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Kazimierz Grzybowski

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Socialist Legality and Uncensored Literature in the Soviet Union

by Kazimierz Grzybowski*

The author discusses the role of Samizdat literature in publicizing the abuse of legal process in the Soviet Union. Trials of dissidents and the persecution of minorities go unreported or are distorted in the censored media. Despite reform in the legal system during Krushchev's regime, Stalinist techniques persist. As many Samizdat documents indicate, a double standard of legality exists in the Soviet Union.

I. POLITICAL AIMS OF SAMIZDAT

The overall political aim of the intellectual opposition and Samizdat (self-published) activists was the struggle for the realization of individual and human rights guaranteed by the Soviet Constitution, and in the United Nations Declaration of Human Rights. As Paval Litvinov, the son of Maxim Litvinov and one of the leaders of the intellectual opposition, explained in an interview in England, where he was in exile, the purpose of the Samizdat publications was to protest against the regime's practices and to force Soviet authorities to respect Soviet laws, however imperfect they may be. Samizdat and its activities were not seeking to change the regime. According to Litvinov, intellectual opposition was not engaged in a political action. The struggle for human rights was not in conflict with Soviet state ideology, and Samizdat activists did not attack the social or economic order of the Soviet state, but sought to "enlarge"—as Litvinov put it—"the area of political debate by creating publicity and giving the people an opportunity to voice their views and engage in discussion." The ideological stance of the opposition may be best described as proceeding from the position of Communism insisting that the Soviet state, existing to establish Communist order in the Soviet society, should live by its own laws which guarantee minimum rights to a Soviet citizen. In his attack on censorship, Solzhenitsyn, though not a Marxist, called for the abolition of censorship as contrary to the Soviet legal regime.

This censorship under the obscuring label of Glavlit—not provided for in the Constitution and therefore illegal, and nowhere official-

* Professor of Law, Duke University.

1 INDEX ON CENSORSHIP, VI (1), at 6-8 (1975).
ly labelled as such—is imposing a yoke on our literature and gives people who are unversed in literature arbitrary control over writers.

A survival of the Middle Ages, censorship manages in a Methuselah-like fashion to drag out its existence almost to the 21st century. Of fleeting significance, it attempts to appropriate unto itself the role of un Fleeting time—of separating the good books from the bad.²

Even in the writings of the leading personalities of the Samizdat literature, there is little quarrel with the laws, or philosophy, or even authoritarianism of the Soviet state. Only Solzhenitsyn desires modification of some features of the Soviet economic order. Medvedev and Sakharov stress the need to change the policies of the Soviet Union (both internal and international) characteristic of the Stalinist regime (i.e., imperialism, suppression of freedom, and terror) to assure greater prosperity and a freer style of life.

Acceptance of the Soviet regime by the leading opinion makers of the intellectual opposition went so far as to uphold the leading role of the party. Solzhenitsyn, who goes further than Sakharov and Medvedev in his outline of the future of Russia, endorses the idea of the continued Party rule.⁴ In effect, Samizdat activists have set out a comparatively modest program, and in opposition not so much to the Soviet state as to the practices inherited from Stalin's regime.

Samizdat was a reaction to the disappointed high hopes of Soviet intellectuals following the death of Stalin. In October 1954, Fadeev, Stalin's henchman in the Writers Union, was removed from control of the Writers Union, and Novy Mir, a leading literary journal in the Soviet Union, promised a new era for Soviet literature. Party conservatives entrenched in the Union forced the Novy Mir to retract. This provoked the liberals and the great debate about the future of Soviet literature opened up, with liberals going back to the original ideas of the Revolutionary period about the role of literature and art in socialist society. When conservatives won the debate, and liberal voices were silenced, Samizdat, a record of the struggle with the process of

² Letter to the Congress of the Writers of the Soviet Union (May 16, 1967), SOBRANIE DOKUMENTOV SAMIZDATA NO. 175 (AS 175).
³ See A. SOLZHENITSYN, LETTER TO THE SOVIET LEADERS (1975); A. SAKHAROV, PROGRESS, COEXISTENCE AND INTELLECTUAL FREEDOM (1968); R. MEDVEDEV, THE ESSAY OF OUR DAY, AS 306.
⁴ A. SOLZHENITSYN, supra note 3, at 67 ff.
re-Stalinization of the intellectual life in the Soviet Union, came into being.  

II. THE ISSUES

_Samizdat_ was a reaction to the role of the Soviet press in the struggle for the liberalization of Soviet intellectual life. Important events were either not reported or passed over in silence. Sometimes untrue information was published, or outright lies fed to the Soviet public. Without _Samizdat_ the public would not have been informed of the plight of Jews, Tartars, religious minorities, and the trials of dissidents.

In the historic struggle for the liberalization of the intellectual life in the Soviet Union, the Soviet press sided with the regime and the conservative trend.

Pavel Litvinov—who assembled a record of one of the dissident’s trials—had the following conversation with KGB (Committee on Government Security) Agent Gostev.

Gostev: Pavel Mikhailovich, we have knowledge that you, together with a group of people, intend to reproduce and distribute the minutes of the recent criminal trial of Bukovsky and others. We warn you that if you do that, you will be held criminally responsible.

Litvinov: Irrespective of my intentions, I cannot understand what the criminal responsibility for such an action might be.

Gostev: The court will decide that, and we wish only to warn you that if such a record should be spread through Moscow or other cities or appear abroad, you will be held responsible for this. . . . In general, Pavel Mikhailovich, have in mind _Vechernaia Moskva_ (Moscow Evening News) has printed all that the Soviet people should know about this case and this information is completely true. . . .

The issue in this instance was that the Soviet press reported that Bukovsky pleaded guilty, when in fact he did not.  

A. The Jewish Question

One of the most striking examples of distortion of truth is information on the treatment of Jews in the Soviet Union.

For years, the Soviet government followed a policy of restriction of Jews. This policy continued unabated even after the death of Stalin.

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6 AS 168. See also AS 175, 176, 176a, 178.
Although the more drastic forms of the persecution of Jews were discontinued, the policy of squeezing them out from positions of trust, professions, and cultural activities was practiced with equal vigor under Khrushchev and his successors, both by the central government as well as by the governments of the republics in which Jews were present in any number. Something of the Soviet Jewish policy can be seen from the letter of February 2, 1968 by twenty-six representatives of the Jewish intelligentsia addressed to the First Secretary of the Communist Party of Lithuania, A. Snieckus. The letter complains about the effect of the anti-Israeli propaganda on the position of Jews in the Soviet Union: Caricatures appearing in the national and local press incite anti-Semitism. Articles in the Lithuanian press ridicule the Jews. Jews are omitted from the selection of candidates for positions in government, teaching, and culture. Jews are never granted scholarships to institutions of higher learning in Leningrad or Moscow, or the Party Academy of Social Sciences, or admitted to aspirantura. Jews are never elected to positions of chairman, secretary, or deputy chairman of the city or ward soviets, nor are they found in higher positions in Lithuanian Party organizations. Synagogues and Jewish cemeteries are systematically destroyed and desecrated. Jewish cultural institutions have been eliminated.

To make the situation worse—the letter complains—it is impossible to avoid persecution by emigrating to Israel. While Jews are not welcome in the Soviet Union, they are not permitted to leave the country.7

The letter of the twenty-six describes the situation of Jews in the entire Soviet Union, aggravated by the fact that the Soviet press maintains total silence regarding their social and economic condition, indulging at the same time in anti-Israeli propaganda.8 That this propaganda finds a fertile soil in the Soviet Union is also obvious from some Samizdat publications.9

B. The Tartars

Deportation was probably one of the harshest Soviet sanctions against the nationalities. Under Stalin, entire nations thought to be a threat to Soviet political power were uprooted from their national ter-

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7 AS 64.
9 See, e.g., Veche, a publication of a Slavophile group. (1971), AS 1013, 1020.
ritories and dispersed throughout the Soviet Union. Under Khrushchev, decrees ordering uprooting and dispersal were abolished and the nations punished by dispersal were rehabilitated. Five of them—the Balkars, Kalmyks, Karachais, Chechen, and Chechen-Ingush—were permitted to return to their native lands. There were two exceptions: the Volga Germans and Crimean Tartars. Their lands had been settled by the Ukrainians and Russians and there was no room for the possible returnees.

After the denunciation of Stalin, a number of Tartars tried to return to Crimea and were forcibly removed, again deported, and tried for various violations of the law. Their plight aroused the Soviet liberals, and various uncensored magazines (e.g., Chronicle of Current Events and Journal of Politics) reported regularly on the prosecution of Tartars, while the appeals of Tartars to Soviet authorities received wide circulation. A number of oppositions activists, among them General Grigorenko, espoused their cause, appealing for a change of policy, earning in the process confinement in a psychiatric ward.¹⁰

C. Soviet Minorities

Anti-Semitism and dispersal of nations are only aspects of the general nationality policy, frequently complained of in the Samizdat publications as evidence of the continuation of the Stalinist regime. Charges of forcible Russification emerge from all corners of the Soviet Union. Latvians, Lithuanians, and Ukrainians protest against the dispersal of their compatriots to other parts of the Soviet Union, and the Russification of their educational institutions, the government, the Party, and the economic administration. Special attention was paid in Samizdat publications to the trials of Ukrainians for nationalism.¹¹

Samizdat documents the persecution of the religious minorities, in particular, the Baptist congregations. Soviet authorities dispersed their meetings, and opposed their organization into regular religious communities. There were even cases where children of members of the Baptist church were seized and removed from paternal homes and placed in the care of a governmental educational institution. Anti-Baptist action seems to be motivated by security reasons due to the

¹⁰ AS 40, 45, 86, 137, 152, 309, 310, 311, 312, 313, 319, 379, 396, 397, 398, 399, 400, 402, 501-07, 520, 580, 1033.
connections of the Baptists with their brethren in the West, particularly in the United States.\footnote{12 AS 83, 113, 115, 121, 155, 322, 325, 442, 515, 544, 545, 582, 1039, 1061, 1087.}

D. Secret Trials

Secret elimination of political opponents of the regime either through physical liquidation or confinement in the forced labor camps is no longer officially practiced in the Soviet Union. In 1956, the punitive powers of the Ministry of Interior were abolished, and the Criminal Code of 1960 established in Article 3, the principle that: "Only persons guilty of committing a crime, that is, who intentionally or negligently commit a socially dangerous act provided for by law, shall be subject to criminal responsibility and punishment. Criminal punishment shall be applied only by judgment of a court." The principle was repeated in Article 13 of the Code of Criminal Procedure, which also provided for the participation of laymen on the bench (Article 15) and the publicity of trials (Article 18). Although the new Codes fell short in many respects of standards reached by modern criminal law, at least in this respect it seemed that abuse of judicial power for political purposes had been seriously limited. Open trials and control of public opinion promised to rule out staged trials, forced confessions of guilty, and abuse of judicial power.

Another guarantee which the new Codes granted the Soviet people was court and procurator control of investigations and criminal proceedings. It seemed that under the new legal order arbitrary arrests would come to an end.

It is the duty of the procurator, the law states:

> to exercise supervision, so that no one is subjected to arrest, otherwise than in accordance with a decree of a court or with the sanction of a procurator; in deciding the question of sanction for arrest the procurator shall carefully acquaint himself with all the materials upon which the arrest is founded and when necessary shall personally interrogate the accused or suspect. (Arts. 11 and 211(1)(d)).

It may be argued that this is far less than the generally accepted standard of the administration of justice, where the rule is that an arrest is within the exclusive competence of the courts, or can be challenged in the courts (habeas corpus). However, the law now provides that police and security organs shall no longer be in exclusive control of criminal investigations, particularly in politically sensitive cases.
Samizdat materials, in particular, materials covering details of criminal trials involving dissenters, demonstrate that in all politically sensitive cases guarantees of fairness and legality are of no avail. The usual technique is to prevent publicity about trials and the publishing of objective reports of tried cases. Two techniques are used. In the first place, although trials are formally open, admission to court rooms is controlled, and audiences are packed with agents of the secret police (KGB) or militia. Even relatives of persons standing trial are not admitted, and reports appearing in the Soviet press misrepresent the facts.

The obvious purpose of these practices is to prevent public knowledge of the fact that government processes and policies of the regime are challenged on account of their shortcomings in terms of practical democracy and respect for individual rights.

As Bukovsky, one of the accused charged with illegally demonstrating in the streets of Moscow, said in court:

Freedom of speech and of the press is, first of all, freedom of criticism. Nobody has ever forbidden the praise of government. If in the Constitution there are articles about freedom of speech and of the press, then have patience to listen to criticism. In what kind of countries is it forbidden to criticize the government and protest against its actions? Perhaps in capitalist countries? No, we know that in bourgeois countries Communist Parties exist, whose purpose is to undermine the capitalist system. In the USA the Communist Party was suppressed. However, the Supreme Court declared that the suppression was unconstitutional and restored the Communist Party to its full rights.\(^{13}\)

In effect the packing of court rooms and slanted reporting in the press removed the need for confessions of the Stalinist period and produced identical results in terms of the isolation of political opposition from the Soviet people.

The by-product of the process of suppression of the political opposition in the 1960's was the distorted interpretation of provisions of the Criminal Code, especially Article 70 of the RSFSR (Russian Soviet Federated Socialist Republic) Code. Under that Article two Soviet authors, Syniavsky and Daniel, were charged and sentenced for a crime which according to Article 70 consisted of “Agitation or propaganda carried on for the purpose of subverting or weakening of Soviet authority or of committing particular, especially dangerous

\(^{13}\) AS 163.

\(^{14}\) Izvestia, Jan. 13, 1966, at 6.
crimes against the state, or circulating for the same purpose slanderous fabrications which defame the Soviet state and the social system. . . .”

The criminal deeds of the two authors consisted of sending and publishing abroad works which criticized so-called “Socialist Realism,” a canon of art adopted by the Party and enforced by the authorities in charge of cultural activities. How on earth could books published abroad on the theory of art in the Soviet Union subvert the Soviet state or defame its social system? That is beyond comprehension. The trial was carried on in secrecy by the technique of packing the court, and Izvestia on the eve of the trial assured the public (even before the charges were heard) that: “The actions of Syniavsky and Daniel fall directly under Article 70 of the Criminal Code. The two deliberately and secretly sent our enemies works that, of course, evoked hostile attitudes toward Soviet rule, served as ammunition for ideological subversion against our country, and damaged the prestige of the Soviet state.” Similar articles appeared in other papers, including Pravda, and the matter ended with a spate of articles applauding conviction. At the same time there was no coverage of the proceedings in the court for the reader’s information and consideration.

Trials of the dissenters were not the only occasions for judicial techniques of this type. Even more cavalierly were treated defendants charged with economic crimes, frequently members of the national minority groups.15

III. SURVIVALS OF STALINISM

Courts, police, and the press dealing with political opposition to governmental practices in the area of cultural policies aim primarily at assuring the monolithic moral outlook of the Soviet society and full approval of government policies. From the perspective of the West, the Soviet authorities’ concern over the publishing of works abroad, and the protests against the treatment of Jews, Tartars, and the political dissenters, the invasion of Czechoslovakia, and the right of the Baptists to practice their own religion seems out of place and nearly incomprehensible. Is the regime really endangered by the presence of a few people in public squares and avenues with placards protesting a policy, or by the conviction of a few dissenters, events which have not aroused public curiosity or indignation? One may wonder about the sense of

security and stability felt by the Soviet leaders governing a country that they have brought to the position of a super power in the present world. A number of answers may be suggested, but none of them will be wholly satisfactory. So the answer to that—perhaps the most important question—shall not be attempted.

It is possible, however, to find an answer to a less political issue, namely, to what extent de-Stalinization, as demonstrated by the legal reforms of the late fifties and early sixties, represents a real change in the Soviet regime of social control.

The first observation which must be made concerns Article 125 of the Soviet Constitution. It provides for a catalog of rights that may be enjoyed: "In conformity with the interests of the working people, and in order to strengthen the socialist system, citizens of the USSR are guaranteed by law various rights" including: freedom of speech, freedom of the press, freedom of assembly, freedom to hold meetings, and freedom of street procession and demonstration. These civil rights, the Constitution goes on to say, are ensured by placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings, the streets, communication facilities, and other material requisite for the exercise of these rights. The rights including various forms of self-expression are not granted to individuals.

If the wording of the Constitution suggests that a more liberal interpretation is not excluded, in practice all forms of self-expression are granted to and may be exercised by the collectives. But, in addition, all forms of self-expression, meetings, demonstrations, and processions require licenses, while dailies, magazines, and publications are not only controlled by various social and governmental organizations including the Communist Party, but are also subject to preliminary censorship. As a matter of fact, persons performing the functions of censors are frequently found on editorial boards, in positions such as editor-in-chief, and are part of the establishment.

Ziemiatin, when he was editor-in-chief of Pravda, speaking in the House of the Press on October 5, 1967, stated that in his official capacity he had to read the unpublished works of Solzhenitsyn, in particular Feast of the Victors written in 1941, one copy of which had been confiscated by the security police, and had been reprinted and circulated among the members of the censoring community.\(^{16}\) Ziemiatin also found that Voznesensky's complaint, against the Writers Union's withdrawal of permission for him to go to the United States,
which was put in a letter to him and the Central Committee, and broadcast by the BBC, was anti-Soviet. "I told him [Voznesensky]," Ziemiatin said, "... if he ever did it again he would be ground to dust. I myself would see to it that not a trace of him remained." Apparently, when he spoke, Ziemiatin had already made up his mind to destroy Solzhenitsyn.

Seen in the perspective of the present day the main purpose of dissident action is to assure public scrutiny of governmental actions, hence the constant concern with the content of the Soviet media. The purpose of the scrutiny is to assure faithful adherence of the courts, police, and procuracy to the proper (liberal) interpretation of the law in force. Dissidents were convinced that enactment of new articles in the Criminal Code of the RSFSR, specially directed against various manifestations of nonconformism, would be inconsistent with the regime established in the Constitution, and contrary to the idea of the Leninist democracy. The Decree of the Presidium (Ukaz) of the Supreme Soviet of the RSFSR of October 16, 1966, added two new definitions of prohibited acts under a penalty. Article 190 prohibits the knowing systematic spreading of untrue inventions defaming the Soviet governmental and social structure, and the preparation of such statements for dissemination in written, printed, or other form. Article 190 provides a penalty for the organization of and participation in group activities that seriously disturb the social order, or combine with open noncompliance with the legal demands of the representatives of authority, or result in the disturbance of the work of transport, or governmental or social institutions or enterprises.

A protest against the Decree introducing these two new articles expressed the fear that it would create an opportunity to determine subjectively and arbitrarily any statement as knowingly untrue, and defamatory of the Soviet governmental and social order. In order to see the significance of the Ukaz and of the articles added to the Criminal Code one must realize that Soviet authorities resorted to a practice that was not repudiated by the Congresses of the Party in the post-Stalin era.

There seems to be little in the program of reform outlined by the 1956 Party Congress, at which Khrushchev delivered his famous speech on the abuses of Stalin's regime, that justified the high hopes of the dissidents. The immediate task set by the Congress was to repair the

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17 Id.
18 AS 158.
damage to the Soviet ship of state by the "cult of personality"—a label for policies and governmental techniques that relied on use of force and dictatorial forms of government with little respect for legal rules or democratic processes. The socialist state was to give meaning to the rule of its law. Since the Twenty-First Congress of the Party in 1959, the reform of the legal system has acquired a new sense because, as the Congress stated, the time has come to reorganize all phases of Soviet life. The time was thought to be ripe because of the upsurge of economic forces in the Soviet society upon which the dawn of communism would bring about total liquidation of the methods of coercion by the state.\(^\text{19}\)

From the perspective of the present day it is clear that the destalinization campaign was only a political device to win the contest for power which was fought among the aspirants to Stalin's mantle.

The two Congresses were by no means an expression of the same basic policy. Following the 1959 Congress it became quite apparent that while return to Stalin's terror was no longer feasible, Soviet public life must still be rigidly controlled by the Party and Moscow-centered bureaucracy which survived Krushchev's attempt at dispersal. The basic purpose of the 1959 Congress was to introduce new methods of control. Almost immediately upon the reform of the criminal legislation, came the law on Increased Participation of Society in the Struggle with Violations of Socialist Legality. It was followed in 1962 by legislation dealing with the confiscation of houses and automobiles acquired by citizens with unearned income. Somewhat earlier, in 1961, the first antiparasite law was enacted in the RSFSR. Simultaneously the campaign against economic crimes was started. In the end, a comparatively short period of liberalization, with the powers of the police circumscribed and with greater respect for the law and individual rights,\(^\text{20}\) was followed by a new wave of regimentation, social control, and restriction of private property rights. Freedom of expression was again seriously restricted, as Soviet leaders grasped the subversive impact of the new type of literature. That, indeed, this is a correct analysis of the events following the Khrushchev speech is confirmed by the decision of the Twenty-Second Party Congress in 1961 to adopt a new Party Program.

\(^{19}\) See K. Grzybowski, Soviet Legal Institutions 241-42 (1962).

\(^{20}\) In 1958 Romashkin, Director of the Institute of State and Law in the USSR Academy of Science, complained that the issue of individual rights attracted no attention among Soviet scholars. Sovetskoe Gosudarstvo i Pravo, 1958, No. 10, at 3.
The chapter of the Program dealing with the tasks of the Party in the spheres of ideology, education, instruction, science, and culture begins with the following statement:

Soviet society has made great progress in the socialist education of the masses, in the molding of active builders of socialism. But even after the socialist system has triumphed there persists in the minds and behavior of people survivals of capitalism, which hamper the progress of society.

The Party considers that the paramount task in the ideological field in the present period is to educate all work-people in a spirit of ideological integrity and devotion to communism. . . , to eliminate completely the survival of bourgeois views and morals, to create a truly rich spiritual culture. . . .

In section 4 of the same chapter, the Program states:

Soviet literature and art, imbued with optimism and dynamic communist ideas, are great factors in ideological education and cultivate in Soviet people the qualities of builders of a new world. They must be a source of joy and inspiration to millions of peoples, express their will, their sentiment and ideas, enrich them ideologically and educate them morally.

The highroad of literature and art lies through the strengthening of their bond with the life of the people, through faithful and highly artistic depiction of the richness and diversity of socialist reality, inspired and vivid portrayal of all that is new and genuinely communist, and exposure of all that hinder the progress of society.

In the art of socialist realism, which is based on the principle of partisanship and kinship with the people, bold pioneering and depiction of life goes hand-in-hand with the cultivation and development of the progressive traditions of world culture. Writers, artists, musicians, theatrical workers, and film makers have every opportunity of displaying creative initiative and skill, using manifold forms, styles, and genres.

One must ask oneself the question: Is the realization of the program possible without censorship and thought control? The analysis of Solzhenitsyn in his letter of May 1967 to the Writers Congress is quite to the point: "Our writers are not supposed to have the right, they are not endowed with the right, to express their anticipatory judgments about the moral life of man and society, or to explain in their own
way the social problems of the historical experience that has been so deeply felt in our country."21

IV. ECONOMIC CRIMES—AN ANALOGY

As was said above the plan of the legal reform was hardly liberal in its main content. Almost immediately upon the enactment of the Criminal Code and Code of Criminal Procedure Soviet authorities began to replace Stalinist controls by new legislation that would assure conformism without Stalin's terror.

The first important departure from the principles laid down in the Codes came with the antiparasite legislation and laws on the participation of society in crime prevention. These enactments were followed by legislation aimed at what was called economic crimes, in direct conflict with the principles of the Code of 1960. Firstly, the principle that Soviet criminal legislation should be stable and criminal policy general rather than specific was not followed. Secondly, and this was a major feature of the special decrees, the death penalty was introduced on a large scale despite the promise made in Article 22 of the General Principles of Criminal Legislation that the death penalty would be an exceptional punishment, to be eventually abolished.

The first of these decrees, dated March 25, 1961, added a second paragraph to Article 25 of the Law on Crimes Against the State of December 1958 (Article 88 of the Criminal Code of the RSFSR of 1960), which sharply increased penalties for illegal currency transactions either when committed by a professional criminal or when large sums of money were involved.22

Next came the Decree of May 5, 1961, which introduced the death penalty by shooting for a number of crimes, including large-scale theft of state and social property, professional counterfeiting, and other crimes committed by dangerous recidivists, or persons serving sentences for serious crimes.23 The Decree of May 24, 1961, penalized fraud in planning accounts.24 The Decree of July 1, 1961, again raised the penalties for serious forms of illegal currency transactions, providing for the application of capital punishment in more serious cases.25 The Decree of February 15, 1962, introduced new rules aimed at the pro-

21 AS 175.
22 VEDOMOSTI VERKHOVNOGO SOVETA SSSR, 1961, No. 13/137.
23 Id., 1961, No. 19/207.
24 Id., 1961, No. 22/225.
tection of the members of the militia and the members of the Volun-
tary People's Brigades (an auxiliary policy force). This Decree was
followed the same day by a Decree which introduced the death penalty
for aggravated cases of rape (committed by a dangerous recidivist or a
gang). Finally, the Decree of February 20, 1962, provided for in-
creased penalties, including the death penalty, for officials accepting
bribes.

Thus the sharp edge of exceptionally severe punishment was not
aimed exclusively at offenders against the economic interests of the
Soviet state. It was also concerned with affording special protection to
new forms of social discipline which had been introduced by the
legislation on the participation of the population in crime prevention
(Decree of February 15, 1962). It singled out for harsher treatment in-
corrigible criminals and certain forms of criminal activity. In addition,
Soviet special decrees were also concerned with the protection of in-
mates of penal institutions and of the administrative personnel
employed in such establishments against the attacks of hardened and
particularly dangerous criminals.

The exceptional decrees in all their categories reflect a sense of
disillusion over the corrective effect of normal measures in protecting
certain important social interests. They demonstrate a doubt whether
some criminals (recidivists and professionals) can be morally
rehabilitated. They also are designed to convince the public that the
use of the auxiliary police force in order to establish a system of tight
supervision over the activities of all citizens, even in their private life, is
a measure to which the regime attaches great significance. The death
penalty in cases of attacks on members of the militia and the auxiliary
police force is used as a deterrent. The death penalty is also provided
for breaches of discipline by certain inmates of corrective institutions.

There seems to be little doubt that harsh punishments for
economic crimes, theft and embezzlement of government and social
property, trade in foreign currencies, gold, and securities, and for the
giving and taking of bribes are also designed to deter rather than to
correct. Their main purpose is to keep the potential offenders on the
path of virtue by fear.

Another important feature of the special legislation enacted in
1961 and 1962 was that in the eyes of the regime economic crimes

16 Id., 1962, No. 8/83.
17 Id., 1962, No. 8/84.
18 Id., 1962, No. 8/85.
represented a singular danger to its plans and interests. Of the seven special decrees, two dealt with illegal currency transactions, one with counterfeiting, one with the theft of state or social property, one with fraud in planning accounts, and one with bribery of officials.

It is clear that the policy of using special decrees to amend the Criminal Codes in a spirit contrary to the original aims of the legal reform has established itself in the Soviet legal system, probably because of the apprehensions caused by popular reaction to the milder course. The system of harsh penalties for economic crimes brings readily to mind the special measures that were usually the feature of Communist legislation directed against class enemies in order to enforce the transfer to public ownership of privately-owned factories and commercial institutions. Now, after more than forty years of the Soviet regime, special legislation can no longer be explained by the presence of the class enemy, but must be attributed to other causes no less dangerous to the interests of the Soviet policy. It is clear that the purpose of the decrees is to deal with a phenomenon which is a serious threat to the social and economic order. That economic crimes for a number of reasons figured chiefly in the mind of the regime is attested by the instructions of the plenary session of the USSR Supreme Court, which pointed out to the courts that the vast punitive powers given to the courts were meant to be used in the struggle with economic crimes. After the Decrees of May and July 1961, the Court pointed out:

[I]n hearing cases of (especially dangerous) crimes the courts commit serious errors, which consist of underappraisal of the social danger of these crimes and the resultant imposition of light penalties, particularly in cases of pilfering state or public property in especially large amounts.\(^{29}\)

An important item in the fight of the dissenters is criticism of the conduct of the trials of members of the intellectual opposition. By no means is this treatment unique in the post-Stalin annals of Soviet justice. Again a case from the great number of cases tried under special decrees may serve as a useful illustration.

The first major case that came within the application of the exceptional decrees was reported in the Moscow Pravda of June 16, 1961. It concerned a number of people, of whom J.T. Rokotov, V.P. Faibishenko, and Edlis (all Jews) were mentioned by name. According

\(^{29}\) Ruling of the Supreme Court of the Soviet Union, Mar. 31, 1962, SOCIALISTICHESKAIA ZAKONNOST, 1962, No. 5.
to the indictment the defendants had in "a relatively short time bought and resold foreign currency and gold coins of a total value of more than twenty million rubles (old currency)." The criminal activity of the defendants had been a source of unearned income for a considerable group of people and had furthered the illegal export of Soviet money and foreign currencies abroad and the development of smuggling and speculation in goods.

The hearings established that the defendants: Refused to work honestly in the interests of society, had pursued a parasitic way of life and, through currency speculation, had extracted an unearned income and enriched themselves. The defendants Rokotov, Faibishenko, Edlis and others, for purposes of buying currency and goods, had systematically met with citizens from capitalist countries who smuggled these valuables into our country and then had resold them at speculative prices. By engaging in such criminal dealings, they had debased the dignity of the Soviet man. All the defendants on trial had fully admitted their guilt and gave extensive evidence on their criminal activity and about their accomplices in the currency speculation.

The defendants were sentenced to various terms of imprisonment and, as Pravda assured its readers, the decision of the court "met with the unanimous approval of all persons present in the courtroom." The defendants were brought to justice by the security police (Committee for State Security) and were charged and sentenced under the Decree of March 1961, which provided higher penalties for "violating the regulations on currency operations and for speculation in currency."

The higher authorities, however, were not satisfied with the outcome of the trial. The USSR Prosecutor-General appealed the sentence of the Moscow City Court, which imposed upon Rokotov and Faibishenko the maximum penalty which the law in force provided, fifteen years of deprivation of freedom. The case went to the Supreme Court of the RSFSR, which tried the defendants under the new charge that they "regularly and for profit bought large amounts of foreign currency and gold coins and sold them at speculative prices." In the meantime Article 25 of the Law on Crimes Against the State was changed; this dealt with violations of the regulations on foreign currency operations, and now permitted the imposition of the death penalty (Decree of July 1, 1961). The RSFSR Supreme Court, having reviewed the case on appeal, sentenced Rokotov and Faibishenko to death by shooting.30

The Court established that the volume of financial operations handled by Rokotov amounted to twelve million old rubles, and those credited to Faibishenko to one million. Again the public put the stamp of its approval on the proceedings and the sentence.

The Rokotov and Faibishenko case raises several important legal questions. In the first place there is the question of the law under which they were tried. It may be assumed that many of the activities with which the defendants were charged took place under the Law on Crimes Against the State of December 25, 1958, and most of them, if not all, prior to the first amendment of Article 25 of that Law by the Decree of March 1961, as the first trial took place on June 16, 1961. If that is so, then the first sentence of the Moscow City Court imposing fifteen years deprivation of freedom was contrary to Article 6 of the General Principles of Criminal Legislation of the USSR and of the Union Republics, which was incorporated in the Criminal Code of the RSFSR of 1960, and states: "Whether an act is criminal and punishable is determined by the law in force at the time of its commission... A law which makes an action punishable or increases the penalty has no retroactive force."

This provision was introduced as a result of the reform initiated in December 1958, and the language of Article 6 suggests that Soviet legislators were highly concerned that this fundamental principle of orderly penal policy should be firmly entrenched in the legal system of the Soviet Union. Neither the Principles nor the Code of 1960 permitted exceptions from the non-retroactivity rule, not even by the addition of a qualifying clause, such as "unless expressly provided for by the law."

A fortiori, the appeal of the Prosecutor-General of the USSR of the decision of the Moscow Supreme Court, seeking a higher penalty, was contrary to the law in force. As the Moscow City Court had already exceeded its sentencing powers the appeal was fundamentally illegal, and should have been thrown out of court. Nevertheless, the RSFSR Supreme Court reviewed the case and applied the Decree, which was enacted well after the first trial was held, and which by no stretch of the imagination could pertain to criminal acts committed before that date. There is good reason to think that there was a return to the practice of secret decrees in this case.31

The manner in which the Prosecutor-General, the Moscow City Court, and the RSFSR Supreme Court handled the case made nonsense of the guarantees of legality enacted in the General Principles of Criminal Legislation of December 25, 1958, and it would appear that the decrees of the 1961-62 period have undone the reforms of the post-Stalin period. The handling of the case by the Soviet judicial and prosecuting authorities suggests that formal guarantees of legality have little if any currency, and the courts will not be constrained by the formal requirements of justice.

The Rokotov case was the first of a great number of crimes tried under the economic decrees. It was followed by the Frunze affair, which involved the organization of production of non-planned goods in a governmental factory for private profit, and by a number of other cases, all of which involved speculation in foreign currency or gold, industrial activities, second-hand cars, or durable consumer goods sold at great profit. All of them had two things in common. First, the cases were never fully reported and significant aspects of each particular case were screened from the public view. Furthermore, the theory explaining the proliferation of economic crimes was that they were committed by a small group of persons, mostly members of the Jewish minority, which was certainly untrue. In the Frunze affair, the criminal group involved mostly Great Russians, posted in various departments of the Kirgizian Republic, who exploited their elevated positions for personal gain. Obviously, the purpose of blaming the deeds on a few Jews in the factory administration was to hide the fact that Russians in Kirgizia, which is reduced to the position of a colony in the Soviet Union, were not real criminals.

V. THE FLEXIBILITY OF SOVIET LEGALITY

Economic crimes are not the only area in which governmental practices in the Soviet policy depart from the privileges of the reformed Codes. Legislation on parasitism, the practice of deporting unwelcome members of the society, involving some of the intellectual dissenters, and the practice of placing dissenters in the lunatic asylums seem to indicate that the Soviet state in the post-Stalin era cannot afford absolute guarantees of civil rights and must at times resort to their violation. The Soviet state must live by a double standard of legality. It is essential, at times, to disregard the guarantees of what we would call in our legal culture the due process of law, in order to en-

force the aims and goals of the Soviet state. That in the minds of many there are serious doubts on that score is best demonstrated by the discussion in the *Literaturnaia Gazeta*.

In an article of May 23, 1964, the eminent Soviet jurist M.S. Strogovich argued, with reference to concrete cases, that unless guilt is fully proved a court should pass the verdict of not guilty. He then added:

[1]In the period of the cult of the individual, a “theory” was current among practical workers and theoreticians in the law that “maximum probability” of guilt was sufficient for conviction. Everyone knows the damage this “theory” did to our society. Frequently, the source of error in investigatory and court work lies in equating an accused person with a guilty one, in regarding a person on trial as a person convicted. . . . Such reasoning involves prejudice, a one-sided accusatory approach to trying the case.

In the *Literaturnaia Gazeta* of August 16, 1964, an Assistant Prosecutor named G. Filimonov from the Cheliabinsk District rebutted Strogovich’s argument as follows:

The law gives the investigatory agencies the right to bring charges against someone, to interrogate him as the accused, and hence to recognize him as guilty. And the prosecutor brings to trial and, in criminal proceedings, accuses a person who is already guilty in the eyes of the investigatory agencies, i.e., in the eyes of authorities. And the court merely verifies to what extent the individual brought to trial and accused by the prosecutor is guilty. . . .

Filimonov was without doubt adequately describing the prevailing practice of the Soviet courts. But his blunt way of stating the facts was an open invitation to criticism. On September 10, 1964, *Izvestia* carried an article by O. Chaikovskaia, who traced the origin of Filimonov’s views to the Stalinist period, and added that his position was far from being an isolated phenomenon: “The ignorance, with which we are dealing here is malignant. In the years of the cult of the individual, they would come for a man in the night, and by morning he would already be called an enemy of the people.”

She followed this statement with a short treatise on the basic principles of fair criminal procedure: the need for an open trial, with public examination of the charges and evidence against the accused; the role of the defense; the role of the courts and the need for their independence.
The Strogovich-Chaikovskaia position was further upheld by A. Gorkin, Chairman of the Supreme Court of the USSR, who wrote in *Izvestia* on December 1, 1964 “In present-day conditions . . . the strengthening of citizens’ rights and of the inviolability of the person, freedom, honor, and dignity of man constitute one of the most important demands of the party.”

The matter might have ended there, except that Filimonov considered Chaikovskaia’s article an insult to his honor and instituted libel proceedings against her and also against *Izvestia*. He duly lost his case on the basis that his position was clearly contrary to the Basic Principles of Criminal Procedure adopted in 1958. *Izvestia*, reporting the trial (December 19, 1964), again upbraided him for his mistakes and enjoined him to mend his ways.

The final word belonged to Strogovich, who in the December 17th issue of *Literaturnaia Gazeta* dealt with the main issues of the controversy, and drew lessons from it. Strogovich stressed again that Filimonov was only one of many like-minded colleagues, that his views were echoed not only by practitioners of law, but in the “pseudoscientific works” of a number of scholars in institutions of higher learning. The root cause of such attitudes, said Strogovich, was a contempt for legal theory, including contempt for the changes introduced by the reform legislation. It was still little understood that to have a system of justice worth its name, it was essential to insist on a high caliber of judges, able to uphold the independence of the courts vis-à-vis the prosecution, and capable of objective examination of all the circumstances of a case *sub judice*. In short, without objectivity, justice was impossible. To support his viewpoint, Strogovich cited various examples of judicial practice where the principle of impartiality and objectivity had been ignored. And yet, only a few years later in cases involving intellectual dissenters, the Soviet administration of justice has relapsed into the practices of the Stalinist period. From the most general point of view neither the Soviet legal community, nor the political leaders of the country, nor the public at large are wholly committed to the idea of legality, with adjective and due process of law as this thing is understood in the open societies.

*Sobranie Dokumentov Samizdata* contains minutes of the trade union meeting of April 16, 1968, which examined the case of the teacher V.M. Gerlin, who signed a protest in connection with the trial Ginzburg, Galanskov, Dobrovoski, and Lashkova. As a teacher of

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literature in advanced classes she was considered unworthy of trust in regard to her ideological and political views. Her explanation was that she was concerned with the authority of the law in the Soviet courts, and her letter was addressed to the Soviet supreme authorities asking for the review of the trial.

Her explanation was interrupted by a participant. “Must the enemies of the Soviet Union be judged according to the law?” “Not only these,” answered Gerlin, “but even war criminals.” “But they are enemies.” The same person, a teacher of mathematics, reiterated his position. “We cannot judge criminals according to justice. They would be declared not guilty.” Eventually the meeting was almost unanimous in declaring the unfitness of teacher Gerlin for further employment.

In the perspective of the events which took place following Khrushchev's speech in 1956 the Samizdat episode is one of many upheavals in the process of transition to a stable regime not much different from Stalin's public order. The ideological framework in which the issue of legality was raised was too narrow, and of no immediate significance for the masses. Dissenters fought for intellectual freedom, and were not concerned with the rights of ordinary criminals who also deserved equal protection of the laws.

The issue of anti-Semitism again was seen exclusively in the perspective of the right of Soviet Jews to move to Israel. The same can be said of the treatment of Tartars, or the treatment of Baptists. Each of these minorities fought in total isolation from the Soviet society which remained indifferent to their plight. Indeed, the only support intellectuals, Tartars, Jews, and Baptists had, came from the West. If it were not for Western media, protests of the oppressed would have died without a ripple.

VI. CONCLUSION

The general picture one obtains from these insights into the life of law in the Soviet Union is that long years of Stalinism established the conviction that power is the deciding factor determining the policy of the Soviet state, and that abuse of power cannot—in sensitive situations—be prevented by law. This of course makes protection of individual rights uncertain.

This general unconcern with the issue of legality is compounded by the fact that various interests in the Party and government have failed to accept the new order of things prescribed by the reform legislation enacted after the 1956 Congress. Powerful bureaucracies still cling to
old dogmas and bad practices learned under Stalin. Filimonov and Ziemiatin spoke for the hordes of Soviet bureaucrats who have no intention of abdicating their positions of power, undermined by the reform legislation.

At the same time reform legislation tends to emphasize the increased role of the institutions charged with the protection of the legal order, generating a struggle for more influential positions in the hierarchy of the Soviet establishment.

An interesting insight into the internal tensions and the power struggle within the Soviet administration of justice comes from a short review of a textbook used in the Higher School of Criminal Investigation of the Ministry of Internal Affairs (MVD) which appeared in Sotsialisticheskaiia Zakonnost. The review condemned the textbook in sharpest terms for distorting the role of the Prokuratura as supervisor of criminal investigation. The review pointed out that the Prokuratura not only has the right, but the duty to control criminal investigation and to prevent violations of the law, particularly of the rights of the individual. The Prokuratura is the guardian of legality and in this capacity supervises all stages of investigation until the moment the case is filed in court. The Prokuror continues to supervise the judicial process and the interests of those involved in it, even those of the accused. Finally, to touch the most important point, the review rebuked the authors of the textbook for suggesting that in fact agents of the MVD acted as Prokuror in court, thus replacing him in this most important function of supervision.

It is difficult not to believe that reality is closer to what the authors of the textbook describe as the normal course of events and that the administration of justice, as well as the Party and the government, are still largely controlled by people whose habits of action are modeled after Stalinist traditions. These habits survive not only because a fair number of the membership of the governing group carries memories of the pre-Khrushchev era, but also because of the fundamental attitudes of the leadership to unexpected developments, which in more liberal societies are seen as a result of social change. Alleviation of terror brought about an unacceptable demand for freedom of expression, and a higher level of prosperity produced greater pressure for durable consumer goods and increased search for financial security, bringing in its wake speculation and illicit commerce with gold and foreign currencies. The reaction of the Soviet Government to these events which took

34 1975, No. 5, at 89-90.
place in conditions of political and economic stability seems to suggest that the Soviet administration of justice is not equipped to deal with unexpected developments, which in open societies are not seen as a danger to social equilibrium, and must resort to exceptional measures reminiscent of the harsh reality of emergency and the early years of the socialist construction.