

**FOR THE RULE
OF LAW**

***Bulletin
of the
International
Commission
of Jurists***

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EDITORIAL

As these lines are being written the people of Hungary are still fighting for their freedom, conditions in the other East European countries are extremely tense and the future of the Middle East is uncertain. At this time of world crisis an international organization, such as the International Commission of Jurists, necessarily reacts in two ways: In the first place, it seeks as a matter of urgency to enlist the support of its friends in many lands, who by their influence on public opinion and on governments can strengthen international and national policies consistent with the general aims of the Commission. Some mention is made below of the activities of the Commission in mobilizing world opinion, and in particular legal opinion, during the last six months. In the second place, the Commission is forced to reconsider and to re-evaluate the basic principles which underlie its organization and activities. What helpful contribution can the lawyer make to the agonizing times through which we are passing? By the nature of his training and the loyalties which arise therefrom and by virtue of the traditions which he has inherited over two and a half millenia of legal development, the lawyer will insist:

1. that all law which is worthy of respect must be based on the fundamental rights of man, his freedom of religion, freedom of expression, freedom of association and freedom to choose his own government;
2. that in national and international society the exercise of power should be authorized and limited by laws based on the above-mentioned principles of individual freedom.

The Poznan Trials

The concern of lawyers with "fair trial" is an example of their interest in fundamental human rights. It is not, as it is sometimes said to be, a mere matter of procedure and legal form. The objections made to confessions obtained by improper means, the require-

ment of an independent judge, the right to be heard and to be defended by counsel in fact rest on a fundamental assumption of the dignity and worth of the individual and the fallibility of any single human judgement. These are basic ideas from which the whole democratic theory might be elaborated.

It is not surprising therefore that the world paid such close attention to the trials in Poznan, Poland, of 154 men who were charged with various offences arising out of the disturbances in that city on June 28, 1956. If the trials were not to be conducted on lines which legal opinion generally would regard as fair, then the whole campaign in Poland for return to "socialist legality" and the "Rule of Law" would have to be regarded with extreme scepticism, even though Mr. CYRANKIEWICZ, the Prime Minister, and Mr. JODLOWSKI, the Chairman of the Polish Lawyers Association, had spoken with great emphasis in favour of these principles in the Sejm debates of the previous April. On the other hand, if the trials were fairly conducted then the example of freedom shown in this limited field might be more widely applied with incalculable political consequences in Poland and beyond.

In the hope of giving practical effect to world concern about the Poznan trials the International Commission of Jurists, on July 5th, requested the Prime Minister of Poland to allow four distinguished members of the legal profession – Professor VAN BEMMELEN of the University of Leyden; Mr. GEOFFREY DE FREITAS, M.P., of London, Chairman of the Society of Labour Lawyers; Professor JEAN GRAVEN of Geneva, Vice-President of the International Association of Penal Law; and Professor ROBERT VOUIN of Bordeaux – to attend the trials as legal observers. At the same time the French Section of the International Commission of Jurists made a similar request to the Polish government, nominating M. JEAN-LOUIS AUJOL and M. JEAN KRÉHER of the Paris Bar to attend the trials as their representatives. The French request was refused and although no official reply was made to the International Commission of Jurists, the Prime Minister of Poland made the following reference to requests made to send legal observers:

"Certain reactionary circles, however, who want to use the Poznan trials as a jumping board for propaganda hostile to Poland."

"Hence the proposals of various foreign organizations that 'observers' should be allowed to attend the court proceedings in Poznan. I repeat we have nothing to conceal here but we do not intend to turn a formal trial in Poland into an international spectacle infringing the prestige of our courts and questioning their impartiality and confidence."

Meanwhile, however, the International Commission of Jurists had been active in many parts of the world drawing the attention of the press and of legal opinion to the importance of the Poznan trials. Influenced by this opinion the Polish government nominated certain legal observers of its own choosing who together with representatives of the Press were present at the trials. Encouraged by the presence of foreigners and by the feeling that they had a strong backing in Poland and in the world, counsel for the defence at the trial spoke on behalf of their clients with a freedom and courage not hitherto known in the court proceedings of the Soviet orbit. Although the court proceedings themselves were conducted with considerable fairness, the outspokenness, both of defence counsel and of the accused, brought to light grave irregularities in the treatment of the accused by the police prior to trial and in the preliminary enquiry by the prosecuting authority at which, according to present Polish law, the accused is not entitled as of right to counsel.

The number of persons originally arrested following the disturbances in Poznan totalled 481 but when the trials opened on September 27 only 154 were still in custody. On October 8 sentence was pronounced by the Provincial Court of Poznan on three youths accused, among other offences, of the murder of a policeman; one received four and a half, the other two four years imprisonment. At the same time in a lower court (the District Court of Poznan) two trials were taking place of defendants accused of the less serious offence of looting. On October 6 in one trial three out of four defendants were sentenced to four years' imprisonment and a fourth to a suspended sentence of two years; in the other trial, also of four defendants, which concluded on October 12, shorter prison sentences and in two cases fines were imposed. The heaviest sentences were inflicted by the Provincial Court in the trial, ending on October 12,

of nine defendants accused of concealing and using arms; the sentences ranged from six years to eighteen months; two defendants were acquitted. Finally, on October 13 it was announced that the District Court had sentenced seven defendants for looting; the punishments inflicted were comparatively light, from eighteen months to six months, in some cases with suspended operation. However, it was clear that public opinion was not satisfied with the trials and it was announced on October 25 that most of those sentenced had already been released; on November 6 this was followed by a statement that proceedings had been dropped against all other persons awaiting trial. The three defendants convicted of murdering a policeman remained in prison, but it was said that the Prosecutor General had ordered a review of all the cases.

The whole episode of the Poznan trials and the surge of feeling inside and outside Poland to which they gave rise shows what may be done by the force of public opinion directed to a clear issue of justice, provided that there is a favourable climate of opinion and freedom from the kind of outside interference of which we have seen the tragic consequences in Hungary. More particularly, the Poznan trials are interesting and important as illustrating the appeal which a threatened violation of fundamental principles of "fair trial" may make to the legal profession throughout the world. It was noteworthy that several foreign observers, who were otherwise complimentary regarding the conduct of the trials, strongly criticized the lack of adequate legal representation in the proceedings prior to trial.

Hungary

Since the Poznan trials there remains in Poland a precarious but nevertheless real basis for an exchange of ideas between the Polish legal profession and the legal opinion of the non-communist world. In Hungary on the other hand a brief week of freedom was brought to an end by Soviet armed force and cruel suppression. This tragically brief period is symbolized by a message sent by the Rector and professors of the University of Szeged which was received in England on November 3 by the Secretary of the Committee on Science and Freedom:

"The reborn democratic Hungary, having regained its national independence, wishes to live in peace and friendship with our immediate neighbours and all nations of the world. We, the University of Szeged, address our appeal to all the universities of the world to rally to our side with their moral authority. In our endeavour to see the early restoration of our country's independence, which is the condition of peace and thereby the foundation of scientific and scholarly pursuits, we make a special appeal to those scholars with whom we had personal contact, whether abroad or at home, to come to our aid. As we have, to the extent of our modest powers, endeavoured in the past to serve mankind with our researches, so we wish to do everything in our power in future to collaborate with our colleagues, both in neighbouring countries and throughout the world. We would be happy if this our aim could be realised."

Until it is possible to provide the people of Hungary with the personal contacts and knowledge of the outside world which they are seeking, it may well be asked what the lawyer, as a lawyer, can do. In the first place he has an obligation to the refugees, and particularly to members of the legal profession, who have escaped from Hungary. In the second place he is under a compelling and immediate necessity to use his influence with his own government and as far as possible with world public opinion to limit the hardships and brutalities, the violations of human rights and the suppression of personal liberties which we have come to associate with Soviet occupation. Thus on November 5, 1956 the Commission issued the following statement to the press:

"The International Commission of Jurists, with its headquarters in The Hague, uniting in common respect for the Rule of Law and the fundamental rights of mankind members of the legal profession in all parts of the world, has on November 5, 1956, issued the following statement on the Hungarian situation:

- (1) The Commission condemns as contrary to the United Nations Charter, the accepted principles of international law and the conscience of all civilized people the brutal suppression by Soviet armed force of all free government and personal liberty in Hungary.

- (2) The Commission strongly endorses the resolution of the United Nations General Assembly instructing the Secretary-General to secure admission for United Nations observers to Hungary. It appeals to the Secretary-General to include among such observers legal experts to ensure that justice is done to the Hungarian people in accordance with the fundamental principles of the United Nations Universal Declaration of Human Rights.
- (3) The Commission appeals to the legal profession in all parts of the world, and in particular, to the National Sections of the Commission, to Bar Associations and to legal organisations of all kinds to join forces in impressing on their respective governments the imperative necessity of granting asylum to the victims of oppression, of refusing to recognize any Soviet-dominated Government in Hungary, of giving whatever aid may be possible to the oppressed Hungarian people and of defending through them the cause of peace and justice in the world.
- (4) The Commission draws the attention of the world community of lawyers to their responsibility with regard to the legal profession in Hungary, whether now subject to Soviet domination or seeking refuge in Western Europe. The Commission with its world-wide legal contacts will do all in its power to help members of the Hungarian legal profession who escaped from Hungary and to maintain contact with all lawyers still in Hungary who defend the cause of justice and human freedom.
- (5) A copy of this statement has been sent to the Secretary-General of the United Nations."

The Hungarian crisis has shown the extent to which it is true to speak of world opinion on questions which concern common humanity and the fundamental rights of man. It has further shown that the Commission can call upon a widespread and powerful body of legal opinion throughout the world, but it has also shown, and most tragically, that as yet the public conscience of the world is not sufficiently detached from national interest and political prejudice to recognize the quality and quantity, as well as the fact of injustice in different parts of the world. Readers of this and the previous Bulletin will realize that the Commission is concerned with the prob-

lems of the Rule of Law in all countries (in South Africa, for example, or in the United States). But the Hungarian situation on account of the flagrant nature of the Soviet intervention, the scale of human suffering involved and the inevitable suppression of all fundamental human rights has a tragic quality and desperate urgency that must give it prior attention in the minds of all humane men.

The Middle East

The Commission as an international body, seeking to achieve the world-wide application of the principles of the Rule of Law, cannot ignore the situation in the Middle East, even if clear judgement is obscured by the political differences of the Great Powers. The assertion of such principles uniting lawyers across the frontiers rests on the assumption of a developing world order of which the United Nations system is the imperfect, but nevertheless only feasible basis. Support must therefore be given to the authority of the United Nations, and the resolutions of the Assembly in which that authority finds expression, in its efforts both to restrain the use of force as a method of settling disputes and to reach a just and lasting settlement. It is the duality of this task which constitutes its especial difficulty, but any solution which emphasizes one aspect of the problem at the expense of the other is bound to fail. The United Nations system, as embodied in the Charter, aims not only at collective security against aggression but also at the protection and increasing realization of individual freedom within the legal order of national states. The Commission has assumed the special task of furthering the second of these two objectives, particularly in so far as it calls for the special knowledge and professional traditions of lawyers; but it must recognize that its work can only be developed in an international society, which provides the machinery to settle disputes by peaceful means and possesses the strength and the will to enforce its decisions. It may be doubted whether the world has yet realized the tremendous implications of the challenge which now faces the members of the United Nations. It is certainly the duty of all those lawyers who support the work of the Commission to educate world opinion as to the new role of the United Nations. There is as yet little ground for complacency; whatever measure of success

may have been achieved by the United Nations in the Middle East is as yet more than counterbalanced by its powerlessness in the face of the Soviet intervention in Hungary.

Vienna Conference

In spite of the international situation the constructive task of the Commission must continue. The first major activity of the coming year in which the Commission is concerned is a Conference of European Jurists to be held in Vienna from April 24-27. Full particulars of the conference can be obtained from the Secretary-General at the Headquarters of the Commission at The Hague, but the following is an outline of the procedure to be followed at the conference. Participation in the conference, on the basis of a maximum of 15 per country, is the joint responsibility of the President of the Conference (Professor GRAVEN of Geneva) and the International Commission of Jurists, but where European National Sections exist they may make recommendations to the President and the International Commission. The themes to be discussed at the conference will be: "The legal nature of and procedure applicable to a political crime" (rapporteurs, Professor VAN BEMMELEN of the University of Leyden, Professor VOUIN of the University of Bordeaux) and "Legal limitations on freedom of opinion" (rapporteurs, Professor SCHNEIDER, University of Mainz; Professor STREET, University of Manchester). In order that the general rapporteurs may complete their reports, national rapporteurs to be nominated by National Sections, or where these do not exist by the International Commission in consultation with the President of the Conference, are requested to send in their reports in triplicate (to the headquarters of the Commission at The Hague and to the two general rapporteurs for each subject) not later than the end of January 1957.

It is very much hoped that the participation in the Vienna Conference will be on the highest level and that it will make an important contribution to European legal thinking, particularly in view of the legal obligations which many European states have now contracted by virtue of the European Convention on Human Rights.

A note on the contributions to this issue

The Soviet intervention in Hungary has set back the hopes of those who saw in recent legal developments in the USSR, particularly since the secret speech of KHRUSHCHEV, the possibility of a coming era of "peaceful coexistence". It is therefore important to understand the nature and limitations of the legal changes recently effected or proposed in the Soviet Union, above all to appreciate that nothing has deprived the Soviet leaders of their absolute power.

In the first paper in this Bulletin an attempt is made to describe the nature and define the extent of this trend, in so far as it has concerned the legal system and legal theory of the Soviet Union. The second paper by M. PIERRE LOCHAK supplements this paper with personal impressions of the judges of the Soviet Supreme Court. M. LOCHAK, who is *Licencié en Droit* of the University of Toulouse and *Conseil Juridique* at Paris, was a Russian-speaking member of the French Socialist Commission which visited the Soviet Union in May 1956.

The third paper by Professor ANDRÉ TUNC of the University of Grenoble, the well-known joint author with Madame TUNC of *Le Droit des États-Unis d'Amérique: Sources et Techniques*, shows the dangers to civil liberties which may arise even in a free society but also how public opinion, and particularly legal opinion, can within such a society deal with these dangers. It will be noted that the Chairman of the Special Committee of the New York Bar Association which drew up the Report forming the subject matter of Professor TUNC'S review was DUDLEY B. BONSALE, one of the members of the International Commission of Jurists.

THE "RULE OF LAW" AND "SOCIALIST LEGALITY" IN THE USSR *

Some Developments in Soviet Legal Policy since the Death of Stalin

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I. INTRODUCTION

Since the XX Party Congress held in Moscow in February 1956 much attention has been paid outside the Soviet Union to possible signs of a new liberal trend in Soviet policy. In examining the evidence, it is however necessary to begin with the period following the death of STALIN in March 1953 and perhaps earlier. For example, in the legal sphere the phrase "socialist legality" which has recently received much publicity was widely used even during the period of STALIN's rule, a fact which suggests that caution is necessary in deciding whether recent developments in Soviet law are only a varia-

* Study prepared by the Staff of the International Commission of Jurists under the supervision of the Secretary-General.

tion in legal policy or whether they mark a basic shift in Soviet legal institutions, theory and practice.

Historically the term "socialist legality" was preceded by the notion of "revolutionary legality"; both were designed as a call for the observance of law and directed against arbitrary administration. The aims of "socialist legality" towards the end of the forties were directed at the protection, primarily, of state interests, but also of limited private interests, without restriction of the omnipotence of the government.¹

In legal theory, however, the term is more widely interpreted. NEDBAILO, managing editor of the juridical series of *Uchenye zapiski* (Scientific Papers) of Lvov University, gave in 1954 the following definition of "socialist legality":

"Socialist legality is the method of action of a socialist state which it adopts in order to lead society to build up communism. It consists of a strict and persistent execution of law and all other legal acts, resulting in the establishment of a firm legal regime in the country. This regime is characterized by the clearness and definite nature of the rights and duties of state organs, organizations, officials and citizens, by the protection of their rights, by the lawfulness of the actions of the Socialist state, by the stability of legal relations and by the atmosphere of confidence of each and everyone in his rights and duties."²

It has always been emphasized that the content of legality varies according to the tasks and functions of the Soviet state. "Revolutionary socialist legality", according to NEDBAILO, "is not something unchangeable and invariable".³ "Socialist legality" remains an imprecise political slogan rather than a sound principle for the guidance of the courts and legal community. It has never implied any questioning of the legality or justice of the law passed - only faithful observance of enacted legislation.

¹ V. GSOVSKI, *Soviet Civil Law* (Ann Arbor: University of Michigan Press, 1948), I, pp. 185-192.

² *Uchenye zapiski*, Vol. XXVII (1954), Juridical Series (Lvov University), No. 2, p. 12.

³ NEDBAILO, *loc. cit.*, pp. 5-6; see also GORSHENIN, *Sotsialisticheskaya zakonnost* (Socialist Legality, journal of the Procuracy, Ministry of Justice, and Supreme Court of the USSR) (Moscow), 1947, No. 5, p. 6.

This conception of legality is not to be confused with the "Rule of Law" of Common Law or the "Rechtsstaat" of Continental jurisprudence. On the contrary, the view of these Western ideas still held by Soviet jurists is authoritatively defined in *Yuridichesky slovar* (*Juridical Dictionary*), the Second Edition of which appeared in 1956:⁴

"Rule of Law – anti-scientific conception, established in bourgeois legal literature, picturing the bourgeois state as if in it there is no room for arbitrary executive power and where allegedly law and legality reign."

"It is characteristic of the theory of the Rule of Law – as is true of the praise accorded to bourgeois democracy as "pure" and as being of a supra-class nature – to assert the priority of law over the State, to regard law as something independent of the State and standing above it (the ideal State under the Rule of Law). In all phases of the existence of the bourgeois State the doctrines of the Rule of Law were anti-scientific doctrines which, deliberately or not, identified the ideal State under the Rule of Law with the existing, real bourgeois-"democratic" States in order to mask their class nature (and) to strengthen the rule of the bourgeoisie.

"In the age of imperialism and proletarian revolutions – due to the turning of the imperialist bourgeoisie from bourgeois democracy to reaction – the doctrines of the Rule of Law are relegated to an inferior plane in favour of the contemporary doctrines of the ideologists of the imperialist State. Such doctrines substantiate this reactionary trend, the destruction of bourgeois legality, the removal of the last remnants of the democratic achievements of the masses. Nevertheless the bourgeoisie of many countries utilize even in this age by way of demagogic appeal the doctrines of the Rule of Law in their class interests, by giving them a particularly reactionary meaning and by trying to inculcate with their help harmful illusions into the masses to mask the imperialist nature of the contemporary bourgeois state and law.

"The doctrines of Rule of Law are pointedly directed at the revolutionary movement of the working class, and, since the establishment of socialist states at these states (as such)."

Summary of Conclusions

To avoid misunderstanding, it will be useful to summarize in advance the conclusions reached in this paper as to the scope and significance of recent legal developments in the Soviet Union. It will be remembered that in Bulletin No. 5 the following questions were put concerning these developments:

⁴ "*Pravovoe gosudarstvo*" (literally, "Legal State", "Rechtsstaat"), *Yuridichesky slovar* (*Juridical Dictionary*), P. I. KUDRYAVTSEV (then Vice-Minister of Justice of the USSR) (2nd ed.; Moscow 1956), II, p. 196.

1) What precisely are the "violations of legality" so far admitted, who were its victims and by what methods and to what extent have they (or their surviving dependents) been rehabilitated? 2) How can we know that these violations are the *only cases* which require correction? 3) *How was it possible* for such abuses to arise and to remain *unrectified* and unadmitted for many years, when their existence was commonly alleged in other parts of the world? 4) *What changes* have been made in the legal systems of the Soviet orbit to prevent their reoccurrence and, in particular, to prevent the suppression of the very fact of their existence?

In the light of the evidence presented in this paper, the "violations of legality" appear to concern mainly miscarriages of justice in particular in connection with the extra-judicial authority of the "Special Board" of the MVD (Ministry of Interior) and the special procedure permitted by the Lex Kirov. Rehabilitations have certainly taken place but there is no data by which the completeness of the process can be assessed.

The abuses in Soviet justice which have to some extent now been admitted arose firstly, because the highest political authorities in the State (which in practice coincided with the supreme direction of the Communist Party), were in fact responsible to no one except themselves; secondly, because the wronged individual had either no remedy against the State or could only seek protection through the Procuracy, which itself was dependent on the supreme State power.

Whatever changes have been made or planned in the legal system of the Soviet Union, they leave at present unchanged the authority of the supreme rulers of the State and Party. There is no security against the reoccurrence of abuses of justice, and without freedom of opinion even knowledge of their existence can be suppressed.

II. FROM STALIN'S DEATH TO THE XX PARTY CONGRESS (March 1953–February 1956)

A. Party and government action

MALENKOV, head of the first post-Stalin government and described as the proponent of the "New Course" which claimed as its object the increased welfare of the population, stated that party and government must protect the rights and liberties of citizens in all sectors of social life.⁵ MALENKOV was ousted as Prime Minister in February 1955.

BERIA's arrest in June 1953 marked the starting-point for an intensive drive for "socialist legality". He became the scapegoat for almost all systematic violations of individual rights which had occurred while he was in office as Soviet police chief (1938–1953). Only after the XX Party Congress was STALIN given a personal share of the responsibility.

BERIA was charged, as far as violations of the rights of the individual were concerned, with an attempt to place an executive organ (the MVD, i.e., Ministry of Internal Affairs) above state and party organs elected by the people, thus neglecting the principles of Soviet democracy.⁶ Another, and less theoretical charge, was the neglect of individual rights in criminal investigation and administrative reprisals ordered and conducted in violation of Soviet law.

The liquidation of BERIA and his followers resulted in a number of trials, the revision of certain cases (e.g., the "Leningrad Case" and the "Doctors' Plot") and the rehabilitation (in some cases posthumously) of the persons involved.

BERIA and his former associates were tried⁷ under the *Lex Kirov*, a law of December 1, 1934 which provided a special summary procedure in cases of terrorism. The defence of an accused person under this law was virtually excluded; the charges had to be deliver-

⁵ In a speech before the Supreme Soviet of the USSR, April 26, 1954, found in *Zasedaniya Verkhovnovo Soveta SSSR, 4 sozyva, 1 sessiya; stenografichesky otchet (Sittings of the Supreme Soviet of the USSR, 4th Convocation, 1st Session, Stenographic Report)* (Moscow, 1954), pp. 455–456.

⁶ *Pravda*, December 17 and 24, 1953.

⁷ *Ibid.*

ed to him only 24 hours before the trial. The trial could be held in *absentia*; no appeal from the sentence or even a petition for clemency was allowed. The law was described by KHRUSHCHEV at the XX Party Congress in his secret speech as "the basis for mass acts of abuse of socialist legality".⁸ "It deprived the accused," KHRUSHCHEV continued, "of any possibility that their cases might be re-examined, even when they stated before the court that their 'confessions' were secured by force".

It is true the *Lex Kirov* was repealed in May 1956 but it should be borne in mind that the body which condemned BERIA was a Special Judicial Session of the Supreme Court of the USSR consisting of a president and seven members, only one of whom was a member of the normal Supreme Court. This would appear to have been done under a law of July 24, 1929⁹ the relevant parts of which are still in force.¹⁰ It makes possible in cases of "extraordinary importance" the creation *ad hoc* of a Special Judicial Session of the Supreme Court of the USSR from which there is no appeal in matters of fact or law.

As part of the campaign to strengthen "socialist legality" the procuracy, which is entrusted with the task of safeguarding the strict observance of law by all governmental organs and every citizen (Constitution, Article 113), was called upon to take measures for the more effective control of legality. Numerous articles appeared

⁸ As published in the text released by the United States Department of State and reproduced in *New York Times*, June 5, 1956; "The Dethronement of Stalin," published by the *Manchester Guardian*, June 1956; French translation: *Documentation française, Notes et études documentaires* (Paris), No. 2189 (23 juin 1956), pp. 1-25; German translation: *Ost-Probleme* (Bad Godesberg), 1956, No. 25-26. For an earlier account of the speech see *Borba* (Belgrad), March 20, 1956; translated in *Est & Ouest* (Paris), No. 150 (16-30 avril 1956), pp. 5-7. Confirmation that the speech was made, without however reproduction of the text, is given in *XX Sezd Kommunisticheskoy Partii Sovetskovo Soyuz* (*XX Congress of the Communist Party of the Soviet Union*), (Moscow 1956), Stenographic Report, II, p. 402.

⁹ Statute of the Supreme Court of the USSR, Articles 13 and 43, in *Sobranie zakonov i rasporyazhenii raboche-krestyanskovo pravitelstva soyuza SSR* (*Collection of Laws and Decisions of the Worker-Peasant Government of the USSR*), 1929, No. 50, item 445; hereafter cited as *USSR Laws*.

¹⁰ As provided for in Article 4, 12, 29 of the Decree of April 26, 1940, in *Vedomosti Verkhovnoy Soveta SSR* (*Gazette of the Supreme Soviet of the USSR*), 1940, No. 14; hereafter cited as *Vedomosti*.

in the press emphasizing and repeating this task, in particular the function of protecting the rights of the citizen.¹¹ The procuracy was warned to strengthen the supervision of administrative organs in order to prevent a reoccurrence of the uncontrolled activities of the Secret Police. It should at this point be explained that "the procuracy is an independent administrative organ with its own highly centralized hierarchy, the head of which is the Procurator-General of the USSR. He is appointed by and accountable to the Supreme Soviet of the USSR. The territorial organization of the procuracy follows the administrative divisions of the USSR. There are separate military and transport procuracies. All are subject to the supreme authority of the Procurator-General. A particular feature of the Soviet government attorney's [in Russian: *prokuror*, in this paper translated as procurator] position is that he is a guardian of the observance of the law in a very broad sense. His supervisory powers are not confined to judicial cases but extend to all agencies in the central government, beginning at the top with the individual ministers and reaching all the way down to local authorities and individual citizens. The government attorney must not only detect violations of the law but must in due time take measures to rectify any violations!"¹²

The functions of the procurator cover a wide range: apart from the "general supervision" which he exercises over all government organs and individual citizens, his specific tasks include control of the legality of investigating and judicial organs and of places of confinement. In addition he acts as public prosecutor, i.e., he performs the function which is the sole task of a procurator in a continental legal system (*ministère public*, *Staatsanwalt*). It should be noted that the control of the Communist Party is excluded from the supervisory powers of the procuracy. It is rather the Party

¹¹ Among them, RUDENKO, Procurator-General of the USSR, in *Pravda*, January 5, 1954; *Izvestia*, April 8, 1954; VETROV, Minister of Justice, Belorussian SSR, in *ibid.*, September 23, 1954; GORSHENIN, Minister of Justice of the USSR, in *Pravda*, November 12, 1954; *Izvestia*, November 26, 1954 and January 19, 1955; *Pravda*, April 12, 1955; GORSHENIN in *Kommunist* (Moscow), 1955, No. 2.

¹² GSOVSKI, *Highlights of Current Legislation and Activities in Mid-Europe* (Washington, D.C.: Mid-European Law Project of the Library of Congress), March 1956, p. 77; hereafter cited as *Highlights*.

which controls the procuracy. This follows from the inherent structure of the Soviet state.

If the procurator discovers a breach of the law – an illegal law, decree, administrative act or criminal offence – he is supposed to take appropriate steps. He may apply to the governmental organ in question or file a formal protest; he may institute criminal investigations and, if necessary, proceedings, against individuals or he may recommend disciplinary measures. If he considers that a court decision violates the law he may take the matter before the next higher court.

B. Legislation

The campaign in favour of “socialist legality” was accompanied by only few legislative acts before the XX Party Congress.

Shortly after STALIN’s death an amnesty was proclaimed which, however, did not include political prisoners.¹³

In connection with the repatriation of German prisoners of war sentenced by Soviet military tribunals another amnesty was decreed in September 1955 which freed Soviet collaborators serving sentences in the Soviet Union and covered also Soviet emigrés abroad.¹⁴ The latter amnesty seems to have affected more persons than its 1953 forerunner.¹⁵

Apart from the amnesties, there were three legislative acts having a direct bearing on the question of legality. The first was a decree establishing presidia within the courts (of provincial level and above) composed of four judges of the court in question. The presidia were entrusted with the task of deciding cases reopened on the “protest” of a procurator or a court president (of provincial level and above). It seems that the presidia were established in order to relieve the divisions of the ordinary courts of the load of work which was

¹³ *Pravda*, March 27, 1953; cf. GSOVSKI, *Problems of Communism* (Washington, D.C.: United States Information Agency), 1953, No. 6; R. MAURACH, *Osteuropa* (Stuttgart), 1953, No. 3, pp. 161–170.

¹⁴ *Vedomosti*, 1955, No. 17, item 245; cf. GSOVSKI, *Problems of Communism*, 1956, No. 1, pp. 25–30, and *Highlights*, November 1955, pp. 301–307.

¹⁵ Cf. ALFRED BURMEISTER, *Ost-Probleme*, 1956, No. 9, pp. 290–294; DOBERAUER, *Bulletin* published by the Institute for the Study of the USSR (Munich), June 1956, pp. 28–34.

expected as the result of an increasing number of such protests. Since protests could always be filed against any court decisions, even a final one, by a procurator the setting up of special machinery for this purpose was apparently necessitated by the action taken to rehabilitate "honest communists". KHRUSHCHEV mentioned in his secret speech that the Military Collegium of the Supreme Court of the USSR also rehabilitated 7679 persons.

The second legislative act relates to the procuracy itself. It is a new version of the statute of the procuracy replacing the former statute enacted in 1933 codifying other scattered provisions on the procuracy.¹⁶ It did not change to any significant extent the rights and duties of the procuracy.

The third act has never been published in *Vedomosti*, the official gazette of the Supreme Soviet of the USSR. This has, however, no effect on its coming into force since publication is not an unconditional requirement in Soviet legislative procedure.¹⁷ The fact that it has not been published would appear connected with its content: it abolished the Special Board of the MVD, the ill-famed administrative organ which made extensive use of its powers to ban and exile "socially dangerous" people to remote areas. The first announcement of this act appeared in an issue of *Sovetskoe gosudarstvo i pravo* which received the *imprimatur* of the editor on January 17, 1956, a month before the XX Party Congress. The Special Board was abolished, it was stated, "already in 1953" as one of the measures to strengthen "socialist legality",¹⁸ but it does not appear from the material made public that the right of the Ministry of Interior to exile, ban, or confine in "correctional camps" so-called "socially-dangerous" persons has been abolished.

¹⁶ *Vedomosti*, 1955, No. 9, item 222; No. 14, item 288. English translation: *Highlights*, March 1956, pp. 83-98; see also GSOVSKI, *ibid.*, pp. 77-83.

¹⁷ *USSR Laws*, 1924, item 71; 1925, item 75; see also GSOVSKI, *Soviet Civil Law*, *op. cit.*, I, pp. 226-227. There is some evidence of criticism of this state of affairs even within the Soviet Union; see pp.29-30, 32-33 below.

¹⁸ *Sovetskoe gosudarstvo i pravo* (*Soviet State and Law*, journal of the Institute of Law of the Academy of Sciences of the USSR and of the All-Union Institute of Juridical Sciences) (Moscow), 1956, No. 1, p. 3; for an analysis, see GSOVSKI, *Problems of Communism*, 1956, No. 3, p. 52.

C. Legal Science ¹⁹

One of the first articles published after STALIN's death in the journal *Sovetskoe gosudarstvo i pravo* was dedicated to the question of civil rights.²⁰ The "protection in all fields of the citizen's personality, of his life, his interest and his rights," is demanded.²¹ Of even greater interest, as it concerns the practical legal procedure for attaining these ends, is the demand made in furtherance of the protection of civil rights for the admission of defence counsel in the pre-trial preliminary inquiry.²² Several writers deal with the citizen's right of complaint in case of violation of his rights by state organs, a question seldom mentioned during Stalin's period.²³

An important role is ascribed to the "people", to the "working masses" in the Soviet state apparatus.²⁴ The instructions of voters to their deputies are stated to be an important factor in state law; they have not previously received much attention. Such instructions should not, it is argued, have as previously only a moral but also a legal effect; they must be discussed during the sessions of the *Soviets*, i.e., "Councils," the elected organs of administration on local levels whose official name is "Councils of Deputies of the Toilers".²⁵ Constitutional experts write in favour of the early publication of legal rules regulating in detail the recall of deputies, on which there has previously been no legal regulation. Another demand is that greater importance be given to the *Soviets* in contrast with their executive organs. The importance of the Supreme Soviet of the USSR as the "highest organ within the state" is specifically and generally emphasized.²⁶ Proposals are also made that the meetings of the *Soviets* should take place at shorter intervals. There should be a minimum of two thirds of the deputies

¹⁹ After an article by L. SCHULTZ, *Osteuropa-Recht* (Stuttgart), 1955, No. 2, pp. 100-109.

²⁰ *Ibid.*, 1953, No. 2-3, p. 19; see also: 1953, No. 7, p. 29; 1956, No. 1, p. 20.

²¹ *Ibid.*, 1955, No. 2, p. 8.

²² *Ibid.*, 1954, No. 2, p. 16.

²³ *Ibid.*, 1954, No. 4, pp. 39-48.

²⁴ *Ibid.*, 1955, No. 2, p. 112; 1954, No. 1, p. 138; see also *Kommunist* 1953, No. 13, p. 60.

²⁵ *Sovetskoe gosudarstvo i pravo*, 1953, No. 6, p. 56; 1954, No. 3, p. 40.

²⁶ *Ibid.*, 1953, No. 8, p. 14; 1955, No. 2, p. 145.

present. At meetings of the Supreme Soviet of the USSR ministers should report on their activities.²⁷

Discussions on Soviet penal law tend to restrict the principle of "social dangerousness" in favour of exactly determined facts as the only basis of responsibility in penal law cases. The actual facts of the case should exactly and in detail be formulated in the new uniform penal code of the USSR; formulations which are not clearly defined and expressed should be avoided.²⁸ The doctrine of "general guilt" with regard to "socialist society", developed by UTEVSKY, Professor of Criminal Law and Procedure at the University of Moscow, is criticised. Furthermore it is remarkable that several Soviet experts in penal law argue for the abolition of the principle of analogy in penal law cases.²⁹ The use of analogy, it is said, would be in contradiction with "socialist legality".³⁰

This cross-section of Soviet legal opinion does not represent, it goes without saying, any measure of achievement. It reflects merely thoughts expressed by individual jurists in their main theoretical law journal, *Sovetskoe gosudarstvo i pravo*. In view of the tight control exercised on all questions which concern the general line to be followed by the Party, the thoughts expressed however acquire some weight; they imply if not agreement with the ideas put forward at least agreement with their publication.

III. THE XX PARTY CONGRESS AND AFTER

(February 1956—and after)

A. Party and government action

The signal for an intensified "struggle" to strengthen socialist legality was given by N. S. KHRUSHCHEV in his report to the XX Party Congress on February 14, 1956 (to be distinguished from his "secret speech" on February 25, 1956). The relevant part of this report reads as follows:

²⁷ *Ibid.*, 1954, No. 2, p. 116; 1954, No. 1, p. 126.

²⁸ *Ibid.*, 1954, No. 5, p. 67; No. 6, p. 72; No. 7, p. 69.

²⁹ See JOHN N. HAZARD, "Soviet Commentators Re-evaluate the Policies of Criminal Law," *Columbia Law Review* (New York), June 1955, pp. 771-794, and especially pp. 773-777.

³⁰ *Sovetskoe gosudarstvo i pravo*, 1954, No. 4, p. 62; No. 7, p. 119.

"The Party Central Committee has devoted and is devoting great attention to strengthening socialist justice. *Experience shows that enemies of the Soviet state try to use for their own foul subversive activity the slightest weakening of socialist law observance.* That is how the BERIA gang, which was exposed by the Party, acted: it *tried to remove the agencies of state security from the control of the Party and the Soviet regime, to place them above the Party and the government and to create in these agencies an atmosphere of lawlessness and arbitrariness.* To serve hostile ends this gang fabricated false charges against honest leading officials and rank-and-file Soviet citizens.

"The Central Committee has checked on the so-called 'Leningrad case' and discovered that it had been rigged by BERIA and his accomplices in order to weaken the Leningrad Party organization and to discredit its cadres. Having established the groundlessness of the 'Leningrad case' *the Party Central Committee also checked a number of other questionable cases.* The Central Committee took measures to restore justice. On the recommendation of the Central Committee, *innocent people* who had been convicted *were rehabilitated.*

"The Central Committee has drawn important conclusions from all this. *Proper control by the Party and the government has been established over the work of the state security agencies.* Considerable work has been accomplished toward *strengthening the state security agencies, the courts and the prosecutor's office by putting in tested cadres. The supervisory powers of the prosecutor's office have been fully restored and strengthened.*

"Our party, state and trade union organizations must vigilantly stand guard over Soviet law observance, *unmask and bring in to the open anyone who violates socialist law and order and the rights of Soviet citizens, and sternly call a halt to the slightest manifestation of lawlessness and arbitrariness.*

"It must be stated that, because a number of cases were re-examined and dismissed, some comrades began to show a certain distrust of workers of the state security agencies. This, of course, is incorrect and very harmful. We know that the over-

whelming majority of our Chekists consist of honest officials, devoted to our common cause, and we trust them."³¹

Among the other speakers at the Congress VOROSHILOV³² and MIKOYAN dwelt at some length on questions of legality and legal science without, however, going beyond the ideas expressed by KHRUSHCHEV.

MIKOYAN directed his criticism particularly against the legal scientists:

"The majority of our theoreticians are engaged in repeating and paraphrasing old quotations, formulas and precepts.

"What science can there be without creative work? This is just scholasticism, schoolwork, rather than science . . ."³³

The climax of the Congress was the sharp attack made on the cult of the individual – of which STALIN was said to be the embodiment. The campaign for eliminating the cult of the individual became closely interwoven with the struggle for strengthening socialist legality. Past violations of socialist law were explained and excused by reference to the cult of the individual under the rule of STALIN. This argument was elaborated in greater detail in editorials in *Kommunist*³⁴ and in *Partynaya zhizn* (Party Life),³⁵ the first being the theoretical and the second the practical journal of the Central Committee of the CPSU.³⁶ "Groundless reprisals" were admitted in these articles and mention was made of steps taken to revise cases in which innocent persons had been sentenced as enemies of the people; "many of them" were said to be already "completely rehabilitated".³⁷ The task of rehabilitating those already dead as a result of these reprisals was consigned to the historian.³⁸

³¹ *Pravda*, February 15, 1956, p. 9; English translation from: *Current Digests of the Soviet Press* (New York), March 14, 1956, p. 14 (italics supplied), hereafter cited as *Current Digest*.

³² *Pravda*, February 21, 1956, p. 6; English translation: *Current Digest*, April 25, 1956, pp. 26–27.

³³ *Pravda*, February 18, 1956, p. 6; English translation: *Current Digest*, April 4, 1956, pp. 10–11.

³⁴ *Kommunist*, 1956, No. 5, pp. 11, 13, 14, 24.

³⁵ *Partynaya zhizn* (Party Life) (Moscow), 1956, No. 6, p. 17.

³⁶ Cf. also speech of SHEPILOV on Lenin's anniversary day in *Pravda*, April 24, 1956, p. 3.

³⁷ Cf. also editorial, *Sotsialisticheskaya zakonnost*, 1956, No. 3, p. 4.

³⁸ Cf. *Voprosy istorii* (Questions of History) (Moscow), 1956, No. 3, p. 8, as well as the previous issue; also MIKOYAN in *Pravda*, February 18, 1956.

It was also said that the cult of the individual had served as an excuse for gross violation of party and state democracy and resulted in serious shortcomings in the working of governmental machinery.

Even more explicit than these statements was the speech of KHRUSHCHEV made in a closed session of the Congress on February 25, 1956.³⁹ KHRUSHCHEV charged STALIN with ordering mass arrests, executions and show trials between 1934 and the outbreak of the war. The victims of these purges were "honest communists" who, when allowed the formality of a trial, were forced to make confessions which served as the legal basis for the sentences pronounced. The accusations it was said were completely groundless and invented as a result of STALIN's personal suspicions. STALIN himself had given directions as to whom to arrest and how to extract the necessary confessions. After the war, KHRUSHCHEV continued, STALIN built up the "Leningrad Case" and "Doctor's Plot" on a similar basis of groundless suspicion and false confessions. KHRUSHCHEV described these acts of vengeance and the methods employed as most flagrant violations of law and of individual rights.

The secret speech of KHRUSHCHEV is a most important document for assessing the Soviet practice of "socialist legality", past and present. The admissions (not "revelations" since almost all were known before in the West) of KHRUSHCHEV related, as far as law is concerned, mainly to the illegal methods used to liquidate alleged enemies of the people. These methods include: arrest without warrant, extraction of confessions by torture, shooting without trial and the arrangement of trials if held as a mere legal facade behind which the arbitrary will of the authorities can be executed. Here again it is not the fact in itself which is new but its publication.

Another feature of interest in KHRUSHCHEV's speech is the way in which he selects his facts. KHRUSHCHEV deals at length with the cases of former important communist officials and mentions other cases in which "honest communists" had been tried in violation of "socialist legality" but there is no mention of trials against non-communists or of the activities of the Special Board of NKVD

³⁹ Text: *supra*, note 7; for an analysis of the legal aspects of the speech and of the Procuracy as a guardian of "socialist legality" see D. A. LOEBER, *Osteuropa-Recht*, 1956, No. 2, pp. 243-255.

(later MVD) which sent large numbers of the population to forced labour camps.

There was no trial, no publicity and no defence possible when the Special Board came to a decision. It acted often, though not always, in cases where guilt could not be proved in court and many potential sources of opposition – in particular minorities and wealthier farmers (kulaks) – were victims of its decisions. Nevertheless it is to be implied that such measures taken against non-communist are not considered violations of law worth mentioning in a report purporting to expose gross violations of legality as a result of the personality cult.

KHRUSHCHEV's secret speech was never published in the Soviet Union, but on June 30, 1956 the Central Committee of the CPSU made an important decision "On overcoming the personality cult and its consequences".⁴⁰ This decision is in effect an official and condensed version of KHRUSHCHEV's secret speech published with the aim of countering the effect of the world-wide attention given to the text of KHRUSHCHEV's speech as released by the US Department of State.⁴¹ A few days before the publication of the Central Committee's statement an indirect reference to the State Department version of KHRUSHCHEV's speech appeared in *Pravda* (June 27, 1956). On that date the newspaper carried a translation of an article in the *Daily Worker* of June 18, 1956 by EUGENE DENNIS, the Secretary-General of the National Committee of the Communist Party of the USA; at the point where DENNIS mentioned KHRUSHCHEV's secret speech the editors of *Pravda* inserted a footnote explaining that the "author has in mind material which the State Department published in the press and which it called KHRUSHCHEV's Report at the XX Party Congress".

The decision of the Central Committee received extensive comment in the Soviet press.⁴² One significant statement was made in an editorial in *Pravda* of July 6, 1956 where it was expressly and firmly laid down that there is room only for one party in the Soviet

⁴⁰ Published in *Pravda*, July 2, 1956; English translation: *New Times* (Moscow) 1956, Supplement to No. 28; *New York Times*, July 3, 1956, pp. 2-3.

⁴¹ See *supra*, note 7.

⁴² Cf. editorial in *Pravda*, July 3, 1956.

Union.⁴³ A similar point of view was expressed in an editorial of *Kommunist* where an attack is made on those "rotten elements" who try to use the present struggle against the cult of the individual as a platform for anti-party statements. A "liberal attitude" towards such people is considered to be wrong. In the same editorial great pains are taken to emphasize that there are only few of such elements in Soviet society.⁴⁴

B. Legislation

The programme regarding socialist legality put forward at the Congress was soon followed by a number of legislative acts.

The first act confirmed in essence the existing central structure of the procuracy of the USSR.⁴⁵ Such confirmation was expressly anticipated in the Statute of the Procuracy of 1955, previously mentioned.⁴⁶ The new act which replaces the relevant provisions of the Act of 1933 mentions among others a department for the supervision of investigations carried out by organs of the State security apparatus. This has given the impression that it is only now that the State security apparatus has become subject to control by the procuracy.⁴⁷ It should however be pointed out that such control was already provided for in the Statute of the Procuracy of 1933 (Article 4) although it was doubtless not effective. The new act therefore confirms existing legislation and introduces virtually no change in the structure of the procuracy.

Nevertheless the recent law confirming the structure of the procuracy has been treated in the Soviet Union as one of the most important measures taken to insure that the errors of the Stalin regime are not repeated.⁴⁸ This attitude is reminiscent of the campaign to strengthen the procuracy after the removal of BERIA.⁴⁹

⁴³ English translation: *New York Times*, June 28, 1956; German translation: *Die Presse der Sowjetunion*, No. 87 (July 22, 1956), pp. 2008-2010.

⁴⁴ *Kommunist*, 1956, No. 9, p. 10.

⁴⁵ *Vedomosti*, 1956, No. 8, item 186.

⁴⁶ See *supra*, note 15.

⁴⁷ Cf. *The Times* (London), April 23, 1956; *New York Herald Tribune*, April 24, 1956 and June 11, 1956.

⁴⁸ *Kommunist*, 1956, No. 5, p. 11.

⁴⁹ Cf. editorials in *Sotsialisticheskaya zakonnost*, 1956, No. 3, pp. 5-6, and *Sovetskoe gosudarstvo i pravo*, 1956, No. 2, p. 8.

The procuracy is warned to pay greater attention to petitions and complaints of citizens, to examine them within the time limits prescribed by law and to control the carrying out of the decisions taken.⁵⁰ The examination of complaints by citizens is a part of the "general supervisory" function of the procuracy; if the procuracy considers a complaint justified it should lodge a protest or take other less formal steps to remove the grievance.

The second act of importance in this period repealed the *Lex Kirov* of 1934 and an order of 1937 which introduced a summary criminal procedure for persons accused of terrorism and counter-revolutionary sabotage.⁵¹ These laws, which practically eliminated the possibility of a defence, were among those most often mentioned in Western publications concerned with the abuse of justice in the USSR. It was this procedure which was applied in the BERIA trial.

The third act abolished the laws of 1940, which tied workers in their jobs.⁵² Workers were thus permitted to change their jobs after giving due notice, although they may still face certain disadvantages short of criminal responsibility. Some relaxation of the rigid labour laws had already been ordered in 1951 and 1952 by two unpublished decrees which were now for the first time disclosed. Laws however which permit the government to draft young persons for vocational training and to assign graduates to work for 3 to 4 years remain in force.

Another aspect of the campaign to strengthen "socialist legality" has been concerned with the lack of democratic procedure within the *Soviets*. The criticism has been made that the *Soviets* do not meet as often as the law requires and thus are incapable of fulfilling their task of directing the executive; if they meet "practical debate is often replaced by ostentatious speeches". The accountability of deputies, it has been said, should be effective and the constitutional provision for recalling deputies who do not justify the confidence

⁵⁰ VOROSHILOV before the XX Party Congress, *loc. cit.* (note *supra* 32).

⁵¹ *Vedomosti*, 1956, No. 9, item 193; cf. BERNARD, *Saturne* (Paris), 1956, No. 7, pp. 8-15; GSOVSKI, *Highlights*, June 1956, pp. 210-212; MIRONENKO, *Bulletin* published by the Institute for the Study of the USSR, July 1956, pp. 21-26; W. SCHULZ, *Ost-Probleme*, 1956, No. 36, pp. 1241-1242.

⁵² *Vedomosti*, 1956, No. 10, item 203; English translation: *Current Digest*, May 30, 1956, p. 3; cf. J. GLIKSMAN, *Problems of Communism*, 1956, No. 4, pp. 20-28; MIRONENKO, *op. cit.*, note 51, September 1956, pp. 20-23.

of the voters should be actually applied.⁵³ VOROSHILOV reported to the XX Party Congress that a draft bill had been prepared regulating the system for recalling deputies.⁵⁴

The drafts of the new Criminal Code and the new Code of Criminal Procedure have, according to VOROSHILOV, been prepared. The order for preparing the draft of a criminal code was given, it should be remembered, in the amnesty decree of March 28, 1953, which charged the USSR Ministry of Justice with the task to draw up appropriate proposals "within a month".⁵⁵

Apart from the three laws mentioned which are directly concerned with the legal process a few other decrees were passed in the field of social legislation. These deserve mention even in a paper which is primarily concerned with the administration of justice, as there is no doubt that the necessity of creating an atmosphere of security in which the working population will work better and more willingly for the policies of the regime has been one of the factors motivating the campaign for socialist legality. Among the social measures of this period mention should therefore be made of the reduction of working hours for adults⁵⁶ as well as for juveniles,⁵⁷ extension of maternity leave⁵⁸ and the passing of a new pension law.⁵⁹

The ratification by the Soviet Union of two conventions of the International Labour Organization also has some indirect bearing on the administration of justice within the Soviet Union. The two conventions in question concern the reduction of working hours to 40 hours a week (1935 Convention) and the prohibition of forced labour (1930 Convention).⁶⁰ The ratification of the latter convention is doubtless intended to strengthen the position of the Soviet

⁵³ KHRUSHCHEV before the XX Party Congress, *loc. cit.* (*supra*, note 31); VOROSHILOV before the XX Party Congress, *loc. cit.* (*supra*, note 32); Editorial, *Partynaya zhizn*, 1956, No. 7, p. 6; letter to the Editor, *Pravda*, May 4, 1956, p. 2.

⁵⁴ VOROSHILOV before the XX Party Congress, *loc. cit.* (*supra*, note 32).

⁵⁵ *Pravda*, March 28, 1953.

⁵⁶ *Vedomosti*, 1956, No. 5, item 135; cf. MIRONENKO, *op. cit.*, note 51, June 1956, pp. 34-39.

⁵⁷ *Pravda*, May 29, 1956; *Vedomosti*, 1956, No. 12, item 242.

⁵⁸ *Vedomosti*, 1956, No. 6, item 154.

⁵⁹ *Ibid.*, 1956, No. 15, item 313; *Izvestia*, July 15, 1956; for draft of law see *Pravda*, May 9, 1956.

⁶⁰ *Vedomosti*, 1956, No. 13, items 279 and 280.

Union in debates on forced labour before the ILO and the United Nations, where accusations regarding its internal regime have previously been embarrassing for the Soviet regime. There is no evidence however that forced labour camps have been abolished.

Finally, among the legislative acts of this period must be mentioned the abolition of the Ministry of Justice of the USSR.⁶¹ The work of codification which was previously the responsibility of this ministry has been taken over by a "Legal Commission" directly responsible to the Council of Ministers of the USSR. The other functions of the Ministry of Justice of the USSR have been taken over by the different Ministries of Justice of the Republics which were already in existence. Certain special functions of the Ministry of Justice of the USSR (control over special courts, such as military and transport courts) have been transferred to the Supreme Court of the USSR. It would thus appear that some decentralization in the administration of justice has been achieved,⁶² but it will be remembered that the procuracy which plays a vital part in the Soviet administration of justice is not affected by these changes and remains a highly centralized organ of the Union. It is not responsible to the Ministry of Justice but is subject to the Supreme Soviet of the USSR and therefore in effect controlled by the Party.

C. Legal science

The first issue of *Sovetskoe gosudarstvo i pravo* which appeared after the XX Party Congress opened with an editorial outlining the task of Soviet legal science in the light of the decisions of the Congress.⁶³

Soviet legal science had been the object of some criticism at the Congress. The editorial takes up this criticism and mentions among the reasons for the unsatisfactory state of Soviet legal science the fact that Soviet jurists in recent years have been denied access to some laws, to information on the practical activities of state organisations, to archives⁶⁴ and to statistics. The law institutes are also held

⁶¹ *Pravda*, June 3, 1956; *Vedomosti*, 1956, No. 12, item 250.

⁶² GSOVSKI, *Highlights*, June 1956, pp. 205-210.

⁶³ *Sovetskoe gosudarstvo i pravo*, 1956, No. 2; English translation: *Current Digest*, June 6, 1956, No. 17, pp. 11-15; German translation: *Sowjetwissenschaft, Gesellschaftswissenschaftliche Beiträge* (Berlin), July 1956, pp. 861-876.

⁶⁴ Cf. a demand for opening MVD and other archives voiced in *Partynaya zhizn*, 1956, No. 4, p. 44.

to blame, particularly with reference to the difficulties created by the widespread recognition of the cult of the individual. It is in this context that VYSHINSKY personally as well as his works are criticised.

A new interest is shown in "such outstanding former representatives of Soviet legal science as STUCHKA, PASHUKANIS, CHELYAPOV and others".⁶⁵ STUCHKA, KRYLENKO and PASHUKANIS represented in their time the orthodox Marxist wing in Soviet jurisprudence. In fact they created a communist legal theory. Their theories based on the maxim of the withering away of state and law proved, however, to be incompatible with ever increasing state control and the development of a totalitarian regime based on force. VYSHINSKY became the exponent of the other extreme – the advocate of legalistic and positivist application and enforcement of law. He succeeded in labelling the adherents of the Pashukanis school as "wreckers" and they disappeared from public view. The fact that they "were falsely accused of sabotage on the legal front" is now admitted.⁶⁶

The theories advanced by the VYSHINSKY school are now attacked. Exception is taken in particular to the view that Soviet law does not recognize the presumption of innocence (advanced by CHELTSOV) and that confession is sufficient evidence of guilt (put forward by VYSHINSKY and followed in practice in many earlier cases before the court).⁶⁷

R. A. RUDENKO, Procurator-General of the USSR, attaches the greatest importance to the abolition of the Special Board of the MVD as part of the campaign for strengthening "socialist legality".⁶⁸

⁶⁵ Editorial, *Sovetskoe gosudarstvo i pravo*, 1956, No. 6, p. 10.

⁶⁶ P. ORLOVSKY, *Vestnik (Herald of the Academy of Sciences of the USSR)* (Moscow), 1956, No. 8, p. 3. Further attacks on VYSHINSKY and his theories are made by PIONTKOVSKY and CHKHIKVADZE in an article devoted to questions of Soviet criminal law and procedure, published in *Sovetskoe gosudarstvo i pravo*, 1956, No. 4, pp. 26–38; German translation: *Ost-Probleme*, 1956, No. 38, pp. 1315–1323.

⁶⁷ RAKHUNOV, *Kommunist*, 1956, No. 7, pp. 42–54; STARCHENKO, *Voprosy filosofii (Questions of Philosophy)* (Moscow), 1956, No. 2, pp. 105–117. German translation: *Rechtswissenschaftlicher Informationsdienst* (Berlin), 1956, No. 13, cols. 361–374.

⁶⁸ *Sovetskoe gosudarstvo i pravo*, 1956, No. 3, pp. 15–25; English translation (condensed text): *Current Digest*, September 19, 1956, pp. 7–10; German translation: *Rechtswissenschaftlicher Informationsdienst*, 1956, No. 16, cols. 459–470.

The procuracy, he writes, is fully reinstated in its rights and its control has become more effective.

This belief is, however, apparently not shared by Professor STROGOVICH who was known as an advocate of legal guarantees for the individual even during the Stalin regime. He calls for guaranteed legal rights of the individual in criminal law and procedure and he criticizes in this connection existing legislation and literature. The present system for the protection of individual rights should be perfected and extended. He suggests, in particular, "a broadening of *judicial* [italics in the original] guarantees of legality by way of extending the jurisdiction of courts to various questions of an administrative character".⁶⁹ In certain cases the court should be allowed to review complaints against the acts of governmental organs, if the complaint has not been satisfied at a higher administrative level. STROGOVICH further suggests that action should be allowed against the state for redress in cases of unjustified arrest and conviction.

The situation in Soviet legal science today was the subject of a recent meeting of the Council of the Institute of Law of the Academy of Sciences of the USSR.⁷⁰ Within the general framework of the drive for "socialist legality" speakers demanded more academic freedom in legal writing, re-evaluation of VYSHINSKY's publications, free access to legal materials and legislative acts, and (an interesting field of inquiry so far ignored by Soviet legal literature) the study of the Soviet system of corrective labour. A need was felt also for closer contacts with bourgeois countries and lawyers, which during the Stalin regime were practically non-existent. The then prevailing climate rendered the study of bourgeois jurisprudence a risky and sometimes harmful task for Soviet jurists. Now Soviet jurists are called upon to consider and criticise bourgeois jurisprudence. "One has to admit that our ideological and class enemies abroad pay relatively much more attention to studying and criticizing Soviet legal literature than we do in regard to their literature."⁷¹ As an example Kelsen's *Communist Theory of Law* is mentioned and

⁶⁹ *Sovetskoe gosudarstvo i pravo*, 1956, No. 4, pp. 23-25; German translation: *Rechtswissenschaftlicher Informationsdienst*, 1956, No. 16, cols. 470-483.

⁷⁰ *Sovetskoe gosudarstvo i pravo*, 1956, No. 4, pp. 125-129.

⁷¹ Editorial, *Sovetskoe gosudarstvo i pravo*, 1956, No. 4, p. 4.

severely criticized. On the other hand it should not be overlooked, the editorial continues, that there are progressive lawyers in the capitalist world; their works are not sufficiently known in the Soviet Union. Mention is made of the Communist-dominated International Association of Democratic Lawyers and its journal, *Law in the Service of Peace*.⁷²

The general attitude to bourgeois jurisprudence however remains critical. It is alleged that it undermines and rejects legality as it is understood in the USSR. Thus Professor GRAVEN of the University of Geneva is accused on the strength of a citation from the *Revue de science criminelle et de droit pénal comparé*⁷³ of putting the judges above the law, when he is clearly only rejecting a formalistic interpretation of the judicial function, as understood in the eighteenth century by BECCARIA and MONTESQUIEU.

Another example of the critical attitude adopted towards "bourgeois" jurisprudence, at least within the Soviet Union, is seen in the unflattering definition of the Western conception of the "Rule of Law" ("Rechtsstaat") given in *Yuridichesky slovar (Juridical Dictionary)* published in 1956 which is quoted in full in the opening section of this paper. The chief editor of this Dictionary is P. I. KUDRYAVTSEV, former Vice-Minister of Justice of the USSR.⁷⁴

A by-product of the changes in Soviet legal thinking has been the ever louder demand for access to hitherto undisclosed legislative material. As far back as August 1955, *Kommunist* drew attention to the great lack of publications making legislative material available to the public.⁷⁵ The question was raised more recently in *Voprosy istorii* (Questions of History).⁷⁶ The author urges the publication of party and government documents pointing out that a number of relevant publications ceased to appear in the mid-thirties. The theme was touched upon in *Literaturnaya gazeta* (Literary Gazette) of March 24, 1956.⁷⁷ At an inter-republican conference of archivists of the Asian republics in Tashkent in

⁷² *Ibid.*, p. 7.

⁷³ Issue of 1954, No. 4, p. 657.

⁷⁴ Cf. his paper before the Sixth Congress of the IADL (see note 80 below).

⁷⁵ *Kommunist*, 1955, No. 12, pp. 126-127.

⁷⁶ *Voprosy istorii*, 1956, No. 4, pp. 195-201.

⁷⁷ English condensed text: *Current Digest*, May 23, 1956, pp. 7-9; German full text: *Die Presse der Sowjetunion*, 1956, pp. 1245-1247.

March 1956 the criticism was made that many documents had been classified as secret without sufficient reason and this withheld from research workers.⁷⁸ A writer in *Kommunist*, BURLATSKY, refers also to the failure of publishing certain orders and statutes of the Council of Ministers of the USSR.⁷⁹

IV. REASONS AND SCOPE OF THE RECENT CHANGES IN SOVIET LEGAL POLICY

A. Reasons for the changes in Soviet legal policy

Some observers have explained recent changes in the Soviet Union in terms of a sharp ideological crisis. Others lay the main weight on the economic difficulties of the USSR; while a third school of thought considers that the Soviet regime is so strong at home and so powerful in international politics that it can afford some relaxation of control. The position however is more complex and cannot be attributed entirely either to the weakness or to the strength of the Soviet system. The following factors however seem to have played the most important part in bringing about recent changes in legal policy: considerations of international politics, motives of domestic policy, the impact of a deep-rooted sociological change and the consequences of an internal struggle for power. To these factors may have to be added at a later stage the opinions expressed by Soviet lawyers and legal scientists who have, as has appeared in the preceding part of this paper, recently been allowed some measure of freedom of criticism regarding the administration of justice.

Considerations of international politics provide the most obvious reason for the changes made or proposed. An apparent liberalization of the regime fitted well into the climate of relaxing international tension, ending of cold war, disarmament and cultural exchanges which characterized the period before the Hungarian rising. A strong delegation from the USSR at the Sixth Congress of the Communist-dominated International Association of Democratic Lawyers in Brussels in May 1956, while admitting that there

⁷⁸ *Kazakhstanskaya Pravda*, March 30, 1956.

⁷⁹ *Kommunist*, 1956, No. 8, pp. 46-60.

had been violations of justice in the USSR, emphasized that these were now matters only of historical interest; the way was thus clear for an intensified campaign in favour of peaceful co-existence.⁸⁰

The motives of internal policy which have inspired recent changes in the Soviet legal system are not so apparent. It is improbable that the Soviet leaders anticipated a revolution which they tried to forestall by granting a minimum of freedom. But it is reasonable to suppose that they were to some extent guided by the practical aim of increasing governmental efficiency and economic productivity. Human nature is likely to carry out any work assigned to it with greater efficiency if granted a relative freedom. Duress and restraints can be used for increasing productivity only for a limited period after which they lose their stimulating force. It is in the very nature of a stimulus that it has to be new. The old stimulus of duress has therefore been changed for the new stimulus of personal interest in the social product. These considerations may in the long run be more important than the international aspects of the legal changes in the USSR, although it is doubtless true that the timing of the changes has been greatly influenced by the immediate needs of Soviet foreign policy.

The third factor which has helped to bring about the changes in the Soviet legal system is the emergence of a new ruling class.⁸¹ The bureaucrats and managers who form this class are no longer inspired by the dynamics of a revolutionary ideal, nor do they feel bound by those ascetic rules of life which prevailed in the earlier

⁸⁰ Thus P. I. KUDRYAVTSEV, Vice-Minister of Justice of the USSR, said at the Congress: "Mr. PRITT has pointed out with reason in his speech that there have been violations of legality in the USSR. I wish to be a man who speaks the truth and who is capable of self-criticism. In reality such violations have taken place in the past and concerned certain matters relating to political crimes. These violations have been discovered already some years ago by the Soviet Government and in a very decisive manner; today they are settled, those guilty of these violations have been strictly punished and the accused persons have been completely rehabilitated and re-established in their rights. The settlement of these violations has been accompanied by important changes in Soviet legislation with the aim of its ultimate democratization, the consolidation of guarantees of the rights of the individual and the abolition of a series of laws which had to a certain extent an arbitrary character."

⁸¹ Cf. B. MEISSNER, *Europa-Archiv* (Frankfurt), 1950, pp. 2989-3004; W. KULSKI, *Problems of Communism*, 1955, No. 1, pp. 20-28; R. MAURACH, *Ost-europa*, 1955, pp. 413-420.

period of building a socialist society. They are anxious therefore to achieve a stable social and material position for themselves and their children and press for greater rights and freedom which would ensure their status and property. The support given to KHRUSHCHEV within the Party depends to some extent on the concessions which he is prepared to make to this new ruling class.⁸²

Fourthly, the recent legal changes may to some extent be due to a struggle for power within the higher leadership of the USSR. In the climate of opinion determined by the factors which have been examined above it seems likely that there was a struggle between certain groups within the Party to establish pre-eminence. One group sought to achieve this by being the first to initiate the process of de-Stalinisation. There are indications that the dramatic nature of the disclosures made at the XX Party Congress had not been planned in advance at the previous Plenum of the Central Committee held in July 1955. What in fact happened at the XX Party Congress appears to have been decided in haste. Thus, a mass demonstration in honour of the Party leaders was arranged to take place on the Red Square in Moscow on the very day (February 25, 1956) when the attack on STALIN was delivered and was only cancelled a few hours before KHRUSHCHEV's secret speech.⁸³

B. The scope of the changes

1. In so far as statements about strengthening "socialist legality" have been followed by legislative acts, two fields of law have been mainly effected: criminal procedure (abolition of summary procedure in cases of terrorism) and labour law (repeal of the laws tying workers in their post; reduction of working hours; extension of maternity leave; improved pensions). Forthcoming changes were announced in constitutional law (regulations to govern the recalling of delegates to *Soviets*) and in criminal law and procedure (All-Union codes).

The common denominator of these changes, actual or promised, is their concern with the rights of the individual whose status may

⁸² Compare the growth of a new aristocracy of bureaucrats and managers in the Soviet Zone of Germany: *The Times*, September 26, 1956.

⁸³ K. MEHNERT, *Osteuropa*, June 1956, p. 169.

be said to have been improved in two respects: a) in *physical freedom* (abolition of some abuses of criminal procedure; the promise of more strictly defined crimes other than those of a political nature, and more humane punishments in the new criminal code; freedom to leave a job without criminal responsibility) and b) in *material well-being* (pension law; reduction of working hours; extension of maternity leave).

2. It will however be noted that criminal procedure of the ordinary courts has not been changed. In many ways it fails to provide the safeguards which might reasonably be expected to secure the interests of the accused. Some of these shortcomings were particularized in an article in *Kommunist*⁸⁴, where the absence of counsel both in the preliminary hearing before the investigator subject to the Procuracy and in proceedings on appeal was criticized. The absence of counsel in the pre-trial stage is all the more serious in that, according to Article 396 of the Code of the Criminal Procedure of the RSFSR, evidence can be used even if it was not given at the trial.⁸⁵

3. Important as the changes may be it is also noteworthy that they do not extend to one essential sphere of individual freedom, i.e., to *freedom of the mind*. The suppression of freedom of opinion, freedom of the press and freedom of elections continues as before. Freedom of expression is only permitted in so far as the opinions expressed conform with the "general line", i.e., with the policy of the Party. Any criticism which goes beyond exposing individual cases of inefficiency or burocratic "red tape" and which deals with policy matters is still considered as reactionary deviation.

This important limitation on freedom of opinion has been made plain in a number of publications dealing with the cult of the individual. Criticism of the cult of the individual is usually followed by a paragraph starting with a "but" or "however" which reminds

⁸⁴ *Kommunist*, 1956, No. 11, p. 22.

⁸⁵ The Plenum of the Supreme Court of the USSR ruled on July 28, 1950 that this provision is subject to Article 23 of the Principles of Criminal Procedure of the USSR, which provides that a court should base its judgement on the data in the files examined at the sitting of the court. Whether this substantially modifies Article 396 of the Criminal Code of the RSFSR appears doubtful, in view of the article in *Kommunist* cited above, which calls for a more complete observance of the principle of oral and direct proceedings.

the reader that freedom to criticise the cult of the individual may not be used to attack the policy of the Party. Examples are cited of anti-party statements made by individuals, and the party organisation in question is criticized for not having suppressed such "corrupt elements" which are attempting to misuse criticism for slanderous bourgeois propaganda and insults against the Party.⁸⁶ Such critics, it is said, have "passed the point where a communist ends and a man hostile to the Party begins."⁸⁷ SHEPILOV, former editor in chief of *Pravda* and now Foreign Minister of the USSR, has defined the limits of criticism clearly in an authoritative form:

"The XX Party Congress gave a strong impetus to the development of Marxist thought with a view to starting – within the framework of the *Party spirit, within the framework of the world's most progressive socialist ideology* – a free and business-like exchange of opinion".⁸⁸

4. The scope of the changes considered above makes it clear that there has as yet been *no basic shift in the power structure* of the Soviet Union. Professor H. J. BERMAN of the Harvard Law School reaches a similar conclusion when he says: "It is of course true that so long as top level Soviet politics is beyond precise legal definition and institutionalized legal controls a recurrence of Stalinist mass terror is always a possibility and a continuation of severe political pressure against individuals who defy the party line is inevitable."⁸⁹

The apparatus for maintaining the present power structure of the USSR is still intact. The new emphasis which has been put on the procuracy of the Soviet Union does not, for example, give it any real independence. According to Soviet legislation and doctrine the "organs of the procuracy constitute one centralized organisation headed by the Procurator-General of the USSR with subordination of procurators of lower rank to those of higher rank."⁹⁰ The Proc-

⁸⁶ *Pravda*, April 5, 1956, pp. 2-3, and *Partynaya zhizn*, 1956, No. 6, pp. 19-20; *Kommunist*, 1956, No. 5, p. 12.

⁸⁷ *Partynaya zhizn*, 1956, No. 7, p. 8.

⁸⁸ *Pravda*, April 23, 1956, pp. 2-3; English translation: *BBC Summary of World Broadcasts*, No. 720 (April 27, 1956), p. 19 (italics supplied).

⁸⁹ *Nation* (New York), June 30, 1956, p. 543.

⁹⁰ Article 5 of the Statute of the Procuracy of 1955 (see *supra*, note 15); cf. also Article 39 of the Statute.

urator-General in his turn is answerable to the Supreme Soviet of the USSR and in the period between its sessions to its Presidium, (the members of which are largely identical with those of the Presidium of the Central Committee of the CPSU).⁹¹

Nevertheless, it is true that the granting of a limited measure of physical freedom is apt in the long view of history to lead to a demand for freedom of the mind. Furthermore, such procedural and organisational changes in the legal system of the USSR as have taken or are taking place, cannot fail to draw attention to, and even to develop an interest in, the values underlying the system of justice and government. Once the necessity of securing a "fair trial" is admitted, the possibility of human error and the importance of hearing two sides of a case is implied; these are principles which have wider appreciation outside the court-room in the political life of the community.⁹²

⁹¹ Article 7 of the Statute of the Procuracy of 1955; it is interesting to compare the remarks made by an observer, in some respects favourable to the Chinese Communist regime, regarding the position of the Public Procurator in China: F. ELWYN JONES, Q.C., M.P., *The Listener* (London), July 19, 1956: "Reporting arrests is good as far it goes. But what is the Chinese citizen to do if he claims to be unjustly detained? So far there is no habeas corpus machinery in China to enable the citizen to say, "You are holding me unjustly. Let me be brought before a court and let those holding me prove to the Court that they do so lawfully". It is true that Article 89 of the new Chinese Constitution says that "freedom of the person of our citizens is inviolable. No citizen may be arrested except by a decision of a people's court or with the sanction of a people's procuratorate". But when I asked to what authority the Chinese citizen complaining of unlawful detention can look for redress, the invariable answer was: "To the Public Procurator's office". Yet this is the very office that must approve all arrests in the first instance except for arrests ordered by the courts themselves. It is true that the Constitution enables the citizen to bring complaints to the various national and local congresses and councils and that citizens wrongly detained have the right to compensation, but, here again, complaints are referred to the Public Procurator, and if he refuses to act, the citizen has no effective remedy."

⁹² A consideration which gave particular importance to the Poznan trials in Poland.

JUSTICE AND THE JUDGES IN THE SOVIET UNION

by

PIERRE LOCHAK

On April 28, 1956 a commission of inquiry from the Socialist Party (SFIO), composed of twelve delegates, two journalists and three interpreters, left Paris for Moscow. The Soviet Communist Party had issued the invitation, which was accepted once it had been ascertained in the preliminary discussions that this mission would be ensured of minimum conditions necessary for an objective investigation.

The commission was in USSR from April 28 to May 14. Its investigation covered a great variety of subjects ranging from political matters to economic and social questions. One group of delegates concerned itself with Soviet law and more particularly with the functioning of the Courts in USSR. This group included ANDRE PHILIP, professor of law, former Minister; LAMINE-GUEYE, lawyer, former judge; ORESTE ROSENFELD, senator, former lawyer. They were accompanied by the writer, a French jurist who speaks Russian.

The group was received on May 3rd and 4th, first by the Vice-President of the Supreme Court of Justice and two assessors, then by President VOLIN; the Vice-President and Messrs. BOLDYREV, assistant Procurator-General; SUKHODREV, Vice-Minister of Justice; GRINEV, Vice-President of the College of Lawyers; and several professors of penal law, including Mr. STROGOVICH.

The first conference was held in private. The second was much publicized. Many journalists were present and reporters with cameras used up a considerable amount of film while questions and answers were bandied back and forth across the long table with its green cloth. On the following day, the French press published a description of this strange meeting in which, for the first time in

many years, Soviet jurists and judges, in the city of Moscow itself, were questioned politely but without too great regard for their feelings, in respect to concentration camps, arbitrary condemnations, the role played by lawyers, and other aspects of Soviet justice.

The scenes taken at these meetings may one day be seen in the cinemas of Paris. The spectator will certainly observe that a man wearing the uniform of an army colonel is present. It is the Vice-President of the Supreme Court who is thus dressed up. To the French jurist, taught that the separation of powers is normal, a civil judge wearing a military uniform appears strange and unusual. I could not refrain from questioning the Vice-President. He informed me that, having left the army ten years or so earlier with the rank of Colonel, he had retained the right to wear his uniform and that he continued to wear it. This may not be shocking in a country in which it is an honour to wear a military uniform, and in which the separation of powers does not exist, although, according to the texts, the elected judge must be independent.

The Supreme Court

The Supreme Court, at the summit of the judicial pyramid in USSR, is elected for a period of five years by the Supreme Soviet of the Union. Immediately under it, in each of the Republics composing the Union, there is a Supreme Court of the Republic elected by its Soviet.

The Supreme Court of the Union has a mixed jurisdiction: cassation, revision¹ and first instance trial. As a trial court, it pronounces judgements at first instance and last resort in "serious cases" and in "complex" matters. The "serious cases" are those relating to the management of large factories, the kolkhozes (collective farms) and the sovkhozes (State farms), etc. "Complex" matters is the name given euphemistically to proceedings in which the State is interested. It does not however have the same duties as the French *Conseil d'Etat* which does not exist in the Soviet judicial system.

Petitions against violation of the law by public authorities and

¹ Revision: examination of a final judgement as a result of new facts or false evidence.

excess of power, which in France are submitted to the *Conseil d'Etat*, in USSR are left to the initiative of the Procurator-General. But the latter has no power of cassation regarding cases of excess of power or violation of the law. He may lodge a complaint regarding the actions of a Minister with the Minister himself. If the Minister dismisses the complaint of the Procurator-General, the latter has only one recourse: to put the matter before the Council of Ministers, who must then pronounce judgement on an act of one of their colleagues.

The Soviet judges appeared to be convinced that their system was excellent. It would have been useless – at least during this official meeting – to attempt to persuade them of the contrary.

The Judges

The French jurists perfunctorily criticized the status of the Soviet judges and Courts. This criticism met with vehement protests. In so far as the Soviet jurists are concerned, except for some slight errors or defects, they maintained everything was going well in their judicial system. It is difficult to say whether this attitude corresponds, in the case of all of them, to a sincere conviction. In contrast with the system of electing judges, their irremovability, the guarantee of their independence, scandalized some of them. One of their professors, the most dogmatic, put forth as the supreme argument that capitalist justice could not be superior to "socialist" justice. The judge elected by the "people" cannot make mistakes or be unjust. He is controlled by his constituents, and removal from office by his constituents is the highest guarantee; no other system can offer a better one. When questioned however by the visitors, the answer given was that this right of removal was practically never exercised.

If our conference had taken place some weeks later, we could have used the KHRUSHCHEV report to oppose this assurance. But on May 3 it had not yet been published. However, this assurance, no doubt obligatory and reserved for discussions with foreigners, is formally contradicted by the discussions between Soviet jurists. *Kommunist*, the official magazine of the Central Committee, published in the No. 7 issue for May 1956 (which had not yet appeared

at the time of our visit) an article signed by RAKHUNOV, setting forth a quite different opinion in respect to the competence and the independence of the judges:

"According to the terms of our legislation, the right to remove judges and to relieve of their functions the assessors selected from among the people belongs to the constituents. But in practice, the judges and the assessors selected from among the people are only removed on the initiative of State organizations. Although eighteen years have gone by since the promulgation of the law relating to the organization of the judiciary in USSR and the independent republics, the rules for the removal of judges and assessors selected from the people have not yet been determined by law. Experience shows that the time is ripe for the preparation and the adoption of a law relating to the rules for the removal of judges and assessors by their constituents." (page 45)

This does not prevent Mr. RAKHUNOV from solemnly declaring with many quotations from the texts of the law and Lenin's writings that the Soviet judge is independent and has no master other than the law. But this appears to resemble singularly a salvo to the king, for with praise and criticism alternating all through the article, the author points out immediately afterwards (page 46) that the assessors (workmen, members of the kolkhozes and intellectuals) sit on the Bench barely ten days a year, are poorly prepared for their task and that often their advice does not seem to be followed by the permanent professional judges. In other words, Mr. RAKHUNOV, discreetly and carefully, allows it to be understood that justice is rendered by civil servants removable . . . by the Government and not by the people. Thus it was a Soviet official who answered our jurists on May 3 regarding the independence of the judges as set forth in Article 112 of the Constitution.

The Preliminary Investigations

The head of the Procuracy is the Procurator-General. He appoints all the Procurators. He also appoints and removes the examining magistrates to the Court of Appeals. The Procurator attached to this Court appoints the examining magistrates for the

Courts within the jurisdiction of said Court. Thus the examining magistrate is not responsible to the Procuracy attached to his court but to that directly above it. This is intended to ensure his independence. But this principle of independence, which is nevertheless present like a twinge of conscience, is undermined by the rule which requires that the investigation be carried out in accordance with the directives of the Procurator which are compulsory for the examining magistrate. If the latter considers them wrong, he may appeal, but as always to the Procurator of the court immediately above.

The Soviet jurists admit that this system is imperfect. A reform of the system which would give the examining magistrate greater independence without going so far as completely to separate him from the Procuracy is being examined. There are some opinions in favour of this separation; but it would appear that these are isolated opinions and that they will not prevail.

The record contributing to the advancement of a magistrate is strongly influenced by the proportion between the number of cases sent to Court and the number of cases dismissed or rejected by the judge.

If the texts were respected, the preliminary investigation would respect the truth and protect the accused. Indeed, Article 136 of the Code of Criminal Procedure sets forth penalties of up to five years of imprisonment for any act tending to extortion by violence of confessions. From the KHRUSHCHEV report, we know that this text has not prevented torture.

Another text encourages the examining magistrate who wishes to do "perfect work" to obtain confessions. Article 282 of the Criminal Procedure Code provides, in effect, that in the event of the accused confessing, the Court may dispense with an investigation on its own account. This Soviet text has its origins in the Military Regulations of Peter the Great. A confession, even obtained under torture, was considered the "acme of proof". For "when some one has acknowledged that he is guilty, there is no need of other proof, since the confession of the accused is the best evidence in the world."

The scrupulous magistrate in Soviet Union is relieved of any possible misgivings by the judicial tenets which in that country

have in effect abolished the principle of presumption of innocence and have accepted the substitution of confession for evidence. In Soviet periodicals such as *Voprosy filosofii* (*Problems of Philosophy*)² or the *Kommunist*³ these theories are condemned. Criticisms of the jurist CHELTSOV as well as of the now deceased prosecutor VYSHINSKY may be found in them. The latter in his *Principles Relating to Proof in Soviet Law*⁴ accepted the efficacy of the confession, at least in matters relating to "conspiracies and other anti-soviet crimes". And CHELTSOV wrote: "What practical meaning can a theory have which requires that a citizen be considered innocent, whom we ourselves – examining magistrate and Public Prosecutor – bring before the Court?"⁵ Similarly, legal theory, supporting the repressive function of the courts, has recognized convictions pronounced on the strength of facts established with "a maximum of probability" although the facts have not been proven as a certainty.⁶

Discussions on these delicate matters are proceeding in the Soviet Union. The jurists of the Supreme Court mentioned them with great discretion before the Socialist commission. The discretion of these civil servants is understandable. Reforms are prospects for the future. Meanwhile, the rules in force continue.

The Lawyers

At present, the preliminary investigation still takes place without the assistance of counsel. His visits to his client in prison are, to say the least, subject to restrictions. His part only begins at the hearing. And his presence there is obligatory... if the Public Prosecutor is present. But another group from the commission saw at the prison of BUTIRKA a prisoner condemned for a period of several years without having had a lawyer to assist him.

When the lawyer intervenes at the hearing, the opinion of the judges has practically been reached. For before the hearing for sentence, the Court has examined the case at a preliminary prepar-

² 1956, No. 2.

³ 1956, No. 7.

⁴ 1950 edition, p. 265.

⁵ *The Criminal Action*, 1948 edition, p. 182.

⁶ VISHINSKY, *op. cit.*

atory hearing. The lawyer is not admitted to this hearing. Nor is the lawyer admitted before the Supreme Courts of the Republics, nor before the Supreme Court of the Soviet Union when it exercises its jurisdiction in appeals or revision.

The status of the defence, namely the fact that it is actually practically non-existent, marks a decline even as compared with the first years of the Revolution. In the article cited, Mr. RAKHUNOV recalls that "during the first years of Soviet power, under conditions of civil war and the bitter opposition of enemy classes, counsel for the defence were not only admitted to the Courts, but also to the preliminary investigation and this was the case despite the scarcity of Soviet lawyers".⁷

The jurists of the Supreme Court admitted that the present system called for a thorough reform. In the Codes being examined, provision would be made, they said, for the right of the accused to be assisted by counsel even at the stage of the preliminary investigation.

However one serious problem will remain, i.e., the role of the lawyer as regards his client, as opposed to the interests of the authorities. The Socialist commission brought up the ethical position of counsel for the defence and recalled the famous cases in the past where counsel, in public hearings, competed with their clients in confessing guilt. The President of the Supreme Court denied these facts and claimed that, should counsel at one of his hearings behave in this way, he would bring up the matter and request that he be excluded from the Bar. The Soviet jurists claimed that the standards of conduct of a lawyer in the Soviet Union do not differ from those held in esteem in the Western world. Choice of means of defence, refusal to submit to the wishes of the client, refusal of a case in the event of disagreement, obligation to assist and prohibition of conduct injurious to one's client, etc . . . It suffices to set forth these rules to realize that they agree with the principles governing lawyers in the Western world.

But, although these rules may be respected in ordinary cases, what is the situation when matters interesting the State are involved? Professor STROGOVICH emphasized that the lawyer is a "social man".

⁷ *Kommunist*, No. 7 (May 1956), p. 52.

In the USSR this means that "society", the collectivity, takes precedence over the individual, that the latter cannot be right when he is in opposition to reasons of State, that a State which by definition represents "society without class distinctions" and identifies itself with that "superior" form of society cannot, as such, be the enemy of the individual, unless the latter is . . . a "counter-revolutionary". If we wish to believe in the great courage and independence of lawyers under the Soviet regime, we must deduce that when it comes to deciding between the assertions of his client and the statements of the Procurator, the "social" obligation of counsel for the defence will put him in a cruel dilemma.

Lawyers argue all types of cases, penal, civil and labour cases. Certain lawyers specialize. They are organized in a College which is apparently similar to our Bar association but from which it nevertheless differs considerably. The College is independent. It is directed by a "Presidium" elected every two years by secret ballot. The "Presidium" decides on admissions. In the event of refusal, the candidate may present a petition to the Minister of Justice. The latter formulates recommendations; the College of Lawyers is not obliged to accept them. The "Presidium" deals with disagreements between lawyers and their clients. It may pronounce sanctions in the event of professional fault.

The College at Moscow, which has 1150 members, is divided into 25 "branches", one for each district. We saw, in passing, their offices with a sign indicating "Legal consultations". The office is under the direction of a qualified lawyer. Persons requiring legal assistance apply to these offices, either to have a lawyer appointed or to designate the one of their own choosing. The fees are paid to the "Consultation" fund, which credits the accounts of the lawyers, and makes payment at the end of the month, having deducted the costs of "Consultation and the College". In the case of destitute persons, the Director of the office for the district grants free defence.

There is a schedule of charges for fees. The minimum for a civil case is 150 roubles. If the claim results in a sum of money or in general something of financial value, a supplementary fee is allotted, amounting to approximately 10 per cent of the claim. Another group of the commission having visited a prison, it appeared during

the conversations with the prisoner that, for a rather simple case, it had been necessary to pay the lawyer 400 roubles for the case argued before the lower court and 300 roubles for the appeal.

The average income of a lawyer at Moscow is approximately 1,200 to 1,300 roubles. The actual value of the rouble varies between 20 and 30 French francs. We observe that the minimum wage for a workman is 300 roubles. The manager of a large factory receives 7,000 to 10,000 roubles. These scales of income constitute an indication, among other things, of the social position of lawyers in the Soviet Union.

Some Particular Crimes

Article 16 of the Penal Code of 1922 makes it possible for a Court to pronounce sentence for an action not specified by law, by analogy with a misdemeanour or crime specified. The system of "analogy" has amply served for all the Soviet Courts, further encouraged by the many decisions of the Supreme Court, as can be observed in the collections of Soviet jurisprudence. The judges of the Supreme Court assured us that Article 16 has fallen into disuse and will not be included in the next Code, which will confirm the principle of "nulla poena sine lege".

The matter of collective responsibility is destined to meet the same fate except for the cases in which the State is interested and which have a fairly wide and vague range: treachery, espionage, sabotage, malfeasance. Is political disagreement set down as a crime? No, unless it finds expression in actions "harmful to the established order".

The texts concerning economic espionage are also reputed to have fallen into disuse and will supposedly be eliminated from the Codes being prepared, unless this "offence" is punished under another description.

The Concentration Camps and the Re-establishment of Legality

It is well-known that the laws of July 10 and November 5, 1934 had initiated special administrative boards, "O.S.S.O.", and that other texts (1934 and 1937) had instituted summary procedures.

These so-called boards sent thousands of people to their death and millions of citizens to forced labour camps.

At the Supreme Court, we were told that the first of these texts had been abrogated by a decree promulgated September 1, 1953 which was not made public. The others were abrogated on April 20, 1956. It is by virtue of the decree of September 1, 1953 that during the last three years the earlier cases are being revised and the deportees are being liberated. The cases for revision are submitted to the Supreme Court of the Union and to the Supreme Courts of the independent Republics on the initiative of the Procurator or of the President of the Court.

The Ministry of the Interior (i.e., the police) is asked to pass on the files. For indeed in a great many cases, perhaps even the immense majority of cases, it is only the police which was responsible for the sentence, which is able to supply the file. A representative of the Public Prosecutor's office was of course on the "O.S.S.O." commissions, but does not appear to have made use of his powers.

We observe in this connection that after having asserted that the Supreme Court was the supreme guardian of legality, the Vice-President of this tribunal, replying to a question relating to conditions in the forced labour camps, calmly stated that he did not know about them, never having visited any such camps himself.

According to the information obtained elsewhere, it would appear that this process of revision and liberation continues. At the Supreme Court, it is estimated that this will take another eighteen months. But no one at the conference, neither the Vice-Minister of Justice nor the judges present with him, knew how many prisoners were still in camps. None of them answered this question. Is this long drawn out period (since 1953) due to the slowness of the proceedings or to the great number of prisoners? Or to both? And will this process of revision and liberation continue according to the plan until the camps are empty? The information supplied at the Supreme Court was of too summary a nature to make it possible to answer these questions. Furthermore, in this process, the Court is only a cog in the machine rather than the motive power.

It is probable that the number of prisoners liberated as a con-

sequence of revision is rather high. At the camp at Tula, no doubt a comparatively mild one since the authorities allowed a group from the socialist commission to visit it, the Director when questioned, stated that out of 510 prisoners 264 were there because of offences relating to a breach of public order and that 97 had just been liberated as a result of revision. Among those liberated, 40 were less than 17 years old, which would seem to indicate that not all of them were victims of the "O.S.S.O." Some of the releases are the consequence of the automatic application of the amnesty to certain specific categories of condemned persons. This is the case for women with a child less than seven years old, for men over 60 years old or in poor health.

The Director of the camp at Tula pointed out that the identity cards of the persons liberated bore no indication which might make things awkward for them and that they freely returned to their normal way of life. The authorities at the camp even assisted those who, not having any family, might have some difficulty in readjusting their lives. The information obtained from the ordinary citizens does not confirm this official version. The persons liberated meet with apprehensive distrust, find themselves isolated and cannot return to the situation from which the arrest had uprooted them. Frequently they cannot make a place for themselves except by going to a different part of the country. But in this country, not being known is a serious obstacle. And so the prisoners who are liberated often end up by returning to their camps as free workers. It would be interesting to know the number of these outcasts that have been freed from the camps and that society rejects.

As a consequence of the laws promulgated, no measures depriving a person of liberty are any longer possible without a judgement emanating from the ordinary courts. At the Supreme Court categorical and virtually official assurances were formulated in this respect in the presence of the Socialist commission. Assurances that were no less positive were given in answer to the question whether there was any risk of a return to legalized despotism. Let us hope this is so; but doubt remains.

The obvious and acknowledged defects of justice in the Soviet Union do not however encourage the jurists of this country to recognize the merits of "bourgeois" justice in the democratic coun-

tries of the Western world. On the contrary, in the articles of self-criticism in the periodicals cited above, the influence of the philosophers and jurists of the West (going as far back as John Stuart Mill) is held responsible for the distortion and the deviations in Soviet law. Without fear of possible contradictions, only several pages apart, VYSHINSKY, CHELTSOV and others are criticized for denying the principle of presumption of innocence in penal law and "bourgeois legal practice" is reproached with the violation of this principle which is proclaimed in the Declaration of the Rights of Man of 1789; on the other hand, we are told, "the presumption of innocence is not fictitious but an expression of legality in criminal investigations".⁸

At the conference at the Court of Justice, one of the professors also began an attack of this sort. With the feeling of an easy triumph, he hoped to embarrass his French interlocutors in asking them why, in France, the noble institution of the jury, which had been suppressed by the reactionaries, was not re-established. The professor was much taken aback to learn from the Socialist Commission that the jury exists, and to hear an exposé of how it functions.

It is to be hoped that if and when Soviet justice is thoroughly reformed, and more particularly when reform has actually penetrated legal institutions, the example set by the West will be followed rather than criticized. For if our institutions remain imperfect and must continue to be improved constantly and vigilantly, it is nonetheless true that a century and a half spent defending liberty as well as enjoying it through many vicissitudes, has resulted in a model which any totalitarian country which really wishes to become democratic would do well to use as an example. But in the Soviet Union the situation with regard to justice cannot be separated from that of other institutions.⁹ Any new tendency which appears to be shown by recent decrees can only make headway therefore if the "democratization" initiated after the death of STALIN and accentuated since the XX Party Congress, results in something better than a system of supervised freedom.

⁸ RAKHUNOV, *op. cit.*, p. 47.

⁹ See the conclusions of the article: "Recent Legal Developments in the Soviet Union" in this issue of the Bulletin, pp. 32-7.

LIBERTY AND SECURITY IN THE USA

by

ANDRÉ TUNC

Communism has given rise to much concern within the United States. The problem, however, has been twofold. While the Government and a majority of the people were mainly concerned with the Communist danger, a far-sighted minority raised another warning. They underlined the dangers to civil liberties inherent in the methods used and in the kind of counter-measures taken to fight Communism. "The world political struggle," as it has been said by Chief Justice EARL WARREN, "is a struggle of greater proportions than Americans have known before. In some of our wars we have briefly succumbed to the temptation of imitating the vices of our antagonists; but the national sense of justice and respect for law always returned with peace. In the present struggle between our world and Communism, the temptation to imitate totalitarian security methods is a subtle temptation that must be resisted day by day, for it will be with us as long as totalitarianism itself. The whole question of man's relation to his nation, his government, his fellow man is raised in acute and chronic form. Each of the 462 words of our Bill of Rights, the most precious part of our legal heritage, will be tested and retested. By 1980 that heritage can be stronger and brighter than ever, and the ideal of liberty and justice under law made more real in its various forms throughout the world. But it will require a new dedication and a continuing faith from all who cherish the heritage and the goal."¹

To try to recite what has been done against the process of "erosion" of liberty² which had taken place would be quite im-

¹ "The Law and the Future", *Fortune*, November 1955, pp. 106, 230.

² The expression has been used by Chief Justice WARREN in *The Blessings of Liberty*, Second Century Convocation of Washington University, February 19, 1955.

possible. Champions of civil liberties may be found in great number, especially in Universities³ and churches. The contribution of the Supreme Court to the problem has also been very impressive, as is shown by the record of the last judicial year.⁴ Some individual members of the Supreme Court have expressed their faith in the Bill of Rights, not only in the official decisions, but in addresses and articles – prominent among them, by the number and the inspiration of his contributions, has been Chief Justice EARL WARREN.

³ Nobody will forget the stand taken by Professor ZACHARIAH CHAFEE, JR., *Free Speech in the United States*, 1941; *Freedom of Speech and Press*, 1955 (see also *The Growth of Freedom of Speech and Liberty of the Press*, Statement before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the Senate, November 14, 1955, reproduced in *Harvard Law School Bulletin*, February 1956); Dean ERWIN N. GRISWOLD, *The Fifth Amendment To-day*, 1955; JOHN LORD O'BRIAN, *National Security and Individual Freedom*, 1955 (see also: "The Value of Constitutionalism", in *Government under Law*, ARTHUR E. SUTHERLAND, JR., ed., soon to be published by Harvard University Press); and many other scholars or reporters: AUGUST R. OGDEN, *The Dies Committee: A Study of the Special House Committee for the Investigation of Un-American Activities 1938-1944*, 1945; ALEXANDER MEIKLEJOHN, *Free Speech in its Relation to Self-Government*, 1948; WALTER GELLHORN, *Security, Loyalty and Science*, 1950; *The States and Subversion*, 1952; ROBERT K. CARR, *The House Committee of Un-American Activities, 1945-1950*, 1952; JAMES A. WECHSLER, *The Age of Suspicion*, 1953; ELEANOR BONTECOU, *The Federal Loyalty-Security Program*, 1953; G. BROMLEY OXNAM, *I Protest*, 1954; ALAN BARTH, *Government by Investigation*, 1955; TELFORD TAYLOR, *Grand Inquest: The Story of Congressional Investigations*, 1955; CHARLES P. CURTIS, *The Oppenheimer Case; The Trial of a Security System*, 1955; MILTON R. KONVITZ, *Bill of Rights Reader; Leading Constitutional Cases*, 1955; EDWIN S. NEWMAN, *The Freedom Reader*, 1955; *Cases Studies in Personnel Security*, ADAM YARMOLINSKY, ed., 1955; ROBERT M. MACIVER, *Academic Freedom in Our Time*, 1955; ROBERT E. CUSHMAN, *Civil Liberties in the United States*, 1956. This list of publications, which, by no means pretends to be complete (less incomplete bibliographies may be found in Cushman, *op. cit.*) is the best answer to give to those who parallel the United States with authoritarian countries (cf. GABRIEL MARCEL, foreword to *Le fait est là*, French translation of MERLE MILLER's *The Sure Thing*). Nor does the reviewer forget the loftiness of the thought and the frankness which inspired the Conference on *Government Under Law*, organized in September 1955 by Harvard Law School, for the commemoration of the 200th anniversary of the birth of Chief Justice JOHN MARSHALL.

⁴ See especially: *Pennsylvania v. Nelson* 350 U.S. 497 (1956); *Slochower v. Board of Education*, 350 U.S. 551 (1956); *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956); *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *Cole v. Young*, 351 U.S. 536 (1956); on the opposite side, see: *Jay v. Boyd*, 351 U.S. 345 (1956), with dissenting opinions by Chief Justice WARREN, Justices BLACK, FRANKFURTER, DOUGLAS; *Ullmann v. United States*, 350 U.S. 422 (1956), with dissenting opinion by Justices DOUGLAS and BLACK.

The Report⁵ reviewed here is an illustration of what can be done by Bar Associations to the same end.

The Report embodies the findings and the recommendations of a Special Committee appointed by the Association of the Bar of the City of New York. It does not deal with the measures taken against communism in general⁶ and, for instance, does not concern itself with the House Committee on Un-American Activities; nor does it deal with civil liberties as a whole.⁷ Its scope is more specific: it constitutes a study of the operation of the Federal Loyalty-Security Program, which was designed to check the loyalty of civil servants and civilian employees in the Government and some industries. The investigation and report have been made possible by a grant from the Fund for the Republic, Inc., an organization which has been subjected in the United States to some insinuations of "red infiltration". To any dispassionate observer, however, these insinuations appear completely unworthy. Moreover, the Association of the Bar of the City of New York, more usually known for its conservatism than for any "red" bias, had been expressly granted full independence for the conduct of the study. Finally, no doubt can be raised as to the objectivity and reasonableness of a report prepared under the chairmanship of DUDLEY B. BONSAL, by the distinguished lawyers who were members of the Committee, with the help of a staff, the Director of which was the highly-respected Professor ELLIOTT E. CHEATHAM.

The report is divided into four parts.

A. The first part is devoted to "Liberty and Security". It contains a statement of the problem in theoretical terms: the conflict between freedom of thought and of expression, on the one hand, self-defence of the government on the other. It may appear extremely short (10 pages). The purpose of the Committee was not to embark

⁵ *The Federal Loyalty-Security Program - Report of the Special Committee of the Association of the Bar of the City of New York* (New York: Dodd, Mead and Co., 1956), 301 + XXVI pages.

⁶ French readers may refer to STANLEY HOFFMANN, "L'anticommunisme dans le droit public des Etats-Unis", *Revue du Droit Public et Sciences Politiques*, 1956, pp. 16-104.

⁷ See ROBERT CUSHMAN, *Civil Liberties in the United States; A Guide to Current Problems and Experiences* (Ithaca, New York: Cornell University Press, 1956), 248 + XIII pages.

on a philosophical discussion. It considered as self-evident that neither liberty nor security could be discarded and that the only problem was to reconcile them. Nobody, we may assume, will challenge this viewpoint, not even the few persons interviewed by the Committee who would favour the abolition of the whole Loyalty-Security Program.⁸ They probably consider the Program to be more harmful than beneficial; it is very unlikely that they would refuse to a nation the right, if threatened, to take protective measures.

B. The concern of the second part of the *Report* is with "The Communist Threat" and "The Counter-Measures by the United States, including the Loyalty-Security Program". A French reader may be excused if he is, at first, sceptical about the communist threat in the United States. Where is the threat? Is there any danger that the communists of the United States will overthrow the present Government? Is there any likelihood of the communists becoming numerous enough in the United States to form a party, other than a paper one, and to play a role in American politics? This seems unthinkable. As far as the writer can see, the conditions for the growth of communism do not exist in the United States. Are not then the United States plagued by a strange lack of confidence in their philosophy and way of life? Are they a colossus with clay feet? France lives with one communist out of four members of the House and nearly the same proportion among voters. This does not help to provide for an effective government, but communism is far from being the greatest problem of French political life. Why are the United States so afraid of communism in their national life?

The report is again quite short on this question. It refers the reader, however, to other reports, some of them prepared under the supervision of a committee headed by a great scholar, Professor ARTHUR E. SUTHERLAND, and published by the Fund for the Republic, Inc.⁹ Furthermore, it shows the real nature of the communist threat in the United States. There is no likelihood of the growth of communism in the United States. On the other hand, there is or would be very likely, if no counter-measure was taken, some com-

⁸ *Report*, p. 134.

⁹ See *Bibliography on the Communist Problem in the United States* (New York: Fund for the Republic, 1955).

munist espionage in the political and technical activities of the American Government and in scientific industries. The report could have recalled Léon Blum's words: "The communist party is not an internationalist party; it is a foreign nationalist party". Does communist activity extend further? The report does not state whether any real communist effort to influence governmental decisions has been detected.

The special nature of the communist threat justifies, as it has been said, the principle of counter-measures. While the last chapter of the second part of the *Report* contains a brief general review of the measures actually taken, the personnel security programs are thoroughly described in the third part.

C. No purpose would be served in trying to summarize these programs. The reviewer will only bring out a few points which may be of special interest.

Firstly, it is the scale of these programs, which is impressive; they concern nearly six millions employees and have been applied to each of these six millions persons individually.¹⁰

Another point immediately strikes the reader: a serious effort has been made to ensure national security through a process which at the same time is fair to the employee. This process is clearly democratic, in a broad sense, in that, in a nation anxious to respect the individual personality of its citizens it is more or less inspired by the judicial process or, perhaps more directly, by the administrative methods of decision. This is evidenced by the heading given by the *Report* to the various stages of the procedure: investigation, screening, charges, hearing, review, final determination.

On the other hand, this process applies only within the frame of very broad directives. Twice, the *Report* emphasizes that in fact these directives have been progressively broadened.¹¹ The standard stated in Executive Order 9835, the Order establishing the first formal loyalty program for Federal employees, was: "... on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." Four years later, in 1951, this standard was amended by Executive Order 10241 to

¹⁰ *Report*, pp. 83-85.

¹¹ *Ibid.*, pp. 75, 81.

provide: "... on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." Then, in Executive Order 10450 of 1953, based on Public Law 733 of 1950, the standard was changed: "... an effective program must be established and maintained in each department and agency of the Government to insure that *"the employment and retention in employment of any civilian officer or employee is clearly consistent with the interests of the national security."*

This last standard calls for three comments.

In the first place how can such a broad standard be administered? The answer may be found on pages 77-78 of the *Report*:

"An analysis of the criteria shows that they relate to three essential components of national security, that is, of security suitability of the employee. The first of these is personal dependability, in the sense of personal honesty and discretion. The second is freedom from 'pressure which may cause him to act contrary to the best interests of the national security.' To ensure this freedom from pressure risk there should be, as the criteria reveal, no grievous personal habits to conceal, no unfortunate past to keep covered up, and no vital interests subject to Communist pressure and extortion. Some derogatory information may bear directly on both of these two components of national security. So a grievous personal habit or an unfortunate past may tend to show both lack of personal dependability and also subjection to blackmail. Lastly, there is the component of freedom from subversive purpose. These components of security fitness or security suitability, as developed by the criteria, fall then into these classes:

- "1. Personal dependability.
 - a. Honesty.
 - b. Discretion.
- "2. Freedom from risk of pressure.
 - a. No grievous personal habits to conceal.
 - b. No unfortunate past to keep covered up.
 - c. No vital interest subject to Communist pressure.
- "3. Freedom from subversive purposes.

"Much of the application of the criteria to the security evaluation of personnel involves inquiry into the relationship between that person and other persons or groups of persons who may be subversive. This matter of relationship has come to be termed 'guilt-by-association.'

"There are at least three types of situations in which association of an employee is used in determining his security suitability. First is the situation in which associates of the employee are security risks and his association with them may show that he shares their views. Second is the situation in which a person with whom he has a close emotional relation is a security risk and the association might be used by the outsider to gain security information from the employee, or the strong emotional influence which the outsider is able to wield might make the employee more than ordinarily susceptible to subversive influence. Finally, there is the case of pressure risk where a person with whom the employee has had a close relationship is behind the iron curtain and may be used as a hostage to extort aid and information from the employee.

"The association most commonly made the subject of charges consists of membership or other participation in an organization deemed subversive or a close personal relationship with some other person who is a member or is participating in such an organization. The listing by the Attorney General of organizations as subversive or as in some other way having a purpose opposed to the government of the United States is the means now used to identify the organizations viewed as questionable."

Even though security regulations emphasize that association with such organizations is not to be taken as automatically disqualifying an employee, it seems, as a matter of fact, that, among other factors, this association, and even past association, if there is no factor to counter-balance the implication which may be derived from it, will normally throw a doubt on the consistency of the retention of the person with the interests of the national security. The compilation of the Attorney General's list therefore, is of primary importance, and one may doubt its value, in view of the fact that it now includes almost 300 organisations. Are there really so many communist and subversive organisations in the United States? The listing was first made without any opportunity for a hearing. In-

formal hearing procedures were later established, but it was not before 1953 that general regulations were prescribed for granting a hearing to every organisation on the list. It is true that the listing of organisations by the Subversive Activities Control Board created in 1950 is made dependent upon a hearing. But the report states that the relationship between the listing of organisations by the Subversive Activities Control Board and the Attorney General's List is not yet clear,¹² and, furthermore, a 1954 amendment to the National Security Act of 1950 provides for the listing of "Communist-infiltrated" as well as of "Communist-action" and "Communist-front" organisations;¹³ previously only the latter two were subject to the listing. A new and serious extension of the criteria which prevent a person from holding employment in the government is thus realized; a man may be discharged for present or past connection with an organisation which is or has been submitted to communist infiltration. Finally, the grounds on which an organisation may be labelled "subversive" seem extremely broad and the process of listing may not inspire full confidence.¹⁴ As to the grounds on which a person may appear to be a risk to national security, they are even broader.

The second comment is that a person may be a "risk" without being guilty of any disloyalty to the nation. The standard of "reasonable grounds" used at first has been abandoned. According to Executive Order 10450, previously quoted, if there is the smallest doubt as to the consistency of the retention of the person with the interests of the national security, the person should not be engaged or should be dismissed: any doubt endangers consistency and prevents the conclusion that the retention of the person is "clearly consistent" with the interests of national security. Yet it should be borne in mind that the person as to whom there is a doubt is not a person "half-guilty" of disloyalty. It may be a person who many years ago gave a contribution of adherence to some "left" fund or

¹² *Report*, p. 80.

¹³ By the effect of another provision, the Vth Amendment is turned or at least violated in its spirit. See 18 U.S.C. 2486(c), held constitutional in *Ullmann v. United States*, 350 U.S. 422 (1956). Cf. Executive Order 10450, sect. 8(a) 8.

¹⁴ See *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *infra*. D, the recommendations of the *Report*.

league, either because he considered that fascism was a danger which should be fought against, or merely in a spirit of charity, without even knowing, in some cases, that the contribution or adherence was given to a leftist organisation. It may even be a person who has had a friend or a relative in such a situation. It may also be a person who, by mere generosity, has "left" feelings, while his honesty and loyalty to his government are entire. None of these persons deserves the slightest punishment. However, they will be refused employment; they will be discharged if already employed; they will be subjected to thorough examination as to their beliefs, their private life, their friends' beliefs; they will be barred not only from powers derived from public employment, public office, trade union office or employment, as a teacher in a public school, but also from rights granted to the ordinary citizen, such as eligibility for the benefit of the Housing Act of 1937;¹⁵ they are in danger of being ostracized by the community.

Thirdly, we may ask: Who are the men who administer the program? Have they sufficient wisdom? From the Report, it appears that hearings¹⁶ and final determination¹⁷ are made by ordinary civil servants. The great bulk of the investigations, however, are handled by the Civil Service Commission and the Federal Bureau of Investigation.¹⁸ As it is well known, the FBI has been, even in the United States, the subject of some discussions. Policemen are rarely angels. It is their function to examine thoroughly all aspects of the life of the person to whom their attention has been called, to check every statement he makes, to look for contradictions. There is a great temptation to try to gain control over him, to play upon his weakness, to threaten him in the sphere of his private life or in that of his friends and to believe too easily unfavourable witnesses.¹⁹ The police may very well carry over into their dealings with

¹⁵ Gwinn Amendment, 1952 and 1953, adversely discussed in 69 *Harvard Law Review* 551 (1956) and 104 *University of Pennsylvania Law Review* 694 (1956).

¹⁶ *Report*, p. 96.

¹⁷ *Ibid.*, p. 163.

¹⁸ *Ibid.*, pp. 83-86.

¹⁹ See *MAFUSON, False Witness* (1955); also *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956) and the *Nelson* decision rendered by the Supreme Court on October 10, 1956.

decent citizens the methods which they use when chasing criminals. They are likely to think that a person would not be called to their attention, if he was not in some respects a suspect – that is to say, through professional propensity, a man whose guilt needs only to be proved. What may happen to such a man, even if entirely respectable, has been told by MERLE MILLER in *The Sure Thing*.

A great merit of the *Report* is to give, not only a picture of the Loyalty-Security Programs, but an evaluation of "The Size and the Monetary Costs of the Programs" and of "The Achievements and the Intangible Costs of the Program". These two last chapters of the third part are not the least important. The monetary costs, heavy as they are, (according to the *Report* the figure of \$ 124,208,960 covers only a fraction of the cost), are little when compared to the intangible costs. With great fairness, the *Report* balances:²⁰

"1. Protection against security risks versus harm to positive security.

"2. Protection of secrecy of scientific and technological developments versus discouragement of scientific and technological advancement.

"3. Protection of secrecy of international discussions versus injury to international standing and security.

"4. Protection against communist infiltration of the government service versus harm to the morale of the services.

"5. Advantages in government and business operation through grant of security clearance versus harm to the individual employee and to national ideals".

The conclusion is as follows:²¹

"It is probable that some undesirable and even dangerous persons have been ousted or barred from employment in Government or industry. It is likely that important scientific and technological developments have been withheld from a progressive enemy, but

²⁰ *Report*, p. 121.

²¹ *Report*, p. 133.

the consequent slowing down of his potential for aggression was of short duration. It seems clear that the reputation of the Government service has been cleared of the imputation of grave subversive infiltration, with improvement of the morale of some of the employees. Similarly, it is suggested that the security clearance has somewhat facilitated the prompt operation of the work of the Government.

"On the other side of the balance, there has probably been some impairment of positive security through the slowing down of scientific and technological advancement. There has been an injury to our international repute and security from the maintenance of a system which seems to our friends abroad to go beyond the true needs of national security. There has probably been some injury to the morale of the government service and certainly needlessly severe burdens to a considerable number of individual employees who have been unnecessarily suspended, tried and subsequently cleared. And there is some evidence of a general blunting of our national concern with freedom of speech and fair hearings, although that is clearly on the rise again."

The general conclusion of the third part of the report may be found in the findings of the Committee.²² The personnel security system should be maintained, but modified in important respects to correct the weaknesses which have developed. The main weaknesses are the following:

"1. There is a lack of coordination and supervision of the various personnel security programs.

"2. The scope of the personnel security programs is too broad in that positions are covered which have no substantial relationship to national security.

"3. The standards and criteria do not sufficiently recognize the variety of elements to be considered, including the positive contribution which an employee may make to national security, and they do not readily permit a common sense judgment on the whole record.

²² *Report*, p. 6.

"4. The security procedures fail in various ways to protect as they could the interests of the government and of employees."

D. These findings have led the Committee to make recommendations which, together with their supporting reasons, constitute the last part of the Report.

These recommendations are numerous and important. Programs should be coordinated in one service. The scope of personnel security should be greatly reduced. The standard for personnel security should be rephrased and the Attorney General's list should be abolished, unless it can be modified in many respects. Security personnel should receive thorough instruction, not only in communism and history, but in constitutional and legal principles and in the relative reliability of various kinds of evidence.

It is in the highest degree desirable that these recommendations be thoroughly studied in the United States and embodied in the new legislation which is at present contemplated.²³ They have some chance to be accepted, at least in great part: the spirit in which and the care with which they have been framed entitles them to general consideration.²⁴

²³ *Report*, p. 113.

²⁴ See *New York Times*, International Edition, July 15, 1956, p. 4.