET UNION 113 (P. Reddaway ed. 1972).

describe as defendants of stature.<sup>38</sup> As such, these defendants customarily regarded the courtroom as an extension of the political arena and as an ideal platform from which to project their contrary views. The court would rarely countenance open political comments by the accused, however, so the commonly used method of defense by dissidents was to put "socialist legality" itself on trial.<sup>39</sup> This technique entailed using Soviet constitutional and code law against the trial court by citing the politically-inspired violations of the defendant's constitutional and due process rights. Perhaps no one was more skilled in this legalistic defense against political arbitrariness than Vladimir Bukovsky.

Vladimir Bukovsky, a persistent public critic of the Soviet system, was arrested in 1971 and charged under RSFSR CC article 70 with subversion. His offense was that he had given an unauthorized interview to an American reporter in which he critically discussed the political abuse of psychiatry in the USSR. The main count in the indictment was that he had transmitted anti-Soviet information abroad. As with all other dissidents subject to prosecution, the court convicted Bukovsky at his trial in 1972.

Bukovsky's case demonstrates the legalistic style of defense frequently used by activists confronted with Soviet political justice. By the time Bukovsky was brought to court in early 1972, he had earned a classification as a political recidivist. He had previously been convicted in 1967 for publicly protesting the passage of articles 190-1 and 190-3, for criticizing article 70's breadth and arbitrariness, and for insisting that all three laws were "unconstitutional," i.e., incompatible with the "bill of rights" inscribed in article 125 of the then controlling 1936 Constitution. Bukovsky had continued to argue these points in court, but of course to no avail.<sup>40</sup> Later, in his 1972 trial for violating article 70, Bukovsky raised the legalistic defense to a fine art. After the indictment was read, Bukovsky made no less than eight pre-trial motions. The first pointed out the imprecision in the indictment and requested that the trial judge remand the case for further investigation. The other seven motions cited numerous procedural irregularities in the investigation. Not surprisingly, all motions but the last, asking that certain unanswered complaints be entered into the record, were denied. At the close of the trial, Bukovsky exercised his right as a defendant to a final statement before the court retired to deliberate its foreordained "political" verdict. Using his statement to rebut the prosecution's case as well as to call attention to additional procedural infringements, Bukovsky concluded:

However long I may have to spend in prison, I will never renounce my beliefs. I will express them, exercising the right given to me by Article

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38. See O. KIRCHHEIMER, *supra* note 23, ch. 6.

39. See Weiner, *Socialist Legality on Trial*, in *QUEST OF JUSTICE: PROTEST AND DISSENT IN THE SOVIET UNION TODAY* 39-51 (A. Brumberg ed. 1970).

40. See *The Moscow Trials of 1967*, in *QUEST OF JUSTICE: PROTEST AND DISSENT IN THE SOVIET UNION TODAY*, 79-89 (A. Brumberg ed. 1970).

125 of the Soviet Constitution, to all who wish to listen to me. I will fight for legality and justice.<sup>41</sup>

## II. The Gorbachev Era, Conflict Between *De Facto* and *De Jure* Civil Rights

### A. Perestroika and the Erosion of Fear

#### 1. Overview

Clearly, much of what has occurred in the USSR in the past several years under the rubric of social reform has been the unintended and even unwanted outcome of Gorbachev's program of *perestroika* or restructuring, especially in the area of speech and assembly. Perhaps the one factor which has contributed most substantially to the enormous *ad hoc* expansion of these civil rights has been the gradual erosion of fear in the mind of the Soviet public. Prior to 1985, the USSR Constitution of 1977 provided only pro forma rights of speech and assembly, subject to caveats rendering them useless to the average citizen.<sup>42</sup> For those few individuals, usually dissidents or non-conformists of one kind or another, who nonetheless chose to speak or assemble publicly without authorization, the regime deployed an array of administrative as well as judicially-administered political techniques to contain maverick behavior.<sup>43</sup> For the vast majority of the population, including those who may have only contemplated public criticism of the status quo, the fear of losing one's job, incarceration, or institutional commitment was usually sufficient to deter ideological deviance and maintain political acquiescence.

Yet, there has been a dramatic change in attitudes toward critical public expression in the course of the past five years. As the USSR Minister of Internal Affairs recently stated, referring to the previous general proscription against "anti-Soviet" agitation and propaganda, "Now there is anti-Soviet propaganda on every street corner — and those who are engaging in it are free."<sup>44</sup> Clearly, the catalyst has been Gorbachev's repeated invitations to the masses to begin to exercise their political rights to freer speech and more assembly under the aegis of *glasnost* and democratization. Probably Gorbachev's first formal conferal of these rights was in his lengthy report to the 27th Congress of the Communist Party of the Soviet Union, in early 1986.<sup>45</sup> Subsequently,

41. *The Case of Vladimir Bukovsky*, 18 SURVEY, no. 2, at 158 (Spring 1972).

42. See article 50 of the USSR Constitution, reprinted in R. SHARLET, *supra* note 8, at 93.

43. See Sharlet, *Dissent and Repression in the Soviet Union and Eastern Europe*, 33 INT'L J. 763, 775-84 (1978).

44. *Interior Minister on Perestroika, Internal Security*, Foreign Broadcast Information Service, Daily Report: Sov. Union, Jan. 12, 1990, at 97 [hereinafter FBIS, Daily Report: Sov. Union].

45. See *Gorbachev's Political Report*, in CURRENT SOVIET POLICIES IX: THE DOCUMENTARY RECORD OF THE 27TH CONGRESS OF THE COMMUNIST PARTY OF THE SOVIET UNION 29-32 (1986).

Gorbachev invoked these liberating ideas routinely in his speeches on a variety of occasions, cited them in his 1987 book,<sup>46</sup> and gave them particular emphasis in his major address at the special 19th Party Conference to promote restructuring in mid-1988.<sup>47</sup> *Glasnost* began to flower, first in the press, then spread to the sphere of culture, and, in recent years, opened the economy, the legal system, and Soviet history to greater scrutiny.<sup>48</sup>

Gorbachev's encouragement, combined with the more open press, inspired the more politically conscious segment of the population to take the idea of democratization seriously and to begin to act. Understandably, the initial steps toward public participation were timid; in the absence of clearly defined guidelines from above, no one was sure of the boundaries of official tolerance of activity independent of the Party. Many of the first unofficial groups to organize undertook the task of promoting the success of restructuring, or, staying well within the political safety zone, formed groups around specific environmental issues — save a coastline in one area,<sup>49</sup> stop a nuclear plant in another.<sup>50</sup> Encountering no serious objections from the authorities to their early lobbying, groups began to merge, giving rise to the emergence of ethnic popular fronts, most notably at first in the Baltic union republics, followed by the Caucasian republics in the South, Moldavia, and finally the Slavic republics of Belorussia and the Ukraine.

Early in their respective developments, the ethnic popular fronts successfully lobbied their republican supreme soviets or legislatures to enact laws making the indigenous language of the ethnic majority, e.g. Estonian, rather than Russian, the official working language of the republic. By early 1990 thirteen of the fifteen union republics had passed such language laws, to the discomfiture, one should note, of the various and sometimes populous minorities living among the majority.<sup>51</sup> Following the 1988 amendments to the USSR Constitution which restructured the national legislative process and Soviet election law, the most highly developed fronts in Latvia, Estonia, and Lithuania began to function as surrogate opposition parties to the union republic communist parties. In the early 1989 elections to the newly-created Congress of People's Deputies, the Baltic fronts' candidates generally trounced

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46. See M. GORBACHEV, *supra* note 2.

47. See, e.g., the resolution on *glasnost* of the 19th Party Conference in PARTY, STATE, AND CITIZEN IN THE SOVIET UNION: A COLLECTION OF DOCUMENTS, *supra* note 3, at 156-59.

48. For discussion of the various forms of *glasnost*, see W. LAQUEUR, THE LONG ROAD TO FREEDOM: RUSSIA AND *Glasnost* (1989).

49. See THE NATIONALITIES FACTOR IN SOVIET POLITICS AND SOCIETY 214-15 (L. Hajda & M. Beissinger eds. 1990).

50. See B. ELLOF, SOVIET BRIEFING: GORBACHEV AND THE REFORM PERIOD 138 (1989).

51. See FBIS, JPRS Report, Soviet Union: Political Affairs: Republic Language Legislation, Dec. 5, 1989.

their Party opponents.<sup>52</sup> Emboldened by this success, the Baltic fronts began to work together in the Congress and in its smaller working legislature, the Supreme Soviet, for greater economic autonomy for the region. That autonomy was granted in the fall of 1989.<sup>53</sup> Since then, populist calls for independence and secession from the USSR have been heard in a number of the smaller union republics, most notably in Lithuania.<sup>54</sup> At the end of 1989 and the beginning of 1990, the most extreme manifestation of democratization or unofficial public activism took place in the southern republic of Azerbaijan. There, the popular front effectively supplanted the Party as the actual governing agency in various parts of the republic by recruiting many of its personnel to the ethnic national cause.<sup>55</sup>

At each stage in the rapid evolution of democratization in the USSR, Gorbachev tried to control it by slowing the process down or by publicly resisting a specific trend — all to no avail. Faced with a series of *fait accompli*, Gorbachev and the reform leadership have consistently backed down, making policy out of the inevitable (the exceptions being the introduction of troops into Azerbaijan in early 1990 to restore order and presumably to try to regain control of a runaway republic, and the pressures brought to bear on secessionist Lithuania during the spring). As evidence that Gorbachev never anticipated how far a restless and long suppressed public would carry their perceptions of *glasnost* and democratization, he began in 1988 to lash out at certain groups as ethnic extremists who, as the enemies of restructuring, were trying to undermine him politically and derail his reform program.<sup>56</sup> Anti-restructuring, in effect, began to supplant the term “anti-Soviet” in the official Soviet lexicon of political deviance.<sup>57</sup>

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52. See Report by the Central Electoral Commission on the New Elections of USSR People's Deputies Held After March 26, 1989, 41 CURRENT DIG. SOV. PRESS, no. 20, at 26 (1989).

53. See Law on Baltic Republics' Shift to Economic Accountability Is Adopted, 41 CURRENT DIG. SOV. PRESS, no. 37, at 13-15 (1989).

54. As of early 1990, calls for secession had been made by one group or another in the following union republics: Lithuania, Latvia, Estonia, Georgia, Moldavia, and Azerbaijan.

55. See, e.g., *People's Front Holds 'All Authority' in Lenkoran*, FBIS, Daily Report: Sov. Union, Jan. 16, 1990, at 73-74.

56. Usually this meant that an ethnic group was using *glasnost* and democratization in bolder ways than anticipated by Gorbachev. The leaders of the independent Armenian movement for the annexation of the Nagorno-Karabakh region in Azerbaijan were the first group to feel Gorbachev's wrath when they did not respond to political entreaties to cease and desist.

57. In spite of his growing frustration with ethnic activism, Gorbachev used repression very sparingly: against the leadership of the Armenian Karabakh group in December 1988, and against selected leaders of the Azerbaijani Popular Front in January 1990. For a discussion of the relationship between republic struggles for independence and human rights, see Goble, *Federalism and Human Rights in the Soviet Union*, 23 CORNELL INT'L L.J. 399 (1990).

## 2. *Slow Movement Toward Legitimization of Social Behavior Under the Constitution and the Rule of Law*

### a. Symbolic Gestures

Gorbachev has become a strong proponent of constitutionalism in the USSR and an ardent champion of civil rights for the Soviet citizen. He has taken significant steps toward limited government, as expressed in the concept of a "law-governed state,"<sup>58</sup> and toward the impending demise of the Party's constitutionally protected hegemony in the Soviet system.<sup>59</sup> In addition, as discussed above, he has skillfully used his policies of *glasnost* and democratization to pry open the closed society of the Soviet Union. None of this was evident, however, during his first year in office (1985-86), when the human rights scene remained bleak and unrelenting. At that time, the increasingly harsh repression policy of the Brezhnev and Andropov years continued unchanged. The KGB was vigorously containing political, religious, and ethnic dissent as well as some instances of aesthetic nonconformity.

Initially, the only relief in sight consisted of several symbolic gestures in connection with the first Reagan-Gorbachev Summit in Geneva in the fall of 1985. Prior to and just after the summit, a number of long-standing family reunification cases involving Soviet spouses of American citizens were resolved, Sakharov's wife, Yelena Bonner, was granted temporary medical leave from their joint internal exile to go abroad for treatment, and Sharansky, the leading Jewish emigration activist, was prematurely released from prison and allowed to emigrate to Israel. Sceptically, the West viewed these moves as merely traditional Soviet summit-related gestures to Western public opinion rather than actual changes in human rights policy.<sup>60</sup>

### b. Major Policy Shifts

By late 1986, there were indications that the Gorbachev administration was re-evaluating the cost-benefit ratio of repression. Major foreign policy objectives began to take priority over the imperatives of domestic social control, and Soviet repression policy gradually began to ease. The second Reagan-Gorbachev Summit brought forth the usual human rights gestures, but this time with a qualitative difference. Following the Iceland Summit in late 1986, Sakharov and Bonner were released from exile, and Gorbachev personally invited them back to Moscow to participate in the restructuring program. Upon Sakharov's arrival in the capital, he presented Gorbachev with a short list of long-suffering dissidents

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58. See Marchenko, *Problemy formirovaniia sotsialisticheskogo pravovogo gosudarstva*, VESTNIK MOSKOVSKOGO UNIVERSITETA, SER. 11: PRAVO, no. 5, at 3-13 (1989); the roundtable discussion *Lichnost v sotsialisticheskogo pravovom gosudarstve*, Sov. Gos. & PRAVO, no. 10, at 28-36 (1989); and Alekseev, *Na putiakh sozdaniia pravovogo gosudarstva*, PRAVOVEDENIE, no. 6, at 3-9 (1989).

59. See Clines, *Soviet Leaders Agree to Surrender Communist Party Monopoly on Power*, N.Y. Times, Feb. 8, 1990, at A1, col. 6.

60. See R. Sharlet, *Soviet Dissent Since Brezhnev*, 85 CURRENT HIST. 324, 340 (1986).



languishing in the prison camps. To the surprise of observers in the USSR and abroad, the government responded in early 1987 by gradually releasing several hundred dissidents of all persuasions, followed by the de-institutionalization of a substantial number of activists unjustly interned in mental hospitals. Simultaneously, the number of new political cases and trials began to diminish, initially in the Moscow and Leningrad regions and then eventually elsewhere in the union. The pace of Jewish, Armenian, and ethnic German emigration slowly started to pick up as well. Clearly, human rights policy under Gorbachev was beginning to change for the better, although the legislation hemming in civil rights practice remained on the books.<sup>61</sup>

### c. Ineffectual Lawmaking

While legislative review of the extant restrictive laws was promised, Gorbachev's twin policies of *glasnost* and democratization rapidly began to open up unimagined opportunities for the citizens' *de facto* rights of freer speech and public assembly. To secure these new affirmative rights, the government scheduled statutory codification of the twin policies. For instance, a set of laws on the new, more open Soviet information policy — on *glasnost*, the press, and access to the state archives — was projected for completion by the fourth quarter of 1987.<sup>62</sup> However, by 1990, a draft law on the press was under discussion in the Supreme Soviet,<sup>63</sup> the archives law was still in the drafting process, and the statute on *glasnost* was the furthest behind schedule with no indication of when it would appear.

According to an early 1989 unofficial account, before the legislative process was reformed, the *glasnost* statute was then in its sixth version with each new draft more regressive.<sup>64</sup> While Gorbachev's tenure has produced economic legislation, the more sensitive social legislation is emerging more slowly. Permitting more speech and freer assembly as a matter of policy is one thing, but codifying *glasnost* and unofficial associational activity (the so-called "informal groups") in law and thereby institutionalizing these new civil rights has apparently given greater pause. These are reportedly hotly conflicted issues between conservatives and reformers in the legislative drafting process.<sup>65</sup>

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61. See, e.g., 9 HELP & ACTION NEWSLETTER, no. 46, at 6 (Mar.-May 1987) (miscellaneous cases of political and religious dissent which arose in late 1986 and early 1987).

62. See PARTY, STATE AND CITIZEN IN THE SOVIET UNION: A COLLECTION OF DOCUMENTS, *supra* note 3, at 31, 35.

63. Discussion of Draft Press Law in Supreme Soviet, 1 RADIO LIBERTY REPORT ON THE USSR, no. 48, at 36 (Dec. 1, 1989).

64. This information was relayed to the author from a Soviet lawyer visiting the United States.

65. Based on personal interviews with several Soviet jurists visiting the United States in 1988-89.

## B. The Emerging Conflict Between Law and Public Ideals

### 1. Public Ideals Expressed by the Press, the Intelligentsia and the Masses

The public has not waited for formal empowerment to speak and assemble in ways inconceivable just a few years ago. *Glasnost* has developed exponentially and has made considerable progress toward fulfilling its principal policy tasks of promoting self-government and realizing human rights.<sup>66</sup> The three constituencies to whom Gorbachev addressed the policy are carrying out these tasks: the press which has been unleashed against the resistant bureaucracy, the intelligentsia which has been enlisted in the cause of restructuring as public persuaders, and the masses themselves whose public opinion has been stimulated by both the press and the intelligentsia.

Gorbachev initially encouraged all three groups to seize the opportunity of *glasnost*, insisting in January 1988, for instance, that there were "no limits to *glasnost* so long as it serves the interests of socialism."<sup>67</sup> Naturally, he intended that he and the leadership would define and supervise the criteria for what served the interests of socialism, but the policy of *glasnost* progressively flew out of his control. The press, freed of pre-publication censorship, now competes vigorously among itself for audience and functions as a key part of the emerging unwritten system of checks and balances, prodding the Party and the legislature in various directions. Sometimes chafing under pressure from the press, Gorbachev has attempted several times to rein it in, but with little effect. The only limitations seem to be self-censorship by the editors themselves and the Party's control over personnel appointments in the media. Even the latter was revealed as a weak lever in 1989 when Gorbachev tried unsuccessfully to get a critical editor to resign his post.<sup>68</sup> Gorbachev has encountered similar problems with the intelligentsia, which has grown steadily disenchanted with the slow pace of restructuring and has begun to openly criticize Gorbachev in the press.

The new mass public opinion has presented Gorbachev with the greatest problems. Beginning with the election campaign of winter-spring 1989, people began publicly to say virtually anything they wanted about the leadership, the Party, the Soviet system, and above all, the deteriorating quality of life in the country. The public rhetoric has been heated, as individuals and groups have used *glasnost* to legitimize and pursue their often uncompromising private or non-negotiable ethnic agendas. As the system of governance becomes less certain at the top, the activities of many of the people below tear at the social fabric.

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66. See PARTY, STATE AND CITIZEN IN THE SOVIET UNION: A COLLECTION OF DOCUMENTS, *supra* note 3, at 156-59.

67. For an English translation of Gorbachev's speech on *glasnost* and the media, see 40 CURRENT DIG. SOV. PRESS, no. 2, at 1-5, (esp. 4) (Feb. 10, 1988).

68. See 19 INDEX ON CENSORSHIP, no. 1, at 41 (Jan. 1990) (brief account of Gorbachev's effort to force the resignation of Vladislav Starkov, the critical editor of *Argumenty i fakty*).

## 2. Legal Responses

In the spring of 1989, the regime attempted to address the problem of a fraying social order with new rules on speech. The Presidium of the outgoing Supreme Soviet replaced the federal legislation underpinning articles 70 and 190-1 with three new laws just before legislative restructuring went into effect. The federal equivalent of article 70 was supplanted by a proscription against "Appeals for the Overthrow or Alteration of the Soviet State and Social System" or against appeals for changing the system "by means which are at variance with the USSR Constitution."<sup>69</sup> The federal version of article 190-1 was replaced with a comparably intolerant provision restricting the public from "Insulting or Discrediting State Agencies and Social Organizations" and their officials.<sup>70</sup> An entirely new third law provided punishment for "Violation of National and Racial Equality of Rights."<sup>71</sup>

If anything, the initial two pieces of replacement legislation complicated the task of policing the limits of speech under *glasnost*. A difficulty inherent in the new "overthrow" law is that it relies on a constitutional test at a time when the Soviet Constitution is in transition. The voluminous reform legislation of the past several years has radically modified or usurped many clauses of the prevailing 1977 Constitution. However, much of the Constitution remains intact, including article 50 on speech and assembly, awaiting an entirely new document, promised yet not imminent.<sup>72</sup> Meanwhile, even the courts restructured under the 1989 law on the status of judges<sup>73</sup> are likely to find it difficult to fairly and reasonably determine what speech is or is not anti-constitutional.

The "discrediting" law was even more seriously flawed. Its broad proscription against criticizing public officials or organizations imposed a virtual muzzle on the newly unleashed speech. Later that spring, the first session of the newly-created Congress of People's Deputies repealed the discrediting law and amended the new article 70 equivalent

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69. See Decree of the Presidium of the USSR Supreme Soviet: *On Making Changes in and Additions to the USSR Law 'on Criminal Liability for State Crimes' and Certain Other USSR Legislative Acts*, 41 CURRENT DIG. SOV. PRESS, no. 15, at 11 (May 10, 1989).

70. *Id.*

71. *Id.* For further discussion of the three new federal rules, see J. Busuttill, TOWARDS THE RULE OF LAW: SOVIET LEGAL REFORM AND HUMAN RIGHTS UNDER *PERESTROIKA* 116-21 (1989).

72. A drafting commission for a new constitution has been established and is at work. However, because of the many other more urgent issues on the 1990 political and legislative agenda, it is thought that completion of a new document will probably take some time. Personal interview with a visiting Soviet jurist, early 1990.

73. The intention of the new law is to try to insulate the judge from extra-judicial interference by moving judicial elections out of the judicial district to the next highest politico-administrative level, by extending the term of office, and by making the use of political pressure on the bench a criminally liable act. It will remain to be seen whether "telephone law" can be effectively disconnected in Soviet jurisprudence. See Quigley, *The Soviet Union as a State Under the Rule of Law: An Overview*, 23 CORNELL INT'L L.J. 205, 213-17 (1990).

to specify "violent" overthrow of the system. Therefore, *glasnost* continues to promote generally unrestricted speech in the USSR.

### 3. The Dangerous Effects of De Facto Rights Outpacing Law

The nearly unlicensed freedom of speech produced by *glasnost* has spilled over into the field of democratization, first generating great enthusiasm for independent groups to spontaneously organize and assemble in public, then eventually in some parts of the country turning into disorder, turmoil, and ultimately communal violence.

#### a. Socialist Pluralism

The operational core of the democratization policy has been Gorbachev's oft-repeated phrase "Everything which is not prohibited by law is allowed."<sup>74</sup> Citizen initiative created hundreds, then thousands of groups which achieved the broad purposes of democratization — to mobilize the public against the bureaucracy exercising a braking effect on restructuring, and to involve people more and give them a greater stake in the political system. The leadership's design was to encourage "socialist pluralism,"<sup>75</sup> or a community of groups well-disposed toward the authorities and supportive of their program of restructuring. What seems to be arising in Soviet society instead might be called a "pluriverse" or "a dangerous jungle of self-interested partnerships, shifting tactical alliances, open disagreements and outbreaks of violent conflict."<sup>76</sup>

#### b. The Limits of Toleration

Among the general population, democratization began slowly and cautiously. No one had any sense of the extent of public activity the Party and police would tolerate. Absent clear guidelines, the majority opted for safety and waited for further developments. Two unanticipated events which significantly stimulated the exercise of the new *de facto* right of assembly were the small Crimean Tartar demonstration in 1987, and

74. See M. GORBACHEV, *supra* note 2, at 108. For a juridical explication of Gorbachev's principle, see Matuzov, *O printsipe 'vse, ne zapreshchenoe zakonom, dozvoleno,'* Sov. Gos. & PRAVO, no. 8, at 3-9 (1989).

75. As with other concepts launched "from above," socialist pluralism, too, has gone awry with the emergence of right-wing groups in the USSR. See Riordan, *Teenage Gangs, 'Afgantsy' and Neofascists*, in SOVIET YOUTH CULTURE 134-36 (J. Riordan ed. 1989).

76. J. KEANE, DEMOCRACY AND CIVIL SOCIETY 161 (1988). In an increasingly rare display of civic comity if not true civic tolerance, the great Moscow demonstration preceding the February 1990 Plenum of the CPSU Central Committee included up to 200,000 people of all hues and shades in the Soviet social spectrum. Marching peacefully shoulder to shoulder outside the walls of the Kremlin were ecologists and ethnic firsters, pro-semitic and anti-semitic groups, and even monarchists and anarchists. For that moment in time they joined in union for a common objective, to show support for Gorbachev and the reformers' plan to have the plenum endorse the revision of Article 6 of the Constitution on the leading role of the Party. Clines, *100,000 At Rally in Moscow Urge Democratic Changes; Crucial Party Talks Today*, N.Y. Times, Feb. 5, 1990, at A1, col. 1.

later, the enormous demonstrations in Armenia in early 1988. The Tartars had been illegally demonstrating and suffering repression since the late 1960s. They were trying to gain permission to move back to their traditional area in the Crimea from which Stalin had deported them during World War II.<sup>77</sup> Taking Gorbachev's democratization rhetoric at the 27th Party Congress seriously, some three hundred Tartars gathered quietly in Red Square during the summer of 1987 and surprised the passers-by as well as the Kremlin leadership by unfurling banners lobbying their cause.<sup>78</sup> Realizing that a "pandora's box" of activist possibilities had been opened, the Moscow municipal authorities soon after established rules for demonstrations in the capital, including application lead times, parade permits, prohibited areas (such as Red Square), and penalties for violators.<sup>79</sup> Other major population centers followed suit as needed, and as the rate and scale of authorized and unauthorized demonstrations burgeoned, all-union rules were enacted in mid-1988.<sup>80</sup> The new rules included much tougher penalties for violations of demonstration procedure, especially for repeat offenders. Usually the police enforced demonstration law, but to back them up in extraordinary situations, the government enhanced the powers of its special corps of riot troops within the USSR Ministry of Internal Affairs and began to use them more frequently.<sup>81</sup>

The Armenian demonstrations of up to 500,000 people on behalf of the annexation of a predominantly Armenian territory in neighboring Azerbaijan,<sup>82</sup> gave even greater impetus to democratization. Huge demonstrations in the USSR have become commonplace since the beginning of 1988, and on some occasions the popular fronts cannot control the crowds, requiring in extreme cases rapid deployment of the riot troops to restore order.<sup>83</sup> More often than not, though, it is a police problem.

To legitimate and regulate the incredible surge of independent group behavior in the Soviet Union, the government promised a law regarding unofficial groups. Subsequently, the government apparently decided to merge legislation on both official and unofficial groups, and a

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77. See L. ALEXEYEV, *supra* note 10, ch. 7.

78. For the Soviet press reports on the demonstration, see THE USSR TODAY: PERSPECTIVES FROM THE SOVIET PRESS 99-100 (R. Ehlers 7th ed. 1988).

79. *New Rules Set for Moscow Demonstrations*, 39 CURRENT DIG. SOV. PRESS, no. 36, at 8 (Oct. 7, 1987).

80. See generally *Handling Public Rallies and Protesters*, 40 CURRENT DIG. SOV. PRESS, no. 34, at 1-5 (Sept. 21, 1988). On the resulting legislation, see J. BUSUTTIL, *supra* note 71, at 75-80 and 84-87.

81. For a discussion of the deployment and activities of the riot troops, see *Facts, Figures on Internal Troops Discussed*, FBIS, Daily Report: Soviet Union, Feb. 1, 1990, at 72-73. See also J. BUSUTTIL, *supra* note 71, at 78-80.

82. For Soviet press accounts of the Armenian demonstrations, see THE USSR TODAY: PERSPECTIVES FROM THE SOVIET PRESS, *supra* note 78, at 93-99.

83. FBIS, Daily Report: Soviet Union, *supra* note 81.

new law on social organizations is forecast for 1990.<sup>84</sup> Meanwhile, a long-suppressed and restless public has not waited for formal institutionalization of the right of assembly. New groups have constantly formed and taken to the streets to advocate on an extensive range of public issues. Absent legislative direction, the municipal police have apparently been given wide discretion as to what types of public advocacy are appropriate or unacceptable in a lawful assembly, and which demonstrations to disperse or tolerate.<sup>85</sup> As can be imagined in a country as large and diverse as the Soviet Union, this discretion has resulted in uneven and inequitable enforcement of demonstration law.<sup>86</sup> For instance, police usually break up demonstrations by the Democratic Union, a group declaring itself a party in opposition to the CPSU, while often leaving undisturbed activities by the group called "Memory," an extreme Russian nationalist organization which promotes religious and ethnic hatred.<sup>87</sup>

### c. Violence in Republics

When democratization was first introduced into the dialogue of restructuring, Gorbachev and the Party, while not giving the concept any specific content, generally did intonate certain parameters for the right of assembly. These parameters were that no border changes within the USSR would be tolerated, a multi-party system would not be permitted, and the use of assembly for purposes of advocating ethnic or religious hatred would be forbidden. After five years of the often tumultuous and chaotic process of reform in the Soviet Union, these parameters for public behavior are rapidly breaking down. Given the rise of secessionist movements, Gorbachev's acknowledgement of a *de facto* multi-party system, and the now almost routine outbursts of ethnic violence between Azeri and Armenian, Georgian and Ossetian, Uzbek and Meskhi, and others,<sup>88</sup> democratization seems to be increasingly leading to separatist tendencies and large scale riotous assemblies.

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84. For the drafting history to date of proposed legislation on the so-called "informals," see J. BUSATTIL, *supra* note 71, at 65-75.

85. See, e.g., Miliukov, *Kak borot'sia s 'neformalami'?*, *Leningradskaiia militsiia*, Mar. 11, 1989, at 7.

86. For example, up until the replacement of the hardline Party leader of the Ukraine in the fall of 1989, the police in that republic routinely dispersed most demonstrations.

87. For example, see the brief report of police action against an authorized demonstration by the Democratic Union in Moscow in January 1990 in FBIS, Daily Report: Soviet Union Jan. 19, 1990, at 115.

88. The fighting between Azeris and Armenians in early 1990 was one of the factors contributing to Gorbachev's request to the Supreme Soviet for stronger executive powers. See Clines, *Gorbachev Forces Bill on Presidency Past Legislature*, *N.Y. Times*, Feb. 28, 1990, at A1, col.4.

### Conclusion

The Soviet system has effectively suppressed civil unrest since the days of Stalin. Although Stalin's jurisprudence of terror eventually evolved into Brezhnev's more subtle administrative and political forms of political justice, both approaches effectively held the masses in check. Today, however, the Soviet people are demanding, even assuming, civil rights unthinkable in the past. Gorbachev's ill-defined plans for *glasnost* and democratization were swept up by the people and carried in unanticipated directions. His provoking rhetoric, his promised legislation, and the gradual erosion of fear among the masses have also largely contributed to the aggressiveness of the people today.

Populist action is currently outstripping legislative initiative in the Soviet Union. The people are assuming and acting upon *de facto* rights before those rights are actually granted by the authorities (*de jure*). The flux of change in the Soviet Union does not permit a "conclusion" in the usual sense. One can only observe that as the Soviet Union moves toward constitutional government and codification of basic civil rights, Moscow's authority within its internal empire is constantly contracting. Social behavior, spurred on by *glasnost* and democratization, continues to swirl out of control.<sup>89</sup>

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89. This Article was completed on March 1, 1990. Since then the Lithuanian Union Republic on March 11 declared its independence from the USSR, Gorbachev began to implement his new strong executive presidency, and the USSR Supreme Soviet passed a somewhat restrictive law governing the right of secession. In an effort to regain some measure of control, Gorbachev began to use his new powers, especially economic sanctions, to try to bring Lithuania back into the union, while the Supreme Soviet began drafting a new law against defamation of the presidency. As of mid-spring, no viable solutions to the quandaries of freedom and order in the USSR were in sight.