

1972

## Commentary

Oswald P. Backus  
*University of Kansas*

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Oswald P. Backus, Commentary, 24 S. C. L. Rev. 83 (1971).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

## COMMENTARY

### Professor Oswald P. Backus\*

I've been billed here as an historian, and I'm terribly sorry to say that the historical dimension is one to which I must give scant attention, because of the five-minute limitation. I feel that I must address myself to a high degree, to the question of dissent in the Soviet Union at present. Perhaps in the questioning I can review some of my strong disagreement with Professor Cohen on the matter of what constitutes Russian tradition, and my personal disagreement with Professor Schiebel.

Professor Schiebel has mentioned that sometimes dissenters seek to use Soviet law against the State. I wish to underline this point. I think that this is a very important one.

We've had various references to samizdat, the underground publications of chronicles of events being one of the most important. I think that one should know that legal issues are raised in these underground publications. Listen here to a protest: "All the political trials in Kiev, L'vov and Ivano-frankovsk, and in the years 1965 to 1966, in which more than twenty persons were found guilty, took place behind closed doors, which is contrary to the Constitution of the USSR, the Constitution of the Union republics, and to the Criminal Code. Most serious is the fact that the secret character of these trials has helped to facilitate the violation of law in the very course of the presentation of arguments. Lenin said, 'The masses should have the right to know all and check on every one of the acts, even the least significant, of the courts in trials involving crimes.'"

Let me turn to another type of protest. "Sometimes judges accept in evidence materials obtained in violation of procedures established by law. Some judges violate the right of the accused to defense, forgetting that the implementation

---

\*Professor Backus received a Masters degree in Russian from Columbia University, a Ph.D. in History from Yale University and an LL.B. from Harvard Law School. He has been the Director for the American Association for the Advancement of Slavic Studies and a visiting professor at the Universities of Marburg and Bonn in Russian Legal History. Professor Backus is presently a Professor of History at the University of Kansas.

of that right is the greatest guarantee of justice." I quote here not from samizdat, but Resolution Number Two of the Plenum of the Supreme Court of the USSR of March 18th, 1963.

Now, this last quotation brings me to the point: What is the boundary line, in the Soviet Union, between permissible and impermissible dissent? When is dissent nonconformity, and when isn't it? How great is the space separating the non-conformist and the legal craftsman who may attempt to work within the system to modify the law? I don't pretend to be able to answer these questions. They point, still, to another question: How successful can the Soviet Union be in satisfying conflicting traditions and conflicting aspirations relative to the law?

It strikes me that one may hazard a hypothesis that eventually, with an increasingly better educated population, the Soviet Union may opt for a pragmatic compromise, involving both an attempt at the maintenance of controls and a relaxation of the sort on which Professor Lipson was pressing his good friend, Maxim L'vovich.

Professor Loeber has mentioned that some aspects of Soviet civil law may be taken seriously. And I would echo his words by pointing to a recent case in which the Soviet Supreme Court ruled that the court has, under certain circumstances, the right to exercise jurisdiction over cases involving disputes over the replanning of an apartment. Heretofore the courts have taken a hands-off stand on this matter, leaving questions of replanning to housing administrations and other administrative bodies. But in a case where those bodies' action was challenged, the courts' reluctance to intervene, based, perhaps, on a fear of getting involved in the burdensome task of supervising the replanning of apartments should they open the doors in this area, broke down. The case was remanded for an investigation of the feasibility or the unfeasibility of the proposed replanning.

I put the question: Will the courts reach out to supervise the rights enumerated in Article 125 of the Soviet Constitution? Under present conditions, I cannot be at all optimistic. Although lawyers may defend dissenters in trials, the ultimate decision for a change in practice rests with the regime. And who is the regime? The answer to our major question may lie in an answer to that question, or to such related questions as: What is the correct way of applying Leninism, a point to which

I think we should pay a lot of attention. Professor Lipson very significantly mentioned the possibility of changing the content of Marxist-Leninist definitions. Or what is in the interest of those who control?

The issue of efficiency, it seems to me, may turn out to be a crucial issue. Maxim L'vovich's goal of real and steady growth may be threatened. I was struck when Mr. Traxler, a Freshman at the Law School of the University of South Carolina, pointed out to me your Capitol building, and mentioned the fact that stars had been placed to cover the evidence of shellfire when Sherman's troops were in South Carolina—and, at the same time, to serve as a reminder that there had been shellfire, that this city had, in fact, been invaded.

Now, I didn't happen to see the stars, unfortunately, but what struck me is that there's a contrast here between this perhaps more American way, and efficient way of doing things, patching up the building and using it, and what I observed in Volgograd—formerly Stalingrad—where I saw the house in which Sergeant Pavlov stood off the Germans, and finally he and his platoon were wiped out; and so as a monument to Sergeant Pavlov, a building is maintained in ruins. And this is, to me, a very interesting contrast.

I say that the issue of efficiency may turn out to be a crucial issue, because I feel that one must bear in mind that not all the dissenters are people who are dissenting in terms of freedom of speech to overturn the regime, but freedom of speech to operate within a Marxist-Leninist context to better the regime. I think it was very impressive when, in 1968, a leader of a Kolkhoz became a protestor, a dissenter, who was very upset. And underlying his dissent, which has been published in the West, lay I think, a dissatisfaction with inefficiency.