

Radio Free Europe/Munich
Non-Target Communist Area Analysis Department
Background Information USSR

27 July 1962

"DECENTRALIZATION" OF JUSTICE?

- I. Introduction
- II. Legal Rights in the Marxist-Leninist Countries
(Amnesty, by Dr. John Keep) p. 1

Introduction

The Supreme Soviet of the RSFSR has enacted a bill which places the legal profession under the jurisdiction of local authorities (Tass, 25 July 1962). The bill was supported by one Soviet official on the grounds that it "would strengthen justice and legality in the republic" and by a lawyer because it "would further democratize legal procedure."

These are sweeping claims to make for an organizational change which may prove to be less than far-reaching. The Ministry of Justice USSR, which used to control the bar under Stalin and in the early Khrushchev years, was responsible for the election and training of judges, for discipline, etc. It was abolished in 1956, and its functions were transferred to the republican ministries, in a move similar to the abolition of the all-Union Ministry of Internal Affairs which took place four years later.

The Republican ministries, in their turn, are now being dissolved and the power which they wielded is transferred to the supreme courts of the Republics. While this sounds good in theory, whether it is so in practice will depend on the composition of the courts and on whether there is any reduction in the present political control exercised over the judges.

As regards personnel, there can be no doubt that a considerable shake-up is in progress. A.T. Rubichev, the former Chairman of the Supreme Court of the RSFSR, has been replaced by Lev Smirnov, who was previously a vice-chairman of the Supreme Court of the USSR. Moreover, out of the 13 members of the editorial board of Soviet State and Law, one of the two authoritative legal journals, eight have recently been removed. Rubichev may well

have decided to retire (he was Minister of Justice of the RSFSR from 1955 to 1957) but the changes in Soviet State and Law bear all the outward signs of a surge, even though it is not yet possible to determine its precise nature.

As for the nature of the change, the major reason for pessimism is that at no previous time during the Khrushchev era have so many death sentences been carried out for such a variety of "crimes" as at the present moment. To decentralize the organization of justice while simultaneously stepping up the execution rate of nationalists in the border areas, embezzlers and currency racketeers, speculators etc. cannot be described as "democratization" or liberalization.

Although Izvestia (February 9th, 1962 and May 25th, 1962) continues to publish occasional articles pleading for more attention to the truth in Soviet law and for less hankering after the theories of Vyshinsky, it is unfortunately true that party committees still interfere constantly with the courts and the prosecutor's office. Indeed in March this year Party Life (No. 5) was still calling for "more skilful party direction" of the courts.

Thus the aim of the "liberals" in Soviet law is extremely limited. It is not the case that they are working, against the tide, for anything as ambitious as an independent judiciary. They acknowledge the need for political guidance, if only to be able to make their views known at all, and then argue that better guarantees of the rights of the individual are necessary to protect the innocent from unjust punishment - hence the frequent attacks on Vyshinsky's methods and theories. On paper decentralization is in their favor, but in practice this one small cheer is at present overwhelmed by the louder rattle of the firing squads.

r.r.g.

LEGAL RIGHTS IN THE MARXIST-LENINIST COUNTRIESAmnesty

by Dr. John Keep

INTRODUCTION

The Western concept of the 'rule of law' is alien to the Marxist-Leninist philosophy obligatory in all countries where the Communist Party is in power. For the Marxist-Leninist law has no universal binding force, but is simply a means used by the ruling class to assert its hegemony. The Russian revolutionaries hoped to abolish the state and with it the laws that it made and implemented, substituting direct rule by the masses, or 'the dictatorship of the proletariat'. Lenin defined this dictatorship as

"power won and maintained by the violence of the proletariat against the bourgeoisie, power unlimited by any laws."

As the dream of imminent world revolution paled, the Party leaders came to view law as a provisional necessity in the isolated Soviet socialist state. They saw that it could prove useful in eliminating 'class enemies' and consolidating the Party's power. They demanded from the masses absolute obedience to the socialist laws issued by their government, on the grounds that they reflected truly the will and interests of the people. Today socialist law is claimed to be essentially different from, and superior to, 'bourgeois' law, since it is

"a weapon for the elimination of exploitation of man by man and the circumstances that have given rise to it. The creative role of socialist law is explained in the first instance by the fact that its norms express the scientifically-based policy of the Communist Party, which is applied by the Soviet government and is the living basis of Soviet society."¹

Law is thus expressly recognized as a political instrument. Its purpose is to realize the goals of the party: the building of a socialist, and ultimately a fully communist, society. Similarly, the judicial machinery in a Marxist-Leninist state implements the Party's will in much the same way as any agency of the executive. For Leninist theory dismisses as 'bourgeois' the idea of 'separation of powers'. Instead, authority is concentrated in a single centre which makes its will effective through all the administrative means at its disposal. All judges, lawyers, and other judicial personnel are State functionaries, and are pledged to carry out the policies of the Communist Party, as the self-proclaimed 'vanguard of the people'.

¹Yuridichesky slovar, Moscow, 1956, Vol. II, p. 425.

"In the activity of investigating organs, the Prosecutor's Office, and the courts - as of all organs of the Soviet State - the directing and guiding role belongs to the CPSU. While obeying the law in all their activity and securing its unwavering observance by all officials and citizens, (they) carry out the policy of the Communist Party as expressed in law."²

The same principles underlie the judicial system in other countries with Marxist-Leninist regimes. Hilde Bejamin, the East German Minister of Justice, has recently stated:

"In the German Democratic Republic jurists...are constantly working under the leadership of the Party to perfect our law, which we regard as a versatile, conscious and readily manageable instrument for the construction of socialism."³

Article 97 of the new Czechoslovak constitution defines it as the prime tasks of the courts "to protect the socialist state". Article 41 (i) of the Hungarian Constitution specifies that:

"The courts of the Hungarian People's Republic punish the enemies of the working people, protect and secure the state, the economic and social order of the people's democracy and its institutions and the rights of working people, and educate the workers in the spirit of observance of the rules of socialist collectivism."

Judges and lawyers are required to adopt a political attitude towards their work, and to avoid 'bourgeois formalism', (i.e., interpretation of the law in a literal manner, without reference to social-political factors as defined by the Party). The very idea of justice is different from that held outside the Communist world: justice is that which advances the cause of communism. Justice is not an abstract principle, but is conditioned by concrete historical circumstance. A judge is required to take into account not only the facts of the case before him but also the socio-political motivation of the offender and the socio-political consequences of his own judgment.

'Socialist Legality'

Much has been written in the Marxist-Leninist countries during recent years about 'socialist legality', a term now favored in place of the 'revolutionary legality' once propagated by Lenin. This expression is vague and self-contradictory (for legality simply means observance of the law, and cannot logically be qualified as 'socialist', 'bourgeois', etc.) but could perhaps be defined as observance of the law within the limits found expedient by the Party. The Party

² Sovetsky ugolovny protsess, ed. Karev, M., 1953, p. 12.

³ Neues Deutschland, 27 September 1961.

is in effect above the law. It is not simply that it is impossible to bring a case against the Party in a court of law, but that its role as a source of law is not legally recognized. This explains why it is thought consistent with 'socialist legality' for laws to be issued in secret (cf., for example, a Rumanian decree of 1 July 1960 which prescribed the death penalty for 'ex-fascists' caught in possession of arms, and was not published until December of that year; many other laws are never published at all.) Such laws and decrees are seen as instructions by the Party (Government) to guide its agents, rather than as acts of the public power, as in a democratic state. It follows that, although steps have been taken in recent years in most Marxist-Leninist countries with the object of assuring the population increased protection against arbitrary action by the police or other officials, those rights still rest on a most precarious basis. No fundamental change has occurred in the attitude of the Soviet authorities towards law as such. It is still seen as an instrument of policy. The Soviet Union (and the people's democracies also) are as remote as ever from the concept of a Rechtstaat (a state based on the rule of law), which presupposes the existence of some independent constitutional check upon those who wield power. No such body exists. Indeed, the very idea of a Rechtsstaat is still criticized by most Soviet jurists as 'bourgeois' and alien - although the merits of a genuinely constitutional system have been given added point by the party's own admissions of the gross injustices that occurred during the 'era of the personality cult'.

Soviet jurists, no doubt sincerely, now condemn Stalin's worst crimes and declare it inconceivable that such 'errors' should ever happen again. But the outside observer cannot but recognize that there is nothing at present in the Soviet political system to prevent a repetition of the purges in Russia in the 1930s or the 'anti-cosmopolitan' drives in the people's democracies after 1948. Whether the Party leaders would permit such action to occur is a question for the political scientists, not for the student of the legal system. From a judicial point of view the Party still occupies the position of supremacy it has always claimed the right to hold; in practice its powers are probably greater today than they were in the Stalin era. To assert, as Soviet spokesmen sometimes do, that effective guarantees against arbitrary infringements of the citizens' personal security are contained in the Constitution is (to put it mildly) misleading: as is well known, such guarantees were introduced in 1936, shortly before the worst abuses occurred. Such confidence as Soviet citizens have that the terror is a thing of the past rests solely upon the Party leaders' assurances that they will observe 'socialist legality' in future. It may be thought that the omens are none too favorable, since:

(a) in the Soviet Union only a fraction of the contraventions of the law perpetrated under Stalin has as yet been acknowledged, and official spokesmen have made every effort to minimize the extent of the harm done;

(b) in some Marxist-Leninist countries the Party leaders have for political reasons been less ready to dissociate themselves from Stalinist practices than their Soviet colleagues.

In all the countries under consideration the Party still reserves to itself the right to determine the degree of self-restraint that it observes in its dealings with the population.

Crime and Punishment

For the Marxist-Leninist a crime committed in a socialist state is not simply a breach of the law but an offense against the whole political and social order. It is the task of all other members of the offender's collective to assist the agencies of the state in subjecting him to such measures of coercion or persuasion as may be necessary to give him a due sense of his responsibilities to the community. Theoretically, crime should not exist in a socialist society that has overcome the exploitation from which it allegedly springs, and it is therefore referred to as a 'relic of capitalism'; although it is recognized that, like other such 'relics', it will recur (although on a decreasing scale) until the final goal of full communism is attained. This view leads to a blurring of the distinction between crime and any other form of deviant, non-conformist behavior. One of the bases of modern jurisprudence is the principle that an individual may not be punished unless he has actually broken a law: a desire or intention to do so is not in itself an offence. This crucial distinction is however, much less clear in socialist law. The term 'crime' is usually replaced by the expression 'socially dangerous act' which presupposes the existence of some authority that determines which acts are in fact dangerous to society, and to what extent. That authority is the Communist Party.

Since the Party sees the law as an instrument for the realization of its objectives, it is naturally anxious to prevent its opponents, who are by definition 'enemies of the people', from evading justice by taking refuge in legal formalities. For this reason the laws are often left vague, so that those who apply them may have broad discretionary powers (subject of course to the overriding claims of Party discipline). Loose definition of offences (e.g., 'acts weakening the Soviet power') enables the law to be stretched to cover any action deemed politically objectionable. The same aim used to be served by the principle of analogy, whereby a man found guilty of some offence not covered by the laws could be sentenced to the penalty prescribed for some similar (analogous) crime. This concept was introduced into Soviet law in the 1920s and after the Second World War adopted in all the eastern European countries (except Poland), when the legal system was adjusted to the soviet model. Again, judicial tribunals were given wide latitude to deal with persons found guilty of 'direct' or 'indirect' intent to commit a crime, with the accomplices of an offender, or with those who failed to report impending crimes of which they had foreknowledge. Similarly, the law made punishable retroactively crimes committed by agents of non-communist regimes on territory that subsequently came under communist control. In the post-war years the main effect of this has naturally been felt in eastern Europe (including the Baltic states, whence countless thousands of persons were deported on account of their role under the previous non-communist regimes).

During the post-Stalin 'thaw' many Soviet lawyers began to advocate a stricter interpretation of the concept of crime in order to ensure greater protection for the citizens against arbitrary acts by the authorities. Others continued to insist on a 'dialectical' approach to law, whereby due weight was given to the political objectives it was supposed to fulfil. The fundamental principles of Soviet penal law, published in December 1958, on the basis of which the various Soviet republics have drawn up their new penal codes, were the result of a compromise between these two tendencies. (A revised penal code came into force in Czechoslovakia in November 1961 and in Hungary in February 1962; it is to be expected that the codes in the other people's democracies will be brought into line in the near future.) The Soviet code states that a person can be punished only if he has "either deliberately or by negligence committed a socially dangerous act covered by the criminal law". This comes close to a recognition of the 'bourgeois' concept of nullum crimen nulla poena sine lege. Soviet spokesmen have stated that Article 7 of the old 1926 code, which allowed punishment of persons considered 'a danger to society' has lost its force. The institution of analogy has been repudiated, and the definitions of complicity, intent, and of some crimes have been tightened. However, there is still room for improvement in this respect. The dangers that exist may be illustrated by the case of two Moscow men who were found guilty of speculation in foreign currency, and sentenced in July 1961 to a term of imprisonment which the Party authorities found too lenient; they were re-tried and executed on the basis of a law passed shortly before, after the commission of the crime, although this law contained no provision as to retroactive effect.

The information available does not allow comprehensive conclusions as to the situation in eastern Europe. Analogy appears to be still recognized in Albania, Bulgaria, Rumania, although it is probably little used. The new Hungarian code abolishes it and contains many improved definitions of offences.

'PROTECTION OF THE STATE'

Another problem related to the above is the greater scope that exists in Marxist-Leninist countries for transgressions of the law, particularly as regards anti-State crimes, as a result of the nature of the political and economic system. In the conditions of extreme concentration of political power and a totally planned economy the interests of the State are correspondingly more far-reaching. It is characteristic that the Basic Principles of Penal Legislation of December 1958 define the prime object of Soviet justice as:

"to protect from infringement: (a) the public and state system of the USSR, the socialist economy and socialist property."

(The protection of the rights and interests of the citizens takes second place. Legal commentators stress that this enumeration of the clauses is deliberate.) Strong pressures

operate for mundane offences, which in other countries would not be offences at all, or would at least be treated lightly, to be dealt with as political crimes and to carry disproportionately heavy sentences. Thus non-fulfilment of plan targets, petty thefts of farm produce, negligent care of machinery, sale of goods produced by the labor of others, etc. - offences endemic in countries where social conditions place ample opportunity to commit them in the way of the ordinary citizen - tend to bring him into a confrontation with the full power of the law. During the Stalin era the courts generally inflicted the highest penalties prescribed for such offences, as otherwise they were liable to severe penalties for undue laxity.

The general tendency of the 1958 principles and the subsequent codes has been to mitigate the severity of the penalties inflicted: the normal maximum prison term is now 10 years instead of 25 as hitherto (in the case of especially dangerous crimes, or crimes by recidivists, the new maximum term is 15 years). The death penalty has, however, been retained for a variety of offences. The new Law on Criminal Responsibility for Anti-State Crimes, passed simultaneously with the Basic Principles, replaces the notorious Article 58 of the old penal code. Although some of the definitions of offences have been made more precise, no reduction has been made in the number of such offences. The death penalty is imposed for treason, wrecking, terrorist acts and banditry (the two last named offences not being subject to it hitherto) - as well as for murder in aggravated circumstances. The concept of treason is defined widely and includes 'defection to the enemy' and 'flight abroad or refusal to return from abroad' - by ordinary citizens as well as members of the armed forces or government employees. A legal textbook states that defection:

"is treason to the fatherland irrespective of whether any further concrete activity in the enemy's interests followed on his (the defector's) part. The very fact of defection or flight abroad already constitutes, from the objective point of view, the corpus delicti of treason to the fatherland." ⁴

An earlier law making defectors' relatives criminally responsible for such actions has been repealed; they are now only liable if they rendered the fugitive actual assistance. The offence of 'anti-State agitation and propaganda' (article 7) carries penalties ranging from 6 months' to 7 years deprivation of liberty. It covers spoken or written communication, the preparation and retention of leaflets, etc. "with the aim of undermining or weakening the Soviet regime."

During the last year the death penalty has been introduced in the Soviet Union for a number of other crimes: misappropriation of State property, counterfeiting, and mutiny by prisoners (May 1961); serious currency offences (July 1961)

⁴ Sovetskoye utolovnoye pravo: osobennaya chast, ed. B.S. Utetsky, Moscow, 1958, p. 32.

and attempted killing of militiamen, rape and bribe-taking (Feb. 1962). Some 50 people are known from press reports to have been executed under these provisions, largely as part of the current drive against fraud by officials. Sentences have also been raised for hooliganism, speculation and 'parasitic living.' This shows that the present trend is once again towards stiffer penalties. It seems that at present sentences vary between 1/2 or 2/3 the maximum penalty and the maximum penalty itself. Many of them seem excessive by Western standards.

In eastern Europe the same tendency can be observed as in the Soviet Union. The death penalty for economic crimes was introduced in Bulgaria in 1954, in Rumania and Hungary in 1958, and in Poland in 1960 (but only two Poles are known to have been sentenced to death, and so far as is known neither sentence has been carried out). In Czechoslovakia the maximum penalty for such offences is still 20 years' imprisonment. The press reports cases of heavy sentences being passed on persons who 'spread hostile propaganda and criticized conditions'.

Podochen of 15 April 1961 cited the case of a worker sentenced to 2 years imprisonment for singing 'obscene' songs and songs 'praising the Western way of life and slandering the Czech socialist system'.

In another case Svobodne Slovo of 7 March 1961 reported that an old-age pensioner from Brno, who collected stamps, was sentenced to 3 years' imprisonment for 'speculating' in stamps. In 3 years he had made a profit of about £250. Such 'remnants of bourgeois individualism', the paper declared, must be ruthlessly stamped out.

Here, as in other people's democracies, there is a constant refrain of sentences on persons who 'sabotage the plan' by putting their own interests above those of the State. In Bulgaria 43 people were condemned to death for economic crimes between 1956 and June 1961. Some of these cases have evident political overtones: e.g. in October 1961 the Chief Rabbi of Bulgaria was sentenced to 3 1/2 years' imprisonment for alleged currency offences. Political trials have taken place recently in Albania (Admiral Sejko and others) and Czechoslovakia (M. Barak, former Minister of the Interior, and some 80 officials, who were ostensibly accused of embezzlement). In East Germany the Council of State adopted a declaration in January 1961 stating that the courts would

"mete out harsh punishment to those who threaten the life of our people and the existence of our nation". Harsh sentences were defended on the grounds that they would "ensure the realization of the humanistic aims of socialism...and the products of the labor of our industrious citizens." (5)

Extra-Judicial Procedure

During most of the time that they have existed Marxist-Leninist regimes have found it necessary to supplement the normal judicial machinery by administrative tribunals composed of officials picked for their political reliability, and to institute special court procedures in which the accused is

⁵Neues Deutschland, 6 April 1961.

denied his legal rights to defence. The detection and investigation of anti-State offences is the function of the political police. In the Soviet Union this body has been known at various times as the CheKa, OGPU, NKVD, MVD/MGB, and is now called the KGB (Committee for State Security). Analogous institutions exist in all the people's democracies. During the Stalin era in particular the police exercised a formidable power and perpetrated the grossest abuses in 'purging' their countries of anyone deemed hostile or potentially hostile to the regime. The police apparatus was based on a vast network of spies and informers; and since even a careless word could have the most serious consequences, the majority of the population lived in a state of constant fear. Many plots against the security of the State were fabricated for their own purposes by the secret police, acting with the sanction of the Party leaders of the day. The Soviet purges cost the lives of millions of people. They served as a model for those undertaken after the War in eastern Europe. In these actions people were arrested en masse, according to lists drawn up by the police, and were sometimes shot outright; in other cases they were detained they were detained for long periods awaiting interrogation and then forced by physical and psychological pressure to confess to real or imaginary crimes. After a secret trial they were sentenced to death or long terms of imprisonment, usually to exile with forced labor in a 'corrective labor camp'. These camps, often situated in remote and isolated areas, were run by the political police organization itself. The regime in them was harsh in the extreme and a high proportion of these sent there never returned. The total number of prisoners in the Soviet camps when the system reached its maximum extension has been estimated at between 10 and 15 million.

How much of this extra-judicial system survives today? It is difficult to answer this question with assurance, since it is so enshrouded in secrecy. In 1954 the Special Board of the MVD was abolished - though it is not known whether it may not have been replaced by some other such tribunal, or whether present-day political offenders are not dealt with by the ordinary courts in secret session under some form of summary procedure. 1956 saw the repeal of two laws dating from the 1930s on the basis of which cases of terrorism or sabotage could be tried in the absence of the defendant, the death penalty being obligatory. Several partial amnesties of offenders have been decreed, and the police brought under closer Party control. The responsibility for the forced labor camps, now re-classified as 'colonies' and thus enjoying a less arduous regime, has been transferred from the police to republican ministries of the interior and the local soviets. However, the practical import of these reforms is far from clear: the new regulations issued in 1958 governing the regime in the camps have not been published. The leading Western authority on the question remarks that it is impossible even to hazard a guess at the present number of persons confined in penal colonies, although it is certainly less than under Stalin.⁶ The post 1953 period saw some

⁶P. Barton, in Le Contrat Social, Paris, July-Aug. 1961, p. 223 et. seq.

relaxations, in the direction of improved material conditions and less inhuman treatment, but of late the situation seems to have worsened again in some respects (e.g. restrictions on remission of sentence for good behavior in certain cases). Camps are now graded into three types, with corresponding differences in the harshness of the regime.

In January 1959 Mr. Khrushchev stated that no one in the Soviet Union was now arrested for a political offence. But the current practice is to label political offenders as ordinary criminals. The existence of political opposition is of course, strenuously denied, but there can be no doubt that political opponents of the regime are at present confined in camps. The continued existence of the political police remains a powerful instrument in the hands of the Party for controlling the lives and thoughts of the people.

Similar changes have taken place in the police system in eastern Europe. In most countries amnesties have been declared for certain groups of offenders. That in Hungary in March 1960 was said to have led to the liberation of three-quarters of all the political detainees; the number of those still detained for their implication in the 1956 revolution has been put at 900-1200.⁷ Many of these arrested in the raids of spring 1961 have not yet been brought to public trial. Forced laborers work in the uranium and lignite mines. An amnesty was announced in Czechoslovakia last month for those convicted of less serious political offences (e.g. attempted defection, 'slandering the republic'). In Albania the police are strongly entrenched, and a Special Board exists which is empowered to pass sentences of up to 10 years' hard labor. In Bulgaria the Minister of the Interior has wide discretionary power to confine persons who 'threaten public order' to imprisonment in 'labor and educational communities' for a 1-year term, which can be extended indefinitely. (Much of the 'education' takes the form of stone-quarrying.) In Rumania the number of political prisoners has been put at 60,000 to 70,000. The number of political prisoners in East Germany was recently put at 14,000.⁸ By March 1962 some 1200 people had been jailed since the erection of the Berlin Wall, and 26 trials publicly announced, in which 4 accused had been sentenced to death. In Poland the power of the police is less obvious than in other people's democracies. A law passed in February 1962 gives the Supreme Court power to review all verdicts, including those passed by military courts and other administrative tribunals. This appears to be a move towards greater legality. But there still exists a system of 'accelerated procedure' in which the accused has only a limited right of defence.

While the powers of the political police have in general diminished, a new threat to legality has appeared from a different direction, in the shape of the quasi-judicial 'comrades courts'. These have been instituted in the Soviet Union and Czechoslovakia, the two states claiming to be furthest advanced

⁷ New York Herald Tribune, 23 October 1961.

⁸ Frankfurter Allgemeine Zeitung, 19 March 1962. Cf. N.Y. Herald Tribune, 31 March 1961.

on the road to communism; as yet relatively little has been heard of them elsewhere. Comrades' courts are

"elected social organs whose aim is to educate citizens actively in the spirit of a Communist attitude to labor, respect for socialist community, development of collective spirit, comradeship, and respect for the dignity and honor of the citizens."⁹

They are formed in enterprises, apartment blocks, etc., on the initiative of 'advanced citizens' (i.e., the Party nucleus) and consist of men without legal training who are elected for one year. Their main emphasis is on the 're-education' of offenders. They are empowered to pass judgement in public, before the whole collective, on minor offences such as drunkenness, indiscipline, hooliganism, 'parasitism' etc. and to sentence offenders to loss of their jobs, fines, and (in the case of 'parasitism') even banishment for a term of 2 to 5 years. The latter offence is very inadequately defined, and is intended, for example, to apply to collective farmers who devote an excessive amount of time to work on their own private plots. These tribunals can serve Party officials as a convenient means of settling accounts with those of whose conduct they disapprove, even where they have committed no offence against the law. Such tribunals are contrary to Article 7 of the Basic Principles, where it is stated that no one can be sentenced except by a decision of a court. The possibility that such tribunals might take too lenient a line with offenders is guarded against by their submission to close Party control (e.g. cases are vetted beforehand, and appeals are possible to regular courts). It should be emphasized that the 'comrades' courts' are officially seen as the embryo of the future legal order under communism, when the regular court system will have 'withered away'. It is hoped that by then men will have become so attuned to collective living that any deviant conduct by an individual will at once bring censure by his comrades. Such a system has nothing in common with the traditional Western concept of a legal order, and indeed appears rather as a system of legalized arbitrariness. Whether the ideal is attainable is another matter.

The Judicial System

The formal organization structure of the court system in Marxist-Leninist countries does not differ substantially from that usual in the rest of continental Europe; there is a hierarchy of instances; cases are normally heard in lower (people's) courts and appeals are allowed to higher courts, and ultimately to the Supreme Court. The Ministry of Justice exercises general supervisory functions over the operation of the judiciary (election and training of judges, discipline, etc). The Soviet Union abolished its central Ministry of Justice in 1956, transferring its functions to republican ministries; these are

⁹Neues Deutschland, 6 April 1961.

now also in process of dissolution, and it seems likely that much of their power will pass to the various supreme courts. This does not, however, imply any reduction in the degree of political control exercised over the judiciary. The theoretical justification for this control has been noted above. In a practical sense it is implemented, not by overt direct Party intervention in judicial proceedings, but rather through the fact that judicial personnel are in their overwhelming majority Party members and as such bound by its discipline. Those who are not members are as socialist citizens also obliged to accept the official State philosophy, and are thus effectively prevented from acting in an independent manner. In 1954 97.4% of all Soviet 'people's judges' and 52.9% of all 'people's assessors' were Party or Komsomol members. In 1958 Party or Komsomol members accounted for 532 out of 1125 members of the Moscow collegium of advocates.

Judges. Judges are normally elected, either by the national legislature, in the case of senior appointments, or by the national legislature, in the case of senior appointments, or by the local soviets ('people's committees', etc.) in the case of those of inferior rank. The term of tenure varies: in the Soviet Union it is 5 years for senior, 2 for junior judges; in Bulgaria and East Germany 5 and 3 years, according to rank; in Albania 4 years, and in Czechoslovakia 3 years. In Hungary, Poland and Rumania judges are appointed by the Ministry of Justice, since although the Constitution provides for their election no law to this effect has yet been adopted. The election of judges serves to give the impression that they are responsible to the people; in practice, as with the election of deputies to the national legislature or local soviet, the election contains no genuine element of choice and bears a purely formal character. Candidates (one to a vacancy) are nominated by the local party organization. Similarly they can in practice be summarily dismissed before expiry of their legal term of tenure if some doubt should arise as to their reliability. Formally, their resignation should take place after a demand for their recall by their electors. In practice it would normally suffice for them to be expelled from their local Party organization, since this automatically leads to the loss by the expellee of any public post he may hold. Normally judges can be expected to 'toe the line' from conviction, reinforced by ideological training and the prospect of promotion for those who conform. Political reliability is of course a major criterion in determining advancement in the judicial hierarchy.

The question of the legal training and experience of judges thus plays a very different role in the Marxist-Leninist countries than it does elsewhere. In non-Communist countries it is reasonable to assume that, the greater the learning of the judge, the greater the likelihood of justice being done impartially. But under the Marxist-Leninist system legal training and political indoctrination go hand in hand. A well-trained judge will see no contradiction in adapting his sense of justice to suit the political requirements of the Party, since this is an essential principle of 'socialist legality'. (This is not to say that all judges or jurists necessarily share the same view of how the Party's interests may best be served.) The early prejudices of the

revolutionaries against legal education, as likely to encourage a 'bourgeois' formalist attitude to law, has now been overcome, and the aim is to raise the professional qualifications of judges to the highest practicable level. In 1957 97.4% of Soviet people's judges had some kind of legal training, and between one-third and one-half higher legal training. Some Sovietjurists have suggested that higher legal training should be made obligatory, but their advice has not been followed.

In eastern Europe the percentage of trained judges is as a rule lower, since 'bourgeois' judges were dismissed after the Communists took power and have not yet been replaced by full-trained socialist cadres. In East Germany, for instance, in 1957 only 8% of the judges had full academic training. Aspiring judges are now required to have completed 4 years' study, in the first year of which 45 out of 57 classes are devoted to 'social science' (i.e. Marxism-Leninism and related topics). There are still some 'Slansky assessors', as they are familiarly known, whose qualifications are exclusively political. In Yugoslavia, where political controls are less obtrusive than elsewhere, judges are required to hold a law degree and to have 3 years' practical experience before appointment (10-12 years in the case of supreme court judges).

A court normally consists of a judge and two lay ('people's') assessors, who are either elected at general meetings in enterprises, etc., or appointed by local soviets or their equivalent. They serve for a few days in the year without pay. Although linked by origin with the jury system of Western law, they perform a different function: they are members of the court with the same rights and duties as the judge. Questions are decided by majority vote, but cases of assessors overruling the judge either do not occur or are not publicly reported - except in the period of initial socialization, when assessors often serve as an instrument of Party control where politically suspect judges are still in office.

Prosecution. The prosecution of offenders is carried out by functionaries of the Prosecutor's Office, headed by a Prosecutor-General. In the Soviet Union the latter is appointed for a term of 7 years by the Supreme Soviet. Prosecutors are required to have legal qualifications, although this condition is not always met. (In Hungary, for instance, there are many who have only completed a 1-year course.) Their function is a dual one: to present the State's case against accused persons and to ensure observance of 'socialist legality' in the investigations and trial, as part of their broader quasi-constitutional function of supervising the legality of acts of the administration in general. It is clear that these two tasks cannot readily be reconciled, and in practice prosecutors have tended to regard themselves first and foremost (if not exclusively) as watchdogs of the State's interests, and have showed little or no concern for the rights of the individual. In the Stalin era their powers of control were purely nominal, since the political police permitted no external interference with their activities. The decline

in their power has led to a corresponding revival of the authority of the Procurator-General and his staff. Nevertheless their powers are rather narrowly circumscribed. Prosecutors who show what the Party considers to be excessive leniency towards accused persons render themselves liable to dismissal and prosecution for undermining the interests of the State. A striking instance of such pressure occurred in Bulgaria in May 1961, when K. Popoff, a senior official of the Ministry of Justice, was sentenced to 20 years' imprisonment for 'helping the class enemy': he was said to have assisted former landowners to recover possession of their expropriated property. In Poland the resignation of the Procurator-General M. Burda, in the summer of 1961 was attributed to dissatisfaction at interference by the Party in the Kielce embezzlement trial (see below).

In performing their control functions prosecutors cannot question the legality of Party or Government decisions, but only actions of the lower organs of the administration. They are also empowered to receive complaints from citizens about illegal actions by officials, whereupon they investigate the facts and lay them before the Party authorities. It is the latter who decide whether to take up the case. In Yugoslavia the individual citizen has the right, not merely to appeal to the prosecutor, but (if the latter finds no grounds for instituting proceedings) to sue in court the official who has wronged him. However, as a Western authority on Yugoslav law points out,

"it is difficult in the present political conditions to imagine the realization of this right in practice if the prosecuting official who has overstepped his duty acted on the initiative or with the approval of the Party organization. In such a case the victim of persecution is practically powerless in spite of the legal guarantees."

Lawyers. All the Marxist-Leninist countries allow the accused to have the services of a defence lawyer (in cases tried under normal procedure). But their rights are limited by comparison with those of advocates in the non-Communist world. Free practice is either prohibited or officially frowned upon; the normal system is for lawyers to be enrolled in a 'collegium' (chamber of advocates, lawyers guild). These exist at a national and local level, and function under the supervision of the Ministry of Justice. Control is exercised primarily through the Party nucleus within the collegium. The members elect their own executive body (Presidium) which controls the admission of new members and disciplines those who err (e.g. by criticizing socialist institutions in their court speeches. It also allots briefs among members and distributes the fees collected from clients. These sums are small by Western standards, and the status of the advocate relatively low. Non-advocates without legal training may be admitted to plead in cases of less significance. The profession has little appeal for ambitious young men and the ratio of lawyers to the population is inadequate.

In eastern Europe various methods of pressure have been and are being used to force lawyers with private

practices to join a collegium. In Hungary, for example, there are special lists in the Ministry of Justice of politically reliable lawyers, who are drawn upon in sensitive cases. In Poland pressures have been intensified of late.

Three lawyers who took a strong line in defending 17 men accused of embezzlement, one of whom was sentenced to death, in a 2-month trial at Kielce, were called before the lawyers' Guild and admonished. One of them, M. Brojdes, was accused of slandering the prosecutor by comparing his methods with those used by the Nazis in Poland during the war, and was sentenced to 3 months' imprisonment (July 1961). The lawyer who defended him, Markowicz, also drew political parallels - this time with the Stalinist practices of the early '50s. He was suspended for insulting 'friendly socialist countries'. Shortly afterwards it was announced that some 60-80 attorneys were under indictment for violations of the penal code. The Minister of Justice, addressing a meeting of the Guild in December, said that "lawyers may properly demand freedom but this must be consistent with the interests of the nation and the Socialist state." Pressure was put on the Guild to reform itself and to eliminate private legal practice, and after a stormy meeting a resolution to this effect was passed.¹⁰

In Yugoslavia private practice is still allowed, and the individual is free to decide whether or not to undertake a case. Fees are fixed with the client within limits laid down by authority. Half the executives of the advocates' chambers are elected by the members, and half nominated by the republican assembly (parliament). A measure of control is exercised by the Party organization, which can exclude potential members if they are deemed 'unworthy'. The criterion of professional qualification is stricter in Yugoslavia than elsewhere, as it is also in the case of judges: advocates must be graduates of a faculty of law, have passed an advocates' examination, and have practised for a minimum of 3 years.

PROCEDURE

Soviet and east European criminal procedure is based on the continental European system which provides for a preliminary investigation before trial, but with omission of some important safeguards against abuses.

Arrest. In the Soviet Union the arrest of a person suspected of a serious offense is normally carried out by the militia (except in political cases, when the KGB intervenes.) If the action is not taken on the instructions of the investigator (i.e., an official of the procurator's office), then the latter must be informed within 24 hours, and must confirm the detention within 48 hours or else release the person concerned. A warrant of arrest as such does not exist. In exceptional circumstances apprehension may take place before a charge is preferred, but not more than 10 days may elapse before this is done. Usually a person may not

¹⁰ Le Monde, 18th July 1961; New York Times, 15th October 1961, 18 November 1961; Times, London, 4 December 1961, 7 December 1961.

be kept in custody for more than 2 months before being brought to trial, but this term can be extended by regional and senior procurators to 6 months, and by the Procurator-General to 9 months. The situation is much the same in other countries. (In Hungary for instance, the normal limit is 1 month, which may be extended by the procurator to 3 months, and by the Procurator-General to 6 months - but in exceptional circumstances for further unlimited periods.) Whether these formalities are observed in practice at the present time it is difficult to say. In Yugoslavia a 9-month limit also applies, but within 24 hours of his apprehension the arrested person must be given a 'decision on custody' stating the grounds for the action and informing him of his right to appeal. The investigating judge must interrogate the accused within 24 hours, and if the case is to be pursued must immediately request the public prosecutor to open the investigation. In all countries a citizen who has been wrongly arrested or detained overlong without trial may complain to the procurator, but so far as is known this right is not utilized in practice.

Preliminary Investigation. In all countries considered here the investigation procedure lacks the distinction made in Western Europe between police investigation and pre-trial judicial investigation; the evidence obtained in both is used in the trial. The two authorities work in close cooperation, if indeed they are not in practice identical. Thus, it is the same person who draws up the indictment against the accused and determines his length of detention in custody. The arrested person has the right to present evidence in his defence during the investigation. But in practice it appears that insufficient attention is often paid to his depositions, and that the borderline between a mere suspect and an accused becomes blurred. The very fact that the accusation is proceeded with tends to lead to a presumption of guilt in the minds of the investigator. The accused is not told the details of the charge against him until the investigation is terminated. Another factor prejudicial to the interest of the accused is that (unless he is a minor or otherwise incapacitated) he is not allowed to see his defence lawyer until the investigation is complete; nor is the lawyer entitled to be present during the preliminary investigation.

Poland and Czechoslovakia are slightly more liberal on this point: lawyers may visit their clients in the presence of the prosecuting official or his agent, though in other respects the system is much the same. In Yugoslavia the 1954 code aims to give the decisive role in the investigation to the court rather than to the prosecutor, as elsewhere, the latter's part being narrowed down to that of a party to the case. This leads to some important differences:

- (a) The initial inquiry and preliminary investigation are carried out, depending on the circumstances, either by prosecuting organs or court officials. An authority

on Yugoslav law states:

"In practice the public prosecutors send more cases for inquiries to the organs of internal affairs than to the district courts, and the investigating judges widely utilize their right to transfer either the whole investigation or individual actions to the inquiry organs of internal affairs. About 75% of all inquiries are conducted by the police and only 25% by the courts, while the share of participation of the investigating judges and the police in conducting preliminary investigations is approximately equal."

(b) The accused, as stated above, must be informed of the charge at the beginning, not the end, of the investigation.

(c) Although contacts with the defence lawyer during the investigation are prohibited, as in other countries, and counsel may not attend the investigation, the latter right is also denied to the prosecutor as well. Both parties are entitled to attend inquiries at the scene of the crime, the hearing of experts, searches of domicile, etc.

Trial. In all the countries concerned the trial must be conducted in open court, although exceptions are allowed where the interests of the state are affected and in certain other circumstances. This provision has to be seen in the light of the general attitude of the Party towards publication of news about crime and legal proceedings. This is governed by the concept that such information fulfils an 'educational' role in stimulating a hostile attitude towards anti-social acts and a willingness among the public to assist the authorities in their struggle against crime. This means that readers of the Soviet press (including specialist journals) have knowledge of only a fraction of the cases that appear before the courts - more precisely, only of those that are considered most 'enlightening' by those who control the flow of information. Moreover, in all accounts of trials no mention is ever made of the point of view of the defendant.

The actual proceedings (except where special procedure is applied) seem now to be conducted in such a way as to give the accused a reasonably fair trial. He is allowed to object to investigators or prosecutors; he knows the names of witnesses and the main substance of their evidence before the trial begins; he has the right to question witnesses; he may call (or, to be precise, request the court to call) his own witnesses and submit written evidence at the trial; if he has not chosen a defence lawyer one is assigned to him by the court; and if he is acquitted his legal expenses are paid by the State; he has a right to consult his defence lawyer after the trial and (usually) to appeal; a copy of the judgments is handed to him shortly after sentence is pronounced. One might take exception to the fact

that many trials take place in the absence of the prosecutor (whose role then falls to the court) and that the presence of a defence lawyer is obligatory only in more serious cases - but these are relatively minor points.

More important is the question of the weight given by the court to various forms of evidence. Here one may note the repudiation of the exaggerated credence placed by courts in the Stalin era upon confession by the accused - even though such confessions were in many cases extracted by torture. The new Basic Principles state that confession must be supplemented by other material evidence, and that the onus of proof lies on the prosecution. This is as close as the new Soviet codes come towards recognition of the principle that an accused is innocent until he is proved guilty. During the discussion in the Soviet press prior to the adoption of the 1958 reforms some lawyers pressed for the introduction of the principle of 'presumption of innocence' but others condemned it as 'bourgeois'. The final result is something of a compromise between the two viewpoints, but nevertheless represents a welcome step towards greater legality.

Another important point to be borne in mind is the limited ability of the defence lawyer to plead his client's case. Oratorical flourishes, appeals to the emotions of the jury - all this has no place in a Soviet court. More than this: Communist functionaries seem unable to rid themselves of the suspicion that the defence lawyer's concern for the interests of his client must indicate a lukewarm attitude towards the interests of the State. He is therefore reduced to entering a cautious plea (pointing out extenuating circumstances that favor the accused, etc.). Soviet jurists have publicly lamented the fact that defence lawyers are not bolder in court, but the political risk involved deter them from taking up this challenge.

It should be emphasized, too, that the Communist idea of the nature of a trial differs from that customary elsewhere: it is seen, not as a contest between two parties, each of which presents its own version of the truth, between which the judge and jury have to decide. The task of elucidating the truth is one shared by all the parties involved - judge, assessors, prosecutor, defence lawyer, and the defendant himself. The prosecution and the defence are as much partners as opponents. The scope open to the defence lawyer cannot help but be restricted by the official theory that the pursuit of truth and justice must coincide with the pursuit of truth and justice must coincide with the pursuit of the good of the State in its efforts to build communism.