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## Commentary

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## COMMENTARY

### Professor Joseph Schiebel\*

I'm going to start praising Professor Loeber; and at a certain point I will probably stop praising him for what he said and start praising him for what I will be saying. I think he gave an excellent description of the range of areas in Soviet society and in East European communist societies, in which manifestations of nonconformity become not only matters for established legal institutions to deal with, but become political matters having to do with the preservation of the State. I think he described very well how the State maintains an administrative network of controls, which, in most instances, make it unnecessary for the State to resort to the law to enforce conformity, and how, even when there are infractions of established law, these can be dealt with by the application of various pressures, without taking a person to court.

But regardless of the extra-legal means of enforcing conformity, there is the criminal code, the legal system, to deal with overt offenders; and therein alone lies one of the significant differences of legal practice between the two systems — that is, it is up to the State, in the Soviet Union, to decide whether the law should be resorted to, in controlling the society, rather than it being up to the society to decide when it would resort to the law to control or limit the State, or to seek the protection of the law when charged with crimes or anti-social behaviour.

The established law is, indeed, the top of the iceberg, and there are some very interesting things underneath this iceberg, including things which Professor Loeber didn't have time to mention but no doubt would have if we had given him more.

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As already mentioned, the judicial system, the law itself, is only a part of the entire system of controls, formal and informal, administrative and political. But even the judicial institutions contain some unusual variants. There is a body of legal institutions built up around anti-parasite laws and comrade courts, which establish a whole system for dealing with minor infraction, various forms of anti-social behavior at the community level, through courts which are quasi-judicial bodies, which are largely composed either of neighborhood activists or of associates at work or in the collective to which one belongs. These courts are extremely interesting to study. They can be, of course, seen very positively as a way in which the members of a society or a collective assist one another in improving one's sense of cooperation and participation in the achievement of common objectives. And one can take the interpretation to the other side of the spectrum and describe them as, essentially, lynch law, where at any given moment friends, neighbors and fellow workers (or students) can be brought together to deal with conduct on the part of an individual which the state simply doesn't approve of.

Other means of controlling non-conformity can be found outside the formal legal system. One very interesting thing is the manifestation of big-time Mafia-type\* crime in the Soviet Union. Evidently this kind of crime is very, very large. Some have estimated it to be much larger than in the United States even in some past periods, and involving some real "wheeling-dealing" of a very substantial nature. This kind of crime appears to serve one particular purpose. It appears to go on partially with the connivance of the State, and it apparently makes available to the State the energies and resources of some of the most ambitious individuals, the kind of people who would not put forth the efforts required in putting together modern and productive industrial enterprises, for simply a wage or for whatever other privileges the State may be able to grant. So the regime allows some people to enrich themselves enormously, in exchange for putting forth unusual effort. At the same time, of course, the State has enormous levers of control, not only the obvious legal levers, but also psychological inhibitions.

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\*Mafia-type crime defined as the satisfaction of needs and wants of society and economy by a system considered illegal under existing rules.

Perhaps everyone in the Soviet system who has ever accomplished anything of any significance has had to break the law in order to do it. And while this makes these achievers legally vulnerable at all times, it has comparatively rarely been necessary to invoke the laws against them, because the feeling of guilt, the feeling of obligation, and often immense psychological pressure, have been a significant instrument in curbing non-conformity among the productive and leadership elite.

At any rate, in talking about the law which is on the surface, the formal judicial system and formal codified laws, one might start out with a very interesting irony, one which has already been alluded to several times in the previous session. Soviet law very much resembles bourgeois institutions and bourgeois formulations. This is most readily apparent in the Soviet Constitution of 1936. And therein, perhaps, may lie the explanation of the irony. On the surface, the theoretical explanation of why Soviet law should be formulated in essentially bourgeois terms is fairly simple. During the period of transition to Socialism, Soviet doctrine argues remnants of bourgeois relations remained, and in order to regulate these relations, there have to be laws adequate to deal with them.

But the promulgation of the Constitution was accompanied by the statement that the building of a socialist society had been accomplished. And so it was precisely when socialism supposedly had been built that new bourgeois laws and bourgeois constitutional principles were promulgated. And there we have, I think, a very significant irony. It has been suggested, of course, that the reasons for doing this in 1936 was that the Soviet leadership anticipated requiring the goodwill of liberal democratic western countries in the period ahead, and that this was the kind of thing that would persuade them to come forth with their support, and I think this is what has happened. Political scientists have suggested that resort to these established bourgeois or western norms and formulations has tended to legitimize the regime, or has been intended to legitimize it, in the minds and attitudes of those who are governed.

At any rate, the formal legal system appears to work remarkably well — that is, to the extent that there are legal

relations which do not deal with challenges by members of the society against the State, established law and norms of procedure with which we are familiar have been employed, and are performing their function.

The question of tradition was raised earlier, that is, whether the absence of a historical base of legal traditions handicapped or precluded the development of western style legal systems or the rule of law in Communist societies. The fact that an essentially western legal structure could be imposed on a totalitarian society hostile to the west would indicate that there was some basis on which it was accepted. Laws were not exactly strange and new to the Soviet citizen. The fact that a western legal system was offered to them in order to get their support, would seem to be one indication that there is a substantial tradition behind it, or that at least the Soviet leaders thought so.

But when one looks for that tradition, one finds several different traditions in Russia. There is the despotic, bureaucratic tradition. A society has for centuries been ruled by administrative bureaucratic controls, providing a tradition in which the idea of a society using the law to challenge or limit the power of the State simply could not flourish. But then there is the liberal tradition which began to grow in Russia before, but particularly after 1905. It included the outstanding lawyer Maklakov, who insisted that a Rechtsstaat, i.e., the rule of law, not of men, had to be established before Russia could progress, and the liberal leader Nilivkov who eventually adopted the position that the existing system had to be destroyed before new principles and institutions could be established. Both had their followers, and both agreed with each other and virtually everyone else that the new Russia would have to be founded via a Constituent Assembly, i.e., a legal and constitutional procedure. Their main objective appears to have been to establish a rule of law, whereby society could limit and control the State.

There is also the tradition of reform, to which the autocracy committed itself from 1861 on. The "Great Reforms" gave Russia, among other things, a model legal and judiciary system, whose only major defect was that it did not immediately protect all citizens, and could not be freely used to curb the State. The emerging Tsarist civil and criminal system was intended to bring all proceedings under a uni-

form code and due process, and to regulate and arbitrate social and economic relations among individuals and groups in society. This legal tradition, of course, came to an untimely end after 1917, and many of those who upheld the tradition were either driven from the country or were destroyed. The Tsarist State had worked hard and with some success to implant the roots of this tradition. The Bolsheviks, being root and branch revolutionaries, replaced it with their Socialist legal system and in the process restored much of the old despotic bureaucratic tradition as well.

There are other legal legacies, Church law being one of them. There seems to be a basis in Russian tradition for a variety of legal systems, and it may be argued that Russia neither needed nor was doomed inevitably to live under Communist law; that more time was needed to allow existing alternative traditions to grow. One issue involved in this is whether we're looking upon the law as a way of regulating the normal relations between individuals and groups and corporations within a society, or whether we're looking at the law as a way whereby the society protects itself against the State or overwhelming conglomerations of power. In the case of the former, I think that there is some reason to be encouraged by the administration of justice in the Soviet Union or East European Communist countries; in the case of the latter, there is much reason to be discouraged.

One of the areas over which one may, indeed, be discouraged concerns the continuing use of the legal process and legal institutions, as well as extralegal procedures, to confine to insane asylums people who patently are not insane, unless one uses a very strange formula for determining insanity that formula going something like this: "Anybody who would resist a State which is that powerful has to be insane!" These methods are not new; what is disturbing is that increasingly and broader application of legality in the Soviet Union cannot curb them effectively.

One other issue which deserves greater attention is the claim of the State that, when it deals with certain offenses on the part of a citizen against institutions, people or property, it is not protecting the State against evildoers, but is protecting the people instead. In this way a crime against State property, an offense against a State official, or any expression of dissent can become a crime against that people. Now, that

phrase has been around at least since the French Revolution, and it is an ominous phrase. Crimes against the people is the one kind of conduct, in radical or revolutionary ideology, which cannot be tolerated and merits total and merciless repression. Enemies against the State, enemies against other groups, enemies against other individuals, violators of various norms of behavior, can be tried, excused, rehabilitated, or punished. But enemies of the people need to be destroyed. This formula has not been frequently invoked recently, but it exists, can be applied, and threatens with annihilation anyone proclaiming total non-conformity, or undermining the power of the State.

A final point: The law is seldom used, as Professor Loeber has pointed out. But in all cases, the law is in reserve. The law can be used if advisable and if other means fail. But the State decides, not the individual.

Now, I want to close with a rather grisly kind of a reminder of what, to me, constitutes one of the questions we have to deal with, whether we are talking of a judicial establishment which tries to help regulate the interactions of the various peoples and groups in a society, according to established norms, or whether we are dealing with the legal establishment in the sense of an institution which defends the State against the people, or the people against the State.

Some years ago there was a movie called "Judgment at Nuremberg"; and you may recall, even if you haven't seen the movie, the problem: The German judges, who went about their business after 1933 of administering justice, of trying to enforce rights and laws, are charged with having neglected the bigger issue, the question of whom or what the law served. In the end, whether they knew it or not, many judges and advocates who administered justice and sought equity at the level of relations among the people, ended up being parties to a system which gave to the State all of the advantages, and to the society none of it. Once this rule of the State was established, the law could be and was perverted for political ends, and the crimes of the State could be and were condoned. This constituted the moral crisis of the German legal profession, and it compromises the legal profession in the Soviet Union today.