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Roscoe Pound
Harvard Law School

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SOVIET CIVIL LAW: A REVIEW*

Roscoe Pound†

HERE is an excellent and much needed book. Although the enthusiastic wishful thinking about things Russian, fashionable not so long ago, has for the most part abated, the rise of a new social and economic order on a great scale must call for careful study by lawyers and law-makers no less than by historians and economists and students of politics. Now that a generation has been at work constructively since the destructive era of militant communism after the revolution, we need accurate and objectively presented and interpreted information as to how the administration of justice goes on under "the dictatorship of the proletariat," whether or how far it shows what have been the characteristics of all rule by dictators, how the new problems created by the new order have been or are being met, how far what experience has shown to be the reasonable expectations incident to life in a civilized society are being met, and how extreme of bureaucratic adjustment of relations and ordering of conduct operates with respect to those expectations. One need not lay himself open to a charge of answering these questions in the way he puts them by speaking of "rights." At any rate, as Llewellyn has so well shown, any organization of mankind which fails to achieve an adjustment taking reasonable care of them sooner or later dissolves. These are the questions to which Dr. Gsovski's book is addressed, and he treats them understandingly, accurately, and with moderation, not with a brief for or against the Soviet legal order but as a thoughtful student of comparative law. In his own words, his method has been to "inquire into the legal protection and actual exercise of private rights in the Soviet Union, on the basis of an examination of the authentic soviet sources."[1]

A recent reviewer[2] complains that Dr. Gsovski neglects the new techniques developed under the soviets to secure efficiency in an order based on public ownership and a planned economy and speaks of a

* SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME. By *Vladimir Gsovski*. Two volumes. Vol. I: Comparative Survey, xxxvii, 909; Vol. II: Translation, xx, 907. Ann Arbor: University of Michigan Law School. 1948, 1949. $15.

† University Professor Emeritus, Harvard; formerly Dean of the Harvard Law School; Visiting Professor of Law, University of California at Los Angeles.—Ed.

[1] Vol. I, xiv.

[2] Rashba in 63 HARV. L. REV. 921 (1950).

"novel two-faced system, involving concepts which we have not learned about in law schools."[3] But the so-called new techniques are largely distortions of techniques frequently going back to the beginnings of law and long outgrown. For the rest the technique is chiefly one of ruthless penal treatment by an administrative type of criminal law enforcement and arbitrary determination, typically without appeal, by bureau officials. One need not doubt that the simple, inexpensive procedure of arbitrators with mixed characteristics of courts and administrative agencies has, as the reviewer tells us, disposed of 65 per cent of the hundreds of thousands of cases that have arisen in less than fifteen days and more than 25 per cent in less than a month.[4] The method of these arbitrators, whose decisions are final, no appeal being permitted, but only an *ex officio* review if the arbitrator in chief or administrative agency to which the trial arbitrator is attached chooses at his own initiative to make it,[5] is nothing novel in administrative law. It has called for legislation with us and to setting up of judicial administrative reviewing tribunals elsewhere in the world. It is not a new legal device invented in Russia, although carried there to an extreme. Nor are the "new forms of documents with new legal characteristics"[6] which have had to be devised to meet the requirements of banking, where substantial payments of cash are prohibited, anything more than a type of device for doing what in experience must be done but is not allowed to be done according to law which the soviet polity has continually been calling for.

I can vouch with assurance for the accuracy of Dr. Gsovski's statements, the moderation and soundness of his conclusions, and the fairness with which he lets facts speak for themselves. When, in 1946, I was appointed Adviser to the Minister of Justice of the Republic of China, it was suggested to me that I ought to make a study of soviet law where it was supposed there must be much worth taking into account in the task of restoring the administration of justice after eight years of enemy occupation. I was prepared to find much suggestive for the law of today in fresh handling of old principles in new forms, in development of new techniques and in working out of new principles and development of new doctrines. I have gone over, in reading Dr. Gsovski's book, some hundred pages of notes I then made. What I found is what Dr. Gsovski found and sets forth and the reviewer in

[3] Id. at 923.
[4] Ibid.
[5] See 1 Gsovski, 873 with cited references. Hereafter page references are to volume I.
[6] 63 HARV. L. REV. 921 at 924 (1950).

the *Harvard Law Review* reproaches him for finding: "A system . . . inconsistent and self-contradictory," a "monster rather than a new species."[7] The words are the reviewer's. But they describe what the data Dr. Gsovski furnishes amply come to. The difficulty seems to be what Krylenko pointed out with respect to one abandoned soviet experiment: To carry out many of the soviet plans "it would be necessary to remake human nature." There is a deep-seated human unwillingness to subject one will to the arbitrary will of another. This is abundantly testified to by the drastic extreme penalties, constantly resorted to, by which the working of the soviet polity has to be assured.

No doubt allowance must be made for want of traditional background and inevitable experimental trial and error in working out a legal system for a regime of complete state ownership and officially planned and administered economy. Nevertheless, as one studies soviet law as it has developed there seems to stand out something deeper and more significant to account for its inconsistencies, confusion, and frequent crudities. A conception of individuals in a modern civilized society as "soldiers on a production front, subject to admonition and order,"[8] with duties but not rights, expected to obey blindly, and to leave initiative to official superiors, is so at conflict with deep-seated human urges that all attempts to work out its requirements for adjusting relations and ordering conduct into a legal system continually encounter obstacles in human nature calling for compromises and evasions, and coverings up of withdrawal from declared principles. Liberty is at a discount in so-called advanced thinking of the time. But the human demand for self assertion is an obstinate fact which a legal system cannot ignore.

Dr. Gsovski shows a grasp of Anglo-American law unusual in jurists of Continental training. This along with his clear understanding of Continental civil law and juristic theory makes his translation accurate and so exceptionally useful. For example, he understands when to translate *Recht* as "law" and not as "right" and to distinguish "law," "laws," and "a law."[9] Also he sees that soviet analytical theory comes from German Pandectists and *Allgemeine Rechtslehre* and not from England.[10] But he knows Austin.

Volume I, Comparative Survey, which must be chiefly considered, is followed in Volume II by a body of translations of codes, statutes, decrees, edicts, resolutions of the Council of Ministers, instructions pro-

[7] Id. at 923.
[8] Ibid.
[9] P. 179 and note 78, pp. 179-180.
[10] Ibid. 180.

mulgated by ministries, standard rules, standard charters, and standard agreements and contracts, with commentary and a full bibliography. Thus the soviet legal materials are left to speak for themselves. There is nothing propagandist in Dr. Gsovski's method.

In the general survey there are two excellent chapters on the political, economic, and legal development down to 1936 followed by a chapter on the present economic order and one on the present soviet order. They are a prelude to the chapter on the soviet theory of private law, and the role of the judiciary, which lead to chapters on special topics: Three on rights under soviet law, one on legal entities, two on contracts, two on torts and theory of liability, one on property, one on inheritance, four on agrarian legislation and the collective farm, and two on courts and civil procedure. From this general survey we can see how the "dictatorship of the proletariat" has developed the characteristics of all rule by dictatorship. Achievement of a social democracy through dictatorship of the proletariat has proved to mean giving up of individual liberty, local self-government, and majority rule. There was to be a classless society. But an official bureau and military caste has grown up, "resurrecting even the insignia of the Tsar." A revolution which was to deliver labor, industrial and agricultural, from exploitation has resulted in a system of forced service, arbitrarily fixed and penally enforced wages, compulsory attainment of planned production, maintained by administrative criminal law with no effective appeal. "Imposition of heavy penalties by nonjudicial bodies is a part of the soviet penal system."[11] Indeed a system of secret statutes, officially withheld from publication, held over from the imperial regime, and "recent practices give ample examples of withholding important statutes from printing in the official law gazettes."[12] We can see the extreme of bureaucratic administration of justice in action. Thus the Ministry of the Interior has jurisdiction of a category of criminal cases with no review by the supreme court.[13] A number of categories of civil disputes are withdrawn from the jurisdiction of the courts and assigned to administrative authorities, e.g., assignment and withdrawal of use of land, expulsion from a collective farm, eviction from certain kinds of houses, and application of disciplinary codes.[14] Certain crimes committed by civilians, such as treason, espionage, subversive activities, are, under normal peace time conditions tried by the military tribunals. Dis-

[11] P. 236.
[12] P. 229.
[13] P. 836.
[14] P. 837.

putes between government owned enterprises are disposed of by official trial arbitrators from whose decision there is no appeal. We can see likewise the extreme of government control in action. If an invention is deemed of special importance to the state, the Council of Ministers may decree a mandatory transfer giving exclusive right to the government with remuneration according to a schedule. As Dr. Gsovski puts it, "unselfish surrender of his interests to the benefit of the State is expected from a soviet inventor."[15] The writer is no better off than the inventor. Indeed he is worse off. He must not even write except in the political interest of officialdom. "Our literature," says a commentator upon a resolution of the Central Committee of the Communist Party in 1946, "is not a private enterprise designed to serve various tastes of the market. . . . We demand that our comrades, who are the leaders of literature, . . . be guided by something without which the soviet regime cannot exist, that is, politics. . . ."[16] The government machine tractor stations, which own all important agricultural machinery, tractors, combination reapers, threshing machines, and supervise their operation in the collective farms, were set up and are maintained as an instrument of party control. They have special political sections and later had special political assistant directors. Sound political thinking is held no less important in the collective farm than efficient production.[17]

What is the idea of law under such a regime? Vishinsky said in 1935 that there might be discrepancies and collisions between the commands of laws and the demands of the proletarian revolution. They must, he said, "be solved by the subordination of the formal commands of law to those of party policy."[18] He defined law thus: "Law is a general body of such rules of conduct, expressing the will of the ruling class as are established by legislation, and of such customs and rules of community life as are sanctioned by the government power, the application of which body of rules is secured by the coercive force of the State for the protection, consolidation, and development of the social relations and the public order, beneficial and desirable for the ruling class."[19] The civil law text book of 1944, issued by two law institutes, one attached to the ministry of justice and the other to the Russian Academy of Sciences, simplifies it thus: "Law is a body of rules of

[15] P. 603.
[16] Pp. 616-617.
[17] Pp. 751, 758-759.
[18] P. 163.
[19] P. 176.

human conduct established or sanctioned by the government power, the execution of which rules is secured by the coercive power of the State."[20] This extreme analytical doctrine is what one would expect in an absolutist state. It goes on to express dissatisfaction with the term "civil law" and object to the term "private law" saying that in a capitalist society civil law protects private rights and allows a certain amount of freedom and autonomy to the individual in contrast to administrative law, criminal law, and other branches of public law "in which mandatory rules of law are predominant."[21] In this connection it should be borne in mind what or who is the state. "Comrade Stalin," says a textbook of administrative law in 1945, "teaches that the Communist Party directs the government machinery. The Communist Party through its members working in the government agencies guides their work and directs their activities."[22] Accordingly, writers have not hestitated to lay down that resolutions of the central committee of the party may be "both party directives and soviet law."[23] What law really amounts to in such a regime is shown by the caliber of the judges who administer it. We are told that of about one hundred members of the supreme court of the Union of Soviet Socialist Republics in 1946 there was not one lawyer of prominence.[24]

As one might expect in such a polity, a notable feature is the complete lack of any separation of powers and repudiation of checks and balances of any sort. The form of the law is thoroughly confused. All the highest governmental bodies, the Supreme Soviet, its Presidium, and the Council of Ministers, proceed on what seems an equal basis upon all current administrative and legislative problems, including constitutional amendments. "The more recent act is enforced, even in preference to one issued earlier by an authority which, under the Constitution, controls the authority enacting such later act."[25] Hence it is often difficult in the confused and often conflicting source material to say with assurance what the law is. What holds the system together is the directing power of the Communist party. Its Central Committee has passed resolutions amounting to direct orders addressed to governmental bodies. Also it addresses resolutions to individual government departments and government enterprises, and such resolutions may repeal otherwise binding rules, and have not been pronounced illegal by

[20] Ibid.
[21] P. 201.
[22] P. 77.
[23] P. 214.
[24] P. 269.
[25] P. 75.

soviet writers. This explains how the system may work. The decisions are made at the real top of the scale no matter to what agency of government they are directed or in what capacity they are directed. The governing authority of the party is not bound by any law, but it can tell the law makers and law administrators what to enact and what to apply.[26] Even so, it happens only a few principles of a general nature can be established assuredly. Soviet writers tell us that the law about regulations as to rent and space allowed to a tenant of one holding by building tenancy is to be found in "hundreds of still effective decrees, orders of government departments, directives, and interpretations by local authorities, which were issued over a period of more than ten years and are not in accord with one another," so that when one appearing applicable is found, the main difficulty begins, namely, whether it is still in force and whether it has been amended.[27] Nor is it easy to say what is the effect of judicial decisions as determining the law under the soviet system. According to the Text Book of 1944 only principles continuously applied by the courts or announced in "instructive rulings," i.e., directives to the lower courts, passed by a plenary session of the Supreme Court of the Union, are to be regarded as sources (i.e., forms) of law.[28]

One significant feature, however, stands out, namely, the persistence and resurgence of certain universal juristic ideas. Thus fault as the basis of liability ultimately held its ground despite attempts to visit loss upon an involuntary good Samaritan or on the basis of comparative need.[29] Also an action for reparation of injuries done by one collective farmer to another came to be allowed.[30] In summing up the soviet law of torts Dr. Gsovski says truly: "It seems that particular protection of the State but not of the poor, and a restricted method of computation of damages in instances of bodily injury, are the only striking features of the soviet law of torts in actual operation. But these features make the soviet law less beneficial than the capitalist law for the person injured."[31]

Likewise, after much experimentation to reject the Continental civil law doctrine of dividing the loss in case of what, at common law, we call contributory negligence, soviet law had to come back to the rule of the modern Roman law, which seems to have been proved by experience since the classical Roman jurists, a rule, it is interesting to note,

[26] Pp. 76-79.
[27] P. 459.
[28] P. 268.
[29] Pp. 494, 499.
[30] P. 534.
[31] P. 554.

not unlike one to which we seem to be coming by legislation both in the United States and in Canada.[32] Again, after confident attempts to reject the law of inheritance the soviet law has had to come back to much of it as it had established itself as general law throughout the civilized world. The tenacity of inheritance as a legal institution suggests also that a right of succession is something deeply rooted in the human mind. It has withstood the challenge in the original provisions of soviet law, it has withstood the teachings of soviet legislators and jurists, who expected the legal order to get along without it, and has increasingly grown to the pattern of the general law.[33] The same phenomenon is to be seen in the law of property where it might have been least expected. The abolition of private ownership of land "made it necessary to create substitutes for it in the form of building tenancy and toil tenure."[34] Dr. Gsovski's conclusion as to the effect of recent changes is amply justified and is worth quoting: ". . . many old values have been rediscovered and certain old legal institutions restored. . . . No legal restriction is imposed upon private ownership of properties serving immediate needs and personal comforts. Certain security granted in respect to the tenure of houses and land, affords some substitute for ownership. The profit motive is recognized as a legitimate incentive to the business efficiency of an individual, provided his activities fit the economic framework designed by the government. Inequality in remuneration according to personal contribution is the cornerstone of the economic system, and economic inequality resulting from it is not considered unjust. Inequality in social standing and the beginning of the formation of caste-like groups is also in evidence."[35] Thus soviet law has in a generation moved significantly back from its extreme beginnings.

Some examples of the effect of persistent pressure of individual instinctive claims may be noted in this connection. Under a number of acts of 1945 and 1946 members of the Academy of Sciences may be assigned lots for building suburban cottages, and generals, admirals, and senior officers, retired after twenty-five years of service, and technical personnel of certain factories may be assigned lots for building houses which will be privately owned by them.[36] Again, originally in soviet law, distribution in intestate succession was *per capita*. But the legislation of 1935 establishes distribution *per stirpes* as to descend-

[32] Pp. 519-522.
[33] Pp. 655, 656.
[34] Pp. 556, 577.
[35] P. 149.
[36] P. 587.

ants.[37] Here once more we see how ideas which have developed in the history of law and have become universal come back into the law in Russia after a generation. These ideas seem to respond to reasonable expectations of life in civilized society and to illustrate Kohler's doctrine of jural postulates of civilization. For another example, when in 1929 the government set out to eliminate the independent farmer, what was called toil tenure for millions of peasants came to an end and tenure by the collective farm developed. But the collective farms did not fulfill the government's expectations. The collective farms were either inefficient and had no surpluses to be requisitioned or were not willing to give them up. Or surpluses were stored under pretext of permitted reserves. Stalin complained that psychologically the farmers remained private owners. There was no incentive for the farmer on the collective farm to work. The result was famine in 1932-1933. New penalties were resorted to. But the collective farms had to be reorganized to stimulate the personal interest of the farmer and yet tie his personal welfare to the collective farm. The present law of collective farms grew out of this situation.[38] It is another example of how continually the communist regime has failed because of giving no incentive to the individual productive energy which the economy of a large population demands. One of the three forms of collective farms, called *artel* became the official standard. Originally the income was divided *per capita* regardless of the contributions of the members in labor and goods. Later when a model charter was provided for the *artel* a section prescribed that "the remuneration for the labor of the members of the commune shall be made in proportion to the quantity and quality of labor spent and work done in the communal economy by a member." The commune was finally abandoned in 1930 when the *artel* became the official type. Thus here too there had to be a movement away from pure communism.[39] But the soviet textbook of 1935 on the law of collective farms recognizes that the scheme has not worked smoothly and recites a long and suggestive list of failures. Also the preambles to laws dealing with the subject point out continual departures on a large scale.[40]

Need of compromise with announced principles, of abandoning attempts at radical rejection of universal doctrines, and of constant changes and amendments to conform to pressure of obstinate human urges has led to much that may well be called window dressing in soviet

[37] Pp. 637, 638.
[38] Pp. 717-719.
[39] Pp. 719, 723, 741-742.
[40] Pp.724-725.

legal and juristic writing. A few examples will suffice. Much in soviet legal procedure that seems novel to the Anglo-American lawyer is staple in the doctrine and procedure of the continental civil law. Very little creative ingenuity has been shown in taking it over. Mostly there is a not too ingenious sophistical endeavor to show that the doctrines and procedures adopted from continental law have been somehow socialized. Often it has been put to new uses but remains essentially the same. Often there is merely boastful terminology, as, for instance, in the constant use of "interests of the toiling masses" to mean interests of the bureaucracy which have to be upheld at the expense of farmers and industrial laborers by extreme penal treatment summarily administered without appeal. Again, in the textbook of 1944 a distinction is made between the soviet state as the owner of all economic resources, including those managed by governmental legal entities, and the treasury (fisc, in Russian *Kazna*). In continental law, adopted from Roman law, the term "treasury" (fisc) is applied to the state when acting not as sovereign but as holder of rights and of obligations. Accordingly, diverse governmental commercial enterprises would belong in this category. But according to the textbook soviet governmental legal entities engaged in business are not a part of the soviet treasury although they would be in capitalist countries. It is clear enough that the highly artificial use of the legal conception "fisc" (treasury) was intended to give a theoretical foundation for soviet refusal to be bound by transactions of its export-import organizations. There is a typical case of juristic window dressing in the use of the term "contract" in soviet law. In its widest sense contract is used for legal transaction, a declaration of intention to bring about a possible and permissible result to which the law, recognizing the intention, gives the effect of requiring the intended result. The soviet regime carries what Josserand called "contractual dirigism" to the extreme. With free private enterprise excluded, there is room only for hazy and artificial legal constructions purporting to bring the complex relations among government agencies under the idea of contract. Thus officially initiated and planned activities to which individuals are constrained by force get the good will of the term, "contract." In the same spirit, the constitution (section 4) announces that "private ownership of the instruments and means of production is abolished." It then in section 10 proceeds to announce protection of "personal ownership" by the citizen. As Dr. Gsovski says, the new term "personal ownership," used in the constitu-

tion, has made a problem for the Soviet jurists.[41] In truth it is another bit of window dressing to hide survival or restoration of secured interests of substance in contravention of the sweeping declaration that they are abolished.

A distinction between the means of production and "consumers' goods" is now made by soviet jurists as giving a guiding principle for the soviet law of property. They now recognize ownership as a permanent institution of human society. They say, however, that in socialist society there is no "capitalist private ownership." There is "socialist ownership" of the instruments and means of production and "personal ownership" of consumers' goods. This "personal ownership," they assert, is something wholly different from private ownership in a capitalist polity.[42] But the distinction they profess to make is not carried out consistently and is simply window dressing. The term "consumers' goods" by no means covers all the objects which individuals are allowed to own. "Auxiliary household economy" and a dwelling house can be called "consumers' goods" only in a very stretched sense. "Earned income and savings" are as much means of production as "consumers' goods," and this category is made to cover winnings from government lotteries, and bonds with prizes, interest on money deposited in government banks, Stalin's prizes, royalties of authors, and remunerations of inventors. All these kinds of income are protected by soviet law. Moreover the division of objects into instruments of production and objects of consumption does not provide for things used in the performance of services such as means of shipping and of conveyance. These are neither means of production nor articles of consumption. Also a peasant household in a collective farm may hold "in personal ownership" a dwelling house, a house and garden plot, and "such livestock, other than draught animals, poultry, and minor agricultural implements, as are compatible with the charter of the collective farm."[43] Limitations on the *jus utendi* of an owner have been steadily increasing throughout the capitalist world but have not been taken to require setting up of a new category of ownership. As Dr. Gsovski says truly, the theory of ownership in consumers' goods and consequent category of "personal ownership" are "more a slogan of economic policy than an operative legal principle. The limitations imposed upon one or another type of ownership open to the soviet citizen are not governed by

[41] P. 565.
[42] Pp. 567-568.
[43] Pp. 567-569, 571-572.

this principle."[44] Likewise as to the powers characteristic of different types of soviet ownership, "the soviet jurists simply evade calling a spade a spade. They prefer to call limited powers, powers with a limited content."[45]

Another example of window dressing may be seen in the doctrine of "property not part of the estate" so as to escape the limitations on testamentary disposition. It was provided that government loans deposited in government banks, and savings accounts, were exempt from the limitations upon inheritance. This included insurance premiums, a number of kinds of government loans, stocks and bonds and other deposits in government banks. They are pronounced not part of the estate. The owner may dispose of such assets freely, not by a will but by a written assignment addressed to the bank indicating the person to whom the deposit shall be paid after death of the depositor.[46] A generation ago the soviet regime began by abolition or confiscation of all accumulated private wealth. Today legal theory allows unlimited accumulation of private wealth if deposited in certain government banks.[47] Indeed the same sort of window dressing may be seen in recent new "interpretations" showing a changed attitude toward inheritance.

Yet another example may be seen in the organization of the collective farm. The charter gives the appearance of organization on a democratic basis. The chairman is supposed to be elected by the general meeting of the members, which is called "the supreme authority in the management of the *artel*." But in fact the chairman, as director and chief executive, is the manager and is by no means actually freely chosen by the members. We are told in the 1940 text book that where no *suitable* chairman can be elected from among the members the district authorities send in candidates from the outside. Also it tells us that in one farm, after two chairmen of its own choice at the beginning, all successors were invariably sent in by the district authorities. Administrative control of these farms stands out clearly. It is admitted that local administrators go beyond the powers granted them by law. The collective farms are supposed to function freely. But they are also supposed to exercise their freedom in following the plans of the government. The organization and management of a collective farm set forth in the standard charter is an ideal scheme only.[48]

[44] P. 572.
[45] P. 575.
[46] P. 632.
[47] P. 633.
[48] P. 759.

A striking example may be seen in the law as to wages. In order to attain the minimum pay provided for in the schedule a worker must maintain the standard output. Under the labor code the standards of output for each job are to be established by agreement between the administration of the agency managing the job and the trade union. Actually new standards of output and new rates are approved by the directors of individual plants upon the recommendation of the heads of the shops and are immediately put in effect. In some instances standards of output and rates are directly enacted by the council of ministers which has legislative authority. Thus the trade unions, though controlled by the government and the communist party, have nothing to say in fixing the chief element in determining wages. The resumption of collective agreements, announced in 1949, does not alter the fact that the decisive voice in fixing standards of output is still in the top government agencies.[49]

Finally, although the Judiciary Act of 1938 provides for direct election of people's judges and assessors (associate judges) by the constituency of the district, no such elections at last accounts had been had. Election is done by the local soviets.[50]

Indeed a certain juristic naïveté seems characteristic of soviet law writers. This has been evident in the attempt to find a new method of interpretation in the writings of Marx and Lenin and discussions of the place of custom in sources of law,[51] in what Dr. Gsovski justly calls "highly spurious constructions," and in the attempts to get away from the definition of sale in the Civil Code to make it apply to bookkeeping transactions.[52] Not infrequently the thinking is confused, as, for example, on the question of loss of profits as a measure of damages, where, to use Dr. Gsovski's words, soviet legal thought in the 1949 textbook "was hopelessly lost."[53] Often there are downright crudities, as in application of code rules manifestly made to govern in torts to damages due to nonperformance of an obligation,[54] and resort to slogans rather than economic realities.[55] Opportunities for juristic creative skill in connection with appeals and "reopenings" have not been improved.[56] Soviet juristic ingenuity has not been manifest in law. Such ingenuity as is manifest has been displayed rather in setting up administrative

[49] Pp. 812-813.
[50] Pp. 836-839.
[51] Pp. 218-224; 230-232.
[52] Pp. 452-454.
[53] P. 444.
[54] Pp. 510, 511, 513.
[55] Pp. 454; 724.
[56] This appears notably in chapter 24, Appeals and Reopenings.

and bureau hierarchies. It must be added, however, that in studying recent soviet juristic writing I got a feeling, which is confirmed by Dr. Gsovski, that one writer, the late Professor Agarkov, showed distinct power of developing systematic doctrine on the basis of soviet legal materials and a sound and wide acquaintance with general juristic literature. Yet on the whole there is much to suggest that a regime of official initiative and official planned and coerced individual activity does not conduce to bringing forth jurists.

Despite protestations to the contrary, much has been borrowed from the general law of continental Europe and not a little from the prerevolutionary imperial law. The soviet conception of law has been taken from the nineteenth century analytical jurists.[57] Section 1 of the Civil Code derives from Saleilles (1904), Gustav Schwarz (1908), and Duguit (1911).[58] Section 406 is borrowed from a section in the draft German Code (1887), a section omitted, however, in the final draft (1896).[59] The model of civil procedure is the general continental civil procedure, the difference being not in the procedure itself but in the position of the soviet court and the principles of administering justice.[60] Also the general course of proceeding as to evidence is that of civil law countries.[61] The model of codes since the German Code which took effect in 1900 is followed by "enacting-laws" *(Einführungsgesetze)* in the Soviet Codes. But in these borrowings there have often been very crude endeavors to dispense with what universal experience had shown as to how to adjust relations in civilized society. These have required successive modifications and there has often been gradual return to what had been developed by reason from experience from the classical Roman Law to the nineteenth century. As to the bill of rights, (Civil Code, Section 5) which follows the well known lines of modern constitutions, it is enough to say that it can be abrogated as to any provision by the government at any time.[62]

Parallel to the hierarchy of courts there is a hierarchy of government attorneys. The federal attorney general, independent of the Ministry of Justice, is elected by the Supreme Soviet for seven years. He appoints the attorneys for the republics, regions, and provinces, and approves appointments of district attorneys. He has "supreme supervisory power over the strict execution of the laws by all Ministries and their agen-

[57] Chapter 5.
[58] P. 319.
[59] P. 526.
[60] Pp. 855-856.
[61] P. 862.
[62] Pp. 344-356.

cies, all public officials, and citizens."[63] The local government attorneys are independent of local authorities, and subordinate only to the attorney general of the Soviet Union. Thus the government attorneys are a centralized machinery for supervising the details of law enforcement. The power goes from top to bottom. Approval of a government attorney, for example, is a sufficient warrant for arrest.[64] Government attorneys have what is called a supervisory power over the administration of justice. They not only serve as public prosecutors but they may intervene in any civil suit at any time. They can take appeals on their own motion and may proceed *ex officio* for reopening of a case in which a court has rendered a final decision. Every appellate court must hear the opinion of a competent government attorney before rendering a decision on appeal. They have much more than the powers of prosecutors. They have statutory authority to supervise activities of the Ministry of the Interior which the judges do not have. The government attorneys also have what is called general supervisory power by virtue of which they watch administration, particularly administration by local authorities, to see to it that it is carried on according to law. They may take part in the deliberations of local Soviets, though they cannot vote. They may examine any resolution of local authorities and may protest against resolutions of the local Soviets of their districts, if they consider them contrary to law. Such protests are filed with the next higher authority.[65] The government attorney with supervisory power is a reverting to provincial attorneys, an institution of absolutist imperial Russia. At the beginning of the Soviet regime they were abolished along with the pre-revolutionary courts. They were provided for in 1927, a federal attorney general was provided for in 1933 and given power of supervision over government attorneys, and in 1936 they were organized as a federal hierarchy.[66] The development of this highly centralized bureaucratic machinery of insuring observance of law as the will of the ruling power, is one of many phenomena suggesting that Russia is the old absolute Russia under new masters.

Soviet rejection of experience and seeking to strike out new paths failed, as in so many other cases, in attempting the oft-repeated experiment of eliminating professional agents for litigation and advocates. At the outset in 1918 a special body of legal representatives, both prosecutors and defenders, were put on a monthly salary, fees to be paid by

[63] P. 846.
[64] Ibid.
[65] Pp. 847, 849.
[66] Pp. 849-850.

the parties to the state treasury. This attempt to put all litigants on complete equality by providing a salaried advocate for each had to be given up. As it turned out an accused would not only fee his own assigned advocate to do his best but as well the prosecutor's advocate to do as little as he could. It became necessary to dismiss the whole panel. In 1920 another experiment was tried. The court in its discretion was allowed to permit counsel, and in that case to draft counsel from a list drawn up by the local Soviet. Counsel for the defense was paid a *per diem* from the treasury. In civil cases the parties could be represented by next of kin.[67] A movement toward a profession of lawyers has gone on. The government has not gone so far as to allow a free self governing profession nor lost its distrust of fixing of lawyer's fees by agreement between lawyer and client. But in one form or another much of this has come in. There has been fluctuation. At one time it was allowable for a client to select a lawyer and agree upon a fee, at another this was restricted. The organizations of lawyers (called by the Roman-law term for associations—*collegia*) were sometimes given more and sometimes less independence. Lawyers were required to practice collectively in groups as legal-aid offices or allowed to practice individually. In the *collegia* the fees collected were at one time pooled and at another apportioned with reference to the personal effort and qualifications of individual lawyers. The title "advocate" was restored in 1939. But under the statute of that year the status of the lawyer is still not entirely systematized. The practice of law is regulated in a way that suggests a free profession. A committee elected by what we may call members of the profession admits graduates of law schools and persons of judicial experience to membership in the *collegium* of advocates. But the Federal Minister of Justice and the Ministers of Justice of the republics may veto or overrule admission. *Collegia* of advocates are established in the regions and republics. The statute defines them as voluntary associations of persons engaged in exercise of the legal profession. Other persons, however, may practice by special license from the Minister of Justice. Instead of being paid salaries by the government, advocates receive fees from their clients according to a schedule made by the Minister of Justice. They are not eligible to any position with the government except as teachers or officials chosen by election. This is one side. But the bulk of what is done by lawyers falls to specially organized legal aid offices.

[67] P. 853.

These operate under the supervision of an advocate appointed as Director by a committee of what we may call the bar. The Director distributes cases among the members of the bureaus and determines the fees according to the Minister's schedule. A member of a *collegium* is subject to discipline as a laborer. He must appear at the office at certain times and sign in.[68]

A characteristic feature of the soviet polity which deserves special mention is growth of *ex officio* administrative reopening of cases after final judgment in the court. In substance it comes to be the real appellate proceeding to which the appeal is only a preliminary. As Dr. Gsovski puts it: "The appellate procedure begins in an open session with the participation of the litigants, but it may then go on indefinitely behind closed doors as a purely internal concern of the government attorneys and courts."[69] Thus civil procedure becomes administrative, not judicial.

Communists have had a great deal to say about capitalist exploitation of the workers for the benefit of the bourgeois. But by the same token and with much more truth we may speak of soviet exploitation of farmers and laborers for the benefit of an official and military class. The soviet polity is proclaimed to be a regime of control by the toilers. It is actually one of control *of* the toilers by an office-holding class.[70] As to exploitation of labor, managers are liable to prosecution for failure to discharge workers for violations of labor discipline.[71] Workers are subject to disciplinary penalties for tardiness and loafing on the job, to criminal prosecution for absenteeism and to deductions from wages for negligent damage to or loss of government property. There has been continual increase in the penalties for absenteeism, tardiness and breaches of labor discipline. Freezing in the job and compulsory transfer of employees were introduced in 1940 and seem to have become permanent features of the soviet labor polity.[72] What we should think trivial infractions of discipline entail the most serious consequences administratively imposed with no possibility of appeal.[73] Collective bargaining as to wages has been given up and government control substituted.[74] Employment may be by administrative order and failure to take it is treated as criminal absenteeism entailing drastic penalties.[75]

[68] Pp. 853-855.
[69] P. 908.
[70] That such a class has been growing up, see pp. 141-144, 744-745.
[71] P. 99.
[72] Ibid., pp. 828-829.
[73] Pp. 802, 816, 819.
[74] Pp. 806-814.
[75] P. 800.

In some branches the management has special disciplinary power and the worker has no recourse to courts or conciliation boards but has only appeal to the administrative superior of the manager.[76] If the worker's product does not satisfy the requirements laid down for it, his wages are reduced according to a rate fixed by the management.[77] If the employee causes damages to the employer, and the ultimate and real employer is the government, the employee is subject to heavy liability both in damages and penal, with no more protection for him than an "objection" which may take the matter to superior management.[78] Soviet labor law is mostly criminal law. A strike would be the serious crime of "absenteeism."

As to exploitation of farmers, urban industry is considered to set the pace for farming. Soviet farms are to be "grain and meat factories."[79] Penal legislation has made possible administrative imposition of very severe penalties. Help by those not of the collective farm is permitted only "when urgent operations cannot be performed in time by the members working at full speed."[80] The farmer is as firmly held to the collective farm as the medieval cottager to the lord's estate. To leave the farm or be transferred to another he must obtain consent of the governing authority of the farm and also of the local administrative authority, the head of the district land office. He must stay on the collective farm or lose everything and while there must work up to a required standard, in fixing which he has no effective voice. He is subjected to what is very like involuntary servitude with the alternative of starvation. One of the staple penalties for infraction of collective-farm discipline is expulsion from the farm. Soviet writers admit that such expulsion is a practical condemnation to starvation.[81] Expulsion may not be contested in court. Complaints as to expulsion are decided by administrative authorities whose ruthlessness is spoken of by Soviet writers themselves.[82] I repeat, this book has value and timeliness not only for lawyers and teachers and students of comparative law but for the public generally. It is clearly written and may be understood by the intelligent layman. It may well be read and pondered by all who are or should be thinking about a polity now urged aggressively throughout the world, which makes confident pretenses not borne out by what it really is and does.

[76] P. 805.
[77] P. 815.
[78] P. 825.
[79] P. 707.
[80] P. 732.
[81] Pp. 764-765.
[82] Ibid.