THE NATIONAL COUNCIL FOR SOVIET AND EAST EUROPEAN RESEARCH

TITLE: IN SEARCH OF THE LAW-GOVERNED STATE
Conference Paper #10 of 17
The Fate of Individual Rights in the
Age of Perestroika

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COUNCIL CONTRACT NUMBER: 805-01

DATE: October 1991

The work leading to this report was supported by funds provided by the National Council for Soviet and East European Research. The analysis and interpretations contained in the report are those of the author.
NCSEER NOTE

This paper is #10 in the series listed on the following page. The series is the product of a major conference entitled, In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev, which was summarized in a Council Report by that title authored by Donald D. Barry, and distributed by the Council in October, 1991. The remaining papers will be distributed seriatim. This paper was written prior to the attempted coup of August 19, 1991.
1. GIANMARIA AJANI, "The Rise and Fall of the Law-Governed State in the Experience of Russian Legal Scholarship."

2. EUGENE HUSKEY, "From Legal Nihilism to Pravovoe Gosudarstvo: Soviet Legal Development, 1917-1990."

3. LOUISE SHELLEY, "Legal Consciousness and the Pravovoe Gosudarstvo."

4. DIETRICH ANDRE LOEBER, "Regional and National Variations: The Baltic Factor."

5. JOHN HAZARD, "The Evolution of the Soviet Constitution."

6. FRANCES FOSTER-SIMONS, "The Soviet Legislature: Gorbachev's School of Democracy."

7. GER VAN DEN BERG, "Executive Power and the Concept of Pravovoe Gosudarstvo."

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

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Executive Summary

The author opens the discussion of the conditions to and the prospects for the development of individual rights in the USSR on a note of skepticism and caution. The effect of constitutional ambiguities and institutional restraints on the definition and practice of individual rights is examined. The fragility, impermanence and potential reversibility of the new rights "granted" by Gorbachev is discussed. The interplay of newly-conferred political-civil rights and long deficient socio-economic rights is also considered.

In the paper, the enormous range of individual activity in pursuit of diverse rights from the quest for rehabilitation to the desire for emigration is surveyed. As counterpoint to this civic action, contra-individualism in the form of countervailing restrictive legislation and practice is examined. In this context, the contrast between de facto rights and lagging de jure empowerment is discussed. A number of cases in the areas of speech, assembly and press, as well as the relevant new laws, are looked at to help the reader understand the still powerful leverage which the administrative-command system has over the everyday administration of individual rights. The conclusion is reached that instead of a law-based state, a "state-ruled law" still prevails in the USSR.
The quest for individual rights in the projected Soviet "law-based state" must be examined initially within a number of layered contexts, including changing ideas on law and the constitution, the question of the reception of Western concepts, the status of limiting and empowering legislation, the quality of law enforcement and judicial protection, and the nature and condition of authority in the Soviet Union today.

At a glance, one might understandably think that a cultural millennium separates the nineteenth century Massachusetts jurist Oliver Wendell Holmes, Jr. from Gorbachev's associate Alexander N. Yakovlev in the late twentieth century. Although the former was a lawyer and judge while the latter is neither, and each reacted to a different legal tradition, their views on law ironically coincide.

Holmes, a young scholar of the common law in the 1870s, and, later, an experienced state supreme court judge in 1890s, consistently argued against the influence of German philosophical idealism on American jurisprudence. German legal idealism was also influential in pre-revolutionary Russian jurisprudence in the late nineteenth and early twentieth centuries. While in the United States judicial pragmatism gradually evolved and prevailed, in Russia it took the Bolshevik seizure of power followed by an ideological "revolution of the law" to overcome the influence of idealism in the law. Its successor until the mid-1930s was a utopian Marxist school of law posited on the gradual "withering away" or elimination of law as an instrument of governance. Since the late 1930s, a kind of Soviet legal positivism has dominated legal thought and practice in the USSR. It is against this
tradition that Yakovlev is arguing.

From their different points of departure, Holmes and Yakovlev both arrive at the same destination. For Holmes, the law was not a "brooding presence in the sky" or a "mystery". For Yakovlev, the idea that law designed by an elite, even a representative elite, and solemnly issued by the state can be omnipotent, is a fallacy. For both thinkers, law, that is, operable law, is to be found in human behavior, in conduct, in the facts of everyday life—not in either the clouds or the social engineering schemes of the state.

Yakovlev argues that to be effective law must "mirror" the actual relationships in society, or as he puts it, "The law means conclusions based on experience." The journey then from Holmes to Yakovlev, a transition to the familiar sociological jurisprudence of the contemporary West, epitomizes the extraordinary rapidity of this new revolution of the law in the turbulent Soviet Union of the late 1980s and 1990s.

As the conception of law is changing in the USSR, so too are the views of its constituent parts, particularly the constitution, the traditional locus for individual rights in most societies. Clearly, the idea of a constitution as an operative document has greatly appreciated in value during the past few years. This perhaps can be best exemplified by two different Soviet perceptions of the USSR Constitution occurring approximately 20 years apart.

In the early 1970s during the formative period of the unofficial Soviet human rights movement, a prominent dissenter was picked up for a pre-arrest "warning" under Soviet law. He was cautioned to cease and desist from his unlawful dissident activities or face arrest. The individual denied that he was violating the law, invoking in his defense individual
rights guaranteed under the Soviet Constitution. To this argument, the investigator replied

"'Please, we're having a serious conversation.'" Nearly two decades later in 1989, a Soviet scholar participated in a Western seminar on the 1988 amendments to the USSR Constitution which brought forth the first quasi-democratic parliamentary system since the shortlived 1918 Constituent Assembly, subject to certain restrictions on the previous constitutional provision for electing deputies. He commented:

I would say that this was a step backward from the constitution which existed before....[The] previous constitutions, say Stalin's 1936 Constitution and Brezhnev's 1977 Constitution, were not meant to be implemented. However, today's more restrictive form of democracy is meant to be implemented....

Between these two diametrically opposed observations on the place of a constitution in the USSR, Gorbachev, a lawyer, came to office in 1985, and subsequently determined to carry out an increasingly radicalized perestroika or restructuring of the Soviet system within a juridical framework. As a result, the Constitution has become the metaphor for this new emphasis on change through law. Consequently, the familiar epithet "anti-Soviet" behavior to label activities deemed oppositional to the Party dictatorship has been fading from the official vocabulary and is being replaced by "anti-constitutional," connoting an action aimed at undermining the legal structure of the state and society.

The problem in focusing on individual rights in the Soviet Union is that, given the pace of law reform, no one can be certain of what the USSR Constitution is at any particular moment in time. A new all-union charter is being drafted, but meanwhile the extant 1977 document is no longer recognizable due to several waves of amendments, and the many other sections which have been superseded by legislative enactments. The confusion deepens when one also takes into account the many union- and autonomous-republic declarations of
sovereignty, constitutional revisions, and assertions of legislative supremacy over federal law. Aside from the formal objections of the Presidency and the USSR Committee on Constitutional Supervision, to these multiple contradictory statements, it is possible that what may be unconstitutional in one jurisdiction could be considered wholly legitimate in another.

This brings me to the question of the intellectual reception of certain Western concepts in this quid Soviet political and legal environment. In some instances, Soviet officials and scholars (possibly encouraged in this respect by Western political leaders and scholars), have been appropriating the classical vocabulary of Western democratic systems to describe what they believe is happening in the USSR, or at least what they aspire to in the future. The choice of crucial labelling concepts does affect our expectations of the status of individual rights in the present USSR. "Law-based state" is essentially a minimalist term, while the use of the concept "rule-of-law state" tends to raise maximalist expectations. Is the latter term appropriate as a descriptive device; is it realistic as an aspirational posture? I am doubtful on either aspect.

First, "rule-of-law" in the Anglo-American tradition from which it originates, historically arose from below, from society, whereas the Soviet version is being conceptualized by Gorbachev and the elite and handed down to society from above. Secondly, rule of law in the West assumes at least three vital premises—(1) a government of laws rather than men, (2) a durable due process of law, buffering the citizen from the power of the state, and (3) a deep-rooted, viable legal culture comprising a set of internalized attitudes supportive of the preceding legal institutions and process. The Soviet Union is well
short of all three requirements. While the first two points are at least susceptible to legislative effort and structural reorganization, a legal culture cannot be legislated or willed from on high. Since attitudinal change is a long-term, glacial process, a supportive legal culture in the USSR will have to be "grown" over time, perhaps across several generations. Until this occurs such ideas as the supremacy of law and an independent judiciary so essential to the rule-of-law may prove difficult to fully realize.

Similar problems arise with the related concept of a "civil society," a term being used increasingly freely among Soviet writers and Western scholars to describe what is presumed to be emerging in Soviet society. Among the major characteristics of a civil society in Western usage, at least two are and probably will continue to be troublesome for the USSR for a long time. One is the existence of a market and the other the presence of the state as guarantor and regulator of the market along with other aspects of a civil society. In spite of the easy rhetoric of Soviet politicians and economists on the goal of marketizing the Soviet economy with such complex ancillaries as price decontrol, currency convertability, bankruptcy, privatization, and controls on money supply to mention a few, political and economic realities in the USSR do not encourage a sanguine outlook for many years to come. Equally difficult will be the necessary reconstitution of the state from a bureaucratic monolith and "brake" on reform into a less interventionist, regulatory state.

To conclude this section, the image of the law and a constitution is indeed changing in the USSR in ways more familiar to the West, but to name and describe these phenomena as the emergence of a rule-of-law state and a civil society is extraordinarily premature. To some extent the attraction of Soviet jurists to these Western ideas is understandable, given the
historic penchant for utopian thinking in the USSR, but for Western scholars a sense of caution and conceptual restraint is recommended.

**Individual Rights in the Contemporary USSR: Scope and Aspirations**

As the Soviet Union attempts to evolve from a state dominating its citizenry to a society encompassing a new relationship between state and citizen, the leadership is confronting one of the great challenges of Western political philosophy--how to fairly and reasonably reconcile freedom and order. Reconciling the demands for individual freedom and the imperatives of public order has never been easy even in democratic societies. As the regular flow of cases up to the U.S. Supreme Court indicates, balancing freedom and order is a continual, dynamic process. The equilibrium in American society is constantly being tested by cases involving new circumstances or interpretations bearing on basic rights. These tests are in turn evaluated and adjudicated against the constitutional touchstones of our legal culture and political faith. But, as a noted American constitutional scholar, points out:

> Constitutions do not govern by text alone, even as interpreted by a supreme body of judges. Constitutions draw their life from forces outside the law: from ideas, customs, society, and the constant dialogue among political institutions.\(^\text{18}\)

In the present quest for a balance between freedom and order, the Soviet leadership is at a decided disadvantage. Although the "constitution" has become a central metaphor of perestroika or restructuring against which nearly all political behavior is measured, the "constitutions" of the USSR are in a state of flux. The USSR Constitution is no longer
considered universally supreme in the hierarchy of constitutions within the Soviet Union. Since the late 1980s, the frequently and repeatedly amended 1977 union constitution has been challenged on a number of fundamental issues in a variety of revised union republic constitutions. Thus whether an action is within or the outside the constitution as well as the new political epithet of "anti-constitutional" behavior flying in every direction, are essentially meaningless exercises in any consistent legal sense, given the centrifugal constitutional forces tearing the union apart.

If, in turn, constitutions draw strength from forces outside the law and from the constant dialogue between political institutions, then the prospects for rectifying the historical imbalance between order and freedom in the USSR are not very favorable. The principal forces beyond the law, which in fact have always been superior to Soviet law, are political arbitrariness, statism, bureaucratic authoritarianism and collectivism among other ideas contributing to an infertile environment for the growth of individual rights. As for institutional political dialogue as another wellspring of constitutionalism, in the USSR this has always been and still is for the most part a closed discourse between the Communist Party leadership and a host of powerful state institutions such as the secret police, the Ministry of Internal Affairs and the armed forces, all of which primarily promote statism at the expense of individualism. Since Gorbachev came to power in the mid-1980s, one could add the new Soviet parliaments to the equation. These parliaments at the federal and the republic level have indeed much enriched the constitutional dialogue by espousing the cause of the individual or the subgroup in an effort to strike a more equitable relationship between citizen and state in the Soviet Union. Even this bright spot in the Soviet constitutional
firmament is blurred, however, by President Gorbachev's domination of the federal legislatures and the inability of these institutions to enforce their legislative writ beyond the suburbs of Moscow in a political culture which can still be fairly described as one of bureaucratic socialism.

Many of the new individual rights being practiced by Soviet citizens have been given "from above" by Gorbachev in the time-honored Russian tradition of reform from the throne. Basically, these rights, such as speech, assembly, and press, have emanated from policy statements, and, hence, are partially reversible by a change in policy. Where the rights have been institutionalized legislatively by the restructured Supreme Soviet, the de jure empowerments have been long in coming forth and usually lag behind existing de facto practice. 19 If anything, some of this legislation, while acknowledging a new right, simultaneously imposes state and bureaucratic controls on its exercise in the form of applications, permissions, registration and approval, all of which are liable to implicit political criteria and the vagaries of administrative subjectivity. 20 At the same time, much of the legislation of the Gorbachev period on state and citizen has actually been designed to replace parts of the administrative-command system with new, presumably more legitimate constitutional and legal bases for the maintenance of public order. 21 In effect, one might say that "freedom" is the fledgling offspring of policy, while "order" has been reinforced and buttressed in law.

Historically, the notion of the "'rights of the individual'" did not garner much attention, not to mention respect, in Russian legal history. 22 Legal modernization, which began only in the mid-nineteenth century, was very late in Russia, in comparison with states
where the rule-of-law had already taken root or at least was being cultivated. Because the tsar-reformers vacillated between legal reform and political regression, Russian legal development was still incomplete by the time of the Bolshevik Revolution of 1917. The revolutionaries soon imposed a new absolutism on Russia under the aegis of an ideology of anti-individualism.

Human rights, generally, during the communist period have basically meant social and economic rights provided by a socialist welfare state to a society undergoing modernization. The resulting social compact equated the state’s subsidy of material rights in return for the public’s political passivity and acquiescence to the prevailing order of things. During the Gorbachev years this contract has been under renegotiation as Soviet academic jurists have begun to promote the Western theory of the individual’s precedence over the state. As Chalidze points out, a shift of emphasis is underway in the USSR from socio-economic to political and civil rights, or, in Sakharov’s words, from “collective” to “personal” rights.

While everything may be clear in academic theory, the question of rights in reality is much more muddled. The conceptual confusion is expressed in a parliamentary deputy’s observation on a strike in his district in which one of the demands was for the scarce commodity of soap. He remarked, “It’s not the shortage of soap that drove people out on the streets, it’s the shortage of justice.” The reference of course is to the lack of distributive justice in a country chronically short of consumer goods in which the situation has significantly worsened under Gorbachev. “Justice” then in the universe of perestroika implies the fusion of recently conferred political and civil rights with long-held economic and
social rights. In effect, the population is using its still tentative political liberties to pursue increasingly empty economic promises. This is a consequence of Gorbachev's qualified efforts to graft the Western philosophy of civil rights onto the body politic of bureaucratic socialism. The paradoxical outcome is radical individualism in quest of socio-economic egalitarianism.

In practice, then, individual rights in the contemporary Soviet Union is not confined to the classical enumeration of the "Bill of Rights" school. Instead, the idea encompasses myriad yearnings and demands for an enormous range of tangible and intangible economic, social and political goods. This includes a drive for "historical and legal justice" to rectify the wrongs of the Stalinist era. Even the dead beckon from the grave for posthumous political and legal rehabilitation, while their families and the millions who survived seek economic indemnification as well. Countless citizens are using glasnost or more openness to pursue their individual housing agendas in an ill-sheltered society.

Democratization or the policy of greater public participation has brought forth tens of thousands of independent groups seeking an extraordinary range of objectives through thousands of demonstrations, strikes and work stoppages. These include such tangibles as disposable syringes for striking miners of the Ukraine who fear an AIDS epidemic, and better conditions for the handicapped. In a country awash in paper money but short of supplies, industrial strikes tend to focus less on wages and more on access to scarce goods. Strikes, however, are not always just an economic phenomenon, but sometimes include political demands as well, from the repeal of Article 6 of the union constitution to the resignation of Gorbachev from the Presidency. Some of the earliest demonstrations in the
Gorbachev period were driven by environmental concerns, from the immediate problem of blocking construction of a possibly dangerous nuclear reactor in Armenia to the longer-term aesthetic desire to restore the beauty of a coastline in the Baltic region. Later, bolder demonstrations sought the closing of factories belching hazardous pollution. However, because the USSR has so many one-industry towns, the personal health issue often collides with the collective issue of employment, a dilemma familiar in some parts of the United States as well.

The agendas of ethnic assemblies have evolved from particularistic tangible objectives to general macro-political goals. For instance, the Moldavians sought the restoration of the Latin alphabet, the Central Asians a return to Arabic script, and the Estonians the right to drop the Slavic patronymic from their names. The next stage became economic zones or economic sovereignty in the Baltic region. In the present stage, the most aggressive popular fronts in control of republic legislatures have gone beyond the now commonplace notion since 1990 of proclaiming political sovereignty within the USSR to formal declarations (Lithuania) or legislative enactments (Latvia, Estonia) proclaiming or constitutionally implying independence from the Soviet Union. In the Baltic republics, at the leading edge of the drive for independence, the rehabilitation of pre-Soviet (before 1940) individual rights is well underway. In these areas, then, nationalism and ethnic solidarity appear to be the route to the restoration of the individual empowered with a set of private rights, to the center of the political universe.

The quest for individual rights in the Soviet Union has also included a wide range of more specific issues. What might be termed "oral" glasnost emerged in the election
campaign for the restructured parliaments in early 1989, significantly extending the scope of the openness policy from the press room, TV studio and legitimate theatre to public meetings and even the streets. The right of unlicensed speech was now in the hands of the average citizen, who has continued to push back the frontiers of control with dramatic and sometimes provocative "speech on a stick" and the display of heretofore banned flags at demonstrations. The most assertive freer speech advocates even presume to criticize or lampoon Lenin, still a protected figure in Soviet system, and argue a principled right to privately view pornographic videos otherwise offensive to public morality in a conservative society.

Still other citizens now claim their individual right to private telephone conversations and confidential correspondence, rights proclaimed in the 1977 USSR Constitution but frequently breached in practice. In a glasnost-era exchange with a KGB official, an individual suspicious that a clicking on his line was a tap, was advised to contact the telephone company for correction of a possible equipment problem. Still other citizens now claim their individual right to private telephone conversations and confidential correspondence, rights proclaimed in the 1977 USSR Constitution but frequently breached in practice. In a glasnost-era exchange with a KGB official, an individual suspicious that a clicking on his line was a tap, was advised to contact the telephone company for correction of a possible equipment problem. Still other citizens now claim their individual right to private telephone conversations and confidential correspondence, rights proclaimed in the 1977 USSR Constitution but frequently breached in practice. In a glasnost-era exchange with a KGB official, an individual suspicious that a clicking on his line was a tap, was advised to contact the telephone company for correction of a possible equipment problem. Several months later, in mid-1990, the USSR's first wiretap law was passed, making official candor more possible. For a certain part of the Soviet population, the more urgent individual rights issue has been the right to claim conscientious objector status and perform alternative service, the earlier admission of counsel in a criminal case, at the point the charge is made not after the preliminary investigation, and the treatment of convicts in the penal system, with one recently released political prisoner even planning a lawsuit against his warden for violating the food norms under the penitentiary legislation. Finally, there are those Soviet citizens for whom the most precious individual right is the right of exit, to emigrate from the USSR in
search of a better life elsewhere. Given this veritable sea of aspirants and litigants, each striving to enhance his and her personal welfare (whether material or spiritual), it is not surprising that the Soviet courts are engulfed and overwhelmed by this rising tide of individualism in all of its diverse manifestations.\textsuperscript{35}

**Contra-Individualism: Restrictive Soviet Legislation and Practice**

The remarkable surge in individual rights in recent years in the USSR has to be credited to Gorbachev’s initiative and leadership. It was he who, tentatively in his early speeches in 1985 and then with greater cogency and authority at the 27th Party Congress of 1986, called for radical reform of the Soviet system, declaring the need for greater glasnost and more democratization of society on the road to economic reform. In speech after speech in 1987, Gorbachev reiterated these policy themes with considerable eloquence, urging the public to take up glasnost and democratization as tools to lever open society and reform the system. His rhetoric was “hot,” raising the public’s expectations for political change and economic results. A year later, at the 19th Party Conference of 1988, he brought forth the concept of *pravovoe gosudarstvo*, the socialist law-based state, as the juridical scaffolding, a framework for social change, within which his ambitious perestroika program would go forward to inevitable, “irreversible” success. Those were, indeed, heady days.

Meanwhile, the man in the street, the individual Soviet citizen, took seriously Gorbachev’s encouraging words and began to speak out and act out his abstract policies. *De facto* rights of speech and assembly began to evolve in practice as the closed society slowly
opened to a cacophony of clashing opinions and the tumult of conflicting causes. Progressively, aggressive editors began to test the implied limits of glasnost, while champions of ethnic causes probed the parameters of democratization. Political taboos were pushed aside and sacred cows gored as 'truth' marched on in the media, culture, the dark recesses of Soviet history, and long inviolate enclaves within the governing system. Party strictures against the promotion of ethnic or religious hatred and internal boundary changes were disregarded by mobilized minorities determined to obtain 'justice' after decades of suppression. First the crusading Crimean Tartars raised their banners in Red Square, then the Armenians, the Azeris, the Lithuanians, the Moldavians and others began to press their grievances, in some cases against one another while in others against the Russians among them and above all the chieftains in Moscow. The idea of democracy as an irresistible force once unleashed was being played out in the press and on the streets and squares of the Soviet Union.

Gorbachev had set in motion a social revolution, but could he now control it? The Yugoslav Milovan Djilas, sometimes called the first communist dissident, seemed to think not. Writing in 1988, he foresaw major problems for Gorbachev, remarking that 'The logic of his own propaganda will confront him with some highly unexpected and unpleasant consequences.' In fact, Gorbachev's patience with negative reporting and excessive activism gradually began to wear thin. His initial reactions were mild, chastising the forces of 'anti-perestroika.' Later his tone became more strident as he castigated 'anti-constitutional' actions, and then in late 1988, exasperated by the insolvency of the Armenian-Azeri bloodfeud, he blurted out what has become the leitmotif of his
administration, the elite must use "all the power at our command--political and administrative" to stop those who would challenge the policies of the center. 39

In this context, the rush to individual rights in Soviet society is being corralled and contained by numerous legal and administrative barriers manned by a vast unrestructured bureaucracy profoundly uncomfortable with the irreverence and disorder wrought by perestroika in the USSR. A new pattern of political repression and human rights abuse is emerging in the USSR of the 1990s. It is different from the prevailing pattern of the Brezhnev and immediate post-Brezhnev years. Then the pressure on human rights was much stronger, particularly for those bold citizens who dared to assert in unauthorized ways the traditional individual rights of speech, assembly, conscience, petition and press. Reference is of course to the political, religious and ethnic dissidents who were active within the broad framework of the unofficial human rights movement which evolved in the Soviet Union from the mid-1960s on. Against these people, who were never numerous, numbering no more than several thousands over a 20-year period, the Party brought to bear the weight of the state's coercive powers. The preferred method was to prosecute under the political and religious articles of the criminal codes. 40

Brezhnevist repression and containment of dissent and non-conformity continued through the first year of Gorbachev's incumbency. Then, however, in the context of the annual Soviet-American summits which began in late 1985, Soviet human rights policy began to improve. Noted prisoners of conscience Sharansky and Orlov were freed, Sakharov and Bonner were released from internal exile, hundreds of other political prisoners gradually regained their freedom, prosecutions for sedition, subversion and religious offenses waned,
Jewish, Armenian and ethnic German emigration swelled, and long-standing family reunification cases were resolved. Some of these moves were cosmetic, geared to the summits, but all were shrewd policy for Gorbachev, who sought a relaxation of East-West tensions in order to carry out deep reforms of the Soviet system, especially the economy. Perhaps more indicative of the pendulum swinging from political repression to elite restraint was the regime’s tolerance of the flowering of glasnost and democratization in the press and in the streets. Heretofore indictable language became everyday discourse as former dissidents such as Sakharov, Kovalev, and Roy Medvedev entered the new electoral politics and gained legitimate platforms for their erstwhile heretical views on politics and human rights. Gorbachev grandly promised legislation to codify all of these positive changes, to secure the new policy-conferred rights in law. By the end of 1987, liberal Soviet intellectual and Western observers had become genuinely hopeful that a sea change for the better was underway in the USSR.

Beginning in the late 1980s, however, as economic reform began to falter and eventually stall with shortages becoming more acute, as the huge activist public became more strident in pursuit of the elusive better life promised, and as the laws designed to guarantee newly-gained individual rights got caught up in the battle of the drafts between political conservatives and legal reformers, the pendulum began to swing back. A significant disjunction began to appear between academic legal culture of the law professors issuing clarion calls for the “supremacy of the law” and a pravovoe gosudarstvo, and the administrative behavior of the Soviet cop on the beat. A new pattern of human rights abuse is coming into view which is indeed different from its Brezhnevist predecessor. This time a
combination of new laws such as the administrative regulations governing demonstrations and more familiar criminal laws, which are being used to criminalize objectionable political behavior, are being employed to curb activities critical of the center by virtually tens of thousands of activists. The pervasive fear of the authorities, which had made dissent of the past a courageous undertaking for a brave few individuals, has lost its hold on the population at large.

The pendulum swinging back in the direction of repression has been impelled by increasing intolerance of unruly street democracy and anti-establishment press criticism among conservatives, traditional elites and even by Gorbachev himself. The mindset of official contra-individualism was apparent at the dawn of Soviet parliamentary democracy in the spring of 1989. During one of the first sessions of the newly elected USSR Congress of People's Deputies, a noisy street demonstration was taking place outside in support of the bloc of radical deputies. A group of Soviet generals, either deputies themselves or observers, during a break were overheard speaking critically of the demonstrators. One quipped that they might need to call in the airborne while another quoted the famous phrase "The guards are tired," spoken by a Red Guard in 1918 as he and his Bolshevik comrades dispersed the Constituent Assembly, the first freely elected parliament in Russia. A year later, in the summer of 1990, the USSR Minister of Justice seemed equally concerned with the dark potential of democratization when he worried about the adverse effect on legal process of the "mob" justice "of the public meeting." Add to this mood Gorbachev's mounting annoyance with press criticism and what he regarded as excesses of glasnost, culminating in his attempt in early 1991 to suspend the then recently passed press law, which had eliminated
pre-publication censorship.

In this spirit, it should not be surprising to note a series of repressive trends directed against individual political activists, including frequent resort to short-term detentions,\(^{43}\) the use of psychiatric exams and sometimes short commitments, and the increasing administrative and legal harassment of former political prisoners.\(^{44}\) Other trends include local elites' use of the criminal justice system vindictively against electoral opponents,\(^{45}\) and to deter critical public groups, e.g., in early 1990 a Soviet Greenpeace activist was falsely charged with murdering a hunter and illegally shooting elk.\(^{46}\) Examples of such abuse of office and administrative retaliation abound, including plainclothesmen photographing speakers at Leningrad's "Hyde Park" in 1988, the drafting of an Estonian journalist in 1989 after his expose of training brutality in the army, and criminal charges for "malicious hooliganism" against a Ukrainian ecology group leader for insulting Lenin in 1990.\(^{47}\) In the latter case, "Earth Day" coincided with the anniversary of Lenin's birth, so an enormous throng marched to the local Lenin monument where a wreath of barbed wire with a ribbon "To the Executioner of the Ukraine" was thrown at the base of the statue. So great was the indignation among the city fathers of Kiev that a team of 10 criminal investigators was assigned to the case.\(^{48}\)

The politics of rehabilitation are something of a paradox in the framework of Gorbachev's administration's record on rights. Legal rehabilitation seems to be best served if the victim of political justice is dead rather than alive. As part of the renewed condemnation of Stalinism, the USSR Supreme Court, the KGB, and high-level Party and state commissions worked expeditiously to rehabilitate on a case by case basis, for the most part
posthumously, Stalin's victims, especially the Old Bolsheviks such as Bukharin, Kamenev, Zinoviev and others.\textsuperscript{49} With hundreds of thousands of ordinary cases unresolved, thousands in just the Tartar Autonomous Republic alone,\textsuperscript{50} Gorbachev issued a sweeping presidential decree in mid-1990 on the restoration of rights to all those illegally repressed from the 1920s-1950s, and called for enactment of the first ever Soviet statute on rehabilitation.\textsuperscript{51} For those in their graves, time was of no consequence, but for those survivors still among the living, it was a matter of concern. The KGB and the Procuracy prepared a draft law, but the association of ex-political prisoners declared it unacceptable, complaining that they had not even been consulted.\textsuperscript{52} By 1991 there was concern that some of the elderly beneficiaries of rehabilitation might not still be alive to receive historical legal justice, including financial compensation.\textsuperscript{53}

For victims of political justice under Gorbachev, the path to the restoration of their good name is proving even more difficult and may in fact be unattainable. Two cases suggest that the dazzling breakthroughs in cultural glasnost of the Gorbachev period may possibly bear no retroactive relationship to verdicts in political cases. In April 1986, a journalist was convicted under Art. 190-1 of the RSFSR Criminal Code for circulating forbidden literature in samizdat, such as Nabokov's Lolita, deemed "anti-Soviet" or seditious. One of the other titles was "The Heart of a Dog," in which the author, Bulgakov, criticizes the leaders of the Bolshevik Revolution. Two months after the man's release from confinement, this story and another involved in his case, were both legally published in Soviet literary journals. Accordingly, the journalist petitioned the procurator to exclude these titles from his verdict and review his conviction. The procurator replied that the stories in question remained "anti-
Soviet” despite their recent publication and thus the conviction stood. The other case involves a man convicted in 1987 after Gorbachev’s apparent decision to reduce the number of new political cases in view of his foreign policy priorities with the West. The second man was also caught circulating illegal, underground copies of Lolita, and since political crime was temporarily out of fashion, was charged with ordinary crimes including pornography (RSFSR Criminal Code, Article 228) and received a seven-year sentence. In spring of 1990, just after the Soviet publication of Lolita and prior to an international conference on Nabokov in Moscow, the man was granted a retrial. His conviction was upheld, but his sentence was commuted to qualify him for imminent release.

The preceding cases bring me quite naturally to the treatment of samizdat or independent publishers and distributors in the Gorbachev era. These are individuals attempting to exercise two related de facto rights. The first is the right to expression under the policy of glasnost, while the second is the right to publish and circulate their own ideas and others’ in unofficial format in the spirit of the Gorbachevian axiom, “Anything which is not prohibited, is permitted.” Hundreds of such publications have sprung up in the Soviet Union under perestroika, addressed to such diverse subjects as anti-Zionism, ecology, emigration, Jewish culture, and of course politics. While the official press practiced the journalism of revelation under glasnost, the independent press has been even more critical and candid; hence, a number of these unofficial publications have incurred the wrath of the authorities at various levels, especially officials who have been resistant to the reform program.

Individuals and independent publications, especially those involving ex-political
prisoners, targeted by the authorities have been regularly harassed, sometimes physically
abused, and occasionally maliciously charged as lawbreakers. In short, their individual
rights have been seriously violated throughout the Soviet Union. The unofficial journal
Glasnost, edited by a former political prisoner, has had its editorial office ransacked and its
equipment wrecked by the police. The journal which seems to receive the most police
attention is Ekspress-Khronika, also edited by an ex-prisoner. During two months in 1989,
its distributors "were detained on 20 occasions, . . . subjected to administrative arrest twice,
. . . beaten up twice, . . . fined seven times, and in all a total of 1,212 copies of the
newspaper were confiscated." Most recently, in spring 1991, a distributor of the paper
received 15 days administrative detention.56

Other samizdat "cases" have routinely involved confiscation of the publication,
sometimes with the charge of "trading in a non-prescribed place" and a fine, and
occasionally a beating. In one such instance, a distributor was selling samizdat copies of the
U.S. Constitution among other publications on the Arbat pedestrian mall in Moscow in 1990.
He was taken to a police station where he was illegally searched, beaten up, and detained for
two days. On release he was treated at a hospital for a broken jaw.57 Ironically, interested
Muscovites can read about the American Constitution, which is treated quite favorably these
days, in official Soviet law journals sold freely in the city.

How the independent press will fare under the new 1990 law of the press remains to
be seen. The law administered by government authorities unfriendly to a critical press
contains a number of potential qualifications of its proclaimed rights of "freedom of the
press" (Article 1).58 While any citizen at least 18 years of age has the right to found a
publication (Article 7), the publication is subject to state registration (Article 8). The application (Article 9) contains a couple of potential traps for the ex-dissident recidivist proposing to legitimize a maverick samizdat bulletin--name of founder (part 1) and "program goals and tasks" (part 4). This is all the more so since the expert commission set up to evaluate applications for all-union publications is laden with legal bureaucrats and personnel, legislators and government regulators of the media. However, if a publication has a press run of less than 1,000 copies, registration is not required (Article 10); most likely this would be a narrowly specialized magazine or a journal sold only in a single city or small republic. Let us assume that a former samizdat journal is registered. Potential pitfalls still remain. The journalist is obligated under the law to verify his reportage (Article 32, part 2) which, on a sensitive matter, might raise the issue of "shielding" a confidential source, say a "leaker" or "whistleblower", from possible retribution. The publication can be held liable monetarily (Article 39) if it "defames the honor and dignity" of an individual official (absent the concept of "public figure" in Soviet law) or an organization (Article 35). This creates the hypothetical possibility for intimidation by litigation against an aggressive investigative publication, or even driving it out of existence through the chilling effect of multiple suits for compensation. These problems can also apply to official publications deemed controversial, some of which reportedly have already encountered opposition in the registration process. The potential for administrative harassment, however, would seem to be far greater for the independent press; given the hidden reefs in the legislation, some may prefer to continue to take their chances as unofficial media.

The right of assembly and its corollaries, the rights of speech and petition, is being
regulated by two laws, the 1990 "Law on Public Associations" and the 1988 decree on 
meetings and demonstrations. As with the press law, the new law on associations arrives on 
the scene well after the fact of tens of thousands of independent groups coming into existence 
in the USSR.\textsuperscript{60} Nonetheless, to attain legal status, each must register with the state and once 
again potential problems for critical or controversial groups can be foreseen. Article 3, for 
instance, declares that a group may not be involved in "stirring up social discord" which, 
excluding the enumerated categories of racial, religious, ethnic and class discord, still leaves 
much room for creative interpretation by, say, an agency or official who may become the 
object of persistent public opposition by a group. "Interference" by a public group in the 
activity of government agencies or officials is not permitted (Article 5), but what constitutes 
interference and will the long leashed Soviet courts be sophisticated and objective enough to 
adjudicate such questions in timely and fair fashion (Article 22)? Finally, the implied control 
vested in the state by the registration process can be seen in the prohibition against a public 
association going "beyond its goals and tasks as defined by its statutes" (Article 21). This 
may create difficulties for groups trying to adapt their objectives and tactics in the dynamic 
and fluid political situation likely to prevail in the USSR during the 1990s.

As the standard Soviet subversion and sedition laws fell into disuse and were later 
revised in 1989 consistent with the new human rights profile Gorbachev has tried to project, 
the demonstration law has quietly taken up the slack in helping the authorities cope with 
critical groups and individuals. As a distinguished Soviet legal reformer has written: "There 
is serious reason to believe that the language" of the demonstration decree and its companion 
law on the use of riot troops, is "designed to severely limit the constitutional right of Soviet
citizens to conduct meetings, rallies and demonstrations. Local administrative behavior justifies this concern. Permits for rallies and demonstrations are arbitrarily denied, sometimes without written reasons for refusal as required by the law. Applications from certain, more critical groups are routinely rejected, so that they frequently go into the streets without permits. Hundreds of such unauthorized demonstrations occur annually, but the police act selectively and probably arbitrarily in choosing the ones to break up and disperse. Periodically, the militia use unnecessary or excessive force against demonstrators as occurred in Lvov in the western Ukraine. Elsewhere in the Ukraine, the demonstration law was employed to break up meeting of Uniates seeking the re-establishment of their religion. In other instances, it is clear that rallies by certain groups are automatically targeted for dispersal, suggesting political criteria are at work and instructions given behind the scenes. Up until 1989, when they won the republic elections, a Georgian nationalist group was frequently harassed in public. Similarly, activists of an independence-minded Azerbaidzhani nationalist group were subjected to a variety of criminal charges during 1990 and through the spring of 1991.

The Democratic Union, a coalition of former dissidents which announced its opposition to the Communist Party before that became commonplace, consistently has its rallies broken up and demonstrations dispersed throughout the Soviet Union. One of the group's leaders has been detained 15 times under Gorbachev while others have been taken to court and sometimes subjected to compulsory psychiatric exams. Rallies on certain issues, such as the advocacy of free emigration, the formation of an Islamic party, or opposition to the proposed new union treaty or its referendum, also invite police interference in some
Clearly, the demonstration law seems to be the weapon of choice for curbing democratization.

This by no means exhausts the scope of official contra-individualism. Although the 1989 law against discrediting government officials and organizations was quickly repealed, the spirit of it seems to be at work as the militia police demonstrations and pursue individuals bearing ""discrediting"" leaflets against Gorbachev's policies, banners criticizing local authorities, and even generic "speech on a stick" with such harmless slogans as "Let the nitrates eat bureaucrats." The frivolous application of the 1990 law against slandering the President is another case in point. Ironically, the law represents an advance through contraction of state legal protection of the symbols and appurtenances of power. Under Stalin, political jokes were indictable offenses and a peasant who cursed a cow was even convicted for insulting the communal herd. During the post-Stalin period, the range of protection was narrowed to the more important objects of power, the Party, the state, and the socialist system in general. Typical of the political sensitivities of the Brezhnev era, a procurator "warned" Sakharov for denouncing "the Socialist system in our country, calling it a system of maximum nonfreedom, a system that is undemocratic, closed, deprived of economic initiative, and falling to pieces." In reply, Sakharov denied saying "falling to pieces."

Today, the veil of juridical protection mainly shields only the President as well as historical and cultural monuments. Not even all monuments apparently warrant protection; in a recent case, a man who defaced a bust of Brezhnev went scot free because the investigation failed to prove that the bust was a defendable memorial of Soviet history. The presidential
slander law, however, is being employed not only frivolously, but vindictively as well. Most absurd was the hounding of street purveyors of Gorbachev nest dolls. In the same spirit, a case was brought against two people in the Ukraine during the spring of 1991 for selling an "anti-Soviet calendar" with caricatures of Gorbachev. In other cases, an obscure man who blamed all his troubles on the President received a year in prison, while charges were brought against a citizen who published a letter-to-the-editor saying Gorbachev was an imperialist agent who had undermined Soviet power.

The new law is also being wielded politically against outspoken members of the radical Democratic Union and even against establishment politicians for criticizing the President's policies which were not intended for judicial protection. On the hopeful side of judicial restraint, the leader of the Democratic Union, who has been previously fined for insulting the President, was recently acquitted on the charge of having called him a "red fascist." More in the political mainstream, questions have been raised twice about Yeltsin's rhetoric constituting slander of Gorbachev, but on both occasions the Procurator-General stated that Yeltsin's criticisms fell within the boundaries of appropriate political speech.

Aside from the rich potential for abuse of this law, a double standard for prosecution appears to be taking shape -- for approximately the same type of remarks about the President, the person in the street runs the risk of a slander charge, while the political notable will be cast as a tolerated critic.68

By far, however, the most egregious violations of human rights, in particular the most precious individual right to life itself, have been carried out by riot police and special troops in several areas of the country, including Kazakhstan in 1986, Georgia 1989, Azerbaijan
1990, and Lithuania and Latvia in 1991. In all of these instances where public order and safety was actually threatened (Alma Ata and Baku) or fictitiously endangered (Tbilisi, Vilnius and Riga), extreme force was used, causing significant loss of life. The common thread, though, was not merely real or putative order-maintenance, but the pursuit by Gorbachev of the central tenet of his political agenda, the maintenance of the union and its corollary, his incumbency, at all costs.

Conclusion

We come full circle to Alexander Yakovlev, one of the founding fathers of contemporary Soviet reform. In an interview while abroad in 1988 he said “law alone can guarantee the exercise of the individual’s rights …” as it “places the activities of all bodies of state power and leadership under legal control.” Legal control of the state is indeed the key to individual rights in the Soviet Union; as the reform jurist Savitsky so aptly put it, a “law-abiding state precedes the Rule-of-Law state.”

As I have tried to demonstrate above however, the USSR remains a long way from becoming a “law-abiding state.” Everyone is of course for a pravovoe gosudarstvo, but one wonders what this really means and what its actual prospects are when one reads that the idea is heartily endorsed by stalwarts of the “old thinking” such as the head of the KGB and the leader of the military opposition Gorbachev. Evidence has begun to mount that Gorbachev who launched his bold social revolution with law at the center of the political universe, has become uncomfortable with its gravitational pull. In the words of the legal
journalist Feofanov, "The limits of law are not always comfortable for executive and administrative authority, especially if it is not accustomed to living within a legal regime." Why else would Gorbachev attempt to delimit glasnost and restrict democratization through his proposed press law suspension and his call for a moratorium on strikes and rallies in early 1991. In contrast, his archrival, Yeltsin urges moving away from "barracks law" toward laws which provide "freedom of choice," surely an attractive option, but one that a Soviet specialist in American constitutional law relegates to the 21st century. The reality he argues is not a law-based state, but "a state-ruled law." For the alternative, he adds, "To build a democracy, we must wander 40 years in the desert."
Notes


Soviet Union),” The Harriman Institute Forum 1991 No. 5, 1-12.


20. See, e.g., the law on demonstrations—“On the Procedure for Organizing and Conducting Gatherings, Meetings, Street Processions and Demonstrations in the USSR,” Ved.SSSR 1988 No. 31, item 504.


22. See Walicki, op.cit, note 2, ch. 1.


25. See V. Chalidze, The Dawn of Legal Reform (April 1985 to June 1989) (L. Chalidze,


30. As the first coal miners’ strikes of the summer of 1989 spread, the Vorkuta miners added to their economic grievances the demand for the removal of the Party hegemony clause (Article 6) from the Constitution. See P. Rutland, “Labor Unrest and Movements in 1989 and 1990,” Soviet Economy 1990 No.4, 364. The most recent striking coal miners of winter-spring 1991 have rejected a substantial economic offer and insisted on President Gorbachev’s resignation. For his acknowledgement of their demand and refusal, see “Vystuplenie M.S. Gorbacheva na vstreche s predstaviteliami shakhterov strany,” Izvestiia 6 April 1991, 1.


21-25, 1991. The new law, however, still contains a provision for the denial of emigration on the grounds of possession of "state secrets." See Article 7-(1)-1 of the "Zakon SSSR O vyezde iz SSSR i v'ezde v SSSR grazhdan SSSR" (personal copy -- RS). Shortly after passage of the law, I was told by an official of the Supreme Soviet staff in Moscow that the denial period for state secrets would not exceed five years. Only time can test this proposition.


44. For instance, S. Grigoryants, a former political prisoner and editor of an independent publication, was detained twice on trumped up charges in May and November of 1988. See CPJ Update 1988 No. 34, 14; and ibid. 1989 No. 35, 17.

45. See Ramm case in USSR News Brief 1990 No. 3, 2, item 3.3.

46. See Dryangogskii case in ibid. 1990 No. 2, 6, item 2-23. The murder charge was later dropped.


The most celebrated rehabilitation was Bukharin’s in 1988 on the 50th anniversary of his trial and execution. For the posthumous rehabilitation of other notable Old Bolsheviks, see CDSP 1988 No. 31, 6-7.


See Zelenin case, USSR News Brief 1990 No. 4, 8, item 4-27.


62. See B. Nahaylo, "Lvov Authorities Resort to Old Methods in Breaking Up Unauthorized Meetings and Religious Services," Radio Liberty Research 1988 No. 33, 1-3; and, more recently, Trud 26 October 1989, 2, for interview with the Lvov Party First Secretary on militia violence.

63. See U.S. State Dept., 26th Semiannual Report, Implementation of Helsinki Final Act: October 1, 1988-March 31, 1989, 9. Not only the new administrative rules, but the older criminal law on violation of public order (RSFSR Criminal Code, Art. 190-3) has been used in the Ukraine to deter organization of certain types of meetings. For a 1991 case involving a man who organized a protest meeting against the new Union Treaty, see USSR News Brief 1991, No. 2, 5, item 2-3.

64. See "Violators of Order--To Account," Zaria vostoka 12 October 1988 in JPRS Report--Soviet Union: Political Affairs 12 January 1989, 30. One of the group detained for violation of the Georgian demonstration law was the longtime dissident Z.K. Gamsakhurdia who has subsequently been elected President of the Georgian Supreme Soviet. For the Azerbaijan cases, see USSR News Brief, 1991, No. 5, 3-5, item 5-4.


66. See the cases of Ismanov et al. and Aibabin, respectively, USSR News Brief 1990 No. 11, 10-11, items 11-54 & 11-55. For a 1991 case concerning the banned Islamic Party, see ibid. 1991, No. 3, 4-5, item 3-15.


73. In January 1991, Gorbachev proposed to the Supreme Soviet that the 1990 law on the press be suspended, but his proposal was not endorsed. In early spring, he proposed an anti-crisis program which includes that statement “until the end of the year a moratorium should be declared on strikes, meetings, and other political actions which destabilize the situation in the country.” See the translation off the TASS wire in FBIS, Daily Report (Supplement): Soviet Union (“Draft Action Program on the Economy”) 11 April 1991, 14.

74. Quoted from President Yeltsin’s speech to the Third Extraordinary Congress of RSFSR People’s Deputies as broadcast over Radio Rossii Network and translated in FBIS, Daily Report: Soviet Union 1 April 1991, 75.

75. V. Vlasihin, a jurist at the Institute of USA and Canada in Moscow, quoted in S.B. Goldberg, “A More Perfect Union,” ABA Journal 1990 October, 67.