Michigan Law Review

Volume 48 | Issue 8

1950

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Recommended Citation
John N. Hazard, *SOVIET SOCIALISM AND DUE PROCESS OF LAW*, 48 MICH. L. REV. 1061 (1950).
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MICHIGAN LAW REVIEW

Vol. 48 JUNE, 1950 No. 8

SOVIET SOCIALISM AND DUE PROCESS OF LAW

*John N. Hazard**

AN eminent American legal philosopher has recently written in the pages of this *Review* that Soviet leaders have discovered some ancient truths—namely, that some respect must be paid, sooner or later, to the principle of legality.[1] In the light of various memoirs and disclosures of persons who have experienced or studied life in Soviet labor camps,[2] such a statement invites incredulity. Can it have any basis in fact? Can it be possible that there is a dualism in Soviet practice, with one set of experiences supporting the conclusion that there is a trend toward legality and another set of experiences supporting the conclusion that the Ministry of Internal Affairs rules without any respect for what the common law lawyer means by legality?

It will be the purpose of this paper to present evidence throwing light on the Soviet attitude toward what the common law lawyer would call "due process of law" in criminal proceedings. Much more might be included in the concept of legality, but there will probably be agreement that legal protection of the individual accused of crime is the heart of the concept. Soviet law and practice will be examined as it relates to trial by a judicial body, trial by jury, presence at one's own trial, availability of counsel, opportunity to be heard, knowledge of the offense charged, and the confrontation of witnesses. These elements

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1 "In the process of attempting to operate a great governmental machine, the Soviet leaders have rediscovered some ancient truths. They have learned that the state without justice is impossible, or at least that it is impossible unless people believe that the state is attempting in some degree to render to each his due. They have also seen that some respect must be paid, sooner or later, to the principle of legality; men must know, or think they know, where they stand under the law and before the courts. The despised bourgeois virtues turn out, in the end, not to be mere copybook maxims, but indispensable ways of getting things done, rooted in the very nature of the human animal." Lon L. Fuller in "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory," 47 MICH. L. REV. 1157 at 1165 (1949).

2 See, for example, PETROV, SOVIET GOLD (1949); BARMINE, MEMOIRS OF A SOVIET DIPLOMAT (1938); KRIVITSKY, STALIN'S AGENT (1939); DALLIN and NICOLAEVSKY, FORCED LABOR IN SOVIET RUSSIA (1947).

enter into the concept of "due process" as the courts of the United States have defined it in cases arising under the Fifth Amendment to the Constitution.[3] Several of these elements are named in the Sixth Amendment to the Constitution.[4]

When such facts as are available to the researcher have been presented, the question will be raised as to why Soviet law and practice has taken the direction indicated by the evidence.

The Ministry of Internal Affairs

Since the days of the Russian revolution, and even for years before it, Russians have utilized administrative boards for the purpose of restraining certain elements of the population. Under the laws of the Russian Empire, the police was authorized to conduct what was called "open police supervision." This authorization was recorded in a brief note to Article 1 of the Statute on the Prevention and Suppression of Crime.[5] Such open police supervision was inaugurated after it had been proposed by local police authorities that "persons dangerous to the peace of the community" be subjected to it.

The proposal of the local police authorities was directed to a Special Board under the Minister of Internal Affairs of the Empire, presided over by the Deputy Minister in charge of the police, and comprising four other members—two from the Ministry of Internal Affairs and two from the Ministry of Justice. If the proposal of the local police met with acceptance from the Special Board, the person concerned might have been exiled for periods not exceeding five years to a remote

[3] "This court has had frequent occasion to consider the requirements of due process of law as applied to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law." Day, J. in Ong Chang Wing v. United States, 218 U.S. 272 at 279, 31 S.Ct. 15 (1910).

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST., Amendment 6.

[5] "Note 1. Among the measures of suppression and prevention of crime there are: placing under police supervision, prohibition of residence in capital cities or in other places, exile through an administrative procedure to specified localities in European and Asiatic Russia, and also expulsion of foreigners beyond the boundaries of the State. These measures may be taken in some special cases in accordance with the procedure established for the purpose, without formal court procedure."

part of European or Asiatic Russia, or control might have been established over his person at his usual place of residence.[6] Under this system large numbers of persons, including several of the leaders of the Bolshevik faction of the Russian Social Democratic Labor Party, spent periods of exile in Siberia.[7]

The upheaval wrought by the revolution in Russia left intact the principle of coping with political dissenters through administrative tribunals. For a time the newly created administrative boards were given the power to execute, but by degrees their authority was reduced.[8] In 1934 the jurisdiction over crime, which the special boards exercised within the police agency, then called the O.G.P.U., was withdrawn and transferred to a system of Special Colleges in the Provincial Courts. These were created for the purpose within the judicial system of the U.S.S.R. The Special Boards themselves were reconstituted within the People's Commissariat of Internal Affairs, but with different jurisdiction and authority. The 1934 statute on the Special Boards gave them the right to apply "exile, banishment and internment in correctional labor camps for periods up to five years and expulsion from the U.S.S.R."[9] A statute relating to the structure and jurisdiction of the new Special Boards was promulgated nearly four months later.[10]

Jurisdiction of the Special Boards was now stated to be over "persons who are recognized as being socially dangerous."[11] The members of the Special Board were prescribed as the People's Commissar of Internal Affairs, the Deputy Commissar, the agent of the R.S.F.S.R. for the Commissariat, the Head of the Chief Administration for the local police, and the Commissar of Internal Affairs of the Union Republic on whose territory the case arose. The Prosecutor General of the U.S.S.R. or his Deputy was required by the decree to be present at meetings of the Special Board, and this official was given the right to protest decisions of the Special Board to a higher body. This higher body has become, since 1936, the Presidium of the Supreme Soviet of the U.S.S.R., which serves as the executive committee of the Soviet "Parliament." All decisions of the Special Board are required by the

[6] The procedure is outlined in ELISTRATOV, ADMINISTRATIVNOE PRAVO (Administrative Law) 95-96 (1911).

[7] See KENNAN, SIBERIA AND THE EXILE SYSTEM, 2 vols. (1891).

[8] For a description of the administrative tribunals of the early years and the steps taken to reduce their authority, see ZELITCH, SOVIET ADMINISTRATION OF CRIMINAL LAW 34-48 (1931); and also 1 GSOVSKI, SOVIET CIVIL LAW 233-240 (1948).

[9] Decree of July 10, 1934, Sob. Zak. SSSR, 1934, I, No. 36, Art. 283, ¶8.

[10] Decree of November 5, 1934, Sob. Zak. SSSR, 1935, I, No. 11, Art. 84.

[11] Id. at ¶1.

decree to set forth the reasons for the application of the measures ordered, and the term for which they are to be applied.

Since the date of the 1934 decree on the Special Boards, various administrative changes have occurred in the government of the U.S.S.R. All Commissariats have been renamed as Ministries. The Ministry of Internal Affairs has been divided into two Ministries, one retaining the former name, and the other being called the Ministry of State Security. It has been indicated that the Special Boards continue to function in the Ministry of Internal Affairs, and that the 1934 decrees on the subject of the Special Boards remain in effect.[12]

No published order requires the Special Boards within the Ministry of Internal Affairs to adhere to the rules of the Code of Criminal Procedure to which all courts are required to adhere on pain of reversal. No published reports on the work of the Special Boards have become available to outsiders. There has been indication in conversation with some of the emigrés from the U.S.S.R. that various provisions of the Code of Criminal Procedure have been adhered to in their own cases before the Special Boards in times past, but there seems always to have been denial of counsel. In some cases defendants have not been present at the hearings in which the decisions concerning them were reached.

To the common law lawyer the Special Boards within the Ministry of Internal Affairs deny to the accused due process of law for the following reasons. They are administrative boards rather than courts. Their hearings are in secret. The defendant has no right of counsel, and is sometimes not present at the hearings. In consequence he has no opportunity to confront witnesses against him and no absolute right to present evidence in his own defense. For these reasons alone there is absent from the proceedings the essentials of legality with which the common law lawyer is familiar. This aspect of Soviet justice can be explained, perhaps, as the outgrowth of the Russian heritage and a perilous thirty years through which the U.S.S.R. has gone, but it cannot be acclaimed as evidence of adherence to any principles of legality as understood at common law. The search for evidence indicating Soviet discovery of respect for the principle of legality must progress further.

[12] EVTIKHIEV and VLASOV, ADMINISTRATIVNOE PRAVO (Administrative Law) 244 (1946).

The Criminal Courts

A system of criminal courts has existed alongside the administrative tribunals since the early days of the Russian revolution. It is evident in statements of one of the earliest Commissars of Justice of the Russian Soviet Federated Socialist Republic that the administrative boards were considered originally as relatively temporary measures. It was apparently anticipated that they would have outlived their usefulness after the difficulties of civil war and reconstruction had been overcome. In a 1922 speech to those engaged in legal work, the then Commissar of Justice reminded his listeners that the Republic had been a military camp and that "the most serious tasks of the struggle were handled by administrative methods or decided with the use of non-judicial methods of repression."[13]

By degrees Soviet courts have been increased in numbers and scope of jurisdiction. A 1934 decree on jurisdiction over crimes investigated by the People's Commissariat of Internal Affairs of the U.S.S.R. completed the process of transfer of jurisdiction to the courts over all cases involving allegation of crime.[14] Since 1934 the types of courts have been reduced in number, so that even the Special Colleges ordered set up in the Provincial Courts in 1934 to assume the responsibilities of punishment for crime formerly handled by the Special Boards of the O.G.P.U. have been abolished. Their jurisdiction has been divided between the regular Criminal Colleges of the Provincial Courts and the Supreme Court of the U.S.S.R. and its subordinate federal courts.[15] Treason, espionage, terror, arson, explosion or other types of "diversion" are currently subject to the jurisdiction of the military courts, whether the accused is a member of the armed services or a civilian. Since the military courts are considered as part of the regular court system and not a separate court martial system within the Ministry of Defense, the military courts are required to abide by the Code of Criminal Procedure. In consequence the Code of Criminal Procedure is today obligatory for all courts, as is indicated by reversals for its violation regardless of the court in which the violation occurred.

[13] KURSKII, IZBRANNYE STATI I RECHI (Collected Articles and Speeches) 69 at 70 (1948).

[14] Decree of July 10, 1934, Sob. Zak., SSSR, 1934, I, No. 36, Art. 284.

[15] Act concerning the Judicial System of the U.S.S.R. and of the Union and the Autonomous Republics, dated August 16, 1938 (Eng. trans. in Second Session of the Supreme Soviet of the U.S.S.R., Verbatim Report, Moscow, 1938) Arts. 32 and 58.

A large number of criminal proceedings, and possibly all criminal proceedings, are today subject to the requirements of the Code of Criminal Procedure. The special procedure permitted the Special Boards of the Ministry of the Interior is believed by foreign experts to be applicable only when there has been no act which is allegedly criminal. The Special Boards seem to be intended as agencies operating in the field of suspicion of danger rather than in the field where there has been action which can be defined as criminal under the terms of the criminal code.

Trial by Jury

No juries participate in the trial of criminal cases in the U.S.S.R. Soviet courts in their composition provide what many jurists in civil law countries have accepted as the substitute for the jury at common law, namely, the three-judge court in which two lay assessors are present with a professional judge.[16] These lay assessors are laymen, elected by the general public[17] to sit for short periods of time, usually a week. They are supposed to bring to the criminal proceeding the non-professional approach, which is prized by common law as the contribution of the jury system. Lay assessors have greater authority than jurors at common law in that they may decide not only questions of fact but of law. On the other hand the decision on the facts is shared with the professional judge. This situation decreases their independent authority to less than that of jurors at common law.

Challenges to the professional judge or the lay assessors are permitted by Soviet law so that prejudiced persons may be eliminated.[18] If the removal does not occur, a reversal by the Supreme Court of the Republic is possible. In a civil case which may illustrate Soviet practice, a professional judge remained on the bench in an action

[16] Constitution of the U.S.S.R., Art. 103: "In all courts, cases are tried with the participation of lay assessors, except in cases specially provided for by law."

[17] Elections were held for the first time early in 1949 in accordance with the requirement of Art. 109 of the Constitution of the U.S.S.R. of 1936. The elections were conducted in accordance with electoral laws enacted by each Republic. For the law of the R.S.F.S.R., see Vedomosti Verkhovnogo Soveta SSSR, No. 39 (538) (Oct. 8, 1948).

[18] Code of Criminal Procedure of the R.S.F.S.R., Art. 43: "A judge may not participate in the review of a case either in the preliminary session or at the trial: (1) if he is a party or the relative of any of the parties; (2) if he or one of his relatives is interested in the outcome of the case; (3) if he has participated in the case as a witness, expert, or a person who has conducted the preliminary investigation, accuser, defense attorney, or representative of the victim's interests or of the civil plaintiff in the case."

brought by the janitress of the court against a lawyer of the district to have him declared the father of her child and liable to the payment of maintenance. The defendant argued that the judge was himself the father of the child, but the judge refused to withdraw, and countered by holding the trial in secret. The Supreme Court of the Republic set aside the finding of parentage because of the irregularity of the proceedings.[19]

No retrial was granted, however, when a judge failed to withdraw in response to the argument that he should do so because the principal witness to a beating for which a defendant was prosecuted was the judge's wife. The Supreme Court of the U.S.S.R., in affirming the conviction, set aside the reversal of the Provincial Court on the ground that there was confirming testimony from other witnesses besides the judge's wife, and because there was medical testimony to the effect that the victim had suffered severe bodily injury. The court added, "The participation of relatives of the judge as witnesses is not under the law incontestible reason for removing a judge."[20]

A conviction brought in by a court in which the lay assessors were not elected in accordance with law was set aside.[21] Likewise, a sentence, signed by the purported judges, was set aside when it was revealed that one of the signatories had not been in fact a lay assessor.[22]

Lay assessors are not required in all courts, as indicated by the Constitutional provision, and by a similarly worded provision of the Judiciary Act of 1938.[23] When a region is under martial law, the military courts sit with a bench of three professional judges.[24] During the past war the railway and water transport systems were militarized, so that all federal courts became militarized, and sat without lay assessors. Even prior to the war the Military College of the Supreme Court of the U.S.S.R. heard the much publicized trials of Bukharin, Radek, Kamenev and others with benches of three professional judges.

[19] Case No. 25,506, Sud. Prak., R.S.F.S.R., No. 14, 1931, p. 14.

[20] Case of Samarokova, Sud. Prak. Verkh. Suda, SSSR, 1948, Vyp. III, p. 26.

[21] Case of Nusein, Sots. Zak., No. 12, 1940, p. 90.

[22] Case of Asheulov, Sots. Zak., No. 9, 1940, p. 74.

[23] Art. 56 of Act concerning the Judicial System of the U.S.S.R. and of the Union and the Autonomous Republics, dated Aug. 16, 1938 (Eng. trans. in Second Session of the Supreme Soviet of the U.S.S.R., Verbatim Report, Moscow, 1938).

[24] Sec. 12 of Statute on Military Tribunals in places declared subject to martial law, and in regions of military operations, dated June 22, 1941, Vedomosti Verkh. Sov. SSSR, No. 29, 1941: reprinted in Code of Criminal Procedure R.S.F.S.R., 1943 ed., p. 245.

The Presumption of Innocence

The immediate past President of the American Bar Association indicated at the St. Louis annual meeting of the Association that he had learned from an examination of French criminal procedure that French law recognized no presumption of innocence. His indictment of the French system has been sharply challenged by specialists in French law who point to the French requirement that trials be conducted with the presumption that the accused is innocent.

The argument that French law recognizes no presumption of innocence bears on Soviet law, since the French and Soviet criminal procedures have much in common. Neither system of law has any written provision to the effect that there is a presumption of guilt. On the contrary both systems claim to recognize the presumption of innocence. Yet both systems provide for a preliminary investigation before the trial begins. In the preliminary investigation before a *juge d'instruction* in France and a preliminary investigator in the U.S.S.R. the accused is arraigned, confronted with those persons prepared to testify against him at the trial and afforded an opportunity to state his side of the case. The record of the preliminary examination is collected in a file, sometimes composing several volumes, and the indictment is drawn. When the trial is held the court will proceed to verify the facts stated in the report of the preliminary examiner and to determine whether elements of a crime are present.

A Soviet preliminary examiner is required by law to investigate both sides of the case.[25] Although his work is subject to the supervision of the office of the Prosecutor, for administrative purposes, he is not conceived of as a prosecutor but more as a magistrate. The preliminary examiner is required to forward the case for trial only if he believes there is sufficient evidence to justify the charge[26] and to terminate proceedings if there is not sufficient evidence.[27] The trial court is not permitted to convict a defendant upon the basis of the record of the preliminary examination. It must rest its decision solely upon the basis of material evidence presented in court or the testimony of witnesses heard in court.

Soviet jurists interpret this procedure as preserving the presumption of innocence. One of them has written, "Although the principle of the presumption of innocence is not reflected directly in

[25] Code of Criminal Procedure, R.S.F.S.R., Art. III
[26] Id., Art. 128.
[27] Id., Art. 204.

our procedural legislation, it flows indirectly from Article 111 of the Constitution of the U.S.S.R. and Article 8 of the Act Concerning the Judicial System, in accordance with which the accused is assured the right of counsel. If the accused has the right of counsel, obviously he is not yet held to be guilty, and the possibility of being acquitted is preserved to him, for which purpose the law provides him with all the various procedural rights and guarantees."[28]

The Right of Counsel

Article 111 of the Constitution is categorical in its statement that "the accused is guaranteed the right to be defended by counsel." In spite of this guarantee, some cases may be heard without the right of counsel in the defendant. Thus, Article 468 of the Code of Criminal Procedure provides that trials for terrorist acts against Soviet government officials shall be heard without the presence of the parties, which means in the language of the Soviet Code, without the presence of a Prosecutor or of a defense attorney. The court handles the case alone on the basis of the material presented by the preliminary examiner.

The right of counsel is also unclear by virtue of Article 55 of the Code of Criminal Procedure, which provides that the presence of a defense attorney is required, unless waived specifically by the defendant, only in the event that there is to be a Prosecutor in the case, and in the event that a defendant is a deaf mute, or otherwise incapable of taking action because of some other physical infirmity. It has been indicated that cases can be heard in the absence of a defense attorney if the prosecutor also absents himself so that the court is left to conduct the case alone on the basis of the record of the preliminary examiner. Because of the provisions of the Code of Criminal Procedure, it appears that a defendant may have an attorney generally, but not in the event that his crime is terrorism against government officials. Probably there will be no reversal in the event that no defense attorney was present if the accused knew of the possibility of having one but failed to avail himself of one for one reason or another within his own control.

The cases on the subject indicate that a conviction of a deaf mute has been set aside when a Railway Court failed to see that a defense attorney was provided.[29] In another case a conviction was set aside because of many violations of the Code of Criminal Procedure among

[28] STROGOVICH, UGOLOVNYI PROTSESS (Criminal Procedure) 159 (1946).
[29] Case of Kozlov, Sud. Prak. Verkh. Suda. SSSR, 1948, Vypusk II, p. 7.

which was the failure to provide a defense attorney to a 17-year-old boy accused of arson.[30] The Supreme Court declared in the latter case that the defendant "deprived of a defense attorney, was naturally not in a position to defend himself in court against the criminal charge brought against him," and at a later point it said, "Kuleshov's appeal should have called the attention of the Provincial Court to the fact that Kuleshov, whose case was heard without a defense attorney, was in fact deprived of that defense in court which is guaranteed by the Constitution."

Soviet law in guaranteeing the right of counsel under the circumstances indicated, limits the exercise of the right to the period of the trial itself. There is no right to counsel before or during the preliminary examination. Suggestions of Soviet procedural experts and prosecutors that presence of a defense attorney at the preliminary stage would aid in determination of the truth have not yet been acted upon.[31]

Knowledge of the Offense Charged

The indictment must be presented to the accused within 48 hours after it has been prepared by the preliminary examiner,[32] and not less than 72 hours before trial.[33] It must contain the circumstances of the crime insofar as the examiner has been able to determine them and the statement of the Articles of the Criminal Code under which the charge is brought.[34] Some surprise was experienced on this score when the Nuremberg indictment was in preparation by the four participating prosecutors in 1945. The French prosecutor expressed dissatisfaction with the form of the indictment proposed since it failed to include references to all of the evidence expected to be introduced at the trial. The Soviet prosecutor agreed that the Soviet criminal procedure required a full indictment with such references, including the names of all witnesses to be called.[35] Only after explanation by the American prosecutor of the difficulties of examining all the tons of documentary evidence before the time for filing the indictment and the desirability of some surprises which would hold continuing world interest was it agreed that the indictment might be less complete.

[30] Case of Kuleshov, Sud. Prak. Verkh. Suda. SSSR, 1948, Vypusk III, p. 27.
[31] Sots. Zak., No. 1, 1947, p. 22.
[32] Code of Criminal Procedure, R.S.F.S.R., Art. 128.
[33] Id., Art. 235.
[34] Id., Art. 129.
[35] Id., Art. 207.

A conviction for speculation obtained against a poor Kirgiz peasant without the presentation of the indictment within the prescribed period was set aside by the College for Criminal Cases of the Supreme Court of the U.S.S.R. in 1938.[36] Some years earlier a conviction had been set aside because the indictment had been presented to the accused only on the day of the trial.[37] In the same year it was indicated, however, that the indictment need not be read aloud in full at the trial unless one of the parties so requests. It is sufficient to read only the conclusion.[38]

An exception to the general rule concerning presentation of the indictment 72 hours before trial is provided by Article 467 of the Code of Criminal Procedure. In cases involving an accusation of a terrorist act against officials of the Soviet government, the accused is entitled to receive the indictment only 24 hours before the trial.

Presence at the Trial

Although no Constitutional provision appears to be concerned, it is required by the Code of Criminal Procedure that the defendant be present at his trial in cases involving crimes for which a penalty of deprivation of freedom may be named.[39] To this general rule, the code permits exceptions in the event that the defendant waives his right to be present, or if it is proved that the defendant has avoided service of summons or is concealing himself from the court.

A conviction for sleeping on duty was set aside because the defendant was not present at the trial and the record provided no evidence that the defendant had concealed himself from the court.[40] Likewise a conviction of a collective farmer on a charge of failing to work the required minimum of labor days was set aside because it was discovered on the protest of the Prosecutor General of the U.S.S.R. that the trial was conducted in the defendant's absence.[41]

The right to be present at the trial was put to a more serious test in a case where a defendant was convicted in absentia, but only after he had failed to appear after having been released before trial upon a written undertaking not to depart from the jurisdiction. Upon the

[36] Case of Karataev, Sov. Yust., No. 2, 1939, p. 75.
[37] Sud. Prak., R.S.F.S.R., No. 6, 1929, p. 12.
[38] Sud. Prak., R.S.F.S.R., No. 9, 1929, p. 2.
[39] Code of Criminal Procedure, R.S.F.S.R., Art. 265.
[40] Case of Pushko, Sots. Zak., No. 12, 1940, p. 82.
[41] Sud. Prak., Verkh. Suda., SSSR, 1942, Vypusk I, p. 17.

review by the College for Criminal Cases of the Supreme Court of the U.S.S.R. it was discovered that the defendant had departed from the jurisdiction when a delay was encountered in bringing him to trial. It was indicated in the record that he had obtained employment in another city during the period of the delay and had written frequently to the local Prosecutor asking that the trial be speeded. In the light of these facts, the Supreme Court's College for Criminal Cases stated the declaration of the trial court that it was necessary to try the defendant in absentia to be without foundation even though the defendant had violated his undertaking not to depart from the jurisdiction. The College argued that the trial court should have taken more severe measures to restrain the defendant and assure his presence, but it should not have tried him in absentia.[42]

An Opportunity to Be Heard

The accused has the right to file requests with the court for the calling of witnesses deemed pertinent to the case. The court is required to grant the request if the circumstances to which the testimony is expected to be directed are relevant.[43] In the event that the accused's request is denied, the court is required to state the reasons in a written ruling, so that an appellate court may be able subsequently to review the wisdom of the decision. This right to call witnesses continues throughout the trial.[44] All those summoned as witnesses are required to appear,[45] and are subject to prosecution for any false testimony they present.[46] Witnesses for either side may be questioned by the accused. The latter may give his own explanations of any events to which the testimony has been directed.[47] There are cases in which offered testimony has been denied admission, and reversals have been obtained on appeal. Thus, a railway engineer was convicted of violation of transport discipline when the engine he was driving ran into the rear of a train moving in front of him. The Supreme Court's Review College reversed and remanded for a new trial because there had been insufficient examination of all the circumstances of the case.[48] In another case a sentence was set aside as it related to one of a group convicted of robbery on the ground that there had been no interrogation of a

42 Case of Dragunov, Sots. Zak., No. 3, 1938, p. 113.
43 Code of Criminal Procedure, R.S.F.S.R., Arts. 253 and 254.
44 Id., Art. 272.
45 Id., Art. 272, and Case of Karataev, Sov. Yust., No. 2, 1939, p. 75.
46 Criminal Code, R.S.F.S.R., Art. 95.
47 Code of Criminal Procedure, R.S.F.S.R., Art. 277.
48 Case of Bereznev, Sov. Yust., No. 8, 1937, p. 55.

witness named by the defendant as able to establish the defendant's alibi.[49]

At the very end of a trial a defendant has a right to make a speech of any length, and of relevancy or not. During this speech, he may not be questioned either by the court, the prosecutor or any co-defendants.[50] Soviet practice is replete with long speeches of this character, the most famous being that by Nikolai Bukharin on the occasion of his trial for treason in 1938. Bukharin ranged over the whole field of his activities. At one point a co-defendant intervened to accuse Bukharin of lying, but the court ordered the co-defendant not to interrupt.[51]

Trial in Public

Public trial, except in cases provided for by law, is required by Article 111 of the U.S.S.R. Constitution. The Constitutional provision is carried into the Code of Criminal Procedure in the detail necessary to understand it.[52] Under the terms of the pertinent Article the public may be excluded from the court room during all or part of the trial only when the reasons are set forth in writing and then only in the event that it appears necessary to protect military, diplomatic or state secrets, and also in the event that the case concerns sex offenses.

Judicial decisions have illustrated court practice. In one to which reference has already been made because of the implication of the judge as the father of the child of a court janitress, the secrecy of the trial was one of the factors causing reversal by the Supreme Court of the Republic.[53] Even though the matter concerned sex, there was no criminal charge. It is apparent that the application of the exception to sex cases has not been limited narrowly to the crimes referred to in the exception. A critic of the Code provisions argued for a broad application, and gave a case in support of his argument in which a murder trial had been held behind closed doors.[54] The reason for the secrecy was that the defendant had refused to testify until she was assured that her daughter's misfortune would not become public knowledge. At the secret session the defendant explained that she had killed her second husband because he had raped the defendant's daughter by her first husband. The critic of the Code provision thought the case would not

[49] Case of Vinogradov, Sots. Zak., No. 7, 1939, p. 94.
[50] Code of Criminal Procedure, R.S.F.S.R., Art. 309.
[51] Report of the Court Proceedings in the Case of the Anti-Soviet "Bloc of Rights and Trotskyites," Verbatim Report, Eng. trans., Moscow, 1938, p. 770.
[52] Code of Criminal Procedure, R.S.F.S.R., Art. 19.
[53] Case No. 25, 506, Sud. Prak., R.S.F.S.R., No. 14, 1931, p. 14.
[54] Sots. Zak., No. 1, 1939, p. 67.

logically fall under the terms of the exception permitted by the Code of Criminal Procedure but he thought it should, and urged revision of the Code.

Secret trials in which military, diplomatic or state secrets have been involved have been revealed on several occasions. The trial of Marshal Tukhachevsky and his associates in 1937 for negotiations with the German General Staff was held in secret. At the public trial of Bukharin and his co-defendants, one of them explained in his testimony that he had been tried a year earlier by the Military College of the Supreme Court in secret under the law of December 1, 1934, but that the College was unable to reach a conclusion as to his guilt or innocence.[55]

The law of December 1, 1934 to which Bukharin's co-defendant made reference was carried into the Code of Criminal Procedure as Articles 466-470. The Articles make no mention of secrecy, however.

Most of the trials of persons accused of plotting against the Soviet government at the time of the Bukharin trial were held in secret, perhaps on the ground that military, diplomatic or state secrets were involved.

Reflections on Dualism

The contrast offered by the approaches of the Special Boards in the Ministry of Internal Affairs and of the courts is marked. In the procedure of the Special Boards the common law lawyer will find nothing of the elements of "due process of law." In the procedure of the courts he will find an increasing conformity to many of the principles of due process. This conformity is evidenced not only by the constitution and the Code of Criminal Procedure. It is evidenced also by a considerable number of reported decisions of the Supreme Court of the R.S.F.S.R. and of the Supreme Court of the U.S.S.R. A dualism seems to exist in the attitude of Soviet leaders toward law. For the American the dualistic approach excites curiosity. Some even ask why the criminal courts exist at all.

At the outset certain principles must be considered in seeking an answer to the question. Soviet legal theorists accept no doctrine of natural law. The Soviet legal dualism cannot be explained, therefore, as a compromise with Divine wisdom or Reason. The Soviet jurists do not present the spectacle of obeisance to a higher law, which they fear or fail to understand, while protecting the leadership through the

[55] Report of the Court Proceedings in the case of the Anti-Soviet "Bloc of Rights and Trotskyites," Verbatim Report, Eng. trans., Moscow, 1938, p. 716.

functioning of administrative boards. Soviet jurists accuse others of such hypocrisy, but they deny any such hypocrisy themselves. They are prepared to admit that for them all "law is politics," as Lenin declared at the outset of the Russian revolution.[56] Their most recent definition of law continues this theme.[57] Both the administrative board and the court are conceived of as serving the same master, the state. Both are believed to have the same function.

Law is promulgated and enforced because it is believed to serve the purposes of the state. That which is not useful is discarded, and that which is useful is retained. In consequence, the condition of Soviet law is not happenstance, but the result of conscious choice on the part of the Soviet lawgivers. This being so, the question arises as to why Soviet leaders have chosen a system of enforcement which is dual in character. What does Soviet leadership find which seems to be advantageous in such a system?

It may be that Soviet leadership is thinking of two publics—that which is within the U.S.S.R. and that which is abroad. Soviet leaders have sometimes mentioned their interest in both publics. Lenin referred to the public abroad when he explained the purpose of the 1919 Program of the Communist Party of the Soviet Union. He declared, "Our program will provide powerful material for propaganda and agitation: it is a document which will lead the workers to say: 'Here are our comrades, our brothers, here our common cause is being accomplished.' "[58] Lenin's words indicate his concern with a foreign public and the desirability of appealing to its interests even when preparing a party program of primarily domestic concern.

Joseph Stalin has been equally mindful of the foreign public in sponsoring the draft which was adopted in 1936 as the Constitution of the U.S.S.R. In concluding his speech upon the Constitution, Stalin said, "It will be a document testifying to the fact that what has been realized in the U.S.S.R. is fully possible of realization in other countries also. But from this it follows that the international significance of the new constitution of the U.S.S.R. can hardly be exaggerated."[59]

[56] 14 LENIN, SOCHINENIYA, 3d ed., 212 (1927).

[57] "Law is a combination of the rules of behavior (norms), established or sanctioned by state authority, reflecting the will of the ruling class—rules of behavior, whose application is assured by the coercive power of the state for the purpose of protecting, strengthening and developing relationships and procedures suitable and beneficial to the ruling class." INSTITUTE OF LAW OF THE ACADEMY OF SCIENCES, U.S.S.R. TEORIYA GOSUDARSTVA I PRAVA (Theory of State and Law) 113 (1949).

[58] Lenin, "Closing Speech at the Eighth Party Congress," 8 SELECTED WORKS 46 (Moscow n.d.).

[59] STALIN, LENINISM, SELECTED WRITINGS, Eng. trans., 404-405 (1942).

The record makes clear that Soviet leadership is hoping to win friends not only within the U.S.S.R. for its system of government. Yet friends in Western Europe must be won among peoples who have long been nurtured on ideas of justice, as imperfect as it may have been in practice in some of the countries of the West. Winning of peoples with such a background requires the setting of an example which they can revere, and this example must manifest the fundamental principles of legality or due process of law.

A show window to bring customers into the store is clearly a consideration of Soviet socialists, but there is an even more serious consideration before Soviet leadership. It is the peoples of the U.S.S.R. themselves—the people who live within the borders.

The Russian heritage is such that these people have almost become used to authoritarian government to the point that they will accept it without protest. Yet the Russian people or groups within it have revolted before. There were the great peasant rebellions of the eighteenth century; the Decembrist uprising in 1825; the revolution of the workmen and liberals in 1905 and the successful revolution of 1917. The Russian people and those minorities associated with it, have been made docile by centuries of hardship and authoritarian government. This people has been removed from much of the current liberal thought in the west, yet it has not been without its revolutionary moments. No leadership can afford to ignore the stirrings among these people who hope for a happier life. Emergency government will be tolerated, probably longer than it would be in the United States, England or France, but there is a limit even among the Russians. There cannot be an emergency for centuries.

Stalin's brief criticism of the multiple sources of Soviet law, "And we need stability of laws now more than ever,"[60] has been used as the text for numerous articles in support of predictability in the law and concepts of due process. As one law professor wrote in explanation of the proposed new Criminal Code of the U.S.S.R., "Starting with the principle of stability of law, the draft rejected the rule of analogy and established the principle of 'no crime and punishment without a law.' "[61]

Soviet jurists have been pressing toward a system of law from which support for the Soviet system can be encouraged on the ground that the system is just. Adherence to the concept of legality can reduce the

[60] Id. at 402.

[61] Gertsenzon, "The Paths of Development of the Soviet Science of Criminal Law During the Past Thirty Years," Sov. Gos. i Pravo, No. 11, 73 at 81 (1947).

costs and difficulties of maintaining order because it makes friends and not enemies. The establishing of a pattern of legality and justice has value as an element of practical politics—preservation of power at minimum cost!

Yet any student of Soviet law would be negligent in his research and reasoning if he were to stop at this point and declare that he had found the answer to the puzzling question raised. He must explore further to ask whether the movement in the direction of legality is spurred by practical considerations alone. Can it be that Soviet leaders have other motives as well?

There is much pre-revolutionary and post-revolutionary literature which describes the good society toward which the Soviet leadership heads in terms of absence of compulsion in the form of police, courts and armies. Stalin's 1930 comments in his report to the 16th Party Congress set forth an indirect path to such an achievement by calling for a stronger state than the world had ever known so that a condition might be reached in which there would be no more compulsion.[62] In 1939 he repeated this concept to the 18th Party Congress, and offered the prospect of a communist society in which there would be no state power in society.[63]

Can it be that this Soviet leadership, steeped as it is in Marxist reasoning, really looks eventually for a future good society in which there is no compulsion because it has become unnecessary? Certainly such a society would have to be satisfied with its lot, or it would be unable to live by rules of intercourse for which there were no means of enforcement.

If the Soviet trend toward legality and due process of law can be explained as an appeal to potential friends abroad and at home, and as an aspect of practical politics, why are the Special Boards in the Ministry of Internal Affairs preserved?

All Soviet political literature, and the Marxist literature on which it is based, is phrased in the form of the polemic. It is the weapon to be used against the enemy, who may turn the spokesman out of power. Engels documented the theory that every revolution has to face efforts to restore the old order it has ousted. He went back to Ancient Greece and Rome and the Bourbon restoration in France to support his thesis.[64]

[62] STALIN, "Political Report of the Central Committee to the 16th Congress of the C.P.S.U.," 2 LENINISM, Eng. trans., 342 (1933).

[63] STALIN, LENINISM, SELECTED WRITINGS 474 (1942).

[64] ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE, Eng. trans. (1942).

Lenin repeated the warning in his State and Revolution. It has become a keystone of Soviet thought. The enemy is believed to be lurking always at hand, and he is believed to be powerful.

An indication of relaxation in ferocity against enemies has appeared on some occasions. Stalin spoke out in 1936 against those who feared to broaden the franchise to include people who were believed to favor the Tsarist system. "Has not the time arrived for us to revise this law? I think the time has arrived. It is said that this is dangerous, as elements hostile to the Soviet government, some of the former White Guards, kulaks, priests, etc., may worm their way into the supreme governing bodies of the country. But what is there to be afraid of? If you are afraid of the wolves, keep out of the woods."[65]

Shortly after this plea for tolerance there followed the trials of those who had opposed Stalin's program and who were accused not only of opposition but attempts to kill him and his colleagues. The nation was on the eve of a war with Hitler. The situation was tense, and the measures taken for protection were severe. Soon afterward the war began, and Moscow came close to falling. The State Committee for Defense ordered the shooting of spies on sight without even a drum head trial.[66]

Post war conditions gave promise of a relaxation of severity in law. The death sentence was abolished as no longer necessary under conditions of peace time.[67] Yet it has since been restored for the most serious crimes endangering the state.[68] The Special Boards have continued to function in the Ministry of Internal Affairs. A competent observer in Moscow has reported that the Soviet leadership appears to be frightened of the intentions of the United States.

In the light of the circumstances indicated, the retention of the dual approach to legality appears to be rooted in continuing fear for the future on one hand, and on the other in the practical problem of winning support by good government. The approach has been used before in history. It is the combination of the preservation of bastions against attack while developing a base of a new good society. The two approaches may seem at first glance to be opposite in character, but they could be designed to further a single policy. It may be that Soviet leadership conceives of them as related in this manner.

[65] STALIN, LENINISM, SELECTED WRITINGS 403 (1942).
[66] Order of October 19, 1941, Izvestiya, No. 249 (7625), p. 1.
[67] Decree of May 29, 1947, Ved. Verkh. Sov. SSSR, No. 17 (471), May 31, 1947.
[68] Decree of January 12, 1950, id., No. 3 (618), January 20, 1950.