

dictatorship of the proletariat must be ruled, won, and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestrained by any laws'.⁷ The final victory of communism, he stated, required the creation of the 'dictatorship of the proletariat'.⁸

Lenin nonetheless agreed with Pashukanis that once the revolutionary period of 'proletarian dictatorship' were accomplished the state with all its laws and institutions would simply wither away, because, in such a view, there would exist no further social conflict among the classes to activate the engine of dialectical historicism.⁹ Meanwhile, in order to continue on the road to the communist utopia, the Soviet state needed to become increasingly arbitrary and violent. Caenegem explains how these seemingly self-contradictory ideas could co-exist and be justified by the Soviet leadership:

*"In order to continue on the road to communism a strong state was indispensable. At the end of the road, after socialism had given way to the ultimate achievement of communism, the state would be meaningless and doomed to disappear. In the meantime, however, its power was needed to keep the forces of reaction in check. When exactly this disappearance would take place was a moot point that used to pop up in theoretical journals. The date was, like that of the coming of the Lord for the early Christians, constantly pushed into a more distant future. It was precisely because a strong state was necessary... that the constitutional freedoms had to be limited, as they could not be invoked against the workers and their state... Freedom in the Soviet Union was a guided, teleological freedom, not to do what one liked, but to co-operate in the construction of socialism. It was comparable to the Christian doctrine that true liberty consists in doing God's will. Consequently Article 50 [of the 1977 Soviet Constitution], which guaranteed freedom of the press and the expression of opinion, stated that Soviet citizens enjoyed those liberties 'in accordance with the interests of the people and in order to strengthen and develop the socialist regime'."*¹⁰

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The death of Lenin in 1924, however, unleashed a deadly struggle for power within the Soviet elite. The struggle was ultimately won by Joseph Stalin (1878-1953), the Party's general secretary, who after eliminating his main political adversary, L.D. Trotsky (1879-1940), launched a deadly 'reign of terror' in which millions were exterminated with or without mock trials by outright execution or by mass deportation to Siberia. It was during the same period that Pashukanis was executed. Stalin's new 'socialist legality' was incompatible with Pashukanis' 'legal nihilism'. Ironically, it has been argued that Pashukanis's own legal approach may nonetheless have contributed to the rise of Stalinism. As explained by Krygier:

⁷ V.I. Lenin, *Collected Works* (Moscow: Progress Publishers, 1981), p. 28-236.

⁸ *Ibid*, p. 16-33.

⁹ Kelly, above n.2, p. 310-311.

¹⁰ Caenegem, above n° 4, p. 266.

“There was no place... for legal rights [in his legal theory]. In the 1920s Pashukanis, who commodity-school dominated Soviet There was no place here for legal rights... In the 1920s Pashukanis, whose commodity-exchange school dominated Soviet law and set the agenda for Soviet law schools, argued for “direct action” rather than “action by means of a general statute” in criminal law. This “legal nihilism” was an important ingredient in early Stalinist lawlessness. Pashukanis attacked, and his school sought to root out, “the bourgeois juridical worldview”. In doing so, they contributed directly to what has been called “jurisprudence of terror”. In the “campaign against the kulaks”, for example, which Robert Conquest estimates to have some 6.5 million lives, terror operated directly without legal restraint, as well as through legal provisions empowering local authorities “to take all necessary measures... to fight Kulaks.”¹¹

Constitutionalism in the Soviet Union

The Soviet legal system created institutional safeguards to the individual citizen that were merely nominal, whereas others were just a mere façade. Indeed, the Soviet regime had no interest in respecting the rule of law. Established by violence, such regime would never become a government under the law. On the contrary, the Soviet law played a rather insignificant role in the actions of the government, since the real power lied in the small leadership of the Bolshevik Party. As Aron pointed out, ‘the proletariat [was] expressed in the Party and the latter being possessed of absolute power, [was] the realization of dictatorship of the proletariat. Ideologically the solution [was] satisfactory and justifie[d] the monopoly of the party. The party possesse[d] and should possess supreme power, because it [was] the expression of the proletariat and the dictatorship of the proletariat’.¹²

The authorities who promulgated the Soviet constitutions never intended to respect their legal provisions. The first Soviet Constitution is dated from 1918, the second is from 1924, the third is from 1936, and the fourth and final Constitution was promulgated in 1977, remaining in operation until the regime’s final collapse, in 1991. In the first Constitution there was an explicit statement that the Soviet Union was ruled by a ‘dictatorship of the proletariat’ and that human rights were guaranteed only to the ‘workers’. As for the so-called ‘exploiting classes’ (priests, landowners, businessmen, etc.), they lost all their individual rights, including the rights to vote and to hold public office.

In all subsequent Soviet constitutions the people were declared to enjoy fundamental rights to free speech, free press, free assembly, etc. And yet, nobody really expected to enjoy these rights. There were limitations derived from the constitutional text itself, which determined that these rights should be exercised in conformity with the general interests of the socialist state. A further check lied on the fact that the special police was immune from respecting the law. So it is argued that these constitutional rights were only a façade to deceive naïve foreigners and to advance the cause of communism. As commented by Aron on the Soviet Constitution enacted by Stalin, in 1936:

¹¹ Martin Krygier. ‘Marxism, Communism and the Rule of Law’, in Martin Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Amsterdam: Rodopi, 1994), 163..

¹² Raymond Aron. *Democracy and Totalitarianism* (London: Weidenfeld and Nicolson, 1968), 168.

*“Because Westerners consider constitutional regulations important, [the Soviet authorities] must be shown that they have no reason to feel superior even in this respect... One of the reasons for the 1936 constitution was possibly to convince world public opinion that the Soviet regime was close in spirit to western constitutional practice and opposed to fascist tyranny or Nazism. The regime wanted foreigners to see the distinction between the party and the state. Without this juridical distinction, relations between the Soviet Union and other states would be compromised.”*¹³

The judicial function in the former Soviet Union

During the former Soviet Union the power of the state was indivisible. The principles of judicial independence and neutrality were discarded as no more than mere ‘bourgeois myths’. As such, the Soviet courts had two basic functions: to advance socialism and to destroy all the real or imagined enemies of that socialist state. I.M. Reisner (d.1958), a member of the People’s Commissariat of Justice from 1917 to 1919, commented:

*“The Separation of powers in legislative, executive and judicial branches corresponds to the structure of the state of the bourgeoisie... The Russian Soviet Republic... has only one aim, the establishment of a socialist regime, and this heroic struggle needs unity and concentration of power rather than separation.”*¹⁴

Lenin believed that the Soviet courts needed to be ‘an organ of state power’.¹⁵ ‘The court is an organ of power of the proletariat. The court is an instrument for inculcating discipline’, Lenin argued.¹⁶ According to him, ‘the only task of the judiciary is to provide a principled and politically correct (and not merely narrowly juridical)... essence and justification of terror... The court is not to eliminate terror... but to substitute it and legitimize it in principle’.¹⁷ True to his convictions Lenin created in 1918 the ‘People’s Courts’ as a judicial body in which ‘judges’ did not rely on rules of evidence and whereby their final verdicts were to be guided by executive decrees and their own sense of ‘socialist justice’.¹⁸ Figs comments on their functioning:

“The Bolsheviks gave institutional form to the mob trials through the new People’s Courts, where ‘revolutionary justice’ was summarily administered in all criminal cases. The old criminal justice system, with its formal rules of law, was abolished as a relic of the ‘bourgeois order’... The sessions of the People’s Courts were little more than formalised mob trials. There were no set of legal procedures or rules of evidence, which in any case hardly featured. Convictions were usually secured

¹³ Ibid, p. 166.

¹⁴ Cited in Caenegem, above n° 4., p. 261.

¹⁵ Lenin, above n° 6, p. 25-155.

¹⁶ Ibid, p. 2-478-9.

¹⁷ V.I. Lenin, *PSS*, XLV, 190. Cited in Richard Pipes. *Russia under the Bolshevik Regime 1919-1924* (London: Harvill Press, 1997), p. 401.

¹⁸ Richard Pipes. *The Russian Revolution* (New York: Vintage Books), p. 798.

on the basis of denunciations, often arising from private vendettas, and sentences tailored to fit the mood of the crowd, which freely voiced its opinions from the public gallery...

The People's Courts judgements were reached according to the social status of the accused and their victims. In one People's Court the jurors made it a practice to inspect the hands of the defendant and, if they were clean and soft, to find him guilty. Speculative traders were heavily punished and sometimes even sentenced to death, whereas robbers – and sometimes even murderers – of the rich were often given only a very light sentence, or even acquitted altogether, if they pleaded poverty as the cause of their crime. The looting of the 'looters' had been legalized and, in the process, law as such abolished: there was only lawlessness."¹⁹

To further intensify repression Lenin introduced another court called 'Revolutionary Tribunals', in February 1919. Modelled on a similar institution of the French Revolution, Dmitry Kursky, the first Soviet Commissar of Justice, recognised that such tribunals were not intended to be real courts of justice, in the 'normal' bourgeois sense of the term, but 'courts of the dictatorship of the proletariat, and weapons in the struggle against the counterrevolution, whose main concern was eradication rather than judgments'.²⁰ According to Nicolai Krylenko, who succeeded Kursky as Soviet Commissar of Justice, 'in the jurisdiction of [these] tribunals complete freedom of repression was advocated while sentencing to death by shooting was a matter of everyday practice'.²¹

Although Lenin deemed 'mass terror' an indispensable instrument to every socialist government, to his great disappointment those revolutionary tribunals turned out not to be entirely efficient instruments of oppression. Too many of their magistrates could easily be bribed, and they appeared reluctant to impose sentences of death on 'enemies' of the socialist state. This was not what Lenin expected so that a new instrument of terror had to be conceived. Thus, the power of those tribunals was gradually transferred to a new and far more deadly entity: the Cheka. Since the decree establishing the Cheka was never published, the exact date of its creation cannot be ascertained.²² Although its date of creation is uncertain it is nonetheless absolutely clear that since its establishment the Cheka became a state within the state, assigned as it was with an unlimited power to eradicate anyone perceived to 'undermine the foundations of the socialist order'.²³ Krylenko characterised Cheka activities as follows:

¹⁹ Orlando Figes. *A People's Tragedy* (London: Pimlico, 1996), p. 534.

²⁰ D.I. Kurskii. *Izbrannye stat'i rechi (Selected articles and speeches)* (Moscow: Gos. izd-vo iurid. lit-ry, 1958), p. 67. Cited in Nicholas Werth, 'A State against its People: Violence, Repression and Terror in the Soviet Union', in Stéphane Courtois. *The black book of communism: crimes, terror, repression* (Cambridge/MA: Harvard University Press, 1999), p. 55.

²¹ N. Krylenko. *Sudoustroistvo RSFSR (The Judiciary of the RSFSR)* (Moscow, 1923), p. 205. Cited in Vladimir Gsovski, 'Preventive and Administrative Detention in the U.S.S.R.' (1961) 3(1) *Journal of the International Commission of Jurists*, p. 135, 138.

²² *Ibid.*, p. 136.

²³ NZh, n°112/327 (June 9, 1918), p. 4. Cited in Gsovski, above n° 20, p. 137.

“The Cheka established a de facto of deciding cases without judicial procedure... In a number of places the Cheka assumed not only the right of rendering final decisions but also the right of control over the courts. Its activities had the character of tremendously merciless repression and complete secrecy as to what occurred within its walls... Final decisions over life and death with no appeal from them... were passed... with no rules establishing the procedure or jurisdiction.”²⁴

Cheka is a name derived from the first letters of the Russian word *Chrezvyshtainaiia Kommissiia*, meaning ‘Extraordinary Commission’. Cheka agents had full licence to kill without having to follow the most perfunctory procedures. Martin Latsis, the head of the Ukrainian Cheka, explicitly instructed his agents: ‘Do not to look for evidence as proof that the accused has acted or spoken against the Soviets. First you must ask him to what class he belongs, what his social origin is, his education and profession. These are the questions that must determine the fate of the accused. That is the meaning of the Red Terror’.²⁵ Such ‘enemies of the regime’, often their entire families, were systematically arrested and thrown into concentration camps, which Latsis himself once reported as being no more than death camps: ‘Gathered together in a camp near Maikop, the hostages, women, children, and old men survive in the most appalling conditions... They are dying like flies. The women will do anything to escape from death. The soldiers guarding the camp take advantage of this and treat them as prostitutes’.²⁶

Latsis also produced two revealing books that provide a general account of Cheka activities: *Two Years Fighting* (1920) and *The Extraordinary Commission for Combating Counterrevolution* (1921). These books reveal Cheka not simply as a mere tribunal or commission but as ‘a fighting organ on the internal front of the civil war... It does not judge, it strikes. It does not pardon, it destroys all who are caught on the other side of the barricade’.²⁷ In fact, Latsis presented its activities in a way that left no doubt about their extra-legal nature as well as incredible brutality:

“Not being a judicial body the Cheka’s acts are of an administrative character... It does not judge the enemy it strikes... The most extreme measure is shooting... The second is isolation in concentration camps. The third measure is confiscation of property... The counterrevolutionaries are active in all spheres of life... Consequently, there is no sphere of life in which the Cheka does not work. It looks after military matters, food supplies, aducation... etc. In its activities the Cheka has endeavoured to make such an impression on the people that the mere mention of the name Cheka will destroy the desire to sabotage, to extort, to plot.”²⁸

²⁴ Krylenko, *Sudoustroistvo. RSFSR (The Judiciary of the RSFSR)*, Moskva, 1923, pp.97, 322-323. Cited in Govski, above n° 20, p. 137.

²⁵ *Izvestiia*, 23 Aug 1918; cited in Figs, above n° 18, p. 535.

²⁶ RTsKhIDNI, 17/84/75/28. Cited in Werth, above n° 19, p. 100.

²⁷ Nazhivin, *Zapiski*. 14. Cited in Figs, above n° 18, p. 632.

²⁸ Latsis, *Chrzvychainaia Komissiiia*. pp.8, 15, 23, 24. Cited in Gsovski, above n.20, 137.

On 6 February 1922 Cheka was abolished by executive decree but Cheka's successors (GPU, OGPU, NKVD, MVD, MGB, and KGB) continued operating outside any legal boundaries, thus being technically free to condemn any person by means of summary procedure, including to death penalty.²⁹ These were nominal changes laid down by such organisations that, if anything, only amounted to the institutionalisation of terror. And so it happens that between 1937 and 1938 alone, no less than 1,575,000 people were arrested by the NKVD. Out of that number 1,345,000 received some form of punishment, with 681,692, or 51 percent of those people, being executed.³⁰ As commented by Werth writes:

*"Although the name had changed, the staff and administrative structure remained the same, ensuring a high degree of continuity within the institution. The change in title emphasized that whereas the Cheka had been an extraordinary agency, which in principle was only transitory, the GPU was permanent. The state thus gained a ubiquitous mechanism for political repression and control. Lying behind the name change were the legalization and the institutionalization of terror as a means of resolving all conflict between the people and the state."*³¹

390 Curiously, during the first five years of the communist experiment, from 1917 and 1923, there was no proper judicial system in the former Soviet Union. Indeed, one of the earliest decrees of Soviet regime abolished all the courts, dismissed all the public prosecutors, and even the Bar Association was dissolved.³² The newly established activities of the revolutionary tribunals and the Cheka overshadowed any legal action. Figs provides a vivid description of the daily life of the Russian people, in April 1918:

*"Those living under Bolshevik rule found themselves in a situation for which there was no historic precedent. There were courts for ordinary crimes and for crimes against the state, but no laws to guide them; citizens were sentenced by judges lacking in professional qualifications for crimes which were nowhere defined. The principles nullum crimen sine lege and nulla poena sine lege... were thrown overboard as so much useless ballast... One observer noted in April 1918 that in the preceding five months no one had been sentenced for looting, robbery, or murder, except by execution squads and lynching mobs. He wondered where all the criminals had disappeared to... The answer, of course, was that Russia had been turned into a lawless society."*³³

²⁹ The Cheka was abolished on February 1922, and immediately replaced by an organization named 'State Political Administration', or GPU. In 1924, following the creation of the Soviet Union, it was renamed 'United State Political Administration', or OGPU.

³⁰ Werth, 'A State against its People: Violence, Repression and Terror in the Soviet Union'. From: Stéphane C. Courtois, *The Black Book of Communism: Crimes, Terror, Repression* (Cambridge/MA: Harvard University Press, 1999), p. 128, 190.

³¹ Werth, above n° 19, p. 128.

³² Gsovski, above n° 20, p. 135.

³³ Pipes, above n° 17, p. 799.

Ultimately a Judiciary Act was enacted by the Soviet authorities in 1923, which created a uniform judicial system that, in the main, survived until the final collapse of the regime. The new courts conceived by this legislation were constituted as 'obedient instruments of the policy of the government and the Communist Party.'³⁴ Soviet judges were not expected to be neutral adjudicators of the law. In fact, they had no independence from the government. Instead, they were instructed by the government to carry out the general line of the Party as well as the general policies of the Soviet Executive. Such an attitude was the guiding principle when the Soviet judicial system was created, and the same was true until the abrupt end of the Soviet experiment, in 1991. As commented by Krylenko in a lecture at the University of Moscow, in 1923:

*"No court has even been above class interest and if there were such a court we would not care for it... We look upon the court as a class institution, as an agency of government power, and we erect it as agency completely under the control of the vanguard of the working class... Our court is not an agency independent of governmental power... therefore it cannot be organized in any other way than dependent upon and removable by the Soviet power."*³⁵

It is somehow ironic therefore that such a staunch supporter of the 'Red Terror' ended up being arrested and executed in the 1930s, during Stalin's 'Great Purge'. In 1938, Krylenko was forced to step down as the Soviet Prosecutor General only to be summarily sentenced to death in a trial that lasted no more than twenty minutes. Krylenko was replaced by Andrei Vyshinsky (1883-1954), a legal academic who acquired a certain reputation for his lectures on legal philosophy at the University of Moscow.³⁶ Vyshinsky's approach to law was remarkably similar to Krylenko's. Inspired by the teachings of Marx, Vyshinsky contended:

*"Law is the aggregate of the rules of conduct expressing the will of the dominant class and established by legislation, as well as of customs and rules of community life confirmed by state authority, the application whereof is guaranteed by the coercive force of state to the end of safeguarding, making secure and developing social relationships and arrangements advantageous and agreeable to the dominant class."*³⁷

According to Vishinsky, 'the main function of the Soviet courts is to destroy without pity all the foes of the people in whatsoever form they manifest their criminal encroachments upon socialism'.³⁸ He thought the 'formal law' should be entirely subordinated to 'the law of the revolution': 'If there might be conflict and discrepancies between the formal commands of law and those of the proletarian revolution this conflict must be solved... by the subordination of the formal commands of law to those of Party policy'.³⁹ In *Judiciary in the URSS* (1936) he stated:

³⁴ Gsovski, above n° 20, p. 139.

³⁵ Krylenko, above n° 23, p. 177.

³⁶ Vyshinsky served also as the Soviet Foreign Minister from 1949 to 1953.

³⁷ Cited in Francis Nigel Lee, *Communist Eschatology* (Nutley/NJ: Craig Press, 1974), p. 383.

³⁸ A. Vyshinsky, *Judiciary of the USSR* (Moscow: Progress Publishers, 1935) 32.

³⁹ A. Vyshinsky, *Sudoustroistvo v SSR* (2nd ed. Moscow, 1935), p.32. Cited in Martin Krygier, 'Marxism, Communism and the Rule of Law', in Martin Krygier (ed.), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Amsterdam: Rodopi, 1994), 141.

“The court of the Soviet State is an inseparable part of the whole of the government machinery... This determines the place of the court in the system of administration. The general [Communist] Party line forms the basis of the entire government machinery of proletarian dictatorship, and also forms the basis of the work of the court... The court has no specific duties, making it different from other agencies of government power, or constituting its ‘particular nature.’”⁴⁰

Soviet criminal law

Among the peculiarities of the Soviet legal system there was the existence of parallel jurisdictions for prosecuting criminal matters, one judicial and another administrative. When questions concerning the abolition of the Cheka were raised, the Soviet authorities promised that the ‘the fight against violations of the laws’ would be entrusted exclusively to judicial bodies. Hence, a decree from 6 February 1922 that abolished Cheka promised that all crimes would henceforth be subject to trial in ordinary courts. This promise was never accomplished. Alongside these ordinary courts there remained a variety of successors to Cheka that kept its broad, undefined powers: GPU; OGPU; NKVD; MVD; and from 1954, the KGB.⁴¹ These agencies possessed extraordinary powers to arrest, investigate, try, sentence and execute anyone who were suspected of political opposition. They worked in secret and without any need to consult a court or legal rule.⁴²

392 The first Soviet Criminal Code came into force on 1 June 1922. And even after this code was enacted the widespread practice of arbitrary imprisonment continued to be one of the most notorious characteristics of the Soviet public life. According to Stuchka, the then Soviet Commissar of Justice, the criminal code was only a ‘codification of revolutionary practices consolidated on a theoretic basis’.⁴³ Indeed, ‘one of the code’s functions was to permit the use of all necessary violence against political enemies even though the civil war was over and expeditious elimination could no longer be justified’.⁴⁴ In other words, the code was enacted not to prevent governmental violence on political grounds, but rather to reveal the ‘motivation’ and ‘essence of terror’. This after all was precisely what Lenin intended when he demanded the following from the drafter of the criminal code:

“Comrade Kursky, I want you to add this draft a complementary paragraph to the penal code... It is quite clear for most part. We must openly – and not simply in narrow juridical terms – espouse a politically just principle that is the essence and motivation for terror, showing its necessity and its limits. The courts must not end terror or suppress it but give it a solid basis.”⁴⁵

⁴⁰ A. Vyshinsky, *The Judiciary*, Vol.1 (Criminal Procedure) (1936). Cited in Gsovski, above n.20, 139.

⁴¹ KGB is the abbreviation for *Komitet gosudarstvennoy bezopasnosti* or ‘State Security Committee’/Committee for State Security. KGB operated from 1954 to 2002.

⁴² Amnesty International, *Prisoners of Conscience in the USSR: Their Treatment and Conditions* (London, 1975), 18-9.

⁴³ Stuchka, *Kurs sovetskogo grazhdanskogo prava tom 1. Vvedenie* (‘Course on Soviet Civil Law, vol.1, Introduction’), 1931. Cited in Gsovski, above n° 20, p. 140.

⁴⁴ Werth, above n° 29, p. 127.

⁴⁵ I.V. Lenin, *Sochineniia* (Works), 3. ed, vol.27, p.296. Cited in Gsovski, above n° 20, p. 140.

In Lenin's view, the main cause of crime was 'the exploitation of the masses'. The removal of such a cause (i.e., capitalism) would lead to the withering way of ordinary crime.⁴⁶ In time, the socialist revolution would do away with such crimes. The code therefore stated that there is 'no such thing as individual guilty', and that criminal punishment 'should not be seen as retribution'.⁴⁷ On the other hand, unlike ordinary criminals all those 'political criminals' classified under the category of 'class enemies' were forced to endure 'harsher punishment than would an ordinary murdered or thief'.⁴⁸ This so being, N.V. Krylenko, the People's Commissar of Justice and Prosecutor-General of Soviet Russia in the 1920s and the early 1930s, wrote many books and articles justifying that matters of political consideration, not criminal ones, should play far more a decisive role on matters of guilt, innocence and punishment. Krylenko even went to be point of stating: 'We must execute not only the guilty. Execution of the innocent will impress the masses even more'.⁴⁹ Serving as Commissar of Justice in 1918, he declared:

"It is one of the most widespread sophistries of bourgeois science to maintain that the court... is an institution whose task it is to realize some sort of special "justice" that stand above classes, that is independent in its essence of society's class structure, the class interests of the struggling groups, and the class ideology of the ruling classes... "let justice prevail in courts" – one can hardly conceive more bitter mockery of reality than this... Alongside, one can quote many such sophistries: that the court is a guardian of "law", which, like "governmental authority", pursues the higher task of assuring the harmonious development of "personality"... Bourgeois "law", bourgeois "justice", the interesting of the "harmonious development" of bourgeois "personality"... Translated into the simple language of living reality this meant, above all, the preservation of private property."⁵⁰

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The criminal codes legislated during the Soviet Union provided for the arrest, conviction and imprisonment on ideological grounds. Article 58 of the first Criminal Code was especially obnoxious in that it classified as 'counterrevolutionary' any form of participation in the so-called 'international bourgeoisie'. This was treated by the law as a serious crime punishable by either a three-year incarceration or lifelong banishment. Such punishment was applied with considerable liberality, in a manner that ultimately facilitated the arrest of countless innocent people, often on no logical basis other than mere political expediency.⁵¹ The lifelong banishment provision in practice meant that anyone who dared return to the country would be greeted with immediate execution. Among those exiled were the compassionate people who had committed the 'political crime' of establishing a committee for the fight against the severe famine of 1921-1922, which was dissolved on 27 July 1921.⁵²

⁴⁶ See H. Kelsen, *The Communist Theory of Law* (London: Stevens & Sons, 1955), 45 & 102.

⁴⁷ Thus one may say that some aspects of the language in the Soviet criminal code would have 'warmed the hearts of the most radical, progressive criminal reformers in the West'. Anne Applebaum, *Gulag: A History* (London: Anchor, 2004), 160.

⁴⁸ *Ibid.*, 161.

⁴⁹ N.V. Krylenko 'Revoliutsionnye Tribunaly' VZh, N° 1, (1918). Cited in Pipes, above n° 17, p. 796.

⁵⁰ *Ibid.*

⁵¹ Werth, above n° 19, p. 128.

⁵² According to Werth, 'In place of the committee the government set up a Central Commission for Help for the Hungry, a slow-moving and bureaucratic organization made up of civil servants from

Article 58 indeed provided blanket charges against anyone who were even remotely suspected of representing a threat to the socialist regime. Thus, anyone who fell within the elastic categories of ‘socially dangerous’ and/or ‘counter-revolutionary’, could be quickly sentenced to prison even if that was in a condition of absolute absence of guilt.⁵³ Arguably, the dramatic situation sprang from the primacy assigned to the interests of the communist state, together with the Marxist understanding of law as a mere instrument of class oppression. Writing in 1947, the Soviet jurist A.A. Piontkowsky made it crystal clear that for political reasons any individual could be sentenced even if no crime had actually been committed:

*“Of course, sometimes for these or those considerations of a political nature... it is necessary to apply compulsory measures to persons who have not committed any crime but who on some basis or another are socially dangerous.”*⁵⁴

394 Alongside the criminal code there was also the Soviet Code of Criminal Procedure (1926), which broadened the definitions of ‘counter-revolutionary crime’ and ‘socially dangerous person’. Among the crimes deemed to be ‘counter-revolutionary’ was any criticism or negative comment about ‘the political and economic achievements of the revolutionary proletariat’.⁵⁵ Another striking feature of this procedural code was the instruction of provincial courts to refuse ‘to admit as a counsel for defense any formally authorized person if the court consider such person not appropriate for appearance in the court in a given case depending upon the substance or the special character of the case’.⁵⁶ Furthermore, Article 281 allowed these courts to hear a case in the absence of both the prosecution and the defense.⁵⁷ As a result, millions of prisoners who received criminal sentences were not really criminals in any normal sense of the word.⁵⁸

From the mid 1920s until the death of Stalin the crimes for which people were arrested, tried and sentenced were often ‘nonsensical’ and the procedures in which they were investigated and convicted were arbitrary and violent, if not absurd, utterly surreal. For instance, the vast majority of inmates in the notorious Soviet concentration camps (‘Gulags’) had been interrogated only cursorily, tried farcically, and found guilty in a trial that often would take less than a minute.⁵⁹ The investigations conducted by the Soviet secret police routinely included gruesome methods of torture, including hitting their victims in the stomach with sandbags, breaking their hands or feet, or tying their arms and legs behind their backs and hoisting them in the air.⁶⁰

various People’s Commissariats, which was characterized by inefficiency and corruption. When the famine was at its worst in the summer of 1922 and nearly 30 million people were starving, the Central Commission was assuring an irregular supply to about 3 million people... Despite the massive international relief effort, at least 5 million people of the 29 million Russians affected died of hunger in 1921 and 1922’. Werth, above n° 19, p. 123.

⁵³ Ibid., p. 136.

⁵⁴ A.A. Piontkowsky, *Stalinskaya Konstitutsia i Proyeckt Ugolovnogo Kodeksa SSSR* (1947) 15-16. Cited in Amnesty International, above n° 41, p. 15.

⁵⁵ Werth, above n° 29, p. 135-6.

⁵⁶ *RSFSR Code of Criminal Procedure*, Section 382. Cited in Gsovski, above n° 20, p. 140.

⁵⁷ Ibid., p. 140.

⁵⁸ Applebaum, above n° 46, p. 582.

⁵⁹ Ibid., p.122.

⁶⁰ Ibid., p. 141.

Undoubtedly, one of the most appalling aspects of the Soviet penal system was the treatment of children.⁶¹ Small children were frequently 'arrested' alongside their parents. Both pregnant and nursing women were arrested. In 1940, an executive order allowed female inmates to stay with their babies for no longer than for a year-and-a-half. But once breast-feeding ended, the mother was separated from her child and denied any further contact. The consequences of separating children from their mothers were so horrifying, that, in these Soviet prisons, infant death rates were extremely high.⁶² Usually children at the age of two and sometimes even less were transferred into regular orphanages that 'were vastly overcrowded, understaffed, and often lethal'.⁶³ Upon arrival at the state orphanages the children of political prisoners had their fingerprints taken like criminals, and 'caretakers were all afraid to show them too much affection, not wanting to be accused of having sympathy with "enemies"'.⁶⁴ These children were brainwashed in such establishments to despise and to hate their parents as 'enemies of the people'. Applebaum provides the following account:

*"Some children... were permanently damaged by their orphanage experiences. One mother returned from exile, and was reunited with her young daughter. The child, at the age of eight, could still barely talk, grabbed at food, and behaved like the wild animal that the orphanage had taught her to be. Another mother released after an eight-year sentence went to get her children from the orphanage, only to find that they refused to go with her. They had been taught that their parents were "enemies of the people" who deserved no love and no affection. They had been specifically instructed to refuse to leave, "if your mother ever comes to get you", and they never wanted to live with their parents again."*⁶⁵

The adoption of a new Penal Code on 25 December 1958 seemed to represent some change of direction. After all, this code did away with key terms such as 'enemy of the people' and 'counterrevolutionary crimes'. The use of violence and torture was also outlawed, and from now on the accused should be entitled to always have a lawyer. Regrettably, all these changes were more apparent than real, particularly because the new code retained some provisions of the previous legislation, including the one authorising for the punishment of 'political deviancy'. Under Article 70, any person caught spreading 'anti-Soviet propaganda' was susceptible of being sentenced to a maximum seven-year imprisonment in a concentration camp followed by exile for two to five years. In addition, Article 190 determined a sentence of no less than three-year jail for any failure to denounce 'anti-Soviet behaviour'. During the 1960s and 1970s these two articles combined were widely used to punish any act of 'political deviancy'.⁶⁶

⁶¹ Ibid., p. 318.

⁶² Ibid., p. 323.

⁶³ Ibid., p. 325.

⁶⁴ Ibid., p. 326.

⁶⁵ Ibid., p. 327.

⁶⁶ Werth, above n° 29, p. 258.

A further problem for the many victims of 'political crime' was that the vast majority of defence lawyers in the former Soviet Union were members or candidate members of the Communist Party (CPSU). These lawyers were utterly subordinated to the party, which required its members an 'uncompromising obedience to its rules and policies'. Under Article 2 of the Statute of the CPSU, 'a member of the Party is obliged to observe Party and State discipline and one law for all Communists, irrespective of their work and of the positions held by them'.⁶⁷ So it was not surprising that a 1975 report released by Amnesty International commented:

*"There has never in Amnesty International's experience been an acquittal of a political defendant in the USSR. No Soviet court trying a person charged from his political activity has rejected the prosecution's case on grounds of procedural violations committed during the investigation period or on grounds of insufficient evidence."*⁶⁸

That such cases invariably ended in criminal conviction indicates that some criteria other than criminal culpability played a more decisive role. Lawyers who were too up-front in defending their clients accused of dissent activity risked losing the right to defend in political cases, and perhaps even the license to exercise the legal profession. The best known such case was that of B.A. Zolotukhin, a Moscow lawyer who defended Alexander Ginzburg, in 1968. As a 'reward' for his professional legal defence, Zolotukhin lost his licence to practice law and, as such, was deprived of the right to work as a defence lawyer. He was expelled from the Communist Party, from the presidium of the Collegium of Lawyers, and from a post as the head of a prestigious legal consultative office. The reason for all these expulsions was Zolotukhin's 'adopting a non-party, non-Soviet line in his defence of Ginzburg'.⁶⁹

Conclusion

There was absolutely no respect for human rights and the rule of law in the former Soviet Union. It was clear to everyone who lived in that communist country that laws could be easily ignored or manipulated by the Soviet elite. There was no judicial guarantee against the encroachment on basic human rights and, as a result, a nihilistic attitude towards legality was developed that affected the entire social perception about law, not only among the bureaucratic elite but also among the ordinary people. Instead of trust in the fairness and neutrality of the legal system, citizens were taught to subject their lives, liberties, and properties to the will of the state. Under this social context, of course, any possible right derived from the law was perceived as having very little or no importance at all. In the former Soviet Union, the attempt to enforce the Marxist dream of equality led only to gross inequality of *power* and, to be sure, to political *oppression* and even equality of *poverty* among the masses. Such a result may nonetheless be the by-product of a Marxist worldview that deems the most powerful to be the ultimate arbiters of law.

⁶⁷ *Ustav Kommunisticheskogo Partii Sovetskogo Soyuza*, Article 2. Cited in Amnesty International, op. cit., .30.

⁶⁸ *Ibid.*, p. 32.

⁶⁹ *Ibid.*, p. 31.