Chapter v

SOCIALIST LEGALITY

SOCIAL CHANGE AND THE REFORM OF SOVIET LAWS

In 1917, Russia was a country deeply rooted in the pre-industrial era. Not only was its economy predominantly agricultural, but it was backward in terms of the techniques of production and social relations as well. The comparatively recent abolition of serfdom had failed to sever the bonds between the lower and higher strata of society which characterized the medieval forms of life. And the incipient growth of the industrial economy, although contributing significantly to the process of social and economic change in Russia, was as yet unable to affect the style of life of the large peasant masses which constituted the bulk of the population.

The revolution, however, violently disturbed this pattern. Indeed, Russia began to experience a period of great social mobility, as the masses moved both from the countryside to the cities and up and down the social ladder.

The physical movement of the human masses was coupled with a great ideological upheaval involving a revision of basic concepts regarding the role of the individual in the social order. Involved were conflicts of various doctrinal formulations on the historical predictions of Marxism and a political struggle involving purges and the physical liquidation of opponents, including those who at one time occupied highest positions in the government of Revolutionary Russia and in the ideological and moral leadership of the new order.

At the same time, the regime was tackling the enormous task of transforming the illiterate peasant mass into an industrial labor force. It was necessary to train the new workers in basic industrial skills
and urban ways of life and to educate industrial, social, and business leaders on a grand scale. The forced expansion of the Soviet economy, beginning with the Five-Year Plans, was made possible only through this immense transfer and training of the labor force. This process was nearly complete by the end of the thirties, and in the late forties and early fifties the process of adaptation of the masses of peasantry from the countryside to urban surroundings and exacting industrial employment was well advanced. The Soviet labor force began to resemble in behavior, attitude toward work, mode of life, and common interests their counterparts in the industrial economies of other countries.¹

This development in the growth of the Soviet labor force was paralleled by a number of refinements taking place in Soviet industries. These latter were reflected in the methods of achieving progress in labor productivity and in greater perfection in the end result of the productive processes.

An expert in Soviet labor relations has suggested that there have been three periods in that country’s improvement of the efficiency and productivity of labor. When Soviet industry was primitive and economic expansion still a matter of large-scale construction, military discipline was the most efficient regime for coordinating the efforts of workers, the majority of whom were peasants. Thus, shock work was said to characterize the first Five-Year Plan. Since 1935, however, when the foundations of the Soviet industrial plant had been laid and the equipment in Soviet factories was becoming more sophisticated, the method of sheer intensification of mass labor was no longer useful, and a new method featuring individual performance was needed. To serve this new need, Stakhanovism was invented. Such, together with a number of similar competitive schemes, remained the chief method for raising the productivity of the labor of factory crews for almost two decades. It was an improvement because raising the productivity of labor was predicated upon the improvement of the production processes and upon the mastering of techniques.

After World War II, Stakhanovism was no longer satisfactory. At this point, emphasis was shifted from record-breaking to individual initiative, to the intelligent employment of modern factory equipment, and to the extension of automation methods in various fields of industrial production.2

In the first period, after an initial phase marked by the regime's endeavor to win the masses to its side, the emphasis of Soviet legislation was on the stabilization of social conditions in the Soviet economy and enforced government control of the labor market. Its aim was to raise the discipline of labor. It struggled against the rapid turnover of labor, labor migration between industrial centers, and against absenteeism, all of which were causing enormous losses in Soviet industries.

The Soviet regime was handicapped by the deplorable state of the cities and by a shortage of urban accommodations and consumer goods—even of staple foods. To meet those conditions, economic incentives were replaced by a system of military discipline as the basic approach to the management of labor. The 1933 decree introduced the "labor book." Under the 1940 decree, a worker was prohibited from leaving his employment without the permission of the management, under penalty of two to four months of imprisonment for noncompliance. A system of penalties was established for unexcused absence from work. A worker could be moved from employment to employment or even to another enterprise. The government established a system of trade schools and training centers where young workers were trained in industrial skills. They were admitted either on their applications or on the basis of draft, again under a regime characterized by army discipline.8

After 1951, the labor regime was somewhat modified as sanctions became less severe. Finally, the decree of April 25, 1956, acknowledged the fact that a new regime for industrial relations had become possible because:

Labor discipline at enterprises and institutions has been strengthened as a result of the growth of the working people's consciousness and the rise in their living standard and cultural level.4

Thus, it was implied that the presence of economic stimuli removed the necessity for harsher methods of discipline. The reform of 1956, however, did not produce the emancipation of the worker in the same sense as occurred in the West. The regime of control was continued in force. Subtler methods of regimentation were introduced. Severe penalties were replaced by differentiation in social insurance and pension benefits according to the employment record, thus favoring those who stayed with their jobs. Furthermore, discipline through a system of penalties, including those imposed by the courts, was replaced by public censure organized and administered by the workers.5 More recently, an amelioration in general conditions of the industrial worker was enacted, introducing two important improvements in the worker's status. The Presidium of the Supreme Soviet enacted the Decree (January 25, 1960), subsequently approved by the Supreme Soviet on May 7, 1960, which removed inequalities in sick pay benefits due to the interruption of employment:

[W]orkers and employees who have left their previous jobs of their own free will are to be paid temporary benefits in all cases on a common basis, regardless of the amount of time they have worked on new jobs. [W]orkers and employees dismissed on their own will retain uninterrupted seniority, if they begin work within one month after the day of their dismissal.6

One can still distinguish sectors of economic life in the Soviet Union where, owing to local difficulties, the organization of new industries is undertaken in conditions resembling early methods, and the recruitment of new workers and their movement into new areas of expansion assume the shape and atmosphere of military campaigns. But on the whole, the stability of labor has been achieved, production processes have been mastered, and alternate methods of social control to enforce the discipline of labor have been developed.

4 Vedomosti (No. 10, 1956).
5 Gliksman, supra note 2, at 775.
6 Vedomosti (No. 4, 1960).
The consequence of these achievements has been the enactment of more humane labor legislation.7

A similar process of relaxation by the regime has taken place in other fields of Soviet law. Thus, police powers have been circumscribed and their activities in the field of the administration of justice placed under the control of the public prosecutor. Control from the center over local authorities has been relaxed, the institution of inheritance liberalized, and progressive reform of criminal law undertaken.

The general change in the methods of enforcing government policies in the Soviet Union and other socialist states of Eastern Europe has called for new qualities in the system of rules governing life and legal commerce in Eastern Europe. As Professor Fuller observed when confronted with a specimen of Soviet legal thought:

Most definitions of law mistakenly try to make it equivalent to an authoritative ordering of social relations, but this does not expose its real essence. The ideal type of an authoritative ordering would be a military company marching in perfect step, ready to follow every command of its captain. Yet such a phenomenon is not only not legal in nature, but actually stands at the opposite pole from law. This is true generally of mere relationships of power. Slavery, for example, requires no legal form. If the relation of master and slave is in any sense legal, it is only because the master can exchange the slave for other goods, or because the law recognizes some semblance of a right in the slave against the master. Law appears as a distinct social phenomenon not when we have one man standing over another, but only when we have men standing toward one another with rights and duties.8

The rule of law represents a technique which operates by a clear assignment of roles in legal relationships, and this is the quality of which the Soviet legal system was almost completely deprived during the life of Stalin. The bulk of the legal regulation of that period consisted of ad hoc commands. Sometimes issued in abstract form, they never served as standards of permanent conduct. As an editorial in the leading Soviet legal publications stated:

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Law called for the new normative acts, and they were issued and frequently they were found to be in conflict with the articles of the codes in force, which officially were not amended, and also with other earlier normative acts. The mass of such careless, frequently contradictory legal material obstructs its application to concrete cases.\(^9\)

When in 1956 the Twentieth Party Congress called for the return to the rule of law in the Soviet Union, it had two aims in view. In the first place, the abuse of power was to be discontinued. In the second place, the laws of the Soviet Union were to be reorganized into a clear system of rules. However, this was not understood as a change in the basic premises of the Soviet regime. The rule of law in its new meaning would still be subordinated to the needs of the national economy which would continue to be administered by the government according to the plan. Furthermore, the leading role of the Communist Party within the social and governmental apparatus was reaffirmed.\(^10\)

Thus, the role of the Soviet legal experts was limited primarily to a systematic organization of the body of Soviet law with a view toward making the law a more useful standard for the guidance of the citizens and law-enforcing authorities. Only secondarily were Soviet lawyers called upon to devise more perfect legal solutions for the purpose of achieving technical improvement rather than a more progressive rule. While it is in the tradition of the European jurist to work for the reform of the legal rule on the basis of an independent scientific analysis of social reality, in the Soviet Union the professional authority of the jurist is highly circumscribed. In-

\(^9\) SGP 3 (No. 1, 1956); Orlovskii, "Zadatchi pravovoi nauki v svete reshenii XX sjezda KPSS," 26 Vestnik Akademii Nauk 5 (No. 8, 1956).

\(^10\) Hazard, "Le droit sovietique et le déperissement de l'État," in 8 Travaux et conférences, Université Libre de Bruxelles 26 (1960); Romashkin, "Razvitie funktsii sovetskogo gosudarstva v protsesse postroienia kommunizma," SGP 12, 15 (No. 10, 1958): "Victory of socialism and communism is possible not in the result of dying off of the economic-organizing function, but in the expansion of that function. It is quite clear that while moving towards communism, the role of the planned direction of the national economy will acquire a growing significance. While progressing towards communism, grows and will grow the directing role of the communist party, which appears as a leading and directing force of the Soviet state, as the nucleus of all organizations of the toilers, both state and social."
deed, the formulation of the basic policies of the Soviet state and of the legislative program is within the exclusive jurisdiction of the Party.11 Thus, the role of the socialist jurist is not that of an independent social or legal reformer.

Within these limitations, however, socialist jurists hold a monopoly over the technique which alone is able to produce the advantages of orderly government and the enforcement of social and economic policies with least resistance and greatest economy of effort. Within these limits, the socialist jurist is responsible for the results of the legal reform in the Soviet Union and Eastern Europe.

The return to socialist legality, to use the official language of the communist leadership, had two aspects. The first step was the re-establishment of legal order on the basis of the laws in force; the second was the reformation of the laws themselves and the raising of the general standards of government operations and legal commerce.

Socialist lawyers have reaffirmed in new form the axiom that legality means observance of certain procedural forms:

Socialist law and procedure endeavors to remove systematically from the positive law those provisions which are superfluous, insisting at the same time on a scrupulous enforcement of these rules which it continues in force as indispensable.... Too liberal an interpretation of the rules of procedure may easily lead...to a violation of the rules providing for the indispensable formalities, and thus result in a confusion which would undermine the principles of the socialist law of procedure.12

As the rule of law consists also in the observance of forms, one can detect among Soviet lawyers a conviction that socialist legality significantly depends on familiarity with legal techniques. Soviet lawyers, whether in practice or in academic circles, urge the importance of legal education and of refined legal thinking for the proper functioning of legal institutions. In the first instance, anxiety is expressed concerning the familiarity of the lawmakers with legislative techniques. Soviet lawyers urge that this inadequacy be remedied by expert assistance of trained lawyers. In the second instance, a low

12 Decision of the bench of seven justices of the Polish Supreme Court, of April 16, 1955, I.C. 20/55, PiP 677 (No. 10, 1955).
level of legal training is deplored among those called upon to enforce the laws of the socialist state.\textsuperscript{13}

While in most of the satellite countries law courts are staffed by lawyers, in the Soviet Union even the recent reform of the judiciary failed to introduce the requirement of legal education for judges. The only steps toward assuring a higher degree of expertise on the bench were the extension of the tenure of office of elected judges from three to five years and the reorganization of the People’s Courts by integrating one-judge courts into locality courts. In the latter instance, judges were assembled physically in one building on the basis of districts, localities, or wards for which these courts were competent. This created opportunities for handling the general business of the court by a more experienced member of the bench and for consultation and advice among the judges as to cases which they were called to decide.

In the beginning of 1960, Dean Karev of the Moscow University Law School demanded that a candidate for judicial office have legal training. He also revealed on this occasion that 55.4 per cent of the people’s judges had legal training acquired in Soviet universities, that 37 per cent had legal training of the high school type, and that only a small number of people’s judges had no legal training. The latter had acquired practical experience on the bench.\textsuperscript{14}

Another aspect of the work of the legal profession in socialist countries drives home the axiom that legality in the operation of government must proceed under conditions in which certain formal standards of action are met. These standards are necessary in any legal order, irrespective of the social order or political regime.\textsuperscript{15}

Essentially, these standards are not only the rules of operation of government, but constitute, as well, basic rules of judicial method which during the Stalinist period lost currency. The Polish Supreme

\begin{itemize}
\item \textsuperscript{13} "Za povyshenie roli pravovoi nauki v kodifikatsii sovetskogo zakonodatelstva," SGP 3 (No. 1, 1956); Nabatov, "Strogo okhraniat prava grazhdan," Sots. zak. 19–23 (No. 12, 1960); Ilyin & Mironov, "O forme i stile pravovykh aktov, SGP 65–73 (No. 12, 1960).
\item \textsuperscript{15} Cf. supra at 104; Polish Supreme Court, directive ruling of February 12, 1955, PiP 290 (No. 7–8, 1955).
\end{itemize}
Court, in a decision passed by the full bench of the Civil Chamber, formulated the following directive for the lower courts:

[P]opular legality means the duty of the citizens to respect the laws in force. While imposing this duty on the citizens, it is not permitted to obscure the actual meaning of the law and to expose citizens to unexpected situations.\(^{16}\)

This decision was passed after a long period of arbitrary repeal by the Polish courts of the laws which were deemed typical of the bourgeois social and economic order.\(^{17}\) This practice, however, jeopardized the position of individuals and undermined the very foundations of legal commerce. In order to break away from this trend, the Court declared that:

It is a basic postulate of legality that, inasmuch as it is possible, the law which was not formally repealed be given full effect, even if there is a need for the reform of that law. Until this reform is introduced, strict observance of those provisions which are still formally in force, is the duty of all. . . .\(^{18}\)

Another principle of the orderly processes of government which socialist jurists have endeavored to bring to the attention of Soviet administrators and government officials is the concept of jurisdiction and the formal legality of each act of a governmental authority. This means a considerable restriction of the freedom of higher authorities to tamper with the decisions of lower agencies. By this means it is sought to give effect to the laws providing for the distribution of authority and responsibility. As a Soviet lawyer wrote:

In our opinion a decision of a lower Soviet may be changed only in the case of the violation of the law. The Constitution of the Union guarantees the rights of the Soviets directly elected by the population as agencies of self-government in their territory, by ruling that Soviets make their decisions within their jurisdiction determined by the law. Socialist legality is based on the principle of expediency, which is correctly interpreted. In other words, a higher Soviet has no right to deal with matters or change decisions which were already made by the lower Soviet within its jurisdiction. A decision of the lower Soviet has legal

\(^{16}\) PiP 290 (No. 7–8, 1955).


\(^{18}\) PiP 291 (No. 7–8, 1955).
force if it is within the jurisdiction fixed by the law, functions or rights of the lower Soviet. In practice higher Soviets, and especially their executive committees, frequently change the decisions of lower organs also for reason of expediency which is a violation of the principle of socialist legality and of the rights of the lower organs. And so for instance in a number of provinces of the Russian SFSR and Byelorussian SSR, the organs of the regions deprive village Soviets of the right to dispose of surplus funds, resulting from higher revenue than estimated in the budget.19

Another important development in the general tendency to give some substance to the principle of self-government in various fields of social activity—which is supposed to be the fundamental principle of the Soviet political order—was the directive passed by the plenary session of the Supreme Court of the Soviet Union in December 1959 in the matter of "Judicial practice in civil cases involving collective farms." The Supreme Court gave effect to the March 1956 Resolution adopted by the Central Committee of the Party and of the Federal Government concerning "the statutes of agricultural collectives and further promotion of the initiative of their members in the organization of the Collective's industry and its administration." The resolution recommended and advised the collectives to assume direct responsibility for changes and amendments of their statutes according to local conditions. The Plenary Session of the Supreme Court had made it clear to the lower courts that, in deciding civil cases involving the activities of collective farms, courts ought to take into consideration that it is within the competence of the collective's members to make decisions as to the disposal of collective's products and property, and to direct its activity in accordance with the Soviet law and decisions of the Party and government

... that the statute of the agricultural collectives with its amendments, properly registered with the executive committee of the region represents the basic law of the kolkhoz activity.... The courts in their cases ought to apply the laws in force and the statutes of the collective farm concerned.20

20 Bardin, "Novoe postanovlenie plenuma Verkhovnogo Suda SSSR 'O Sudebnoi praktike po grazhdanskim kolkhoznym delam,'" SGP 12 (No. 6, 1960).
A Soviet jurist drew the attention of the officials of social organizations in charge of public functions to the fact that these activities, in contrast with the internal affairs of the organization, must conform to the provisions of the Constitution “which envisages the uniform subordination of all organizations and citizens to the law of the Soviet state.”

The significance of this discussion, which is barely sketched here, is that socialist jurists worked for the reconstruction of the foundations of the legal order from materials which were already available in the statute books of socialist legislation. New life had to be put into institutions which under Stalin had served to provide a façade for administrative practices which were far from being normal governmental procedures. The effort of Soviet lawyers is directed toward the precise distribution of social functions so as to provide for a framework in which social discipline may be achieved by a method in which individuals, government authorities, and socialist organizations are placed not “standing over another” but “toward one another” with rights and duties.

The work of Soviet jurists is part and parcel of a large program of social reform. It began in 1956 with the repudiation of some of the basic features of the Soviet regime under Stalin. Finally, the Twenty-first Congress of the Communist Party in 1959 declared that Soviet society had reached the halfway mark on the road of its historical progress and had passed into the period of communist construction. Thus, the legal reform begun after 1956 has acquired a new dimension and is geared now toward improving the general standard of the Soviet legal system and to the devising of new techniques for fostering the emergence of the new society.

REFORM OF CRIMINAL LAW

The efforts of Soviet jurists to reform the Soviet legal system are motivated by the conviction that its institutions must meet cer-

tain requirements valid for all types of lawmaking. The patterns for modern laws are the result of centuries of scientific inquiry. A refined legal system, which alone can meet the needs of modern society, cannot deviate from certain generally accepted standards. This position, although formally concerned with technical aspects of lawmaking, is not without its ideological content. Legal reformers of the West, striving for the solution of practical problems, have always seen their task in terms of social policies. Such, it should be noted, are also declared to be the purposes of law enforcement in socialist societies. So, for instance, the purpose of criminal law is not only to punish crimes. In addition, its function is to eliminate criminality and to provide a method for the effective rehabilitation of the criminal, thus implying a judgment as to what social needs are. It follows, therefore, that Soviet imitation of the models of Western lawmaking implies also adoption of the ideological positions which motivated those who devised them.23

This is particularly true with regard to the field of criminal legislation. Since the time of Beccaria and Montesquieu, it has been realized that only through the scholarly reform of criminal legislation and the efficient and prompt enforcement of scientifically determined penal policy could the desired two purposes be achieved. In the first place, criminal activity would tend to diminish; secondly, a humane system of punishment might be introduced. The French reformers realized that harsh punishments contribute to the brutalization of the social psyche and tend to make matters worse. The history of European legal thought has equated a liberal system of government with a humane penal policy. In this scheme of things, the basic object of the inquiry into the causes of crimes has been the person of the offender as against the background of social conditions, in general, and special situations leading to the emergence and formation of criminal psychology. Methods of crime prevention and a program of rehabilita-

23 An illuminating account of the currents of ideas in the socialist world at the present time is to be found in Hazard, supra note 10, at 26 ff.; cf. also, Ehrlich, "Uwagi o praworządności socjalistycznej, PiP 233–52 (No. 8–9, 1958). Ehrlich asserts that it is necessary to take account of the continuity of political ideas and that socialist legality and political institutions must expand social and humanitarian values formulated in the earlier social formations.
tation were thus formulated with regard to the individual concerned, not with regard to social conditions as such.24

The initial Soviet position, which motivated some of the basic ideas of the Soviet criminal code, stemmed from the general inclination to regard social conditions as the prime object of legal regulation. Pashukanis, who contributed largely to the "ideology" of the criminal legislation of his time, saw the axis of the reform movement in Soviet society in the departure from the contractual principle in criminal law. This, in his opinion, permeated the institutions of criminal law in the West. It was expressed, according to Pashukanis, in the fact that the offender knew "the amount of freedom which he pays as a result of the court arrangement." Instead, he suggested that the penalty be converted into a measure of expediency for safeguarding society and correcting a socially dangerous personality. Thus, socialist law needed no definitions of crimes, nor did the measure of social protection administered by the courts need strict and precise formulation, because that would again restore the contractual principle in criminal law. And so, criminal legal science was also unnecessary.25

Although Soviet criminal codes, as they emerged after a number of amendments, have failed to incorporate the basic ideas of the ideologists of the Soviet legal order, they certainly evidence little attention on the achievements of criminological thought in the West. As a result, they were inferior products in terms of legislative techniques. The RSFSR Code of 1926, which finally has assumed the position as model of criminal legislation for the Soviet Union, failed to provide a basis for an orderly administration of justice in the Soviet society. Constantly amended by inexpertly prepared insertions, the Code quickly became a shapeless mass of penal provisions, lacking a central idea and even a formal order. It has also failed as an expression of a theoretical formulation.

Responsibility for this state of affairs is divided. On one hand,

Soviet jurists who experimented with lawmaking were not profession­ally prepared to draft a new code. Their successors, who added to the Code’s provisions, had little concern for the central ideas of the Code or even its terminology. The general climate of the legisla­tive work was initially characterized by lack of experience, a lack of concern and patience with technical aspects of the lawmaking, and an inclination, even among the leading jurists of the new elite, to look at things from the political rather than legal point of view.

The central piece in the 1926 Criminal Code of the RSFSR was the analogy clause (Article 16), which permitted the imposition of criminal liability for a socially dangerous act not expressly proscribed by a criminal statute. Criminal liability was imposed under that article of the Criminal Code which most nearly approximated such an act.26

This provision was in direct opposition to the principle, “nullum crimen sine lege, nulla poena sine lege,” which since the French Revolution has been the fundamental rule of modern criminal law. Its juristic implications were perhaps most expertly formulated by the Permanent Court of International Justice in the case of certain Danzig decrees, which provided for the prosecution of acts “deserv­ing of penalty according to the fundamental conceptions of penal law and sound popular” feeling, which was a Nazi formula for the Soviet revival of analogy in criminal law. The Court stated:

A judge’s belief as to what was the intention which underlay a law is essentially a matter of individual appreciation of the facts; so is his opinion as to what is condemned by popular feeling. Instead of applying a penal law equally clear to both the judge and the party accused, as was the case under the criminal law previously in force in Danzig, there is a possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offense, because its criminality depends entirely upon the appreciation of the situation by the public prosecutor and the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone, replaces a system in which this knowledge was equally open to both the judge and the accused.27

26 Cf. Starosolskyj, supra note 25.
While the analogy provision was not the only cause of the harsh practices of Soviet courts, it was symbolic of the general attitude of the Soviet and satellite courts to the problems of law enforcement. The RSFSR Code of 1926 was imitated in detail by the other Soviet republics, and, after Soviet influence spread in Eastern Europe, also in a number of Eastern European countries, where analogy clauses and other features of the Soviet criminal law made their appearance in socialist legislation.28

The Soviet criminal code and its analogy clause has had a devastating effect on the level of legal practice and on law enforcement wherever Soviet institutions have made their appearance. This was due to the fact that the Soviet architects of the new legal concepts were guilty of a basic miscalculation in constructing a legal system of ill-fitting parts, borrowed from foreign political and legal doctrines with little discrimination as to their origin or understanding of their real functions.

The idea that courts ought to have great powers in meting out punishment was not a Soviet innovation. It was and still is current in legal thinking in the West, and is motivated by the need of the strict adjustment of punishment to the circumstances of each individual case and the personality of the offender. According to the founders of the sociological school of criminal law, vast judicial powers postulated high expertise on the bench. Professional judges, well trained in law and in the basic techniques of criminal policy and assisted by the auxiliary services of modern penology, were authorized to apply judicial pardon or extraordinary reduction even below the minimum statutory limit. The central purpose of the vast judicial powers was to make law enforcement humane by eliminating the element of vengeance. Soviet criminologists have extended judicial powers even further and have entrusted them to a bench of laymen. By insisting on the objective criteria of crime, they have rendered the adjustment of penalties according to the degree of guilt impossible.29

The death of Stalin made the reform of criminal law feasible; and in December 1958, fourteen laws were adopted which instituted a new trend in the criminal legislation of the Soviet Union.80

The new laws fell into three categories. First, there were three statutes containing the basic principles of criminal law, the organization of courts, and judicial procedure in criminal matters. These statutes required additional legislative action by the constituent republics. The second group consisted of those statutes which came into force directly and uniformly throughout the Union without any additional action by the individual republics. Two principal statutes constituted this category—one pertaining to crimes against the state and another concerning military crimes. A statute abolishing the punishment of deprivation of electoral rights and another on changes in the election of the people's courts—which was connected with the new basic principles of the organization of courts—belonged to the same category. Another law which went into effect immediately was the Statute on Military Courts. The final category was made up of six statutes containing formal and transitory provisions for the interim period before the new regime in the Soviet administration of justice was fully established.

Some of the enactments of December 1958 constituted basic reforms affecting due process of law. Others, though less fundamental in scope and significance, were nevertheless of great practical importance. In the first category of reforms, the issue of punishment

La crise moderne du droit pénal, la politique criminelle des états autoritaires 156 (1938). The only exception in the general adoption of the principle of the nonretroactivity of penal laws, except when more lenient than the law under which an offense was committed, represents the legislation of the Nordic countries. Danish criminal codes of 1866 and 1930, contrary to the general European practice, have stated the principle of the analogous application of the criminal statute to crimes not defined in the written law. Art. 1 of the Code of 1930 rules that: "only acts punishable under a statute or acts of entirely similar nature shall be punished...." In fact, however, legal science has limited the application of the analogy clause thus formulated to situations in which western European courts also resort to the analogy technique. Cf. Hurvitz, "L'analogie dans le droit danois," Revue de science criminelle et de droit pénal comparé (n.s.) 1-5 (1950).

by analogy was central to the whole range of questions involving the nature of judicial process in the Soviet Union. Its significance, involving basic attitudes toward the function and role of the state in relation to the individual, clearly exceeded the somewhat narrow limits of criminal law and judicial procedure. Article 3 of the 1958 Basic Principles of Criminal Legislation of the USSR and the Constituent Republics signified the victory of the traditionalist tendency. It stated that “only persons guilty of committing a crime, that is those who intentionally or by negligence have committed a socially dangerous act specified by the criminal statute, shall be held responsible and shall incur punishment.”

Modern criminal law is based on the proposition that the purpose of punishment is primarily to correct and only in exceptional cases to eliminate. As a consequence, liability to punishment, as well as its type and severity, are related to the form and nature of subjective guilt which modern criminologists consider the surest guide to the personality of the offender. Absolute liability (objective criteria of responsibility) is little known to European criminal law. The commission of a punishable act requires either intent (*dolus* in its various forms, *directus, indirectus, eventualis, preterintentional*) or negligence (*culpa*). As a rule, a punishable act must be committed intentionally. If the offender is guilty of negligence he is liable to punishment if the law expressly provides for it.

As legislative techniques developed, types of guilt were related to the classification of offenses. Crimes and misdemeanors as a rule require intent. In expressly provided circumstances, a misdemeanor may be committed through negligence, while petty offenses (police

31 *Cf. supra* at 185–86.
32 *Art. 19* of the Danish Criminal Code stated: “As regards the offenses dealt with in this act, acts which have been committed through negligence on the part of the perpetrator shall not be punished except when expressly provided for…” The Norwegian Criminal Code of 1902 stated the same principle in a somewhat different manner (art. 40): “Whoever acts without malicious forethought is not subject to punitive provisions of the present statute, unless it is expressly provided for, or undoubtedly results that the omission is punishable.” Italian pre-Fascist code also stated (art. 45) that a person is not subject to punishment if he did not intend (*non abbia voluto*) the result which constitutes a criminal act, unless the law provides otherwise.
transgressions) are liable to punishment without regard for the type of guilt (absolute responsibility), except when the law rules otherwise. A full statement of the various forms of guilt seems to have been included for the first time in the Russian Code of 1903, and its classification has become almost a rule in modern codes. The Yugoslav (1927) and Polish (1932) Codes have repeated it almost without change.

Even these fairly detailed provisions have not satisfied European scholars, and one may note efforts at a closer definition of the conditions under which the law should punish crimes committed by negligence. The Swiss Code of 1937 (Article 18) rules that an offense committed by negligence is punishable only when the perpetrator, out of carelessness contrary to his duties, has not foreseen or taken into account the consequences of his behavior. Carelessness is contrary to duty when the perpetrator has not exercised caution to which he is obligated either by the circumstances or his personal situation.

The Greek Criminal Code of 1952, which included in its provisions a short theoretical treatise dealing with various aspects of guilt and forms of criminal acts, introduced a small addition to the generally accepted limitation of criminal responsibility for acts considered punishable but committed without direct intent. Article 15 of this Code states:

33 Art. 48 of the Russian Code of 1903 ruled that an offense should be considered intentional not only when the offender desired its commission but also when he was aware of the possibility of the result, which constitutes the criminal nature of the act. An offense is committed by negligence not only when the offender failed to foresee it, although he could or should have foreseen it, but also when, having foreseen the possibility of the result, he lightmindedly supposed that he could prevent its occurrence.

34 Provisions of the Italian Code of 1930 (art. 42) represent another type of formulation of the same set of ideas: "No one may be punished for an act of omission, or omission deemed by the law to be an offense, unless he has committed it with criminal intent, except in cases of crimes of transferred intent or crimes without criminal intent which are expressly contemplated by the law. The law determines the cases for which an agent is otherwise accountable as a consequence of his act of commission or omission. In regard to contravention, each person is answerable for his knowing and willful act or omission, whether it be with or without intent."
When the law requires that a specific consequence should occur as an element of a criminal act, the non-prevention of that consequence shall stand for causation only when the offender was under special duty to prevent that consequence.\textsuperscript{35}

The general meaning of the provisions of modern criminal codes concerning types of guilt in their relation to the classification of offenses and the type of punishment is that while guilt by negligence extends the scope of responsibility regarding the type of criminal act, at the same time it restricts the class of persons criminally responsible for a negligent act or omission (special duties, violations of orders, etc.) and reduces the severity of punishment.\textsuperscript{36}

The reform of 1958 has failed to change Soviet criminal law as to the determination of criminal responsibility according to the degree of guilt. The new law defines as criminal any socially dangerous acts (of commission or omission) directed against the Soviet social and political order, the economic system, etc., if so specified by the statute.\textsuperscript{37} In addition, it defines criminal intent and negligence in much the same manner as the Russian Code of 1903, but fails to repeat the latter's general reservation that unless otherwise expressly provided for by a criminal statute, a prohibited act is punishable only when committed with intent.\textsuperscript{38} Contrary to modern practice, the Soviet statute lumps all punishable acts into a single category of socially dangerous acts. Although on occasion a distinction is made between more dangerous and less important crimes, a systematic grouping of offenses into classes according to their seriousness is avoided. In this manner, it is left to the judge to distinguish between intent and negligence; and unless expressly provided in each

\textsuperscript{35} As to the position of Ferri on the question of responsibility for intentional or nonintentional crimes, \textit{cf.} 31 \textit{La Scuola Positiva} 20–21, 135 (1921); \textit{cf.} Cuban Code of Social Defense, arts. 18–20.

\textsuperscript{36} \textit{E.g.}, ch. XXXIII of the Polish Code of 1932 on crimes causing public danger. According to the provisions of the \textit{Code} of 1932, intentional crimes are punishable by imprisonment from 6 months to 15 years, while negligent commission of such crimes calls, as a rule, only for detention (from one week to one year) or a fine.

\textsuperscript{37} Basic Principles of Criminal Legislation of the Soviet Union and of the Union Republics, art. 7 (1958).

\textsuperscript{38} \textit{Id.} arts. 8 and 9.
definition, the court has to give similar weight to intent and negligence.

Lack of differentiation between negligent and intentional offenses permits the measurement of punishment according to the objective criteria of social danger involved and not according to the personal relationship of the offender to the prohibited act. That this is to remain a feature of criminal legislation of the Soviet state in the future is already apparent from the two federal statutes on antistate and military crimes. Regarding crimes which by their nature may be committed only intentionally, these statutes contain statements making intent a constitutive element of the crime definition. Sometimes the definitions of intent are somewhat vague, and give little concrete instruction for the court to go by ("weakening the state," "undermining . . . a branch of economy"). Thus, an unusually wide latitude of interpretation of the true purpose of the crime defined in the statute is permitted. In other cases, however, the statute fails to make clear the nature of guilt which renders an offender punishable. But in addition to those two groups, a considerable number of crime definitions are couched in terms which make it clear that a serious penalty is threatened for the commission of an act which may be the result of either intent or negligence. Both the statute on antistate crimes and that on military crimes list a large number of offenses of this type. After a list of crimes, which either by their nature or by direct statement must be committed with intent, the statute on military crimes lists a large group of offenses which, although threatened with serious punishment, may also be committed by negligence. The mere loss of secret documents is punished by imprisonment for from two to five years. Article 24 of the same statute provides a stiff sentence of from six months to ten years for a careless attitude toward service duties, a vague and all-embracing statement permitting a criminal prosecution for any dereliction of duty. The two statutes still leave many questions unanswered; but there is little hope that

39 E.g., Soviet Statue on Crimes against the State, art. 8 (propaganda of war).
40 Id. art. 13 (loss of documents), art. 21 (violation of rules of international flights), art. 22 (violation of rules of safety of traffic and exploitation of transport).
in other parts of the criminal codes, which still await enactment by
the republican legislatures, a new approach to the question of guilt
may be expected.

The attitude of the Code of 1926 is quite orthodox in regard
to crimes which are traditional and specially connected with crimes
against the life, health, freedom, and honor of a person or against
private property. A distinction between intentional and unintentional
crimes is clearly made in the definitions and is properly reflected in
penal sanctions.\textsuperscript{41} The type of guilt is not specified when only in­
tentional crime is possible.\textsuperscript{42} Furthermore, there is no reference to
criminal liability for negligence when failure to take action is criminal
owing to specific obligations and duties resulting from the offender's
qualifications or position. In such a case, a modern code would
make it clear that negligence is punishable.\textsuperscript{43}

In defining crimes which constitute an attack on the new order,
there is either no reference to the type of guilt, or it is described in
different terms from those used in the general part. Article 58\textsuperscript{14}
on sabotage speaks of conscious nonexecution or intentionally careless
execution of duties. Sometimes no clear distinction is made between
an intentional and negligent act,\textsuperscript{44} which is also the case with respect
to crimes particularly dangerous to the governmental order.\textsuperscript{45} Some­
times a reference to negligence signifies that all forms of prohibited
activity or inactivity from which damage results are punishable ir­
respective of the type of guilt.\textsuperscript{46} The obliteration of the dividing line
between intent and negligence is particularly striking in the definitions
of economic crimes.

Additional light is thrown on Soviet legislative solutions of
the question of negligent and intentional crimes by the extent to
which this technique was followed by satellite criminal legislation

\textsuperscript{41} Art. 138 and 139 (murder and negligent homicide); arts. 142–47 (in­
tentional and negligent bodily harm).
\textsuperscript{42} Art. 162 (larceny).
\textsuperscript{43} Art. 176 (a captain's failure to give assistance to a ship involved in a
collision with his own ship, if such assistance could be rendered with­
out serious danger to his own ship, crew, or passengers).
\textsuperscript{44} RSFSR Criminal Code of 1926, art. 58\textsuperscript{i}.
\textsuperscript{45} Id. art. 59\textsuperscript{a} (violation of rules of international aviation).
\textsuperscript{46} Id. art. 74\textsuperscript{a}. 
in Eastern Europe. Of five criminal codes enacted there since 1945, two—the Hungarian Code of 1950 and the Albanian Code of 1952—have adopted, in one form or another, the Soviet formulation of intent and negligence. The Hungarian Code differs from its Soviet model, stating plainly in Article 11 that “crimes committed by negligence shall be punished except when the law declares that only an act intentionally committed shall be punished.” The statement of the Minister of Justice, submitted with the bill to the parliament, explained that:

[T]he law declares that as a general rule crimes committed by negligence are punishable, except when the law states that only an act intentionally committed shall be punished. This represents a more satisfactory defense of the society, because the social danger of negligence is frequently equal to that of intent, and sometimes even surpasses it.

Other satellite codes, however—the Bulgarian Code of 1951, the Czechoslovak Code of 1950, and the Yugoslav Code of 1951—state that crimes committed by negligence are punishable only when so provided by law.

The Soviet approach to the question of guilt falls far short of the general European standards which, before the revolution, provided a model for the reform of Russian law. It denotes a total lack of concern with the personality of the offender as a factor in determining the nature and severity of punishment, and turns the administration of justice in penal matters into blind retribution.47

On the other hand, the reform bears eloquent witness to the effort to make Soviet criminal law more humane. Under the old rule, juveniles were equally responsible with adults after reaching the age of fourteen. In a number of limited, most serious crimes, the age of responsibility had been lowered to twelve years, with no restriction to the kinds and types of penalty applied, including the death penalty. Under the 1958 General Principles of Criminal Legislation, minors under fourteen are not liable to criminal prosecution. Those over fourteen and not more than sixteen are criminally liable only for the most serious offenses, such as murder, rape, serious bodily harm, etc. Between sixteen and eighteen they are criminally

47 Basic Principles of Criminal Legislation of the Soviet Union and Union Republics, art. 10.
liable as adults, with the limitation that if the youthful offender can be reformed without the imposition of penalty the court may so refrain. However, if the offense represents a great social danger, the court must apply coercive educational measures. What these measures shall be is left to the legislation of the individual republics.

The new regulations on the treatment of juveniles thus represent a considerable improvement, although they are far from models of moderation. The general tendency of modern codes is to substitute educational measures for punishment as a matter of principle and not as a matter of exception. Indeed, the provision is made that even after the age of full responsibility is reached, the court may apply judicial mercy or educational measures.48

The system of penalties provided in the 1926 Code was extremely complicated. In 1958 the number of penalties was reduced from eighteen to eight, retaining, however, the most important and traditional punishment in Russia, exile and expulsion. The maximum prison sentence has been reduced from fifteen to ten years; and in cases where previously, under the Code of 1926, a maximum sentence of twenty-five years imprisonment could be imposed, the maximum is now fifteen years. The death penalty is now imposed only for treason, espionage, subversion, terroristic activities, banditry, and murder, and in time of war, for the most serious military crimes. In no case is the death penalty mandatory. It should be mentioned, however, that treason covers a number of activities, among which is the refusal to return from abroad, for which the death penalty seems excessive.49

There are special provisions concerning the penalties for juveniles and pregnant women. The death penalty cannot be imposed on juveniles under eighteen or on women who are pregnant either at the time when the crime is committed or the sentence is rendered, and such sentence cannot be carried out on a pregnant woman. The

48 In the Polish Code of 1932 and the Greek Code of 1952 the age of responsibility began at 17 years, and educational measures or judicial mercy to the youthful offender could be applied until he was 20 or 21 years old respectively.

49 Basic Principles of Criminal Legislation of the Soviet Union and of the Union Republics, arts. 21–22; Law on Crimes Against the State, art. 1.
maximum prison sentence for a juvenile under eighteen is ten years. Juveniles serve their prison sentences in separate labor colonies. Exile and expulsion cannot be imposed upon juveniles under eighteen or upon pregnant women.60

One of the disappointments of the reform is the preservation of the penalty of the general confiscation of property. In the Principles of 1958, this appears as an additional penalty for the most serious crimes against the state or crimes committed for mercenary motives. A leading Soviet jurist, in an article which appeared in this country, has confidently forecast its repeal.61 Obviously this part of the reform failed because of the last-minute tug of war in the drafting committee. There is no record of the discussions of the committee, however, which makes it difficult to establish the reason for the retention of this penalty in the arsenal of repressive measures. The confiscation of an offender’s entire property was introduced as a typical measure to combat counter-revolutionary activities, and its presence suggests that however optimistic the official image of the ideological unity of Soviet society may be, it still needs bolstering up by exceptional measures. The Principles of 1958 continue a practice which the French bourgeoisie hoped to consign to the unreturnable past in the Declaration de droits de l’homme et du citoyen. Together with expulsion, exile, and long term imprisonment, the general confiscation of property constitutes a measure which is testimony to the pessimistic attitude of the penal policies in socialist society and suggests sui generis elements of civil death.

In contrast, the abolition of the penalty of deprivation of the right to vote strikes a somewhat bizarre note. One would suppose that in a socialist society which, according to the official line, is the first in history to realize the complete equality of citizens, the exercise of political rights would be one of the most cherished privileges, fully deserved by only the most loyal citizens. Obviously this is not so, if the deprivation of such right has no deterrent value.62

50 Basic Principles of Criminal Legislation of the Soviet Union and of the Union Republics, arts. 22-23.
52 Polianski, Izvestia, Dec. 27, 1958.
At the foundation of the provisions guaranteeing a fair trial stands the conviction that, in the system of the separation of powers or of checks and balances, the courts constitute the branch of government specially designed to protect the rights of the individual. Under the Soviet rule of unity of powers, citizens are said to need no special protection against the agencies of the people's government. In theory administrative authorities of a socialist country have no policy but that determined by the well-understood interests of the people. However, this assumption has not worked with the perfection expected, and Soviet legislators have felt obliged to proclaim anew the principle of judicial monopoly in imposing serious penalties. Article 4 of the General Principles of Procedure in Criminal Matters formally states that no person shall be put in the position of a defendant otherwise than in virtue of, and in a manner prescribed by, the law. Article 7 of the same law states that the “administration of justice in criminal matters belongs exclusively to the court. Nobody may be declared guilty of committing a crime and be subjected to penalty except by court sentence.” The same principle is restated in the General Principles of Criminal Legislation, which asserts in Article 3 that criminal punishment may be imposed only by a court sentence.

Legislative formulas adopted in the December 1958 laws, restricting the exercise of judicial power exclusively to the proper courts of justice, were seriously affected and put in doubt by the policy of transferring some of the governmental responsibilities and public functions into the administration of social organizations. But by no means is this the only instance of administrative trespass into judicial functions which survived the reform of 1958.

The Principles of Judicial Procedure in Criminal Matters of 1958 have re-established the traditional terminology indicating the difference between a police and formal investigation, the latter being obligatory in trials of more important crimes (crimes against the state and military crimes). In modern European criminal procedures such investigations are controlled, after the French pattern, by the court and are conducted by a judicial officer who enjoys all the privileges and has the status of an independent judge. The strict connection between formal investigation and the disposal of a case

is indicated by the fact that Soviet legislators have included herein the law on judicial procedure. But while judicial control of an investigation assures all the guarantees of a fair trial, the element of judicial guarantees is lacking in the Soviet procedure. Here the real difference between police investigations and formal investigative proceedings is that the latter are conducted by the more experienced agents of the security police or the public prosecutor.

The principle that pretrial investigations are controlled by the public prosecutor has also been uniformly adopted by the socialist states in Eastern Europe, although actual solutions in implementing the principle of procuratorial control differ from country to country. In some of the satellites, courts have been given a role in controlling the legality of the proceedings in regard to certain specific points, such as the legality of temporary arrest. In this respect, the Yugoslav Code of Criminal Procedure is of singular interest. The first Code of Criminal Procedure enacted in 1948 was an imitation of the Soviet pattern. After experimenting for five years with this type of judicial procedure, the Yugoslav Code of 1953 vindicated the validity of some fundamental principles of law for all social orders. As it was originally enacted, the Code of 1953 was a combination of two approaches. The distribution of jurisdiction was conceived, according to the general interests of the administration of justice, not only to expedite the investigation of crimes, but also to preserve certain fields of criminal investigation exclusively for the jurisdiction of the public prosecutor and the administrative authorities, especially the investigators of the Ministry of the Interior. In this category of proceedings, the public prosecutor controlled the informal investigations and could address himself variously to the county court, to the investigating judge, to the district court, or to the police, with a request to investigate a case or a phase of it or to perform a function in the proceedings (Article 141). The Law of December 26, 1959, abolished this dichotomy by giving the investigating judge of the district court the overriding authority to assume, at any time, the conduct of any pretrial investigation (Article 161), thus restoring the principle of the full judicial character of the pretrial proceedings.

There are areas where the Procedural Principles of 1958 con-
stitute a definite improvement over those of the Code of 1923. Article 14 introduced an important innovation by incorporating into Soviet criminal procedure the Roman law principle "ei incubat probatio qui ait non qui negat." Thus, the Article stated that "neither the court, the prosecutor, nor the investigating agent has the right to impose the duty of furnishing proof on the defendant." In this connection, two other issues are important: the presumption of innocence and the status of the defendant.

The presumption of innocence is dealt with in Article 43, which states:

A conviction cannot be based on suppositions, and may be decreed only when in the course of trial the guilt of the accused in committing the crime has been proved.

In regard to the second issue, the Principles of 1958 are less clear. In one place, they put the depositions of the defendant in the same category as those of a witness or of an expert, calling them testimony (pokazania). In another, the procedural principles state that the defendant has the right, but not the duty, to give explanations in connection with the charges against him. This suggests that the defendant may either participate actively in the proceedings or remain passive, and that his position differs from that of a witness.54

The rights of the defendant circumscribe the powers of the court and the prosecution, and their exercise is subject to definite rules which, in the final analysis, constitute the essence of legality. Soviet criminal procedure still falls short of generally accepted standards in this respect, although in the 1958 reform, a definite attempt was made to bring Soviet procedure in criminal matters closer to the established practice. This is especially evident in appeal proceedings. Contrary to the Code of 1923, the Principles of 1958 limit the right of the higher court to impose stiffer sentence only when the appeal is lodged by the prosecution or by the injured party. At the same time, the higher court always has the right to go beyond the appeal if, in reviewing the case, it comes to the conclusion that a milder sentence would be more appropriate.55

Generally speaking, the reform has produced more cohesion

54 Id. art. 21.
55 Id. arts. 44–45.
between the various parts of the Soviet legal system and in the machinery of criminal justice. In addition, it has removed some of the inherent contradictions by reinstating a number of the principles which are basic for any system of justice. It has also corrected some of the misconceptions and plain mistakes born of the endeavor to produce a socialist order equipped with institutions differing fundamentally from those of free societies. Thus, the humane aspects of the new provisions are not to be overlooked, although there is perhaps a greater distance between practice and the legal rule in the Soviet Union than in any other public order.

However, some of the most important aspects of the Soviet penal policy have not been affected by the reform. The General Principles of 1958 provide no machinery for permitting the individualization of criminal cases in order to make proper use of the large punitive powers with which the law has equipped the Soviet courts. The most important element in the determination of criminal responsibility, the element of guilt, has remained blurred, and there is no direct connection between the degree of guilt and the penalty. Elsewhere, modern legislators have employed great ingenuity in order to assure as full and purposeful a realization of criminal policy as possible. This example has not been followed in Soviet law which still contains little more than high-sounding slogans having no coverage in the detailed provisions of the law.

The same conservatism prevailed in regard to the principal features of the administration of justice. It is still dominated by the person of the government attorney, who combines in his office the role of prosecutor of crimes and guardian of legality with the duty to enforce government policies and to protect the law. The prosecutor appears in the dual role of party before the court and supervisor of court practice. Furthermore, the government attorney represents the only element in the complicated machinery of the administration of justice in which the principle of professional proficiency has received consistent recognition.

Two aspects of the reform are particularly disappointing. In the first place, the conduct of pretrial investigations is left in the hands of the public prosecutor and police authorities. This conservatism is

56 Id. arts. 28–35.
the more surprising in that there is a definite tendency in other social­ist countries of Eastern Europe to return the conduct of pretrial in­vestigations, which are obligatory in all the more important crimes, to judicial officers. These officers act as judges and are subordinate exclusively to the court, before whom a government attorney has only the position of a party. The other disappointing feature is that little has been done to improve the professional qualifications and the performance of Soviet courts. No requirement of legal education or practice, which would have extended the principle of professionalism into the administration of justice, has been established. The serious effect of the absence of trained personnel in the administration of justice is apparent from the low level of judicial work in the Soviet Union.57

As early as 1927, Ferri, the founder of the Italian Positive School of Criminal Law, having come into immediate contact with the Soviet Criminal Code, complained about the verbosity and propagandistic passages in the Soviet statutes. Theoretical or political expositions are not needed in a well-written law. The same is also characteristic of the 1958 judicial statutes. Faced with untrained judges who have never been exposed to organized instruction in law, the Soviet legislator feels compelled to lecture on the rudiments of the theory of criminal law. The low level of legal preparation prevailing in the Soviet Union makes it doubtful whether the use of modern legislative techniques is at all possible and practicable. The modern tendency toward simple phraseology and succinct definitions is based on the assumption that the bench, the prosecution, and the defense consist of highly trained jurists, familiar with the theory of modern criminal law and fully conversant with the various penological theories. In countries with modern codes, judges must first refer the definitions of individual crimes to the provisions of the General Part which determine the principles and purpose of the punishment of crimes, and secondly to legal theories learned from their professors which constitute the ultimate terms of reference in order to fill a gap or clarify a doubtful point.

STANDARDS OF CRIMINAL POLICY

Reform in Soviet criminal law has taken place in two areas. On the one hand, Soviet lawyers, in drafting Soviet statutes, introduced basic concepts of orderly and purposeful criminal policy. On the other hand, they found it necessary to clear the ground of fundamental misconceptions which were largely responsible for the harshness and low level of Soviet criminal justice in practice. As a leading Soviet jurist noticed at the moment when the new Soviet criminal statutes were being debated, one of the Stalinist cliches which had influenced the tenor of judicial action was demolished. The idea that the more socialist society moved toward communism, the harsher would be the forms of criminal repression against the offenders of the rules of socialist law was no longer recognized as valid. The other notion was based on the conviction that all crime constituted a remnant of the capitalist order, and that as socialist construction made progress, crime became more and more rare. Exceptional manifestations of criminality would then call for even stronger measures in order to hasten the arrival of the millennium.

With the theory of the capitalist devil exploded, Soviet jurists were forced to abandon the sheltered theoretical position which absolved them from making researches into the real causes of crimes in socialist society. One leading jurist wrote with exasperation that Soviet legal science had done little to inquire into the causes of crime or into the effectiveness of the educational measures which the Soviet State was employing. The mere fact that there was among criminal groups a large number of youthful criminals, who were the product of the new social order, put a question mark over the validity of all stereotyped explanations.58

This call for objectivity and attention to those facts and circumstances important for the disposal of criminal cases was reflected in an appeal for what the public prosecutor of the Moscow region called the raising of the level of culture of the pretrial investigations. Such was thought to be an indispensable condition for the realization of the postulate that only those whose crimes which were proven should be subject to criminal repression:

58 Romashkin, supra note 10, at 14–16.
Tendentiousness, lack of objectivity, prejudicial inclination to produce a criminal charge in the examination of criminal cases (obvinitel'nyi ukлон) lead to serious mistakes. When we talk of the prejudicial inclination to prove a criminal charge we have in mind such activities of the inquisitorial, procuratorial and judicial authorities which lead to unfounded accusations or illegal imposition of harsher penalties. Sometimes this prejudicial tendency is revealed in cases involving innocent persons.69

The term culture has many meanings in Soviet parlance. In our present connection, it seems to signify a civilized approach to the administration of justice together with a proper understanding of the purpose of the prosecution of crimes. It means due respect for human dignity, elimination of lynch-law attitudes, striving to set an example by punishing an accused only after proper examination of all the circumstances of the case, and endeavoring to discover whether there is a legal foundation for the charge.

Soviet legal periodicals have begun to publish various instances of such attitudes. So, for instance, a young man was found guilty and sentenced to ten years of deprivation of freedom for taking without authorization a ride in an army truck. His act was found to be a crime of causing damage to government property (decree of Presidium of the Supreme Soviet of July 4, 1947), though there was no evidence that the accused intended to dismantle the truck of its parts or that he planned or actually had damaged it in any manner.60

In another case, a people's court in Uzbekistan sentenced a dining room supervisor for causing a shortage of goods which were said to constitute government property. Owing to the defendant's negligence, some of the fruit which was in her care was spoiled. The public prosecutor lodged a protest against the sentence, which had pronounced the defendant to be guilty of negligence without explaining what this negligence consisted of. Obviously, the Soviet court confused two ideas, one of negligence in the usual sense of the word, as a case of spoilage of fruit, and the other as denoting a state of mind, which caused criminal action or omission punishable in law.61

Frequently, harsh justice is the result of the poor professional

60 Sots. zak. 86–87 (No. 2, 1960).
61 Id. 89–90 (No. 7, 1960).
preparation of Soviet judges, sometimes even on the bench of appeal instances, and their consequent inability to relate the facts of the case to the provisions of the law or the doctrines of legal concepts. Ideas and institutions, such as acting under emotional stress, self-defense, and reduced criminal responsibility, have no concrete meaning to Soviet judges who until quite recently worked in a regime which stressed prompt and formal crime repression calling for little refinement in judicial action.62

Another area where the mechanical enforcement of the criminal statute has wide currency is that of prohibitions of certain trades and industries. In this regard, courts frequently dispose of cases without a proper examination of all the circumstances of the case, of the nature of criminal offenses as defined in the law, and of the purposes of criminal policy. Sometimes, high prison sentences are imposed for making articles for sale permitted by the law or from raw materials available on the open market. On occasion, criminal repression has struck at persons for whom sewing and producing items of clothing, underwear, etc., was the only possible means and source of support. In one case, a widow with three young children was sentenced to prison for making infants’ clothing. Prison sentences have been imposed for making articles which are a legitimate object of private industry or for using small amounts of certain metals which cannot be used in private production. At the same time, certain consumer articles made of those metals (nails) are available on the market. A Soviet jurist has vigorously criticized these provisions, stating that they lead to an obvious misinterpretation of the law and, in most instances, deserve no place in the statute book.63 Confronted with cases of this nature, the appeals of Polish lawyers striving for the humanization of the socialist law become both urgent and realistic.64

While these various matters, which contribute vitally to the tone and climate of the life of the law in the Soviet Union, deal with peripheral issues of the Soviet penal provisions, Soviet lawyers have attempted some basic reconstruction of juristic concepts. After the

62 Cf. procuratorial protests in Sots. zak. 79–80 (No. 12, 1960).
64 Hazard, supra note 10, at 26ff.
analogy clause was removed, another central institution which highly colors Soviet practice of criminal law, i.e., the institution of social danger, came under consideration. Appearing in the Soviet Codes and also in the 1958 statutes, it persists as a constitutive element of crime definition.65

Article 7 of the General Principles of Criminal Law stated that: As a crime shall be considered, if it is so specified by a criminal statute, any social dangerous act (of commission or omission) attacking the Soviet social or political order; socialist system of economy, socialist property; persons; political, labor, property and other rights of citizens; as well as any other socially dangerous act attacking the socialist legal order, if so specified by a criminal statute.

The doctrine of social danger is one of the oldest concepts in criminal law. It formulates a basic reason for the prohibition of certain acts under the sanction of penalty, as each society protects those ideas, institutions, or assumptions which are fundamental in any legal order. Its role is to provide the reason for the legislative enactment of a legal prohibition of certain acts. The difference between the traditional law and the socialist legal concept begins at the moment when courts come into the general picture of law enforcement. In disposing of individual cases, courts are not primarily concerned with the aspect of social danger. Rather, they focus their attention upon the personality of the offender and other specific circumstances of the case.

A Soviet jurist has attacked the doctrine of social danger in connection with recent plans for drawing in and engaging Soviet social organizations in the process of law enforcement and the struggle with criminal activity. He pointed out that the conviction that a criminal act must produce a single type of reaction in the form of court punishment has been replaced by a new approach. Now, the reaction of society to a criminal act may take any of the three forms. In the first place, the court may declare that a guilty person may be subject to educational measures which will engage social action as a chief measure of social defense. Secondly, in certain categories of offenses, the case itself may be transmitted to be dealt with by a social organization, which takes the place of the court. Thirdly, there is a possibility of

65 Cf. supra at 185–86, 191 ff.
dealing with the case and of applying educational measures without formal sentence being passed either by the courts or social organizations. A multiplication of methods for disposing of criminal cases calls for a new approach to criminal activity and a careful study of the individuality of the offender. Such alone can provide a guide to the selection of the best method.\textsuperscript{66}

Thus, after forty years of experimenting with criminal justice, Soviet jurists have discovered the importance of the teachings of the sociological school of criminal law, which has inspired the institutions of modern criminal law.

Soviet jurists complain that in the Soviet Union itself little work has been done to provide the bar and the bench with a proper understanding of the issues involved. Again, the period of Stalinism seems to be responsible for the lag in this field. Prior to Stalin's supremacy, there were serious efforts to build up a theoretical basis for the criminal policy of the Soviet state. The official doctrine of law enforcement and of the nature of judicial decision left no room for legal refinement in Soviet courts. Courts were to be people's courts, guided by their feeling of what was right in a socialist order. They were to enforce a simple penal policy which distinguished between the enemies and supporters of the regime. Soviet jurists, more realistic than the architects of the Soviet legal order, have concentrated their attention on the study of the personality of the offender. Already in 1921, an Institute for the Study of the Personality of the Offender was set up in Petrograd (Leningrad). Shortly afterwards, similar institutes were created in Moscow, Kiev, Minsk, Saratov, and Rostov-on-Don. In 1925, Commissariats of Justice, Health, and Internal Affairs of the RSFSR acted jointly to create an Institute for the study of the causes of criminality and the personality of the offender in Moscow. In time, as Stalin's grip on the Soviet regime tightened, formal aspects of the criminal policy attracted attention. In 1931, the name of the institute was changed to the Institute for Criminal Policy and Correctional Labor, reflecting thus, in a truly classical Soviet manner, a new interest of the regime—the collective aspects of social life. In due course,

all the institutes and studies of the personality of the offender in the provinces were abolished.\textsuperscript{67}

The new policy had a profound influence on the state of legal science in the field of criminal law. Law books and treatises on criminal law of the Stalinist period reduced the problem of the personality of the offender exclusively to the formal aspects of guilt, accepting without demur the fact that, in most important crimes, absolute responsibility was being practiced.\textsuperscript{68}

Revived interest in the individual aspects of criminal responsibility and attention to the personality of the offender were not purely academic quests. They were the natural consequences of the policy of Soviet authorities, which, since the decisions of the Twenty-first Congress of the Communist Party of the Soviet Union, had called for a closer cooperation between society and the administration of justice. The Resolution of the Congress drew attention to the fact that greater emphasis should be placed upon the application of preventive and educational measures as a means of crime prevention, thus eliminating opportunities for formation of criminal individualities.

In the implementation of the Resolution, the Supreme Court of the USSR and the Procurator General of the USSR each issued in July 1959 instructions to courts and subordinate personnel of the procuratura regarding judicial practice in imposing court sentences on offenders. Both indicated that in order to implement these directives of the Congress the policy of individualization in imposing sentences should be followed. The criminal policy of the Soviet statutes, the instructions insisted, is based on the rule that all aspects of the case must be examined, including all mitigating and aggravating circumstances and the personality of the offender. This new policy is to provide a guide for differentiation between various cases. Further, it is directed to the discontinuance of the mechanical and automatic imposition of the penalty of deprivation of liberty for each criminal conviction, replacing it by social supervision and other educational and correctional measures. The purpose of criminal prosecution, both


\textsuperscript{68} Romashkin, \textit{supra} note 10.
resolutions state, is to reform the individual and prevent criminal activity. In this connection, the usefulness of the actual carrying out of the sentence, or even of the act of sentencing, should be separately examined and gone into. Similarly, a system of conditional sentences and of paroling those who have partly served their sentences, deserve leniency, and have merited a conditional release from prison should be established. The question of the treatment and prevention of juvenile crime also came under special attention. In order to enforce a proper policy, it was thought social organizations should be brought into the process of the administration of justice.

The instructions of the public prosecutor insist that this policy should be reflected, in particular, in pretrial investigations. Here all questions of expediency regarding various correctional, educational, and prophylactic measures should be probed and concrete steps suggested in connection with the investigation of the case itself. This latter should always include an investigation of the personality of the offender.

Among others, the prosecuting and investigatory agencies were instructed—perhaps for the first time in the history of the Soviet administration of justice—to examine the expediency in each case of preliminary detention and to apply it only to cases where preliminary detention was absolutely indispensable in the interest of the administration of justice. The instruction recommends that formal prosecution of offenses in courts should be limited to those cases where the social danger of the crimes committed is considerable. Otherwise, the question whether the case should be disposed of through social organizations rather than by the courts should be gone into as early as possible.69

These instructions and the response of Soviet jurists have introduced a new dimension to Soviet administration of justice. One of the important tendencies which the instructions of the Supreme Court and

of the Prosecutor General demonstrate is the attempt to introduce some of the atmosphere of judicial procedure into pretrial investigation. This, of course, is an indispensable condition for the realization of the new postulates in the administration of criminal justice. Hence, the insistence on the impartiality of the investigating authorities, on the clarification of all circumstances which would support not only the accusation but also the defense, and on the making of pretrial investigation a stage at which the case could be disposed of without necessarily reaching the stage of the open trial.

Recent Soviet legal thought aims at getting the administration of justice out of the official routines. It seeks to endow it with flexibility in the application of the necessary techniques and broadening the significance of findings regarding the personality of the offender. Thus, the administration of justice is not to be limited exclusively to the question of the severity of the criminal repression or the form of the educational and correctional measures, but is to be employed in determining the question of the criminal responsibility itself. The fact that there may be a clue for the determination of guilt or its degree in the general behavior of the accused has already been affirmed in some of the decisions of the Soviet Supreme Court.

Post-Stalin developments in the field of criminal prosecution and the reaction of the Soviet legal profession to new opportunities to advance the cause of legal science, and in this connection the level of Soviet lawmaking and court practice, all bear the signs of great intellectual ferment. Discussions which take place seem to indicate that the Soviet legal profession is fully aware of some of the basic shortcomings of the Soviet laws, even in their reformed editions of December 1958. Whenever opportunity offered, Soviet jurists insisted on a broader understanding of the new provisions in order to reach a higher level of refinement in the administration of justice. Of great assistance in this situation has been the new trend which differentiates between various categories of offenses in order to permit disposal of cases involving minor transgressions by social agencies. This provided an opening for an attack, although in an oblique form, against some of the consequences of the doctrine of social danger on which the Soviet practice of absolute responsibility relied.

At the same time, there are serious obstacles to the efforts of Soviet jurists to lift Soviet law and court practice to that level of administration of justice enjoyed generally in modern societies. In the first place, the 1958 statutes are still unable to accept the postulate of a uniform application of the principles of criminal responsibility to all categories of crimes. Rather, they still single out certain crimes which are not only threatened by harsher penalties, but are judged according to standards tending toward absolute justice. As long as this attitude prevails, Soviet jurists are helpless as they are unable to take a stand independent of political authority. As long as this state of Soviet criminal legislation is perpetuated, the effects of the doctrine of social danger in individual cases will limit the effectiveness of the doctrine of individualization.71

Another major obstacle in the Soviet jurist's struggle for making the judicial process in the Soviet Union an efficient tool of criminal policy is that judicial technique itself is below the accepted standards. Its major feature is that, in accordance with the Western European tradition, pretrial investigations in the Soviet Union are also a part of the judicial process. But it is only a bastard child of this tradition, as only in form and not in substance do the pretrial investigation and the open trial constitute a single whole. In the traditional pattern, the unity of proceedings in these two stages is reflected in the unity of principle by which they are governed. Preliminary investigations are conducted by a judge, and both the defense and the prosecution have the right to participate in it. The secrecy of the proceedings is offset by the right of appeal to the court, and generally all acts of preliminary arrest and detention by the administrative authority are only preliminary to the judicial review of reason for arrest within a short and preclusive period of time (automatic habeas corpus).

In the Soviet Union, even after Stalin, there has been no judicial control of preliminary investigations. Further, there is no judicial examination of reasons for arrest, the defense has no right to participate, and the prosecution, with its unavoidable prejudice, dominates the proceedings.

Furthermore, in the Western European tradition, evidence obtained in the course of preliminary investigations must be examined again in the open trial. As a matter of principle, police investigations

71 Utevskii, supra note 66, at 116–17; Utevskii, supra note 67, at 14–18.
and evidence produced in the course of preliminary investigation have no probative value in the trial court.

In the free world, the tendency is to extend the rules applicable to the open trial to the proceedings in the pretrial investigations, thereby extending the protection of individual rights. Under the Soviet system, on the other hand, administrative action in pretrial investigations not only is free from controls characterizing judicial process, but tends to influence materially the open trial in its most important aspects. This is due to the fact that evidence collected in the course of pretrial investigations constitutes evidence in court; and furthermore, that depositions of the defendant in the course of a pretrial investigation constitute such evidence.\(^2\)

This situation has a profound influence on the course of the open trial. It voids the constitutionally guaranteed rights of the defendant to legal defense. The defendant may exercise his right only in the open court, not in the pretrial investigations. However, in the Soviet system, pretrial investigation far outweighs in importance the open trial. It is there that issues are joined, evidence examined, the defense line is formed, and most, if not all, evidence inculpating or exculpating the defendant, including his own depositions and testimony, is gathered. Thus, the position of defense and prosecution is a very unequal one. Professional advice, matching the expertise of the prosecution, which may at times be higher than that of the court itself, is available to the defendant only in the latter stages of the proceedings. In the course of the pretrial investigations, the defendant—generally under arrest—has no right to communicate with the outside world with regard to the case against him or to question witnesses or experts.

The case against Francis G. Powers, the pilot of the U-2 plane who was tried by the military collegium of the Soviet Supreme Court, is a typical example of the consequences of this state of affairs. On several occasions, the prosecution pointed out to the defendant that his depositions in the open court differed from those in the pretrial investigation. Furthermore, the court in sentencing him lumped together all the evidence which was produced in the open proceedings and that which was produced only in pretrial proceedings as sources

\(^2\) General Principles of Criminal Procedure, art. 16 (1958).
of information which convinced it of the guilt of the defendant. It appears from quotations of various documents in the Powers dossier that at least six volumes of such documents were involved. These were far more extensive than the slim pamphlet which covered the proceedings in the open court. It is matter of speculation what other "evidence" the dossier contained. 73

As a result of this basic debility of Soviet rules of procedure in criminal matters, various institutions modeled on those of civil law countries are simply empty and useless paraphernalia of a process which has little meaning. To give an example from the Powers case, the defendant was asked at the outset of the proceedings whether he had any objections regarding the person of his defense counsel, who was appointed by the court, and whether he agreed to grant this same lawyer access to the files of the case. After an affirmative answer the court proceeded with the examination of the case. This little ceremony presupposed that the Soviet lawyer was not familiar with the six-volume dossier of the case and that, in spite of this fact, he was able to participate actively in the trial, without even having opportunity to converse with his client. 74

The Soviet answer to this type of criticism is that the judicial control of legality has been replaced by procuratorial control. In the Soviet federal system this concentration of legal control is vested in a central organization which owes its allegiance to the federal regime, and is said to provide a better instrument for the preservation of uniform standards of legality and a greater guarantee of correct law enforcement.

To this argument two exceptions may be raised. The necessity for a procuratorial system of control over legality arose from the extravagant and, on the whole, unsuccessful effort to establish a purely popular system of justice; Soviet complaints against their own courts are the best witness of the results of this policy. Soviet people's courts, and frequently even higher courts, demonstrated little understanding of their functions; nor were they able to grasp finer points of law. Certainly, Soviet courts have failed as guardians of

74 Ibid.
civil liberties and as barriers to the abuse of power by the administrative authority.

While Stalin's regime lasted, the presence of the Procurator General of the Soviet Union, with his enormous network of offices, various means of information, and his vast powers to institute proceedings in the judicial and administrative branches of government, was certainly no substitute for independent courts as a guardian of legality. Nowhere in the Soviet literature is it claimed that the procuratorial service systematically attempted to enforce standards of justice. The reason for this is quite simple: the procuratorial organization is administrative in principle and is not independent.

Yugoslavia experimented with many aspects of the Soviet legal system. After an initial period of a full-scale imitation of the Soviet system, it was discovered that the interests of the administration of justice were best served by a return to the traditional pattern. The reform of criminal procedure of December 26, 1959,\textsuperscript{75} shifted the control of all stages of criminal proceedings from the procuratorial offices, which are still charged with the general prosecution of crimes, to the courts. This is apparent in all those cases where the rights of the individual are involved in pretrial investigations. In its present shape, Yugoslav criminal procedures distinguish between two types of detention, according to the authority which decides to deprive a suspect of liberty. Anybody may apprehend a suspect at the scene of the crime in order to take him to the county court, to the police, or to the investigating judge of the district court. The police or a county judge may detain a person for three days only. Detention may be prolonged by a decision of the judge or the county court for valid reasons if more time is needed for the investigation. Arrest by the police or the county judge may be extended for an additional twenty-four hours in order to bring the suspect before the investigating judge of the district court.\textsuperscript{76}

In more serious cases, the decision to impose arrest upon a person may be issued only by the investigating judge in the course of a formal pretrial investigation (Article 190). An investigating judge may arrest a suspect without a formal pretrial investigation only if,

\textsuperscript{76} Arts. 182 and 188 of the Code of Criminal Procedure.
within three days, he obtains from the public prosecutor a motion to institute a formal pretrial investigation. If the public prosecutor refuses this demand, the suspect must be released (Article 184). In addition, Yugoslav law rules that detention in the course of pretrial investigation is limited to a fixed period, after which the suspect must be released.

The increased role of the judicial function in Yugoslavia is part of the general pattern of the decentralization of authority and of various forms of self-government introduced into the public life of that country, including management of the national economy. Legality has been divorced from the tasks of administration and of the economic management of the country.

In other socialist countries, in addition to the procuratorial control of pretrial proceedings, some of the criminal procedures provide for statutory possibility of two standards of proceedings, depending upon the type of matter involved. Criminal procedures of Eastern Europe contain clauses indicating that special governmental interests may cause the investigating authorities to use the provisions regarding temporary detention for purely punitive reasons. So, for instance, the Bulgarian Code of Criminal Procedure (Section 92 (a)) rules that preliminary detention is mandatory in all cases of offenses against the political, social, and economic aspects of the regime. Furthermore, the Bulgarian legislators strengthened the power of the investigating authorities to restrict the liberty of the offender by providing that preliminary detention may also be imposed for important governmental reasons (Article 93 (a)).

Polish Criminal Procedure rules that preliminary detention may be applied if the social danger of the offense, owing either to its kind or to its prevalence, is considerable (Article 152 Section 2). According to the Rumanian Code of criminal procedure, the investigator has the right to detain the suspect whenever so indicated in the interest of public order and general security (Article 200 (8)). There is no mandatory detention in Hungarian criminal procedure, but the Code states that if a criminal act belongs to the category of crimes directed against the People's republic, detention may last twice as long as preliminary detention in ordinary crimes (Sections 98, 99 (3)).
With few exceptions, therefore, in the majority of Eastern European criminal procedures preliminary detention may be used as a form of criminal repression. In certain situations the socialist state desires to strike at the possible offender even before his guilt and criminal responsibility are established. According to the traditional pattern, detention imposed in connection with a type of offense was justified by the reasoning that the severity of a possible punishment might induce the offender either to hide from justice or to interfere with its course by some other method. The present practice in Eastern Europe blurs this line of thought and makes criminal procedure an instrument of political action.

These various practices and applications of the rule of law to achieve special protection of governmental policies of the moment disturb the course of justice which is, or should be, centered on the implementation of the policy defined in the rule of law itself. Otherwise, it becomes political justice. Institutional guarantees of the subordination of the administration of justice to the demands of governmental policy are further aggravated by the practice of enacting exceptional statutes, which introduce drastic measures in order to stamp out abuses of power or offenses which, at a given moment, are declared as specially dangerous to the regime.

Special legislation providing for the death penalty and for other special measures for embezzling, theft, or dishonesty in dealing with government property is an ever recurring phenomenon in Soviet life. It has frequently been used as a shock device to strengthen standards of integrity among those responsible for handling or managing governmental property. The Decree of the Presidium of the Supreme Soviet of May 6, 1961, which introduced a death penalty for large scale embezzlers of government property in the Soviet Union, represents one of these measures. By such means the general pattern of law enforcement regarding the type and scale of punishments provided for in the general laws of the country is greatly disturbed. It must be said that they are not marked by great leniency against those who offend government or social interests.77

Soviet reform of the criminal law and penal policy was further set back by the article of Prosecutor General of the Soviet Union

77 Izvestia, May 6, 1961.
Rudenko, which provided a theoretical explanation of the Decree of May 6, 1961. Rudenko argued the necessity of the harsher penalties for the embezzlers of government property by reviving the Stalinist doctrine on stepping up the severity of criminal repression as Soviet society moves forward on the road to the millennium, although it was declared to be no longer a cornerstone of Soviet criminal policy.\textsuperscript{78}

Thus, the general picture one obtains from contemplation of the life of law in the Soviet Union seems to suggest that it is influenced by the constant change of official opinion, purporting to be the expression of general convictions on some of the fundamental institutions of the Soviet order. There is constant revision of views on the role of the courts, on the function of penalty, on the purpose of law enforcement, and on the significance of courts' paying attention to the social and political needs of Soviet polity. Since the May 1961 decree, it seems that the policy of individualization and circumspection in the use of penal sanction is again being frowned upon. Courts are criticized for leniency, while only a few months ago they were criticized for their severity. Socialist legality now means the harsh prosecution of offenders, while a short time ago it was interpreted to mean particular attention to avoid meting out punishment in cases where guilt was dubious and to see the case in the terms of the individual situation of the accused.

As a result, the very standards governing the rule of law, the function of administration of justice, the guarantees of human freedom, and the limits to powers of the state are in constant jeopardy. An objective attitude toward those concepts which in more traditional circumstances constitute the very foundations of collective and individual life is almost impossible for a member of socialist society.

Indirectly, these constant changes of policy jeopardize the prospects for re-educating the Soviet man. This is because the institutions of Soviet life appear as relative values and not as constants, raising no doubts in the minds of the majority. In this situation, the prestige of the law cannot be great, respect for the courts cannot be firmly rooted, and the concept of socialist legality, which means so many things, has little practical content.

\textsuperscript{78} \textit{Id.}, May 7, 1961.
UNITY OF SOCIALIST CIVIL LAW

The program of legal reform in the Soviet Union and in the satellite states included the enactment of new civil codes which sought to provide a new basis for legal commerce involving property relations in the socialist society. Legislative work and theoretical thinking on the subject of the form, scope, and content of civil legislation and its place within the general framework of the socialist legal order was stimulated by the fact that the new political conditions, which made legal reform possible, have also removed the stigma of unorthodoxy from the theories of the early Marxist theoreticians who were deeply concerned with problems of civil law.

According to Pashukanis, revolution per se will not destroy civil law and replace it automatically by some other higher type of regulation:

As state enterprises are subordinate to the conditions of turnover, the bond between them is molded in the form of arrangements and the form of technical subordination. Accordingly, the purely juridic—that is to say, the legal—form of regulating relationships becomes possible and necessary.

Gradually however, after the bourgeois civil law, inherited from the previous socio-economic formation, had expended its utility, new relations between the economic units of the socialist order would be established. These, argued Pashukanis, would be based on a new type of regulation, i.e., administrative regulation, leading finally to a total disappearance of legal rule and to the emergence of the new economic order based on economic links between social functions.79 In other words, the realization of the program of socialist construction was linked to the transformation of the nature of legal rule.

The theories of Pashukanis, who was an official leader of Marxist juristic thinking, have produced considerable response among Soviet lawyers. They have come up with various schemes indicating an imminent transformation of the civil law of the Soviet state into what was called the economic law—a system of administrative regulations governing relations between Soviet agencies of government in charge of the national economy of Russia.

In particular, Stuchka conceived the pattern of transition from the civil law order into the economic law as the struggle of two systems. They were forced to coexist within the Soviet society for a time, i.e., as long as the Soviet economic system contained some elements of the private economy and some belonging to the socialist order. The anarchic character of the private economic relations was primarily reflected in the institution of contract of sale and purchase, while the planned character of the socialist economy as its vehicle had a channel of administrative regulations.80

Thus was devised a legal system governing property and contractual relations of which the Civil Code was only a part of the legal order. This idea produced a considerable number of works, of which perhaps the most representative was produced by the first systematic treatise on the economic law of the RSFSR, which began with the analysis of the civil law in force.81

The first of the five-year economic plans was greeted by this school of thought as the sign that their prophecies were beginning to take practical shape. Transformation of the Russian economy into a socialist system, in which only collective forms of economic activity were to survive, was understood to mean that the whole basis for civil law relations would disappear. It was thought then that contractual relations between government enterprises would be barred. As a result, two sets of business relations would be reflected in a dual system: those based on contracts between private individuals—a marginal legal situation, and those based upon administrative regulations between units of the socialist economy. The Civil Code would thus cover almost exclusively transactions between individuals while

80 Stuchka, 3 Kurs sovetskogo grazhdanskogo prava 10 (1931); cf. also Basic Principles of Civil Legislation of the USSR, a draft edited and prefaced by Stuchka (1931); also Amfiteatrov, “Osnovnye cherty zakonoproekta o dogovorakh (1934); Hazard, supra note 10, at 62 ff. Although Stuchka and other writers of the epoch have never acknowledged their indebtedness to Jellinek, their theories were a direct borrowing from the writings of this influential and widely read legal writer. Cf. in particular Jellinek, Der Kampf des alten mit dem neuen Recht 8–9 (1907); also Jellinek, 1 Ausgewählte Schriften und Reden 396 (1911); cf. Grzybowski, supra note 17.
administrative economic law, based on central economic plans, would govern the socialist sector.\(^{82}\)

This school of thought was violently condemned by Vyshinskii. As long as Stalin’s regime continued, nothing more was heard of the schemes of gradual transition from the bourgeois legal system into a system of law which would reflect more truly the socialist management of the national economy of the Soviet Union. Theoretical difficulties were solved by the declaration that all Soviet law was socialist law and that the Civil Code in force was a socialist code and an indispensable part of the Soviet legal system. Soviet lawyers were told to get busy with the practical problems of legal rules of socialism and to forget about theories of socialist law.\(^{88}\)

The decisions of the Twentieth Congress of the Communist Party of the Soviet Union (1956) to prepare and enact new codes of law in all provinces of socialist law revived the discussion of the systematic organization of the Soviet legal system. Also revived was the question of the duality of regulations pertaining to property relations and business transactions.

The tenor of the discussion which followed is perhaps illustrative of the barrenness of intellectual life under Stalin. It demonstrated the absence of fruitful and significant ideas despite enormous experience in the field of economic relations. As the problem of the new codes came to the fore, the Soviet Union, for nearly four decades, had experimented with socialist economic forms. In addition, new socialist communities in Eastern Europe had come into existence and had been developing new economic forms as well as new forms of economic transactions between socialist states and enterprises on an international scale. Nevertheless, Soviet jurists found little to inspire them in the contemporary reality and turned rather to the ideas which were formulated in the beginnings of the Soviet State.

This trend was obviously encouraged by the rehabilitation of Pashukanis and Krylenko, the originators of the concept of economic law and of a legal order based on an administrative regulation of

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\(^{82}\) Gsovski, Soviet Civil Law 433 (1948).

\(^{83}\) Vyshinskii, The Law of the Soviet State 53 ff. (Babb transl. 1948); Grzybowski, supra note 17, at 73.
the economic activity in the socialist society. After twenty years in Siberia, one of the leading jurists of the initial years of Revolutionary Russia, Gintsburg, regained his freedom.84

But it was also apparent that the freedom of intellectual speculation which the Soviet jurists gained was limited, and they could hardly give free rein to their imagination by expressing preferences and offering suggestions regarding systematic arrangements of the Soviet legal system. The Yugoslav experiment with socialist law was condemned, and its patterns for socialist legal relations and theoretical solutions were rejected. Between the two extremes of the solutions adopted by Stalin's regime and the pattern of transition developed by Pashukanis and his school was all the room that was left for the exercise of the minds of Soviet jurists. The astounding fact that there was no discussion of the actual regime in the management of socialist industries or of organization of socialist agriculture once the program of legal reform was announced could perhaps be explained by the fact that such a discussion and suggested programs of reform would have offended the policy makers. And so discussion centered around problems of great theoretical attractiveness, although with little practical profit.

Even contemporary changes in the administrative methods and new organization of industries in the Soviet Union following the reform of 1957 have attracted little attention from Soviet legal scholars. Changes taking place before their very eyes did not register as indicative of social needs, nor as a manifestation of a process calling for a reformulation of the legal rule.

This is even more surprising since the debate on reform was initiated by the realization of the disjointed and amorphous state of the Soviet legal system. While criminal and civil law were in a poor state of organization, the real problem existed in the field of administrative regulations, concerned with management of the Soviet national economy. There can be no doubt that Soviet lawyers were aware of this state of affairs. That there was no great debate concerning these issues was due primarily, or so it seems, to the fact that these matters belonged to the central issues of the Soviet system of govern-

84 Hazard, supra note 10, at 62 ff.
ment, and that suggestions and discussions in this connection might involve fundamental axioms as to the nature and method of the socialist government.\textsuperscript{85}

Thus, the main issue of the debate on reform was the problem of the systematic arrangement of legal rules. Followers of the early school of legal Marxism suggested that instead of the division of law into public and private, a trichotomy be adopted, consisting of the following groups of legal rules: the law of the state, economic law, and civil law. The first group would include rules to regulate the organization of government machinery and its public services, including judiciary and procuratura. The second would cover all aspects of economic activity of the state. Civil law would be exclusively concerned with the individual but would include some constitutional and political aspects of the legal position of the citizen, such as electoral and other political rights.

These suggestions for the reform of the Soviet legal system were the result of the conviction that regulations dealing with the management of the national economy have little if anything to do with the circulation of consumer goods, property relations, and other fields of law governing individual life. The rights of a Soviet citizen have been thus segregated into a separate category. In terms of concrete legislative proposals, partisans of the new category, economic law, proposed to limit future civil codes to property and nonproperty relations involving individuals only. Consequently a socialist civil code would be restricted to relations between individuals, those between

individuals and socialist enterprises and economic institutions, and would include family law and such institutions as copyright and patents.

Simultaneously, a separate code would include the totality of rules dealing with planning, administration of the economic enterprises of the state, and their business relations.

The argument of the partisans of the new systematization is that the present system continues an artificial division of the rules pertaining to a single field of social activity, i.e., the operation of the economic system of the country under two classes of rules, one dealing with those relations which are based on the administrative subordination of economic enterprises to higher authorities of economic management, and the other on the contractual relations between them. The weakness of the present order is thought to be its predication upon a formal difference between the modes of regulating social relations, and not on their qualitative characteristics. Civil law, it is argued by the partisans of the economic law, is concerned with the satisfaction of the personal needs of citizens, while the economic law is a means of organizing the economic activity of socialist enterprises and organizations. The economic law should deal with the hierarchy of the economic administration, including economic councils and the legal position of economic enterprises. It should be directed toward their internal organization, economic planning, commercial basis of their operation, planned contracts, and government arbitration in settling disputes between socialist organizations.

Opponents of the economic codes have brought out serious arguments against segregating the rules regarding management of the national economy in a separate legal category. They have pointed out that not all the rules regarding the activities of economic enterprises have the same character. So, for instance, there is a difference between business transactions among socialist enterprises and administrative regulations regarding relations between the planning and supervisory authority and the enterprise itself. While in the first class of relations there are rights which have their basis in a contract which cannot be unilaterally changed, in the second type of relations this concept of rights does not apply. Thus interenterprise relations and business transactions have similar characteristics to those involving
individuals or socialist organizations and individuals. As such they may be subject to uniform treatment within a systematic arrangement in a single code of civil law regulations.

Another objection is that proposals for the economic code disrupt the unity of the institution of property. The conservative trend among Soviet jurists insists on the preservation of the idea of the civil code in its present form and scope and argues that there is no valid reason for the segregation of property relations concerning the individual from the rest of the legal regulations concerning property relations between socialist enterprises. Civil law rules regarding property between individuals and socialist enterprises represent a channel for including property relations involving individual existence into the general over-all planning activities of the state. Property relations between socialist enterprises represent a basis for property relations between individuals, as their economic activity is indissolubly tied to the satisfaction of social needs.

Furthermore, both the Party and the government are planning for a progressive relaxation of the centralized management of the national economy. Decentralization of administrative responsibility tends toward increasing the independence and initiative of economic enterprises regarding their business activities. In fact, civil law provisions regulate all those relations which are characterized by the absence of administrative subordination, and the equality of partners is the basis of operations. The tendency is to restrict the method of administrative handling of problems of the national economy and to favor a growing use of the channels of the civil law. This does not mean, say the defenders of the present scope and form of civil law regulation, that the traditional approach favoring the form of contractual relations tends to disrupt the mechanism of planning by separating the plan from the planned contracts. While the plan represents a statutory obligation, it is put into effect by a contractual method, such constituting a better means of establishing relations between equal partners.  

A slightly different position was taken by a Soviet jurist who has proposed that the new Soviet civil code should take account of the changes in the property relations in the socialist economic order. In fact, he claimed that there is no longer one system of the civil law relations and that, therefore, several laws ought to be enacted. All of them, however, would still pertain broadly to the branch of civil law. Thus, he proposed to differentiate between the civil law of the socialist economy, the civil law of collective farming, the civil law of physical persons, and the civil law of foreign trade.87

In spite of the theoretical attractions of the early theories of socialist law, the traditional trends seem to have carried the day, although not without some hesitations. Three major pieces of legislation which have made their appearance in the Soviet Union (Draft of Principles of Civil Law Legislation in the Soviet Union and Union Republic), in Hungary (Civil Code of 1959), and in Poland (Draft of the Civil Code) express the principle of the unity of the civil law. Thus, the tradition of the civil law countries of the West has been continued. The Soviet Draft (Article 1) states that its provisions cover property and related nonproperty relations, with the exclusion of those based on the administrative subordination of one party to another or to the budget relations. The Polish Code (Article 1) states that it regulates civil law relations between physical persons, between socialist and nonsocialist organizations, and between the physical persons and these organizations. It repeats the reservation contained in the Soviet Code by stating that the Code applies between state organizations only inasmuch as these relations are not differently regulated either by the laws in force or by the regulations issued by the supreme authorities of the state administration. The Hungarian Code (Article 1) contains a similar regulation.

The report attached to the Polish Draft reveals that the members of the codification commission did not quite see eye to eye on the various aspects of the scope and function of the civil code in a socialist country. They were doubtful whether management of the national economy, owing to the nature of its regulations, constituted a proper subject for inclusion within the civil code. Consequently, they did not propose to deal with the organization of the socialist economic

87 Aleksieiev, supra note 85, at 79.
units, quasi-corporations created by the government for the management of various industries and services.

In each of these civil law codifications, the law on obligations (contracts) constitutes the core of their provisions and raises important problems of technique and theory, due primarily to the fact that most legal commerce in a socialist state is handled by governmental, cooperative, and social institutions of all types.

The Polish approach took account of the fundamental difference between the dealings and transactions of socialist organizations and those involving individuals or individuals and socialist organizations. Thus, in order to preserve the unity of civil law but at the same time to recognize the special position of the socialist economic units, general provisions of the civil law were given a subsidiary role regarding the relations of socialist juristic persons. They apply only when other more specific provisions regulating economic cooperation and legal commerce between socialist units are absent.

In the Hungarian Civil Code no such reservation has been enacted. However, separate provisions for legal relations between socialist institutions are made whenever applicable. Thus, for instance, provisions on contracts deal separately with socialist contracts within the general framework of provisions covering all types of contractual relations.

The Polish Code failed to provide in detail for the mechanism of contractual relations between socialist institutions. However, in the general provisions a special reservation was made as to the spirit in which contractual relations between the socialist enterprises ought to be entered into (Article 343):

[S]ocialist organizations are obligated to cooperate both in concluding contracts as well as in their execution, taking into account the influence of their action on the execution of the contract by the other party, on the satisfaction of the needs of the economic life, efficiency of production commerce, and on safeguarding the national economy from losses.

In addition to this general regulation and the initial reservation that the Code applies only in the absence of more specific rules, the Code made it clear that agreements between socialist business partners must follow government regulations as to form, content, and choice of partners in their business activity (Article 342, 344).
The degree of influence of higher authority on the execution of contracts between socialist partners is especially visible in business deals connected with assignments of the national economic plan. Polish and Soviet drafts have kept the rules of the distribution of planned assignments between socialist enterprises outside the civil code. It was impossible, however, to avoid reference to administrative regulations of higher authorities in charge of economic management regarding the institution of contractual obligations between the parties, the effects of the nonfulfillment of contractual obligations, and the decisions of higher authorities regarding the change or abolition of planned assignments.\(^88\)

The scope of modern efforts at devising patterns for a socialist code discloses the fact that civil codes in socialist countries are profoundly affected by the internal conflict, characteristic of the Soviet legal order, which pertains in the precarious position of individual rights and the stability of social structures. Nevertheless, the usefulness of a code of law predicated upon the free exercise of will in legal commerce is beyond doubt. The perspective of forty years of operation of the socialist economy in Russia has put a question mark after the theories of the Pashukanis school. Its ideas on the nature of legal rules within the socialist economic order have had some foundation in reality only in the initial years of the regimented and government-directed transition from free enterprise to the government-owned and -controlled system of economic institutions and planned economy. Centralization of planning and the neat organization of economic activities according to administrative schemes, with economic ministries on top, was a proper method and could produce desirable effects as long as investment, organization, and expansion and deployment of the industrial establishment were stressed, at the expense of service and consumption. However, once the economic machine reached a certain level of expansion, it was discovered that the very size of the economic mechanism and the multiplication of its parts called for a different method of cooperation in performing services and satisfying human needs. In this situation, methods characteristic of the market economy were the only answer.

The solutions which finally prevailed were based on the simple

\(^{88}\) Cf. supra at 85 ff.
reality of the nature of economic operations. Theories of the partisans of the economic law had to be relegated to limbo, because in spite of the centralized direction of the national economy, the contract has maintained its function in the socialist economic system. As a Soviet jurist wrote in 1959, when the question was debated again:

Efforts to separate regulations of the circulation of goods between the socialist organizations, from the regulation of circulation between organizations and citizens (and also citizens) amount to denying the unity of economic circulation in the Soviet society. Previously some justification for such a denial was supplied by the view that means of production in the internal exchange are not goods. But at the present time Soviet economists have come to the conclusion that in view of the unity of the socialist economy, even the means of production are goods produced and circulated within the governmental sector, although there is no change in the person of the owner.89

Theories on the place of the civil law contract within the framework of the Soviet legal system raise serious theoretical objections which cannot be answered by a dogmatic dictum, e.g., that goods disposed in the trade between socialist units are goods in spite of the fact that the contract of sale and purchase produces no change in the person of the owner. It is realized that the contract theory is tied to the theory on the position of the juristic persons in the Soviet order in terms of their concrete rights. Their business independence is emphasized at the expense of the doctrine that socialist juristic persons represent only various forms of the activity of the state, which remains the sole owner of the means of production. Those who favor the concept of the unity of the civil law and the contractual form of business transactions in the socialist sector of economy would insist on distinguishing those activities of the state which engage the action of governmental agencies from those which are exercised through the operation of juristic persons.90

The heart of the matter is that complexities of economic life in socialist societies tend to favor business independence of the


90 Denisov & Bernstein, *supra* note 85, at 57 ff.
juristic persons, at the expense of the idea of the centralized management of the national economy, as the business of public authority. In a new form the distinction between various functions of the public authority, those subject to the rule of the public law, and those under the rule of the Civil Code is finding its way into the Soviet legal system.

In Yugoslav legal theory, which was evolved after a total reorganization of the economic mechanism of the country, the concept of national ownership of the means of production became a purely theoretical proposition. As a Yugoslav lawyer wrote:

[\textit{N}]o organ of society may be the general bearer of social property. Each institution is the bearer but of determinate rights as issuing from social ownership. This does not mean that property as property is divided into a supreme property and the lower categories of property as in feudal law, but that the different social organs have different rights in the management of social property.\textsuperscript{91}

Socialist codes of the most recent vintage still maintain the unity of the ownership of the means of production. Article 18 of the Soviet Draft of Principles of Civil Legislation stated:

Socialist ownership has the form of state ownership (property of all the people), or the form of collective farm cooperative ownership (ownership by an individual collective farm of cooperative association, or common ownership by several collective farms or cooperative associations).

In practice, however, these differentiations have little practical significance. Indeed, it seems that property relations in terms of the permanent assignment of control of various economic assets to various parts and elements of Soviet government apparatus have not yet reached that degree of stability which would permit a serious analysis of reality in order to produce a doctrinal formulation. In addition to a great movement in various forms of the immediate control of economic assets by socialist corporations, there is constant change in assigning responsibility for organizing industrial activity to various levels of government (federal, individual republics, provinces, etc.). The only real element of significance for legal forms of economic ac-

\textsuperscript{91} Gerskovic, "On the Basic Institutes of Property Law," The New Yugoslav Law 27 (Jan.–June, 1955).
tivity are the powers of various institutions to participate in their own name in the system of socialist transactions.92

Another aspect of the economic operations which militated against the doctrines of Pashukanis in contemporary conditions in Russia and in the satellite countries is the fact that such notions would tend to strengthen the rule of bureaucratic management in the national economy. It was not only a question of the realization of political postulates, i.e., of direct participation of the workers' organizations in the management of their factories. In addition was involved the question of economic efficiency which, in the final analysis, decides the issue.

These two questions provided the chief motivation in the demand for the reform of economic management and the rule of law in Poland after October 1956. In order to put a limit to bureaucratic rule and to establish an efficient bulwark to administrative arbitrariness, it was proposed to distinguish between various types of enterprises and to apply a varying degree of decentralization in their administration. Decentralization, however, was to stop short of their virtual return to private, although collective, ownership. In this system civil law would regain its pristine role and application. It was argued that, although the government would continue to control all industrial enterprises and that trade and distribution would continue to be an almost exclusive preserve of government monopoly, this fact would not preclude the rule of civil law and the regime of contracts in their commercial relations. Indeed, it was agreed, if anything, that the rule of civil law in the government sector of economy was even more indispensable, because by its very size government participation in the administration of economic resources affected the life of everybody. Polish lawyers at that time saw the only alternative to untrammeled rule by bureaucracy in decentralization and in the return of regulation of business transactions by the civil law.93

92 In an article published in 1958, Professor Pyontkovskii attacked the view that subjective rights have no place in the Soviet legal system: "K voprosu o vzaimootnoshenii obiektivnogo i subiektivnogo prava," SGP (No. 5, 1958).
93 Buczkowski, O właściwą rolę prawa cywilnego w gospodarce uspołecznionej," PiP 249–62 (No. 8–9, 1956); Brus, Prawo wartości a problematyka bodźców ekonomicznych 88 ff. (1956); Mayzel, "O umowach
While the defenders of the system of contractual relations in the socialist economic sector favor an expansion of civil law institutions, they are quite firm in their conviction that Soviet civil law is not the private law of the West. A leading Soviet expert in this field stated that:

"The term "civil law," as well as a number of other terms, has lost its pristine meaning. Soviet civil law represents that branch of law which concerns property relations tied to the commodity exchange relations irrespective of the participants. The political, procedural, rights of citizens from employment relations do not enter there, but belong to the field of civil law financial relations, agrarian relations, and also relations arising from the membership in the agricultural and other cooperative organizations."

In this sense, the civil law of the Soviet Union has lost its traditional function. It has become part of the legal system which is concerned primarily with public service, administered in a manner which has borrowed from the patterns of Western Europe, developed in the Soviet law.

Defenders of civilistic forms in business relations or the socialist economy have also pointed out that the preference for these forms was brought about by processes which are characteristic of the period preceding the moment of transition from socialism to communism. Civil law signifies relations based on cooperation, while economic law emphasizes administrative forms of ordering. Thus, civil law forms are closer to the ultimate form of social institutions characteristic of the highest form of social existence:

What meaning has the above-described objective process, if it is considered in terms of the perspectives of the development of Soviet society in the period of construction of communism? . . . one must keep in mind the fact that in contrast with the administrative law, in civil law the main role belongs not to the organizing activity of the governmental agencies, but to regulations founded on juristic equality of . . . parties. And therefore, the expansion of the sphere of application of civil law at the expense of the sphere of direct organizing activity of the agencies of Soviet state

represent a sui generis stage in the process of the development of the Soviet law, which is characterized by the narrowing of the realm of direct governmental coercion.  

The problem of the historical significance of the re-establishment of the rule of civil law is a somewhat esoteric issue. What is real is that the economic situation calls for departure from the administrative methods in the economic life of the socialist countries. Yugoslavs have referred this process to an earlier historical moment, that of the transition from capitalism to socialism. A Yugoslav lawyer, supplying a political rationale for the administrative and legal reform in his country, thus described the stages of transition from the capitalist to the socialist society. He pointed out that in the last stages of capitalism, the control of means of production was in the hands, not of the capitalists, but of the managerial class, consisting of the "economic bureaucracy both of the private monopolies and the contemporary state developing in the direction of state capitalism." He continued:

The experience of socialist development in the world has indicated that even after the winning of power on the part of the working class, a special social stratum is being created which stands between the direct producers and means of production. The same practice has further shown that, at this early stage of socialist development too, the direct producers are still separated from the means of production. The social stratum in question, and which still separates both the essential factors of any production in the initial stages of socialist development, is made up of the members of the economic administration of the proletarian state. Such a condition is necessary directly after the Revolution... but after a time such a condition begins to lose its necessary and progressive character... and leads to a system of bureaucratic dictatorship and this system in its deepest substance in no way differs from any other class rule.... Consequently: as long as there will subsist such a social stratum, which will stand between both the essential factors of every system of production, whether in the form of legal owners of means of production or in the form of state bureaucracy, exploitation also will subsist.

95 Aleksieiev, "O zakonomernostях razvitiia sovetskogo prava v period razvernutogo stroitelstva kommunizma," SGP 16 (No. 9, 1960).
96 Goricar, "Workers' Self-Government in the Light of Scientific Socialism," New Yugoslav Law 3–4 (April–Dec., 1957); Yugoslav theories were condemned by the Soviet jurists because they were based on the theory that the process of the withering away of the state and law in
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In effect, a number of causes have contributed to the fact that political amnesty for the theories of Pashukanis has not been transformed into his posthumous victory. Such would have meant the continuation of the rigid regimentation of economic life, very much in the pattern of Stalin's regime. That, of course, was no longer politically possible. It was out of tune with the general economic situation in the Soviet Union and other socialist countries, where further economic progress depended on the decentralization of authority. Finally, it was inconsistent with the great expansion of trade with other members of the socialist bloc and also with the free world, both in its neutralist part as well as that organized in the Western alliance. All of these developments called, not for the first time in the history of the Soviet Union and other socialist states, for stabilizing the rules of trade in some general formulas.97

Internally the most important development was the administrative decentralization of economic management, practically throughout the entire area of the Soviet bloc in Eastern Europe. Administrative reform in the Soviet Union in the course of 1957 contributed fundamentally to the expansion of the contractual forms of economic cooperation between Soviet economic units. As Professor Bratus wrote at the end of 1957, barely a few months after the reform, it was apparent that "the scope of purchase and sale contract has now a socialist society begins immediately after the overthrow of the power of the bourgeoisie. Cf. Romanshkin, supra note 10; also Hazard, supra note 10, at 27.

97 The responsibility for building up a new legal system under the revolutionary regime in Russia was laid at the door of the capitalist states with which the Soviet Union had concluded commercial treaties and agreements. Kurskii told the congress of workers of the administration of justice that when the question of the agenda for a congress in Genoa was being discussed, Lloyd George had said that Soviet Russia would have to establish a known system of legal norms which would permit other countries to have permanent relations with her. Kurskii added as an aside: "We shall see what these juridical norms shall be and who in the last analysis will dictate them." He admitted, however, that commercial treaties had raised some problems because they put forward demands for specified guarantees of property and persons. Hazard, supra note 10, at 150.
been considerably enlarged as regards the legal relations between the socialist economic organizations.” 98

No less important was the impact of foreign trade. Professor Bratus, the chief spokesman of the civilist orientation in the ranks of Soviet scholars, was convinced that:

To accept proposals of the partisans of the economic law, would result in serious difficulties in the field of foreign trade transactions with the capitalist firms. . . . It would be impossible to apply to a foreign merchant . . . those rules, which determine property relations of the Soviet citizens as the owner of the consumer goods. It would be also impossible to apply to foreign transactions the rules of the so-called economic law which is to serve relations between the Soviet socialist organizations. . . . When a foreign deal is referred to the rule of law competent in the place of the contracts, such rules of the civil law are applied as a given state applies with regard to its physical and juristic persons. Otherwise a discrimination against the foreign partner would take place, which in turn would result in the creation of a special legal regime for the trade organizations of the Soviet Union, which would upset the foundations of the economic cooperation of the USSR with the capitalist countries.99

Developments in the Soviet Union and in other socialist countries have inspired hopes that this was a first step toward the gradual relaxation of the administrative rule in business relations, and that the system of planned contracts, “masquerading as civil contracts and until recently unchallenged, is now to some extent giving way to truly civil contracts, and due recognition is given to the law of value.” 100 A Polish jurist, an expert in the field of commercial law, drew further comfort from the fact that Soviet economists have changed their position and now stress the commercial character of commodities and recognize the validity of the law of value for the circulation of commodities.101

101 See proceedings of the Soviet Institute of Economy of the USSR Academy of Science (September 1957), Voprosy Ekonomiki 103–11 (No. 11, 1957).
Furthermore, in a number of Soviet bloc countries, in Yugoslavia, and also for international trade within the Soviet bloc itself, a type of regulation was adopted which provided some general rules regarding important aspects of commercial relations between governmental institutions engaged either in internal or foreign trade relations. In 1954 the State Court of Arbitration in Yugoslavia adopted a commercial code under the name of General Usages of Trade for the adjudication of disputes arising from business transactions of Yugoslav business organizations. In mid-December of 1957 the Council of Mutual Economic Assistance at its session in Moscow adopted “General Terms of Goods Deliveries Between the Foreign Trade Concerns of the Member Countries” for the regulation of foreign trade between the member countries of the Soviet bloc in Eastern Europe. In Czechoslovakia, a law on “Business Relations between the socialist organizations was adopted on October 17, 1958.” Finally, in the Soviet Union itself, a resolution of the Council of Ministers of the USSR of May 22, 1959, enacted a regulation on the deliveries of capital and consumer goods to govern the simplified system of contractual relations between economic units after the reform of 1957.

In inter-bloc trade, a more precise definition of the mutual rights and obligations of the parties and of the terms of performance was the result of a considerable reassertion of equal position in the economic cooperation of the members of the bloc with the Soviet Union. Terms of delivery or general usages of trade constitute a system of rules which have their analogy in the commercial codes of the capitalist countries. As such they are *sui generis* civil law statutes adopted to business relations between that category of juristic persons which is closest to the merchant class of the free world. But here their resemblance ends. They contain no rules regarding the organization of juristic business entities. As in the socialist legal system, these matters belong to the public law. Owing to the standardization of business relations in the socialist world, only sale-purchase and contract of construction are described. Finally all those contracts and arrangements which provide for guarantees and security of commercial relations are eliminated. Performance of contracts and

103 Cf. supra at 91 ff.
terms of performance, as well as terms of payments, are guaranteed by over-all provisions regulating foreign trade. Clearing arrangements make provisions superfluous in case of bankruptcy, and also of liens and sureties.104

The presence of the new regulations introduced a new element into the activity of the government arbitration boards in the socialist countries, converting them into a kind of commercial court. In addition to the provisions of the economic plans and other administrative regulations which regulate business relations between various economic institutions, the boards have for their guidance a set of general rules for the performance of contracts which they must apply in the interpretation of the terms of commercial and other business deals between the partners. With respect to these aspects of the litigations concerned with the business activity of Soviet and other socialist enterprises, their function is identical with that of the civil courts dealing with commercial disputes in the civil law countries of the West. Otherwise, government arbitration boards have retained their original character and function as administrative bodies participating directly in adjusting, by administrative action, the cooperation of the economic units. The reform of economic administration in the Soviet Union and other satellite countries, although relaxing the controls and supervision of higher economic authorities, has failed to change fundamentally the regime of the planned economy in which business operations are geared strictly to the plan.

The only exception in this picture was Yugoslavia which reorganized the economic administration according to a pattern which gave full control of business operations to their individual workers' collectives. This made it possible to re-establish the normal system of adjudication between the business organizations of Yugoslavia. Following the economic reform of 1950–1953, the Judiciary Act of 1954 transformed Yugoslav government arbitration boards into a system of economic courts which have assumed functions similar in essence to commercial courts in the civil law countries of Western Europe. As the presiding judge of the Supreme Economic Court of Yugoslavia explained:

104 Piotrowski, supra note 100, also Piotrowski, "Na marginesie proponowanych zmian w polskim prawie rodzinnym," PiP 739 (No. 11, 1960).
The reason for converting the State Court of Arbitration into economic courts lies in the changes which were made in Yugoslavia in the system of economy and planning. The new economic system, whose hallmarks included the economic-juridical independence of economic enterprises, the management of factories and enterprises by the working collective and the fixing of the economic organizations’ rights, has made it possible for economic organizations to appear independently on the market, which fact, in turn, has had its effect of expanding the role of law in regulating mutual property relationships and strengthening the role of law in that domain.\(^\text{105}\)

In this situation, the work of the courts of arbitration has assumed a new function, and has turned into a “purely judicial organ.”

The interesting feature of the new Yugoslav arrangement is that the Soviet type of adjudication through arbitration boards was retained in those industries which have remained in the direct administration of the Department of Defense. Such is directed to decide controversies between military and economic organizations, military institutions, or authorized commands which have continued for specific reasons under the bureaucratic regime.\(^\text{106}\)

**ENFORCEMENT OF PRIVATE RIGHTS**

A distinguished American jurist has thus characterized the law of modern societies:

...there had resulted a degree of antinomy between the classic system of private rights and the concept of public service, closely supervised or even provided by administrative organs of the state. Private rights in essence pertain to individuals; the public services to great impersonal public utilities or organs of government. The former are enforced by sporadic litigation in independent tribunals; the latter supervised or conducted by administrative officers subject to more or less restricted judicial review....\(^\text{107}\)

In the Soviet polity this antinomy is no longer in evidence. Individual life has been so closely integrated with the activities and vast responsibilities of the public organizations that litigation in independent tribunals is no longer important in securing the frontiers

106 Gsovski & Grzybowski, *supra* note 57, at 821.
107 Yntema, Crossroads of Justice 162 (1957).
of individual liberties. Courts are still competent to provide solutions to conflicts arising from family relations and to adjudicate in disputes arising from petty transactions between individuals, private quarrels, or conflict of interests. Rights arising from contracts of work or government employment belong to the jurisdiction of the courts of general jurisdiction, and courts still deal with claims to a share in inheritance. But these rights are precarious. The institution of inheritance is not necessarily a constant feature of socialist order, and the institution of the family was subject to scrutiny as to the role it would play in the new society. In the vast area where the roots of individual existence are planted, however, individual rights have only a secondary mission. Thus, there is no channel for the adjudication against the government of claims arising from their exercise for the benefit of individual existence. Rights are determined in general constitutional clauses and concretized in administrative regulations. The general atmosphere in which the vast mechanism of the socialist state developed and in which the spirit of its laws took shape was such that some forty years after the Soviet State had come into existence, a leading Soviet jurist complained:

Until quite recently such an important function in the activity of the socialist state as the protection of rights and legal interests of the citizens was not considered an independent function. This thesis was based on an incorrect interpretation of the well known statements of I. V. Stalin... who stated that “the main task of the revolutionary legality in our time consists concretely in the protection of socialist property—and in nothing else.” Without doubt, protection of socialist property is an important function of the Soviet state. However, limitation of the tasks of the socialist legality exclusively to the protection of socialist property means nothing else but the neglect in the protection of rights and legal interests of the citizens.108

In addition, the indifference of the Soviet state to the problem of rights is not the only reason for their poor enforcement and lack of concern with that aspect of legal commerce in the socialist order. The formulation of individual rights is such that legal processes have no function in their implementation. One of the techniques of the integration of individual life into the social processes has been that individual rights became formulated so as to be capable of implementation primarily through social action, e.g., right to work, protection of family, or equality of sexes. Two Polish lawyers have pointed out that such a formulation frequently means that a full implementation of rights depends upon the level of economic development:

For the poor countries, a narrower formula of the civil rights is more advisable particularly as regards these points which deal with the so-called social rights, in order to establish some correlation between their formulation and a reality. It is also indispensable to remove all sorts of "democratic privileges" in the areas which do not belong to the sphere of civil rights. In this sphere, real liberty is better than phony equality—the freedom of the citizen to acquire certain property according to his financial possibilities, and not according to the official prices with rights to acquire factually limited to a small circle of persons. Official prices constitute one of those shams of democracy: prices so low that (theoretically) everybody has a material chance to acquire a thing or a service. But what of it when there is not enough of them for everybody? In such situations it is preferable that the price of such objects be fixed according to supply and demand.109

In this situation, the implementation and content of individual rights is not a matter of the concrete legal situation but of governmental policy. In consequence, judicial review became disqualified from playing a hand in the process of the supervision of government's performance, and the control of governmental activities in this respect was entrusted to the procuratura. In addition to its functions in the field of the prosecution of crimes and the protection of the interests of the state in private litigations, it was charged with a general supervision of all governmental institutions below the ministerial level from the point of view of the observance of the laws and regula-

tions in force. In practice, procuratorial agencies respond to individual complaints against governmental actions which impair the rights of Soviet citizens.

This aspect of the activities of the procuratorial agencies came to the fore after the demise of Stalin. Socialist Legality, a periodical issued by the Procurator General, carries in each number a section devoted to the protests lodged by the procuratorial officers against the violations of the law not only in judicial cases but also in regard to the action by various administrative agencies. 

Procuratorial actions reveal the intimate connection between administrative decisions and the rights of citizens arising from general conditions provided in the laws in force regarding various categories of employment. So, for instance, a protest was lodged against a ministerial instruction which gave the foremen, senior foremen, and chiefs of plants the right to impose certain penalties exceeding the disciplinary powers given these officers under the law. In another case, a protest was lodged against the instruction of the chief of an educational program which ordered the subordinate administration of education in Kursk to replace all instructors without higher education with instructors with higher education, as the law does not require higher education from this category of instructors.

Similarly, a procuratorial protest was made against an instruction of the USSR Ministry of Finance concerning certain persons in possession of houses and building plots. Involved was the operation of certain regulations imposing special taxes on those who had taken possession of such house and plots without proper authorization. The procuratura also protested an instruction of higher authorities which would deprive candidates for higher examinations of their earnings during the time of such examinations; an instruction barring employment of a dismissed worker in another enterprise under the same administration; an order to reduce the wages of

111 Gsovski & Grzybowski, supra note 57, at 554.
112 Sots. zak. 5 (No. 5, 1958).
113 Ibid.
114 Ibid.
115 Id. at 94 (No. 4, 1958).
116 Ibid.
workers for incomplete production; \textsuperscript{117} an order fixing without proper authorization an age limit for certain positions in the research institutes of the Ministry of Health; \textsuperscript{118} and an instruction which prohibited employment of persons living in other localities.\textsuperscript{119}

Another aspect of the right to work was dealt with by a protest against an instruction which barred the employment of drivers who failed a driver’s test in other jobs in the same institution.\textsuperscript{120} A procuratorial protest dealt with the refusal of an executive committee of a province in Uzbekistan to continue grants in aid to a mother of many children who left a \textit{kolkhoz} for another locality without the permission of the committee. The protest contended that this decision violated the right to freedom of movement of this woman.\textsuperscript{121} In another case, the procuratura objected against delegation of authority to the subordinate agency.\textsuperscript{122}

The characteristic feature of this type of redress is that individual complaint is only a means of obtaining information of the departure from the rules of law. Proceedings are then initiated which aim not so much at safeguarding individual rights as at the correction of a mistaken line of policy. Individual involvement in the preservation of the correct line of policy by government authorities in accordance with the laws in force is reduced to a minimum. The element of the violation of private rights pertaining to a specific individual citizen of the Soviet polity is not essential for the performance of the function of supervision. As a matter of fact, it is difficult to detect the element of a violation of rights in the case which concerned the validity of the instruction that in future only people living in the locality where a government institution was located be considered for employment.

Thus, in the final analysis, the concern of the procuratorial services with individual rights originates not so much in the content of the rule of law, which deals also with general conditions of service regarding personnel policy, but from the decision of the

\textsuperscript{117} \textit{Id.} at 108 (No. 7, 1958).
\textsuperscript{118} \textit{Id.} at 87 (No. 7, 1960).
\textsuperscript{119} \textit{Id.} at 87 (No. 5, 1960).
\textsuperscript{120} \textit{Ibid.}
\textsuperscript{121} \textit{Id.} at 89 (No. 7, 1959).
\textsuperscript{122} \textit{Ibid.}
Twentieth Congress which ordered a stricter protection of individual rights. The decision of the Party Congress could influence the general tone of the work of government agencies in the performance of their official duties, but could not change the function of individual rights in the socialist legal order. It is not in the nature of this order to consider individual rights as absolute values.

In a Polish case in which a worker sued a government enterprise for damages (one month's pay) because of improper dismissal, it was alleged that, contrary to the regulations, the factory manager alone signed the notice of separation. The Polish Supreme Court gave the following opinion:

[I]t is necessary to examine whether claimant's demands are not an abuse of his rights . . . It must be borne in mind that the Polish People's Republic is a state of the working people, in which every citizen has a duty to protect social property. . . . It follows that one of the rules of social co-existence in a people's state is that a citizen has no right to counterpoise fully his rights to the interests of his enterprise as being totally alien to his own. Obviously this is not to mean that individual interests should be subordinated to the interests of all, but to mean a wise compromise between the two.128

To adjust the rights and claims of the disputants in a civil suit is a legitimate function of the modern judge. According to modern civil codes, its classic example is judicial power to distribute more equitably the hazards of modern life, not according to principles of liability, but according to the economic position of the parties. The appearance of this institution is one of the symptoms of the relativity of the institution of property in our society. The decision of the Polish Supreme Court indicates that the rights of the workingman, which in our world are a matter of public policy and remain unaffected by contract, have also become relative.

123 Decision of November 23, 1958, Case No. 4 CO 18/58, PiP 1085 (No. 12, 1959).