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John H. Shoemaker

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THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE U.S.S.R.

I. Introduction

A complete examination of the operation and function of the machinery of Soviet criminal justice would require a description of all areas of criminal administration and law. However, an analysis and a comparison of certain selected institutions within the Soviet criminal justice system will suffice to give at least a superficial view of the general scope of current Soviet criminal justice. The institutions selected for scrutiny are the Soviet Procuracy, the Soviet Judiciary, and the Soviet equivalent of the defense counsel, the *advokat*.

An analysis of the role each of these three play in Soviet Law should give one an understanding of the mechanics of Soviet criminal jurisprudence, as well as the ability to appraise the over-all effect of its criminal justice machinery on Soviet society.

In general, it may be stated that criminal procedural methods followed in the Soviet Union are similar to those found in the western world. Upon the commission of a criminal act, a formal investigation is conducted to determine if further legal action is required; and if such action is deemed necessary, another governmental agency holds a pre-trial examination and an arraignment. The trial is then held, and if the person is convicted he may be sentenced to incarceration in a penal institution or even given the death penalty.

The above procedure in the United States is conducted as follows: on the state and local level by the local police departments, with the arraignment and indictment being handled by the local county prosecutor; or on the federal level by federal police agencies operating through the U. S. attorney. The incarceration of the convicted person is handled by county or state agencies on the one hand, or federal penal institutions on the other. One similarity between the Russian System and ours is that in United States criminal practice on the federal level the coordination and uniformity essential to reform and efficiency are, as under the Soviet system, under the control of the central government. However, the type of relationship existing within the U.S. system precludes the federal coercion of local units which is a chief characteristic of the Soviet system.

II. The Procuracy

The Soviet Procuracy, an institution that dates back to Peter the Great, has a more expanded role in their system of criminal justice than our American prosecutor has in ours. Since the Soviet version does perform multiple duties, the title of Procurator is interpreted as meaning government attorney. This wide scope of authority of the state's attorney, which is unfamiliar to the American scene, is more akin to that of the French or German prosecuting attorney. The Soviet institution has been compared to the *Ombudsman* program that is currently utilized in many Scandinavian countries.¹

The Soviet Procuracy has the familiar criminal law functions as well as the less familiar general supervisory function (*obshchii nodzoi*) over the Soviet administrative system. As one authority has stated:

"All union law (U.S.S.R.) is protected by the Procuracy of the U.S.S.R., which is responsible for the prosecution of criminals. In addition it exercises a supervisory function with respect to courts to the extent that it may protest judicial decisions to higher judicial authority, and ultimately, as a last resort to the Presidium.² The Procuracy is an all-union organization entirely independent of legislative or administrative control."³

This statement of the Procuracy's function by A. Y. Vishinsky, a noted Soviet jurist, fails to point out clearly the Procuracy's role in administrative law, but rather, focuses on its criminal functions. The description also makes the theoretically true but actually erroneous statement that the Procuracy operates independently. By statute, only the Presidium has the power to vacate or rescind orders of the Procuracy. Despite the fact that the Procuracy has extensive power, it has never exercised any authority over an administrative or executive agency higher than

¹ H. Berman, *Justice in the U.S.S.R.*, 239 (1966).

² Here the Presidium is the minority that meets when the Supreme Soviet is not in regular session. This minority is made up of members of the Communist Party Central Committee. It has the same power to pass laws and edicts as the Supreme Soviet. The Supreme Soviet functions similarly to the United States Congress. The members are elected from the various Soviet Republics. The Soviet Autonomous Republics are comparable to States in the United States.

³ Berman, *supra* note 1, at 17. Also, see H. Babb, *Soviet Legal Philosophy* (1951).

one of the fifteen Ministries of the Soviet Autonomous Republics.⁴

Despite the above restrictions, the Soviet Procuracy, the "Cornerstone of Soviet legality," employed some 18,000 lawyers (jurists) as of 1965.⁵ Since there were approximately 70,000 lawyers in the whole country at the time, it is reasonable to assume that an institution as powerful as the Procuracy would select the better products of the Soviet Law Schools.⁶ That this employment opportunity would be limited to the elite of the law graduates is only natural. The Procuracy has the advantages of our civil service and offers opportunities for promotion which lead to a privileged status more rapidly than in most other legal fields. A contemporary example of the success attainable in this area is the Soviet Procurator General, R. A. Rudenko, who rose through the ranks of the bureaucracy, and who also served as the Chief Soviet Justice at the Nuremburg War Trials.⁷

It can be said that the Procuracy is more influential and wields more power than does the Soviet court system in which it operates. This is due in some measure to the fact that the Procuracy is independent of the local political units and their accompanying regulations and codes.

Unlike the Soviet judges, who are responsible to the local governmental or judicial units, a Procurator assigned to the smallest city is not answerable to that city's government, but is under the direct control of the Procurator General of the Soviet Union. The Procurator General is appointed for a seven-year term, while the Soviet judges (including those on the Soviet Supreme Court) are only appointed for five years. Both are appointed by the Supreme Soviet, to whom they are both responsible. The Procurator General in turn appoints the Procurators for the republics. The Republic Procurator appoints local district Procurators, subject to the approval of the Procurator General.⁸ This system of hierarchy allows the Central Soviet Government to have a "watch dog" to observe and control the

⁴ V. Gosovski and K. Grzybowski, *Government, Laws and Courts in the Soviet Union and Eastern Europe*, 548 (1959).

⁵ Berman and Barry, *Soviet Legal Profession*, 82 Harv. L. Rev. 1 (1968).

⁶ Maxwell, *A Contrast in Viewpoints*, 43 A.B.A.J. 219 (1957).

⁷ Berman and Barry, *supra* note 5, at 25.

⁸ H. Berman, *Soviet Criminal Law and Procedure*, 104 (1966).

local authorities and their judicial and administrative actions.⁹ It has been suggested by one authority that this kind of arrangement creates a fourth branch of government. Though this "branch" operates under the scrutiny of the Soviet Judiciary, it is nevertheless relatively free from the operative checks that can be occasionally utilized by private persons against the regular branches of government. Unfortunately, this type of organization has been utilized down through western history by autocratic, centralized, and bureaucracy-burdened governments.¹⁰

An interesting Soviet trait is the frequent resurrection of institutions that were initially discredited when the Bolsheviks took over in 1917. The same order that abolished both the Imperial court system and the organized bar also did away with the institution of the Procuracy, but then revived it in 1922.

In 1722 Peter the Great found his government beset by many of the same problems that would face the Soviets some two hundred years later. He found that some organization was needed to report directly to the central government on the numerous independent and inconsistent actions being taken by his lesser and more remote officials. Otherwise order, unification and solidarity could never be achieved. The end result of Peter's quest was the Procuracy, which became known as "the eyes of the Czar." The system established by Peter would continue unchanged until the great reforms initiated in 1864.¹¹ At this time, the general supervisory function was dropped as an out-moded and inefficient procedure. It had become apparent that allowing one executive agency to coordinate and supervise another section of the bureaucracy inevitably caused resentment and proved unsuccessful. In 1922 the Soviets, who were more interested in expediency and efficiency than in justice, reached back into Russian history and revived the form of the Procuracy that existed before 1864. Although this system had been rejected because of its undesirable features, the Soviets have not made any concerted attempts to remedy these deficiencies. It is evident that these features will jeopardize other reforms.

Because of the uncertainty as to the scope of the Procurators' duties, and as to what areas were within their procedural do-

⁹ *Id.* at 111.

¹⁰ Berman, *supra* note 1, at 240.

¹¹ Berman, *supra* note 8, at 116.

mains, a statute was passed in 1955 that codified the various functions of the Procuracy.¹² However, this 1955 statute did not mark a reform in the progressive liberal sense, but was merely an attempt to streamline and revitalize the current system.

One of the provisions of this statute provided for changes in the investigational procedures used in criminal cases. Formerly, in the case of non-political crimes, the Procuracy exercised a general supervisory control over the local police in conducting criminal investigations. In instances when the crime was more serious the Procuracy's own investigators did the work, with all investigations of political and counter-revolutionary crimes being left to the omnipotent protective agency of the Cheka (Extraordinary Commission).¹³ This sinister organization's use of *de facto* methods of deciding "criminal cases" without judicial procedure was not unlike the practices of earlier times in Russian history, when the use of secret police was considered an essential attribute of Czarist governments.

With the reforms of 1864 the pre-trial investigation was separated from the Procuracy and put under judicial control (Imperial Code of Criminal Procedure). This 19th century pre-trial investigation system did involve some supervision by the Procuracy, but it also provided that if a disagreement occurred between the investigator (*subdebnnyi sledovatel*) and the Procurator, the court would then resolve the matter by making the decision of whether to indict or to take a person into custody.¹⁴ In that earlier period the records of the investigator, along with his recommendation to indict, were sent to the Procurator who, if he concurred, added his files of the case; and the entire "brief" would then be forwarded to the local appellate court, called the "Chamber of Accusation." This judicial tribunal, which sits much like the United States Supreme Court does when it is in closed chambers and is ruling on whether or not to grant certiorari, made the final decision on the indictment. This hearing on the sufficiency of the indictment was not adopted as a procedural safe-guard for the accused in 1922 (or in 1955) and is quite unknown in current Soviet practice. An aspect of the present system that might ameliorate matters

¹² Gosovski and Grzybowski, *supra* note 4, at 547.

¹³ *Id.* at 511.

¹⁴ Kucherov, *The Legal Profession in Post-Revolutionary Russia*, 5 *Amer. J. of Comp. Law*, 442 (1956).

somewhat is that the Procuracy investigator (*sledovate*) is undeniably better trained and more skillful than the average police detective. He is more similar to a magistrate, who weighs the evidence with a more impartial attitude than that of the local police.¹⁵ Thus there is a possibility that a person wrongly suspected may be freed at this initial stage of the criminal investigation.

The first reform made by the Soviet government in 1917 was to establish the People's Commissariat of Justice, which had sole power to indict criminals.¹⁶ This body indicted under evidence gained in investigations by the People's Investigators, who had replaced the earlier police and Procuracy investigators.

This system, despite its untrained personnel and lack of defined powers, did not much impede the growth of the new Soviet government. The Russian Civil War, local unrest, and the breakdown of general government functions after World War One, all of which would generally be conducive to anarchy, were being dealt with by the use of more pragmatic and efficient administrative machinery, such as local communist party executive committees, military tribunals, and the Cheka. Then, with the initiation of the New Economic Policy (N.E.P.) and the repudiation of War Communism in 1921, it became pointless to continue the older system of judicial functions and criminal justice. Thus, the "incessant groping and searching for a workable system" had ended; and the expectation of a new Soviet judicial vista was thought to be imminent.¹⁷

The excesses of the Cheka-Military tribunal had to be curtailed, and with the ensuing procedural vacuum it was abundantly clear that the People's Investigators, the Commissariat of Justice, and the courts were unable to fill the void. It was then decided to separate the combined offices of the prosecutor and trial defense counsel.¹⁸ The officer Lenin selected to replace the existing system with was the Procurator. The adoption of the Procuracy met a real need for a unified control by the central government over the newly created judicial and administrative agencies, and yet it could easily be reconciled with prevailing political theories.

¹⁵ Berman and Barry, *supra* note 5, at 28.

¹⁶ Gosovski and Grzybowski, *supra* note 4, at 551.

¹⁷ Malone, *The Soviet Bar*, 46 *Corn. L. Q.* 264 (1961).

¹⁸ Kucherov, *supra* note 14, at 443.

Initially, the Procuracy was under the Minister of Justice, as it had been under Alexander I from 1800 to 1864. However, in 1933 the Procuracy was made an independent arm of the Soviet Government. In 1923 the first of the new Soviet law codes, which were patterned on continental and earlier Russian models and included the Procuracy structure, was promulgated. This gave the Procuracy an all-union legal standing that it did not have immediately after the revolution.¹⁹ The investigatory procedure still authorized the state security police, now the G.P.U., to have the same free hand that the Cheka had enjoyed in seeking out political dissidents. These administrative agencies have, throughout Russian history, been able to conduct their own investigations, make arrests, and incarcerate persons without trial by court. They could, however, if the political situation dictated, submit all of their evidence to the Procurator, who was obliged to indict and put on a show trial for propaganda purposes, such as was done in the public purges in the thirties. Unfortunately, these latter trials were used to eliminate some of the best Soviet legal minds.²⁰

This same general statutory format, with its unfortunate social consequences, was continued through the post-war period, with no significant changes occurring until the death of Stalin in 1953. In the post-Stalin period some limited changes were made in the operation of the Procuracy to match changes made elsewhere in the legal system, which was slowly trying to extricate itself from the stigma of the reign of Stalin's terror. In 1955 the Procurator General was put in charge of all Soviet penal institutions, replacing the state security police. Under Chapter V of the Procuracy section of the 1955 edict of the Supreme Soviet the Procurator General has the written duty to insure humanitarian treatment for personnel detained in such places and the further duty to insure that only those "legally" convicted are incarcerated.

By the 1960's more progress was made toward liberalization. For example the role of the investigator was made more like the professional found in the French *d'instruction* or the German *Untersuchungsrichter*.²¹ However, if there are constitutional abuses during the preliminary procedure, the appeals from such

¹⁹ Berman, *supra* note 8, at 67.

²⁰ Malone, *supra* note 17, at 269.

²¹ Berman, *supra* note 1, at 243.

illegal actions cannot be heard by the courts as in the United States, but only by the Procuracy. In the United States it may be seen that the local county prosecutors are seldom effective instruments to combat procedural abuse. In the U.S.S.R. a partially effective safeguard is placed in the investigator's hands. He may refuse to proceed to investigate if the facts do not warrant it. Also, an additional new protective device is that during these early stages the person has a right to a defense counsel.

Other significant changes made in the investigatory procedure by the 1960s provide that all investigations, even those of the secret police (K.G.B.), are under the supervision of the Procurator General. Also, the secret police may only investigate espionage cases.²²

Another important part of the investigatory procedure of the Procuracy is the physical detention of persons prior to preliminary investigation. Under the 1923 codes the Procurator could indefinitely confine an accused person during the investigation. This power was retained until the 1960 codes of the R.S.F.S.R.,²³ which still allow a nine-month confinement of accused persons. The new system assures the accused notice of the charges against him, for it provides that he is to be brought before a judge for arraignment. He is to be confronted with the witnesses who are to testify against him at his trial and afforded an opportunity to state his case.²⁴ Once again, unfortunately, neither the 1923 code nor the 1960 code will allow phone calls, letters, or visitors. How this incommunicado incarceration for up to nine months is squared with the provision that a person has a right to counsel²⁵ while detained for preliminary investigation is not clear. Apparently there is no answer to be found in the Soviet Constitution, for while Chapter X on the fundamental rights and duties of citizens declares that a lawful arrest may be made only on the order of a court or of a Procurator,²⁶ it does not mention the apparent conflict between incommunicado detention and a right to counsel.

²² Berman, *Dilemma of Soviet Legal Reform*, 76 Harv. L. Rev. 929 (1962).

²³ These initials stand for Russian Soviet Federated Socialist Republic.

²⁴ Hazard, *Soviet Socialism and Due Process of Law*, 48 Mich. L. Rev. 1068 (1950).

²⁵ Berman, *supra* note 8, at 72.

²⁶ J. Berman and J. Quigley, *Basic Laws on the Structure of the Soviet State*, 23 (1968).

The only procedural safeguard observable is that under the 1960 code the Procuracy must release improperly detained persons. Formerly this power was held by the court, as it had been under the Czars. The use of a single agency to both detain persons and adjudge improper detentions is certainly a concept alien to the western mind.

The person who is not yet accused is also unprotected in the Soviet criminal system. He can be detained for 72 hours prior to an accusation. This is definitely not in accord with the Common Law rule or with the federal McNabb-Mallory Rule.²⁷ True, many local police departments in the United States would welcome a rule that the detaining police agency would have 24 hours to notify the prosecutor; and that he in turn would have 48 hours to decide whether or not to initiate a criminal case. The police or the Procuracy investigator must give a Miranda-type warning as to the rights of an accused individual, but the warnings are only required once the person becomes an accused, and are not mandatory in the 72-hour stage of investigation.

Another facet of the criminal duties of the Soviet Procuracy is the role of the Procurator in the criminal trial. He initially gets the case there by the indictment he prepares. The absence of a grand jury, however, is not in itself disruptive of reasonable criminal procedure. In fact there are several states in the United States that allow an indictment by the prosecutor based upon evidence which he has collected.²⁸

A feature of the Soviet semi-inquisitorial system that is similar to those of several Western European countries is the allowance of a withdrawal by the Procurator from a trial already in progress if at any time he feels that the evidence or other facts do not establish a person's guilt. When this occurs the court is bound to go on conducting the trial without the Procurator.²⁹

Two final characteristics of the Soviet criminal Procuracy are its unique appellate ability and its provision for military Procurators. First, it is to be observed that only the Procurator may appeal a case beyond the first appellate court, and this is true in both criminal and civil cases. Thus, the party losing must file a "protest" with the local Procurator, and the Procu-

²⁷ Comment, *The McNabb-Mallory Rule*, 47 Ga. L. J. 52 (1958).

²⁸ Berman, *supra* note 8, at 77.

²⁹ *Id.* at 89.

rator may elect to appeal via this "protest." Also, the Procurator may appeal even if the parties do not want to do so.³⁰ Thus, there is never an assured potential of review by the Soviet Supreme Courts, as there is in the United States. Unfortunately, it is clear that throughout history the most determined drives against police and institutional abuses have been made by the private citizen in courts accessible to him, and not by altruistic prosecutors.

A unique feature of the Soviet Procuracy is its relation to the military establishment. The Soviets have a professional military Procuracy that operates on a full-time basis, just as their military tribunals (courts martial) do. The military Procuracy is under the civilian control of the Procurator General, who has a separate office that deals with military matters.

A major function of the Soviet Procuracy is the general supervisory function (*obshchii nodzor*), as provided in the 1955 statute on the Procuracy.³¹ The fact that this administrative function is listed prior to the chapter on the criminal function is revealing, for it tends to confirm the observer's impression that the primary role of the Procuracy is deemed to be that of administrative supervision. A provision of the 1955 statute declares:

"The Procurator General of the U.S.S.R. . . . shall exercise supervision over the strict conformity of acts issued by the ministries and departments and their subordinate institutions and enterprises, as well as acts issued by executive and administrative . . . and cooperative and other social organizations."³²

However, practice has shown this statutory command to be unrealistic. The Procuracy is granted the power to correct a subordinate department by means of a "protest"; and if this is not sufficient, the protest is conveyed to the next higher unit over the delinquent subordinate. To conduct this review, the Procurator may "subpoena" all papers and records as evidence from the agency under review.³³ Here the "watch dog" function of the Procuracy in criminal matters is extended into the administrative realm. One of the major reasons why this administrative law function is carried out by the Procuracy is "the almost com-

³⁰ Berman, *supra* note 1, at 185.

³¹ Berman and Quigley, *supra* note 26, at 184.

³² *Id.* at 185.

³³ Berman, *supra* note 8, at 112.

plete absence in the U.S.S.R. of a reliance upon courts for the purpose of reviewing decisions of the administrative authorities.”³⁴ The fact that the individual Soviet citizen is not able to question administrative and governmental acts by judicial review represents a significant restriction on his personal freedom. He can only act by lodging a “protest” with the Procurator and awaiting the latter’s action if he believes it merits attention. This is clearly incompatible with the American view that after exhausting his administrative remedies, one may have recourse to the judiciary, thereby escaping the potential of built-in institutional bias. Despite the extensive Soviet legal literature stressing the primacy of the Procuracy in the role of general supervision, one authority declares:

“At best the Procuracy has exercised general supervision with some vigor during certain periods, while neglecting it or abandoning it completely at other times. During the period of extreme stress and tension, when the goal was the elimination of the regime’s enemies or the achievement of party policy, the Procuracy has always emphasized its function of criminal prosecution and judicial supervision.”³⁵

A further indication of the lack of esteem in which this supervisory role over administration is held is the fact that Procurators have been punished for the unsatisfactory quality of their investigations or their judicial supervision, but no records exist to show any disciplinary action against Procurators for malfeasance in the administrative areas.³⁶ It is enlightening to consider the roles played by the Procuracy before and after the Second World War. By 1938 the growth of industry and the proliferation of administrative agencies created an acute need for administrative supervision, which had been neglected in the switch from the New Economic Policy of the Twenties to the Industrialization and Collectivization of the Thirties.³⁷ However, the war reduced the need for this function of the Procuracy, and administrative problems were usually handled by more expedient non-legal means. It was not until the death of Stalin in

³⁴ Morgan, *The Protest of the Soviet Procuracy*, 9 Amer. J. Comp. Law 499 (1960).

³⁵ *Ibid.*

³⁶ G. Morgan, *Soviet Administrative Legality* 125 (1962).

³⁷ *Id.* at 112.

1953 that internal conditions permitted a resurgence of the administrative function of the Procuracy.³⁸

For many years a serious defect of the Procuracy has been its deficiency of adequately trained personnel.³⁹ Only in recent years has there been an insistence on skilled lawyers (jurists).⁴⁰ The Soviets have a complicated administrative bureaucracy, made more complex by the numerous checks and re-checks on personnel and procedure. When his supervisory duties are coupled with those of administering and applying the criminal law, it is difficult to believe that the average Procurator, who is admittedly a lawyer with considerable training (though less than that given his American counterpart) can operate with an adequate degree of skill and dispatch. While it is true that lower level matters are handled by separate divisions of the Procurator's office, they eventually progress up the ladder to the point where a one-man decision is required. Whether or not he is trained in the matter at hand, the typical Soviet bureaucrat will normally closely scrutinize all work-products of his subordinates in order to protect himself and his job from the blunders of his underlings.

It is often said that the Procuracy is "every man's lawyer" when it comes to questions of administrative acts about which the citizen has a grievance.⁴¹ However, it is clear that the "protest" function of the Procuracy fails to adequately safeguard individual rights. Despite the rule in the Soviet codes that the Procurator must file a citizen's protest, and then allow the dissident agent ten days within which to respond, it is inevitable that this rule is honored more in its breach than in its practice.⁴² Procurators have been criticized by Soviet legal writers for their failure to act until the delay has made any positive action moot. When they finally do act, there is little follow-up activity to insure that there is no repetition of the fault.

It would seem that administrative supervision would best be handled by the courts, and this has been suggested by several important Soviet legal scholars.⁴³ However, to date this transfer

³⁸ *Id.* at 248.

³⁹ *Id.* at 250.

⁴⁰ *Ibid.*

⁴¹ Berman, *supra* note 1, at 116.

⁴² Morgan, *supra* note 34, at 501.

⁴³ Morgan, *supra* note 36, at 250.

of power has been rejected, and whether it would actually aid the administration of the law is uncertain, for the Soviet courts, while gaining more judicial independence, are still surreptitiously dominated by the Communist Party. This was revealed by the Party's drive in the mid-sixties against the liberalization achieved in the late fifties. The show trials of many Soviet writers in this period, persons such as Aleksandr I. Solzhenitsyn, are examples of the political influence exerted on Soviet courts.

In summary, the Soviet Procurator is a combination U.S. Attorney, Congressional investigating committee, grand jury, legal aid attorney, and public prosecutor. Whether the typical Soviet lawyer (jurist) who works for the Procuracy is really competent to handle all of these diverse duties is open to serious doubt. Undeniably, the institution of the Procuracy has achieved some success in the criminal field. Advances have been made in procedure and individual rights that were formerly almost unknown.

The Procuracy's drive for independence, influence, and professionalization has matched the efforts of other contemporary Soviet legal institutions.⁴⁴ Thus the needs of the Soviet citizen for more certainty, legality, and justice have been met in a greater degree than they were in the past; however, there are still not the built-in constitutional safe-guards that mark the legal procedures of the United States or England. Furthermore, there has been no discernible tendency to establish a rigid legal framework that will not fluctuate with the needs and spirits of the current regime. Historically, under both the Czars and the Communists, the legal reforms that were made were subsequently suppressed when the government's needs dictated. While it is unlikely that the Procuracy's criminal operations will ever regress to the state of those conducted under Stalin's regime, it is uncertain whether any real solidification will occur to serve as a foundation for other changes.

Entrusting administrative supervision to the Procuracy may perhaps be consistent with the aims of a totalitarian society, but this arrangement is clearly unsuited for the protection of individual rights. Private persons, in their dealings with the administrative agencies, are denied what in the United States would be considered minimal due process of law—rights such as a mandamus action, right to notice, opportunity to be heard, ju-

⁴⁴ Berman and Barry, *supra* note 5, at 21.

dicial review of administrative action, and comparable safeguards.

III. The Judiciary

The next area of Soviet criminal justice to be considered is the Judiciary. The Soviet court system somewhat resembles the French System in that it does not use juries, only judges and accessors.⁴⁵ The size of the courts varies from one judge and two accessors at the People's Court level (similar to our common pleas and municipal courts), up to larger numbers at higher judicial levels.

The People's Court has original jurisdiction in both civil and criminal matters that are not of an extremely serious nature. The next higher level is the intermediate appellate system. These are the middle level courts organized by district (*Kari*), region (*Oblast*), and cities within the autonomous fifteen Soviet Republics. Over these in each republic is a Supreme Court that may review the proceedings of its intermediate appellate courts and may in turn be subject to review by the Soviet Supreme Court.

Two points worthy of mention here are these: First, there are 3582 People's Courts within the Soviet Union and 147 intermediate appellate courts.⁴⁶ Secondly, the Soviet Supreme Court and the Republic Supreme Courts have the similar problems of a dualism of laws found in the federalism of the United States. The Soviet Court system started initially after the revolution and consisted generally of untrained judges, the prior trained judicial personnel having been banned by law after the Soviet takeover. These Peoples Courts only tried minor offenses with the majority of the judicial work being performed by the military tribunals and the Cheka.⁴⁷ By 1922 this kind of justice then prevailing was found to be inconsistent with the government's new policies.

Dual systems of justice developed that were to be in competition with each other until the mid-fifties. First was the legally established system of courts. Second were the administrative agencies that could administer punishment without trial

⁴⁵ Berman and Quigley, *supra* note 26, at 102.

⁴⁶ Berman, *The Spirit of Soviet Law*, 23 Wash. L. Rev. 154 (1948).

⁴⁷ Stason, *The Administration of Justice in the Soviet Union*, 42 J. of Amer. Judicature Soc. 152 (1960).

by court.⁴⁸ This second system, with its total disregard of individual rights, established *de facto* independence from the courts until the mid-fifties. These agencies assumed the right of final decision, from which no appeals were granted. As noted by one of its leaders, "The Cheka's acts are of an administrative character. . . It does not judge the enemy but simply strikes."⁴⁹ And as noted by one authority, despite the intervening time and the coexistence between the courts and the state security apparatus, there is still the potential of a limited reversal of the liberal trend, as was demonstrated by the reinstatement of the death penalty in the 1960's.⁵⁰ Another limitation on the Soviet courts, in addition to the external threat of the administrative tribunals, is that caused by their own procedural shortcomings. The scope of judicial function is narrower in the U.S.S.R. than in the United States. The American judge may refuse to enforce unconstitutional statutes, but the Soviet judge may not; however, the latter may refuse to enforce unconstitutional administrative acts.⁵¹ He is also bound to certify evidence of a criminal nature found in a civil trial to the Procurator for possible criminal indictment.⁵² However, he does not have to contend with detailed pleadings. No formal issues are ever drawn in Soviet judicial procedure, which somewhat resembles the United States' Federal Rules of Civil Procedure. Of course this makes it hard to separate holding and dicta, but it does not present the problem that it would create in common law countries, since the Soviet judge does not make use of precedent in his decisions.⁵³ Another distinction between the role of the Soviet and the American judge is that there are no rules of evidence as there are in the United States. All evidence must be admitted, as in Europe, with the only distinction to be made being the standard of evaluation used by the judge as he considers the merits of each item of evidence.⁵⁴

The court's role in the supervision of governmental agencies is severely limited by the use of other units of government for

⁴⁸ Gosovski and Grzybowski, *supra* note 4, at 564.

⁴⁹ *Id.* at 569.

⁵⁰ Berman, *supra* note 22, at 929.

⁵¹ *Supra* note 5, at 23.

⁵² Berman, *A Comparison of Soviet and American Law*, 38 *Ind. L. Rev.* 564 (1959).

⁵³ *Id.* at 565.

⁵⁴ *Id.* at 564.

this purpose. The economic disputes that sometimes take on criminal overtones are generally not left to the regular court system, but rather to an "economic court." This agency, which is known as the state *Arbitrazh* (French for arbitrator), is under the control of the Council of Ministers and not that of the Soviet Supreme Court. This federal agency has parallels within the autonomous republics, each of which has its own *Arbitrazh*. This arrangement helps to suppress and defeat any efforts to achieve independent judicial review of administrative agency actions. As noted earlier, the decision whether to appeal a criminal or civil ruling lies within the discretion of the Procurator after the trial at the People's Court level.⁵⁵

A major weakness of the Soviet Courts is the limited independence of the judiciary. As far back as the enactment of the Stalin constitution of 1936, they were, in theory, limited only by the rules comprising the "law." However, political influence was and is able to circumvent such idealistic theories.⁵⁶ Recently, however, there have been some positive gains. Today the state security police (N.V.D.) may not send a person to penal detention; only the courts have this authority. In addition, the security police are now under the control of the Procuracy when conducting investigations, and they may only investigate espionage cases. The security police have also lost the power of supervision of penal institutions, and now only their para-military secret police are utilized as guards. Another improvement has been the abolition of the doctrine of "Crime by Analogy" from the Soviet criminal system.⁵⁷ This concept created an open-end system, since the judge could punish persons who committed misdeeds that were considered social wrongs but were not prohibited by the law. The potential for abuse in the application of this doctrine is obvious. Another progressive step was taken in 1956, when the Ministry of Justice was abolished. Also discarded was the system of "court checkers," persons who had followed each court proceeding and reported back to the Minister of Justice on whether the judge was showing the proper socialist inclinations in his work.⁵⁸ Today this judicial supervision is exercised by the Soviet Supreme Court, which exercises control

⁵⁵ Morgan, *supra* note 34, at 499.

⁵⁶ Gosovski and Grzybowski, *supra* note 4, at 48.

⁵⁷ Berman, *Soviet Law Reform*, 66 *Yale L. J.* 1191 (1957).

⁵⁸ Berman and Barry, *supra* note 5, at 22.

similar to that of the United States Supreme Court over the lower federal courts.⁵⁹

In conclusion it appears that the Soviet courts, while hampered by some political and procedural restraints, are more independent, enlightened, and skilled than were their predecessors. This improvement is probably ascribable in part to the higher standard of education now required of judges. This has allowed more freedom from party control and has helped to foster a more professional attitude among Soviet judges. However, despite these gains, the accepted judicial theory is still a form of mechanical jurisprudence that is characterized by short judicial opinions reflecting little knowledge of sociology.⁶⁰ Moreover it has only been since the nineteen-sixties that there has been any consistent attempt to publish the opinions of the appellate courts and the Supreme Courts. This has occurred at about the same time as the establishment of the scholarly journal *Social Legality*, a periodical published jointly by the Procurator General and the Soviet Supreme Court.⁶¹ The publication of such a work suggests that there has been a decision to allow the judicial system to benefit from long term, uniform, orderly development.

IV. The Advokat

The last institution to be considered is the Soviet equivalent of the American defense counsel or trial lawyer, the Advokat.

In November of 1917 the Soviet Bar, which had been established in 1864 and had functioned brilliantly in the late 19th century and early 20th century, was dissolved along with the rest of the country's legal machinery. It was thought by Russia's Revolutionary leaders that any person, no matter what his education, could adequately represent a defendant at trial. This system was soon found to be completely unworkable. Recognizing that something had to be done, the new government decided to establish colleges (*Kollegii*) or special groups of persons with either legal skill or other educational attainments to represent criminal defendants in court.⁶² These persons were appointed,

⁵⁹ Id. at 23.

⁶⁰ Berman, *supra* note 22, at 564.

⁶¹ Berman, *supra* note 8, at 106.

⁶² Kucheron, *The Soviet Judicial System*, 5 Amer. J. Comp. Law 459 (1961).

controlled, and paid by the state. While this system did not constitute a great improvement, it did eliminate some of the chaos created by the former system. One reason for the comparative success of this system was that most legal adjudication was thrust upon the Cheka and the military tribunals, which were relatively efficient institutions notwithstanding their lack of independence and impartiality.

However, by 1921 the First World War had ended and the N.E.P., with its more liberal social views, had been formed; and as a consequence considerable pressure developed for changes in the legal system. Reacting to this, the government significantly curbed the jurisdiction of the existing quasi-legal tribunals; but it was afraid to establish an independent judiciary utilizing independent defense counsel, for this would have constituted a threat to Communist Party power and control. After some hesitation, however, the government did resurrect the Soviet Bar.⁶³

The period of 1922 to 1930 saw the establishment of the Soviet colleges of defenders (*kollegii zashchitnikov*) which later replaced the older colleges (*kollegii*). This new group was a voluntary association comprised entirely of defense lawyers. The older colleges, which had combined defense and prosecution lawyers were ended. The attorneys were paid by the state and were under the control of the courts. An effort was made to recruit school-educated lawyers, as well as former members of the Russian Imperial Bar who had demonstrated sufficient socialist transformation. Later during this period a few lawyers were permitted to engage in a limited private defense practice.

However, with an ideological shift in the early thirties and the resulting liquidation of the N.E.P., the role of the independent lawyer was terminated.⁶⁴ Only law practice through one of the colleges of defenders was allowed, and these were transformed into government corporations subject to many restrictions and controls. This collective association of attorneys has remained the body which constitutes the defense portion of the Soviet Bar.

In light of contemporary changes, the Soviet defense attorney has made limited but continued progress toward a freer

⁶³ L. Friedman and Z. Zile, *Recent Developments in Soviet Law & Practice* 34 (1964).

⁶⁴ *Id.* at 35.

and more professional status. However, it should be noted that the Soviet defense lawyer does not play the decisive role that his American counterpart does. This is partly because of the fact that Russia's semi-inquisitorial court system conceives of the lawyer's duty to his client as consisting mainly of asking supplementary questions and of advancing some arguments on his client's behalf. Under this system the court, via the judge, takes the lead in the questioning of the defendant and the witnesses. In addition, the Soviet lawyer is subject to considerable state control. The American lawyer seeks to put his client's case in the best possible light, but under Communist theory there are times when such a course of action would be improper. When the two interests conflict, the Soviet lawyer is expected to place his duty to society over his duty to his client. In the United States and other democratic countries the obligation to the lawyer's state or country is usually placed behind the duty to his client, as the lawyer knows that there are other adequate safeguards for the protection and the preservation of societal goals and interests. The Soviet system, while recognizing a dualism of duty, sees the paramount obligation as that owed to the state. When this loyalty to the state is further reinforced by the subtle but pervasive party authority, and is combined with the control exercised over the *advocatura* by the Soviet court system, the result is not likely to be a defense counsel who is fiercely protective of his client.⁶⁵

The problem of outside pressure being exerted on the attorney, a familiar problem in the United States, is not unknown in the Soviet Union. It is common for both the Soviet press and private individuals to say, as in the United States, that the lawyer is shielding people for mercenary ends or that lawyers "are tricky shysters defending obviously guilty people."⁶⁶ Perhaps the relatively small number of advocates, (12,828) is a reflection of the low esteem in which they are held by both citizens and the Soviet Government.

Even so, it is clear that the Soviet defense lawyer (*Advokat*) has in recent years gained prestige and professional esteem, as have the attorneys in the Judiciary and Procuracy. The legal training of all of these lawyers is roughly similar to that in the United States. The Soviet lawyer must have five years of train-

⁶⁵ Ginsburgs, *The Political Undercurrents of Legal Dialogue*, 15 U.C.L.A. L. Rev. 1226 (1967).

⁶⁶ Friedman and Zile, *supra* note 63, at 36.

ing at a Soviet law school after the completion of what is comparable to a four-year high school program in the United States. However, whether this is sufficient to meet the growing demand for quality needed to enable the *Advokat* to meet the challenges posed by Russia's limited legal reforms remains uncertain. The Soviet lawyer must be trained to lead his profession down the path of reform toward more expertise and professionalism, as well as to know when he may procedurally challenge the judge or accessor.⁶⁷ While it is true that the Soviet lawyer does not handle minor civil matters, such as the drawing of wills and contracts, he does have an expanding role to play in the criminal law field.⁶⁸

V. Conclusion

In reviewing the Soviet administration of criminal justice, one must remember several points. First, the rule of law has always been and still is an alien theory to Russian society. As pointed out by one Soviet legal expert, "Policy determines Law. . . Law has no independent value; . . . it is a tool of policy."⁶⁹ This indicates a view opposite to that prevailing in the United States and other democratic countries, where all policies must be implemented within the existing legal framework. Secondly, in Russia the criminal justice system is utilized not merely to insure justice, but to act as a propaganda instrument for the Soviet citizen.⁷⁰ Thirdly, the recent legal reforms appear to have been inspired not by altruistic or idealistic motives, but rather by the egotistic instincts of the Soviet leaders.⁷¹ They see the public relations value of law reform as a sign of their benevolence and as a tool to make the citizens happier and more loyal. Thus the rule of force is still extant in Russia, and force can be employed whenever necessary. The current liberalization of Soviet criminal law is essentially a facade employed by the current regime, who have found that a more stable, orderly, and lasting government can be achieved through a legalistic dictatorship than through the use of naked force and terrorism.

JOHN H. SHOEMAKER

⁶⁷ Hazard, *supra* note 24, at 1066.

⁶⁸ Berman, *supra* note 52, at 534.

⁶⁹ Razi, *Around the World's Legal Systems*, 5 Howard L. J. 4 (1959).

⁷⁰ *Id.* at 14.

⁷¹ Berman, *supra* note 52, at 566.