

Soviet Penal Policy

A BACKGROUND BOOK

Ivo Lapenna

Reader in Soviet Law, London
School of Economics and The
School of Slavonic and East
European Studies, University of
London

© Ivo Lapenna 1968

ISBN 370003888

Printed and bound as paper -edition in Great Britain for The Bodley Head Ltd. 9
Bow Street, London, WC2 by William Clowes & Sons Ltd, Beccles Set in
Monotype Plantin First published in 1968.

Republished by www.kehlet.com and Birthe Lapenna in Denmark December 2000.

CONTENTS

Acknowledgments

I: INTRODUCTION 9

II: MARXIST CONCEPT OF STATE, LAW AND CRIME 13

Dialectical Method 13

State 15 Law 18

Crime 21

Present Soviet Position 22

III: MAIN FEATURES OF CRIMINAL LEGISLATION

1917-1958 28

First Revolutionary Courts 28

Decrees on Courts 30

Material Definition of Crime 51

Analogy 34

Measures of Social Protection 34

Impact of Ideology 37

IV: SOCIALIST LEGALITY 40

Some Enactments 40

Lenin's Views 42

Developments after Stalin's Death 49

V: LEGAL REFORM OF DECEMBER 1958 55

Preliminary Remarks 55

System 56 Characteristics 59

VI: CRIME AND CRIMINAL LIABILITY 66

The Party Programme on Crime 66

Definition 67

Analogy 71

Circumstances excluding Criminal Offence 77 Liability 80

Exclusion of Liability 84

VII: PUNISHMENTS AND EDUCATIONAL MEASURES 87

Aim of Punishment 87

Kinds of Punishment 88

Compulsory Educational Measures 96

Other Educational Measures 98 Individualisation of Punishment and Educational

Measures 102

VIII: PRE-TRIAL PROCEEDINGS 105 Courts – Procuracy – Advocates 105 Inquiry 112

Preliminary Investigation 115

IX: THE TRIAL 122

First Instance Proceedings 122

Appeal and Supervision 129 Special Proceedings 133

X: CONCLUSION 136

Acknowledgments

THE AUTHOR wishes to express his thanks to Professor L. B. Schapiro and Mr. P. B. Reddaway, editors of *Lenin The Man, The Theorist, The Leader. A Reappraisal* (Pall Mall Press, 1967) ; Dr. K. R. Simmonds, Director of the British Institute of International and Comparative Law, and General Editor of *The International and Comparative Law Quarterly*; and Mr. Leopold Labedz, Editor of *Soviet Survey*, for permission given to the author to utilise in this book parts of his earlier articles on Lenin, law and legality, on Soviet criminal law and procedure, and on 'socialist legality', published in the above-mentioned book and periodicals.

While the author is fully responsible for the contents of the book, he owes a special debt to Professor L. B. Schapiro who kindly read the manuscript and generously made suggestions which have considerably improved the present text. Thanks also to Miss M. Nicholson, whose secretarial help was most valuable in the preparation of the manuscript.

I

Introduction

THE CONCEPT of crime is closely connected with the character of the state and its legal structure. An act which is defined by the law as a crime in one historical period or in one society of the same epoch may not be regarded as an offence at all in another. Methods applied in combating crime, particularly measures of repression, depend entirely, or to a great extent, on the predominant concept of crime as an act directed against the most significant values which, precisely because of their social importance, require special protection.

On the other hand, the classification of social values as most important in a given society, and the kind and degree of legal protection they enjoy, are determined in the last analysis by the economic and political organisation of the state, as well as by the prevailing philosophical ideas in this field and the contemporary rules of morality. Without this location of crime in a concrete society, the penal policy of that society, i.e. of the factors responsible for it, cannot be completely and correctly understood.

This is certainly so for the penal policy in any society, but it is especially true for Soviet penal policy which forms a constituent part of Marxist legal philosophy as interpreted by the Soviet doctrine of state and law at various times in order to adapt it to the general political needs or to utilise it for justification of individual political actions. Therefore, whatever the scientific value of Marxism or of its Soviet variant, it seems not only useful, but really indispensable to begin this book with a short survey of the main Marxist theses regarding state, law and crime. This will enable the reader to compare and to judge for himself to what extent, if any, Soviet reality, Soviet legal doctrine and Marxism which is claimed to be the ideological

basis of both practice and theory in the US S R-are all in conformity one with another. In any case, I believe, it will contribute to a better understanding of Soviet criminal law and penal policy.

Penal policy is a part of the general policy of a society – of the 'ruling class' according to Marxism – aimed at combating crime, and it embraces all methods and measures applied for this purpose. All these remedies against crime may be divided into two main groups: measures of prevention and measures of repression. Measures of general prevention are, for instance, those which are undertaken in order to educate people to observe law and social discipline, mainly through the influence of the school, youth clubs and various organisations and institutions for people in need of care, as well as through special radio broadcasts, television programmes and the press.

Special measures which are applied to convicted persons while serving their sentences, or for some time afterwards, have mainly the character of individual prevention. Compulsory measures of a medical and educational character belong to the same category. On the contrary, compulsory security measures and punishments are measures of repression which include a retaliatory element. However, it is absolutely impossible to make a clear division between measures of prevention and those of repression, because no measure of repression applied to an offender has an exclusively punitive or retributive purpose. Even punishment as the most outstanding measure of repression contains elements of prevention both individual in respect of the offender and general as a warning to and discouragement of potential delinquents.

During a study tour in the Soviet Union in March 1967, organised under Scheme V(6) of the Cultural Agreement between Britain and the US S R, I had the opportunity to acquaint myself more closely with current Soviet penal policy. The subject of my study was the organisation of the judiciary and the administration of justice. This included visits to the faculties of law and institutes of criminology in Moscow and criminalistics in Leningrad; visits to all organs of the judicial

system such as courts, the procuracy, advocates' consultative offices, and personal contacts with officials of these institutions ; public hearings in criminal cases before courts and various semi-judicial institutions. I paid special attention to the basic principles of criminal law and criminal procedure, to the problems of juvenile delinquency, recidivism and to the so-called economic crimes, and also to the methods applied by the authorities and by society in combating crime in general. The Russian study tour was in fact a continuation of the studies that I completed in April and May 1966, in Hungary, Poland and Czechoslovakia with a similar programme of work.

Both in Moscow and Leningrad I worked mainly at the Faculties of Law, but in Moscow I also spent four days in the All-Union Institute for the Study of Causes of Crime and Elaboration of Measures for its Prevention (a rather long Soviet title instead of a simple and short Institute of Criminology), whereas in Leningrad I paid two visits to the Institute of Criminalistics, attached to the Faculty of Law. I met a considerable number of Soviet scholars engaged in research or teaching in the fields of my study and discussed with them several questions, beginning with the phenomenon of crime as such in a society which deems itself to be socialist and developing towards full communism.

These academic discussions were supplemented by many conversations with judges, lawyers, procurators and other practitioners, as well as by court hearings. In all I attended about twenty hearings at people's courts of first instance and one hearing at the Moscow City Court acting as court of appeal against a judgment of a district people's court. From all points of view, looking at the Soviet administration of justice as a part of its penal policy from the inside of court-rooms in Moscow and Leningrad was a telling and extremely useful experience. I was able to confirm or to correct my previous theoretical conclusions and, most important of all, to feel for myself the social and political climate in which law is being applied.

One of the results of the Russian study tour is the present

work. In a publication of this size and purpose many details, including references and footnotes, must be omitted. The scope of the book is not to give a comprehensive analysis of the subject in all its aspects, but only to serve as a basic guide to present-day Soviet penal policy.

2

Marxist Concept of State, Law and Crime

Dialectical Method

MARXISTS REGARD Marxism as an all-embracing science of the laws governing nature and society. It is claimed that when truly understood and properly applied, it gives correct explanations of all natural and social phenomena and of each of them taken separately.

The main instrument of Marxism is the dialectical method which Karl Marx (1818-1883) borrowed from the idealistic philosophy of G. W. F. Hegel (1770-1831). For Hegel the world is real only as a reflection of ideas. Development is nothing but an endless way of internal contradictions where a negation of positive leads to a synthesis on a higher level, which then appears as an affirmation of a new positive contradicted in its turn by its own negation, followed by a further synthesis of the two, and so on. Marx only substituted Hegel's world of ideas, his 'Absolute Idea' as the primary basis of all Being, by matter in the field of nature and by economic necessity in that of society. Lenin once wrote that Marx and Engels 'turning their eyes on life saw that it was not the development of the Spirit which explained the development of nature but, on the contrary, that the Spirit must be explained from nature, from matter'.

Marxist dialectical method is characterised by four fundamental principles.

First of all it regards nature as a whole in which things and phenomena are reciprocally connected and conditioned by each other. Secondly, everything in nature is in movement and change: something appears and develops constantly, while at

the same time something withers away and disappears. Thirdly, development of nature is a process in which, as a result of small, unnoticeable and gradual quantitative changes, there suddenly occurs an open leap into a new quality (qualitative leap). Lastly, development is due to internal contradictions inherent in all things and phenomena of nature: everything has its positive and negative, its disappearing and developing aspects, and the struggle between these contradictory aspects constitutes the very substance of development which causes the transformation of quantity into quality on a higher plane. The developing process does not turn in a circle, but in the form of a spiral leading incessantly upwards.

The same principles also apply to society.

Every social-economic formation (slave-owning system, feudalism, capitalism, socialism) is a single totality in which individual parts and phenomena – mode of production, political organisation, the world of ideas – are bound by links of reciprocal influence and dependence. Social ideas, morality, political institutions and the like ('superstructure') have their deepest roots in the economic structure ('basis') of society, but in their turn they exercise influence on this basis. As in nature, so in society everything is moving and changing. The replacement of one social-economic formation by another (for instance, of feudalism by capitalism, or of capitalism by socialism) is a revolutionary transition from one qualitative status into another qualitative status as a result of accumulation of quantitative changes.

The struggle between antagonistic classes ('exploiters' and 'exploited') which are the products of the economic forces in each formation and express the contradictions in the mode of production, i.e. contradictions between the forces of production and the relations of production, is the substance of the process of development in all class societies. Capitalism cannot exist nor develop its forces without a working class depending solely on its wages for the means of subsistence. But this proletariat, opposed to the capitalists and gathered together in even greater numbers in factories and mines to produce wealth for the

owners of the means of production, becomes more and more powerful and conscious of its class interests. At a given stage of development – when the relations of production (class relations) do not correspond any more to the forces of production – the organised proletariat overthrows the capitalist system and establishes socialism, which necessarily leads on to the communist classless society.

To each of the social-economic formations corresponds a definite type of state and law: state of slave-owners, feudal state, bourgeois-capitalist state and socialist state.

State

According to Marxism, state and law belong to the so-called phenomena of superstructure. Marx's closest friend and follower, F. Engels (1820-1895), wrote in his famous book *Anti-Dühring* (1878) that '...the economic structure of society always forms the real basis from which, in the last analysis, is to be explained the whole superstructure of legal and political institutions, as well as of the religious, philosophical, and other conceptions of each historical period '. Marx and Engels believed the economic structure of society to be the material basis of such phenomena.

In his book *Zur Kritik der Politischen Ökonomie* (The Critique of Political Economy), published in 1859, Marx asserts that the sum total of the relations of production' constitutes the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness '. And he goes on: ' The mode of production of material life conditions the social, political and intellectual process in general.'

The main cause of the birth of the state is to be found in the division of the primitive, classless society into hostile, antagonistic classes. The need for defence against attacks from without, if it really existed, could only hurry on this process, but it was not essential for the birth of the state. Essential is the division

of society into classes. The gentile constitution' was burst asunder by the division of labour and its result, the division of society into classes' and 'its place was taken by the state' (Engels).

V. I. Lenin endorsed this in a lecture delivered at the Sverdlov University in July, 1919, when he said: ' So contemplating the state, you will – as I said – see that the state simply did not exist prior to the division of society into classes, but as that division emerges and grows firmer, so does the state.'

Every state is an instrument of the rule of one class, 'a machine for suppression " used against the other class. It serves to conserve, fortify and evolve that economic and social order which best corresponds to the interests of the ruling class, as determined by the mode of production.

According to Marxism, capitalist society – like all other economic-social formations which preceded it in history and which are based upon private ownership – is divided into antagonistic classes consisting of those who own, and those who are deprived of, the means of production, the exploiters and the exploited. The bourgeois state – whatever its concrete political form – is the most powerful tool utilised for holding down the proletariat and promoting the interests of the ruling class, but it is condemned to death because of its inherent antagonistic contradictions. When these contradictions reach their peak, the masses of the oppressed abolish the bourgeois state through a social revolution, sweep away the last exploiting class and form a socialist state with the proletariat as the ruling class.

Between capitalist and communist society lies a period of revolutionary transformation of society, or revolutionary transition from the capitalist system to the communist classless society. It is the period in which all institutions, which come into being in the class social organisation on the basis of private ownership, must be destroyed. Simultaneously new institutions must be set up, leading to the realisation of the classless society in which, among other things, state and law will no longer exist.

According to the Marxist concept the proletariat as a ruling

class also definitely needs the state because a classless and stateless society cannot be established immediately after the revolution. 'The proletariat – says the Communist Manifesto (1848) – will use its political supremacy to wrest by degrees all capital from the bourgeoisie, to centralise all instruments of production in the hands of the State, i.e. of the proletariat organised as the ruling class.' Only, unlike all other types of state, whose object is to guard and further the interests of a small group of exploiters against the huge majority of the people, the proletarian state of the transition period is an instrument of war against the remnants of class society and a means for the construction of a classless society.

This 'socialist state' of the transition period is characterised by the dictatorship of the proletariat. In the *Critique of the Gotha Programme* (written in 1875, published in 1891) Marx wrote: 'There corresponds to this also a political transition period in which the State can be nothing but the *revolutionary dictatorship of the proletariat*.'

But what in fact does 'dictatorship of the proletariat' signify ? What was Marx's image of a state under dictatorship of the proletariat ? Had he really in mind anything similar to the immense machinery of oppression built up in the Leninist-Stalinist state allegedly as a realisation of the idea contained in this single sentence of his ?

Without entering into any discussion regarding the value of this Marxist thesis, it is necessary to point out that according to Marx and Engels 'dictatorship of the proletariat' does not mean the dictatorship of one man, nor of a small group of persons, nor has it at all the meaning which is usually given to that expression. In the theory of Marx and Engels 'dictatorship of the proletariat' is not the reverse of 'democracy', but the reverse of 'dictatorship of the bourgeoisie'. The thesis and antithesis are therefore proletariat-bourgeoisie and not dictatorship-democracy. This becomes clearer if one recalls that according to Marxism every capitalist state – even that which has the most democratic political institutions – is a state of dictatorship of the bourgeoisie. It is so precisely because the

bourgeoisie owns the means of production and in this position utilises the state for its class interests, even when, owing to the stability of the social-economic order at a given time, political democracy is able to exist in such a state. This 'bourgeois dictatorship' is done away with by the proletarian revolution and replaced by the 'dictatorship of the proletariat " i.e. necessarily of the great majority of the people.

In his *Criticism of the Proposed Erfurt Programme* (1891) Engels explicitly said that 'the specific form for the dictatorship of the proletariat' was a democratic republic of the type created by the French Revolution. In the Soviet Union however this view of Engels is either ignored, or misrepresented, or it is asserted with a suggestion of pity that 'even to the Marxist genius of Engels the concrete form of the proletarian state was still that of a parliamentary republic '.

The state of the transition period begins to wither away at the very moment of its birth, and disappears once and for all when the classes and their remnants have been destroyed. There follows a new epoch of self-organisation of society on the basis of free association of direct producers. 'The government of persons is replaced by the administration of things and the direction of the processes of production' (Anti-Dühring). And Engels concluded with his famous sentence: 'The state is not " abolished " ' *it withers away*' [italics in the original].

Law

According to Marxism, law, like the state, is of a class nature and belongs to the phenomena of superstructure, built over the whole of the economic conditions of production. Law came into being simultaneously with the state. It is inseparably linked with class society.

The content and form of law depend upon the material conditions of life and the mode of production. In the *Critique of the Gotha Programme* Marx emphasised that economic relations are not regulated by legal conceptions, but, on the

contrary, 'legal relations arise from economic ones.' On the other hand, Engels wrote in *Ludwig Feuerbach and the End of Classical German Philosophy* (1886): 'If state and public law are determined by economic relations, so, too, of course, is private law, which indeed in essence only sanctions the existing economic relations between individuals which are normal in the given circumstances.' On another occasion – in his letter to C. Schmidt – Engels explained that in a modern state, 'law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression, which does not, owing to inner contradictions, reduce itself to naught'.

What then is law? Is it determined by the 'economic relations' and therefore must correspond to the 'general economic condition' or does it express the will of the ruling class?

To each stage in the development of the productive forces correspond definite relations of production. Consequently, the mode of production in any historical epoch determines, in the final analysis, the nature of the class division of society (slaveowners and slaves, feudal nobility and serfs, bourgeoisie and proletariat). Since the stage of development of the productive forces does not depend upon human will, and cannot, consequently, be arbitrarily altered, the relations of production, i.e. the class relationships, cannot be modified while they correspond to those productive forces. Harmony reigns between the two. However, when the productive forces which are continually evolving (quantitative changes) have so far progressed and outstripped the obsolescent, but still existing, relationships that they no longer correspond to them, a dialectical contradiction (antagonism) arises between the new productive forces and the no longer adequate relations of production. This dialectical antagonism is resolved by social revolution, which alters the relations of production and the entire superstructure (qualitative change). A new economic-social organisation comes into being, which once more corresponds to the productive forces, but this time to the new forces, and the dialectical balance is re-established (new positive), until the moment when

the further development of the productive forces requires a further revolutionary alteration in the relations of production.

In this sense law is determined. But within the general framework determined by the mode of production, law is an expression of the will of the ruling class. This does not signify that the ruling class is able to create law as it pleases quite arbitrarily. It means merely that the ruling class sets up such a system of law as corresponds to the existing conditions of production at a given historical epoch, and that, owing to the exploiting position of that class, the law corresponds first and foremost to its interests. But it corresponds at the same time to the mode of production in periods of equilibrium between the productive forces and the relations of production, which it itself strengthens. In these limits, law corresponds 'to the general economic conditions' and therefore satisfies the , general interests and needs of society' also.

However, when the swollen productive forces require new relations of production, the ruling class then attempts by ever more drastic measures to preserve the existing economic-social system, in order to conserve its privileged position. At such periods, marked by antagonism between the productive forces and the relations of production, law no longer reflects the general needs of society, but expresses exclusively the interests of the ruling class, which are now opposed to the general interests

of society. Together with the relations of production (class relations), which law endeavours to preserve, but which are no longer in conformity with the productive forces, it becomes an obstacle to progress. The social revolution, altering the relations, also creates anew legal system, which in turn expresses the will of the new ruling class, but at the same time corresponds to the new' needs and interests' of society.

In the ' socialist state of the transition period' law still exists, but, parallel with the state, it withers away and completely disappears in full communism. Marxists expect that in a communist society, owing to the absence of antagonistic classes and to the resulting identity between the essential interests of individuals and those of society, law as a body of compulsory

rules of conduct sanctioned by the state power would be replaced by rules of communist morality, high self-discipline and, if necessary, direct coercion by society.

Crime

Crime may be considered from different points of view: sociological, psychological, political and others. Sociology, for instance, treats crime as a social evil, as socially deviating conduct, while psychology deals with the mental aspects of this phenomenon.

Whatever the approach, crime is by definition a legal category. It is always an act or a default directed against the most important values of a given society and forbidden by law on pain of punishment.

From the Marxist concept of state and law it clearly follows that crime in the juristic sense of the word is also a phenomenon belonging only to class society. There were, of course, negative, antisocial attitudes also in the pre-class society, but these cannot be regarded as crimes for the simple reason that state and law did not exist. At that time the whole community reacted in various ways against antisocial behaviour of individual members. Expulsion from the community and the principle 'an eye for an eye' belonged to the most severe measures applied or permitted by society in such cases.

Crime appears simultaneously with state and law as a result of the disintegration of the primary society and its transformation into a class society. The concept of crime in general and the definition of certain acts as criminal offences changed from one social-economic formation to another, but crime as such is inherent in all societies based on private ownership. Crime reaches its highest level under capitalism. Marx asserted that the average rate of crimes committed every year in the bourgeois states at the beginning of the nineteenth century depended not so much on the particular political institutions in one or other capitalist country, but on the nature of the basic conditions

peculiar to contemporary bourgeois society .In a socialist society – Marxists believe – crime should wither away and finally disappear in the new communist classless society. 'We know' – Lenin wrote – 'that the exploitation of the masses, their misery and poverty, are the social roots of excesses consisting of violations of the rules of community life. With the elimination of this main cause the excesses will necessarily begin to wither away. We do not know how fast and to what extent, but we do know that they will wither away.'

Present Soviet Position

The rulers of the Soviet Union have always claimed that the social-economic and political organisation of the Soviet state is based on Marxist principles. Soviet theorists of state and law have been compelled from the first days of the Revolution 1917 to follow this thesis as an axiom which, in fact, represents the fundamental and unquestionable ideological justification for the very existence of the Soviet type of government. Owing to the character of the Soviet state and of the whole Soviet reality, theory is and has always been forced to ignore, misrepresent or deform many aspects of real life in order forcibly to fit state, law and crime into the Procrustean bed of Marxism, which however, in this case had to be specially adapted to the purpose. All this is the source of what appears at first sight a peculiar phenomenon, that theory claiming to present an uncompromising materialist explanation of society and all social phenomena, including crime, in many respects is today wandering in a vacuum. Theory goes more or less its own way, real state and law go theirs.

The question of the emergence and the class nature of state and law did not evoke any especially significant discussion in Soviet theory. On the contrary, all questions connected with the thesis regarding the withering away of state and law, particularly that of the role of the dictatorship during the 'transition period " were a source of disagreements, and are still among the most slippery and dangerous points.

This is quite understandable, if one considers the political importance of these questions for the Soviet state. In fact, if in conformity with the Marxist concept state and law (and crime, of course) in the transition epoch begin to 'wither away' from the very moment when the 'proletariat' seizes power, then that state with its law must grow weaker from year to year, giving place at the same time to the 'self-administration of society' on the basis of 'free association of direct producers'.

In the Soviet Union matters have so evolved that the state has become ever stronger. Stalin not only recognised but even emphasised this fact. In contrast to what was believed in the first post-revolutionary period (approximately from 1917 – 1930) when theory tended to explain that Soviet state and law were 'withering away', Stalin in 1930 put forward a new thesis according to which the highest possible development of the power of the state, with the object of preparing the conditions for the dying out of the state, must be regarded as the only correct Marxist formula'. In 1937 he was even more explicit when he asserted that 'the state will wither away, not as a result of weakening the state power, but as a result of strengthening it to the utmost, which is necessary for finally crushing the remnants of the dying classes and for organising defence against the capitalist encirclement'.

Simultaneously with the new 'line' relating to the withering away of the state through its strengthening, there occurred also a radical change in the conception of the role of law. The chief interpreter of this new position was A. Ya. Vyshinsky. Pouncing on all theories which in one form or another emphasised the growing unimportance of law in the 'socialist state' he set up the thesis of the full value of law in the transition period. This law had nothing of a 'bourgeois character', but was according to him a new, 'socialist' law which played 'an enormous creative and organisational role,' as he said in 1938.

In fact, law did 'wither away' in the Stalinist state of terror. However, it was not replaced by the Marxist 'self-administration of society' but by arbitrary actions of a powerful bureaucratic party and state machinery in the service of the summit

of the Communist Party. At that time law played only a subsidiary role and even this secondary role was limited to the narrow and degrading task of supporting 'the direct blows of administrative repression, with the help of extraordinary and exclusive measures and methods' (Vyshinsky). In this sense and for this purpose 'law' had to be strengthened. But it must not be forgotten that here it is a question of law in a special kind of dictatorship which does indeed utilise law for the attainment of its ends, but is not restrained by the provisions of that same law which it itself has created. In his brochure, *The Proletarian Revolution and Kautsky the Renegade*, Lenin revealed beyond all doubt how he imagined the relation between dictatorship and law: 'Dictatorship is an authority relying upon force, and not bound by any laws.' On another occasion he emphasised: 'The dictatorship signifies, notice once and for all, gentlemen, unlimited power, which rests upon force and not upon law.'

The new Programme, accepted unanimously by the 22nd Party Congress of the Communist Party on 31 October 1961, contains a number of points of great importance for the present Soviet theory of state and law. First of all the Programme declares that the Soviet state which 'arose as a state of the dictatorship of the proletariat, has in the new, contemporary stage, become a state of the entire people, an organ expressing the interests and the will of the people as a whole'. Then there follows the assertion that 'the dictatorship of the proletariat' has accomplished its mission and has ceased to be necessary in the U.S.S.R. Accordingly the dictatorship of the proletariat disappears 'before the state withers away'.

All this amounts to an affirmation that in the Soviet Union a classless society has been established. Even more, the Programme and the new party Rules declare that 'the Communist Party of the working class has become the vanguard of the Soviet people, a party of the entire people', although, the 'two friendly classes' (workers and peasantry) and the 'distinct social stratum' (intelligentsia) still remain in the Programme and the 'working class' is still recognised as the leader of

society'. Leaving aside the fact that a classless 'all-people's' state is nonsense from a Marxist point of view – and Soviet doctrine still claims, as already mentioned, to be the purest expression of true Marxism – and that a 'party of the entire people' is absurd both in the light of Marxism and quite apart from Marxist doctrine, it is clear that theoretically the whole people has now been proclaimed as the holder of power .

Of course, neither now on the basis of the Programme, does power belong, nor earlier, on the basis of the Constitution, did power belong to the 'working people of town and countryside', or to the 'entire people'. All these statements and assertions of the Programme about the Soviet Union as a classless all-people's state, the party of the entire people, are mere slogans which contradict other theses such as the leading role of the working class, the class character of any state, the definition of a party as the best, organised force of a class and others still regarded as valid. The aim of these slogans is to disguise the genuine ruler, the real holder of political sovereignty, and to obscure the true character of power in the Soviet state: the dictatorship, in a very ordinary sense of the word, of the summit of the party.

As for the withering away of the Soviet state – which according to Marxism should already have been replaced by a classless society of self-administration – the Programme affirms again that historical development inevitably leads to the disappearance of the state. But 'for a complete withering away of the state both internal conditions – the building of a developed communist society – and external conditions – the victory and consolidation of socialism in the world arena – are necessary'. For the time being it is necessary to strengthen the armed forces and the defence capacity of the Soviet Union, because this is 'the most important function of the socialist state'.

Of course, theorists could do nothing but accept the new thesis of an 'all-people's state' and consequently of an 'all-people's' law. At present, a distinction is drawn between law in a class state, including the 'socialist state' before the 'contemporary stage' and law in the 'all-people's state'. The old

definition of law as a class category is applied to law in all , class states' with a further distinction between those states where' the exploiters' form the ruling class, and the' socialist state of the transition period' with the' working class' as ruling class. And finally there is a new definition of law as an expression of the will of the people as a whole in the contemporary , all-people's ' Soviet state, unique in the history of mankind. Nobody in Russia is able to give a satisfactory, 'Marxist' answer to the basic question of how in an allegedly classless state there can be any laws at all in the Marxist sense of the word, since law deprived of class character subsisting in a classless state is also nonsense according to Marxist doctrine. The question still remains open for Soviet theory which, as far as this essential point of legal philosophy is concerned, has not moved very 'far away from the point where it stood fifty years ago.

The new theses of the Programme are praised as a 'further development of Marxism' as 'a remarkable event in the development of the Marxist-Leninist science or in similar terms, but in fact they are a complete and very "undialectical" , negation of Marxism in one of its basic and most essential points. Perhaps all this really is a development, but it certainly is not Marxism, because there has been nothing left of it but the name.

In Soviet practice, of course, law continues to exist. Its role has increased in importance since Stalin's death in 1953, but particularly since the 20th Party Congress in 1956, at which Khrushchev made his famous attack on Stalin, criticised the 'personality cult' and admitted innumerable crimes committed by various state agencies, in the first place by the secret police. The official recognition of previous illegal and arbitrary acts, with the simultaneous setting-up of demands for' socialist legality', contributed in part to the mood of liberalisation. ' Law and legality' became the main slogans.

There is no difference between the earlier and the present basic approach to the phenomenon of crime as such. The old thesis still remains valid that crime is foreign to a socialist

society and should disappear completely under full communism. As recently as the end of July 1967, N. Shchelokov, the Soviet Minister for the Preservation of Public Order, wrote in the Moscow Pravda that in the Soviet state all conditions existed' for completely eradicating crime '. In spite of these allegedly favourable conditions, crime in the U S S R not only still exists, but also becomes a more and more urgent problem, just as it does in other countries.

Beside this fundamental thesis, many other things are rather different. Whereas earlier Soviet doctrine, following the policymakers, used to be satisfied with a few simple formulae such as , no room for crime in our socialist state' or' crime is due to the remnants of the past', and the like, greater and more serious attention is now paid at least to some aspects of crime. New methods in combating crime are applied in practice, sometimes experimentally. The results of these measures are examined either by closed groups of specialists or openly in public discussions and in the press. Certainly, the achievements are not and cannot be spectacular. These efforts are still at their beginning, more in the stage of initial research and of tentative attempts than in the nature of a firm penal policy. Nevertheless they represent a step forward when compared with the previous rigidity and dogmatism.

3

Main Features of Criminal Legislation, 1917-1958 *First Revolutionary Courts*

LENIN SAID once that '...dictatorship presupposes the application of mercilessly brutal, swift and decisive violence to strangle the opposition of exploiters, landowners and their hangers-on ...'. Although he immediately added that the essence of the 'proletarian dictatorship' was not to be found in violence alone, nor mainly in violence, it is nevertheless a fact that in the Soviet state criminal law has always been, and still is, regarded not only as a remedy for combating crime, but also as a powerful political weapon for the suppression of any opposition whatever. This relates to the very nature of Soviet criminal law and to its application in practice, as well as to the general view of the doctrine in respect of its rôle. Therefore it is possible fully to agree with V. G. Smirnov and M. D. Shargorodsky, when they say in a work published in 1957:

'Criminal law is so closely and directly connected with the state and its functions that the tasks confronting the Soviet state, too, at each stage of its development have always found and still find their direct expression and reflection in criminal legislation and in the practical actions of the judicial organs in the sphere of criminal law.'

One of the main aims of the October Revolution was not to reform, but to destroy completely the former state machinery, including courts, procuracy (public prosecutor's office) and the institution of private advocates, and to create instead anew, a 'proletarian' apparatus. Lenin believed, or appeared to believe, that all workers and peasants, the masses, should participate in

running the state, but, of course, under the guidance of the Bolsheviki. He explained that it was 'of great importance for us to draw absolutely all the workers into the management of the state'. This included the administration of justice.

During the revolution the party formed, through the local organs of the revolutionary state authority, a number of new courts which consisted mainly of workers and peasants. As early as November 1917 the first 'provisional revolutionary tribunal' was organised in the Vyborg district of Petrograd. It consisted of five members, appointed by the Vyborg District Soviet (Council) of Workers' and Soldiers' Deputies. The first case was heard on 4 November 1917. A certain Belaev, a member of the militia and a soldier, was accused of 'firing a rifle while in a state of drunkenness'. The chairman of the court announced that the court will first hear the defence of the accused and then 'two of the citizens present in the courtroom would speak for the prosecution and two against', if they wanted. In fact two citizens demanded punishment and one spoke in favour of the accused. The court ruled that Belaev should be dismissed from the militia and warned him that 'the most severe measures' would be applied against him, if he committed such an offence again.

Similar courts were established in many other places (Novgorod, Kronstadt, Saratov, etc.) under various names as , court of social consciousness " 'revolutionary court', 'pro- visional revolutionary court' and the like. In some cases the members of these courts were elected by citizens, in others they were appointed by the local soviets or by their executive committees. There was no uniformity either regarding their composition or in respect of punishment they might inflict. Some courts consisted of one judge and four members, others of three judges and nine assessors or of three judges without assessors at all. A court in the Tomsk province was entitled to inflict the punishment of imprisonment for a term of up to two years, whereas some other courts had wider powers. The court of the Vyborg district in Petrograd applied imprisonment, confiscation of property and other punishments. It is worth

mentioning that this court first introduced the 'measure' of compulsory labour without detention which is still one of the punishments in the Soviet penal system.

In spite of these differences there were also some common features, of which the most important were the following : generally speaking, the courts were organised and their members appointed by the local Soviet authorities; in order to achieve ' widespread participation of the masses' the period of office of judges and assessors was very short (one to three months) ; all courts functioned as collegiate organs with equal rights of their members (chairman, judge, people's assessors) ; cases were heard in public and everybody who happened to be in the courtroom had the right to put questions to the accused and to witnesses, or to act either as ' accusers' in support of the charge or to represent the defence; the courts were not bound by any formal rules of procedure, but reached their decisions on the basis of ' free conviction '. The decisions were final. Many of these principles were confirmed by the legislation of the early post-revolutionary years, and some of them – for instance, the collegiate system of formal equality between professional judges and people's assessors – have survived to this day.

Decrees on Courts

The Decree on Courts No.1 of 22 November (5 December) 1917 (published two days later) formally abolished the old judicial system and established a new uniform system of people's local courts, based to some extent on the experience of the existing revolutionary courts in various parts of Russia. These courts consisted of one full-time judge and two assessors, appointed by the local soviets. Decree No.1 also established special revolutionary tribunals which consisted of a presiding judge and six assessors. Local courts had general jurisdiction in civil matters up to 300 roubles and in criminal cases over offences for which punishment of up to two years' imprisonment was provided for by law. Sentences condemning the

accused to seven days of deprivation of liberty or to a milder penalty and judgments concerning civil disputes of 100 roubles or less, were final. Appeals against other sentences or judgments were permitted and, if lodged, were decided by periodical meetings (called 'congresses') of local judges of the district or city. The revolutionary tribunals, on the other hand, were direct political weapons of the revolution. Their task was to , struggle against the counter-revolution' and to combat other 'anti-state crimes'.

Decree No.1 permitted the application of imperial laws, including the provisions of the old criminal law, if they had not been explicitly abolished, or if they were not contrary to 'the revolutionary conscience and revolutionary legal consciousness , (Art.5). Actually, the old principles and rules were little applied in practice. By Art. 3 of the Decree on Courts No.3 of July 1918 (*Dekret o Sude*, No.3) the application of laws of prerevolutionary authorities was forbidden and the courts were ordered to apply only' the decrees of the worker-peasant government' and to act according to their socialist consciousness.*

Courts and revolutionary tribunals formed by the party in 1917, 1918 and later 'created their own criminal law, the distinguishing feature of which was the protection of the established revolutionary order " as admitted in Soviet legal literature. To put it more simply, trials were conducted and sentences passed according to the revolutionary needs of the moment and of the local circumstances, without reference to any legal provisions whatever in the true sense of the word.

Material Definition of Crime

The first document of importance to deal with the very concept of crime was an act under the title' Guiding Principles of Criminal Law of the R SF S R " issued by the People's Commissar of Justice (P. Stuchka) on 12 December 1919. Art. 6 defined crime as' an action or omission, dangerous for a given

* See Chapter 4.

system of social relationships '. In Soviet legal theory it is emphasised that it was through this document that Soviet law 'firmly set off along the road' of the so-called material determination of crime. The substance of this concept is that it is not the action or omission formally forbidden by the criminal law which is to be regarded as constituting a criminal offence, but every 'socially dangerous' act (action or omission) directed against the Soviet state or against its economic, social or political system. The material determination of crime in this sense (at present it has another meaning) was until recently emphasised in Soviet theory as one of the great achievements of Soviet legal science in the field of criminal law .The point of view of Soviet theory was perhaps best and most concisely expressed by the following passage in P. I. Kudryavtsev's *Dictionary of Legal Terms (Yuridichesky Slovar'*, 1956):

'Unlike the formal, politically empty, definitions of the concept of crime supplied by the bourgeois criminal codes ("a crime is an act forbidden under threat of punishment"), the definition of crime contained in Soviet criminal legislation is material, i.e. it reveals the class-political nature of those socially dangerous actions or omissions which are recognised as criminal and punishable as crimes.'

In 1920 the Commissariat of Justice issued a draft of a Criminal Code which gave no definition of crime at all. In the Institute of Law another draft was drawn up at the end of 1921, whose authors accepted in principle the material determination of crime, but at the same time insisted on the maxim *nullum crimen sine lege* (no crime without law). However, this principle did not find its way into the Criminal Code of 1922. Art. 6 of this code defined crime as 'a socially dangerous action or omission threatening the bases of the Soviet system and legal order established by the worker-peasant authority for the period of transition to communist organisation '.

The Decree of 31 October 1924 of the Central Executive Committee of the US S R on the Fundamental Principles of Criminal Legislation of the US S R and the Union-Republics contained the new basic principles of criminal law, to which all

republican criminal codes had to conform. Consequently, the legislative organs of the union-republics passed their respective new criminal codes. The Criminal Code of the most important republic, the Russian SFSR, of 1926, came into force on 1 January 1927. The criminal codes of the other republics were accepted and promulgated between 1926 and 1928. The provision of the Fundamental Principles of 1924 entered into all these codes as their constituent parts. The provisions of various other all-union legislative acts also entered the republican criminal codes, and in any case, even without this formal incorporation, owing to the structure of the Soviet legal system they had to be applied on the whole territory of the USSR. Of these all-union provisions, the most important were certainly contained in the Decree on Crimes against the State of 25 February 1927* whose text became the notorious Art. 58 (1)-58 (14) of the Russian Criminal Code and the corresponding articles of the other republican codes. Another important act was the Decree on Military Crimes of July 1927, which also entered the Russian Criminal Code as Art. 193(1)-193(31), and the other codes.

The main characteristics of all these codes and all-union legislative acts was that the principle of material determination of crime was retained. Art. I of the Russian (RSFSR) code and corresponding articles of the other codes stated that the task of criminal legislation was to protect 'the socialist state of workers and peasants' from 'socially dangerous acts'

while Art. 6 defined a socially dangerous act (crime) as 'an action or omission directed against the Soviet system or violating

* This Decree was later amended on several occasions, particularly by the Decree of 8 June 1934 which defined a considerable number of 'crimes against the state' for which the death penalty or other most severe punishments were provided, 'Flight abroad' was – and still is – one of these 'crimes'. In some cases all adult persons who lived in the household of the 'criminal', even if they did not know anything about his 'flight abroad', were punishable by exile in the far regions of Siberia for a term of five years, The punishment for 'failure to report' an intended flight abroad of a serviceman by adult relatives who lived in his household or were maintained by him was imprisonment for a term of five to ten years and confiscation of property.

the legal order established by the worker-peasant authority for the period of transition to communist organisation '.

Analogy

From the basic standpoint in respect of the very essence of crime there logically followed a number of other Principles, of which the most significant was the application of analogy. This was permitted by Art. 16 of the RSFSR code which read as follows :

'If this or that socially dangerous act is not explicitly provided for by this code, then the basis and limits of responsibility for it are determined by the application of those articles of the code which define crimes generically most similar.'

The material definition of crime and analogy as a constituent part of this definition were criticised at the time even in the Soviet Union. Analogy was regarded by some authors as a provisional withdrawal from strict legality. Others asserted, and quite rightly So, that analogy transformed the special part of the Criminal Code (in which individual offences were defined) into a simple listing of examples of crimes. Naturally, such criticisms were possible only in the twenties. In later years, until recently, the material definition of crime and analogy were defended by all who wanted to conform to the official political line or to what they considered to be this line. They argued that analogy in the Soviet Union was applied not contrary to the law, but in accordance with the law, and that it assisted in strengthening legality, because its application, they asserted, ensured that some 'socially dangerous acts' which were not defined in the special parts of the Soviet codes did not remain unpunished on these formal grounds. In fact, in Soviet political conditions analogy was utilised as a further legal instrument for all kinds of arbitrary actions.

Measures of Social Protection

Various decrees issued by the Soviet authority in 1917 and 1918

often mentioned sanctions in a very uncertain manner, such as , most severe punishment' or 'judicial liability' or the like without specifying the punishment to be applied. In practice, revolutionary courts used to inflict fines, confiscation of property, compulsory labour, deprivation of citizenship, imprisonment, designation of the offender as an enemy of the workers or of the people and, of course, the death penalty. In the Instructions of the Commissariat of Justice of 19 December 1917 on the Revolutionary Tribunal and its composition the following punishments were mentioned: fine, deprivation of liberty, expulsion from definite places or regions, public censure, designation of the offender as an enemy of the people, deprivation of political rights, sequestration or confiscation of property, compulsory labour. A Decree of 16 June 1918 officially introduced the death penalty by shooting for 'counterrevolutionary crimes, sabotage and the like'. The death penalty is still one of the punishments in the Soviet penal system.

The above mentioned Guiding Principles of Criminal Law of 1919 contained the first elaborated system of punishments. The long list of sixteen various punishments included such measures as reprimand, public censure, fulfilment of a task without deprivation of liberty (for instance the duty to attend a course in any field of education), setting up a boycott against the offender ('sending to Coventry'), expulsion from a union, compensation for damages, dismissal from duty or office, prohibiting the offender to perform a definite job, compulsory labour without detention. Besides these punishments, the Decree of 1919 comprised also the punishments of confiscation of property, deprivation of political rights, designation of the offender as an enemy of the revolution or of the people, deprivation of liberty for a definite term or without any term' until a given event occurs " declaring the offender an outlaw* and

* It is interesting to mention that this was a very ancient form of punishment to be found also in other legal systems, including English law, but it was relinquished long ago In England outlawry proceedings were formally abolished only in 1938.

shooting. It was explicitly stated in the Decree that all these punishments had to be regarded only as examples.

The courts were entitled to inflict any of the mentioned punishments, or several punishments at the same time, or to apply other, similar measures. It was also laid down that people's courts had no right to apply the death penalty. At that time this privilege was reserved for the revolutionary tribunals which dealt not only with counter-revolutionary activities, but also with many other offences such as speculation and embezzlement of state property.

Although the Guiding Principles of 1919 used the term 'punishment' (*nakazanie*), it was quite clear from the introduction and from various provisions of the decree, that these punishments were understood by the Commissariat of Justice as measures of social protection rather than as punishments in the true sense of the word. Art. 25 of the Guiding Principles stated that punishments must be applied in conformity with the special characteristics of each individual case and the character of the offender. The courts ought to take into consideration the task of protecting the new social system from infringements on the one hand, and the necessity 'to reduce the personal sufferings of the offender as much as possible' on the other. Art. 10 of the Guiding Principles expressed the view that 'crime in class society is provoked by the structure of social relationships, in which the offender lives' and that therefore the punishment must not be regarded 'as a retribution for guilt' or as 'an expiation of guilt'. It is not surprising that the decree contained such statements, if one considers that it was signed by P. Stuchka, then People's Commissar of Justice, one of the best Soviet interpreters of Marxist legal philosophy in the first post-revolutionary period.

The idea that punishment is only a measure of social protection also found its way into the Criminal Code of 1922 (Art. 26). It is true that this code still used, like the Guiding Principles, the term 'punishment', but it regarded punishment as a 'measure of social defence' or 'protection'. The heading of Section Four of the General Part read 'Kinds and Forms of

Punishments and Other Measures of Social Protection'. The Fundamental Principles of Criminal Legislation of 1924, and the criminal codes of the union-republics issued after 1926 and based on the Fundamental Principles, completely excluded the term 'punishment' and used instead the expression 'measures of social protection of a judicial-corrective nature'.

If some of the punishments listed in the Guiding Principles of 1919 could be rightly qualified as true measures of necessary defence of society, the 'measures of social protection' in the new criminal codes had the character of punishments in the most ordinary sense of the word. These 'measures' included such severe punishments as the death penalty, deprivation of liberty in corrective labour camps in distant regions of the US S R, imprisonment for a term of up to twenty-five years, confiscation of property, exile, banishment and many others.

It happened in this field, too, as it often happens in the US S R, 1 that for ideological, political or other reasons a word or expression is used in order to conceal the reality which does not correspond at all to the usual meaning of the word. And, strangely enough, there have always been people, both in the US S R and outside its frontiers, who were inclined to give more credit to the words than to the reality.

A Decree of 8 June 1934 used the term 'punishment' instead of 'measure of social protection' for the death penalty by shooting and confiscation of property in cases of treason. Since then the word 'punishment' has been generally introduced and it corresponds in fact to the character of measures applied against offenders. In 1944 the Supreme Court of the U S S R recognised that the expression 'measures of social protection', was inappropriate for the kind of penalties applied in the Soviet Union.

Impact of Ideology

The steps taken by the Bolsheviks either directly or through various organs of the new Soviet authority were imposed, at least in part, by the circumstances and the revolutionary needs

of the moment, but some of them also reflected to a great extent Marxist ideology.

The abolition of pre-revolutionary law and the attempts to establish a substantially new, socialist legal system corresponded to the idea of qualitative changes in the structure and super-structure of society as taught by historical materialism in Lenin's interpretation. The material definition of crime as an act directed against the Soviet state' (Principles of 1919) or 'threatening the bases of the Soviet system' (Code of 1922) or , directed against the Soviet system' (Code of 1926), with all the consequences of this definition, was in conformity with the concept, according to which crime is a class category. Soviet authors would say that this was 'a really Marxist, materialist determination of the concept of crime, which uncovered its true class character' (A. A. Piontkovsky in a book published in 1961). Accordingly, the special parts of the codes contained chapters dealing with 'counter-revolutionary crimes " , especially dangerous crimes' and other crimes threatening the Soviet system of government. Furthermore, this Soviet concept of crime not only permitted analogy, but also favoured extremely vague descriptions of individual political and other offences which by itself, even without the application of analogy, contributed to arbitrariness.

The words 'for the period of transition to communist organisation' both in the Criminal Code of 1922 and in that of 1926 echoed the thesis regarding the transition period from capitalism to communism and implied the belief that crime will completely disappear in communist society.

Finally, the expression itself measures of social protection , and the whole structure of these measures as framed and explained in the Guiding Principles of 1919 mirrored Marxist legal philosophy. This was not an incorrect use of terms or 'a break in terminology' caused by erroneous views regarding the class character of language', as some Soviet authors asserted many years later, but an important matter of principle which, had it been realised in practice, could have had far reaching consequences. It was closely connected with the

Marxist concept of crime. If, in fact, crime is one of the necessary negative phenomena produced by class relationships 'in which the offender lives' then society may be certainly entitled somehow to defend itself but not to retaliate. Therefore the measures applied ought to be of such a character as to cause as little suffering as possible to the perpetrator. They must be understood as a remedy of self-defence and not as a 'expiation of guilt'. Thus, from a purely theoretical Marxist point of view the expression and the idea behind it were justified and correct. But here again Soviet practice had nothing or very little to do with theory. For those hundreds of thousands who were executed, imprisoned for many years, sent to forced labour camps, exiled from their homes – sentenced by courts or without trial, guilty or innocent – it made no difference whether their sufferings were called measures of social protection before 8 June 1934 or punishments after that day and up to the present time.

Soviet criminal law based on the principle of material definition of the crime was replaced in December 1958 by the new criminal legislation which is now in force. It would be wrong to blame this principle exclusively for all the misfortunes and calamities endured by very wide sections of the Soviet people for forty years, particularly in the period of Stalinist terror, for which the euphemistic term 'cult of personality' is still used in Russia. In a favourable political climate with true democratic institutions and an independent judiciary this principle might perhaps work and even produce some positive results. Analogy, for instance, is in fact explicitly permitted in some states with codified criminal law – such as Denmark – without causing any special concern in respect of legality. However in Soviet practice the material definition of crime has been transformed from the very beginning into the converse of what it was claimed to be in theory: it became a legal device which could be invoked at any time for justifying any arbitrary action. This principle, together with that of the so-called 'socialist legality' in Soviet political conditions meant in fact and in law a legalisation of illegality.

4

Socialist Legality

Some Enactments

THE QUESTION of 'revolutionary' or 'socialist' legality, revived at the 20th Congress of the Communist Party in 1956, has been on the agenda since the October Revolution.

During the revolution itself, in November 1917, the Soviet authorities called for 'the strictest revolutionary order'. A conference of the party, held in December 1921, emphasised the need for 'strengthening the strict principles of revolutionary legality in all spheres'. In May 1922, in the discussion regarding the structure of the Soviet Procuracy, Lenin again expressed his views on legality in a letter which will be analysed in the next section.

In December 1922, in April 1923, in April 1925, in March 1930 and on many other occasions, the party leadership either directly or through state organs repeatedly noted violations of legality in various fields, and called for observance of the laws. The decision of the Central Committee of March 1930 'On the Deviations from the Party Line in the Kolkhoz Movement', explicitly mentioned a number of illegalities such as: violation of the principle that collective farms must be founded on a 'voluntary basis'; founding of 'communes' (full community) instead of 'artels' a looser form of agricultural co-operation which the party leadership, after some hesitation, decided to apply to the kolkhozy; administrative closing of churches without the consent of the 'overwhelming majority in the village', etc.

The compulsory collectivisation of agriculture during the first five-year plan (shortened later to four and a quarter years: 1928-1932) was ruthlessly carried out by order of the party by means of terror and at the price of rivers of blood and

shocking suffering of the resisting peasants.* This evoked the need to proclaim once more, at least formally, the principle of legality. A Decree of 15 June 1932, aimed at strengthening the kolkhoz system, demanded rigorous 'revolutionary legality' in relation to the collective farms and all their members. This was considered to be 'the most important task of the moment'. The same decree again admitted 'the existence of a still considerable number of violations of revolutionary legality by officials'. Instructions were issued to the procuracy and to the courts to deal severely with all officials involved in violations of workers' rights, and especially in cases of illegal arrest, search, confiscation, etc. Needless to say, this decree, like those that preceded it, remained ineffective. Arbitrary police suppression and terror continued to be used, in the villages as well as in the towns, with greater or less intensity according to circumstances.

The Soviet Constitution of 1936 (still in force as subsequently amended on many occasions) also implied the principle of legality and established a hierarchy of legislative instances. The Presidium of the Supreme Soviet was given the constitutional right to repeal all decrees and other acts of the government of the U S S R and of the union republics which are contrary to the law, but, as far as is known, the Presidium has never made use of this right.

In the long series of acts concerning legality, the Decree of 19 September 1946 must not be overlooked. Noting once more a great number of 'serious violations' of the provisions concerning

* There were massacres of whole villages and mass depredations of peasants from their homes to remote camps and new plants, where they were forced to work for mere subsistence. These massacres were aimed in the first place against kulaks (rich peasants), but in fact they were applied against all those who opposed collectivisation and therefore were classified as kulaks. According to Soviet figures, published later, the number of deported peasants (kulaks) amounted to 5,000,000, but some estimates put this figure much higher. Forced labour was introduced for many peasant-workers. Like serfs under feudalism, they were attached to their plants and camps and were not permitted to leave their jobs under threat of severe penalties.

the kolkhozy – for instance, incorrect calculation of working days, destruction of kolkhoz property, infringement of rules concerning 'democratic' administration of the kolkhozy etc. – the government and the Central Committee' decisively condemned these violations" and directed that the culprits were to be 'brought before courts' and punished as 'criminal offenders'.

With so many constitutional and legal provisions regarding the strict implementation of the law, one would be inclined to believe that the central party and state authorities were anxious to establish a régime of legality, which, however, was repeatedly ignored by individual officials and local agencies. In actual fact, although many abuses certainly occurred at lower levels, sometimes even against the official party line in a given period, the vast amount of arbitrariness was due mainly to the totalitarian character of the system in which the Leninist concept of legality played a decisive rôle.

Lenin's Views

In spite of his negative attitude toward the importance of the law and his contempt for lawyers, Lenin took a very active part in shaping Soviet law. Many of the first Soviet decrees were written by Lenin himself. In other cases he gave general directives, or corrected and completed drafts of various legislative acts. During the six years of Lenin's rule nothing important in the field of law was ever enacted without his direct participation, approval or at least tacit consent.

Is there a contradiction between the Lenin who thinks that the dictatorship is not bound by any law, not even by its own, and the Lenin who makes enormous efforts to create new laws and requires the observance of those laws according to the formula of 'revolutionary' or 'socialist' legality? There is none. Law is regarded by Lenin as one of the instruments of power, as a mighty weapon in so far as it suits the needs of the dictatorship, but which is not permitted to go beyond these limits; it must be a docile servant, never a master over the

masters. The idea of a *Rechtstaat* – a state under the rule of law – was completely foreign to Lenin's way of thinking, and even today Soviet legal doctrine rejects it most emphatically as a liberal and 'bourgeois' theory.

The Soviet 'decrees' of the early years – whatever their name in Russian* – may be divided into four main categories, according to their relation to legality.

The first group consists of acts which have no legal meaning at all. They are, in fact, political proclamations or directives for action and do not deserve attention in this context. The 'Decree on Peace' of 26 October (8 November) 1917, the decree 'The Socialist Fatherland in Danger' of 21 February 1918, and many others, have such a character.

A considerable number of decrees – the second group – did contain provisions of a legal character, but either they could not be implemented owing to the circumstances of War Communism or they were not intended to be implemented. These decrees, too, were issued mainly for propaganda purposes, as Lenin himself admitted at the Eighth Party Congress in March 1919. To this group belongs, among others, the Decree on Workers' Control of 14 (27) November 1917, to which, it seems, Lenin never attached serious importance.

The third group consists of decrees which legalised arbitrariness and terror .

On 28 November (II December) 1917 Lenin wrote personally and signed the decree 'On the Arrest of the Leaders of the Civil War against the Revolution " according to which the members of all the leading bodies of the Constitutional Democratic Party were to be arrested and tried by the revolutionary tribunals.

A few days later, on 7 (20) December 1917 Lenin wrote a note in which he approved Dzerzhinsky's report on the necessity of extraordinary measures for the struggle against the counter-revolution. A decree, which was passed the same day by the Council of People's Commissars (Sovnarkom),

* The term 'decree' was used at that time not only for legislative enactments but also for simple decisions or orders.

established the famous All-Russian Extraordinary Commission for the Struggle against the Counter-Revolution and Sabotage (*Cheka*). F. F. Dzerzhinsky was appointed its chairman. The task of the *Cheka* (political police) was the persecution and liquidation of all "counter-revolutionaries and wreckers" but it very soon became the main weapon of party terror and master over life and death in all fields. The rôle of the *Cheka* was legally confirmed by the Decree on the Red Terror of 5 September 1918, enacted by the *Sovnarkom* on the proposal of Dzerzhinsky.

On 21 October 1919 the *Sovnarkom* under the chairmanship of Lenin issued a decree on the struggle against speculation, embezzlement of state property and other offences against the regulations operating in economic and distributive agencies. The decree established, and attached to the *Cheka*, a special Revolutionary Tribunal of three members to deal with these matters. Section 3 of the decree provided that the Special Revolutionary Tribunal should act exclusively in conformity with the interests of the revolution and that it was not bound by any rules of procedure.

Although the *Cheka* – renamed G P U (State Political Directorate) on 6 February 1922 and later OGPU – was formally a state agency, created and reorganised on several occasions by normative acts – it was in fact a party organ, responsible only to the party summit. On many occasions Lenin personally gave instructions to the *Cheka* or otherwise intervened. For instance, he ordered the *Cheka* to arrest the management of certain industries in the Urals and to confiscate their property; to arrest all responsible for red tape (on several occasions) ; to return a confiscated bicycle to a poor worker; not to evict an old man and his wife from their lodgings; to report immediately on the arrest of a professor, whose release had been asked for by two communists; to find the prison where another professor was detained and free him; and so on.

These and many other interventions of the same kind, represented in Soviet publications as examples of Lenin's attachment to legality, appear rather as a confirmation of

arbitrariness, and certainly do not deprive the Cheka of its terroristic character.

Lenin invested the GPU with identical terroristic powers. Only a few days after the change of name Lenin wrote to Ya. Peters (1 March 1922), then vice-chief of the GPU, that the State Political Directorate' can and must combat bribery, etc., and the like, and punish by shooting through a court sentence'. In the same short note he urged the G P U ' to come to an agreement with the Commissariat of Justice and to give, through the Politbureau, the necessary directives both to the Commissar of Justice and to all State agencies '. In practice, this meant that the courts, which at that time were administered by the Commissariat of Justice, had to comply with the instructions issued by the G P U through the Politbureau of the Party. This note has now been published in a book with the title *Lenin on Socialist Legality* (Moscow 1948, 2nd edn. 1961).

Besides the organised and 'legalised' terror through the *Cheka* (GPU), Lenin approved also direct terror by the 'armed masses'. In a letter of 26 June 1918 Lenin protested that workers in Petrograd, who wanted 'to reply by mass terror' to the assassination of V. Volodarsky, a prominent Bolshevik, had been restrained by the Petrograd party leaders from doing so.

The fourth and last group consists of normative acts which were aimed at a gradual building up of a new system of law in the ordinary sense of the term. Legislation on the organisation and functioning of the judiciary, on crime and punishment, on personal, family, property, labour and other relations, as well as legislation directly concerning legality, belong to this category. Lenin's drafts, amendments, notes and remarks throw additional light on his attitudes and complete the picture of his concept of legality. Some of them deserve attention.

In contradistinction to Lenin's views on violence and terror, one finds in his writings and speeches parallel requirements for legality.

In November 1918 he drafted a number of theses for a decree on the precise observance of laws. In thesis No.1 he said that legality must be strengthened (or most strictly observed),

because the fundamentals of the R S F S R legislation had been established. Only exceptionally, he asserted, owing to the war against the counter-revolution, extraordinary measures might be applied which are not provided for by law or are contrary to the law; but in such cases the official or the agency concerned must immediately issue a statement of the reasons for application of extraordinary measures.

Lenin's well-known letter to Stalin of 21 May 1922 'on " Double " Subordination and Legality' is particularly significant for his approach to legality in relation to the rôle of the procuracy. In this letter he admitted that 'we live in a sea of illegality " but blamed' local influence' as 'one of the greatest, if not the greatest, opponent of the establishment of legality and standards of culture (*kul'turnost*)'. Lenin strongly criticised the commission elected by the All-Russian Central Executive Committee for its views regarding the future structure of the procuracy as an organ of supervision. The majority in the Commission opposed the opinion of the minority, according to which the local representatives of the procuracy would be appointed by the central authority and subordinated to it alone. The majority wanted 'double' subordination, i.e. both to the local authority and to the centre. The majority thought that 'double subordination' would prevent 'bureaucratic centralism' in this field. Lenin pointed out that 'legality cannot be that of Kaluga or that of Kazan " but must be a 'single all-Russian legality, and even a single legality for the whole federation '. He argued that, whatever the composition of the body in charge of the supreme supervision, this body, being in the political centre, would perform its work in the closest contact with the central party authorities and under their control. 'Therefore' , he continued, , the possible mistakes committed by this central juridical body would be corrected on the spot without delay by those party organs which in general establish all basic concepts and all basic rules for all our work, both party and Soviet, in the republic.'

Although Lenin's letter of 21 May 1922 has been quoted again and again in the discussion on legality which is still going

on in the Soviet Union, the parts concerning the control of the procuracy by the central party agencies are usually omitted. Yet precisely these parts are essential, because they demonstrate very clearly that Lenin was not at all opposed to party influence over the application of law, but only fought against local influence, i.e. influence upon the court and the prosecution by local administrative agencies and party organisations or by their individual officials. In Lenin's opinion, which finally prevailed, supervision of legality was to be in the hands of a central state agency, itself under the control of the main central party organs.

Lenin approached the question of the relations between the party and the judiciary in a similar way. In 1929, the Party Central Committee issued a circular which included a proposal that the courts would have the duty of discontinuing proceedings against communists and release them from custody on the order of persons authorised by the local party committees. The party committees would have to acquaint themselves with the case and form a judgment which would act as a party directive to the court and should determine its decision. On this occasion, again, Lenin did not oppose the influence of the party, but only that of the local party agencies. On 19 November 1921 he wrote a letter to the Organisation Bureau of the Central

Committee in which he required the 'strengthening of the legal responsibility of communists' and emphasised that 'the "judgment" of the party committee can be introduced only if it has been sent to the centre and verified by the Central Control Commission.'

For a better understanding of Lenin's ideas of legality it is necessary to say a few words on the concept of so-called 'socialist consciousness'. Art. 3 of the Decree on Courts No.3 of 1918 provided that the courts shall be guided in their activity by the decrees of the government and by their 'socialist consciousness'. This 'socialist' or 'revolutionary' consciousness (or conscience) may be found also in the Decree on Courts No.1 of November, 1917, in the Decree on Courts No.2 of February, 1918, and in the whole of Soviet legal literature from the revolution until

the present time, always with a very definite meaning. These decrees, drafted under Lenin's supervision, also reflected his ideas on legality. The courts had to judge, not according to the 'social consciousness of law' (as it has been sometimes interpreted in the West), but according to a 'socialist' or 'revolutionary' consciousness, which could at any given moment be determined by the supreme party authorities (or by Lenin himself) and which in Soviet political conditions could not but be binding on the courts. When in a case of bribery the revolutionary tribunal in Moscow inflicted the punishment of 'only half-a-year's imprisonment', Lenin immediately demanded the expulsion of the judges from the party, because in his opinion they ought to have sentenced the bribe-takers to death by shooting (letter of 4 May 1918).

'Socialist' consciousness, in connection with the rôle of the political police as an organ responsible to the party summit, the procuracy subordinated to the same top of the party and, if politically necessary, party interference with the administration of justice – all this taken together reveals the true meaning of 'socialist' legality. It is not surprising that even after Stalin's death, in 1956, 'socialist' legality was described in *Yuridichesky Slovar'* (Dictionary of Legal Terms) as one of the 'basic methods of achieving the dictatorship of the proletariat', and as 'a powerful means of carrying out the tasks of socialist construction'.

In Lenin's thinking, the notion of legality is unconditionally determined by the 'socialist' element which in the last analysis means by the party line at any given time. A doctrine which

openly declares that the dictatorship is not bound by any laws cannot have any other but apolitical understanding of legality; the latter is good as long as it serves the needs of the dictatorship, but it can always be adjusted through the 'socialist' element whenever this is more convenient for the holder of power. 'Socialist' legality does not mean legality in a system of law with socialist character, but 'legality' as arbitrarily defined by the top rulers of the party or by officials unconditionally subordinated to them.

Lenin formulated the concept of 'socialist' legality in conformity with his interpretation of Marxist ideology and, even more, under pressure of circumstances. Under the rule of Stalin and his associates' socialist' legality became a cover for most horrible crimes and was transformed into a true system of lawlessness.

Developments after Stalin's Death

The discussion on legality was re-opened immediately after the disappearance of the dictator. Thus R. E. Orlovsky was writing on the rôle of 'socialist' legality in the 'construction of communism' by the end of 1953. Articles on the strict implementation of Soviet laws began to appear in one issue after the other of the main Soviet legal periodical *Sovetskoe Gosudarstvo i Pravo* (Soviet State and Law). In 1955, N. G. Aleksandrov, an authority in this field, published his book *Legality and Legal Relations in Soviet Society*, which abounded in praise of Soviet , socialist' legality as the only true legality, guaranteed by the Soviet state which 'by its very essence does not and cannot tolerate unlawfulness from any person whatever'.

S. N. Bratus', another outstanding Soviet scholar, said later that Aleksandrov's book contained 'a certain amount of embellishment of our reality, so characteristic of many books published in former years on law, philosophy, history and economy'. This criticism, it need hardly be said, dated from the period following the 20th Party Congress. Discussion based on a more realistic recognition and analysis of the facts began only after the Congress approved the 'strengthening of Soviet legality'. The Congress also heard Khrushchev's secret report, in which he admitted certain crimes of the regime. , Many thousands of honest and innocent communists " he said, 'have died as a result of this monstrous falsification of such "cases".'

Stalin himself pushed the workers of the political police 'along the path of falsification, mass arrests and executions' .'

Not only the political police (NKVD/MVD) and the procuracy but also the investigators participated in false accusations. Khrushchev cited the example of an investigator who declared at a session of the Presidium of the Central Committee : , I was told that Kosior and Chubar were people's enemies and for this reason I, as an investigator, had to make them confess that they were enemies.'

Although Khrushchev revealed only a small part of lawlessness and this only in so far as it concerned a restricted number of party members, his speech had some repercussions in the fields of theory and practice.

Soviet legal theory began to state more openly various aspects of illegality and to examine some of the reasons for it.

The most frequent and most serious illegalities occurred in the sphere of criminal law , particularly in political cases, which were linked with the activities of the security police and the procuracy. The principle of assuming the defendant's innocence until his guilt is proved was not observed in the courts. In many cases the accused was treated as a criminal merely on the basis of the charge against him. Legality was also violated, because the courts accepted confessions as sufficient proof, often without examining the circumstances in which the confessions had been made. According to A. Ya. Vyshinsky (Stalin's Procurator-General and later chairman of the Institute of Law of the U S S R Academy of Sciences), confessions, even if made during investigation, constituted sufficient proof, if not in ordinary criminal cases, then certainly in political ones. It is now generally accepted in theory, although not always in practice, that confession is not sufficient proof of guilt.

It is also now recognised that much evil resulted from Vyshinsky's view that the court is entitled to condemn on the basis of mere 'probability'. As early as 1956 the main party periodical *Kommunist* wrote: ' However great the' probability " may be, it is nonetheless not objective truth, and, consequently, Vyshinsky's thesis leads in fact to violations of legality.' A number of authors began to blame analogy as a further source

of unlawful acts. This was made possible by the criminal codes themselves which, as shown in Chapter 3, explicitly permitted the application of analogy. Other writers reproached the courts, including the Supreme Court of the US S R, for inflicting punishments not provided for by the law. Legislation of December, 1958, removed some of these 'sources of illegality'.

The prosecution system also contributed to violations of the law in many cases. Investigators of the procuracy and of the political police NKVD (MVD) were the more highly regarded the greater the number of cases they submitted to the court. Cases closed at the investigation stage and not submitted to the court were not included in recommendations for promotion. The rights of the defence were violated and the advocates' profession held in disrespect. 'Unfortunately', Kommunist complained, , in our press the true rôle of the Soviet defence counsel is distorted, for he is presented as a "patron " of the criminal.'

All the crimes of the political police – arbitrary imprisonment, tortures, murders, falsification of documents, staging of , conspiracies " etc. – were blamed on the ' Beria gang' which 'the Party destroyed'.* Once more the party appeared in the rôle of an infallible guardian-angel of legality, as if a Beria, or indeed the Soviet political police as such, could exist at all without the backing of the party, and as if they could have committed crimes of this kind without the orders or approval of its leaders.

The procuracy was criticised because it did not supervise legality as it ought to have done in conformity with the Decree of 1933 (in this respect identical with the new Decree of 14 May 1955). Supervision by the procuracy must be increased,

* L. Beria was the powerful chief of the NKVD, later MVD, which followed the former OGPU, GPU and *Cheka*. The name changed, but the functions remained essentially the same. According to information in the Soviet press, Beria was tried by a 'special judicial session' of the Supreme Court, sentenced to death and executed on 23 December 1953. There are, however, many indications that he was not tried at all, but 'liquidated' in the old Chekist way. 'Special judicial session' is not known to Soviet procedure.

insisted *Kommunist*, as a guarantee of legality, but did not add that gross illegalities were frequently committed by the procurators and other officials of the procuracy. Professor M. S. Strogovich, one of the exponents of more liberal legal concepts, no doubt with this in mind, was not satisfied by mere , strengthening of procuracy supervision " but demanded in addition judicial guarantees of legality, increased court authority and extension of their jurisdiction to some questions of an administrative nature. But these proposals have not yet been accepted.

There was also a demand for increasing the rights of the defence, particularly for authorisation to represent the defendant at the investigation stage. In the new legislation of 1958 and later this demand has been satisfied, but only in part.

It was pointed out in the discussion that obsolescence of many laws was one of the causes of unlawfulness. This mainly concerned legislation passed in the twenties in the sphere of criminal and civil law as well as regulations promulgated during the Second World War 'under the pressure of circumstances " which still remained in force. The number of normative acts was so large that even lawyers specialising in one branch of law were unable to find their way through the jungle of regulations. The obscurity of the laws in force was mentioned as a further cause. Although the book *Forty Years of Soviet Law*, published in 1957, emphasised that Soviet laws were 'exceptionally clear, precise and comprehensible to the wide mass of the people' (Vol. II, p. 45), it admitted a few pages later that the legal rules were set out 'in complicated, obscure language' (p. 51). In addition, laws and other normative acts contradicted each other .

Finally, Soviet jurisprudence was reproached for not occupying itself with a study of legal practice, and for not revealing violations of legality. The main Soviet legal periodical

immediately recognised the ' errors of Soviet legal science "

but explained at the same time that scholars had met with objective difficulties precisely because normative acts had simply not been published, and because statistics and other

information were not available, so that in many respects it was not possible to observe the actual application or non-application of legal provisions. In this respect, too, the situation has improved since then but very little. *

Parallel with these criticisms and demands for improvement of the technical instruments of legality (without, however, touching the sovereign position of the party), some changes took place in the field of legislation even before the legal reform of December 1958. Several amnesties (the first in 1953) caused the liberation of thousands of persons undergoing sentence. Many prominent victims of the Stalinist terror were rehabilitated, often posthumously. Simultaneously, a series of new enactments sought to set up 'socialist legality'. The Decree of 1 December 1934 concerning 'terroristic acts' and the Decrees of 1 December 1934 and 14 September 1937 which had introduced extraordinary summary proceedings both at the stage of the investigation and of the hearing provided for in Articles 58(7), 58(8) and 58(9) of the Criminal Code of the RSFSR (economic sabotage, terroristic acts, offences against the security of the transport and communications), and the corresponding articles of the criminal codes of the other union-republics were repealed by the Ukase (Decree) of 19 April 1956. Different legal acts of 1940 with subsequent amendments which had compelled workers and employees to remain in their place of work and had introduced criminal liability for leaving work or absenteeism without good reason were abolished by the Ukase

* On the occasion of my visit to Moscow and Leningrad in March 1967 I noticed that many ordinary citizens and, in some cases, even lawyers ignored the law in force. This is due, at least in part, to the fact that important legal texts are simply not available. The new Russian Criminal Code as amended up to 16 September 1966 (published in 1966) was sold out in a few days, but I was presented with a copy in the Faculty of Law in Moscow. In one of the consultative advocates' offices this edition of the Criminal Code was fixed with a chain to the wall of the small library so that nobody could remove it. Important statistics regarding crime are still not published, but I was told that some figures are communicated to scholars concerned with criminological research.

of 25 April 1956 which at the same time established disciplinary responsibility in such cases. Another important event was the abolition of the Special Board of the NKVD/MVD.*

Further reorganisation took place in the judicial system. In August 1956 the second degree courts of territories and regions (kray, oblast') were given the right to supervise the first degree people's courts and their work, as well as to control the work of notaries' offices. By a law of February 1957 the presidents of the republican supreme courts become automatically members of the Supreme Court of the US S R. Special transport courts which had jurisdiction in cases of offences involving obstruction of the efficiency of the service or labour discipline in the sphere of water transport or railway communications, were abolished by another law of 12 February 1957.

All these developments – in connection with the general trend towards decentralisation and 'destatisation' i.e. transfer of some functions from state agencies to social organisations ('withering away' of state functions) – led to the legal reform of December 1958 and the subsequent legislation, which together embody the present Soviet penal policy.

* According to a statement published in the January 1956 issue of *Sovetskoe Gosudarstvo i Pravo*, the Special Board was abolished sometime in 1953. Established by the Decree of 5 November 1934, this Special Board had the right to inflict various punishments including confinement of 'socially dangerous persons' in correctional labour camps. It is characteristic of the Soviet conditions that even at that time of new demands for legality the decree on the abolition of the Special Board (if there was any such decree) was never published in the Official Gazette (*Vedomosti*).

5

Legal Reform of December 1958

Preliminary Remarks

ACCORDING TO Art. 14(h) of the Soviet Constitution as adopted in 1936, legislation concerning the organisation of the judiciary, criminal and civil codes, as well as criminal and civil procedures was to come under the competence of the Union, i.e. the Supreme Soviet of the US S R. Although no all-union criminal code of criminal procedure was enacted in conformity with this provision, nevertheless a great number of acts concerning criminal law and procedure were issued by the all-union authorities between 1936 and 1957, and the union-republics had to incorporate them into their codes.

In connection with the general decentralisation of some state functions (but not of the highly centralised party apparatus) it was also decided that the Supreme Soviet of the US S R should in future determine only the basic principles concerning criminal and civil law, court procedures and the organisation of the judiciary, while the union-republics should be entitled to enact their own codes in conformity with these basic principles. Consequently, by the Law of 11 February 1957, Art. 14(11) of the Constitution was amended.

In conformity with this new provision of the Constitution, on 25 December 1958 the Supreme Soviet of the USSR passed several new laws, among them the Fundamental Principles of the Criminal Legislation of the US S R and the Union--Republics, the Law on Criminal Responsibility for Crimes against the State, the Law of Criminal Responsibility for Military Crimes, and the Fundamental Principles of Criminal Procedure of the USSR and the Union Republics.*

* For an English translation of these laws by F. J. Feldbrugge see Z. Szirmai (editor), *Law in Eastern Europe*, III, Leyden, 1959.

The laws passed in December 1958 have an all-union character and therefore they came into force in the whole territory of the USSR without first being incorporated into the existing union-republican codes. Of course the union-republics were called upon to adapt their legislation to the new federal criminal laws, precisely as they were called upon to do so in 1924. That has been done in the new criminal codes and codes of criminal procedure of the fifteen union-republics. The first two criminal codes – those of the Uzbek and Kazak SSR – came into force on 1 January 1960. The Criminal Code and the Code of Criminal Procedure of the Russian SF SR, both of October 1960, came into force on 1 January 1961, followed later by the codes of other union-republics. These codes do not differ very much from each other either in respect of their contents or of their system. Therefore, it will suffice to deal here solely with the codes of the RSFSR, or shortly Russian Criminal Code (RCC) and Russian Code of Criminal Procedure (RCCP).* Only exceptionally references will be made to the codes of other union-republics.

System

All Soviet criminal codes consist of two parts: a general and a special. The present RCC originally enacted had 265 articles, whereas the former code as passed in 1926 had only 205 articles.

The General Part is subdivided into six chapters (63 articles) which relate to general provisions, extent of operation of the code, definition of crime, punishments, determination of and relief from punishment, compulsory measures of a medical and educational character. The General Part of the former RCC also had six chapters, but with a different division of the material, and it was less systematic.

* For an English translation of the codes by Harold J. Berman and James V. Spindler see *Soviet Criminal Law and Procedure – the RSFSR codes*, Harvard University Press, Cambridge, Massachusetts, 1966.

The General Part contains not only all the provisions of the Fundamental Principles of Criminal Legislation of December 1958, but also some additions – for example in Art. 10 concerning the responsibilities of minors, or in Art. 21 concerning the kinds of punishment. On the other hand the General Part comprises a number of provisions which are not contained in the Fundamental Principles at all. There is first of all the whole of Chapter Six which deals with compulsory measures of a medical and educational character, and then a number of rules in the first five chapters which consist of 57 articles, whereas the Fundamental Principles have only 47 articles. Thus the General Part is composed of federal provisions (which must be identical in all republican codes), but also of provisions of a local-republican character which could in principle differ from each other in some details.

The Special Part is subdivided into twelve chapters with 206 articles. In this part individual criminal offences are defined and penalties laid down. All-union legislation relating to crimes against the state and military crimes has been fully incorporated. It is worth mentioning that in Art. 64 of the RCC, which corresponds to Art. I of the federal Law on Criminal Responsibility for Crimes against the State (treason), there is an additional section. It provides that a person who has been recruited by a foreign intelligence service for the purpose of carrying on hostile activities against the US S R shall be relieved from criminal responsibility if he has not in fact committed any hostile act and if he has voluntarily informed the authorities about his connection with the foreign intelligence service.

Compared with the former R C C, the present code contains two important new chapters: one dealing with the political and labour rights of the citizens and the other relating to the crimes against the personal property of citizens. On the other hand, Chapter Four of the R C C of 1926, dealing with offences against the rules on the separation of the church from the state, has no corresponding chapter in the new code, which, however, contains two articles (142 and 143) relative to this

matter. The punishments for these offences were identical with the previous (correctional labour up to one year or six months respectively) until March 1966, when the punishment was increased to deprivation of freedom for a term of up to three years in case of recidivism and in some others. It is perhaps interesting to notice that the former so-called ' crimes constituting survivals of tribal ways of life' are now called , crimes constituting survivals of local customs' (for instance payment and acceptance of brideprice, bigamy or polygamy, blood feud).

The new Russian Code of Criminal Procedure (RCCP) differs relatively slightly from the Code of 1923 as amended before 25 December 1958. Of course, the fifty-four articles of the Fundamental Principles have been incorporated in the new R C C P, but here again the provisions of the Fundamental Principles have been amplified by additional rules.

The present RCCP consists of eight parts, 33 chapters and 413 articles, while the Code of 1923, after the repeal of the last part in May 1956, contained six parts, 33 chapters and 465 articles. The titles of the eight parts of the present code give a clear picture of the matters regulated by the code and of the system. They are: (1) General Provisions; (2) Opening of a Criminal Case, Inquiry and Preliminary Investigation; (3) Proceedings in the Court of First Instance; (4) Proceedings on appeal; (5) Execution of the Judgment; (6) Review of Judgments, Rulings and Orders which have become final; (7) Proceedings in cases against Minors; (8) Proceedings for Application of Compulsory Measures of a Medical Character . The R C C P of 192 3 contained no special provisions concerning proceedings against minors and cases where compulsory measures of a medical nature had to be applied. Before the new RCCP entered into force, the application of these compulsory measures was regulated by an Instruction of the Ministry of Health of the USSR of 31 July 1954. The last two parts of the code mean an improvement of the procedure in cases involving minors and insane persons.

Characteristics

Two fundamental ideas dominated the criminal legislation of December 1958: the maximum degree of legality attainable in Soviet political conditions; and a more advanced approach to the question of educational and punitive measures aimed at the prevention and repression of crime in Soviet society. These two ideas have been expressed in a number of new principles, some of which deserve special attention and will be discussed more extensively in the following chapters.

The most important change introduced into Soviet criminal law by the legal reform of 1958 was the abolition of the material definition of crime in the sense previously accepted. The logical consequence of this was that analogy, too, has been abolished. For the first time in the history of the Soviet state – if the draft drawn up in 1921 by the Institute of Soviet Law is excepted – the principle of *nullum crimen, nulla poena sine lege* (there is no crime and no punishment without law) has been introduced.

A further innovation, which follows from the new definition of crime, is the principle that there is no criminal liability without guilt. Consequently, circumstances excluding liability or criminal offence have been more precisely defined in the new legislation than was the case before.

The system of punishments was also improved. Some penalties, applicable under the former legislation, have been omitted and some others introduced, but the new system, notwithstanding several later retrograde changes, is still milder than the system which was in force before December, 1958. According to the legislation of 1958 and the R C Cas originally enacted in 1960, the death penalty was applicable only to a relatively small number of crimes: banditry, murder under aggravating circumstances and some political offences. The maximum possible term of deprivation of freedom was lowered from twenty-five years to fifteen years and the minimum from one year to three months. This system of punishment, in conjunction with other principles, particularly with the rules

regarding aggravating and mitigating circumstances, gave the courts more possibilities for individualisation of punishment.

The 1958 legislation raised the minimum age for general criminal responsibility from fourteen years to sixteen and introduced a more humane treatment of minors (milder punishment and educational measures).

In the field of criminal procedure the new legislation incorporates a number of safeguards for the protection of fundamental human rights and freedoms. It is not without interest to mention the most significant of them.

No innocent person shall be prosecuted or convicted; prosecution only on the basis of and in accordance with the law; inviolability of the person; inviolability of domicile and secrecy of correspondence; administration of justice only by courts and according to the principle of equality of citizens before the law and courts; independence of judges and their subjection only to the law; publicity of hearing with the exception of cases involving a state secret or against minors under sixteen years of age, or sexual offences or offences involving the intimate life of the parties in the case; the presumption of innocence and the objective examination of the circumstances of the case; guarantees regarding the rights of the defence and some other less important safeguards.

All these rights and freedoms guaranteed by Soviet law are in conformity with the great liberal achievements of nineteenth-century Europe in the field of criminal procedure. This was certainly a great step forward in the Soviet Union from both a legal and apolitical point of view. Nevertheless already in 1959, when the new legislation became known, doubts were expressed about the true value of these guarantees. It was impossible not to remember that practically the same rights were formally recognised in the Soviet legal system long before the Fundamental Principles of 1958 came into force. All these and many other human rights were and still are guaranteed by the Soviet Constitution of 1936, and some of them were also contained in the Code of Criminal Procedure of 1923. Yet all this did not prevent most scandalous violations of legality.

Later developments have justified the doubts.

From the beginning of 1961, when the present RCC and RCCP came into force, up to the end of 1967, Soviet criminal legislation in all union-republics underwent major changes.

First of all, a considerable number of new criminal offences have been enacted and incorporated into the relevant chapters of the criminal codes either as new articles or as new sections of existing articles: for instance, Arts. 77-1 activities disorganising work in correctional labour institutions; 88-1 failure to report crimes against the state; 88-2 concealment of crimes against the state; 93-1 stealing of state or social property on an especially large scale; 99-1 criminally negligent use or maintenance of agricultural equipment; 142/II recidivism or organised activities in violation of laws regarding separation of church from state and school from church; 152-1 distortion of accounts concerning fulfilment of plans; 190-1 dissemination of obviously false fabrications which defame the Soviet state and social system; 190-3 organising or taking active part in group activities which disturb public order (such as obstruction of public traffic),* and many others. The great majority of these amendments relate to crimes against the state, economic crimes, official crimes and offences against the system of administration.

Secondly, the punishments for a great number of offences have been made harsher. This concerns particularly the death penalty and punishment by deprivation of freedom. By a series of enactments the death penalty (originally applicable only to six main crimes and in case of war to a few others) was gradually extended to an ever greater number of offences such as counterfeiting money or securities; stealing or embezzlement of state or social property on an especially large scale; the terrorising of fellow inmates or the attacking of officers of the administration

* The repressive Arts. 190-1 and 190-3 are directed in the first place against those intellectuals whose opinions cannot be classified as anti-soviet propaganda (Art. 70 RCC, Art. 62 Ukrainian CC, etc.). Many distinguished Soviet cultural figures, among them the famous composer Shostakovich, expressed their deep concern in a letter of protest. V. Bukovsky, who led a protest demonstration, was later sentenced to three years' imprisonment under Art. 190-3.

by especially dangerous criminals in places of detention; organising groups within these places for this purpose or active participation in such groups; killing or attempting to kill a policeman or a people's guard (member of voluntary people's brigades) under aggravating circumstances; rape in some especially grave cases; offering or taking a bribe under aggravating circumstances; and speculation in foreign currency or valuables on a large scale.

In several articles of all codes the punishment of exile for a term of up to five years has been added as a supplementary punishment to that of deprivation of freedom for a term of up to fifteen years which makes a total of twenty years of these combined punishments for an increased number of offences. Confiscation of property, originally applicable only to a relatively small number of crimes, has been extended to a wide range of other offences, including practically all crimes against the state and many economic offences.

At the beginning the courts were inclined to interpret the new legislation as originally intended and as explained by the more liberal-minded authors in Soviet legal periodicals. Broadly speaking they used to inflict rather mild penalties and often to apply various measures of social pressure instead of punishments, especially in cases of minor offences. Later, however, parallel with the legislative enactments since 1961, but particularly as a result of instructions issued by the party leadership either directly or by means of various rulings of the Supreme Court of the U S S R, as well as through organised campaigns against leniency in respect of some categories of crime, the

courts were increasingly compelled to apply more severe punishments and also to violate the law on many occasions. The exaggerated severity of penalties inflicted by Soviet courts

for those offences which are from time to time in the focus of a campaign ~ at present mainly hooliganism, political and economic crimes ~ necessarily influences the application of punishments at large. Although, for instance, the courts still can mitigate punishment or relieve the offender from any penalty in appropriate cases (because the relevant provisions of the

codes have not been repealed or amended), they now make use of this right considerably less frequently than in previous years. In some non-political cases which the author of this book recently attended in Russia the punishments were out of all proportion to the character and gravity of the offences. At least in two cases they amounted directly to cruelty if measured by the standards applied in all civilised countries. In political cases – such as those of the British lecturer Gerald Brooke, of the Soviet writers Daniel and Sinyavsky and many others ~ and in cases against Baptists and other believers the punishments are even more shocking.

Lastly, in the period 1961-1962 there were also several instances of illegalities committed by legislative bodies. The most flagrant example of this kind of violation of legality is the so-called 'anti-parasite' legislation.

On 4 May 1961 the Presidium of the Supreme Soviet of the Russian SFSR enacted a decree against so-called 'parasites'. This decree defined two groups of 'parasites': (1) those who, do not honestly work according to their abilities' or 'obtain unearned income' or 'commit other anti-social acts', and (2) those who 'take jobs in enterprises or offices, or become members of kolkhozy (collective farms) only for the sake of appearances while in fact conducting a parasitic life'. Before the amendment of 20 September 1965 the punishment in both cases was 'expulsion into specially assigned localities' for a term from two to five years with forced labour and with confiscation of the 'unearned property'. Formally this 'expulsion'

was and remains anew 'measure of social influence' called *vysselenie*, but in fact it corresponds to *ssylka* (exile) which is one of the principal punishments provided for by the criminal law. Only offenders belonging to the first group of 'parasites' were to be tried by regular people's courts, while the others could be sentenced either by a people's court or by a 'collective of workers' which in practice meant the local party officials.

Yet the RCC explicitly states that 'criminal punishment is inflicted only by court sentence' (Art. 3) and the RCCP similarly guarantees that 'justice in criminal cases is admini-

stered by the courts' (Art. 13). There was no appeal against the decision of the first instance court, while the 'judgment' of the , collective of workers' had to be approved by the executive committee of the local soviet, i.e. in practice again by the local party officials. Yet the law of criminal procedure explicitly guarantees to the accused the right of appeal to a court of second instance.

The amendments introduced by the Decree of 20 September 1965 abolished the 'judgment' by collectives of workers and transferred their jurisdiction in 'parasite' matters to the executive committees of local soviets. The executive committee may force the 'parasite' to work either in the place of his residence or in any other part of the province in question (kraj, oblast', autonomous republic). Only in Moscow, in the Moscow Province and in Leningrad the first instance people's courts deal with 'parasites' and may inflict the 'measure' of expulsion into specially designated areas '. There is still no possibility of appeal in either case. The police (*militias*) must allow the offender one month to find a job. Only if he fails to do this can it bring the case before the executive committee of the local soviet, or to the court in Moscow, the Moscow Province and in Leningrad.

This decree (and similar decrees of other union-republics), by itself illegal because contrary to the principle contained in both codes and in the Constitution that justice may be administered by courts alone, opened the door wide to a large new stream of arbitrariness and abuse. Some of the most dreadful cases of persecution motivated by private vengeance or by other base reasons (such as acquisition of the dwelling of the , parasite '), but disguised under the mask of measures of social influence against parasites' were even occasionally reported in the Soviet press.

In spite of all these retrograde steps, the present situation is still rather far from the Stalinist system of permanent illegality, and there is little probability that the old forms of monstrous terror could ever be reinstated in their full magnitude. On the other hand, it is now clear that the legal reform of 1958 did not

mean the beginning of anew era based on strict legality, as some experts optimistically expected at that time, but in fact only marked the peak in a slow process of partial liberalisation which began after Stalin's death as a result of a struggle between numerous progressive demands and the backward forces of the obscure past. The struggle, characterised by many ups and downs, is still going on and may produce further changes in the near future.

6

Crime and Criminal Liability

The Party Programme on Crime

THE PROGRAMME of the Communist Party of the Soviet Union, adopted by the 22nd Party Congress on 31 October 1961, also deals with crime. Its point of departure is the old thesis that crime should begin to wither away under socialism and completely disappear under full communism. The Programme states :

'There should be no reason for law breakers and criminals in a society building communism. But as long as there are criminal offences, it is necessary severely to punish those who commit crimes dangerous to society, violate the rules of socialist community and refuse to live by honest labour. Attention should be mainly focused on crime prevention.'

The Programme takes into account the social conditions of crime when it admits that 'higher standard of living and culture, and greater social consciousness of the people, pave the way to the abolition of crime '. This should ultimately lead to , replacement of judicial punishment by measures of influence by society and education '. In the meantime, , anyone who has strayed from the path of the working man can return to useful activity'.

In conformity with the Soviet interpretation of the Marxist thesis regarding the state of the transition period* the Programme says that trade-unions, co-operatives and other social organisations should be given a greater part not only in managing cultural, health and social insurance institutions, but also 'in promoting law and order, particularly through the people's volunteer brigades (*druzhinniki*) and comrades' courts '.

* See Chapter 2.

These statements from the Programme contain the main principles of the present penal policy: prevention of crime in general by various methods of social influence; repression of acts specified as dangerous for Soviet society by a number of punishments ranging from the death penalty to the fine; social pressure against persons guilty of minor offences not representing significant social danger; and re-education of all who have committed any criminal offence, except, of course, those sentenced to capital punishment.

The new concept of crime constitutes the corner-stone of this policy.

Definition

The present definition of crime contains two elements, one 'material' and the other 'formal': the act (action or omission to act) must be not only 'socially dangerous' but it must also be explicitly defined in the law as a criminal offence. According to Art. 7 of the RCC – and the corresponding articles of the criminal codes of the other-union republics – a crime is 'a socially dangerous act (action or omission to act) provided for by the Special Part of the present code'. Thus the law conserves the definition of crime as a socially dangerous act, but this by itself no longer suffices. An act, even if objectively dangerous to society at the moment of commission, is not regarded as a crime, if its constituent elements are not contained in the Special Part, i.e. if it is not defined in the law as a crime.

The 'material' element in the definition ('socially dangerous act') has now a meaning different from that in the former legislation. Formerly it might either entail worse consequences for the accused (the usual case), since he could be sentenced for committing an act not provided for by the law as a criminal offence; or an improvement, since he could be discharged, if the act, although forbidden by the criminal law, did not in fact represent social danger. Now only the second possibility exists from a legal point of view. Section 2 of the same Art. 7 states that an act (or omission) which contains all the constituent

elements of a crime, but which does not represent any social danger because of its insignificance, is not a criminal offence.

Furthermore, if the offence has lost its socially dangerous character as a result of changed circumstances, or if the offender has ceased to be socially dangerous either at the time of the investigation or when the case is heard in court, he may be relieved from criminal responsibility and punishment (Art. 501 II). In some cases of minor offences – such as light bodily injury, defamation, insult, theft of inexpensive articles of consumption and similar petty offences – the guilty person may be relieved from criminal responsibility and punishment and the matter transferred to a comrades' court for its consideration (Art. 51), provided the offender and the injured party belong to the same collective of workers. The new codes also determine the conditions under which a guilty person may be relieved from criminal responsibility and released on surety for re-education and correction to the charge of asocial organisation or a collective of workers. The conditions required are as follows :

- (i) owing to the particular circumstances of the case neither the offence nor the guilty person present any great social danger ;
- (ii) the act must not have caused serious consequences ;
- (iii) the guilty person must sincerely repent;
- (iv) asocial organisation or a collective of workers must have made a petition to this effect.

A person who had previously been condemned for an intentional crime, or who had already been released on surety, or who does not admit his guilt, or who wishes his case to be heard in court, may not be released on surety.

A different legal situation arises in the case provided for by Section 2 of Art. 50 of the R C C. Here the act shall be regarded as a criminal offence and the guilty person cannot be relieved from criminal responsibility, but he may be discharged from punishment, if at the time when his case is heard in court,

'having regard to his subsequent irreproachable conduct and his honourable attitude toward labour" he cannot any longer be considered socially dangerous.

Thus, the 'material' side in the definition no longer provides a legal ground for illegalities against innocent persons, but represents abroad framework for the application of criminal law in conformity with justice. At any stage of criminal proceedings the respective organs of the judiciary – agencies of inquiry and investigation, procuracy, courts – must consider the danger which both the act and the person who committed it represent for society. Depending on the degree of social danger they may decide, within the limits determined by the law, that the act itself, owing to its insignificance, is not a criminal offence, but they also have at their disposal a number of other possibilities. Thus, even if the act is found to be slightly or to some greater extent socially dangerous, the accused may be relieved from criminal responsibility and punishment or only from punishment, with or without transfer of the case to a comrades' court, with or without release of the offender on surety.

This is the law. Its application is a different matter. In a judicial system with truly independent and competent courts, a free and highly qualified bar, prosecution divorced from investigation, public controls through the press and other safeguards, the principle of social danger as defined in Soviet criminal law might work properly and produce positive results. In Soviet practice since 1958 it has been applied only in part according to the letter and spirit of the law and this solely in ordinary, non-political criminal cases. As examples of acts considered to represent insignificant social danger and therefore deprived of any criminal character may be mentioned, for instance, theft of a few cigarettes from a comrade; misappropriation of a few kopecks found in the street; talking away of two horses belonging to a kolkhoz for a ride to a neighbouring village, without the intention of stealing them; stealing through abuse of trust of 550 old roubles (55 new, or approximately £27) by a dedicated member of a kolkhoz and of its governing

body, who in addition was disabled during the war, and the stealing was his first offence; attempt to give a bribe of 20 old roubles to an official by a person not in official dependence on him; and similar minor offences.

In the great majority of ordinary criminal offences the fluctuation from one extreme to the other has assumed such proportions that no firm principle can be deduced from the practice of the Soviet judicial authorities. There were many instances of unjustifiable leniency and even more of inordinate severity. In one case, for instance, inflicting grave bodily injury with a knife was regarded as an act not representing 'great social danger' and the guilty person, a certain Tretyakov, was released on surety; but in a case of light bodily injury caused with a hard object (probably an axe, although this was not proved at the court hearing with reasonable certainty) the offence was qualified as malicious hooliganism, socially very dangerous and the offender was sentenced to imprisonment for a term of three years (case of Igumenov, attended in Moscow by the author). In one case stealing of objects from an apartment by a certain Iгла Gindra was treated as socially not very dangerous and she was released on surety, although she had been sentenced on a previous occasion to ten years' imprisonment for another theft; but an attempt to steal from a handbag in a shop in Leningrad was treated as a socially dangerous act and the guilty person (a recidivist) was condemned to imprisonment for a term of two-and-a-half years.

The Supreme Court of the US S R has itself changed its policy on several occasions. In 1958 the Supreme Court called

upon the courts to apply measures of social pressure instead of punishment in cases which did not represent great social danger. At the beginning of 1960 the Supreme Court again criticised the lower courts for dealing themselves with offences which 'did not represent great social danger, instead of transferring such cases for the consideration of society' i.e. of comrades' courts or workers' collectives. But at the end of 1960 the Supreme Court condemned the practice of releasing on surety of many persons' who had committed dangerous crimes "

and in 1961 it reconfirmed this position in the analysis of the case of the driver Dadzitis from Latvia. In 1962 the Supreme Court returned to the previous position and ordered the courts to transfer persons who commit first offences of insignificant social danger' to society for re-education and correction' rather than to inflict punishments, particularly deprivation of freedom for a short term.

A Ruling of 3 December 1966 of the Supreme Court on measures concerning the intensification of the struggle against crime points out once more that the courts do not always consider the character and the degree of social danger. 'As a result of this" the Ruling continues, , up to date there are cases in which mild measures of punishment are applied to dangerous criminals, whereas persons who for the first time commit less dangerous offences are sentenced to deprivation of freedom even in cases when they could take the path of correction without being isolated from society .'

At present (1968) the official line favours a restricted interpretation of 'social danger' which means more punishment and less measures of pressure by society.

Analogy

Owing to the formal introduction of the principle of legality (nullum crimen, nulla poena) into Soviet criminal law, analogy is not applicable any longer. Nevertheless, political offences – and also many others – are described so widely, that the definitions given in the special parts of all codes provide a very elastic framework which can cover all acts which are, or can be considered to be, dangerous for the regime. Therefore the abolition of analogy, although salutary in principle, has not led to any particularly significant consequences.

Three methods are used for the description of individual offences.

In some cases the criminal offence is defined in the code

itself. Art. 130 (defamation), 131 (insult), 235 (bigamy or polygamy) and others belong to this group. From a technical point of view the definitions are rather poor, especially if compared with other modern criminal codes, for instance the Yugoslav Code of 1951 (with later amendments).

In a great number of cases the criminal offences are not defined at all. This means that the definition of the crime must be sought in the common meaning of the word, i.e. not only outside the criminal code, but also outside any other legal enactment. When, for instance, Art. 120 of the R C C forbids 'depraved actions' (razvratnye deystviya) in relation to minors, then the sense of 'depraved actions' has to be sought outside the code.

The third method of description consists in prescribing punishments for acts which are defined in other laws, decrees, regulations, etc. Art. 88 (violation of rules on currency transactions), 116 (illegal abortion), 197 – 198 (rules concerning frontier regions and passports), 211-217 (rules concerning transport, road traffic, mining safety, construction works, explosive and radioactive materials etc.) and many others have such a character. In all these cases the criminal code only prescribes in general terms that 'violation of the rules relating to... shall be punished in a certain way under certain conditions, but the content of the respective rules must be ascertained from other legal sources. Of course, no criminal code can entirely avoid such a description of some criminal offences, but their number should be as limited as possible. One of the characteristics of Soviet criminal codes is precisely their relatively great number.

All this considerably reduces the practical value of the principle 'millum crimen' in Soviet criminal law and facilitates outside interference with the administration of justice. The fact that many decrees or regulations to which the RCC and the other codes refer are not easily available, and some of them have never even been published, can only contribute to further arbitrariness. A typical example is Art. 142 of the RCC which originally read as follows :

'The violation of laws on the separation of the church from the state and of the school from the church shall be punished by correctional labour for a term not exceeding one year, or by a fine not exceeding fifty roubles.'

Later, by a Decree (Ukaz) of the Presidium of the RSFSR

Supreme Soviet of 18 March 1966, confirmed by the Law of 17 August 1966, a new section was added, according to which persons previously sentenced for acts violating these laws, or persons organising activities aimed at committing such acts, shall be punished by deprivation of freedom for a term not exceeding three years.

The following are some of the most important 'laws' to which Art. 142 refers: the U S S R Constitution which 'ensures to citizens freedom of conscience' and states that 'freedom of religious worship and freedom of anti-religious propaganda is recognised to all citizens'; a Decree of 23 January 1918 on the separation of the church from the state and of the school from the church (still in force) ; a Decree of 8 April 1929 on religious communities as amended on several occasions which is in flagrant contradiction with the principle of freedom of conscience guaranteed by the Constitution; an Instruction on the rights and duties of the religious communities issued by the Commissariat of Internal Affairs (NKVD) on 1 October 1929 (not available, but occasionally mentioned in Soviet publications); an Instruction issued in January 1931 by the Commission for Questions of Religious Cults (not available) ; two Decrees issued in August 1945 by the USSR Council of People's Commissars (not available, not published) ; and some others.

It is difficult to imagine a more confusing situation and a more fertile ground for arbitrariness. A new directive contained in the Decree of the Presidium of the R S F S R Supreme Soviet of 18 March 1966 not only did not clarify the question which of the enactments on religious communities are still in force and which have lost their validity – either as contrary to the constitution or as contradicting later legislation – but in fact it added new restrictions to the principle of freedom of conscience.

According to this official and obligatory interpretation of Art. 142 the following acts must be regarded as violations of the laws on the separation of the church from the state and of the school from the church:

- (1) Compulsory collection of contributions in aid of religious communities and of the clergy;
- (2) production with the intention of mass distribution, or mass distribution of appeals, letters, leaflets and similar documents calling for infractions of the law on religious cults ;
- (3) perpetration of deceitful acts aimed at provoking religious superstitions among the masses of the population;
- (4) organisation and carrying out of religious gatherings, processions and other ceremonies of the cult which disturb public order ;
- (5) organisation and systematic conduct of religious instruction of minors contrary to the rules established by the law;
- (6) refusal to employ citizens or to admit them to educational institutions, or dismissal from employment or from an educational institution, as well as other *substantia*/limitations of citizens' rights on the grounds of their relation to religion.

It is not known – at least not to the author – whether anybody has been punished in Russia for acts described in point (6), but it is well known that many believers have lost their jobs and suffered other forms of discrimination because of their religious activities. It is also known that hundreds of believers have been prosecuted and sentenced for other 'violations of the laws regarding religious communities'. The victims of the present anti-religious campaign may be found among the believers of all religions and sects but mainly among Baptists who do not recognise the officially sponsored All-Union Council of Evangelical Christians and Baptists. According to reliable documents in part based on information published in the Soviet press, the total number of Evangelical Christian Baptists, sentenced to various terms of imprisonment or exile or both (usually the maximum possible penalty) between 1961 and June 1964, was at least 197 persons. By court decisions in

several cases the children were taken away from their parents for re-education.

On 7 June 1967 the Council of Relatives of Prisoners, members of the Baptist Churches, not just those officially recognised by the Government, sent an appeal to the Secretary General of the United Nations, U Thant, with many details regarding arrests, sentences and inhuman treatment of Baptists in prisons and camps. The Annex to the letter contains the names, addresses, terms of punishment and other information on 202 Baptists arrested and sentenced almost exclusively in 1966 and on a few cases known at the beginning of 1967. They were condemned mainly on the basis of Arts. 142 or 227 (infringement of the person or rights of citizens under the appearance of performing religious ceremonies), of the R C C and the corresponding articles of the criminal codes of other republics (Arts. 138 and 209 of the Ukrainian SSR; Arts. 139 and 222 of the Byelorussian S S R etc.). There were also cases in which other articles of the codes were applied, for instance Art. 70 of the R C C in the case of P. Sofronov from Ryazan who was sentenced in January 1967 to six years deprivation of freedom. In a great number of cases measures of administrative repression were inflicted, mainly fines of up to 50 roubles* in conformity with the RSFSR Decree of 18 March 1966 on Administrative Responsibility for Violations of Laws on Religious Cults.

It follows from the available documents (extracts from indictments or sentences) that the offences often consisted of mere prayer meetings, in private homes, sometimes in the presence of children, or of reading and studying the Bible at private gatherings and the like. For instance, on 19 September 1966 A. Shepel' and A. Petrenko were sentenced to three and two-and-a-half years' deprivation of freedom respectively, because 'on 7 May 1966 one girl of pre-school age was present at prayers, and on 8 May 1966 one girl was also present'. A

* The official rate of exchange is 1.10 USA dollars or approximately 9 shillings for 1 rouble. Average monthly wages and salaries are about 100 roubles, while old age pensions very often do not exceed 25 – 30 roubles.

certain S. I. Tabachlkov, a presbyter of the Moscow Congregation of Baptists, was arrested on 17 May 1966 and later sentenced to two years' deprivation of freedom for a prayer meeting in a private home, although the neighbours witnessed at the trial that this meeting' did not disturb public order' .A certain F. F. Bos'ko from Moldavia was sentenced to three years' deprivation of freedom for organising , a schismatic sect of Baptists ' . The following part from the sentence shows the kind of actions which are regarded by the courts as criminal offences.

'The sect thus organised by him was not registered with the organs of the state authority. Without special permission from the Regional Soviet (Council) of Workers' Deputies, members of the sect gathered together not in a special house of prayer, but at the house of F. F. Bos'ko, who had furnished a room, made special stools for the believers and a pulpit, pasted placards on the walls exhorting belief in Christ, where believers could satisfy their religious needs, contrary to the interests of Soviet society .'

The punishments inflicted in judicial proceedings varied from conditional convictions or correctional labour up to exile or deprivation of freedom for the maximum possible terms depending on the article of the code applied to the offence in question, usually three or five years respectively.

A further consequence of the new definition of crime is that the criminal law does not have retroactive force, with the exception of cases where the new law is more favourable to the offender (Art. 6 of the RCC), but this rule, too, has not been strictly applied. A gross violation of Art. 6 of the code was very probably committed by the Moscow City Court in June 1961 and certainly by the RSFSR Supreme Court in July of the same year in the case of Rokotov, Faybishenko and Edlis, widely reported both in the US S Rand in the West.

The three men were accused of the violation of the rules regarding currency transactions, a crime provided for by all the All-Union legislation of 1958 and by all criminal codes. Art. 88 of the RCC, as originally enacted, prescribed the punishment of deprivation of freedom for a term of three to

eight years with the confiscation of the currency or valuables. By a Decree (*Ukaz*) of 25 March 1961 the Presidium of the US S R Supreme Soviet increased the punishment for this offence to deprivation of freedom for a term of five to fifteen years and confiscation of property. In June 1961 the Moscow City Court condemned the accused to the maximum possible punishment of fifteen years in conformity with the Decree of 25 March.

From the reports in the press it does not appear clearly at what time the offence was committed, but, owing to its character (speculation as business or on a large scale), it is most likely that the three men were active for rather along period of time before 25 March 1961. If so, the retroactive application of the March Decree to this case represented a violation of Art. 6 of the code. The procurator lodged a protest (appeal) against the sentence and the matter went to the Supreme Court of the RSFSR. By a Decree (*Ukaz*) of I July 1961 the Presidium of the US S R Supreme Soviet again increased the punishment for the same offence, this time to the death penalty with confiscation of property. In July 1961 the Supreme Court, at the request of the procurator (regarded as guardian of legality) changed the judgment and sentenced the accused to death by shooting in accordance with the Decree of I July , but in glaring violation of the principle that a more severe law shall not have retroactive force.

Circumstances excluding Criminal Offence

There are three main grounds on which crime is excluded, in spite of the fact that the act committed corresponds to the .description of crime in law: insignificance of its social danger , necessary defence and extreme necessity.

(1) As shown in the section on the definition of crime, Soviet criminal law contains a rule according to which *insignificance of social danger* relieves the act of its criminal nature. It is useful to add here that the courts have no right to investigate which

socially dangerous acts are at the same time criminal acts. That is the task of the legislator. The courts cannot proclaim an objectively socially dangerous act as criminal if it is not provided for as such by criminal law. The courts have also no right to decide that an act which the law defines as criminal, and therefore as socially dangerous, is not socially dangerous. They cannot, for instance, declare that homicide, theft, bigamy or any other crime whatsoever, determined as such in the Special Part, is not socially dangerous. The courts have only the right and duty to examine whether a given act committed in real life and corresponding to the description of a crime in the law contains all the elements of a socially dangerous act. They must decide whether the danger is so important that the act has to be regarded as a criminal offence, or whether it is so insignificant that the act cannot be considered an offence.

(2) Art. 13 of the RCC, corresponding to Art. 13 of the Fundamental Principles of 1958 and to the relevant articles of I other criminal codes, states that an action committed in *necessary defence* is not a criminal offence, if the limits of the defence are not thereby exceeded. An action is considered to be committed in a state of necessary defence if it is done with the object of protecting the interests of the Soviet state, or social interests, or the person or rights of the defender or of another person against a socially dangerous infringement by causing harm to the infringer, provided the limits of necessary defence are not exceeded. This definition lacks the requirement that the defence must be simultaneous with the infringement, but in Soviet theory and practice there is no doubt that this element is required precisely in the sense in which it is required in all other systems of criminal law based on the same principle. 'The infringement' – states *Yuridicheskiy Slovar'* – 'must be contemporaneous.' One may not defend oneself or others against a supposed or already completed infringement.

According to Soviet law the limits of necessary defence are deemed to be exceeded if the defence is obviously disproportionate to the character and danger of the infringement. Exceeding the limits of necessary defence is a criminal offence,

but the court may inflict a reduced punishment or even discharge the offender from punishment, depending on the character and social danger of the excess.

(3) An action committed in a state of extreme necessity is also not a criminal offence. It is defined in Art. 14 of the RCC (and in the corresponding articles of the criminal codes of the union-republics) in conformity with Art. 14 of the Fundamental

Principles as an action committed' in order to avert a danger threatening the interests of the Soviet state, or social interests, or the person or rights of the person concerned or of other citizens, if in the circumstances the danger could not be averted by other means and if the harm caused is less significant than the harm prevented'. Some criminal codes explicitly require that the danger must be both 'unprovoked' and contemporaneous with the action, and these two elements are also required by Soviet practice and theory, although they are not mentioned in the law. In Soviet criminal law there is no provision in respect of exceeding the limits of extreme necessity, but the rule regarding extenuating circumstances certainly may be applied.

Since necessary defence is directed against an act forbidden under criminal law, while in the case of extreme necessity a criminally unlawful attack is absent, it is natural that the boundary line where excess begins is narrower and more severe in the case of extreme necessity than in the case of necessary defence. Thus, to give a very simple example, homicide committed in conditions of necessary defence in order to protect someone's life is not a criminal offence, but homicide for the purpose of saving one's own or another's life committed in a state of extreme necessity is a criminal offence. The following few examples illustrate which actions are regarded by Soviet courts as justified by a state of extreme necessity: participation in the commission of a crime under threat of serious harm by armed criminals; violation of rules regarding road traffic and causing damage in order to avoid a serious road accident; theft of food by a group of persons who found themselves in an uninhabited region without possibility of getting it otherwise.

There is no extreme necessity if it was the duty of the offender to expose himself to the danger. This is not explicitly stated in Art, 161, but it clearly follows from Soviet judicial practice.

Theory and practice in the Soviet Union also deal with other circumstances which may exclude criminal offence such as consent (in some cases), reasonable punishment of children by parents and teachers, performance of a duty imposed by a rule of law, orders from a superior (in some circumstances). Broadly speaking, the solutions of all these questions may be found in the general principles governing the present concept of crime, the circumstances excluding or mitigating responsibility, and also in the provisions concerning punishments.

Liability

The legal reform of 1958 also introduced the principle that there is no criminal liability without guilt. According to Art. 3 of the Fundamental Principles (incorporated later into all the criminal codes) there are two basic forms of guilt: intent (*umysel*) and negligence (*neostorozhnost'*) which broadly correspond to the Latin *dolus* and *culpa*.

Intent is defined in Art. 8 of the Fundamental Principles and in the relevant articles of all codes as follows :

'A crime shall be regarded as committed intentionally if the perpetrator was conscious of the socially dangerous character of his action or omission, foresaw its socially dangerous consequences and wished them or consciously permitted them to occur.'

It follows that Soviet criminal law recognises not only direct intent (*dolus directus*), but also constructive or indirect intent (*dolus eventualis*). Direct intent exists when the perpetrator is conscious of his act and its consequences, and wishes precisely these consequences, while indirect intent exists when the perpetrator is conscious that from his action or omission a prohibited consequence might result and mentally consents to this possible consequence.

There are also two kinds of negligence. The first consists in the offender being aware that socially dangerous consequences might result from his action or omission, but lightheartedly assuming that they will be avoided. In the second type of negligence the perpetrator is not aware that socially dangerous consequences might result from this action or omission, although he should have been and could have been aware of such a possibility.

In practice it is sometimes very difficult to distinguish between the four kinds of guilt. Particularly delicate is the extremely important distinction between intent and conscious negligence. In all cases of direct intent, indirect intent and conscious negligence the perpetrator *foresees the prohibited consequences of his act* either as certain or as possible. In case of direct intent he wills the consequences; in case of indirect intent he mentally consents to the possible consequences; in case of conscious negligence he does not consent to their materialisation, because he lightheartedly expects that they will be avoided. The essential difference between conscious and unconscious negligence (*luxuria* and *negligentia*) is that in the former case the perpetrator foresees the criminally prohibited consequence, whereas in the latter case he does not foresee it, although in the circumstances he should and could have done so.

The fundamental difference between indirect intent and conscious negligence consists in the mental approach to the prohibited consequences: if the perpetrator would not have abstained from committing his act had he foreseen the consequences as certain, this would mean that he consented to the consequences foreseen as possible (but in fact not directly willed) and would therefore amount to indirect or constructive intent; if in such an event he would have abstained, his guilt would be limited to conscious negligence.

The difference may be seen from the following example :

A certain K installed a wire fence charged with electricity around his apple orchard in order to protect this property from thieves. Lapina, a fifteen-year old girl, touched the fence and

was killed. The lower courts condemned K for indirect intentional homicide. The procuracy lodged a protest by way of supervision in favour of the accused and the matter went to the US S R Supreme Court which ruled that this was a case of negligent homicide. The Supreme Court found that K ' did not foresee the possible grave consequence of his act " because, as shown at his trial, he had tested the fence in the presence of a witness and both of them had got only insignificant shocks. Therefore K was convinced that grave consequences would not occur.

Modern criminal codes, such as the Yugoslav code now in force, usually contain a rule to the effect that for an act committed negligently the perpetrator shall be criminally liable only when it is so explicitly provided by the law. Neither the Fundamental Principles nor the Soviet codes contain such an explicit provision. From this fact two important consequences follow.

The first is that in principle every act defined as a criminal offence may be committed either intentionally or negligently. That means that in order to establish criminal liability it is sufficient to prove even the slightest kind of negligence. Of course, some offences, because of their very nature, can be committed only with intent (for instance theft, rape), but a great number may be committed either intentionally or negligently. In some cases the law makes explicit differences between intent and negligence, for instance in respect of homicide (Arts. 102, 103 and 106 of the RCC), but in others there is no mention at all of either intent or negligence. This causes doubts and discussions on the question whether individual offences, owing to their nature, may be committed not only with intent, but also with negligence. A negative answer means that there is no criminal offence at all, if intent cannot be imputed to the perpetrator .

In the present code a number of definitions of crimes are still not very clear as regards this important point. Such are, for instance, illegal use of trade marks (Art. 155) or issuing for sale by economic enterprises of goods of bad quality or below

standard or incomplete (Art. 152). According to a commentary published in 1962 by the Leningrad State University, an offence infringing Art. 152 may be committed either with intent or with negligence, but for the deception of purchasers (Art. 156) direct intent is required. This and other commentaries contain explanatory notes, sometimes based on judicial practice, for practically every offence described in the Special Part. It would appear from these comments that a number of offences which have not been clearly defined in respect of liability may be committed either intentionally or negligently, others only intentionally, while in some cases (for instance illegal arrest or detention, Art. 178) the highest degree of guilt, i.e. direct intention, is necessary.

The second consequence is that, in principle, the punishment should be the same for all kinds of guilt, provided the law makes no difference between an offence committed with intent and the same offence committed with negligence. Thus, intentional homicide under aggravating circumstances (Art. 102) is punishable by deprivation of freedom for a term of eight to fifteen years, with or without exile, or by death, but homicide committed negligently (Art. 106) is punishable only by deprivation of freedom for a maximum term of three years or by corrective labour for a term not exceeding one year. However in respect of many other offences such a distinction has not been made in the Special Part.

Considering the objective difficulties in distinguishing the four kinds of guilt even in a highly developed system of criminal law, and the failure of the Soviet legislator to improve in the new legislation former deficiencies and inconsistencies in this

field, one can easily imagine the amount of problems arising in practice, especially if one takes into account the following facts: that people's assessors usually have no legal education and that even professional judges may still be without it; that the retention of counsel for the defence is compulsory only in the most important cases; that the professional standard of lawyers (advocates) is rather low; and that not only advocates, but also representatives of trade unions or other so-called

'social organisations', relatives of the accused and some other persons may act as counsel for the defence with permission of the court (Art. 47 of the RCCP).

Exclusion of Liability

From the principle that no one may be criminally responsible without guilt, it follows that persons who, owing to the state of their mind, are unable to comprehend the significance of their acts or to control them, cannot be criminally liable. There are two grounds on which responsibility may be partly or completely excluded: age and insanity.

(1) According to Art. 10 of the Fundamental Principles and the corresponding articles of all codes general criminal responsibility begins at sixteen years. Originally, in 1922, the minimum age for criminal responsibility was fourteen years, in 1929 it became sixteen years, in 1935 it was lowered to fourteen years, and for some crimes to twelve years. Now it is again sixteen years, but with two important exceptions: one concerning minors between fourteen and sixteen years of age, and the other those between sixteen and eighteen years.

Minors between fourteen and sixteen years of age are criminally responsible only for some very serious criminal offences, explicitly mentioned in the codes, such as homicide (Arts. 102 – 106 RCC), intentional inflicting of bodily harm with grave consequences to the health of the injured person (Arts. 108-111 and 1121 I R C C), rape (117), theft (89, 144), robbery (90, 145), assault with the purpose of robbery (91, 146), malicious hooliganism (206, sections II and III) and some other crimes including intentional actions which might cause a railway accident.

The other exception concerns persons between sixteen and eighteen years of age. Where such a young person has committed a crime, but one not implying a grave social danger, and the court finds out that coercive measures of an educational nature may be applied in order to reform him without punish-

ment, it should apply these measures. These are not regarded as punishments. Such a person may also be relieved from criminal responsibility and punishment, and transferred to a commission for cases of minors which is entitled to apply to him compulsory measures of an educational character (see Chapter 7). Of course, it is also possible to apply compulsory measures of an educational character in the case of offenders between fourteen and sixteen years of age, either by court decision or by a decision of a commission for minors.

(2) Sanity is the other condition of criminal responsibility. According to Art. 11 of the Fundamental Principles and the relevant articles of the codes, a person who at the time of committing a socially dangerous act was unable to understand the significance of his act or to control his conduct, owing to a chronic mental disease or a temporary disturbance of his mind or mental deficiency or other psycho-pathological state, is not criminally responsible. With regard to such a person the court may order the application of compulsory measures of a medical character which are provided for in the codes, for instance in Arts. 58 – 61 of the R CC. These are either compulsory treatment in a mental hospital of a general type or, in cases of offenders especially dangerous to society, compulsory treatment in a mental hospital of special character, where they must be under

especially severe surveillance. Unfortunately, in the last few years these measures have been applied on several occasions against completely sane intellectuals in order to isolate them and to discredit their activities or ideas for which they could not be criminally charged, but which were considered to be politically inconvenient. This has happened not only in the US S R, but also in other countries with a similar type of government. Needless to say, these medical measures when applied to sane persons are in fact an intolerable form of repression, certainly felt by the victims as a more severe and inhuman treatment than would be the punishment of deprivation of freedom inflicted on an innocent person.

A person who was sane at the time of committing an offence, but has become insane before the court has passed sentence on

him, cannot be sentenced. Only the above-mentioned compulsory measures of a medical character may be applied in such a case. If the perpetrator later recovers, he must be tried and, if found guilty, punished.

Drunkenness is not in itself a criminal offence, but neither does it excuse from liability. Drunkenness is one of the main causes of crimes with violence in the Soviet Union. In more than 90% of cases concerning hooliganism and about 70% of cases regarding intentional homicide the perpetrators were in a state of intoxication at the time when they committed the offence. At present a large-scale campaign is going on in Russia against this evil. The mere appearance in the streets or in other public places in a state of drunkenness, even without disturbing public order, is a contravention punishable in administrative proceedings with a fine. The results of this campaign are not known. From what the author had the opportunity to see in public places in Russia, it does not seem to be very successful.

7

Punishments and Educational Measures

Aims of Punishment

SOVIET CRIMINAL law explicitly defines the object of punishment. Art. 20 of the Fundamental Principles of 1958 and the corresponding articles of the criminal codes state that the aims of punishment are :

- (i) retaliation for the committed crime;
- (ii) correction and re-education of the convicted persons' in the spirit of an honourable attitude towards labour, of strict compliance with the laws, and of respect towards socialist communal life ' ;
- (iii) the exercise of educational influence on the offender and other people in order to deter them from committing criminal offences.

These aims reflect the basic ideas of Soviet penal policy as shaped mainly in the period 1953-1958: general and special prevention combined with retaliatory repression.

Soviet criminal law makes a sharp distinction between punishments and various coercive measures of either a medical or educational character. The main difference between punishment and these measures is that the latter have not and cannot by their nature have retaliation as their object, provided, of course, that they are honestly applied which is not always the case (see Chapter 6, p. 85). Medical and coercive educational measures may be ordered only by the court and solely in connection with the criminal offence committed, in accordance with the provisions of the criminal codes and codes of criminal procedure, with the object of protecting society, and of

preventing the perpetrator from repeating his act or from committing a similar one (and correcting him in the case of educational measures), but not with the object of punishing him. The principle *nulla poena sine lege* applies to coercive educational and medical measures but, of course, with modifications, since there is no question of punishment in such cases.

Kinds of Punishment

The following punishments formally existing prior to the legal reform of 1958 have been abolished:

- (i) designation of the offender as an enemy of the workers, with deprivation of Soviet citizenship and exile from the country;
- (ii) deprivation of freedom in special corrective labour camps in distant regions of the US S R;
- (iii) deprivation of political and individual citizenship rights ; (iv) exile from the US S R for a given period.

Although these punishments were contained in the former R C C and other codes the courts had ceased to inflict them long before December 1958. This concerns especially both forms of exile from the US S R (for ever and for a given period) which most probably would have been regarded by the condemned persons as privilege rather than punishment.

Having eliminated these punishments from the new penal system, the Fundamental Principles of 1958 established the following penalties :

(1) Death by shooting, (2) deprivation of freedom, (3) exile from the place of residence and confinement in another place (*ssylka*), (4) banishment from the place of residence (*vysylka*), (5) correctional labour without deprivation of freedom, (6) disqualification from holding specific offices or performing specific activities, (7) fine, (8) social censure. In addition, for servicemen, a special further punishment was provided : assignment to a disciplinary battalion. Confiscation of property

and deprivation of military or special rank were established as additional punishments.

All these punishments have been incorporated into the criminal codes of the union-republics. On the ground of authorisation given by Art. 21 of the Fundamental Principles individual union-republics also introduced into their respective codes other penalties. For instance the Ukrainian CC contains the punishment of deprivation of parental rights; the Byelorussian, Uzbek and other CC have the punishment of removal from office; the R C C established two further punishments : removal from office and imposing of the obligation to make redress for the harm caused.

Some of these penalties may be imposed only as principal (main) punishments. The death penalty, deprivation of freedom, correctional labour, social censure and assignment to a disciplinary battalion belong to this group. Others may be applied either as main or as additional (supplementary) punishments: exile, banishment, disqualification from holding specific offices or performing specific activities, fine, removal from office and imposing of an obligation to redress the harm caused by the offence. Finally, confiscation of property and deprivation of military or special rank may be imposed only as additional punishments.

If more than one punishment is provided for a criminal offence, only one of them may be imposed as a main penalty but several additional penalties may be inflicted together with the principal one.

Now a few words about individual punishments :

(i) *The death penalty* – carried out by shooting – is still claimed to be ' an exceptional punitive measure until its complete abolition '. It is useful to be reminded that the death penalty – which obviously contradicts Marxist understanding of crime – was provided for in the same way' provisionally until full abolition' in the former legislation, based on the Fundamental Principles of 1924. In May, 1947, the death penalty was abolished, but in 1950 it was reintroduced for treason, espionage and sabotage, and in April 1954 also for intentional

homicide under aggravating circumstances. At present the death penalty may be imposed for a considerable number of offences including treason, flying abroad or refusal to return from abroad, espionage, terroristic acts, sabotage, banditry, intentional homicide under aggravating circumstances, counterfeiting, speculation in currency or valuables on a large scale or as a form of business, stealing of state property on an especially large scale, rape in most serious cases, and others. * In war-time or in a war-like situation the death penalty may also be imposed for other offences such as evasion of call-up by mobilisation, insubordination to superiors, desertion and several others.

Offenders who at the time when they committed the crime were precisely eighteen (case of K. ; Ruling of the US S R Supreme Court of 24 March 1959) or under eighteen years of age, or women who were pregnant at that time or at the time when sentence is being passed on them, may not be condemned to death. For the same reason the death penalty cannot be carried out on a woman who is pregnant at the time when she should be executed. It is not clear from the law whether such a woman must be executed after giving birth or after an accidental miscarriage.

Since statistics on crime and punishments are still not published in the US SI)', it is not known how many persons have been executed under the new legislation. From reports published occasionally in the Soviet press and from other reliable sources it appears that in the last six years at the very least 200 persons have been sentenced to death for economic offences alone.

(ii) *Deprivation of freedom* may not be shorter than three months nor longer than ten years or, in especially grave cases, fifteen years (previously one year, ten years and twenty-five years respectively). The punishment is served either in a corrective-labour colony or in prison. At present there are four regimes of this punishment: normal, strict, severe and especially severe. Persons condemned for the 'most dangerous'

* See also Chapter 5, PP. 59ff.

political offences and hardened criminals are kept in places of detention under this especially severe regime. As distinct from Poland, where I could visit one of the largest prisons in that country and see for myself the relatively high standard of re-educational work being done there (among other things a complete high school and a factory inside the prison walls), in Russia I was not given the opportunity to acquaint myself personally with the internal structure of any place of detention. In the Institute of Criminology in Moscow I was told that great efforts are now being made in order to re-educate all inmates ; on the other hand it is known from statements given by persons who spent some time in Soviet prisons and camps that re-education often takes the form of various disciplinary punishments. One of these is the so-called *shizo*, namely penal , isolator '. A certain Pavel Semenevich Overchuk, sentenced in September, 1966, by the Kiev District Court to two-and-a-half years' deprivation of freedom in a corrective labour camp of normal regime, described a *shizo* in his complaint of 10 May 1967 to the procurator of the Ukrainian S S R as follows :

'This is a cell without windows, light, or air, of 12 – 14 square metres. Electric light comes from the corridor through a Judaswindow with a narrow grille, which is about 15 – 20 cm. high and the width of the door 80 cm. Into such a cell, deprived of air and light, about 12 to 15 and more people are crowded, from whom warm clothes, handkerchiefs, and bedding have been taken away. In such a cell one can sleep on the wooden floor (a platform), in a crouching position, or sitting.'

'During the 10 days the cell is not opened for airing, and not for a single moment may the prisoners leave the room, not even to attend to natural needs, or for essential hygienic necessities. Food is served in a trough – 450 g. of black bread and 600-700 g. of water-soup, and the next day a bit of tasteless, cold food with no oil (the ration for 5 days is less than one day's food ration for a normal prisoner).'

'Naturally, endurance of conditions like these facilitates the development of parasites which indeed happened when after I had stayed there for 8 days a great multitude of lice appeared.

For two days all the men confined in the cell asked for disinfectants, and finally after two days the head of the sanitary department came and ordered that we be bathed and the cell dusted; this was done. But when we came out of the bathroom we saw that the floor of the cell was covered with a 3 – 5 mm. layer of the dust. The prisoners began to ask that the dust be removed or the room be washed. The prisoners had to inhale this dust. But the request was not granted., and they were only allowed to sweep the dust to the base of the walls.'

P. S. Overchuk was first deprived of the right to have visits and to receive food parcels, although prisoners of a normal regime are entitled to have both a general visit and a food parcel once every two months. When this disciplinary measure did not help he was put into the *shizo* and kept there for ten days. His offence consisted in praying for himself in the barracks where he slept, in the presence of other prisoners, which was regarded by the prison administration as a breach of discipline.

Minors serve the punishment of deprivation of freedom (maximum ten years) in special labour colonies for minors) but if they reach the age of eighteen during the term they are transferred to adult colonies.

(iii) *Exile or banishment* cannot be shorter than two years nor longer than five years (previously from one year up to ten years). These two punishments cannot be applied to persons who are under eighteen years of age at the moment when they committed the offence, nor to pregnant women, nor to women having children under eight years of age in their care.

(iv) *Correctional labour without deprivation of freedom* may be for a period not shorter than one month, nor longer than one year (previously one day to one year). Correctional labour is carried out at the place where the convicted person works or at any other place in the district (rayon) of his residence. A portion of his salary or wages – between 5% and 20% according to the sentence – is deducted for the benefit of the state.

(v) *Disqualification from holding specific offices or performing specific activities* may be inflicted for a period of one to five years (previously up to five years).

(vi) A *fine* is fixed by the court within the limits laid down for individual offences. The amount of the fine must be determined on the basis of the significance of the offence, but the court must also take into consideration the offender's property situation. If the fine cannot be paid, the court may substitute a sentence of correctional labour without deprivation of freedom at the rate of one month of correctional labour for each ten roubles, but in no case for a term longer than one year .

(vii) *Removal from office* may be inflicted if, owing to the character of the offence, the court finds that it is not feasible to leave the offender at the public duty or in the office occupied by him.

(viii) *Duty to make redress* consists either of the direct separation by personal efforts of the harm caused, or of compensation for loss by personal means, or of a public apology to the injured person or apology before the members of the collective in the form decided by the court. Compensation may be ordered only if the amount of the loss does not exceed the sum of one hundred roubles. If the convicted person does not fulfil his duty to make redress within the time determined by the court, the court may substitute correctional labour, fine, removal from duty or social censure for this punishment. In this case, as well as in the case where material loss exceeds the sum of one hundred roubles, the question of compensation is resolved in civil proceedings.

(ix) Social *censure* consists in a censure addressed to the offender in public by the court. Where necessary, it can be given further publicity, by means of the Press or otherwise.

(x) Persons in military service who have committed a crime may be *assigned to a disciplinary battalion* for a term from three months up to two years in some cases. The court may also assign an offender to a disciplinary battalion for a term of up to two years instead of sentencing him to deprivation of freedom for the same term.

(xi) *Confiscation of property* may only be imposed for crimes against the state and for other grave crimes committed for gain in cases laid down in the criminal codes. Confiscation may be

full or partial. A special Appendix to the codes contains a list of objects which are exempt from confiscation. Such objects are : one summer and one winter suit for the offender and for each person of his household (two summer dresses and two winter dresses for each woman) ; one autumn and one winter coat (for women two winter coats) ; shoes, underwear, bedding, kitchen and table utensils in use; one bed and one chair for each person ; one table, one cupboard and one trunk for the whole family; and some other objects for persons whose basic occupation is agriculture.

(xii) There is finally the punishment of *deprivation of military and other ranks, of orders, honorary titles and medals*, which may be inflicted by a court sentence in cases of grave crimes.

In accordance with this system of penalties established in the General Part of the RCC (and in the same parts of the other criminal codes), the punishment for each individual offence is determined in the Special Part, again within wide limits. In some cases the codes explicitly define the upper and lower limits of the punishment (for instance from eight to fifteen years of deprivation of freedom – or the death penalty – for intentional homicide under aggravating circumstances). A punishment laid down in this way determines the maximum and minimum limits of punishment for the type of crime concerned. In other cases the law only fixes either the maximum or the minimum so that the other limit is the general limit for this kind of punishment as laid down in the General Part (for instance up to five years of deprivation of freedom for intentional homicide committed in a state of strong mental agitation). A third variant – defining only the kind of punishment without specifying the limits – is not utilised in the Russian penal system.

In view of the fact that the upper limits of punishment as determined by the Criminal Legislation of 1958 and the general parts of the codes have been lowered, one could expect that the penalties for individual offences would also be milder than in the previous codes, but it is not so. In most of the cases where

comparison is possible, the punishments for individual crimes are practically the same. For instance, the punishment for negligent homicide is now deprivation of freedom for a term not exceeding three years or correctional labour for a term of up to one year, precisely as it was previously. The punishment for intentional grave bodily injury (up to eight years of deprivation of freedom), intentional light bodily injury (up to one year of deprivation of freedom or correctional labour for the same term) and many others are identical in the present and former codes. Some punishments – for instance for rape, theft, defamamation, insult and others – are even more severe. To the third group of punishments belong those which are milder than before, for instance illegal abortion* performed by a doctor (now up to one year of deprivation of freedom) or illegal deprivation of liberty (now up to six months) and a few others.

Generally speaking, the penal system as initially framed in the new codes was milder and more humane than the system based on the criminal legislation of 1924, as in force before December 1958, but later enactments which extended the death penalty and increased the duration of deprivation of freedom with or without confiscation of property for a great number of political, economic and other offences** considerably reduced its original progressive character. However, in spite of these retrograde steps, the present penal system still appears as more tolerable than that of arbitrary cruel repression at the time of Stalinist terror. In respect of minors it certainly contains many improvements in comparison with the situation which existed under the Decree of 7 April 1935 when all kinds of punishments might be inflicted even on children of twelve years of age or older for crimes specified in that decree.

* However it is necessary to point out that in November, 1955, the prohibition of abortion was abolished. Accordingly 'illegal abortion' is at present only that performed outside a hospital or other medical establishment.

** See Chapter 5.

Compulsory Educational Measures

There are three groups of minors to whom various compulsory measures of an educational character may be applied :

- (i) young persons under eighteen years of age who have committed offences not representing great social danger, if it is expected that they may be reformed without being sentenced to a punishment ;
- (ii) young offenders who have committed socially dangerous acts at an age which excludes criminal liability (under sixteen or, for some offences, under fourteen)*
- (iii) those who have committed anti-social acts of minor significance, such as petty hooliganism.

In all instances involving minors who have committed criminal offences, the compulsory educational measures may be applied either by order of the court at the hearing of the case, or by a decision of the competent commission for cases of minors, if the court or the investigator (with the approval of the procurator) have discontinued criminal proceedings against a minor and sent the file to this commission for consideration. In all other cases, i.e. in cases of anti-social acts which do not amount to a criminal offence, these measures are applied exclusively by the commissions for cases of minors.**

The measures applied either by the courts or by the commissions are practically identical :

* See Chapter 6, p. 84.

** These commissions were established in 1961 and 1962 in all union-republics by their respective presidiums of the supreme soviets (in the RSFSR by the Decree (Ukaz) of 29 August 1961). In 1963 and 1964 provincial commissions were formed in all union-republics which are divided into provinces and regions (kray, oblast'); district commissions function at local level. They are attached to the executive committees of their respective soviets. The main task of the commissions for cases of minors is preventing and combating juvenile delinquency. The commissions usually consist of 10--15 members: deputies of local soviets, representatives of trade unions, komsomol (Young Communist League), schools and other

- (1) imposition of the duty to apologise to the injured person either publicly or in another form;
- (2) reprimand or severe reprimand;
- (3) warning, i.e. public censure for the act committed by the minor and a threat that he will be criminally prosecuted if he repeats it;
- (4) imposition of the duty to compensate for the loss caused, provided the amount of the loss does not exceed twenty roubles* and the minor has attained fifteen years of age at the time when the case is heard (compensation may be made either in form of payment, if the minor has his own income, or by personal labour);
- (5) putting the minor into the charge of his parents, or persons acting for them, for strict surveillance ;
- (6) entrusting the minor to the supervision of a collective of workers or asocial organisation or an individual citizen with their consent or at their request;
- (7) sending the minor into a special medical-educational institution or other educational institution, if there is a real need to change the living conditions of the minor, or into a hospital if he needs treatment;
- (8) assignment of the minor to an educational colony for minors. This measure is still applied in Ukraine, but in the R S F S R it has been replaced by assignment of the minor to a 'special school' or a 'special trade and technical school " although the code (Art. 63) has not been amended in this respect.

Assignment to an educational colony or, in Russia, to one of the two kinds of special schools, is applied to children who have attained eleven years of age in cases of malicious and systematic anti-social behaviour or in cases of grave socially dangerous acts committed by them. Minors are kept in these colonies or special schools for a term not exceeding three years under special surveillance. They must learn and qualify for a trade. If they are successful in their examinations, they receive a

* If the loss exceeds twenty roubles, compensation may be claimed in civil proceedings,

normal certificate without any indication of the place where they completed their study. If a minor becomes of age while in one of these institutions he will remain there until the end of the school year when he must be released.

Several measures may be imposed simultaneously if deemed necessary or useful from an educational point of view. As distinct from a sentence of punishment, the infliction of compulsory educational measures is not deemed to be a conviction for any purpose.

On 13 December 1967 the Presidium of the RSFSR Supreme Soviet passed a Regulation (Statut) on Social Educators of Minors as a further step in the effort to reduce juvenile delinquency. The main task of these 'social educators' is to help parents or persons substituting them in re-educating some categories of minors who have committed criminal offences or other grave anti-social acts. Special lists of social educators, recommended by workers' collectives, social organisations or meetings of tenants from among qualified persons belonging to the respective collective (teachers, students, workers, etc.) and having experience in dealing with youth, shall be held at the district commission for cases of minors. From these lists the commissions shall appoint social educators in appropriate cases either by order of a court, or at the initiative of the commission itself, or on the proposal of a state organ, a social organisation or individual citizens. At present, it is impossible to say exactly how the new institution will eventually work in practice.

Other Educational Measures

It has already been mentioned that, under certain conditions, a person who has committed a criminal offence may be relieved from criminal responsibility and punishment, and the case transferred to a comrades' court; in other circumstances he may be released on surety for re-education and correction to a social organisation or a collective of workers.* These are the two

* See Chapter 6, p. 68 ff.

main instruments aimed at the reformation without punishment of offenders who have committed criminal acts not representing great social danger.

In connection with Khrushchev's ideas concerning the 'withering away of the state' through the transfer of some state functions to so-called social organisations, voluntary people's brigades (narodnaya druzhina) and comrades' courts were formed in 1959 and in the early sixties throughout the US S R. Both are deemed to be 'organs of society' as distinct from state agencies, but, of course, they are under strict control of the party organisations. In fact, people's brigades help the state police (militsiya) in the struggle against crime, while comrades' courts play the role of semi-judicial bodies which, among other things, relieve state judicial organs from the burden of those civil and more particularly criminal matters which are regarded as being of minor significance.

The organisation and functioning of comrades' courts are regulated by union-republican legislation (in the RSFSR by a Decree of 3 July 1961 with the later amendments). There are two main groups of comrades' courts :

(i) those established according to the place of work, such as factories, institutions, organisations, universities, schools collective farms and the like;

(ii) those organised at the place of living (blocks of flats, groups of houses or barracks, etc.).

As a rule these courts are established only at collectives with fifty members or more. The members of a comrades' court are elected by the collective in question for a period of two years,

but they may be dismissed before the expiration of the term if it turns out that 'they do not deserve confidence'. The chairman, vice-chairman and secretary are elected by the members of the court from among themselves.

Comrades' courts deal with breaches of discipline at work; with civil cases if the disputed amount does not exceed fifty roubles and if the parties agree to submit the case to this court; and with petty criminal offences committed for the first time,

such as petty hooliganism, petty theft of state or social property, stealing of inexpensive objects from citizens and the like. These cases are transmitted to the comrades' courts either by ordinary people's courts or by the organs of the procuracy and inquiry (police). Comrades' courts may consider also administrative contraventions, if such cases have been transferred to them by the state administrative agencies.

Comrades' courts are entitled to impose various' measures of social influence' for instance an obligation to apologise to the victim; reprimand; comradely warning with or without publication in the Press; fine not exceeding ten, thirty or fifty roubles depending on the kind of offence committed; proposal to the administration of the enterprise or institution to transfer the offender to unskilled manual labour for a term not exceeding fifteen days (only for petty hooliganism, theft of state or social property, speculation and similar offences). The comrades' courts may also impose the duty to make reparation for the loss caused, if it does not exceed the sum of fifty roubles.

If at the hearing of a case the comrades' court finds that the offence or administrative contravention, in view of its significance, requires criminal or administrative prosecution and punishment, it must transmit the case to the competent organ.

The decisions of comrades' courts are final. However, if the executive committee of the trade union or the executive committee of the local soviet considers that the decision is illegal, it has the right to demand that the comrades' court should hear the case again, or reconsider its decision. Furthermore, ordinary people's courts are entitled to refuse execution of illegal decisions of comrades' courts. I was told in the Institute of Criminology in Moscow that this happens from time to time, but that, generally speaking, comrades' courts perform a useful social task. On the other hand, an outstanding scholar in Poland assessed the work of 'comrades' courts' in that country as 'more than unsatisfactory', which induced the authorities to give up the whole idea. The same seems to be the case in Hungary and in some other East European countries. Yugoslavia did not even try to introduce comrades' courts although

the collectives of workers there enjoy considerably more rights in the management of the enterprises than their counterparts in the US S R, and could therefore set up semi-judicial bodies of this nature with a greater degree of independence from direct party interference than in the Soviet Union.

The release of an offender on surety may occur in all stages of criminal proceedings: from the inquiry or investigation up to the appeal proceedings, provided the requirements of the law are fulfilled. One of the essential conditions is that an organisation or a collective of workers should have petitioned to this effect. According to the law, the decision of the organisation or of the collective to take an offender on surety should be reached at a general meeting of all members of the organisation or collective, but in practice it very often happens that applications are made either by the executive committees of the trade unions or even by their individual officials, or by the directors of the enterprises.

The duty of the collective which applies for release on surety consists mainly in supervising the offender's behaviour for one year (in Estonia for two years), and in correcting and reforming him during this period. It is not clear how in real life a collective consisting sometimes of several hundreds or thousands of persons can perform this duty. When I put this question to the members of the Moscow Institute of Criminology engaged in this particular field, they replied that, of course, not all the

members of the collective deal with the offender, but a few of them or even only one or two of them. Again, to my question whether these few possessed the necessary qualifications for this delicate and responsible work, the answer was that they attend evening classes, keep in touch with the court or procuracy, discuss the matter within the collective or trade union and the like. They admitted that the British system of probation deserved great attention and praised the function of our probation officer and his role in reforming, advising and assisting those placed on probation. Perhaps some time in the future probation will be introduced into the Soviet legal system, but at present there is only release on surety.

If the offender fails to comply with the terms of his release on surety, does not correct himself and refuses to behave 'according to the rules of socialist communal life', or if he leaves his job' in order to avoid social influence " the collective in question may decide to give up surety and to inform the court or the procuracy about this, depending on which of the two organs had made the decision to release the offender on surety. In such a case the procurator or the court may reopen the case.

Individualisation of Punishment and Educational Measures

Individualisation of punishment and educational measures is one of the basic principles of the Soviet penal policy under the new legislation.

As regards punishment there is first of all the duty of the courts to apply punishment within the limits provided for in the special parts of the criminal codes for the type of the criminal offence concerned. Since the limits are usually wide, the courts have the possibility to determine, within these limits, the kind and degree of penalty which correspond most closely to the gravity of the offence committed and to the character of the perpetrator. In doing this the court must take into account all circumstances which mitigate or aggravate the responsibility of the offender.

The law explicitly mentions a number of mitigating circumstances such as prevention by the offender of harmful consequences of the offence or voluntary compensation for the loss or harm caused; difficult personal or family circumstances ; commission of a crime under threat, harm or owing to material, occupational or other dependence; first offence committed as a result of special circumstances, if the offence does not represent great social danger; strong mental agitation provoked by unlawful actions of the injured person; exceeding the limits of necessary defence; commission of the crime by a minor or by a pregnant woman; sincere repentance and active help in uncovering the crime.

There are twelve aggravating circumstances provided for by Art. 39 of the RCC: (1) recidivism, (2) commission of a crime by an organised group; (3) or for mercenary or similar base reasons; (4) or against a minor or an old or helpless person, as well as against a person depending materially, occupationally, or otherwise on the offender; (5) causing grave consequences by the criminal act; (6) instigating minors to commit a crime or drawing minors into participation in a crime; (7) commission of a crime in an especially cruel manner, or (8) by exploiting a public disaster or (9) involving general danger; (10) commission of a crime connected with the utilisation of a source of higher danger by a person in a state of drunkenness; (11) denouncing a person known to the perpetrators to be innocent; (12) commission of anew offence by a person released on surety during the term of surety or within one year after the expiration of the term.

In assessing the punishment the relevant mitigating and aggravating circumstances must be considered, but the court may also take into consideration other mitigating (but not aggravating) circumstances, which are not mentioned in the law. In addition to these circumstances enumerated in the General Part, there are also other circumstances regarding some particular offences. For instance, Art. 102 of the RCC mentions eleven aggravating circumstances which qualify an

intentional homicide as an especially grave murder (motives of hooliganism, special cruelty, danger to the life of many persons, in conjunction with rape, against a woman known by the offender to be pregnant, on grounds of blood feud etc.). Some of the Soviet codes do not contain all these aggravating circumstances (for instance Art. 93 of the Ukrainian CC does not mention homicide committed on the ground of blood feud), whereas others contain further aggravating circumstances (for instance Art. 80 of the Uzbek CC mentions homicide committed by reason of survivals of the past in respect of women ').

Thus the law not only enables the courts to inflict the appropriate punishment in a given case, but also indicates the criteria whereby this must be done. But that is not all. In special cases

the court may inflict a punishment below the minimum prescribed for the type of criminal offence in question, or apply a milder kind of punishment whenever it deems such mitigation necessary because of the extraordinary circumstances of the case and the personality of the offender. The law requires the court to indicate in the judgment the reasons for such extenuation (Art. 43 RCC). As discussed above, in some cases the court may even relieve a person from criminal responsibility and punishment or discharge him only from punishment.

There is, finally, the possibility of conditional conviction (Art. 44 RCC) and conditional early release, or replacement of a punishment by a milder penalty under certain conditions (Arts. 53-56 of the RCC). Special provisions cover punishments for preparation of a crime, attempted crime, and voluntary abstention from bringing a crime to completion (Arts. 15 and 16 RCC). Other provisions concern participation in committing a crime, concealing and failure to report a crime (Arts. 17-18 RCC). Here again the principle is accepted that every participant of a crime – perpetrators, organisers, instigators and accomplices – is criminally liable within the limits of his own guilt. In assigning the punishment or in applying other measures the court must take into consideration the degree and the nature of participation of each of those who took part in the commission of the crime.

All these provisions give the courts wide possibilities for a correct individualisation of punishment or for application of medical or educational measures depending on the nature and importance of the offence and the character of the perpetrator .

8

Pre-Trial Proceedings

Courts – Procuracy – Advocates

A FEW WORDS ON the present organisation of the courts, procuracy and advocates seem indispensable for a better understanding of the principles and rules governing criminal proceedings in the USSR.

(i) Before the legal reform of December 1958 the judiciary functioned according to the Law on Court Organisation of the USSR and the Union and Autonomous Republics of 16 August 1938. There were ordinary and special courts. The ordinary courts consisted of four groups of courts: (1) people's courts; (2) courts of territories, regions, autonomous republics, autonomous regions and national areas; (3) supreme courts of union-republics; (4) The Supreme Court of the USSR. Special courts were the military courts, the water transport court and the railway transport courts. The last two groups of special courts had jurisdiction in cases of offences involving obstruction of the efficiency of the service or labour discipline in the fields of water transport or railway communications. Both kinds of transport courts (lineynye sudy) were abolished by the USSR Supreme Soviet in February 1957, so that as special courts there remained, even before December 1958, only the military tribunals which tried persons belonging to the army, and also civilians in cases of espionage.

On 25 December 1958 the USSR Supreme Soviet enacted the new Fundamental Principles of Legislation on Court Organisation of the USSR and the Union and Autonomous Republics. This Law, together with the new Law on Military Tribunals passed by the Supreme Soviet on the same day, and the laws on court organisation passed later by the union republics, as well as the Statute on the USSR Supreme Court

of 12 February 1951, as amended on 30 September 1967, form the main sources on the Soviet judicial system.

The new legislation did not introduce any substantial changes into the organisation and structure of courts. A slight alteration concerns people's courts. Formerly the council of ministers of a union-republic had the authority to fix the number of judicial districts, each with its own people's court. In some union-republics their number was greater than the number of territorial-administrative districts. For instance, in the Russian F S R there were about 4,600 people's courts, but only about 3,000 administrative districts. Under the new legislation each administrative district or city which is not divided into districts (*rayon*) has in principle only one people's court.

As previously, there are courts of four degrees. People's courts of district or towns (if they are not divided into districts) form the first group. They are courts of first instance which deal with the great majority of civil and criminal matters, such as property claims, labour relations (after all remedies provided for by the labour law have been unsuccessfully exhausted), some inheritance claims, the majority of criminal offences against life, health, liberty and honour of citizens, property, official duties. The second degree courts are the courts of territories (*kray*), regions (*oblast'*), cities (if they are divided into districts), autonomous republics, autonomous regions and national areas, but only if and where such a territorial division exists (for instance in the Russian S F S R, the Ukrainian S S R, the Azerbaijan S S R and others, but not in the Lithuanian, Latvian, Estonian, Moldavian and Armenian S S R). All these courts act as first instance courts in more important civil and criminal matters as determined by the republican codes of procedure. As courts of second instance they hear appeals and protests against the judgments and orders of the people's courts. The supreme courts of the union-republics are the highest republican judicial organs. As courts of first instance they have jurisdiction only in the most important civil and criminal cases. Usually they judge in the second instance as courts of appeal against judgments and orders of the courts

belonging to the second group (territories, regions etc.). In union-republics which have no such regional subdivision, they hear appeals and protests against the judgments and orders of people's courts.

The Supreme Court of the US S R is the highest judicial organ of the Soviet state. Its fundamental function is to ensure uniform and equal application of the law throughout the whole territory of the state. The Supreme Court supervises the functioning of all judicial organs in conformity with the rules laid down in the Statute on the Supreme Court of the USSR of 12 February 1957. The federal Supreme Court acts either in plenary session (at least two-thirds of all members) or in one of the three divisions: for civil, criminal and military matters.

Even the USSR Supreme Court may sit as court of first instance, but only in extraordinarily important civil and criminal matters. Usually, however, the divisions of civil and criminal matters of the Supreme Court consider protests of the Procurator-General or of the President of the US S R Supreme Court (or their deputies) against the judgments and orders of the republican supreme courts, if they are contrary to the federal legislation or if they affect the interests of other republics. The Military Division has corresponding functions and powers in respect of military tribunals. The plenary session of the Supreme Court considers protests lodged by the President of the Supreme Court or by the Procurator-General against judgments and orders of any of the three divisions of the US S R Supreme Court, or against the rulings of the supreme courts of the union-republics if these rulings are contrary to the federal legislation, or if they affect the interests of other union-republics.

Whenever a court, including the USSR Supreme Court, sits as court of first instance, the bench consists of one professional judge and two people's assessors; when a court considers appeals and protests, the bench consists of three professional judges.

Professional judges of people's courts are elected for a term of five years (formerly three years) by the citizens of the district

over which the territorial jurisdiction of the court extends. People's assessors are elected for a term of two years (previously three years) by special general assemblies of collectives of workers or citizens either at their place of work (factories, enterprises, mines, institutions, collective farms, etc.) or at their place of residence. Candidates may be nominated by trade unions, collective farms, co-operatives, youth organisations, cultural associations and other so-called social organisations which in practice means by the party organisations. There are at present more than 320,000 people's assessors of people's courts and more than 21,000 people's assessors of regional (territorial, etc.) courts in the RSFSR only. According to official statistics, about 44% were members or candidate-members of the Communist Party.

Professional judges and people's assessors of all other courts are formally elected for a term of five years by the appropriate soviets (councils). Thus, the judges and assessors of the US S R Supreme Court are elected by the Supreme Soviet of the Soviet Union, but in this case, owing to the new role of the federal supreme court, the chairmen of all fifteen supreme courts of the union-republics are also its members *ex officio*.

Soviet citizenship and a minimum age of twenty-five years are the two main formal conditions required by the law for becoming a judge or a people's assessor. Legal training is not necessary. Even professional judges of the US S R Supreme Court may be without legal qualifications. I was told in Moscow that the present policy is aimed at gradually eliminating professional judges without legal training, but for the time being their number is still considerable (19.1% of all professional judges).

The proportion of professional judges to assessors of people's courts is approximately 1:80. According to information given to me by P. P. Lukanov, the vice-chairman of the Moscow City Court, there are, for instance, 234 professional judges and 17,750 people's assessors attached to the people's district courts in Moscow. Moscow City Court itself has 900 people's assessors. People's assessors are equal in rights to professional judges

not only in respect of facts, but also regarding the application of the law. They perform their duties as assessors for not more than two weeks per year .

The US S R Constitution and the constitutions of all union-republics, as well as the federal and union-republican legislation on court organisation, explicitly state that 'judges and people's assessors when administering justice are independent and subordinate only to the law'. This means – it is continually emphasised in Soviet legal literature – that the courts must be independent of 'local influences' but this in no wise signifies that they should be independent in respect of the 'general party line' or 'general state policy' as stressed in *yuridichesky Slovar* , (Dictionary of Legal Terms). This was published after the 20th Party Congress and therefore could no longer be 'under the impact of the personality cult'. Art. 3 of the new all-union Law on Court Organisation of 25 December 1958 states that one of the main tasks of Soviet Courts is 'to educate the citizens of the US S R in the spirit of devotion to the Fatherland and to the cause of Communism'. In other words, this means that, according to present legislation as well, the activities of courts are still dictated by the 'general party line' as established by the leaders of the Communist Party.

(ii) The procuracy, first established in 1922,* is now organised in conformity with Chapter IX of the 1936 Constitution and the Ukaz of the Presidium of the Supreme Soviet of 24 May 1955 which contains the Statute on the Supervision by the Procuracy, later confirmed by the Law of 28 December 1955. In April 1956 the Presidium of the US S R Supreme Soviet passed a decree on the structure of the central apparatus of the procuracy and in February 1967 it enacted an important decree on the disciplinary responsibility of procurators.

The main function of the procuracy is defined in Art. 113 of the Constitution which vests in the Procurator-General of the US S R 'supreme supervisory powers in order to ensure the strict observance of the law by all ministries and institutions

* See Chapter 4, p. 46.

subordinated to them, as well as by persons in office and other citizens' .

The procuracy is organised hierarchically as a powerful organ of the central state and party authority, independent in its functions of any local influence. This means that all organs of the procuracy are subordinated only to the centre.

The head of the Procuracy is the Procurator-General of the US S R, who is appointed by the Supreme Soviet of the US S R for a term of seven years and is responsible to it for the work of the procuracy. His deputies are appointed by the Presidium of the US S R Supreme Soviet on his recommendation. The procurators of the union-republics, autonomous republics, territories, regions, autonomous regions, cities (with division into districts) are appointed by the US S R Procurator-General, whereas procurators of national areas, cities (without division into districts) and districts are appointed by the procurators of the union-republics with the approval by the Procurator-General. All these procurators are appointed for a term of five years.

The military procuracy carries out the supervision of legality in the army and navy .Territorial and military procuracies are not subordinated to each other, but the Supreme Military Procuracy is incorporated in the Procurator-General's office.

Procurators have the right and duty to lodge protests against illegal decisions made within their jurisdiction. The illegal decision must be annulled either by the organ which issued it or by a superior agency. In the field of criminal proceedings the procuracy appears both as an organ of investigation and as a representative of the state prosecution. Procurators also supervise inquiry proceedings and preliminary investigations conducted by other organs, as well as the execution of court judgments and orders.

Only Soviet citizens who are at least twenty-five years old may be appointed as procurators. As a rule, they must be graduates in law. More important are the candidate's political qualifications. V. S.. Tadevosyan, a leading Soviet author, says in this respect :

'With the assistance of the leading party centres the Procurator-General of the U S S R and the procurators of union-republics select and appoint to the office of procurators clever, qualified, politically educated and experienced workers capable of bearing the full responsibility of the high office of procurator confided to them.'

(iii) Art. 13 of the new Fundamental Principles of Legislation on Court Organisation of 25 December 1958 defines only in the most general terms the functions of the colleges of advocates leaving further legislation in this field to the legislative organs of the union-republics. Later, between 1960 and 1963, the supreme soviets of the union-republics passed legislation adopting new regulations on the organisation and functioning of the advocates' profession.

Advocates are organised in advocates' colleges according to the territorial, administrative and judicial division into territories, regions, autonomous republics, autonomous regions and cities. In the union-republics which have no territorial division, there are only republican advocates' colleges.

The colleges of advocates maintain in various places the so-called 'legal consultative offices' in which several advocates work under a head appointed by the presidium of the college concerned. In Moscow, for instance, there are 21 consultative offices with about 800 advocates and only 5-6 'candidates', (stazher).^{*} In the consultative office headed by N. K. Borovik – who acted as counsel for the defence in the famous case of Gerald Brooke – there were, in 1967, 46 advocates.

The parties do not turn to an individual advocate but to the consultative office. The head of the office with the help of a secretary distributes the work among the advocates with due regard for their qualifications and for the clients' requests for their personal service, but avoiding situations in which some advocates would be overworked, while others would lack work. The parties pay the consultative office for legal assistance in accordance with the instructions or ~~tariffs laid down or~~

* There are only about 14,000 advocates in the whole territory of the Union.

approved either by the republican councils of ministers in some union-republics, or by special' juridical commissions' in others. Individual advocates are paid for their work out of the fees received by the office from the clients. At present they usually receive 82% of the fee paid by their client, while 18% is utilised for the maintenance and expenses of the office. Since the fees are very low, the average monthly income of advocates is also low. In Moscow and Leningrad it does not exceed 120150 roubles, but I was told that the best advocates may earn up to 300 roubles per month. The monthly salary of candidates (*stazher*) is 40 roubles. *

The new regulations, aimed at improving the very poor professional standards of Soviet advocates, are more severe as regards qualifications. At present only persons who have graduated from higher law schools and have practised law for a period of at least two years may be admitted to a college of advocates. Persons with higher legal education, but without the two years' practice in law, may be admitted to a college of advocates only after completing a period of probation of not less than six months as 'candidates' (*stazher*) in a college of advocates. Persons lacking higher legal education may be admitted to a college only exceptionally, if they fulfil some other conditions, such as five years' practice in legal matters.

Inquiry

Broadly speaking, all new codes of criminal procedure follow the pattern of the former codes and that of more or less all continental systems of criminal procedure. According to the new Russian Code of Criminal Procedure (RCCP) of 27 October 1960 and to the codes of other union-republics,**t three main stages can be distinguished in the pre-trial proceedings.

(i) The first stage of criminal proceedings begins with the initiation of a criminal case. A case may be initiated on the

* For the rate of exchange see p. 75. **See also Chapter 5, pp. 58 and 60.

ground of letters or private complaints of citizens, communications of various organisations and institutions, information published in the press, direct discovery of signs of a crime, or as a result of a defendant giving himself up. If there are sufficient indications that a crime has been committed, the procurator or investigator, or organ of inquiry, or judge, each within the limits of his jurisdiction, are obliged to initiate a criminal case, and, for this purpose, to issue a decree which must contain all the relevant data regarding the facts and the article(s) of the criminal law applicable to the case.

The initial stage is that of 'suspicion' before a formal charge has been brought against a person. In this stage the person concerned is called 'a suspect'. Art. 52 of the RCCP defines a suspect as a person who has been detained on suspicion of committing a crime or a person against whom a measure of restraint has been applied before a charge has been brought against him. According to Arts. 122 and 127 of the RCCP, the agency of inquiry or the investigator may detain a person suspected of having committed a crime only in a case where the punishment of deprivation of freedom can be imposed, and solely on one of the following grounds: (1) where the suspect is caught *in flagrante delicto*, (2) where eye-witnesses or the victim directly identify the person as the one who has committed the crime; (3) where obvious traces of the crime are found on the suspect, his clothing, near him or in his home. Where there are other grounds of suspicion a suspected person may be detained only if he has tried to escape, or if he has no permanent address" or if his identity has not been established. The agency of inquiry or the investigator – depending on which of the two ordered the detention – must notify the procurator within twenty-four hours about all relevant circumstances of the detention. Within forty-eight hours from the moment he has received the report, the procurator must either sanction confinement under guard or order the release of the suspected person.

As distinct from detention which has a provisional character, confinement under guard is one of the various measures of

restraint* which may only exceptionally be applied to suspected persons. If such a measure, including confinement under guard, has been applied against a suspected person, either a charge must be brought against him not later than ten days from the moment of application of this measure or the measure must be revoked (Art. 90, RCCP).

Although the suspected person can make complaints, give explanations, and file petitions, the services of a defence counsel (advocate) are not permitted.

(ii) The second stage begins at the moment when a charge is brought against a suspected person. As from this moment he is called 'a charged person' (*obvinyaemy*). He now has the right to take cognizance of the charge brought against him, to give explanations, to submit evidence, to file petitions and to make complaints, but, before the closing of the inquiry or preliminary investigation, he still has no right to be represented by counsel.

At this stage cases are still dealt with either by the agencies of inquiry or by the agencies of the preliminary investigation, or by both.

The agencies of inquiry are the police (*militsiya*), commanding officers of military units, organs of state security, directors

* The other measures of restraint are: written undertaking by the suspect or the charged person that he will not leave his place of residence; personal surety, i.e. a written obligation by trustworthy persons that they will ensure the proper conduct of the suspect or the charged person and his appearance when summoned; surety of asocial organisation, i.e. the same obligation as in the case of personal surety, but given by asocial organisation (not to be confused with surety as a re-educational measure instead of punishment; see Chapter 7, p. 101 ff) ; bail; and surveillance which may be applied only to the members of the armed forces. Any of these measures of restraint may be applied either by the agency of inquiry, or by the investigator, or procurator, or court, but only if there are sufficient grounds for supposing that the suspect or the charged or the accused person will hide, or that he will hinder the establishment of the truth, or that he will engage in criminal activity. The same measures may be applied in order to secure the execution of a judgment. Confinement under guard may be applied only in cases of crime for which the punishment by deprivation of freedom is provided for by the law,

of correctional-labour institutions, agencies of state fire supervision, organs of frontier security, captains of vessels on the high seas and heads of polar stations. The authority of each of these agencies to open and conduct inquiries depends either on the occupation of the person in question, or on the place of the commission of the crime, or on the nature of the offence.

If preliminary investigation is compulsory, the inquiry must be completed within ten days from the day the case has been initiated, and all the materials of the case must be sent to the investigator. On the contrary, if a preliminary investigation is not obligatory, the inquiry must be completed not later than one month from the day the case was initiated, including in this period the drawing up of an indictment or a decision which discontinues proceedings (Arts. 121 and 124 RCCP). This period of one month may be prolonged for not more than another month by the procurator exercising direct supervision over the inquiry. Further prolongation is possible only in exceptional cases in conformity with the rules regarding the periods for conducting preliminary investigation. The indictment or the decision to discontinue proceedings must be sent by the organ of inquiry to the supervising procurator. Only the procurator has the right to approve the indictment, or to discontinue the case, or to order further inquiry.

Preliminary Investigation

A preliminary investigation is conducted either by the investigators of the procuracy, or by those of the state security (KGB),* or, since April, 1963, by the investigators of the agencies for protection of public order in cases provided for by the law. The investigators of the KGB conduct investigations in cases of treason, espionage, terroristic acts, sabotage, anti-soviet agitation and propaganda, illegal flight abroad, illegal entry into the USSR and many other offences regarded by the

* Committee for State Security, the present name of the political police, known earlier as MGB, MVD, NKVD, OGPU, GPU and Cheka. See also Chapter 4, p. 43 ff,

framers of Soviet criminal law as especially dangerous crimes against the state.

Preliminary investigation is obligatory not only in respect of criminal offences against the state and military crimes, but also for the great majority of other crimes such as stealing of state, social or personal property, robbery, homicide, inflicting grave or less grave bodily injury, abortion, rape, depraved actions, abduction or substitution of infant, etc. Preliminary investigation is also compulsory in all cases of offences committed by minors and by persons who, owing to their mental or physical deficiency, cannot exercise their right of defence (Art. 126 RCCP).

In cases where preliminary investigation is compulsory, the investigator may begin the investigation immediately, without waiting for the completion of the inquiry. He may also instruct the agency of inquiry to carry out specific measures, and such instructions are binding on the agency of inquiry. The investigator has the right to challenge the directives of the procurator concerning the question of who is to be charged, or regarding the classification of the offence, the question of whether the case should be referred to the court and the charged person brought to trial, or whether it should be terminated. In all these cases of disagreement with the procurator, the investigator has the right to submit the question to a higher procurator, whose decision is final.

In the course of the preliminary investigation – as in general in all stages of criminal proceedings – all relevant facts must be established on the basis of statements by witnesses, by the injured party or the suspected (charged) person, by expert evidence, exhibits, records of proceedings in previous stages, documents, as well as by other means of evidence, such as inspection of the place of the crime and other places, examination of the body, search, seizure of the instruments of the crime and of all other articles which may serve as evidence. Art. 71 of the RCCP lays down that officials conducting inquiries, investigators, procurators and courts must evaluate evidence according to their inner conviction, taking into account all the

circumstances in their totality, and not according to a preestablished criterion of the value of any particular kind of evidence. However, in doing this, they must be guided not only by the formal rules of the law, but also by their 'socialist legal consciousness'. *

As distinct from the period of Stalinist terror when 'confession of guilt' (usually extracted by the political police under torture) formed the basis of prosecution and conviction,** the present codes state that confession of guilt' may become the basis for a charge (or accusation) only if the confession is confirmed by the evidence in the case as a whole' (Art. 77 RCCP). In the last few years a number of ordinary (non-political) criminal cases were reported, in which confessions by the accused were not confirmed by other means of evidence and the persons in question were discharged. In a case reported recently in the Moscow daily Izvestiya under the title Nilkolayev v. Nikolayev, a teenager called Nikolayev confessed that in a street brawl he had stabbed a certain Ivanov with two knives, one a shoemaker's knife taken from his father and the other a hunting knife borrowed before the quarrel started from a friend. The blows were fatal and Ivanov died a few minutes later. Some additional evidence corroborated Nilkolayev's confession. Nikolayev was sentenced by the Moscow city court to deprivation of freedom for a term often years for premeditated homicide committed out of motives of hooliganism (Art. 102(b) of the RCC). The case was dealt with twice by the RSFSR Supreme Court. At the second hearing not only counsel for the defence, but also the procurator expressed doubts about Nikolayev's guilt. The Supreme Court ordered an experiment. A man two metres tall – the height of the murdered Ivanov – was brought into the courtroom. Experts, who had made models

* For the meaning of 'socialist legal consciousness' see Chapter 4.

** During the spectacular trials in 1936 and 1937 many prominent communists (Rykov, Zinovyev, Bukharin, several generals and many other famous persons) 'confessed' various acts of treason and sabotage. They were all sentenced to death and shot. According to A. Ya. Vyshinsky, confession was considered sufficient proof of guilt, at least in political cases.

of the knives, asked Nikolayev to show the position from which he had inflicted the blows and how he had done it. The accused, who was rather short, repeatedly hit the tall man with both , knives '. From the angles of the blows the experts concluded that the accused Nikolayev could not have inflicted either of the two wounds. The Supreme Court acquitted Nikolayev because , his confession cannot be taken as ground for conviction' and because' his participation in the commission of this crime has not been proved '. It seems that Nikolayev's ' confession' was motivated by his wish to take upon himself full responsibility for the brawl he had initiated, and to protect his friends in the gang, particularly the killer. Nilkolayev was sentenced to five years imprisonment for malicious hooliganism.

(iii) The third stage begins at the moment when the investigator thinks that the evidence collected gives sufficient grounds for drawing up an indictment (act of accusation). He must give notice to the charged person, the injured party, the civil plaintiff, and the civil defendant or their representatives that the investigation is completed and that, as from this moment, they have the right to acquaint themselves with the materials of the case. From this moment only is the active participation of defence counsel permitted. As regards the position of the charged person, he and his counsel now have the right to acquaint themselves with all the materials of the case either separately or together and to make the necessary notes from these. In particular, counsel has the right to meet his client without the presence of any official; to submit further evidence ; to object (otvod) to the persons of the investigator, procurator, expert or interpreter; to complain to the procurator against actions of the investigator which violate or prejudice the rights of the charged person or his counsel, to be present, with the permission of the investigator, at the acts of further investigation performed at the request of the charged person or his counsel (Arts. 200-202 RCCP).

Preliminary investigation ends with an indictment or a decision to send the case to the court for consideration of the question whether compulsory measures of a medical character

should be applied,* or with a decision to discontinue the case (Art. 199 RCCP). Preliminary investigation may also end with a decision to transfer the matter to a comrades' court, or to a commission for cases of minors, or with a decision to release the perpetrator on surety.** In all these cases, the investigator's decision must be sent to the supervising procurator. If a case has been discontinued by the investigator, the procurator has the right to set aside the investigator's decision and to reopen the case, provided the periods of limitation have not expired (Art. 210 RCCP).

After signing the indictment, the investigator must immediately, i.e. the same day, refer the case to the procurator. Within five days from the moment he receives the case, the procurator may either send the case back for further investigation (or inquiry) ; or discontinue the case if there are no grounds for prosecution; or ask the investigator (or agency of inquiry) to modify the indictment; or confirm the indictment as presented by the investigator (or agency of inquiry) ; or, finally, himself draw up a new indictment (Art. 214 RCCP). Having confirmed the indictment or worked out anew one, the procurator hands the case over to the court which has jurisdiction for the offence in question. At the same time he notifies the court about his intention of supporting the accusation at the court hearing (Art. 217 RCCP). This is important, because the participation of defence counsel at the court hearing is obligatory in all cases in which a procurator appears for the state prosecution (or a 'social accuser' for an organisation).

Preliminary investigation, including inquiry, must be completed within a period of two months. This period is calculated from the day of the initiation of the case*** until the day of referring the case to the procurator either with an indictment, or with a decision to transfer the case to a court for consideration of the proposal to apply compulsory measures of a medical nature, or until the termination of the case for other reasons

* See Chapter 6, p. 85,

** See Chapter 7, p. 101 ff.

***See above, p. 112.

mentioned above. This period of two months may be prolonged by procurators of autonomous republics, territories, regions, autonomous regions or national areas for another period of up to two months, and, , in exceptional instances " by the procurators of the union-republics and by the US S R Procurator-General for even longer periods which, however, have not been defined by the law.

The duration of the preliminary investigation must not be confused with the periods of confinement under guard as the most severe measure of restraint permitted during investigation. * In principle, confinement under guard should not continue for more than two months from the day when this measure was applied. In complicated cases this period may be prolonged for another month by the procurators of territories, regions and other procurators of the same group, and for a further three months by the procurators of the union-republics. Additional prolongation for a period not exceeding three months may be permitted by the US S R Procurator-General, and this only in 'exceptional instances' (Art. 97 RCCP). Thus, nine months is the maximum possible period of confinement under guard permitted by Soviet law. This period includes the time of detention, if any,** and the period during which the case is dealt with by the procuracy and by the court. According to the Commentary on the R SF S R Code of Criminal Procedure edited by the R SF S R Minister of Justice, V. A. Boldyrev, and published in 1963, even additional investigation ordered by a procurator, or by a court (including a court of appeal) does not interrupt this period: it must always be calculated from the moment of confinement (or detention). In another commentary published in 1962 by the Leningrad university, the authors wrote:

'The determination and observance of these terms [of confinement] during the investigation represent one of the essential guarantees of the rights of the individual in criminal proceedings.'

* See pp. 113-14.

** See p. 113.

These guarantees, however, did not prevent gross violations of Art. 97 of the RCCP both by the procuracy and by the court in the famous case of Alexander Ginsburg, Yuri Galanskov, Alexey Dobrovolsky and Vera Lashkova. They were arrested within a few days of each other in January 1967, and their trial was held in Moscow in January 1968. The Moscow City Court as court of first instance passed the sentences on 12 January 1968. Thus, the four accused have been confined under guard for nearly one year, i.e. approximately three months in excess of the maximum period of nine months provided for by Art. 97 of the Russian Code of Criminal Procedure. This and other flagrant violations of the law by the procuracy, including the Procurator-General of the US S R, and by the court have caused protests among Soviet intellectuals, and indignation all over the world.

9

The Trial

First Instance Proceedings

WHERE THERE are sufficient grounds for hearing a case in court, the judge orders the person charged to be brought to trial.

However, if the judge does not agree with the conclusions of the indictment, or he thinks that it is necessary to alter the preventive measures of restraint applied to the charged person, the case must first be considered in a preliminary sitting of the court. In such cases also the bench consists of one professional judge and two people's assessors. The procurator must be present and he has the right to express his opinion (Arts. 221 and 225 RCCP). One of the following decisions may be taken by the court in a preliminary sitting: (1) that the person charged shall be brought to trial; (2) that the case shall be returned for supplementary investigation; (3) that the case shall be discontinued; (4) that the case shall be transferred to the proper jurisdiction; (5) that specific points of the indictment shall be cancelled, or the accusation brought under a less severe provision of the criminal law, without thereby substantially altering the factual circumstances of the accusation contained in the original indictment. The court may also decide to change the measure of restraint and to apply another one, or to cancel the measure applied, or to apply a measure if none had been applied in earlier stages. The question of bringing to trial must be resolved by the judge dealing with the case or by the court in preliminary sitting within fourteen days from the moment the case comes to the court from the procuracy.

A person charged who is brought to trial is called 'an accused' (*podsudymy*).

The next stage is the trial at the court of first instance. As shown above,* this may be either a district people's court, or a court belonging to the second group of courts in those union-republics where such courts exist. In the union-republics without regional division and therefore without courts belonging to the second degree group, the republican supreme courts have, broadly speaking, the same jurisdiction as the territorial, regional and other courts of this degree in the union-republics having territorial-regional division. The supreme courts of all union-republics may decide, either on their own initiative or on the proposal of the respective republican procurator, to act as courts of first instance in all cases which they regard as especially complicated or which in their opinion have especially important significance for society (Art. 38 of the RCCP and corresponding Arts. of the CCP of other union-republics). The Supreme Court of the USSR has the same right. Furthermore, every higher court – for instance a court of a territory in respect of a district people's court – may accept for trial as a first instance court any case within the jurisdiction of a lower court.

A court sitting as a court of first instance must consider the case directly and orally. This means that it interrogates the accused, the injured party and witnesses, hears opinions of experts, discloses records and other documents, and analyses all other evidence at the hearing itself, because the judgment must be founded only on the evidence which has been considered and analysed at the hearing (Arts. 240 and 301 RCCP). The hearing must proceed without interruption except for the time necessary for rest. The bench is always presided by a professional judge. He directs the proceedings and takes all the steps provided by the law in order to establish the truth** and 'to secure the educational influence of the trial'. If this 'educational influence' which is one of the main tasks of Soviet

* See Chapter 8, pp. 106-7.

** Soviet criminal procedure, like many other systems of procedure, is based on the inquisitorial principle, according to which the court has the task to establish the truth. In a system based on the accusatorial principle, such as ours, the main task of the court is to examine admissible evidence rather than to inquire into the truth.

criminal proceedings (Art. 2 RCCP), may be achieved more successfully by hearing the case at a factory, plant, institution, collective or state farm, or at any other similar place, the court is obliged to hold the session at one of these places.* The court has also the right and the duty to find out the causes and conditions which have facilitated the commission of the crime, and to take measures for their elimination. **

The law prescribes that all the participants of a hearing – the procurator representing state prosecution, the accused, counsel for the defence, the injured party, civil plaintiff and defendant, or their representatives, as well as the so-called social accusers and social defenders – must enjoy equal rights in presenting evidence, in the analysis of the evidence, and in submitting petitions. In practice the role of the procurator is predominant. This is so not only by reason of his legal training, which is usually considerably better than that of professional judges or advocates, but also, and in the first place, because of the political position of the procuracy in Soviet society. His importance is emphasised by some external signs of his authority. Whereas professional judges, people's assessors and advocates wear civilian clothes, procurators always appear in courtrooms in their official uniforms with the insignia of their respective ranks, and a uniform by itself still commands respect everywhere, but especially in the Soviet Union. At hearings (at least those attended by the author in Moscow and Leningrad) the procurators sit very near the bench, sometimes at one end of the same table at which the members of the bench sit, while the place designated for defence counsels is always at some distance.

The accused must be present at the hearing, except in cases where he is outside the US S R and evades appearance in court, or where – in cases of offences for which the punishment by deprivation of freedom is not provided for by the law – he himself makes an application for the examination of the case in his absence, and the court consents. Whether present or not,

* In 1966 about 25 % of all criminal cases were heard at such places.

** Agencies of inquiry, investigators and procurators have the same right and duty.

the accused has the right to defence. On the other hand counsel for the defence is obligatory not only in cases of minors and persons who owing to their physical or mental defects are not able to defend themselves, but also in some other cases. For instance, whenever a procurator as state procurator or asocial accuser takes part at the hearing, or where the death penalty may be inflicted, counsel for the defence is compulsory.

'Social accusers' and 'social defenders' have been introduced into criminal proceedings in conformity with the present penal policy which is aimed at encouraging 'society' to take part in the struggle against crime and in the administration of justice. These social accusers and defenders – to be clearly distinguished from procurators as state prosecutors and defence counsels – are elected by trade unions, party and other social organisations or collectives of workers to which the accused belongs either as a worker or as a member. The court has the right, but is not obliged, to admit asocial accuser or defender to the hearing. If admitted, asocial accuser or defender has the right to present evidence, to submit petitions, to participate in oral arguments and to express his opinion in respect of the act committed by the accused and other questions of importance.

The social accuser, in particular, has the right to express views as regards the classification of the incriminated act and in respect of the punishment which in his opinion should be applied. The social defender has especially the right to make statements concerning mitigating circumstances, the possibility of conditional conviction of the accused, or his relief from punishment and transfer on surety to the organisation or collective of workers in whose names the social defender speaks.

This is the law. In practice there was at the beginning great confusion regarding the function and rights of social accusers and defenders. Some organisations used to elect at the same time asocial accuser and asocial defender, and they both appeared at the hearing with contradictory statements, if any. In other cases social accusers or defenders were not elected at all, but appointed by the administrative organs of enterprises or institutions. In March 1960 the USSR Supreme Court condemned

this practice. At present a social organisation or a collective of workers may only elect either a social accuser or a social defender. In 1964 social accusers or defenders took part in 22.1% of all criminal cases. In 1966, 10.3 per cent of criminal cases involved social accusers, only 5.6 per cent social defenders. It seems, however, that now organisations and workers' collectives are not very anxious to utilise this right: a social defender was present at only one of the hearings that I attended during my journey in Russia, and he appeared to be rather embarrassed when he was asked by the presiding judge to state his views.

The trial begins with the calling of the case and the establishment of the accused's identity. For this purpose the presiding judge puts to the accused a number of questions regarding his name, place and date of birth, education, occupation and others, one of which is always whether the accused is a member of the Communist Party, although party membership is not mentioned in the law as an item of identity (Art. 271 RCCP). Having established the accused's identity, the presiding judge reads the indictment. If a preliminary investigation or inquiry has not been conducted (only exceptionally, in cases initiated upon private complaint of the injured party), the hearing begins with the reading of the statement of the injured party.

This stage of criminal proceedings ends by a judgment of the court which may be either a condemnation or an acquittal. A judgment of acquittal must be pronounced if the commission of a crime has not been established; if the act of the accused does not contain all the constituent elements of a crime, or if the participation of the accused in the commission of the crime has not been proved. In both cases – that of a conviction and that of an acquittal – the court must state the reasons for its judgment. The court reaches its decision at a meeting held in the conference room (usually adjoining the courtroom) immediately after hearing the accused who must be granted the last word. The judgment is delivered in the courtroom either by the presiding judge or by another member of the bench. Within three days from the delivery of the judgment a copy of the

judgment must be handed to the convicted or acquitted person.

When deciding about the judgment the court must also discuss the causes and conditions which have facilitated the commission of the crime and, if necessary, issue a special ruling with instructions regarding the appropriate measures to be taken by directors of enterprises, institutions and organisations in order to remove these causes and conditions. The court has also the right to direct the attention of appropriate officials to violations of the law, committed during the inquiry or preliminary investigation. Other rulings of the court may relate to the incorrect conduct of individual citizens at work or in daily life. These rulings must be directed to the appropriate social organisations and collectives of workers, as well as to comrades' courts whenever necessary.

All these measures are aimed at reducing to the utmost the number of offences. Soviet criminologists are convinced that this particular role of the court produces satisfactory results. In any case, it constitutes an important component in the general efforts directed against crime.

One of the most important principles governing Soviet criminal proceedings is that of publicity of the hearing. A closed judicial examination may be permitted only exceptionally in cases of offences committed by persons who have not attained the age of sixteen years, or in cases of sexual crimes, or in those involving the intimate life of the participants. Furthermore, a case must be heard in camera, if an open trial would affect the interests of protecting a state secret (Art. 18 RCCP).

Unfortunately, even under the new legislation this principle has not been strictly observed. At the trial of Yuri Galanskov and three other Russian intellectuals, held in Moscow at the beginning of January 1968,* the courtroom was filled with officials of the political police (KGB) and members of people's squads (*druzhinniki*). According to an appeal issued by Dr. Pavel Litvinov** and Mrs. Larisa Daniel*** and smuggled to the

* See also Chapter 8, p. 121.

**A grandson of the former Soviet Foreign Minister.

***The wife of Yuri Daniel, sentenced in 1966 to imprisonment.

West, these people made a noise, laughed and insulted the accused and the witnesses. The presiding judge Mironov made no attempt to prevent these violations of order. Some fifty relatives and friends of the accused were kept out of the courtroom by a strong police force. About an hour after the beginning of the hearing only five of the relatives were permitted to go into the courtroom. Foreign correspondents were refused permission to attend. In their appeal to the world A. Litvinov and L. Daniel denounced the trial as 'a stain on the honour of our State and on the conscience of everyone of us' and called it 'a witch trial'. * Even the *Morning Star*, organ of the British Communist Party, expressed concern, but for other reasons. It wrote that 'progressive people outside the Soviet Union. .. cannot avoid expressing concern when the handling of a trial such as this one gives such opportunities to the enemies of the Soviet Union to create confusion and misunderstanding.'

Both the court and the procuracy also committed a number of other illegalities during the hearing, particularly as regards the examination of witnesses and the rights of the accused and their lawyers. The trial ended with sentences ranging from seven years' to one year's deprivation of freedom for alleged anti-Soviet activities, precisely as demanded by the procurator. In the circumstances of the case it seems obvious that the sentences were decided upon from the very beginning, even before the hearing was opened.

In 1967 secret trials were held all-over the USSR, but particularly in the Ukraine against university teachers, scientists, critics and other Ukrainian intellectuals whose 'crime', consisted in legally opposing forcible Russification of their country and the systematic destruction of its culture. A letter of about 20,000 words, written by the young Ukrainian journalist, Vyacheslav Chornovil, and addressed to the KG Band the judicial authorities in Kiev, contains shocking details of multifarious violations of the Constitution and the Ukrainian codes, committed by the political police, courts, procuracy and defence

* The full text of the appeal was published in *The Guardian* of 13 January 1968.

counsels. According to this most reliable document, smuggled to the West during the secret trial of V. Chornovil himself, twenty Ukrainian intellectuals were tried in total secrecy and condemned to imprisonment for terms ranging from three to six years. Chornovil, an official of the Young Communist League, had been summoned as a witness in one of these numerous trials, but was so disgusted by the secrecy and other illegalities, that he refused to give evidence. Later he wrote his letter of protest, sent a copy to P. Y. Shelest, first secretary of the Communist Party of the Ukraine, and distributed it among his friends. As a result, Chornovil himself was arrested, tried in secret and sentenced to three years' imprisonment (later reduced to 18 months) for anti-Soviet propaganda ('slanderous fabrications which defame the Soviet state and social system ') according to Art. 62 of the Ukrainian Criminal Code. Chornovil wrote: ' It seems possible to classify as " slanderous fabrication " any statement which does not conform to the directives [of the party].'

A person against whom a condemnatory judgment has been pronounced is called a 'convicted person' (*osuzhdenny*).

Appeal and Supervision

The right of lodging an appeal belongs to the accused, his counsel, his legal representative and the injured party or his representative, while the procurator may lodge an ordinary protest against every unlawful or unfounded judgment. A civil plaintiff, civil defendant, and their representatives may appeal against a judgment only in so far as it concerns civil claims. Even an acquitted person may lodge an appeal in respect of the reasons and grounds of acquittal (Art. 325 RCCP).

All appeals and protests must be presented in seven days' time from the moment when the judgment has been pronounced (Art. 328 RCCP), and that is a rather short period especially in complicated cases.

The courts of second degree (territories, regions, etc.) act as courts of second instance in all cases tried by the district peoples' courts, while the Supreme Courts of the union-republics are the second instance courts in respect of all judgments of the second degree courts when they acted as courts of first instance. In the union-republics which are not divided into territories, regions, etc.,* the supreme courts of the union-republics are not only courts of appeal against judgments rendered by the district people's courts, but also first instance courts for those offences which usually belong to the jurisdiction of the second group of courts (territories, regions, etc.) in the union-republics having such a division.

Since the judgments of all union-republican supreme courts are always final, this means that Soviet citizens who commit a 'more serious crime' on the territory of a union-republic with regional subdivision are in a better position than those Soviet citizens who commit the same offence in a union-republic without such division: in ten union-republics (with subdivision) the case will be heard first by a bench of one professional judge and two people's assessors of the regional court, and then, by way of appeal or protest, it may be heard by a bench of three professional judges of the supreme court; in the other five union-republics (without subdivision) the case can be heard only by a bench composed of one professional judge and two people's assessors. This is contrary not only to the two-instances-rule, but also to the principle of equality of all citizens before the law and the courts, explicitly proclaimed in the Soviet Constitution and in all-union legislation of criminal procedure. When the US S R Supreme Court sits as first instance court (in exceptionally important cases, at its own discretion) the impossibility of appealing against its judgment is even more disturbing.

While modern systems of criminal procedure favour appeals in more important cases and some of them even provide for consideration of the most serious offences by a third instance court with an enlarged bench of experienced and highly

* See Chapter 8, p. 106.

qualified professional judges, the Soviet system functions precisely in the opposite direction. According to this, at first sight strange system, which contradicts two of its own basic principles, the more important the crime, the fewer the possibilities of appeal and the more restricted the number of professional judges taking part in the consideration of the case. However, it fits perfectly the old Leninist concept of legality which requires direct control of the procuracy and courts by the party leadership.* The so-called 'most important' or , exceptionally important' cases always have a political significance. Precisely for this reason they are regarded as important. Since in any circumstances such cases are decided by the relevant party authority before any court hearing, it does not matter at all whether there is a possibility of appeal or not.

One of the characteristics of the Soviet appeal procedure is that appeal is not restricted to points of law, nor limited to the facts proved at the hearing of the case before a court of first instance. New evidence may be submitted not only in the appeal, but even at the second instance hearing until the moment when the procurator gives his final conclusions (Art. 337 RCCP). The presence of the convicted person is not obligatory, but it may be permitted. Counsel for the defence may also participate at the hearing, if permitted by the court, but the procurator must be present and give his conclusion concerning the legality and well-founded nature of the judgment (Art. 335 RCCP).

As a result of considering a case in appeal proceedings, the court may take one of the following decisions: (1) it may uphold the judgment without alteration; (2) quash the judgment and refer the case back for new investigation or new court hearing; (3) quash the judgment and discontinue the case; (4) change the judgment, i.e. pronounce anew judgment. The court of appeal may change the judgment (without sending it back to the court of first instance for retrial) only in favour of the convicted. There is no *reformatio in pejus*. On the other hand a judgment may be quashed and the case sent back to the court

* See Chapter 4, p. 42 ff.

of first instance for new consideration either because of the leniency of the punishment or because another provision, covering a more serious kind of crime, should be applied, but only in instances where the procurator has protested or the injured party has lodged an appeal on such grounds.

If the court of appeal confirms the judgment of the lower court or replaces it by a new judgment, this judgment of the court of second instance is final. However, there is always a possibility of a protest by way of judicial supervision against final judgments and other final decisions. Such a protest by way of supervision, to be clearly distinguished from protests in ordinary criminal proceedings, may be lodged by the officials enumerated in Art. 371 of the RCCP and in the corresponding articles of the codes of criminal procedure of other union-republics, within their respective jurisdiction (Procurator-General of the US S R and his deputy; Chairman of the Supreme Court of the USSR and his deputy; procurators and chairmen of the supreme courts of the union-republics and their deputies; procurators and chairmen of the courts of territories, regions, etc.). A protest by way of supervision is examined either by a higher court or by the presidium of the same court. Protests by way of supervision against final judgments or decisions of the presidia of the union-republican supreme courts, or against judgments or decisions of a judicial division for criminal cases of a union-republican court, on the ground that these judgments or decisions are contrary to all-union legislation or violate the interests of other republics, are examined by the US S R Supreme Court. Protests lodged by the Chairman of the US S R Supreme Court or by the Procurator-General against judgments and the decisions of the Judicial Division for Criminal Cases of the USSR Supreme Court are considered by a Plenary Session of all members* of the US S R Supreme Court.

In such cases of protests by way of supervision the court of supervision may either confirm the judgment (or decision), or quash the judgment and refer it back for new investigation or

* The quorum is two-thirds of all the members.

hearing; or alter the judgment (Art. 378 RCCP). Here again *reformatio in pejus* is not permitted. The court of supervision may, without referring the case back for a new judicial consideration, only mitigate the punishment or apply a provision of the code covering a less serious offence, but it has not the right to increase the punishment or to apply a provision of the criminal law relating to a graver crime.

An important formal improvement in relation to former legislation is the provision contained in Art. 48/III of the Fundamental Principles (Art. 373 of the RCCP). According to this provision a protest by way of supervision in pejus may be lodged within one year from the moment a judgment or decision or ruling has become 'final'.

Besides proceedings initiated on the basis of protests by way of supervision, Soviet codes of criminal procedure also contain rules regarding the reopening of cases on grounds of newly discovered circumstances. Here again, provided all other conditions required by the law have been fulfilled, a case may be re-opened against the interests of the acquitted or convicted person only within the periods of limitation for instituting criminal proceedings, and solely within one year from the moment the new facts have been discovered. On the contrary, review of a judgment of conviction on grounds of newly discovered circumstances in favour of the convicted person is not limited in time.

Special Proceedings

Special proceedings are provided for by all-union legislation and the codes for the application of compulsory measures of a medical character and in cases of minors. Counsel for the defence is obligatory in both proceedings.

Special proceedings in cases of minors have been introduced in the light of contemporary Soviet views on the criminal responsibility of minors, new measures of an educational character, research into the nature and causes of juvenile delinquency, and the development of activities aimed at crime prevention.

The main features of proceedings in cases of minors are as follows:

The preliminary investigation is carried out by investigators with pedagogic qualifications and experience in dealing with youth. When a witness under the age of fourteen years is being examined, a school teacher must be present. His presence assures the necessary contact between the witness and the investigator, and helps to obtain information about the capability of the witness to state the facts correctly. The investigator has the right to call for the presence of a school teacher when he questions a witness aged between fourteen and sixteen. He may also give permission to the near relatives of the witness to be present. A school teacher may be invited to participate in the interrogation of a charged minor who has not attained sixteen years of age and, in some cases, over this age.

The decisive stage of proceedings in juvenile matters is the court hearing. At present, all matters involving juvenile offenders are first considered at a preliminary sitting of the court in order to decide whether the juvenile charged should be brought to trial, or whether the case should be discontinued and the matter sent to a commission for cases of minors or to a comrades' court, or whether the minor should be released on surety.*

Attention is paid to the composition of the bench. In Leningrad, for instance, each people's court has one experienced professional judge who deals only with juvenile offenders. People's assessors are selected from among persons with adequate qualifications, such as teachers or persons with teaching experience, children's instructors, doctors and the like.

In order to obtain a fuller examination of the case, the parents or other legal representatives of the accused minor may be summoned to the hearing. They have the right to present evidence, to participate in the analysis of the evidence, to submit petitions and to appeal. They may not be deprived of these rights even if they are examined as witnesses in the same case.

* See Chapter 7, p. 96.

On the other hand they may be prosecuted as civil defendants for the loss caused by the criminal actions of the accused. Parents may not be called as legal representatives when they took part in committing the offence or when their presence might harm the interests of the accused minor (Art. 399 RCCP).

In addition to the legal representatives of the accused and his defence counsel, the court has the right to summon to the hearing representatives of his school or other educational institution, as well as social organisations of his place of study or work, and also representatives of the social organisations of the place of work of the parents or other legal representatives. Furthermore, representatives of the competent commission for cases of minors and of the youth department of the militia may also be called to the court hearing.

The object of calling all these persons is to strengthen the educational effect of the judicial examination of the case; to obtain more particulars about the minor himself; and to enable the court to adopt efficient measures for the prevention of crime in future.

10

Conclusion

--

THE STRUGGLE against crime in the USSR is going on at various levels.

(i) Parallel with the activities of the courts and other state agencies engaged in combating crime, the public has also been encouraged to take a very active part in this effort. The so-called people's brigades, comrades' courts, councils for safeguarding socialist (state) property at enterprises, commissions for minors at local soviets, street and dwelling-houses committees, parents' committees at schools, volunteer child-care rooms and other similar bodies (always, of course, under party control) have been established in many places all over the country exclusively or chiefly for the purpose of 'eradicating crime from Soviet society'. These activities are supported by lectures and discussions at enterprises and institutions; evening classes for people's assessors and members of comrades' courts ; visits by teachers and other qualified persons to the homes of children and youth in need of care; articles in the press, radio broadcasts and television programmes; special educational films; and so on.

The tremendous attempt to mobilise society in this field certainly represents a positive approach to the problems of crime prevention. However, even without taking into account Soviet social and political conditions which necessarily hinder any genuine activity by the public, the realisation in practice of such a programme would meet a number of obstacles everywhere in the world. It is not very difficult to form various committees for the struggle against crime, or to organise evening classes, or to charge workers' collectives with the task of re-educating offenders; it is much more difficult to force people to attend evening classes and to be interested in the subjects

taught there, or to find competent persons who will dedicate their free time to the work in committees and for the re-education of their workmates.

The shortcomings of this aspect of Soviet penal policy have been admitted on several occasions by the Soviet press itself. For instance, the Moscow daily Pravda wrote on 31 July 1967:

'Unfortunately, not everywhere does the work of preventing anti-social phenomena proceed successfully. ...In some places all kinds of conferences are substituted for genuine struggle against crime. Many angry words are directed at drunkards, hooligans and other anti-social elements, and there is no end to admonishments making the criminals feel that "things are getting hot for them". But these admonishments are often unsupported by deeds, and loud words have no effect on hooligans, drunkards, thieves and rapists.'

Of course, this does not mean that there have been no achievements at all. It seems that the best results of these prophylactic measures have been attained in Leningrad thanks to the work of two women. One, Lidiya Aleksandrovna Asyonova, is the head of the Department for Cases of Minors of the Leningrad Procuracy ; the other, Nina Petrovna Grabovskaya, is a 'dotsent' (senior lecturer) at the Faculty of Law of the Leningrad University. In close co-operation they launched a real offensive against juvenile delinquency in Leningrad. This included, among other things, organising and running youth clubs in various districts of Leningrad; educational work at schools and enterprises; lectures to parents by university teachers, judges, students and others; inquiries by students at the homes of young offenders, at their schools or the place of their work in order to establish the effects of the inflicted punishments or to control the application of educational measures.

According to information received by scholars both in Leningrad and in Moscow, one of the results of these activities was that juvenile delinquency decreased by 36% between 1961 and 1965. The percentage for 1966 (precise figures are still not published in the USSR) was not known in March 1967, but a

further decrease was expected for that year. Since reliable statistics do not exist or, if they exist, are not available, it is impossible to say whether or to what extent the rate of crime among juveniles in Leningrad has actually decreased and, if so, whether this was due exclusively to the prophylactic measures applied there, or to some other factors in connection or without any connection with these measures. In Poland, where criminological research has attained a considerably higher level than in the Soviet Union, and where statistics on crime are published, scholars are more cautious in assessing the relationship between the prophylactic measures and the rate of crime in their country. However, it may be assumed that some positive results have been achieved in Leningrad, because the Leningrad example was praised everywhere as an outstanding accomplishment of two competent women, dedicated completely to this task.

(ii) As regards other forms of 'participation of society' in combating crime – such as comrades' courts, people's brigades, , surety by social organisations' and the like – the results seem either insignificant or, in many instances, contrary to what they were expected to be, as already shown when these questions were discussed in the preceding chapters of this volume.

(iii) In the field of criminological research a noticeable break with the past occurred in 1963 when the All-Union Institute for the Study of Causes of Crime and Elaboration of Measures for its Prevention (or shortly Institute of Criminology) was set up in Moscow and Soviet criminology was born as a separate branch of Soviet social sciences. The true beginnings of some kind of criminological research go as far back as 1925, when a State Institute for the Study of Crime and the Criminal was established in Moscow. Similar institutions called 'Kabinety' functioned in other cities, for instance in Leningrad, Odessa, Irkutsk, Baku and Rostov, but in the early thirties all these institutions were abolished under the influence of the 'personality cult' and in conformity with the thesis that 'there is no room for crime in a socialist society.' For nearly thirty years criminology was not only neglected, but also completely ignored

to such an extent that even the *Great Soviet Encyclopaedia* (1953) did not contain any article on this topic. The very existence of the present Institute in Moscow and the extensive criminological research done also in other parts of the Soviet Union show that the attitude towards the phenomenon of crime has changed, and imply recognition that crime in the US S R cannot be explained by the old formula 'remnants of the past in the consciousness of man' but require serious research into all its aspects in Soviet social conditions. This is, in itself, a step forward.

The Institute, headed by I. I. Karpets and his deputy V. N. Kudryavtsev, is situated in a relatively new building in Krasnopresnenskaya Ul. in Moscow. It has at present ten departments dealing with the following matters: general methodology, juvenile delinquency, crimes against socialist property, crimes against the person, criminal law, criminal procedure, preliminary investigation, supervision by the procuracy, criminalistics, methods of work and scientific information. Apparently, a psychological laboratory is soon to be set up in the Institute.

About 100 specialists in various branches and about 180 technical and administrative employees work in the Institute. In four years of its existence the Institute completed a number of research programmes and published several books in a special series. One of them – *Sovetskaya Kriminologiya* (Soviet Criminology) – published in Moscow at the end of 1966, is the first book on criminology in Soviet legal literature.

As in other East European countries with a Soviet type of government, in the USSR too the main problems are economic crimes, particularly those committed against state property, juvenile delinquency, crimes against the life and health, and recidivism. The Moscow Institute deals with all these questions. It has paid special attention to intentional homicide, hooliganism, rape, robbery, open stealing and theft. Since one of the tasks of the Institute is not only to study the causes and conditions of crime, but also to suggest remedies for its prevention, the already published results of research usually consist of three parts. The introductory part contains the main crimino-

logical features of a given group of crimes; the second concerns the causes of these offences; the third relates to various measures of prevention applicable to the group of crimes in question.

An analysis of the materials published by the Institute would require a separate book. It will suffice to mention here only some of those conditions which the Institute regards as the main causes of crime. They are: lack of education, low cultural level, various forms of superstitions, 'remnants of the past' in respect of women, drunkenness, broken family life, 'old traditions' (for instance, fights with stones between peasants of two villages or workers of two factories), and the like. No research has been made into the 'causes and conditions' of political offences in Soviet society. Their existence is shortly explained by the influence of 'imperialist propaganda'.

Speaking about 'especially dangerous state crimes' the authors of the book *Soviet Criminology* assert that these offences, are committed by individual Soviet citizens under the influence of agents of capitalist countries or the anti-Soviet propaganda of imperialism'. Therefore the main cause of these crimes is 'the impact of the imperialist camp in the broad sense of the word, its undermining anti-Soviet activity' (pp. 76-77). In fact, as shown at numerous political trials of the last few years, many of these acts, which no civilised country regards as, crimes " have been committed by Soviet citizens, often very young, educated in Soviet schools, sometimes even members of the Communist Party, without any connection with foreign countries.

In the study of the character, causes and conditions of ordinary (non-political) crimes, Soviet criminology has certainly made some progress, but it stopped half-way, and it is most unlikely that it will be able to move forward in the near future. There are two main reasons for this.

First, with the object of remaining within Marxism, Soviet criminology has concentrated its attention almost exclusively on the social aspects of crime. Its task is 'to establish the true social causes of this phenomenon, and to analyse them in con-

nection with the general laws governing social development'. It is now openly admitted that 'social causes of crime in our socialist society' do exist and must be examined. Actually, however, the examination has not gone along way. If Soviet criminology wanted or were permitted to fulfil its task completely, at least as regards the social aspects of crime, it should widen its field of research far beyond the present very general , causes " which are only external symptoms of the disease, and analyse the deepest roots of crime specific to Soviet economic, social and political conditions. Dealing with the causes of crime in capitalist countries, Soviet criminologists mention unemployment, poverty, misery, exploitation of man by man and the like as necessary by-products of a society based on private ownership' with antagonistic classes' , and as the deepest and unchangeable roots of crime in such a society.

This is fully in conformity with the Marxist concept of crime.* In the Soviet Union there is no unemployment. There are only 'parasites' who do not honestly work according to their abilities '. Allegedly there is no 'exploitation of man by man " but average salaries, wages and especially old-age pensions are so low that often they do not reach the equivalent of regular assistance given to unemployed persons in many capitalist countries. There are innumerable families in Moscow, Leningrad and other cities, living in single rooms of a few square metres and sharing kitchens and bathrooms, if any, with three, four or more other families in the same flat. This easily leads to tensions, drunkenness, violence and crime. There is too much poverty and misery in the Soviet state to be disregarded as one of the deepest roots of crime, due not to , imperialist propaganda' or to 'remnants of the past' , but to typical Soviet conditions, and all this more than fifty years after a revolution which was aimed at establishing socialism with the simultaneous withering away of the state, law and crime.

Of course, Soviet criminology cannot go that distance, because further research in this direction would necessarily lead to the conclusion that either the Marxist concept of crime as a

* See Chapter 2, p. 21 ff.

class category inherent only to class society is not correct, or that the Soviet system is not socialism, but state capitalism with , antagonistic classes '. For reasons explained above,* neither is admissible.

Secondly, for the same ideological reasons, Soviet criminology rejects *a priori* any study which could appear as a biological approach to the phenomenon of crime. On 15 March 1967 Dr. V. N. Kudryavtsev, one of the present leaders of Soviet criminology, read a paper in the Institute of Criminology on the subject ' Problems of Relation between Social and Biological Factors '. About three hundred persons – members of the Institute, procurators, judges and others – attended the meeting. Kudryavtsev's main point was that crime should be explained from a social rather than a biological standpoint.

He repeated his ideas in an interview published in the periodical *Literaturnaya Gazeta* of 29 November 1967. Among other things, the interviewer asked Dr. Kudryavtsev what he thought about a study of some 100-150 twins whose inherited characteristics were identical and their social behaviour proved similar in 72 cases out of 100 : if, for instance, one of them became a criminal, the other also would follow that path. Dr. Kudryavtsev replied that, first of all, the study was not of a mass nature and therefore no grounds existed for making far-reaching conclusions. Secondly, he continued, it must be taken into account that twins usually grow up, develop and are shaped in the same social environment and therefore acquire identical habits and views. In his opinion, crimes committed by twins must be explained from social factors rather than from their genetic characteristics. To the interviewer's remark that a Soviet biologist recently said that the causes of crime should be studied 'not only from social, but also from biological positions'. Dr. Kudryavtsev maintained his view even more

explicitly:

'I have respect', he answered, 'for genetics and the laws of heredity, but I nevertheless think that these laws can help

* See Chapter 2.

jurists in their study of the causes of crime no more than criminal legislation can help specialists in genetics in their work.'

It is true that some of the views expressed by Dr. Kudryavtsev in the interview were criticised by two professors of law – N. Struchkov and B. Utevsky – in the same issue of *Literaturnaya Gazeta*. They rightly stressed that 'in man the biological and the social are always combined " that' explanations of crime from a social or a biological standpoint alone are equally one-sided " and that' it was important to find a correct correlation '. Although many outstanding Soviet scholars certainly share this opinion, nevertheless official Soviet criminology does not and cannot move in this direction, because, as two other members of the Institute put it, to deny the social causes of crime (as a matter of fact in practice nobody seems to deny them) would mean the same as admitting either that the causes are biological or that crime has no causes at all. Again, this is inadmissible.

Thus, for ideological reasons, criminology in the US S R is condemned to a standstill. It cannot make further genuine progress in the study of social causes of crime; it cannot expand research to biological factors; but neither can it be completely eliminated as under Stalin's rule, because it is officially recognised as a most valuable component in the struggle against crime. This inevitable failure due to the dogmatic rigidity of ideological requirements is regrettable; even more so, since there is no lack of erudition, knowledge and good will among Soviet juristic scholars.

(iv) Most important, however, is the failure in respect of legality. Although legality has ceased to be a completely empty slogan, this principle is still very far from being strictly applied by the organs of the judiciary. Before the legal reform, in 1956, Professor M. S. Strogovich sharply criticised all' elastic , interpretations of law, especially that of Professor A. I. Denisov, according to whom the law must be 'dialectically' applied as circumstances require. Strogovich emphasised that such interpretation necessarily leads in fact to unlawfulness, and he insisted on 'the precise and firm observance of Soviet laws by

all organs of the Soviet state, by all institutions and social organisations, by the officials and the citizens of the U.S.S.R.'. Ten years later, at the end of 1966, another Soviet author, S. V. Kurylev, expressed identical views in the same main legal periodical *Sovetskoe Gosudarstvo i Pravo*. He presents sound arguments against the 'elastic', 'dynamic' or so-called 'law correction' (*korrektirovka*) approaches, and maintains that any interpretation of law which permits deviation from the letter and substance of law in order to meet changed public requirements is contrary to the principle of socialist legality'.^{*} 'Soviet law', he asserts, 'must be applied in strict conformity with its letter and meaning.' The fact that some of the most liberal Soviet authors repeatedly feel compelled to raise their voice and to require 'strict observance of the law by all' implies recognition that Soviet law is not applied 'in conformity with its letter and meaning'.

In the field of criminal law there are marked discrepancies between the three levels of theory, legal rules and practice: between the theoretical demands put forward by advanced Soviet scholars, and a number of regressive principles and rules in the codes; between the basic ideas of the new penal policy as originally formulated in the criminal legislation of 1958 (a combination of measures of education and penalties), and the actual penal policy as carried out by the procuracy and courts (very severe, sometimes cruel, punishments for relatively insignificant offences); between the formally recognised and constitutionally guaranteed principle of 'socialist legality' on one side, and the actual violations of legality by the authorities, on the other.

Furthermore, it is necessary to point out that even the most advanced Soviet concept in fact only equates legality with the strict implementation of the law by all, whatever its contents. Although progressive for Soviet conditions, it is not complete, because it disregards certain other essential elements of legality, and is therefore too narrow.

^{*} See Chapter 4. ^{*} See Chapter 4.

First of all, legality presupposes the existence of a legal system which provides adequate solutions for all possible legal relations. \\\\ here there is no legal system, there is no legality. Both a legal vacuum and a legal jungle with an overabundance of rules and internal inconsistencies are sources of arbitrariness. Soviet criminal law and criminal procedure contain many vacuums, internal contradictions and inconsistencies.

Secondly, a system based on the principle of legality must possess safeguards for the prevention of illegality and efficient means of redress in the case both of involuntary breaches of law and of intentional abuses. The supervision of legality may be organised in various ways depending on many factors such as the existing relations of political forces, the degree of democracy, legal traditions, accepted concepts of justice, and so on. Checking the legality of authorities' acts may be left to the initiative of state organs or social organisations or individual citizens. The instruments for supervision of legality differ not only from country to country, but also from one field to another in the same country. They may include appeals, administrative complaints and appeals, special administrative proceedings

before administrative courts and some others up to the level of constitutional courts. In democracies an important role is fulfilled by the Press and other media of mass information. In any case, whatever the remedies utilised for supervision, legality implies a system of guarantees for protection against arbitrariness and abuses. In the US S R supervision of legality is almost completely in the hands of the procuracy, itself a source of illegalities on many occasions and usually powerless in respect of gross violations of the law by the political police (KG B).

Thirdly, a system of law which ignores the minimum legal standards recognised by all the civilised nations of a given epoch certainly lacks legality. Broadly speaking, the basic legal principles, recognised at present by all civilised countries, irrespective of their economic or social structure, are now contained in the Universal Declaration of Human Rights of 10 December 1948. This Declaration provides, for instance, that

'everyone has the right to leave any country, including his own, and to return to his country'. In the U S S R a passport for a trip abroad is not a citizen's right, but a rare and exceptional privilege, and emigrating without permission or refusing to return from abroad is classified as an especially dangerous crime against the state, for which the death penalty may be inflicted. The Declaration states that everybody has the right to manifest his religion or belief in teaching, practice, worship and observance, either alone or in community with others and in public or private'. In the Soviet Union this 'right of everyone' has been reduced either to nothing or to very little, and exceeding the permitted extremely narrow limits of this 'freedom' constitutes a crime. According to the Declaration, , everyone has the right to freedom of opinion and expression' including the right 'to seek, receive and impart information and ideas through any media and regardless of frontiers'. In the Soviet state, depending on the character of 'information and ideas' activities of this kind may be classified either as anti-Soviet propaganda (up to fifteen years' imprisonment and up to five years' exile) or as a crime against the system of administration (dissemination of false information, punishable by up to three years' imprisonment). These and several other provisions of the Soviet criminal law are in obvious contempt of human rights and fundamental freedoms.

The three elements – a system of law, a system of guarantees for the correct implementation of law, and minimum legal standards – are inherent in the modern concept of legality. Only if it contains these elements does legality provide the stability, security and predictability in freedom which are its main aims. Only in this case does 'strict observance of law' receive its true legal meaning and full human value. Soviet theory still neglects this aspect, and Soviet practice is very far from it.

* * *

Finally, the last question: is crime in the U S S R disappearing, or is the number of ordinary (non-political) offences increasing ?

Nobody really knows except, perhaps, a very few persons dealing with this matter in the procuracy and the most trusted members of the Institute of Criminology in Moscow. Precise figures do not exist; or if they exist they are regarded as state secrets.

Various official 'percentages' show that the rate of crime is decreasing. Members of the Institute asserted the same during the conversations that I had there. They emphasised that substantial results have been attained particularly in the struggle against professional delinquency. One member said that , armed robbery has been liquidated almost completely'. At my remark that this was certainly due to the methods of work applied by the police force, which is considerable in size, he answered that the main reason was 'not only the excellent work of the militsiya, but also the fact that there was little which could be gained by robbery at all without being noticed '. Another member explained: ' It would be impossible for the robbers to enjoy the fruits of their crime since everybody would easily and very soon notice spending which does not correspond to their supposed income.'

On the other hand, all organs for the protection of public order, procuracy and courts of all degrees, particularly people's courts, are constantly very busy in dealing with criminal matters. This, and the numerous amendments to the criminal law passed between 1961 and 1968,* as well as the secrecy of statistics, would indicate an increase in the rate of crime, or of some groups of crimes, rather than a decrease.

Public opinion, too, seems to be alarmed. In connection with the amnesty granted to groups of ordinary criminals (but not to persons sentenced for political offences, such as Gerald Brooke, Daniel, Sinyavsky and many others) on the occasion of the fiftieth anniversary of the October Revolution, a certain G. Marchenko said in a letter to the editor of Komsomolskaya Pravda: ' It appears that while with one hand we seize the criminal by the collar, judge him severely and put him into jail,

* See Chapter 5, p. 61 ff.

with the other hand we open the prison gates for him.' He added: 'Because of the amnesty, I have forbidden my little son to play in the street after 8.00 p.m.' In an article, published in the same issue of Komsomolskaya Pravda (the main organ of Communist Youth) on 1 December 1967 a correspondent explained at length the meaning of the amnesty. As regards public uneasiness, the following short passage concerning a conversation in the Moscow underground is characteristic :

'Then came the usual conversation among passengers in which everyone recalled and described something, and everyone, surprisingly, found something worth recalling and describing, since there is hardly anyone who has no story to tell about hooligans and hooliganism, about criminals and crime.'

Between the optimistic official 'percentages' and the sad experience of ordinary people in a Moscow underground train, there is again an enormous gap.

Where is the truth ?

It may be assumed that the great campaign against crime did produce some positive results, if not in eliminating crime, then at least in slowing down the rate of increase, but, whatever the truth, crime remains a major problem in Soviet society.