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JUSTICE IN RUSSIA

JUSTICE IN RUSSIA

AN INTERPRETATION OF SOVIET LAW

HAROLD J. BERMAN

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PREFACE

There are two words for law in Russian, as there are in all the major European languages except English. One is *zakon,* which means a particular law or statute. The other is *pravo,* which means Law in the large sense, with a capital *L,* connoting Right or Justice. Perhaps unique to Russian is the relation between the word Law, *pravo,* and the word truth, *pravda.* This may derive from an older conception that law is revelation, that it is ordained by nature itself. The first written collection of laws in Russian history was entitled *Russkaia Pravda,* Russian Truth.

This book is primarily about Soviet Law with a capital *L*—the Soviet system of justice. In a sense it is about Soviet truth, since it is an attempt to view the Soviet legal system in terms of the nature of Soviet life, the underlying assumptions of the social order. Of course there is a good deal here about particular laws as well, for there is no such thing as Law without laws, though there may be laws without Law.

The term Soviet Law will at first seem to many people to be a self-contradiction. It is widely believed that the Soviet system is run solely by terror, the only principle of order being that of hierarchical subordination backed up by the secret police. From the proposition that the Soviet regime places heavy reliance on the use of force, it is often deduced that the Soviet legal system is worthless window-dressing.

These are dangerous delusions, which in the long run only weaken us. They conceal the inner resources of the Soviet social order. The Soviets do have a working legal system, founded on rather definite principles of law and justice.

A system of law and a system of force exist side by side in the Soviet Union. There are certain areas into which law penetrates only slightly. For example, a person who is suspected of antagonism to the regime may be picked up by the secret police,

held incommunicado for a long period of time, tried secretly by an administrative board, and sentenced to hard labor—without benefit of defense counsel and without any possibility of appeal. On the other hand, there are other areas which are on the whole governed by well-defined legal standards. For example, crimes such as theft or assault or murder, suits between state business enterprises for breach of contract, disputes over rights of inheritance, workers' grievances against wrongful treatment by management, and many other types of conflict within the social order, are generally dealt with publicly by regular procedures and established norms.

One would suppose that political and ideological repression would undermine the legal system. How can there be respect for law when the most important political decisions are made secretly behind the scenes and when the rulers themselves have no qualms about resorting to force when they feel that the stability of the regime is threatened? The evidence tends to show a surprising degree of official compartmentalization of the legal and the extralegal. Boris Konstantinovsky, a former Soviet lawyer now in this country, reports that in his extensive experience there was only one case in which the Communist Party interfered, and in that case the procurator (a Party member) went against the Party decision and in effect annulled it.

In this connection we might recall the experience of the Roman Empire. The absolutism of the Imperial rule, and its brutality, did not prevent the coexistence of a legal system. A modern illustration may be found in the United States, where the fact that in some areas Negroes are often deprived of a fair trial and are sometimes victims of violence does not mean that law is nonexistent in those areas. In each of the examples cited, the acceptance of force and violence in certain types of situations undoubtedly has a deleterious influence on the legal system as a whole. But that influence may be a subtle one.

This book attempts to shed some light on the relationship

between law and force in the Soviet system. It seeks explanations which will fit both the Soviet "police state" and the Soviet "welfare state." It does not, however, attempt to describe the Soviet system of force in any detail. Our point of departure is not the conditions in the labor camps but the cases in the courts. As a result, the data here presented may give a total impression far more favorable to Soviet Russia than the one which most people now have. It should be encouraging to them to learn that there is another side to the story. However, they should be warned that it is not the author's purpose to give a complete picture of "life in the Soviet Union," but rather to portray the development of the Soviet legal system, to show its relationship to the Soviet social order as a whole, and to seek its significance for Russia and for us.

The gathering of material for this book began in the course of extensive visits to Russian DP camps in France and Germany during the war. There I came to know Soviet Russians—peasants, factory workers, schoolteachers, professional soldiers—and to appreciate some of the great similarities and some of the great differences between the Soviet world from which they came and the American world in which I grew up. Through them I had a glimpse of Soviet law—that part of it, at least, which had become part of them.

Some of the Russian DP's came to the United States. Among them are two lawyers, a professor of engineering, and an economist, whom I have interviewed at some length concerning their experiences with the Soviet legal system. This is not a traditional technique for securing legal information; it has, however, some distinct advantages, especially in studying the law of another country. I am particularly grateful to Boris Konstantinovsky, who taught law for seventeen years at the University of Odessa, and was also for eleven years general counsel of a large government corporation, the Chief Bread

Trust of Odessa. With a staff of five lawyers under him, Professor Konstantinovsky tried hundreds of cases in the Soviet courts before his evacuation from Odessa by the Germans in 1942. He has helped me throughout the preparation of this book and has confirmed it as an accurate description of the Soviet legal system.

I should like also to express my gratitude for the generous help which many colleagues and friends have given in that very important stage between the completion of the original manuscript and the final revision. Lon Fuller of the Harvard Law School has been of inestimable help not only in improving the style of the book but also in helping me to rethink and reshape some of my own thoughts. Isaiah Berlin, Merle Fainsod, John Hazard, Alex Inkeles, Michael Karpovich, and Sadi Mase have given liberally of their time and their great knowledge of Russia. Suggestions of Clyde Kluckhohn and Talcott Parsons have improved the manuscript at many points. Vladimir Gsovski has written a long criticism and many of his recommendations have been incorporated into the book. Mark Howe has given encouragement and good advice when both were badly needed. Chase Duffy of the Harvard University Press has been a most helpful editor.

Others to whom I am indebted for thoughtful criticism, and in some cases for assistance in research, are Raymond Bauer, Paul Friedrich, Miriam Haskell, Franklyn Holzman, Paul Horecky, Donald Hunt, Alfred Meyer, and Boris Syssoeff, all of whom are or were associated with the Russian Research Center. Helene Teholiz has been a patient and efficient typist. I am especially grateful to the Russian Research Center itself for providing an environment in which men of various disciplines can meet in the study of a common problem.

HAROLD J. BERMAN

Cambridge, Massachusetts
May 1950

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INTRODUCTION

We would like not to have to think so much about Soviet Russia. If it were not for Soviet Russia perhaps we would not have to think so much at all. We might settle back more or less complacently and cultivate our own garden.

We are forced to think about the Russians because of the power struggle going on in the world today. They appear to us primarily as a problem of foreign policy. Yet it is impossible to develop a sound foreign policy toward Soviet Russia on the basis of international politics alone; we cannot estimate what she wants in the world merely from our contacts with her in Germany, Yugoslavia, Iran, China, and other places outside her borders. To understand Soviet aims and methods abroad we are compelled also to concern ourselves with Soviet aims and methods at home. We must be in a position to evaluate the strength and weakness of the Soviet system, and the beliefs and values on which it is founded.

Here law occupies a position of crucial significance, for a legal system expresses in a most vivid and real way what a society stands for. It represents both what is preached and what is practised. It tells what is officially and publicly considered to be right, and what is officially and publicly done when things go wrong. Of course, what is officially and publicly considered and done may conflict with what is unofficially and secretly considered and done. It is surprising, however, how much we can learn from Soviet codes and statutes and reports of cases, as well as from the extensive commentaries and criticisms in Soviet legal periodicals and treatises, about how the system actually works.

From a purely political viewpoint, then, the study of Soviet law has become a matter of urgent practical importance. Certainly we cannot make an enduring peace with Russia, or even a temporary settlement, without some understanding of her legal system—her

concepts of law and justice as well as her actual legal practices. If, however, the avenues of peace are cut off by a new world war then we shall surely have to know Soviet law, since if we win we shall presumably have the task of governing some two hundred million people who have been brought up on it; on the other hand, if the Russians should win we might possibly have to face the not so very pleasant prospect of being brought up on it ourselves.

Behind these considerations of international politics lie issues more profound and more subtle. The power struggle between Uncle Sam and Mother Russia conceals within it a struggle of social systems. "Behind the new equilibrium of force," writes John Condliffe, "stalk the ghostly figures of Karl Marx and John Calvin." Calvin, Locke, Rousseau, Paine, Jefferson—the line runs from the English Revolution of 1640–1689 to the French Revolution of 1789 with the American Revolution coming as a sort of compromise between the two. It was against these "bourgeois" revolutions that Marxism reacted. Lenin and the Russian revolutionaries of 1917 thought of themselves as missionaries of a new social order of world-wide dimensions, in which there would be an end to the economic and political individualism of the eighteenth and nineteenth centuries, based on private property and class domination. "The contest of two systems," of which the Soviet leaders now speak, was conceived originally as a contest within each country. For many in America today it continues to have that aspect. The external threat posed by Soviet power in Europe and Asia serves to dramatize, in many minds, the internal threat posed by powerful labor unions, government control of business, socialized medicine, anticlericalism, Negro equality, or anything else which can with imagination be identified as "Communism."

In investigating the extent to which Soviet law embodies a new social order, we cannot evade the questions posed by the changes which are taking place in our own legal system. It is not true that if Russia did not exist we would have no serious problems. Indeed, the tensions latent in our social order might flare up with far

greater intensity if we could not externalize and objectify them as issues of foreign policy. Soviet law, because it is Marxist and socialist, challenges us to rethink the crucial social and economic questions which confront our own legal system.

Yet Soviet law is not a product of Marxian socialism alone, and the conflict between socialism and free enterprise is by no means the only issue that is posed by the present international struggle. Soviet law is also a product of Russian history. It is Russian law—just as our law is not "capitalist" law, or "democratic" law, but American law. Each system is a mixture not only of socialist and capitalist features, but also of precapitalist elements, stemming from many different periods of past history. Law cannot be neatly classified in terms of social-economic forces. A legal system is built up slowly over the centuries, and it is in many respects remarkably impervious to social upheavals. This is as true of Soviet law, which is built on the foundations of the Russian past, as it is of American law, with its roots in English and Western European history. The differences between Soviet law and American law stem in large part from the polarity which has existed between Russian history and Western history for almost a thousand years. Not only Marx and Calvin, but Protestant kings and Russian tsars, Catholic popes and Orthodox saints, have left their impress on the "contest of two systems."

Because Soviet law is Russian law, grounded in Russian history, it challenges us to rediscover the historical bases of our own law, and to seek a clear understanding of the differences and similarities between the Russian and the Western heritages.

There is a third aspect of Soviet law which deserves a separate identification. Implicit in the Soviet legal system is a new conception of the role of law in society and of the nature of the person who is the subject of law. The Soviet legislator, administrator, or judge plays the part of a parent or guardian or teacher; the individual before the law, "legal man," is treated as a child or youth to be guided and trained and made to behave. I have called this the

"parental" aspect of Soviet law, though it should be understood at the outset that the concept of parentalism does not necessarily imply benevolence. The parent may be a cruel stepmother; the teacher may be a Wackford Squeers. We shall see that Soviet law contains, in its parental aspect, both good features and bad.

"Parental law" is not confined to Marxian socialism or to Russia. Its development has accompanied the increasing centralization of power in all industrial countries during the past fifty years, and the increasing helplessness of the individual and the weakening of the ties of family and of local community. Soviet Russia has probably gone further than any other country, however, in focusing on the role of law as a teacher and parent. Soviet law thus challenges us to examine the potentialities and dangers inherent in parental law.

We might view the whole Soviet legal system analytically, in terms of the needs and interests of a socialist state. We might study the whole system historically, in terms of the characteristic features of Russian society over the past thousand years of its development. We might approach the whole system philosophically, in terms of the parental concept of law and of man implicit in it. It has seemed more fruitful to use these three methods —the analytical, the historical, and the philosophical—as three screens to be placed successively over Soviet law. Under each screen different legal institutions come to prominence. None of the three screens gives a complete picture in itself. Together they may suggest the main outlines of the Soviet legal system as a whole, and its main implications not only for an understanding of Soviet Russia but also for an understanding of law.

PART I

SOCIALIST LAW

I

MARXISM—LENINISM—STALINISM

An American general who served in Russia during World War II has said: "If you want to know what the Russians are going to do next, read Karl Marx." Fortunately or unfortunately, the relation between theory and practice is not so simple. Certainly one could not deduce from the most careful study of Marx's writings the actual provisions of the Soviet legal system, any more than one could deduce from a study of the New Testament the nature of the present-day canon law of the Christian churches. The analogy may be fruitful. The writings of Marx and his collaborator Engels are in effect the New Testament of Communism. Lenin is the Pauline apostle to the gentiles who adapted the gospel to a new generation and a new people. Stalin is the Soviet Emperor Constantine, who made of the new religion a State Orthodoxy.

Marx and Engels claimed to provide a scientific basis for understanding and shaping society and history. There were indeed moral and ethical overtones in their denunciation of "bourgeois" law as "justice for the rich and not for the poor"; but the moral and ethical qualities of their prophecy were to them secondary. They wished above all to be social scientists, seeking the causes of social (and therewith legal) development, attempting to uncover the basic assumptions upon which social systems rest and the forces which make them operate as they do. Their political activities were in their view simply the practical application of their scientific theories.

It was on the foundation of the Marxian analysis of the origin, growth, and decline of societies that the Russian revolutionaries set

out to construct a new social order. Led by Lenin, these men were thoroughly grounded in Marxism and were fanatical believers in its doctrines. Lenin, however, had given the original Marxist theory a new twist and had developed it in new directions. In the years which have followed the events of 1917, there have been other new twists and directions. Soviet Marxism has moved from Marxism-Leninism to Marxism-Leninism-Stalinism.

The official Soviet modification of Marxist theory has been the source of much confusion both inside and outside Russia, both among Communists and non-Communists. On the one hand, Marx and Engels had themselves conceived of their theory as dynamic and subject to development; all knowledge, they said, must be treated not as dogma or as a set of principles but rather as a "guide to further study and empirical investigation" and as a "guide to action." Marxism, according to its founders, is "no doctrine, but a movement." In reinterpreting Marxism and adapting it to the Russian Revolution and the Soviet state, Lenin and Stalin have continually emphasized "creative" as against "dogmatic" Marxism. On the other hand, a philosophy which is susceptible of perpetual revision tends to lose all value as a basis either of criticism or of understanding.

Yet even if our conclusion were to be that the Soviet rulers today only pay lip-service to Marxism and that there is nothing left of the original teachings of Marx and Engels, it would still be true that we cannot understand Stalinist law without first understanding Marxist theory. In the first place, the vocabulary and doctrine of classical Marxism have provided the conceptual framework for Soviet law; Soviet law is *clothed* in Marxism. In the second place, classical Marxism served the Soviet leaders in the first years of the Revolution as one of the chief sources of guidance for their politics and law; the program of the *Communist Manifesto* was actually enacted as statutory law by the new Bolshevik regime. In the third place, with all the changes that have taken place in Russia since 1917, and especially since the mid-1930's, Marxism continues

to serve the Soviet rulers as a means of justification and rationalization of Soviet law, to whatever extent they may have ceased to accept it in fact as the basis for an applied science of society.

Marxism does not "explain" Soviet law. It does, however, provide us with a clue to the explanation. In particular, it helps us to understand what Soviet jurists mean when they speak of their legal system as "socialist" in character; and it helps us to isolate and identify the socialist elements which actually exist in it.

CLASSICAL MARXISM

The method of Marxism was called a century ago, by Marx and Engels, historical materialism. A "materialist" in the Marxist sense is one who views matter, or nature, as the ultimate reality, upon which the ideal and the spiritual depend. Man is a product of nature and is bound by its laws; his thoughts are therefore a reflection of the natural, or material, conditions of his existence. But man must not be viewed in the abstract; he is a social being, living in society, and society, too, is bound by the laws of the natural or material conditions which surround it—its geography and climate, its population factors, but above all its mode of producing food, clothing, shelter, and the other necessities of life. In Marx's words, "The mode of production in material life determines the general character of the social, political, and spiritual processes of life." Man in society has to make a living; he has to produce. Production and the exchange of products are basic. As these change, men's thoughts change, men's politics change, men's laws change. Economic activity precedes and determines social beliefs and values, and also the institutions which manifest those beliefs and values.

Thus law for Marx and Engels is "superstructure," an unconscious or semiconscious ideological reflection of economic relations. "The economic structure of society," wrote Engels, "always forms the real basis from which, in the last analysis, is to be explained the whole superstructure of legal and political institutions, as well as of the religious, philosophical, and other conceptions of each his-

torical period." And again, "The jurist imagines that he is operating with *a priori* principles whereas they are really only economic reflexes."

Plekhanov, who first translated Marx into Russian and was the leading Russian Marxist until Lenin robbed him of that crown, summarizes the progression from "foundation" to "superstructure" as follows:

1. The state of the forces of production.
2. Economic relations conditioned by those forces.
3. The socio-political regime erected upon a given foundation.
4. The psychology of man in society, determined in part directly by economic conditions, and in part by the whole socio-political regime erected upon the economic foundation.
5. Various ideologies reflecting this psychology.[1]

Neither Marx nor Engels (nor Plekhanov after them) denied that the legal superstructure "reacts in its turn upon the economic basis and may, within certain limits, modify it." They emphasized that "ultimately," "in the last analysis," economic conditions are decisive. At the same time they rejected, in Plekhanov's words, "the eclecticism which cannot get beyond the idea of a reciprocal action between the various social forces and does not realise that such reciprocal action between forces cannot solve the problem of their origin." They clung to a monistic formula just because such a formula did provide an explanation of the origin of political-legal institutions and therewith a basis for radical attack upon them. In terms of Plekhanov's progression, it is futile to try to alter "the socio-political regime erected upon a given foundation" while leaving unchanged "the state of the forces of production" and "the economic relations conditioned by these forces." Since law originates in economics, it is necessary to change the whole economy before any fundamental reform of law can be achieved.

It was the Marxist contention, however, that "the state of the forces of production"—that is, the nineteenth-century industrial system—was already in contradiction with the socio-political order,

since the factory represented a "socialist" mode of production, with the workers forming a collective labor force instead of each individually producing for himself, while the socio-political order was based, still, on private property and private enterprise. What really had to be changed, therefore, were the "economic relations," that is, the relations between economic classes.

Economic classes are the medium, in the Marxian scheme, through which economic necessities are transmuted into socio-political institutions such as law. The mode of production (pastoral, manorial, industrial) gives rise to relations of production—relations between those who have appropriated to themselves the means of production (cattle, land, factories) and those who do the actual producing (slaves, serfs, workers). Class—that group which gets its character from its relationship with other classes in the process of production and distribution—determines ideology. Ideology is thus the reflection of class relations; it is class consciousness. On the personal level it is not the individual himself who thinks and acts but the class to which he belongs: he thinks and acts primarily as a nobleman, a merchant, a petit bourgeois, a proletarian. On the social level it is not individuals who govern society but the group that owns the means of production: the state is simply an executive committee of the ruling class.

A historical materialist adds to this sociological perspective the dialectical element of the struggle of opposites. "The world," said Engels, "is not to be comprehended as a complex of ready-made *things,* but as a complex of *processes,* in which the things apparently stable . . . go through an uninterrupted change of coming into and passing out of being." As matter is always in motion, following certain laws of action and reaction, combination and dissociation of atoms, attraction and repulsion of negative charges, so society is dominated by the historical strife, interpenetration, and synthesis of opposing economic classes. The class that controls the means of production depends on the labor of an opposite servant class. As the mode of production changes and the servant

class grows in numbers and strength, the tension between the two main opposing classes increases; finally, out of the cumulation of quantitative changes in the social-economic order (increased concentration of capital, increased impoverishment of the proletariat), there is reached a "nodal" point (depression) when the old order is burst and, with a violent wrench (revolution), a qualitative change (the new socialist society) is produced. "At a certain stage of their development," Marx wrote, "the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before. From forms of development of the forces of production these relations turn into their fetters. Then comes the period of social revolution."[2] So it was with the transition from a pastoral economy to manorial feudalism; so it was, later, when bourgeois capitalism rose to supersede the feudal order; so it is now proceeding with the emergence and development of the industrial proletariat. Thus society moves like a sailboat (to borrow a simile from former President Lowell of Harvard), tacking in first one direction and then in another in order to reach its appointed objective. But the rulers of a given social order resist change; as it becomes more imminent and more crucial, they increase the coercion and oppressiveness of their law, thereby only accelerating the dialectical process which results in their ultimate downfall.

Historical (or dialectical) materialism offers a critique of law rather than a science of law. Marx sought to expose the illusions of social consciousness, as Freud sought to expose the illusions of personal consciousness, in order to free the rational from its bondage to the non-rational. Rights, according to the Marxist, are reflexes of subconscious economic interests. But Marxism, like Freudianism, offers no solution "within the system." Marxism cannot tell a judge whether to qualify a certain act as a breach of contract or a personal injury. It cannot explain why in nineteenth-century capitalist England the doctrine of unjust enrichment was viewed with disapproval

by the courts while in nineteenth-century capitalist America it was accepted. Historical materialism might interpret, for example, the extension of the powers of the federal government over the past thirty years of American history as a device whereby the ruling class has consolidated its power and brought its national political position in line with its national economic position; but it cannot explain why, in particular, the interstate commerce clause of the Constitution should be the legal instrument used for the justification of this extension of federal control, and, more important, it can provide no basis for decision as to how far the interstate commerce clause may be stretched for this purpose without upsetting the constitutional system of a working federalism. Plekhanov admitted this when he wrote (relying on and expanding some statements of Engels) that economic conditions determine the "content" of law though not its "form." But in law, "form" is of the essence.

Engels hinted at the complexity of the process by which law develops in a letter, written in 1890 to the German socialist Conrad Schmidt, in which he said:

> In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is *consistent in itself* . . . And in order to achieve this, the faithful reflection of economic conditions is more and more infringed upon. All the more so the more rarely it happens that a code of law is the blunt, unmitigated, unaltered expression of the domination of a class—this in itself would already offend the "conception of justice" . . . Thus to a great extent the course of the "development of law" only consists: first in the attempt to do away with the contradictions arising from the direct translation of economic relations into legal principles, and to establish a harmonious system of law, and then in the repeated breaches made in this system by the influence and pressure of further economic development, which involves it in further contradictions.

In fact, Engels could not make sense out of the internal developmental structure of a legal system, and at one time he wrote, referring to English law, that there was no point in "wasting one's time on this juridical confusion, this chaos of contradictions."

Classical Marxism thus contents itself with exposing what it conceives to be the ultimate sources of law. In broad terms it states that law is politics, that justice is a cloak for class interests, and that "bourgeois" justice is permeated with conceptions of private property and private contract which exclude the interests of the propertyless masses. Under capitalism, the "formal" equality of individuals is only a mask for the "real" inequality of social classes. Marxist writers cite with relish Anatole France's scornful reference to the "majestic equality of the law" which forbids rich and poor alike to beg in the streets and to sleep under the bridges.

Throughout history man has been imprisoned by the struggle of classes, wherein ideology and law have served only to conceal harsh economic reality. But that is only half of Marxism. The other half is its vision of the future—of the proletariat in the messianic role of standard-bearer of a new classless society, in which mankind will finally have cast off its chains. The proletariat is the last class; with its triumph over the bourgeoisie, and with its extermination of the last vestiges of capitalism, a new society without class antagonisms will emerge. The coercive institutions with which ruling classes of the present and past have held class antagonisms in check and thereby preserved their own dominant position will no longer have any reason for being. There will be no need for state and law, since these are merely instruments for maintaining property relations that will have vanished.

The future classless society was for Marx and Engels not something to be predicted or predescribed, but was rather a logical conclusion from their premises. It derived from their conception of the nature of history as a story of the struggle of classes. Just as theorists of the French Revolution of 1789 had postulated an original state of nature to which democracy, by eliminating prejudice and privilege, would restore mankind; just as Cromwell and the Puritans of the seventeenth-century English revolution had looked back to ancient rights and liberties of Anglo-Saxon and medieval times as the foundation of their attack on royal prerogative and their

vision for the future; just as Luther and the Protestant reformers of the sixteenth century had found their inspiration in an early uncorrupted Christianity existing before popes and emperors had come on the stage of history, and had sought to rebuild the future in the image of that remote past—so Marx and Engels found in the original condition of society a primitive communism which served as a foundation and precursor of the classless society to come. In his *Origin of the Family, Private Property and the State,* Engels built on the theories of the American anthropologist Henry Lewis Morgan in describing the earliest tribal societies as communist in character, with sharing of wives and children, with common ownership of goods, with no special organs of government. Only when a new type of economy developed, according to Engels, did there emerge a division of labor and a class structure. The patriarchal minority appropriated the means of production—cattle and sheep—in the new pastoral economy and created a slave class to do the work. Only then did the family as we know it emerge; only then did property become a legal institution; only then did the state as a special form become necessary as a means of protecting the dominant position of the ruling class.

"The state," declared Engels, "has not existed from all eternity. There have been societies which have managed without it, which had no notion of the state or state power. At a definite stage of economic development, which necessarily involved the cleavage of society into classes, the state became a necessity because of this cleavage." But history repeats itself on newer and higher levels. It is an ascending spiral in which we can find our direction only by looking down at the shadows cast by the curves below us. "We are now rapidly approaching a stage in the development of production at which the existence of these classes has not only ceased to be a necessity, but becomes a positive hindrance to production. They will fall as inevitably as they once arose. The state inevitably falls with them. The society which organizes production anew on the basis of free and equal association of the producers will put the

whole state machinery where it will then belong—into the museum of antiquities, next to the spinning wheel and the bronze axe."

With no class of society to be held in subjection, the state will gradually become superfluous; in Engels' controversial phrase, it will "wither away."[3] The "government of persons" will be replaced by the "administration of things" and the "direction of the processes of production." In the words of the *Communist Manifesto* (1848), "when in the course of development, class distinctions have disappeared, and all production has been concentrated in the hands of a vast association of the whole nation, the public power will lose its political character. . . In place of the old bourgeois society, with its classes and class antagonism, we shall have an association, in which the free development of each is the condition for the free development of all."

It is easy to dismiss this as utopian nonsense. The twentieth century is less optimistic about man than the nineteenth. Certain English liberals, contemporaries of Marx, developed ideas curiously parallel to his. They, too, conceived of law and government as an evil to be surpassed; but they visualized that it would be surpassed by the extension of the free expression of the individual will. As time and enlightenment went on, they believed, social relations would be more and more determined by free contract. In 1937 Roscoe Pound, in discussing this trend in English jurisprudence, noted "the contrast between the idea of a gradual superseding of law by a regime of free self-determination through contract and the idea urged increasingly today of superseding law by a regime of free administrative activity."[4]

Marx and Engels were pessimistic about the past, optimistic about the future. They foresaw a time in which coercion, compulsion, would gradually become unnecessary; when consciousness would at last be freed from economic determinism; when a collectivist society of enlightened materialists would solve all problems rationally and freely. Yet they vigorously denounced utopias and utopianism. Their vision of the future rested, so they thought, not on wishful

thinking but on scientific analysis. Since mankind is in bondage to the "capitalist mode of appropriation"—that is, to private ownership of the means of production—and since that and all other modes of appropriation are destined to be dissolved in a classless society, the days of our bondage are numbered. It is property, ownership, which tempted man at the dawn of history and led to his expulsion from the garden of tribal communism. The future communist society will abolish the exclusiveness of ownership; or, more accurately, the abolition of exclusive ownership and the introduction of social ownership will lead to the future communist society. Private ownership is a legal institution, depending on the sanction of the state; social ownership will be an administrative institution, depending only on public consent.

Classical Marxism is therefore a critique of law and a science of the overthrow of law, a science of revolution. In seeking to explain law, it explains it away. The only solution to bourgeois injustice is to overthrow the ruling class, smash its system of state and law altogether, and introduce a new social order based not on law but on administration. Indeed, this is not only desirable but inevitable. The future will spell out its own details.

However unsatisfactory such a theory may appear to statesmen and lawyers, it found increasing favor among those who identified themselves with the dispossessed, the propertyless masses, to whom it offered both a reason for being and the predestination of greatness. It is, indeed, a kind of New Testament foolishness which makes no sense to those who don't believe in it but a great deal of sense to those who do. It is a kind of foolishness which when once believed, though subsequently modified, rationalized, or even abandoned, nevertheless leaves great consequences in its wake.

LENINISM

Prerevolutionary Marxism went in two directions. In the West, chiefly in Germany, it became a reformist program for waiting out the collapse of capitalism. Engels himself, in his last written work,

seems to endorse a program of legal, democratic reform, and states that "the time of surprise attacks, of revolutions carried on by small conscious minorities at the head of unconscious masses is past."[5] Although the German Social Democrats had their counterparts in Russia, too, in the Mensheviks and the "legal Marxists," it was ultimately a quite different Marxism which, under Lenin's leadership, won the day. Lenin seized on the second half of Marxism—not its economic determinism but its messianism, its eschatology, its faith in the impending triumph of "consciousness," of Reason, over the material conditions of existence. In fact the Communist Party, which was Lenin's creation, was formed as a disciplined conspiratorial elite of superconscious revolutionaries who would lead the "unconscious masses" to power and then, in time, would transform the proletarian dictatorship into a classless socialist society. The proletariat is unconscious, Lenin said, and of itself cannot go beyond trade unionism; it must therefore be pushed from outside by the Party. "The Party," he wrote in 1917 in *State and Revolution,* "must be teacher, guide and leader."

In formulating for the first time a theory of the transitional period of proletarian dictatorship, or, in effect, party dictatorship in the name of the proletariat, Lenin (who had himself been trained as a lawyer and had placed first in the state law examination of 1891) accepted the classical Marxist conception of state and law as instruments of coercion, but called for the use of a new proletarian state apparatus to crush the bourgeoisie. At the same time, the theory of the "withering away" of the state, once the classless society had emerged, was made central to the doctrine of socialism.

The Bolsheviks despised the legalism of the West—the legalism of both the capitalists and the socialists. Under War Communism (1917–1921), the New Economic Policy (1921–1928), and the First and Second Five-Year Plans (1929–1937), Soviet jurists elaborated the thesis that law is in its very essence a bourgeois fetish. "The feudal state was a state by divine grace, a *religious* state. The bour-

geoisie called its state a *legal* state. Religion and law are the ideologies of oppressing classes, one gradually replacing the other. And if we ought now at the present time to contend with the religious ideology, then we ought to a far greater degree to contend with the legal ideology." So wrote Goikhbarg, one of the leading Soviet jurists, in 1924.[6]

Under the leadership of Eugene Pashukanis, a new Soviet jurisprudence was created, which explained all law as a reflection of the market. The economic traders who exchange commodities in the market require a legal system for the enforcement of their transactions; they therefore identify themselves as juristic persons, "right-and-duty-bearing units," who, primarily through the medium of contracts, create reciprocal legal relations which express their reciprocal economic relations. The cornerstone of law is John Doe, the abstract individual, who by entering into transactions with other individuals creates mutual rights and duties. This John Doe is nothing but the legal version of economic man. Just as a commodity is an abstraction expressing the commensurability of all things in the market, so a right is an abstraction expressing the commensurability—or reciprocity—of relations in the law court. Law rests on the intentional voluntary conduct of individuals dealing with each other on a reciprocal basis.

According to Pashukanis, the agreement of the intention of the parties, which is the foundation of contract law, is at the same time the foundation of all other branches of the legal tree. It enters into labor law, where the relationship between labor force and management is viewed as a series of individual employer-employee contracts; it enters into family law, where marriage is treated as a contract and even the parent-child relationship is considered in terms of mutual rights and duties; it extends to criminal law, which originally was based on retribution (an eye for an eye), then passed through a stage of money composition, and now rests on a sort of bargain between the state and the individual whereby a particular

act is given an equivalent punishment, regardless of the social-economic implications involved; even in constitutional law Pashukanis saw the idea of government by consent, "social contract," as underlying a political order based on an alleged harmony of individual expressions of will. Thus all law is, in essence, commercial in character; all law presupposes the reasonable prudent individual who engages in arm's length transactions with other equally abstract legal entities.

Of course Pashukanis saw in this a cloak for bourgeois class interests. But he claimed to go deeper into the nature of law than any Marxist hitherto. He was concerned with law "not so much as an ideological process (*i.e.*, one that belongs entirely in the history of ideas, outlooks, *etc.*) but much more as a real process of the legalization of human relations, which accompanies the development of a goods-and-money economy (in Europe a capitalist economy) and brings with itself thorough-going all-round changes of an objective nature. Thereto belong the origin and fortification of private property, its universal extension both to subjects and to all possible objects, the emancipation of land from relations of lordship and vassalage, the transformation of all property into movable property, the development and dominion of relationships of obligation, and finally the separation of political power as a special force—standing next to the purely economic force of money—and, following from that, the more or less sharp separation of spheres of public and private relations, public and private law."[7]

Thus law is in its very essence a capitalist, or bourgeois, institution. It may exist in embryonic form in feudal or slave societies, but essentially those societies are religious or military in character. "Law reaches its highest point of development under capitalism," wrote Pashukanis in 1930. To speak of "proletarian law" is therefore incorrect. The proletarian state may use bourgeois law, and must use it insofar as vestiges of the capitalist economy remain; but it cannot develop proletarian law, since law is by its nature based

on individualism and contractualism. In saying that the legal system to be used by the interim proletarian state is at bottom a "bourgeois" system, Pashukanis could rely on the authority of both Marx and Lenin.

With the abolition of the market and of economic individualism there will come, in Pashukanis' words, "the withering away of law in general, that is, the gradual disappearance of the juridical element from human relations." Here, too, Pashukanis could rely on the works of Marx and Lenin, though he extended their general theory of politics to the field of law, with which they had concerned themselves only slightly. But this was not only Pashukanis' idea; it was shared by his colleagues. Stuchka, President of the Supreme Court, wrote in 1927 that "Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will disappear altogether."[8]

The men who preached this conception of law were not only the theoreticians of the new Soviet regime but also the compilers of its codes, the chief judges of its courts, the heads of its legal profession, the commissars of justice. At first, in accordance with their theories, law tended to die out. Later, with the partial restoration of capitalism under the New Economic Policy, there was a restoration of what was frankly conceived as "bourgeois" law. When the period of the Five-Year Plans was introduced in 1928, the revolutionary offensive against law as such was resumed. Not until 1937 were the theories of Pashukanis renounced, and with their renunciation came the revision of practically every branch of the Soviet legal system.

SOVIET LAW UNDER WAR COMMUNISM, 1917–1921

In the first years of the Revolution, the Soviet leaders, believing in the imminence of world-wide socialism, strove to rid their country of every vestige of capitalism. Much of what they did was the

product of emergency: war raged against counterrevolution from within and intervention from without. However, they attributed to their responses a more lasting significance.

Nationalization and socialization proceeded at a rapid rate. Private ownership of land and the means of production was abolished. A Supreme Economic Council was established for the public management of business, and its agencies not only supervised but actually operated the confiscated industries. Private trade in consumers' goods was prohibited. Inheritance was declared to be abolished. The distribution of commodities by ration cards, the payment of wages partially in kind, and the carrying on of moneyless transactions between state business enterprises seemed to herald the dawn of pure communism. Particularly, the establishment of a system of general compulsory labor and of appropriation of farm surpluses in the villages led to the belief, expressed by Lenin in May 1918, that "our Revolution has succeeded in coming to immediate grips with the practical realization of Socialism." "We are fighting for the principle of communist distribution," he announced in 1918 in regard to the decree establishing the People's Commissariat of Food Supplies. "We are approaching the complete abolition of money," Zinoviev claimed in 1920. According to Trotsky, "the Soviet government hoped and strove to develop these [early] methods of regimentation directly into a system of planned economy in distribution as well as production. In other words, from 'war communism' it hoped gradually, but without destroying the system, to arrive at genuine communism." Trotsky explains this by "the fact that all calculations at that time were based on the hope of an early victory of the revolution in the West."

The first Constitution of the Russian Republic, enacted in 1918, explicitly declared: "The basic task of the Constitution . . . at the present transitional moment is the establishment of the dictatorship of the city and village proletariat and the poorest peasantry in the form of a powerful All-Russian state authority for the purpose of complete suppression of the bourgeoisie, the destruction of exploitation of man by man, and the installation of *socialism, under which*

there will be neither division into classes nor state authority" (italics supplied).

As for the traditional apparatus of political and legal institutions, the first efforts of the Soviet regime were directed chiefly toward their destruction, and toward their replacement, as Lenin had prophesied in *State and Revolution,* by a proletarian state operating through a system of "accounting and control." A Council of People's Commissars, seventeen in number, was established to manage the affairs of the new republic; it had almost absolute governmental power in fact, though according to the 1918 Constitution it was responsible to a Central Executive Committee of not more than two hundred members, which in turn was responsible to a Congress of Soviets, composed of representatives of local soviets. The previously existing system of courts was dissolved and new People's Courts instituted, with the instruction that they were to be guided by "revolutionary legal consciousness" wherever there was a gap in the decrees of the workers' and peasants' government. The practice of law was at first opened to "all who enjoy civil rights"; but this attempt to abolish the legal profession as such was soon rejected in favor of the establishment of a body of legal representatives appointed by the local government organs on a salary basis, with clients' fees to be collected by the state treasury. In fact, during this period the regular courts functioned very little. For civil litigation there was not much occasion, and criminal law was largely in the hands of the notorious Cheka and of special revolutionary tribunals set up to deal with such crimes as organized insurrections, sabotage against the government, and willful destruction of necessities. These revolutionary tribunals enforced what was officially called the Red Terror. They were instructed to be guided "exclusively by the circumstances of the case and by revolutionary conscience." The People's Commissariat of Justice enacted in 1919 certain "Leading Principles of Criminal Law," which stated:

> In the interests of economizing forces and harmonizing and centralizing diverse acts, the proletariat ought to work out rules of repressing its class enemies, ought to create a method of struggle with its enemies and

to learn to dominate them. And first of all this ought to relate to criminal law, which has as its task the struggle against the breakers of the new conditions of commonlife in the transitional period of the dictatorship of the proletariat. Only with the final smashing of the opposing overthrown bourgeois and intermediate classes and with the realization of the communist social order will the proletariat annihilate both the state as an organization of coercion, and law as a function of the state.[9]

Apart from the "Leading Principles of Criminal Law," the new regime produced a Labor Code, to signalize the victory of the workers over the capitalists, and a Family Code, to free marriage, divorce, and other domestic relations from the control of the churches. This, it was thought, was sufficient.

The spirit of Soviet law in these first years was thus a spirit of nihilism and of apocalypticism—of ruthless destruction of prerevolutionary law and of glorious transition to a new order of equality and freedom *without* law. It was the spirit of Cheka and the spirit of anarchism in its literal significance. In spite of Lenin's warnings against "the sickness of leftism," the new Soviet law was afflicted with that congenital revolutionary disease.

With the end of intervention and civil war, and with the failure of the revolution in the West to materialize, the hope of transforming "war communism" into "genuine communism" proved illusory. The "heroic period" was completely bankrupt. Production and distribution both were at a standstill. "We went too far on the path of nationalization of commerce and industry, and in the suppression of local trade," Lenin stated in April 1921; "was it a blunder? Yes, without question." The whole program of War Communism, he now said, "was but a temporary measure." And so the New Economic Policy, or NEP—a "strategic retreat," a "bourgeois" restoration.

SOVIET LAW UNDER THE NEP, 1921–1928

The NEP was a mixed system, neither capitalism nor socialism. On the one hand there was the reappearance of money, of private trade,

of well-to-do peasants (kulaks), of private business managers operating under state licenses (nepmen). The system of surplus appropriation of farm produce was replaced by taxes in kind. Foreign firms were invited to do business in Russia on the basis of "concessions." In 1925 the hiring of labor and the renting of land was legalized for agriculture. On the other hand there was strict supervision of these capitalist elements in the interests of the proletarian dictatorship. Kulaks and nepmen were restricted, disfranchised, heavily taxed. A large "socialist sector" of industry—the "commanding heights" of banking, insurance, large-scale transport, production of raw materials, foreign trade—remained in the hands of the state. The state continued to own the land and to distribute it according to use; it continued also to own the means of production and to fix prices. As early as 1923 wholesale private trade was again prohibited, leaving only retail trade in the private sector. This was a new strategy but toward the same end: it was visualized that from the commanding heights the whole economy would gradually be socialized.

Since the market was restored, however, it followed with ruthless logic that there would have to be a restoration of bourgeois law—there being no other kind. Lenin therefore sent his jurists to the German, Swiss and French codes, as well as to the prerevolutionary Russian codes, to copy their provisions and to adapt them to the new Soviet conditions. It is said that he demanded that they produce a new Civil Code in three weeks. Actually, it was written in the record time of four months.

In 1922 and 1923 there appeared a Judiciary Act, a Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure, Land Code, and a new Labor Code. The Family Code of 1918 remained in force until it was replaced by a new Family Code in 1926. In 1926 a new Criminal Code was also enacted. These codes gave Soviet Russia a legal system which on paper and in its main outlines is basically similar to that of the countries of continental

Europe, differing from that of England and the United States in technique but not in essence.[10]

The Judiciary Act established a hierarchy of courts and a system of trials and appeals familiar, with variations, to all Western countries. Its most unusual feature was the provision for trial by a three-judge court, with two of the judges, called people's assessors, chosen from the general population for a ten-day period.[11] The individual lawyer-client relationship was restored, subject to certain restrictions. The Civil Code dealt in traditional terms with such matters as legal capacity, persons, corporations, legal transactions, statute of limitations, property, mortgages, landlord and tenant, contracts and torts, unjust enrichment, inheritance. Ownership was defined in Napoleonic terms as "the right to possess, to use, and to dispose of" one's property. Contracts were required to include agreement on the subject matter of the contract, the price, the time for performance. No American lawyer would be shocked by the provision that "by the contract of sale one party (the seller) undertakes to transfer property to the ownership of another party (the buyer), while the buyer undertakes to accept the property and to pay the price agreed upon." In criminal law there were established the usual general provisions concerning complicity, attempts, juvenile delinquency, insanity, self-defense, and so forth; in addition, the so-called "Special Part" of the code listed minimum and maximum penalties for various crimes grouped according to their common objects, such as crimes against the state, crimes against the administrative order, crimes by officials, crimes against property, crimes against the person, and so forth. In family law the civil registration of marriage and divorce was introduced into Russia for the first time in the 1918 Family Code, and the legal status of women was made equal in every respect to that of men. The new Labor Code restored the voluntary character of employment on a contractual basis.

With the formation of the various republics into a federal union in 1923, a new all-union constitution was enacted, establishing on paper a system of representative government which had certain

important features in common with democratic systems generally.

On the other hand, to safeguard the interests of the proletarian dictatorship and in anticipation of the transition to classless socialism, the NEP codes made certain revolutionary innovations. In civil law it was provided that any legal transaction "directed to the obvious prejudice of the state" shall be invalid and that any profits which have accrued from such a transaction shall be forfeited to the state as "unjust enrichment." In criminal law the doctrine of analogy was formulated: abandoning the French Revolutionary principle of "no crime, no punishment without a [previous] law," the code permitted sentence for an act not directly prohibited but analogous to an act so prohibited. More than that, the General Part of the Criminal Code made the entire criminal law hinge on "social danger" and "measures of social defense," rather than on crime and punishment as such. Throughout all branches of law, the underlying principle for the decision of doubtful cases continued to be "revolutionary legal consciousness"—a phrase which gained meaning from the conscious policy of discrimination against nonproletarians and persons of nonproletarian origin in both private and public law, as well as from the actual domination of the Communist Party behind the façade of a democratic structure.

Perhaps the most striking provision of NEP law is the famous Article 1 of the Civil Code: "Civil rights shall be protected by law except in instances when they are exercised in contradiction with their social-economic purpose." By this overriding principle (subsequently copied, as was the doctrine of analogy, by the Nazis) an attempt was made to counteract the absolutist and conceptual character of the private rights granted in other sections of the code. A man could own his house, but if he had an extra room in it he could be required to take in a tenant; a mill could be leased to a private individual, but if he failed to operate it for a certain period in order to avoid taxes, it could be taken away from him; an owner of a boat had full rights of possession, use, and disposition over it, but if another man seized it in order to rush his wife to the hospital the

owner might be given no relief against the trespasser, on grounds of "social-economic purpose." Thus Article 1 brought back in through the window what had been shown out through the door. Yet Article 1 itself involved a concession: it provided an article of the code on which to rely, and it accepted the dualism of private rights and public policy.

"We look at the court as a class institution, as an organ of government power, and we erect it as an organ completely under the control of the vanguard of the working class," wrote Krylenko, later People's Commissar of Justice, in 1923. "Our judge is above all a politician, a worker in the political field." If so, why erect this elaborate structure of rights and procedures? Because, in the words of the same author, "a club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court." The proletarian dictatorship needs this most efficient weapon to protect its position in the transition period of a mixed economy. But the transition period moves forward toward socialism, and the proletarian dictatorship adapts bourgeois law to serve not only its immediate interests but also its ultimate goal. Thus the NEP codes contain many provisions which are "revolutionary" not merely in the sense that they are useful to the revolutionary state, but also in the sense that they implement the revolutionary vision of a classless socialist order. In family law, the era of the post-card divorce was inaugurated,[12] and in many cases the courts accepted *de facto* cohabitation and separation as the ultimate criterion of marriage and divorce. In regard to liability for personal injury, the element of fault was minimized if not entirely eliminated: "Our code does not view the fault of the person causing the injury as essential for the imposition of liability," stated Goikhbarg, the principal author of the Civil Code. This followed from the assumption that "compensation for injury is, generally speaking, an institution beneficial to the workers" and that therefore "it is necessary to give extensive interpretation to the liability of the person causing the injury (except where the liability of the state is involved), and a narrow construction to rules permit-

ting the defendant to escape liability." A similar social policy underlay the code provision that "where a person, under the pressure of distress, concludes a transaction clearly unprofitable to him, the court, on the petition of the damaged party, or on the petition of a proper government agency or social organization, may either declare the transaction invalid or preclude its operation in the future."[13]

The character of these and other revolutionary innovations introduced in the Soviet codes remained obscure to outsiders (and to many insiders as well) who failed to appreciate the centrality of the "withering away" theory. People like Duguit in France, the exponent of the theory that "social solidarity" is paramount to all law, and that the protection of "social functions" should replace the enforcement of individual rights, hailed the new features of Soviet law as steps toward "liberalizing" and "socializing" law. As a matter of fact they were conceived by their authors as steps toward the elimination of law.

SOVIET LAW UNDER THE FIRST AND SECOND FIVE-YEARS PLANS, 1928–1937

In 1928 the NEP compromise was abandoned; total planning was inaugurated as a means of rapid industrialization, collectivization, and militarization. Gradualness was replaced by a gigantic leap. The basic decision which the Soviet leaders made at that time was not only economic, but also political and social. The NEP could not meet the need for large-scale mechanized agriculture except by increasing the landholdings of the kulaks and this, it was felt, would threaten the entire socialist character of the Revolution, and perhaps the political position of the regime. Large-scale mechanized agriculture was necessary for a program of rapid industrialization, which in turn was essential if the Soviet Union was to "overtake and surpass" the West. "Those who fall behind get beaten," said Stalin in 1931. Indeed, he gave Russia just ten years from that time to match the industrial might of the most advanced Western countries, "or we shall be defeated again." And so the Five-Year Plan was launched, replete with military phraseology, with "assaults on

fortresses," "communiques," the "labor front," the "collective farm front," "shock brigades," and so on.

This was War Communism revisited, but now independent of world revolution. Politically and socially, the speedy transformation of the Soviet Union into a classless society was again envisioned. At the Communist Party Conference which approved the draft of the Second Five-Year Plan in 1932, Premier Molotov stated: "The leading idea of the Second Five-Year Plan is that all classes and their causes are to disappear by 1937 in the U.S.S.R." The Party Conference declared: "The chief political task of the Second Five-Year Plan is to do away with the capitalist elements and with classes in general; to destroy fully the causes giving rise to class distinctions and exploitation; to abolish the survivals of capitalism in the economy and the consciousness of the people; to transform the whole working population of the country into conscious and active builders of a classless society." This explicitly included the aim of "destroying the difference between the worker and the peasant," who were now to become a single body of urban-and-rural proletariat, not a class in the Marxist sense because of the absence of exploitation, because of the social ownership of the means of production, and the social character of the Plan.[14]

Now for the first time positive content was given to the Marxist idea of the disappearance of state and law under socialism. It was thought that Law, an instrument of the class-dominated state, would be replaced by Plan, the manifestation of the will of a classless society. Through the Plan all the characteristics of the original Marxist dream would be realized. Planning would eliminate exploitation; money would be transformed into a mere unit of account; private property and private rights generally would be swallowed up in collectivism; the family would disappear as a legal entity, with husbands and wives bound only by ties of affection and children owing their allegiance and their upbringing to the whole society; crime would be exceptional and would be treated as mental illness; the coercive machinery of the state would become superfluous.[15]

The Plan would give unity and harmony to all relations. The Plan itself would differ from Law, since it would be an instrument neither of compulsion nor of formality but simply an expression of rational foresight on the part of the planners, with the whole people participating and assenting spontaneously. Society would be regulated, administered—much as traffic at an intersection is regulated by traffic-lights and by rules of the road; but in a society without class conflict there would be few collisions and to deal with them it would be unnecessary to have a system of "justice." Social-economic expediency would be the ultimate criterion; disputes would be resolved on the spot.

The legal developments which accompanied the so-called Second Revolution of the early 1930's may be better understood if viewed in the light of two controversies which shook Soviet theory and practice at the time of the introduction of the First Five-Year Plan. One of these controversies was in the field of economics; the other was in the field of philosophy. They were closely interrelated, and their outcome was fateful for the progress of Soviet law.

The economic controversy arose over the crucial question of the rate of industrialization. One group of economists, called the "geneticists," argued that the basic problem in working out a rational plan for the whole economy was that of determining "the conditions of economic equilibrium," and that unless equilibrium relations were respected the Plan would fail. Concerned with the harmful effects upon the peasantry of too fast a pace of industrialization, the geneticists stressed the existence of certain objective factors which could not be altered by planning. They urged that economic laws not be disregarded, and said that the Plan should be used as a means of projecting or "extrapolating" trends. Their opponents, called "teleologists," argued an approach in terms of purpose, rather than origin. They said: "The primacy of teleology was determined for us as far back as the days of the October Revolution when we acted contrary to the 'eternal laws' of capitalist development." The Revolution had "abolished economic laws." "Our

task is not to study economics but to change it," wrote one of their leaders. "We are bound by no laws. There are no fortresses which Bolsheviks cannot storm. The question of tempos is subject to decision by human beings." Needless to say, the teleological doctrine became official; the geneticists were damned as "Right Opportunists," and were associated with Bukharin and the opponents of the Plan.[16]

A parallel controversy raged in the field of philosophy between the "mechanists" and the "dialecticians." Here again the name of Bukharin, the leading theoretician of the NEP, was prominent. Building on Bukharin's conception of a social order as a balance or system of forces which is only changed by the application of some outside force, the mechanists viewed the main task of society as that of adapting or adjusting to its environment. They argued for a determinism which excluded both chance and self-movement. They derived their social ideas from a conception of nature or matter as fundamentally mechanical in character, consisting of rigid or fixed elements which are in equilibrium until moved by some external cause. Against this philosophy the proponents of the dialectical approach started not with fixity but with motion. They viewed society as capable of moving itself and of thereby transforming its external environment. Thus like their brothers the teleologists, they stressed the power of human will and activity. In effect the mechanists were saying that man must accept the inevitable, while the dialectical view was that man can anticipate and shape the inevitable. The difference was as crucial as that which separates the Mohammedan view of Fate from the Calvinist belief in Predestination.

Both the economic and the philosophical controversy involved the use of the concept of law. The geneticists and the mechanists, in emphasizing the determinist elements of Marxism, warned against the dangers of violating economic and social laws; the teleologists and the dialecticians said that the Five-Year Plan had already introduced "a different order of lawfulness," in which man was at last master of his own destiny. The concept of economic or

social law, as an observed regularity, is, of course, different from the concept of law in the "legal" sense, as a rule or norm which is mandatory in character and to which the idea of rightness attaches. Nevertheless there is a connection between these two concepts. A law of either sort is something upon which one can depend; it connotes stability, that which is "laid."

The victory of the teleologists and dialecticians therefore had great relevance to the problem confronted by the legal theorists when the Five-Year Plan began to render a great deal of NEP law obsolete. The acceptance of the idea that "plan" should gradually replace "law" was a renunciation of stability for dynamism. Pashukanis, in restating and adapting his earlier views to the new situation, declared in 1930: "Unquestionably the fundamental fact from which our work should now start is that we are entering upon the period of socialism." It would be foolish, he said, to try to substitute for the "bourgeois" law of the NEP a new "proletarian" law, since the new period of direct transition to socialism was not a social-economic stage in itself; it was rather a time of rapid changes which could not be crystallized in the form of a legal system but must be shaped by ever-shifting social-economic policy. "That which we need more than anything else," he continued, "is political elasticity." By elevating the transition period into a "final system," the proponents of a new legal order only "hold development back."

Pashukanis wrote:

> The relationship of law to politics and to economics is utterly different among us from what it is in bourgeois society . . . In bourgeois-capitalist society, the legal superstructure should have maximum immobility—maximum stability—because it represents a firm framework of the movement of the economic forces whose bearers are capitalist entrepreneurs . . . Among us it is different. We require that our legislation possess maximum elasticity. We cannot fetter ourselves by any sort of system . . . Accordingly, at a time when bourgeois political scientists are striving to depict politics itself as law—to dissolve politics in law—law occupies among us, on the contrary, a subordinate position with reference to politics. We have a system of proletarian politics, but we have no need for any sort of juridical system of proletarian law . . .

We have a system of proletarian politics and upon it law should be oriented. Once we even wished to arrange the curriculum so that, for example, the course in land law would be replaced by a course in land *policy* and law, because among us law can play no independent and final part: this was the design when War Communism was going out. During the years of the New Economic Policy and of the rehabilitation period, the system of codes was introduced and began again to develop, and at the same time attempts to pack and to tie all law into a system were renewed. Now, when we have passed to the reconstruction period, the utmost dynamic force is essential . . . Revolutionary legality is for us a problem which is ninety-nine per cent political.[17]

The other leading Soviet jurists echoed these views. Vyshinsky, then Procurator (Attorney General) of the USSR, wrote in 1935: "The formal law is subordinate to the law of the revolution. There might be collisions and discrepancies between the formal commands of laws and those of the proletarian revolution. . . This collision must be solved only by the subordination of the formal commands of law to those of party policy."[18]

How should the policy of the transition period be determined and to what would it lead? Pashukanis' answer is simplicity itself. "The social-economic conception for whose sake the proletarian dictatorship exists and actively manifests itself is socialism and communism." "Of course when this dominant (socialist) sector shall have absorbed everything, the disappearance of law will begin forthwith. How can you wish to build a final legal system when you start from social relationships which already involve the necessity that law of every sort wither away?"

Of course Pashukanis did not advocate that during the transition period the coercive machinery of the state should be weakened. He accepted the statement made by Stalin in 1930: "We are in favor of the state withering away and at the same time we stand for the strengthening of the dictatorship of the proletariat, which represents the most powerful and mighty authority of all forms of the state which have existed up to the present day. The highest possible development of the government power with the object of preparing

conditions for the withering away of government power, this is the Marxist formula. Isn't it 'contradictory'? Yes, it is, but this contradiction is a living thing, and completely reflects the Marxian dialectic."

But the strengthening of the power of the state does not necessarily involve the concomitant strengthening of the legal system. This, in fact, was Pashukanis' point. Law, for him and for Soviet jurisprudence generally, is only one of the possible means of social control. Social control in itself is not synonymous with law. "The idea of absolute obedience to some external authority establishing rules (a norm-creating authority) has nothing to do with law," according to Pashukanis. Indeed, as Vyshinsky said, a law may conflict with the interests of the state. It is not illogical, therefore, given their premises, that during the period of "direct transition" to socialism in the early 1930's Soviet lawyers and judges and prosecutors, though advocating absolute obedience to a strong state, nevertheless actively anticipated and fostered the withering away of law, that is, "the gradual disappearance of the juridical element from human relations."

The First and Second Five-Year Plans were chiefly directed toward the replacement of private commerce and individual farming by a totally planned economy. This policy took precedence over all the provisions of the codes and all the previously admitted principles of legal order. The collectivization of agriculture, for example, was carried out with an unabashed disregard for legality. There were, of course, statutes authorizing collectivization, but they gave very broad powers to local administrative authorities to confiscate the entire property of kulaks, including personal belongings, and to deport them. "Provisional extraordinary measures are permissible," said Stalin. When the ruthlessness of collectivization had gone too far, Stalin, whose only official position was that of Secretary of the Communist Party, published an article entitled "Dizzy with Success," warning party members that the program was being pushed too fast; as a result of this article alone, the pace of collectivization

slowed down. Here was an example of pure policy-making, without benefit even of legislation.

In the domain of industrial production and distribution, relations between economic units were governed during this period to a large extent by *ad hoc* rules and decisions of administrative organs, with strict subordination of lower to higher links. The Plan was the foundation upon which these rules and decisions rested. In 1931 the so-called State Board of Arbitration (Gosarbitrazh), established to resolve conflicts arising between state business enterprises, was reorganized. Gosarbitrazh now looked primarily to the Plan for guidance and was not bound by the Civil Code. The "local contracts" which were the subject of dispute before the arbiters were for the most part merely a detailization of "general contracts" made between the chief administrations of the various commissariats. They were interpreted in the light of economic expediency, as administrative acts, rather than according to the intent of the parties.

Many parts of the Civil Code became obsolete and the whole of it was treated with considerable disdain. In the law schools courses in civil law were dropped; instead "economic-administrative law" was taught, emphasizing the problems of public regulation of economic relations. John Hazard, who studied Soviet law at the Moscow Juridical Institute during this period, reported that "law concerning the rights of individuals was relegated to a few hours at the end of the course in economic-administrative law and given apologetically, as an unwelcome necessity for a few years due to the fact that capitalist relationships and bourgeois psychology had not yet been wholly eliminated."[19]

Drafts of new criminal codes which appeared annually from 1930 to 1935 minimized the element of personal guilt and modified the "bourgeois" system of a fixed scale of punishments corresponding to the gravity of the acts committed. These draft codes, though not officially adopted, actually guided the courts in their decisions; behind them was the authority not only of Pashukanis but also of

Krylenko and many others. A Soviet legal treatise of 1935 considered liability for injuries as "in the nature of a supplement to the system of social insurance [which] is regulated by adapting the principles of the latter . . . where the injury is not covered by it."

Of course many cases continued to come before the courts and to be decided on the basis of conventional principles of law. Also the supreme courts, through decisions and directives, attempted to raise the judicial standards of the lower courts. But the general deterioration of the legal system was strikingly evident. Law schools decreased in number and law students even passed resolutions questioning the necessity of continuing their studies. There was no future in it! High officials of the People's Commissariat of Justice said in 1930 that in six or seven years at the most all litigation, civil or criminal, would disappear. It is said that some judges actually closed their courts in anticipation of this occurrence.

With the decline in the role of law went an increase in the role of other means of social control. It was in this period that the basic system of party, police, and administrative controls was elaborated. The Communist Party during the early thirties underwent a process of complete centralization; Stalin consolidated his own power position and that of the Politburo over the Central Committee of the Party and over the Party Conference and the Party Congress. He did this in part through the People's Commissariat of Internal Affairs—the NKVD—which at this time achieved its full development as an effective instrument of police repression and terror.[20] Finally, this was the period in which a new managerial-administrative class was created to direct and operate the planned economic order. The Party, the secret police, and the administrators had of course existed at the start; with the drive for rapid industrialization and total planning, their role was enhanced and their structure established.

STALINISM

In 1936 the original Marxist vision of a classless socialist society in which "the public power will lose its political character" was of-

ficially recognized as impossible of achievement in the foreseeable future. It was not officially denied that for the world as a whole such a social order is desirable and that ultimately it will come. As far as Soviet Russia was concerned, however, it was proclaimed in 1936 that a socialist society had indeed finally been achieved, that the transition period to socialism was at last over, that such classes as existed (the workers, the peasants, and now a third "stratum" hitherto not distinguished by the Soviets—the intelligentsia) were "friendly" classes, not "hostile" or "antagonistic" economic classes in the Marxian sense; but instead of the withering away of state and law, of money and property, of the family, of criminal sanctions, and the rest, there was a wholesale restoration of these institutions on a new "socialist" basis. Nor will they disappear, it was later said, when Soviet Russia has moved from socialism, the first stage of the classless society, where each "receives according to his work," to communism, the final stage, in which each will "receive according to his need." The formal reason given for this radical departure from earlier Marxist and Leninist doctrine was the existence of socialism (and eventually communism) in one country; surrounded by capitalist powers, Soviet socialism requires the protection of a state, and the state in turn requires law. But such a reason is theoretically inadequate to explain the fact that the new classless (or class-conflictless) socialist state, supported by classless socialist law, now came to be treated not as a necessary evil but as a positive good.

Since the mid-1930's the Soviet regime has restored the traditional institutions of social stability, one after the other. The full extent of this restoration has not generally been appreciated. It has been obscured in the first place by the violent mass purges which accompanied it, though these must be understood in part as the liquidation of those groups which were identified with the prerestoration conceptions of socialism. It has been obscured, secondly, by the war and the prewar preparations, which some have interpreted as giving a temporary emergency character to Soviet internal developments

since the mid-1930's; yet the direction of these developments has not fundamentally changed in the postwar period. The restoration has been obscured, finally, by the Soviet fiction of continuity, which represents Russian history since 1917 as a single advance "according to Marx" and which dismisses past inconsistencies as due to the "Trotskyite" aberrations of wreckers and saboteurs.

To whatever aspect of the Soviet social order one turns, however, one finds a fundamental shift of emphasis since the years 1934, 1935, and 1936.

1. *In its cultural aspect,* Soviet society returned then to a sense of tradition, to Russian history, to patriotism—not simply as a matter of wartime propaganda, but primarily because of the need for a sense of continuity with the past which made itself felt independently well before the outbreak of hostilities. Stalin began to compare himself to Peter the Great; the leading role of the Great Russian people both before and after the Revolution was reëmphasized; a trend away from internationalism was inaugurated which has culminated in the postwar period in bitter attacks upon "cosmopolitanism." The "International" has been dropped as the national anthem and replaced by a new "hymn" beginning with the words: "Unbreakable union of free republics welded together by the great Rus"—Rus being the historic name for old Russia. The names that "smacked of Revolution" have gone: people's commissars are now ministers, the Red Army is the Soviet Army.

In part, this "ideological" change was undoubtedly a response to the apparent failure of the earlier Marxist-Leninist internationalism to command the support of the people, either at home or abroad, after twenty years of the most intense propaganda efforts. In part it was a realistic acceptance of the fact that the Russian past had actually survived into the present, and that the more the Bolsheviks changed the face of Russia the more it remained the same.

Similarly, strong bonds of family life, legal and economic as well as spiritual, have been restored—again, not simply to increase the birth rate, but primarily because the disintegration of the family

which was threatening under the original conception, especially in the cities, was endangering the stability of Soviet social relations. By 1935, for example, juvenile delinquency had increased to an alarming extent, and harsh legal measures were taken to deal with it; in Moscow and other cities the rate of abortions was higher than the rate of births, and in 1936 it was prohibited to perform abortions except in unusual cases (as when the mother had a serious disease which could be passed on to the child); the number of registered and *de facto* divorces was extraordinarily high, and in 1936 graduated fees were imposed for the registration of successive divorces. Ultimately, in 1944, a judicial process of divorce was established for the first time since the Revolution. As with the restoration of Russian tradition, so with the restoration of the family, the change was both a response to a crisis and a realistic reappraisal of older doctrine.

The same may be said of the new policy toward the Church which began in the mid-1930's. The failure of the so-called "Five-Year Plan for the elimination of religion" was by then obvious and admitted. Yaroslavsky, head of the League of the Militant Godless, reported in 1937 that two-thirds of the adults in the villages and one-third in the cities still believed in God, and he asked for more funds for the work of his organization. Not only were his requests not granted, but the League declined rapidly in importance and was ultimately abolished. The 1936 Constitution enfranchised the clergy. In 1937 wage penalization for attendance at religious festivals was discontinued. In 1940 the seven-day week was restored, with Sunday as a common day of rest. The role of the Church as having a legitimate part to play in the life of the people (but not of the Communist Party) has been recognized, antireligious publications have been discontinued, a few church seminaries have been opened, many thousands of new churches have been licensed, monasteries have been exempted from taxation, a religious periodical is published —not to satisfy American public opinion, but primarily to satisfy Soviet public opinion; not because the Russian Church is weak but

because it is strong. That Stalin and the Party remain ardently atheist in principle only bears witness to the fact that the new policy has been based on practical social needs.[21]

2. *In respect to the Soviet economy,* there was likewise a fundamental revision of theory and practice in the mid-1930's, based upon a breakdown of the older theory and practice. The First and Second Five-Year Plans had succeeded in industrializing Russia to a remarkable extent; by 1936, however, it was apparent that production in itself is no solution to the basic economic problems. The problem of the quality of the products had become very serious. The problem of disproportions in production (factories built but no raw materials to supply them, raw materials produced but no factories to process them) had become even more serious. Behind such problems as these lay the breakdown of personal responsibility, personal initiative, personal ability. It was in response to such problems, and because of the apparent inadequacy of earlier doctrine, that the emphasis since the mid-1930's has been on competition ("socialist emulation"), on reward for incentive, on profits, on prices that reflect more adequately market conditions, on "business accountability," on "economic laws." This is a return to the economic and legal institutions of the NEP, but within the framework of a planned economy.

Since its introduction in 1935 the Stakhanovite movement has become increasingly important, with its rewards for workers on the basis of the fulfillment and overfulfillment of norms. Since 1934 managers of state business enterprises have been given greater control of their organizations, with considerable freedom from the influence of both the trade union and the party organ within the plant. Since 1936 (except for the war years) a certain percentage of the profits of a plant has gone into a so-called Director's Fund, from which bonuses and workers' benefits are distributed. Financial stability has been encouraged as a check on the overexuberance of production drives. The role of contracts between state business enterprises has become greatly enhanced, with far

greater freedom for real bargaining. Not only a trend toward decentralization of operations, but even some tendency toward decentralization of planning may be seen: in 1941, a law was passed transferring the planning of production and distribution of products of local industry for local consumption from the central planning commission in Moscow to local administrative and executive bodies.

As far as the economic rights of the individual are concerned, there has been a new stress on personal ownership of one's house, of one's personal belongings, of one's savings account and government bonds (on both of which there are fairly high interest rates). Inheritance has been freed from crushing taxation and a greater freedom of testation has been introduced; a Russian can now not only become rich, but he can pass on his riches to his heirs with a maximum inheritance tax of 10 per cent. On the collective farm, the property rights of the peasant household have been restored and extended. While almost all Soviet farmers are members of collective farms, they do a very considerable part of their work on the few acres belonging to their individual households and not to the collective. The free market to which they may bring the produce of their household plots, as well as that portion of the produce of the collective which is distributed to them as wages, has become increasingly important.[22] Here again Stalin's repeated denunciation of a "equality-mongering," and his accent on individual initiative, on personal rewards and punishments, are a concession to the "logic of facts," which, according to Stalin, "is stronger than any other logic." "Having emerged from a period of dearth in technique," Stalin declared in May 1935, "we have entered a new period, a period, I would say, of dearth in people, in cadres . . . The old slogan, 'Technique decides everything' . . . must now be replaced by a new slogan, the slogan 'Cadres decide everything.'"

3. *Politically and legally,* also, there has been since the mid-1930's what Sir John Maynard has called a "new respectability." With regard to the political crisis which called forth the changes of 1936

and thereafter we are still largely in the dark, for Soviet politics is played behind the scenes. Yet we know that the assassination of Kirov in 1934 paved the way for a series of ruthless mass purges in which hundreds of thousands, at the least, were disposed of either through death or sentence to labor camps or exile to remote places. We know, secondly, that in these purges almost all the original revolutionaries of 1917 disappeared, those of the Right who were identified with Bukharin and those of the Left who were identified with Trotsky. We know, finally, that the Stalinist political science which emerged from this holocaust has put very great emphasis on stability, orthodoxy, legality, as a means of consolidating the strength of the regime.

Soviet propaganda has stressed the changes wrought in constitutional law since 1936. From the viewpoint of civil liberties and political democracy these changes are insignificant. They are overshadowed by the absolute supremacy of the Communist Party and particularly its Politburo, for whom terror continues to be an important instrument of policy. The 1936 Constitution is important only as a symbol of the stability and legality which the regime ardently seeks but for which it is unwilling to sacrifice its faith in force. One might say that the Constitution regularizes the external system of government, without much affecting the actual process of political decision. It substitutes direct for indirect elections, but retains the one-party system. It removes the earlier political and civil restrictions from nonproletarians. The dictatorship of the proletariat, strictly speaking, is over.[23] Lines, avowedly wavy, are drawn between the legislative, administrative, and judicial branches of government—not a "separation of powers," according to the Soviet writers, but a "distribution of functions." Since the enactment of the Constitution administrative discretion has been restricted somewhat; for example the power of taxation has been subjected to judicial review, insofar as the treasury may now be compelled to prove in court that the assessment was authorized. In regard to legislation, a postwar law gives dissenting minorities on legislative

bills committees the right to present their own reports to the supreme legislature and to defend their proposals in open debate—a right which is politically meaningless so long as speeches in the Supreme Soviet continue to be choruses of praises and complaints and not real debates. Other changes whose political importance is at best prospective include the implementation, by new procedural rules, of the responsibility of representatives to their constituents and of the right of recall by electors.

Soviet politics, for all its new-found outward respectability, continues in fact to remain the monopoly of the Party. In its application to civil life generally, however, Soviet law has undergone profound changes not only in form and in theory but also in substance and in practice. Here the emphasis on strict legality, the independence of the judiciary, and due process, reflects the effort of the regime to bring about a stabilization in those areas of social relations in which political power cannot be directly affected.

"We need stability of laws now more than ever," said Stalin in his Report on the Draft Constitution in 1936. With "stability of laws" as their slogan, Soviet jurists and lawmakers have denounced the radical ideas of the first phase of the Revolution, and in one field of law after another have restored conservative and even conventional doctrines and practices, proclaiming them to be truly "socialist."

The new party line concerning law was authoritatively laid down in 1938 in a series of articles by Vyshinsky, who replaced Pashukanis as dean of the Soviet legal profession, and by his book of the same year on Soviet public law. In comparison with the intricate and scholarly theory of Pashukanis, Vyshinsky's doctrine seems on the one hand extremely simple and even naïve, and on the other highly emotional and vituperative. His invective goes in two directions: first, against the law of other states, with their "inhuman, bestial relationship to the exploited masses of the people," and second, against the doctrines of the leading jurists of the first twenty years of the Revolution, particularly against "the rotten

theory of the wrecker Pashukanis," with its "putrid vapor, whereby our enemies sought to sully the pure source of great and truly scientific thought." On the other hand, no words are exalted enough to do justice to "the genius Stalin," to the great Stalin Constitution, "that genuine charter of the rights of emancipated humanity," and to the greatness of the Soviet legal system.[24]

It must be remembered, however, that Vyshinsky's task was far more difficult than the task which had confronted Pashukanis, Krylenko, and their confrères (of whom Vyshinsky had, of course, been one).[25] Vyshinsky faced the necessity of developing a theory which, in the interests of stability, would put socialist law on its own feet, give it a life of its own, apart from economics and politics in the narrow sense of those words, and which at the same time, in the interests of the fiction of the continuity of the Revolution, would *appear* Marxist-Leninist. Vyshinsky in 1938 was thus exploring new territory; he was pioneering. A good deal of the invective and distortion was to cover his tracks against the wolves who stand ready to fall upon and devour all who dare to deviate. There could be no apparent deviation; everything had to look like mere exegesis on the holy writ of Marx, Lenin, and Stalin. The distaste engendered by his method should not obscure the fact that behind the revision of the catechism lay very real issues. This was not just an ideological pillow fight.

Vyshinsky attacked Pashukanis' thesis that law reaches its highest stage of development under capitalism. In fact, he wrote, "the development of capitalist society goes in the direction of the decay of law and of legality"; in its imperialist and fascist stages, capitalism leads "not to the strengthening of legality and of the rule of law but to the final destruction of the rule of law." "History demonstrates that under socialism, on the contrary, law is raised to the highest level of development."

"Reducing law to economics, as Stuchka did, asserting that law coincides with the relations of production, these gentlemen slid into the bog of economic materialism." "Stuchka and his followers

liquidated law as a special, specific social category, drowned law in economics, deprived it of its active, creative role."

On the other hand, "reducing law to politics, these gentlemen depersonalized law as the totality of legal rules, undermining their stability and their authoritativeness, introducing the false concept that in a socialist state the application of a statute is determined not by the force and authority of Soviet law but by political considerations."

Law is, of course, "a political category," Vyshinsky said. "At the basis of Soviet law lie the political and economic interests of the workers and peasants." "But nevertheless it is impossible to reduce law to politics, as it is impossible to identify cause and effect. If law is a form of politics, then how is one to explain Article 112 of the Stalin Constitution which says that our judges are independent and subject only to the law?" "The reduction of law to politics would signify the ignoring of those tasks standing before law such as the tasks of legal protection of personal, property, family, testamentary and other rights and interests."

Yet when it came to the elaboration of a positive theory of law, and not merely to a renunciation of the negative and nihilistic theories of the past, Vyshinsky could scarcely get beyond platitudes. "Our law is the embodiment in statutes of the will of the people," he wrote. "In capitalist society reference to the will of the people serves as a screen which covers the exploitational character of the bourgeois state. In our conditions the matter is in principle otherwise." "Our laws are the expression of the will of our people as it directs and creates history under the leadership of the working class. The will of the working class with us is fused with the will of the whole people."

Such generalities hardly constitute a theory of law. Yet they do offer *some* theoretical foundation on which to elaborate a workable legal system. By declaring Soviet law to be socialist in character, Vyshinsky provided Soviet lawyers and judges with a basis for utilizing and interpreting the hitherto "bourgeois" NEP codes,

whose dignity was now restored. By defending the independence of law from economics, he laid a foundation in theory for court decisions requiring contracts between state business enterprises to be fulfilled in certain types of cases even when the terms of the contracts were in violation of authorized plans. By attacking the reduction of law to politics, he paved the way, for example, for the 1947 directive excluding from court proceedings documents submitted by public organizations which have no direct connection with the case at hand. These practical implications of Vyshinsky's argument are not mentioned in his writings. They are to be read where Soviet eyes are trained to read—between the lines.

The actual developments in Soviet law since the mid-1930's have not been meager. The 1936 Constitution provided for the promulgation of All-Union codes to replace the various codes of the separate constituent republics. The new codes would eliminate the old dichotomy of bourgeois law and socialist no-law. Pending the drafting of the All-Union codes, there has been a return to stricter adherence to the existing law. "Revolutionary legality" has been redefined as the strict observance of those laws which the Revolution has established: from a symbol of extreme flexibility the phrase has been converted into a symbol of stability. Article 1 of the Civil Code, requiring that rights be enforced only when exercised "according to their social-economic purpose," has fallen into disuse and has been attacked by some as tautological. In criminal law, the principle of "no crime, no punishment without a [previous] law" has been reasserted as a socialist principle, and the doctrine of analogy has been severely limited, so that it is in effect (despite Soviet claims to the contrary) merely a method of amplification of a statute by interpretation. The words "crime" and "punishment" have been restored: the "formal-juridical" element is now emphasized as having an importance equal to that of the "material" element of social danger and social defense. Personal guilt is considered an essential element of a crime. In family law, not only is divorce now a matter for the courts to decide, but certain formalities are

required for marriage, without which it will not be recognized as valid. In the field of commercial contracts between state business enterprises, Gosarbitrazh has been transformed from an arbitration tribunal into a commercial court, and it is now bound by the Civil Code. In contract law generally, Soviet law is declared to start from the principle of *pacta sunt servanda.* In the law of personal injury, fault is restored as the chief criterion of liability. A new Judiciary Act was promulgated in 1938 to lay the foundation for more orthodox trial procedure. The need for "judicial culture" (that is, proper court procedure) and "judicial authority" has been emphasized. "Judicial activity requires the deepest trust in the court," Vyshinsky stated in 1938. "The judge must fight for that trust." Law schools have been expanded, and legal education has returned to more orthodox paths.

The nihilistic theory of law which had previously dominated is now denounced; yet the practice of force and violence survives. Is not this practice evidence that the denunciation of a "negative" attitude toward Soviet law is purely verbal? How can law and force exist side by side? It is the Soviet thesis that they can. Vyshinsky in 1938 wrote with utter frankness that alongside "supression and the use of force," which are "still essential" so long as world-wide communism does not exist, it is necessary to have "also" due process of law. Behind such a thesis is the assumption that politics is beyond law, and that law only extends to those areas of society in which the political factor has been stabilized. Where the stability of the regime is threatened, law goes out the window. No fundamental legal opposition is tolerated. Where real opposition is even suspected, it is dealt with by "supression and the use of force." The Soviets have the delicacy at least not to call this law. Yet the line is not always easy to draw, and the inherent conflict between law and force results in some strange paradoxes. The law punishes discrimination on the basis of nationality, yet the Ministry of the Interior removes and disperses whole national groups which have been considered insufficiently loyal—the Volga Germans, the Crimean Tartars, the

Chechen and Ingush in the North Caucasus. Anti-Semitism is a crime in law, but Zionists are sent to labor camps as counter-revolutionaries. Legal guilt is purely personal, but political guilt may be avenged against relatives and friends.

Nevertheless, the "Restoration of Law" since 1936, though still a movement rather than an accomplished fact, is one of the most significant internal developments in Soviet Russia since 1917. From 1917 to the mid-1930's, Soviet policy followed from the fundamental principles of Leninist philosophy. As Leninism was a transformation of classical Marxism, exalting the second half of Marx's teachings, not his economic determinism but his apocalyptic vision of a future society of conscious social scientists—so Stalinism is a transformation of Leninism. Stalinism is the name appropriate to the new theory and practice of socialism introduced by Stalin in the mid-1930's after he finally consolidated his power within and over the Party; it represents what Soviet writers themselves have called "the second phase of development of the Soviet State," beginning in 1936. Stalinism retains the Leninist emphasis on the power of human and social consciousness to overcome and transform the material conditions of existence; but a different conception of consciousness is involved. Consciousness to Lenin and to his disciples meant enlightenment, science in its application to human activities, reason; it was the accurate and enlightened reflection of social-economic needs —true (class) interest rightly understood.[26] Lenin tolerated the oppresssive features of the proletarian dictatorship because he believed that that was the only path toward a free society in which reason would replace coercion, in which all nonrational factors—all tradition, all emotion, all passion, all morality as such—would be subordinated to and transcended by reason. State and Law were only temporary instruments toward that end. In Stalinism, however, consciousness means the exaltation of the nonrational elements. Stalin has deintellectualized the Party; he has purged it of the men who were in love with revolutionary ideas. The revolutionary ideas themselves have become liturgical rather than rational in Soviet

Russia. Marxism is chanted. Not reason as such but loyalty, patriotism, responsibility, are now stressed. It is in this context that law has been restored, not only as legality but also as a system of justice. Without a legal system and a legal order—without Law with a capital *L*—the Stalinist regime could neither control the social relations of the people nor keep the economy going nor command the political forces in the country as a whole. It was rediscovered that law is not a luxury but a necessity, that at the very least it satisfies a basic need for some outlet for the feelings of justice, of rightness, of reward and punishment, of reciprocity, which exist in all people. Stalin does not want the Russian people merely to obey; he wants them also to believe in the rightness of the order which has been established. This fact breathes in every word of Soviet legal literature, from the statutes and cases to the treatises and law reviews.

Stalinism has rehabilitated the superstructure. Having solved the basic economic problem by the elimination of antagonistic classes —so goes the theoretical justification—it is possible to concentrate on the moral and legal aspects of social relations. There is no longer an economic excuse for moral or legal deviations. But whatever the justification and whatever the reason, the Soviet state is struggling to legalize its position; it is seeking in law a justification of authority which the original apocalyptic vision no longer provides. The Soviets have turned away from the original Marxist question: how can the coercive, formal institutions of politics and law be superseded by a rational social order in which "the free development of each is the condition for the free development of all"? They now ask the questions: how can economic, political, and sociocultural institutions be integrated through law? How can law change to meet changing conditions and yet provide stability in a society which badly needs stability? What is the relation of personal claims and interests, of litigation, to the broad purposes for which society exists? These are the age-old questions, the "accursed" questions, which have troubled statesmen and legal philosophers throughout history.

2

THE SOCIALIST CHARACTER OF SOVIET LAW

The socialist movement of the nineteenth century reacted against the individualistic conceptions of law and economics which had dominated the thinking of the late eighteenth century and which had found concrete expression in the French Revolution of 1789. Basic to the French Revolution was the idea that the individual is at the center of things, that it is he who should determine what is in his own best interest, and that government is essentially a means of minimizing frictions between conflicting individual interests and thereby of providing an opportunity for the free development by each of his own capacities. In law and economics this was reflected in the exaltation of rights of private property and private contract. Not only Marx and Engels, but other socialist thinkers of the nineteenth century as well, started out by rejecting the thesis that the pursuit of individual self-interest leads to social harmony. Thinking in the same terms as the exponents of nineteenth-century liberalism, they reached the opposite conclusions. The individual, they said, is a product of society; it is society which should determine what is in the interests of its members; social life should be so organized as to prevent the oppression of the poor by the rich. The socialists therefore minimized rights of private property and contract. They proposed the abolition of the profits of the middleman or entrepreneur, and exalted public ownership of the means of production. The economy, in their view, was not something to be left to the will of private individuals; it was rather something

to be consciously regulated and controlled by the public authority.

With all the changes in the Soviet social system since 1917, the fundamental socialist principle of public ownership and control of the basic factors of production has been preserved intact. Economic life is essentially public, not private, in character. As Lenin instructed the compilers of the Civil Code in 1922, "Everything pertaining to the economy is a matter of public and not private law." On the other hand, Soviet experience since 1917 has demonstrated the total inadequacy, in itself, of the principle of public ownership. Public ownership is a negative formula; it means the absence of private ownership—and no more. What the state owns, nobody owns. Everybody's business is nobody's business. The fundamental economic and legal questions still remain. How is the economy to be mobilized? Who is to have the possession, use, and disposition of the property now declared to be in the exclusive ownership of the people as a whole (that is, of nobody)?

As Leon Trotsky later wrote in *The Revolution Betrayed*: "A revolution in the forms of ownership does not solve the problem of socialism but only raises it!"

To the "problem of socialism" in this sense, Soviet experience has given an answer quite different from that anticipated by the nineteenth-century socialists, including Marx and Engels. That answer, in a word, is Planning. As the distinguished English economist Alfred Pigou pointed out in 1937, Soviet developments since 1917 have caused European economists to give a new definition of socialism, adding to the older criteria of public ownership and no profits for middlemen the new criterion of a national economic plan for the community as a whole.

The concept of national economic planning is not to be found in the works of Marx and Engels. The nearest they came to it was in Engels' idea that the "government of persons" would be replaced by the "administration of things" and the "direction of the processes of production." This was more a political than an economic concept, however, since it had reference primarily to the absence of coercion.

Nor is administration and direction the same thing as planning, for planning in the Soviet sense involves not the mere establishment of limits and controls by administrative boards, or the licensing of nationalized enterprises to individuals or boards, but state management and operation of economic units under an all-embracing centralized program of production and distribution. Marx spoke once of the possibility of "rational calculation" of economic factors under socialism, and the *Communist Manifesto* mentions as one of the first steps which a proletarian government would undertake "the improvement of the soil generally in accordance with a common plan." It was left to actual Soviet experience, however, to develop the modern theory and practice of planning as such. Undoubtedly the Marxist emphasis on economic collectivism contributed to this development; also, as we shall see later, Russian history provided an important background for it; in addition, the military experience of World War I, and particularly the lesson in efficiency offered by the German General Staff, gave a practical example of military planning which was consciously carried over by the Bolsheviks to the economic sphere, the State Planning Commission being referred to at its inception in 1921 as an Economic General Staff.

With the introduction in 1929 of a system of national economic planning in the Soviet Union, the nineteenth-century antithesis of socialism and capitalism (or socialism and individualism) was given a new intensity. Planning seemed to be not merely a third criterion of socialism, supplementary to public ownership of the means of production and abolition of the entrepreneurial function, but rather the only criterion. Planning, it was thought, meant ultimately the end of *all* ownership, including state ownership, and the introduction of a new social order in which the very categories state, ownership, law, would disappear. "The word property has no passport to cross the frontiers of the collectivist state," wrote Walton Hamilton in 1934.[1]

In 1936, however, property was again admitted to full citizen-

ship. Not only "state ownership" but also "personal ownership" and "social ownership" (that is, ownership by collective farms and coöperative organizations) were restored to dignity. Moreover, the property and contract rights of state business enterprises were greatly enlarged, though they were still more restricted than under the NEP. Economic life remained essentially public in character, but the public interest itself required a considerable decentralization of operations and a considerable extension of personal initiative and reward. A fusion of public and private law took place.

This means that the dualism of socialism and capitalism (or socialism and individualism) has become greatly complicated in the Soviet economic and legal system. Both in practice and in theory there has been, over the past fifteen years, an attempt to create an equilibrium between the integration of the whole and the autonomy of the parts, between the interests of society and the interests of personality, between the dynamics of change and the stability of continuity.

PLAN AND LAW

Soviet economists and jurists speak of this equilibrium in terms of the interdependence of Plan and Law. Planning is the integrating, social, dynamic element; legality is the decentralizing, personal, stabilizing element. Of course the concepts "plan" and "law" overlap. Nevertheless the distinction between them makes sense. Plan is that aspect of the social process which is concerned with the rational use of institutions and resources from the point of view of economic development; law is that aspect of the social process which is concerned with the formalizing and enforcement of social policy (plan) in terms of the personal and property rights and duties arising therefrom.

Planning itself is subject to law. This means, in the first place, that there is an established procedure for the promulgation and implementation of plans, and that this procedure is in the hands

not of technical experts but of responsible state officials who act within the limitations of a definite administrative order.

The Constitution of the USSR provides that the economic life of the Soviet Union shall be determined and directed by the state economic plan; that at the head of the national economy, responsible both for making and for executing the plan, shall be the All-Union Council of Ministers; and that this body, in which the leading industrial, agricultural, commercial, and financial organizations are represented, shall also be the highest executive and administrative organ of the state, whose decisions and orders shall be binding throughout the territory of the USSR. The State Planning Commission (*Gosplan*), which draws up the five-year, annual, and quarterly plans for the Soviet Union as a whole, is an administrative body which serves the Council of Ministers.

Of the forty-eight members of the Council of Ministers in 1950, thirty-eight were heads of particular industries (oil, iron and steel, chemicals, aircraft, shipbuilding, munitions, machine building, and so forth), or of systems of communications (railways, maritime fleet, post, telegraph and telephone), or of spheres of economic activity such as foreign trade, internal trade, and finance. Other (noneconomic) ministries include those of Internal Affairs, State Security, Armed Forces, Higher Education, Public Health, Foreign Affairs, Justice. Each of the sixteen constituent republics of the USSR also has a council of ministers, constituted similarly to the All-Union Council and subordinate to it. The so-called autonomous republics also have councils of ministers.

An economic ministry is divided into chief administrations (*glavki*) for subindustries or for areas or for both, and certain glavki are further subdivided into trusts.[2] A typical ministry, *glavk*, or trust contains departments of planning, finance, procurement and sale, construction, manpower, and accounting. The general directives and plans of the Council of Ministers and its administrative organs are implemented by more specific directives and plans of ministries,

glavki, and trusts, allocating production or consumption to individual enterprises, regulating interrelationships among enterprises jointly producing certain products, and issuing general plans of operations.

The individual factory, plant, or business enterprise is owned by the state and calculated as part of the assets of the ministry to which it belongs. Its director is directly subordinate to the minister, in the case of the largest enterprises, or to the head of the glavk or trust (who in turn is subordinate to the minister). Thus the Soviet manager or director is a state official, a member of the all-embracing political-economic hierarchy. His task is to operate a given portion of state property in accordance with the directives and plans issued by superior state economic organs.

However, these directives and plans do not spring full-blown from Stalin's brow, nor are they self-executing. Plans generally involve the presentation of applications by business enterprises and other operative organizations concerning their requirements for the coming year, together with statements of their own plans of operations. These applications and statements, which are based on the individual plans drawn up by the planning sections of the individual enterprises and organizations, are presented to superior organs (trusts, glavki, ministries), which correct and coördinate them in the light of their own plans and then submit them to Gosplan. In this way applications and statements move up step by step from the immediate operative organizations, the producing and consuming plants, to the highest regulating and planning organs. The plans drawn up by Gosplan are then returned to the particular ministry or administrative organ concerned, and thence transmitted, in the form of "planned tasks," down through the glavki and trusts to the operative units. On the basis of the draft plan of Gosplan, a ministry may make its own plan, the two different plans being submitted to the Council of Ministers for examination, coördination, and ratification. It is the Council of Ministers and the individual ministries, not Gosplan, which issue the plans.

The plans may be very general, leaving the particular decisions to be made by the lower economic links, or they may be very detailed. In any case, planning involves a great deal more than drawing up blueprints. The Plan, in Stalin's words, is not merely a program but is rather a "creative process," embracing all aspects of production and distribution; it is "a living reality." Planning is not finished until the plans are executed, and increasingly the executors of the plan have been given responsibility and discretion in making the operational decisions.

The last fifteen years have witnessed an extraordinary multiplication of economic commissariats or ministries. In 1930 there were three industrial commissariats. In 1935 there were six. From 1936 the number of economic commissariats increased rapidly from year to year until 1948 when about ten were abolished, leaving 38. At the same time the number of glavki within the individual ministries has increased. This process of multiplication has gone hand in hand with the abandonment of the earlier idea of total economic control by Gosplan in Moscow—an idea which was never actually put into practice, but which nevertheless had a strong influence on practice during the First and Second Five-Year Plans.

The over-all economic policies, the crucial decisions as to proportion of expenditure on producers' and consumers' goods, extent of militarization, and so forth, are made now, as before, by the Politburo of the Communist Party. Yet here too there has been a significant change since the mid-1930's. The members of the Politburo have by and large assumed official state responsibilities. Stalin has become Chairman of the Council of Ministers, and the other members have become deputy chairmen. The individual members have been given supervision over particular spheres of activity; Mikoyan over foreign trade, Kaganovich over rail transport, Andreev over agriculture, Molotov over foreign affairs, Beria over internal affairs and state security, and so forth.[3] This is a merging of Party and State, and a merging of State and Plan, at the top. It is at the same time part of the process of the subjection of planning to the

formal procedures and sanctions of law which has also found expression in the decentralization of administration below.

Planning has been influenced by the new emphasis on law and legality in yet another way. It is now said by Soviet theorists that Soviet economic development is subject to "economic laws"; and in saying this, they deliberately fail to distinguish between a law in the political sense, as a rule prescribed by some authority for human action, and a law in the social-scientific sense, as a statement of some sort of observed regularity in phenomena or events.[4] Under capitalism, indeed, economic laws (it is maintained) manifest themselves outside the will and consciousness of the people; but under socialism, economic laws are perceived and consciously utilized by the state in the practice of socialist construction. Thus economic laws under socialism are actual directives, principles which consciously guide and determine action. They are policies. On the other hand, they are policies which are dictated by events, by objective necessity, by the dialectic of history. The economic laws which are now asserted to govern the socialist economy are: the law of industrialization and collectivization of agriculture, the law of the planned administration of the economy, the law of distribution according to work done, and the (Marxian) law of value. Only the last of these is an economic law in the non-Soviet sense. Yet all of them have significance, for they represent the effort of Soviet economists to state the fundamental aims, methods, and conditions of the Soviet economic order, and thereby to define its limitations.

The law of industrialization, that is, the statement that industrialization is an objective necessity for Soviet socialism, provides a broad theoretical basis for describing how priorities in the allocation of resources are determined. It says, in effect, that Soviet socialism is not a "democratic welfare economy" in the usual sense, with consumers' sovereignty, but rather an industrializing economy, in which top priority is assigned to the production of producers' goods.[5] As the law of industrialization goes to the direction and purpose of Soviet socialism, so the law of the planned administration of the

economy goes to the method by which it operates. Socialism, in its economic aspect, is industrialization by planning. The third and fourth economic laws of socialism—the law of distribution according to work and the law of value—may be taken together as expressing economic conditions under which the system operates. The two laws are interrelated. One refers to the evaluation of labor; the other to the evaluation of commodities. Here it is significant that Soviet economists now purport to accept the Marxian law of value as applicable to socialism whereas in fact they transform it from a labor theory of value (under which the value of a commodity is determined ultimately by the socially necessary labor-time that is put into it) to a theory of use-value, under which the value of labor is determined by the value of commodities and the value of commodities, in turn, by their utility.[6] The importance of this transformation is that it serves as a theoretical basis for putting the Soviet financial system on a sound foundation.

The emphasis upon finance as the coördinating and stabilizing factor in the economic system is the main clue to the relation between Plan and Law. There is an attempt to maintain the stability of the ruble. There is an attempt to establish prices that reflect supply and demand, even within the closed circle of state business enterprises. There is an attempt to provide monetary rewards for efficiency. The earlier emphasis upon production at all costs proved too costly. There is an attempt at greater financial coördination of the economy as a whole.

Basic to these developments is the recognition that the planned economy itself requires the principle of "business accountability" (*khozraschet*): each industry should pay its own way, and each glavk or enterprise must respond for its liabilities with its assets. "The essential feature of the Soviet *khozraschet* system," wrote Bogolepov, the leading Soviet expert on finance, in the late thirties, "is the combination of the method of the balance sheet and the method of the plan." The method of the balance sheet has in fact become the foundation of the method of the plan. "Accounting

figures form the point of departure for every kind of plan."[7] And the plan not only starts from the balance sheet; it also ends with it. It is recognized that effective planning of an integrated national economy is not possible unless the integrity and responsibility of the individual links in the economy are maintained.

The balance sheet of the Soviet glavk or state business enterprise is expressive of the attempted synthesis of public control and individual initiative. "Logically," concedes the same author, writing in 1945, "[capital accumulation] could be entirely contributed to the Exchequer, for the State is the owner of industry. In actual fact, however, the process is much more complicated. This is necessitated by the following considerations: the State seeks to create among the managers and workers of its establishments a direct interest in the results of their efforts. State-owned establishments are run as juridically independent economic units. Each establishment, having received from the State for its exclusive use both equipment and capital, proceeds to operate on its own, with its own financial accounting, bank account, credit facilities, and, finally, with the right to make a profit. In the distribution of this profit the establishment considers its own requirements, contributes a definite sum to the workers' welfare, and provides bonuses for good workers."[8]

"Business accountability" only makes sense when there is some autonomy in the units which are accountable. This autonomy finds legal expression in property rights and contract rights. The recognition of such rights is a clear concession to nonsocialist realities. At the same time, the interdependence of Law and Plan has given a new socialist cast to these traditional institutions.

PROPERTY AND CONTRACT

Article 6 of the Soviet Constitution states: "The land, its natural deposits, waters, forests, mills, factories, mines, rail, water and air transport, banks, post, telegraph and telephones, large state-organized agricultural enterprises (state farms, machine and tractor stations, and the like) as well as municipal enterprises and the

bulk of the dwelling houses in the cities and industrial localities comprise state ownership, that is, belong to the whole people."

The effect of Article 6 is to remove from private commerce that property in which the "whole people" has a vital interest. Only by collective action, through the organs of the state, may such property be possessed, utilized, and disposed of, and only its administration, not its ownership, may be thereby affected. For ownership is in the state alone, and not in any of its organs.

Ownership is defined in the Soviet Civil Code, as in European law generally, as including the right of possession, use, and disposition of the thing which is owned. What the state owns it has the right to possess, use, and dispose of. But what a state business enterprise may possess, use, and dispose of—it does not own! May one speak, then, of a "right" of possession, use, and disposition in the state business enterprise? Or does not the enterprise merely exercise certain economic-administrative functions delegated to it by the state?

How are we to test the difference between a right and a function? According to Duguit and other sociologically minded jurists, a right is nothing but a social function. The theory of Soviet jurisprudence under Pashukanis was somewhat similar: rights were considered to be fictions reflecting a market economy, and under planning they were replaced by economic-administrative functions. The Soviet theory since 1936 has been that rights really do exist, and, in particular, that Soviet economic organs have not merely the functions but also the rights of possession, use, and disposition of the property assigned to them. Yet they do not own that property. Their property rights are derived not from ownership but from "operative administration"; they are derived, that is, from economic-administrative functions. They are nevertheless rights.

The Soviet state business enterprise is a juridical person, a corporation. By its charter it is assigned its basic capital and its working capital. Its basic capital—buildings, machinery, tools and productive equipment, and so forth—is said to be at the enterprise's "full and

exclusive disposal"; and although such disposal must operate under strict controls, nevertheless the enterprise may sometimes lend or lease such basic capital, and may sometimes sell it. The working capital—stocks of raw materials, fuel, partly finished goods, finished goods, cash, and so forth—may be employed by the enterprise, in the words of a Soviet writer, "in any way it deems fit for the fulfillment of its plan; it may sell it, pledge it, or acquire other working capital; no special sanction from the higher authorities is required for such transactions." It receives its land from the local city or village council under an "Act of Perpetual Use"; however it must pay ground rent on the land.

Here are rules concerning the rights of economic organizations to possess, use, and dispose of buildings, money, land, which they do not own. Nor are they agents of the owner, for the state is not legally responsible for their acts, nor can a glavk or ministry be sued for the debts of a subordinate trust or enterprise. Yet it is apparent that the rights of an enterprise are strongly conditioned by plans and directives of its superior organs. Moreover its rights are shared by those organs: a superior glavk or ministry may order an enterprise to dispose of its working capital in a particular way, and it may even wind up the enterprise, in which case the basic capital of the enterprise reverts to the glavk or ministry and the working capital is used to pay the enterprise's debts. Thus rights of possession, use, and disposition are only a part of a total process of production and distribution carried on under plan.

It is the fact that the property rights of a state business enterprise (or trust or glavk) are conditioned by plan that gives them their socialist character. In adopting the Roman law categories of *jus possidendi, jus utendi,* and *jus disponendi,* and divorcing them from the Roman *dominium,* Soviet lawmakers have made it clear that these property rights (in socialist property, at least) exist not to protect ownership but rather to protect and direct the *administration* of the property in behalf of the socialist economy. Thus the contract of sale between two state business enterprises is explained in

property law as the transfer of state property from the administration of one state organ to the administration of another state organ.[9]

Administration in the Soviet sense is not merely direction or supervision, but involves all aspects of control including the realization of that control. It is thus something less than ownership, but something more than giving orders. The Russian word for it, *upravlenie,* has the connotation of government; the root *prav* is the same as that in *pravo,* meaning law. An economic ministry not only controls a branch of industry but also operates it. The economic units to which it delegates "immediate operative administration" derive their property rights from that administration.

The fact that administration, and not ownership, is involved in the property relations between a state business enterprise and its superior economic and administrative organs, as well as in the commercial relations between one state business enterprise and another state business enterprise, makes those relations no less serious from the point of view of the rights of the parties. The proof of this is in the vast amount of litigation of claims against each other by state business enterprises, trusts, glavki, and in some cases ministries. It is here that we shall find the test of the difference between a right of property or contract and an economic-administrative function; for a right is a claim enforceable by a lawsuit before a competent tribunal, which adjudicates on the basis of established norms, after a fair hearing, and not on the basis of mere economic-administrative expediency.

GOSARBITRAZH.

Property and contract disputes between economic organs belonging to different ministries are adjudicated in a special system of courts called the State Board of Arbitration (*Gosarbitrazh*). Disputes arising within a single ministry are decided by the Departmental Board of Arbitration of the ministry, with removal to Gosarbitrazh on permission of the ministry.

Gosarbitrazh is completely separate from the regular courts and

is closely linked with the administrative branch of the government. Each of the organs of Gosarbitrazh is immediately subordinate to the supreme administrative body of the territory in which it operates, that is, the Council of Ministers of the USSR, the councils of ministers of the various constituent and autonomous republics, and the executive committees of the territories and regions. In Moscow, Leningrad, and Kuibyshev organs of Gosarbitrazh are attached to the executive committee of the city councils. The administrative body appoints the members of the branch of Gosarbitrazh subordinate to it, supervises its activities, and has power to reverse or modify its decisions or remand for retrial. The chief arbiter may also review the decisions of other arbiters. Although the arbiter is generally not a lawyer or professional judge, he is assisted by a lawyer throughout each case. Uniformity is maintained by the Gosarbitrazh of the Council of Ministers of the USSR, which may on its own motion remove cases from the lower organs to its own jurisdiction. In addition, the chief arbiter of the All-Union Gosarbitrazh convokes periodical consultations of all organs of Gosarbitrazh for joint discussion of questions confronting them and for the establishment of uniformity. Also Gosarbitrazh has published an official biweekly journal, called *Arbitrazh,* with reports of cases, instructions of the chief arbiter, relevant new statutes, and articles on various aspects of the law.[10]

When reëstablished in 1931, after the introduction of planning had rendered its predecessor obsolete, Gosarbitrazh was intended to be first and foremost an arbitration board, whose primary efforts were to be directed toward reconciling the parties to a dispute (that is, the managers of the respective enterprises); failing reconciliation, Gosarbitrazh was to decide the dispute in the light of the governing plans and regulations, with particular emphasis on economic policy and expediency. It was clearly understood that Gosarbitrazh was not governed by the provisions of the Civil Code. It was not a judicial but an arbitrational and administrative body. At one time lawyers were excluded from its proceedings.

In the mid-1930's Gosarbitrazh was converted in effect into a commercial court. It was declared to be bound by the Civil Code and by the norms of Soviet law in general. The emphasis on reconciliation diminished, and directors were no longer required to appear personally but could send their lawyers instead. The earlier "procedural nihilism," as it was now called, was denounced, and the rules of the Code of Civil Procedure were held to govern. Emphasis was placed on an accurate record of the proceedings and on the written opinion of the arbiter.

The 1931 decree establishing Gosarbitrazh states: "In deciding disputes, Gosarbitrazh shall be guided by the laws and dispositions of the central and local organs of state power and also by the general principles of the economic policy of the USSR." Earlier interpreted as authorizing a disregard for both law and contract, this provision is now understood differently. The leading authorities on the practice of Gosarbitrazh wrote in 1938:

> It is proper to reject the clearly untrue arguments of the opponents of Gosarbitrazh that only the courts should be guided by law, but Gosarbitrazh is freed from it. It is proper definitely to condemn and to punish those arbiters who imagine that an arbitrational decision may go contrary to law because a decision not corresponding to law is "economically convenient." Gosarbitrazh does not have the right to depart from law even by one step . . . Since not all questions arising out of economic relations are regulated by law or by decree of the government, the statute [on Gosarbitrazh] indicates that in such cases the general principles of the economic policy of the USSR are applicable. Accordingly, the arbiter must be politically and economically literate, must see that his decisions correspond to the general directives of the government. [But] may Gosarbitrazh in deciding a dispute depart from the terms of a legally concluded contract? No . . . Of course the arbiter is not bound by the literal sense of the contract in those cases where it appears that the economic relations were in fact not such as the contract stated.

The importance of planning is in no way minimized; on the contrary, it is stated unequivocally that every dispute between state business enterprises must be decided in the general interests of the state, that is, in the direction of realizing the planned tasks set by

the state. But the subordination of Gosarbitrazh to civil law, the necessity for procedural correctness, and the protection of the legal rights and interests of the parties are now acclaimed as essential to the life of the Plan itself. "The defense of the interests of the state, of socialist ownership," write the same authors, "is achieved by means of the defense of individual enterprises and organizations representing that ownership." The protection of their operative independence and property rights—that is, the thorough carrying out of business accountability—"creates the most suitable conditions for fulfillment of the plans issued for their activity . . . Conversely, disdain for the operative independence of the individual organizations, for their rights to property, depersonalizes the responsibility for maintaining that property, creates fissures and breaches in the legal position of the business organizations."[11] In other words, whereas economic expediency was previously hailed as the ultimate criterion for the decision of disputes, it is now stated that the judicial protection of property and contract rights as such is itself the highest expediency. In this way the judicial process complements the planning process, giving it a measure of stability which it otherwise lacks.

THE CASES[12]

The test of the character of the property and contract rights of Soviet state business organizations is in the decisions of Gosarbitrazh. It is there that we shall see the interaction of Plan and Law. It is there that we may find evidence on which to determine whether the upheaval in Soviet jurisprudence in the mid-1930's was in fact a real development of major proportions, with important implications for the actual practice of Soviet socialism.

In the first place, the number of lawsuits between state business enterprises, trusts, glavki, ministries, and other economic organs, is very large. In 1938, for example, over 330,000 cases were litigated in Gosarbitrazh. This figure does not include the vast number of

disputes between economic units within an individual ministry, which are heard in Departmental Arbitrazh.

It is apparent from the decisions of Gosarbitrazh that the relationship between a business enterprise and its superior glavk may be on a legal, and not merely an administrative, basis. The glavk may be obliged to procure for its subordinate production units the necessary materials and equipment for the fulfillment of production tasks. Losses which arise from failure to perform such an obligation are borne by the glavk. Thus in the case of Machine Construction Plant Artem versus Linen Factory F. Engels, in 1939, the defendant factory, on a claim against it for the price of a machine delivered to it by the plaintiff, was allowed to join its glavk as party defendant on the ground that the glavk had promised to assign funds for the construction of the machine but had failed to do so; Gosarbitrazh held the glavk liable "as guarantor" for the purchase price plus a penalty for delay of payment. The court held in addition that the fact that the glavk had not been authorized by the state budget to assign funds for such machine, and that it did so through the irresponsible acts of its officials, did not release it from liability.

The practice of Gosarbitrazh indicates a difference, in this respect, between the status of a glavk and that of a trust. Originally, the subordinate enterprises of a trust had no independent legal rights, and were incapable of suing or being sued. In the mid-1930's, the enterprises of a trust were given increased independence, and were allowed to conclude contracts in their own name, keep checking accounts in credit institutions, and in general have the characteristics of a juridical person.[18] One distinction between the glavk and the trust still remains, however. This is illustrated in a 1938 suit brought by the Moscow Commercial Purchasing Base of the Combine of Lumber Products Stores against the Local Industry Trust of the Sokolnicheskii District, in which it was held that the trust was responsible for all the debts of a bankrupt factory belonging to it and not merely those debts which could be met with the remaining

assets of the factory. The court said: "A business-accounting production enterprise [of a trust] is an independent subject of property rights and bears independent responsibility within the limits of the capital assigned to it. . . But this obligation does not free the trusts from material liability for the debts of enterprises which have entered into its composition in the event of the proved incapacity of such an enterprise to pay."

On the other hand, if the trust itself is liquidated by its superior ministry and its enterprises are made autonomous and subordinated to several glavki, the question arises as to whether the glavki are jointly responsible for all the debts of all the enterprises of the reorganized trust. The statute on trusts of 1927 prescribed such joint responsibility, on the analogy of Soviet inheritance law, which provides for universal succession of the heirs to the debts of the decedent (a Roman law principle which had passed over to the Russian empire). In practice, however, Gosarbitrazh applied a different principle, establishing the separate liability of each glavk for the debts of the enterprises transferred to it. This practice was later confirmed by a government decree.

The creative role of Gosarbitrazh in the adjudication of property disputes is well illustrated in a series of cases involving the transfer of superfluous equipment from one economic organization to another. It is forbidden, under Soviet laws of 1935 and 1936, for one organ to sell to another its basic capital, including the whole enterprise, its buildings, or equipment. Only by order of the Council of Ministers, or, in some instances, of an individual ministry, may such property be transferred, and in such case there is to be no compensation but merely the deduction of the value of the property from the balance sheet of the transferor and its addition to the balance sheet of the transferee. In a suit brought in 1936 by the Machinery Rebuilding Trust against an organization which had accepted a turbine from the plaintiff but then refused to pay for it on the ground that the contract was illegal, Gosarbitrazh held that the law prohibiting the sale of enterprises, buildings, or edifices does

not extend to the transfer of individual objects of equipment such as a turbine. Following that decision, various economic organs attempted to disguise the sale of an entire enterprise by making a series of contracts for the sale of individual items, but Gosarbitrazh generally struck such arrangements down. In 1940, however, the giant Kirov automobile plant in Leningrad sold as superfluous equipment certain materials and property amounting to some millions of rubles in value. To meet this situation, a law of February 1941 prohibited as a "crime equivalent to theft of socialist property" the unauthorized sale, exchange, or release of equipment and materials which are superfluous or not in use, and imposed a penalty of two to five years imprisonment for violation. Under this law, with subsequent changes, such equipment and materials may be transferred only by special authorization of the appropriate ministry. Where transfer is authorized and made, it is now required that the transferee pay for the goods at the prevailing price.

It may be thought that such a law would put an end to the civil law problems involved in the transfer of superfluous equipment and materials. Perhaps the framers of the law had such a thought. If so, they were soon to be disillusioned. The major question which now confronted Gosarbitrazh was whether the *lease* of superfluous equipment and materials fell within the prohibition to sell, exchange, or release. In an early case involving this question, Gosarbitrazh sent the parties to Gosplan and to the appropriate ministry for instructions as to the disposal of property which had been so leased. In subsequent cases, however, Gosarbitrazh reversed its stand. In 1942, Metallurgical Warehouse No. 1 of the Chief Administration for Metallurgical Supply in Leningrad leased a railroad crane for an indefinite time to Hydroelectric Station No. 2. In 1944 the Metallurgical Warehouse sued for return of the crane. The Leningrad Regional Gosarbitrazh dismissed the suit on technical grounds, without referring to the law of February 1941. A few months later, a similar case arose in the same court. The Clara Tsetkin Tobacco Factory had leased an automobile to the Automotive Division of one of the

Leningrad administrative regions and now sued for its return. Again the court dismissed the suit on technical grounds, but this time it also held that the automobile was transferred in violation of the 1941 law. On appeal, the RSFSR Gosarbitrazh reversed the decision and remanded for a new hearing; but the Chief Arbiter of the RSFSR Gosarbitrazh subsequently reviewed the case by way of supervision and reversed the reversal, leaving in force the original decision of the Leningrad Gosarbitrazh, on the same technical grounds, but at the same time held invalid the finding of the lower court that there had been a violation of the 1941 law. The final decision is greeted with approval by A. V. Venediktov, a leading Soviet authority on property law, who points out in his 1948 Stalin-prize work on "Soviet State Socialist Ownership" that the prohibition to "sell, exchange, or release" refers to the transfer of property to the "immediate operative administration" of another, and that the transfer of property for temporary use is clearly to be distinguished. Venediktov also argues that a lease of this kind does not fall within the spirit of a criminal statute directed against activity "equivalent to the theft of state property."

Turning to cases involving the transfer not of basic capital but of working, or turnover, capital—in other words, of goods primarily intended for transfer—we again find Gosarbitrazh exercising a combination of administrative and judicial functions. Here the chief problem is the balancing of economic policy, as expressed in plans and planned tasks, against individual initiative and responsibility, as expressed in contract.

Before 1936 commercial contracts tended to be assimilated to plans of distribution. The higher economic organs entered into so-called general contracts, in execution of which the lower links concluded so-called local contracts. The general contract determined which of the subordinate enterprises should conclude local contracts with each other and fixed the most important terms of those contracts. Before receiving a copy of the general contract, the parties could not conclude a local contract.

In regard to the distribution of industrial goods, at least, it was felt by 1936 that "the excessive regimentation by the general contract of the terms of local contracts limited the initiative of the middle and low links." General contracts proved particularly ineffectual as a basis for short-term contracts, single (spot) agreements, or commercial orders—transactions which were becoming increasingly important. To correct the evils of general contracts, the Council of Ministers declared that henceforth so-called direct contracts, concluded by the producing and consuming (or trading) enterprises themselves, were to comprise the basic form of contractual relationships.[14] Thus a definite line was drawn between plan and contract. The principle was established that, while higher organizations do the planning, nevertheless (in the words of one Soviet writer) "contractual relations should be established between the business enterprises which immediately execute the contract."

With the decline of general contracts, control over the commercial transactions of the enterprises and glavki (for the glavki were now put on a *khozraschet* basis and were increasingly active commercially) came to be exercised through annual agreements, called Basic Conditions of Supply, drawn up jointly by supplier and consumer ministries. The Basic Conditions generally state what standards are to govern the quality of the goods to be supplied in the coming year, what methods of payment are permissible, under what conditions contractual penalties may be applied and what their limits must be, under what circumstances a purchaser may refuse to accept a demand for payment, and similar matters. They are, in effect, rather detailed trade regulations agreed upon by representatives of the producers and purchasers of a given type of product, binding upon such producers and purchasers, but leaving considerable scope for initiative and independence in the direct contracts concluded in conformity therewith.

Stricter control over direct contracts is exercised by the glavki, which may issue specific orders for procurement and supply of goods. Contracts between subordinate enterprises drawn up in accordance

with specific orders issued by superior glavki have been called planned contracts.[15] Generally restricted to the scarcest and most important types of commodities, planned contracts are largely, though not entirely,[16] *pro forma* acknowledgments by the enterprises of obligations which already exist by virtue of the specific orders of the glavki. For more abundant commodities, for local products locally consumed, for particular objects (such as an individual machine or "beyond-plan" goods produced specially), contracts are considerably freer.

By 1949, the system of direct contracts had hit serious snags. Apparently the enterprises were evading the planned tasks and orders issued to them by their superior glavki and were entering into informal deals with each other. In this way they were succeeding in fulfilling and overfulfilling their plans in money terms, while evading the requirements of the plans of distribution. At the same time the glavki too were apparently more concerned with their balance sheets than with the actual plans of distribution, for the charge was leveled at them that they were lax in issuing orders for procurement and supply by the lower links. The only legal sanctions available in such cases of evasion of plan were administrative and criminal: someone might be punished. Apparently these sanctions were not strong enough.

On April 21, 1949, the Council of Ministers issued a decree requiring that glavki and other central organs of suppliers and consumers shall (if their superior ministers so decide) once again enter annually into general contracts, and that the subordinate enterprises shall conclude local contracts on the basis of the general contracts. The system of direct contracts continues to exist alongside the system of general and local contracts, at the discretion of each ministry. The Basic Conditions of Supply continue as the framework for both the general contracts and the direct contracts.[17]

It is too early to judge the actual effect of the 1949 decree. It explicitly gives one glavk a contractual remedy against another glavk for failure to present specifications and orders to a subordinate

enterprise, as well as for failure by a subordinate enterprise to conclude a local contract. This seems to be its main purpose—to increase the financial responsibility of the glavki for the acts of their subordinate enterprises and thus to give added incentive for strict supervision of the planned tasks. On the other hand, the local contracts seem to leave a fairly large field for maneuvering. As stated in the decree, "In local and direct contracts there shall be provided the concrete obligations of the supplier and the consumer: the exact quantity of the product to be supplied; the times of delivery; the quality of the product and, in appropriate instances, its composition and assortment; the price of the product and the general cost of delivery; the method of payment; the property liability for nonfulfillment of the contract." This provision assimilates the new local contracts to the direct contracts; on the other hand, the authority of the general contract replaces or supplements the authority of the planned tasks.

The decree illuminates the fundamental dilemma faced by the Soviet planners. "Excessive regimentation" freezes the flow of commodities, while excessive contractual freedom defeats the plans of distribution. The dilemma lies at the very heart of the system of "democratic centralism"—centralized planning and decentralized operations. It is confronted most directly by the glavki, the middle links. Established as administrative branches of the economic ministries, the glavki have come increasingly to assume operative functions. At the same time, they must rely heavily on their subordinate enterprises. The ambiguity of their role expresses the ambiguity of the system itself.

The 1949 decree, despite the terminology of general and local contract, creates a situation essentially different from that of the pre-1936 period, since at that time the glavki were not yet on a *khozraschet* basis, and were far less numerous as well as less operative in character. On the other hand, it seems to limit the contractual independence of the enterprises and to present the possibility, at least, of tying them to routine operations. If this hap-

pens, the effect on the distributive system will be very harmful, and we may expect a new decree.

Whether or not the effect of the 1949 decree will be to make the glavki the principal parties in every contract dispute (which seems very doubtful), the basic problem of plan versus contract will continue to plague Gosarbitrazh. We have already considered one case in which the fact that a glavk had acted beyond its authority in promising to assign funds for the production of a particular machine to be sold to another plant did not relieve it of civil liability. In another case, the Second Cartographical Factory had ordered 17,000,000 pieces of tin stamp from the First Industrial Trust, but then refused to accept the goods or to pay the price on the ground that its planned task had only called for 8,000,000 pieces. Gosarbitrazh held that this was an inadequate defense and ordered specific performance of the contract.[18]

In other cases, however, involving so-called planned contracts, an opposite result has been reached. The underlying consideration behind the distinctions hitherto made, in the resolution of conflicts between plan and contract, is the scarcity and importance of the commodities involved. With the reintroduction of the general and local contracts, new distinctions will have to be made—presumably on the same basis.

Basic to the Soviet attempts to balance over-all direction against individual initiative is a socialist philosophy of freedom and authority. It is recognized that the very idea of contract presupposes some freedom on the part of the parties to express their wills. This was formerly challenged as a bourgeois fiction. As stated in 1938, "the basic constitutive characteristic of a contract is the agreement of the parties, the coincidence of their wills, directed toward the achievement of a definite legal result. The statements of the wreckers were therefore directed toward showing the absence of the will of the parties, of their agreement, in contracts under Soviet law, primarily in planned contracts in socialist organizations. Plan and Law were placed in contradiction as irreconcilable things. These

wrecking tendencies taught a contemptuous attitude toward contract ... they brought great injury to our national economy." Now upheld as a fundamental principle of Soviet contract law, freedom of will is not considered, however, as a natural right, but rather as a right emerging from social conditions. Its ultimate source is found in the harmony of social and personal interests under socialism, and in the equality of bargaining power of the contracting parties. Actual freedom of contract, it is said, is thus created by socialism itself—by the absence of unemployment, by confidence in the future, by regulation and integration of the national economy. The welfare of the whole economy, in turn, is thought to require the granting of initiative and responsibility to the parties.

Soviet legal literature talks in terms of a polar or dialectical relationship between freedom and authority, between the initiative of the individual enterprise and the undivided will of society. A concrete illustration of this general approach may be found in the manner in which the courts treat invalid contracts. Article 30 of the Civil Code declares invalid any contract made for a purpose contrary to law, made in evasion of the law, or directed to the clear detriment of the state. Article 147 requires that in the event a contract is invalid under Article 30, neither of the parties shall have the right to demand from the other the return of whatever has been performed under the contract; instead it may be treated as unjust enrichment to be forfeit to the state. (Under American law, an illegal contract is often held to create no obligations at all, and the court will leave the parties as they are; in any case, the notion of forfeiture to the state is foreign to us, though it has been urged by some American legal writers.) These articles were originally held applicable to the transactions of private citizens only; with the growth of the business accountability and juridical personality of state business enterprises, Gosarbitrazh began to apply them to contracts between such enterprises, and subsequently, in 1939, the Plenum of the Supreme Court of the USSR explicitly overruled the 1927 ruling on which the earlier judicial practice had been based.

Particularly, a contract in violation of state-planned tasks may fall within the provisions of Article 30.

The application of Article 147 does not follow automatically from the application of Article 30, however. Under the latter, the intention of the parties is irrelevant. But judicial practice has required for the application of the penalty of Article 147 the presence of a subjective intent. The detriment to the state must have been apparent at the time the contract was made; the parties must have acted in bad faith. Further, the court may or may not apply Article 147 at its discretion; restitution may be granted to an innocent party. In the case of Moscow Central Base of Galanteria versus the Disabled Veterans Coöperative Red October, plaintiff sued for the surrender of 6.5 tons of swans' down purchased by it from defendant. In the course of the proceedings it appeared that an illegal advance payment had been made, covered by a fictitious receipt. Gosarbitrazh, applying Articles 30 and 147, ordered defendant to pay over the amount received to the state treasury. On the other hand, when a power plant purchased barracks from a construction company and then sued because the barracks were in such a bad state that the city council condemned them, Gosarbitrazh held that the contract was invalid since it violated the decree on the transfer of the buildings and edifices from one state enterprise to another; however, Gosarbitrazh merely ordered the defendant to return to the plaintiff the purchase price, and the plaintiff to return to the defendant the barracks.

The variety of the contractual relationships between Soviet state business enterprises makes any general analysis of the cases very difficult. Not only does the strictness and thoroughness of planning depend on the importance and scarcity of the particular commodities involved, but also the methods of distribution vary tremendously with different commodities and in different areas. The types of disputes that come before Gosarbitrazh are amazingly diverse. Many arise over the quality of the goods supplied under the contract. A large number involve the question of prices, for

despite the fact that prices are fixed, many devices exist for avoiding or evading the established prices. The number of cases involving terms of payment are relatively small, for the predominant method of payment is by the payor's acceptance, through his bank, of the payee's demand for payment presented through *his* bank. Since all commercial banks are branches of the State Bank (Gosbank), and since all financial dealings of 1000 rubles or more must be handled by the banks, a central clearing house is provided for all commercial transactions, and the entire system operates on the basis of bookkeeping deductions. This gives Gosbank the opportunity to supervise the credit relations of the state business enterprises. Yet even here disputes arise, and distinctions must be drawn—between refusal by the payor to accept the demand for payment on the ground of the nondelivery of the goods or their defective quality (a refusal which will be rejected by Gosbank, since the transaction calls for cash against documents, and any suit for non-delivery or for defects in the goods must be brought later) and similar refusal on the ground of a defect in the documents presented by the payee (a refusal which will be accepted by Gosbank); between the responsibility of the buyer who refuses acceptance of perishable goods (in which case the buyer must take all necessary measures to prevent their ruin, including the selling of the goods for the account of the seller) and the buyer's responsibility where the goods are nonperishable; and many other such distinctions, most of which are familiar to the entire commercial world.

It is apparent that, from the legal standpoint, socialism does not make economic life less complicated. A few years ago leading New York newspapers carried a full-page advertisement discussing the virtues of advertising which a planned economy could not know or appreciate, and headed by the streamer: "This Ad Could Never Appear in *Pravda*." The business firm which inserted this advertisement would undoubtedly be surprised by the following case litigated in Gosarbitrazh in 1938. The Leningrad Sour Milk Products Plant supplied its products to the Leningrad Combine of

Dining Rooms, Restaurants and Cafes, under a contract which provided that the buyer Combine should advertise the seller's products widely, through the press, radio, and leaflets, in return for which 1 per cent of the price of the goods would be deducted. Subsequently, the Combine refused to account to the Sour Milk Products Plant for the expenditure of the deducted sum (82,500 rubles), and the seller therefore sued for that amount. The Leningrad Regional Gosarbitrazh denied the claim on the ground that there was no provision in the contract requiring an accounting of how the deducted sum was to be spent. Plaintiff petitioned the chief arbiter of the All-Union Gosarbitrazh, who reversed the decision, condemning its "narrowly formal approach" to the interpretation of the contract and stating that since the defendant refused to present an account of the expenditure of the deducted sum, "there is no assurance that defendant fulfilled its obligation. Therefore plaintiff has the right to receive back the sums not expended for the purpose provided."

ECONOMIC CRIMES

In analyzing the socialist component of Soviet law we have taken as our starting point the definition of socialism as a planned economy and have attempted to indicate the extent to which Soviet planning relies on the property and contract rights of business organizations. We have seen that state ownership of the means of production and centralized allocation of resources are not solutions of the problems which confront lawyers and lawgivers, but are only the transposition of these problems onto a new plane. State ownership leaves open the question of possession, use, and disposition. Centralized allocation requires a basis in something more than administrative fiat. Indeed, Soviet experience explodes the myth of the "administrative state" in which all questions are decided in terms of "public policy." The judicial process has been found essential to the life of administration itself. The integrity of the whole has been seen to depend on the integrity of the parts. Stability of

laws is itself public policy. And the rights of persons are emphasized as necessary correlatives of that sense of personal responsibility without which the Plan ceases to be a living thing. This is the theory. The practice approximates it in varying degrees.

Yet it would be a mistake to think that a planned economy can exist merely on the basis of a synthesis of administrative law and property-contract law. For one thing, there are important extralegal factors which take some of the strain off the legal system. The corrective labor camps, for example, regarded solely from the viewpoint of the functioning of a planned economy, provide the planners with a mobile labor force. Also personal pressures, deals, bribery of one kind or another, and other informal devices, are means of evading the rigid requirements of the official system and may even be essential to its smooth functioning. But even in terms of the legal system as such, there are certain human and social needs which affect the economy and which cannot be met by the neat balancing of Plan against Law. A lawsuit in Gosarbitrazh may satisfy the enterprise which has suffered a financial loss through the improper acts of another enterprise (for example, the manufacture and sale of goods of poor quality), and the economic equilibrium disrupted by such improper acts may thereby be restored as between the parties. But the planned economy itself, that is, the state ("the whole people"), may remain without satisfaction for the violation of a law prohibiting those improper acts. Because of its desire to prevent the recurrence of such prohibited acts and to express its disapproval and condemnation of them, the state may impose, in addition to administrative and civil sanctions, criminal sanctions.

For a state business enterprise to break a contract is in itself no crime in Soviet law. That is, there is no statute declaring mere breach of contract unlawful. On the other hand, the Criminal Code does prohibit "thriftlessness" on the part of managers of enterprises and "malicious nonfulfillment of contracts," as well as delivery of goods of poor quality. Moreover, a Soviet official is subject to a high degree of criminal responsibility in the performance of his official

duties; in a planned economy the word "official" includes not only the holder of political office but also the manager, chief engineer, or other official of a factory, the officer of a trade union or a coöperative, and the like.

In addition, private individuals may run afoul of the criminal law in the conduct of their economic activities. For an individual to purchase and resell goods for profit constitutes the crime of "speculation." In 1940 it was made a crime for workers in state enterprises and institutions to leave their jobs without the consent of management or to stay away from work without good reason.

The planned economy protects itself further by imposing very severe criminal penalties for the theft of socialist property, as contrasted with the theft of personal property of individuals.

The definitions of these new economic and official crimes, as given in the Criminal Code, are broad and sweeping. Article 128 states: "Thriftlessness, based on a negligent or unconscionable attitude toward a matter entrusted to them, of persons who stand at the head of state or social institutions and enterprises, or their authorized agents, which has resulted in the squandering of the property of [such] institutions or enterprises or irreparable damage to them, [shall be punished by] deprivation of liberty for a term up to two years or corrective labor tasks for a term up to one year." (Deprivation of liberty signifies sentences to a corrective labor camp or imprisonment; "corrective labor tasks" consist in a deduction of a certain percentage from monthly wages while at work at the place of regular employment or at some other assigned place.) Article 128*a* declares that "for the release of industrial products which are of poor quality or incomplete, and for the release of products in violation of obligatory standards, directors, chief engineers and leaders of divisions of technical control of industrial enterprises, shall be punished as for anti-state crimes equivalent to wrecking, by imprisonment for a term from five to eight years." According to Article 131: "Nonfulfillment of contractual obligations concluded with a state or social institution or an enterprise, pro-

vided that the consideration of the case in a civil proceeding has disclosed the malicious character of the nonfulfillment, [shall be punished by] deprivation of liberty for a term not less than six months with confiscation of all or part of [the criminal's] property."

For "abuse of authority" by one who occupies a temporary or permanent office in state enterprises and organizations, Article 109 imposes a penalty of deprivation of liberty for a term not less than six months. New official crimes are sometimes created in connection with new government policies. For example, in the drive to improve labor discipline on collective farms in 1933, officials who failed to carry out certain orders were made subject to penalties under a special edict. With the introduction of a plan to develop cattle breeding in 1935, it became a specific crime for an official intentionally to conceal or give false information concerning cattle. These and similar crimes fall under the general rule of Article 109. Failure to use one's authority when there is a duty to do so, coupled with a negligent or unconscionable attitude toward the obligations imposed by one's position, is made punishable under a separate provision, Article 111, by deprivation of liberty for a term up to three years.

Still more serious is speculation, which Article 107 defines as "the forestalling and re-sale by private persons, for profit, of agricultural products and other objects of mass consumption." It is punishable by deprivation of liberty for a term not less than five years with confiscation of all or part of the criminal's property.

Unauthorized departure from state, coöperative, and social enterprises and institutions is punishable by imprisonment for a term from two to four months, and absenteeism without good reason by correctional labor tasks for a term up to six months, with deductions from wages up to 25 per cent. Though passed in 1940 as an explicit preparation-for-war measure, this law has not been repealed.

By a decree of August 7, 1932, socialist property was declared to be "sacred and inviolable" and theft of it was made punishable by deprivation of liberty for not less than ten years, with confiscation

of property, and, under certain aggravating circumstances, death by shooting. At the time, and until 1947, theft of personal property was punishable by deprivation of liberty for a term up to three months, and theft by assault (robbery) by deprivation of liberty for a term up to five years. In 1947, capital punishment was abolished in the Soviet Union, and the sanction for theft of socialist property was changed to internment in a correctional labor camp for a term of seven to ten years, with or without confiscation, in the case of theft of state property, and five to eight years, with or without confiscation, in the case of collective farm or coöperative property. For a second offense, or for commission of the crime by an organized band or on a large scale, the maximum penalty is twenty-five years with confiscation. At the same time, the penalty for theft of the personal property of citizens was increased to internment in a correctional labor camp for a period from five to six years, and, when accompanied by assault, to ten to fifteen years (and in some cases fifteen to twenty years) with confiscation.

The code provisions concerning many of these economic crimes say nothing of the requirement of criminal intent. At the time most of them were enacted it was widely held both by writers and by courts that criminal intent was not a prerequisite for guilt. Was the act socially dangerous? Was the actor himself a social danger? More than that it was hardly necessary to ask. With the shift in Soviet jurisprudence, criminal intent has in fact been required, and a very far-reaching effort has been made to limit and define and stabilize these economic crimes in a manner consistent with the new emphasis on personal fault. Where the code provision does not explicitly require direct intent, the commentators and courts infer that the act must be committed negligently (as contrasted with mere accident, or through someone else's fault) in order to be considered criminal. In the case of thriftlessness, for example, and of release of products of poor quality, it must be proved either that the manager actually foresaw that his acts would result in the squandering of socialist property or in some damage to the state, or else that,

from all the circumstances of the case, he should have foreseen it. In the case of "malicious nonfulfillment of contract," the courts require not merely an intent to commit the prohibited act but also the presence of malice, that is, "intent directed to the causing of harm to the state thereby."

"Abuse of authority" by an official is not considered criminal unless the official knew or should have known that his acts were illegal; in addition, the courts have required that the abuse of authority actually lead to some injurious result or the possibility thereof.

Likewise in regard to speculation, the courts have required that the accused be proved to have had the purpose of making a profit before they will convict him. Thus workers or housewives who sell their personal belongings are not *ipso facto* guilty of speculation, nor is every exchange of goods for personal gain a criminal offense. Again, in the case of departure or absenteeism the mere occurrence of the prohibited result is not sufficient for conviction: the fault of the accused must be proved.

Where there is a charge of theft of socialist property, the actor, to be adjudged guilty, must be shown to have actually known that the property was socialist (and not personal) property, and that he intended to steal it. Although the decree states that the crime is "equivalent to a counterrevolutionary crime," it is not required that counterrevolutionary intent be shown.

The Soviet emphasis on the intent with which the economic offense was committed is undoubtedly connected with the nature of the planned economy itself. The state tends to enact into law its economic objectives. However, its plans and regulations proclaim goals, ideals, which cannot possibly be met 100 per cent. Violations are therefore inevitable, and to punish all violators indiscriminately would make little sense. It is the "malicious" or "grossly negligent" violator who is dangerous for the system. However, it is not easy to prove—or disprove—a wrongful purpose or the grossness of an act of mismanagement. Thus the objectivity of law—always precarious—is still further threatened.

As crimes, the economic offenses which are here being discussed are tried not in Gosarbitrazh but in the regular criminal courts. They are prosecuted by the state and defended by the accused, with the help of his lawyer. Gosarbitrazh plays an important part, however, in bringing economic crimes to the attention of the prosecutor; and in the case of malicious nonfulfillment of contract, it must first be shown in a civil proceeding (which generally takes place before Gosarbitrazh) that the nonfulfillment was malicious, before the criminal action can be brought. The People's Court has jurisdiction, in the first instance, over crimes generally. From its verdict an appeal may be taken by either side to the next superior court; thence the case may be reviewed by the supreme court of the particular republic, and finally by the Supreme Court of the USSR. The appellate courts generally have a civil division and a criminal division. In the supreme court of the republic, and in the Supreme Court of the USSR, the decision of the civil or criminal division may be reversed by the court sitting as a whole.

Entirely outside of this judicial hierarchy stand the Ministry of the Interior and the Ministry of State Security.[19] Let the element of sabotage or counterrevolution be introduced, and the Ministry of the Interior, through a "Special Board," takes over. Here the trial is administrative and secret. Judging from reports of those who have experienced these trials, defense counsel are not allowed, there is no right of appeal, and conviction is almost certain, regardless of the truth of the charges.

The line between political and nonpolitical is a wavy one, and it is the Ministry of the Interior, and not the courts, which draws it. In other words, the Ministry of the Interior has the right to take any case it desires. There is no way of assessing the number of cases which it actually takes. There can be little doubt, however, that it is a large one.

On the other hand, a great many cases are tried in the regular courts, and there is considerable evidence that there they are generally dealt with according to accepted standards of law and justice.

Here the case of Dmitri Buligin—a former Soviet citizen now in the United States—may be instructive.[20] As consultant for an engineering office, Buligin, a professor at the Leningrad Engineering Institute, was asked in 1940 to draw up blueprints for an important construction project in Kazan. Progress had to be reported directly to Moscow, to what was then called the Technical Council of the People's Commissariat (now Ministry) of Heavy Industry. After the layout was finished, a hearing was called in Moscow, which Buligin attended as supervising engineer. Over his protest, the Council altered the plans, for the sake of economy and speed. Buligin was accordingly compelled to direct his team of engineers to carry out the revised plans. After construction got under way, the director of the engineering office received the following telegram: "Foundation sagged under machine Number Five when tested. Investigation started. Send your representative."

The director sent Buligin to Kazan, where he was greeted by an investigator of the Ministry of the Interior, who told him that he was suspected of a "deliberate act of sabotage," designed "to prevent the new plant from getting into the production needed to strengthen our country's war potential." The investigator questioned him about his relations with his uncle abroad, and about his relations with all the people who had worked with him on the project, and then asked him to prepare a written report on the basis of his observations at the scene of the construction. Buligin concluded, in his report, that the sagging was due to weak layers of soil which should have been detected by the engineers in charge of boring.

On his return to Leningrad, he "received a summons to visit the Big House" (NKVD headquarters), where a new investigation began all over again. "Why haven't you told us anything about Alutin?" he was asked. Alutin was his chief assistant. "We've had to arrest him. He's a rather suspicious character, you know. His father was a priest. And he has relatives abroad. In the Engineering Institute he did not have a good record, either. He didn't participate in any of the social work. Did you know him well?" Buligin

defended Alutin, who by this time had been arrested and was under detention.

After two more months in which he was called several more times for severe questioning, Buligin was formally shown an indictment that had been drawn up on the basis of the preliminary investigation. Four persons were indicted—Alutin, the engineer in charge of the borings, a foreman, and Buligin. "I was pleasantly surprised," Buligin reports, "that none of us were accused of counterrevolutionary sabotage, as had constantly been taken for granted by the agents in talking to me. Instead we were accused of criminal negligence, under Article 114, which carries a maximum penalty of ten years in prison, whereas Article 58, on counterrevolutionary crimes, could have meant capital punishment."

"I inquired about court procedure, about the sort of defense I might be allowed, about what rights would be accorded us in the trial. The investigators avoided my questions, suggesting merely that I find a lawyer to give me the information I sought."

The next day Buligin, who alone of the four accused was not detained, owing to the fact that the Institute considered him indispensable, went to see a lawyer. Buligin writes:

I had met him somewhere before, and I remembered his name. I wanted to hear his opinion of the case in general, and to know whom to approach first. I told him my whole story, with all the details. His first reaction was to congratulate me on my luck in not being indicted under Article 58. "Such cases are usually decided without any trial, by the NKVD itself," he explained, "and no defense attorneys are allowed in at all."

The day came for the trial. I felt awkward, standing alongside my three co-defendants. I was at liberty, and they had been in jail. They sat on a bench between two guards, but I was given a chair next to my attorney's table.

I was happy to see two engineering experts taking part in the trial. They were well-known professors. I was acquainted with one of them, and knew the other by reputation.

The trial took place in the Leningrad District Court, and lasted four days. There were three judges on the bench—the main judge and two

lay associates. One associate judge was a carpenter, and the other was a janitor. This was a municipal court—higher than a people's court. The next highest court was the Supreme Court [of the RSFSR] itself. The chief judge, a professional jurist, bent over his two associates from time to time, seemingly just for the look of the thing, and they always bowed their heads in solemn agreement to whatever he was saying. During the whole trial, only one inconsequential question was asked by either of these two associate judges.

The lawyer assigned to the other two defendants was quite an old man, who constantly yawned, and even took little catnaps.

My attorney was very alert. He constantly took notes, and insisted that I consult him each time before he spoke or asked questions. He frequently stopped me from speaking. Even so my voice, in my own defense, was heard more frequently than that of the others. During recess, I heard people refer to "the trial of Buligin and three others." My co-defendants spoke so little, and stared about with such scared looks, that it was evident they had been bulldozed by their detention and jail environment, and had undoubtedly undergone severe grilling. I tried to defend Alutin as much as I could. The two professors were there only to answer technical questions. Their answers were clear and to the point, and it was very evident that they were well acquainted with the case.

The prosecutor's questions were about the same as had been hurled at me during my interrogation. He seemed interested only in people, not in technical details. Damage had been done, people must have done it, and they must pay the penalty. This was his simple logic, which he hammered upon again and again. He spoke with emphasis, staring pointedly at me several times when he said: Most probably the accident came about not only because of negligence, but for some other reasons.—This was an obvious hint at sabotage.

All but two of the ten or so witnesses were on our side. The two exceptions were motivated by dislike of Alutin. One was a young engineer, from the same graduating class as Alutin, and a Party member. The other was the director of the engineering office. The former criticized poor Alutin to the right and to the left. I had the impression that beside the personal animosity for him, he also resented the fact that Alutin had been placed above him, while he had to remain as his assistant.

The director was afraid the blame might be laid to him, and he tried to put the whole responsibility on Alutin and me. He told the court that he wasn't a specialist, only an organizer, and that the responsibility was mine. Why hadn't I gone to Kazan myself? he asked, although he knew

perfectly well why I couldn't have. Why hadn't I demanded a more detailed analysis of the borings? Why had I selected such an assistant as Alutin, who he said didn't have a serious attitude toward his work. These were his only arguments.

A very interesting point came up which the two engineering experts and the defense lawyer grabbed. During the questioning of the foreman, it came out that a representative of the People's Commissar had gone to Kazan for an inspection, when the ground for the foundation had already been dug up. He had noticed water seeping from underground, and had seen the laborers standing in the water. This Moscow official, the testimony revealed, gave orders to pump out the water, and to keep the drainage work going all during construction. His orders were instantly obeyed. The foreman let this information slip out while trying to impress the court how faithfully he had always obeyed the orders of his superiors.

The constant flow of water might easily have washed away some of the clay layers of soil, which could have caused the uneven sagging of the foundation. In their conclusions, both experts pointed out that this could have caused the accident.

But the court didn't consider this point at all. A representative of the People's Commissar cannot be blamed for anything—unless he first has fallen into disfavor in the Party! But engineers and technicians, well, those were the people who could be blamed!

The sentences handed down were six years of imprisonment for me, four years for Alutin, and three years for the technicians and the foreman.

Buligin had reckoned on a conviction, but the harshness of the sentence was a shock to him. However, he writes, "I took the verdict calmly, for I believed it was so absurd that it certainly would be overruled by the Supreme Court."

After several weeks of extreme discomfort at "The Crosses," the old Leningrad prison constructed for political prisoners before the Revolution, Buligin was sent to a labor camp. Meanwhile his lawyer brought an appeal in the Supreme Court of the RSFSR, which reversed the conviction and remanded the case for a new trial on the ground that the lower court had ignored statements by the two experts, and also that it had erroneously refused to call witnesses requested by the defense. His sentence having been revoked.

Buligin was told by the head of the labor camp that he could not be kept prisoner for more than seventy-two hours afterward. Also, according to law, he had to be reinstated in his old job.

The new trial was in the hands of new investigators, not of the NKVD but of the regular investigating and prosecuting arm of the government, the Procuracy. The new investigators examined the witnesses upon whom the defense had wished to rely in the earlier trial, including some of the people who had taken part in the meeting of the Technical Council and who had therefore heard Buligin's protest against the revision of the plans.

The second trial proceeded much more calmly than the first. All four accused were now at liberty. One of the two lay judges was an engineer, Buligin having been advised of a little-known right to demand that in a case involving technical matters there be one specialist on the bench. The engineer-judge asked pointed technical questions of the expert witnesses. After a trial of three days, the judges deliberated for about six hours and then brought in a verdict of acquittal for all four.

The prosecutor appealed the acquittal, but Buligin's attorney explained that that was only a matter of form, for the record. Buligin went to Moscow to represent himself in the Supreme Court. After a perfunctory hearing lasting ten minutes, the acquittal was affirmed.

3

SOCIALIST AND CAPITALIST LAW

Socialism means many things to many people. In Massachusetts some years ago a Congregationalist minister was asked by two elderly ladies of his church whether it was true he was planning to run for Congress on the socialist ticket. He replied that it was. "Oh, Mr. H——," they said in a horrified whisper, "we didn't know that you believe in bigamy!" More recently the charge has been made by an official of the National Association of Manufacturers that the United States has already adopted the main features of the *Communist Manifesto;* he cites as an example the virtual "abolition of inheritance" through taxation. By such criteria as these, Soviet law is not in the least bit socialist. Its family law is far stricter than ours, and its inheritance law, with regard to taxation, far more liberal.

In the non-Soviet world there is a tendency to call every limitation of private property and private contract a step towards socialism. A public health program such as has existed in some European countries for more than a generation is today in the United States termed by some "socialized medicine." Legislation protecting labor unions, social security laws, increased public regulation of business, and various other infringements of the laissez-faire economic individualism of the past, are indiscriminately lumped together under the rubric "socialist."

Soviet theory, on the other hand, categorically denies the socialist character of such measures. From the Soviet standpoint, the "welfare state" is simply the last stand of monopoly capitalism.

Even English socialism is not socialism at all, according to the Russians, but merely state capitalism. Only when the last capitalist is gone, and the entire economy is planned, can there be socialism in their sense of the word.

On both sides there is a tendency to make socialism and capitalism mutually exclusive. Everything that is not capitalist must be socialist, and everything that is not socialist must be capitalist.

This is the terminology of Marxism, to which many non-Marxists have now succumbed. It was Marx who first identified our entire social order as a capitalist system, founded on capitalist economics. However justified such an analysis may have been one hundred years ago in the big industrial cities of Europe with which Marx was familiar, it is hardly adequate as an explanation of present-day society. A World War, a world-wide depression, and a Second World War have intervened to create an entirely new social order not only in Russia but throughout the world. The Soviets are stuck with Marxist slogans which do not correspond to the underlying economic and legal realities both of their society and of ours.

Pure capitalism and pure socialism are myths. Nowhere does either exist. When the Soviets speak of our economic system as a capitalist system, they do violence to some of the most important developments of the past thirty years. The United States government has acquired ownership of some six billion dollars' worth of land alone. Dozens of administrative agencies and public corporations have been given vast control over business activities. Taxation has become an important instrument for the redistribution, in the public interest, of private profits and inherited wealth. The Atomic Energy Commission—to mention the most striking example—is a three and one-half billion dollar government agency which exercises a very large measure of control over the resources, both human and natural, with which it is concerned. Indeed, atomic energy is a nationalized industry in the strict sense; fissionable materials are

a government monopoly, capable of ownership by the state alone. Whatever this is, it isn't pure capitalism.

On the other hand, we have seen that Soviet socialism is dependent for its operation on institutions, both economic and legal, which have been adapted from presocialist eras. The Soviet economy is a money economy; the ruble is not merely a unit of account but also a measure of value, and prices, though fixed by the state, are designed to correspond at least in part to market conditions of supply and demand. Profits are an important incentive for the directors and employees of state business enterprises. The traditional categories and relationships of corporation law, property law, contract law, are restored even in the "socialist sector." In addition, there are important areas of the economy which are relatively free, such as the free market for the produce of individual peasant households and the labor market, which remains at least flexible despite all attempts to stabilize it. Whatever this is, it isn't pure socialism.

This is not to say that socialism, pure or otherwise, necessarily implies a controlled labor market or the absence of money, or that capitalism necessarily excludes an Atomic Energy Commission or a TVA. For one thing, there are many variants of both socialism and capitalism. The point is, however, that to talk in terms of socialism and capitalism makes less and less sense as we enter the second half of the twentieth century. Not only the Soviet and the American economies, but any going modern economy, is a mixture of socialist and capitalist elements. The developments of the past generation in Russia and the United States show a progressive fusion of these elements. The Soviet system is compelled to restore centers of initiative and responsibility on local, group, and individual levels, for the sake of making the planned economy work. Starting from the opposite pole, the United States is compelled to seek greater integration and "socialization" of its economy in order to preserve local, group, and individual independence.[1]

To socialists, the blunders of the first phase of development of

the Soviet system are an obvious object lesson in the dangers of a socialist oversimplification. Planning is in itself no solution to economic and legal problems, but at best only a possible means to a solution. The planners must face the same fundamental economic and legal realities which exist in a nonsocialist society. If anything, the complexities are more overwhelming than before. A good example may be found in the dilemma which has confronted Soviet industry in respect to meeting quantitative and qualitative standards of production. At first the plans called for production in quantitative terms, without much emphasis on the quality of the products. As a result goods were being turned out without essential parts, in order to meet production plans. Automobiles were manufactured, but they wouldn't run. New laws were passed prohibiting this practice, and establishing strict qualitative norms. As a result, manufacturers, lacking necessary parts, turned out nothing. Another problem has arisen from price fixing, which in some instances has resulted in discouraging the production of goods for which the demand is strong and encouraging the production of goods which are already in sufficient supply. It is such bottlenecks as these which have caused Soviet economists and lawyers, both in theory and in practice, to emphasize managerial responsibility and initiative, strong personal incentives both of reward and punishment, "business accountability," decentralization of operations. With this, the old ghosts return. The parties are now government officials rather than private capitalists, but the questions which confront the courts are the same: Was there a contract? Was there offer and acceptance? Did the director act beyond the scope of his authority? What are the priorities of creditors' claims against a bankrupt enterprise? Is a superfluous turbine basic capital or working capital within the meaning of a statute restricting the sale of basic capital? Does a lease fall within the categories of "sell, exchange, or release"? There are countless other similar questions arising out of economic relations and demanding legal characterization. A Five-Year Plan may be a beautiful thing, but it is not

self-executing; and in its execution the very problems which socialist theory has sought to eliminate come back to haunt the planners.

To capitalists, on the other hand, the fact that the Soviet planned economy *has* been able to integrate into its pattern the traditional institutions of property and contract is an equally obvious object lesson in the dangers of a capitalist oversimplification. Competition, credit, accountability, are not peculiar to capitalism. The corporation is not a legal form which makes sense only in terms of private property and limited shareholder liability. These and other familiar capitalist institutions can be made workable under socialism as well. At the same time, socialism undoubtedly has certain positive values. As Vladimir Soloviev said over fifty years ago, "To defeat what is false in socialism we must recognize what is true in it."

If we avoid both the socialist and the capitalist oversimplifications we shall be on surer ground in facing the implications of Soviet law. We ourselves are moving toward increased public control of economic life. Our ideas of property and contract are changing. In enforcing our new administrative law we too have created new types of economic crimes. In none of these respects have we approached the extreme lengths to which the Soviets have gone. We are moving slowly and cautiously along a path which they have traversed with crude and violent rapidity. Only from a very broad historical perspective may we treat our system and theirs as similar. One might say, for example, that the recently established Council of Economic Advisers, attached to the President, plays a role in our country analogous to that of the State Planning Commission attached to the Soviet Council of Ministers. The point in saying so would be to indicate that in twentieth century industrial society politics can no longer be divorced from economics; some official body is needed to view the economy as a whole and to formulate long-range economic policy. Beyond that, the analogy fails. We both face the same fundamental economic questions; our answers fall along the same line—but at different points.

It makes sense, therefore, to attempt to understand the Soviet answers for the light they may shed on the possibilities and pitfalls of the path we are treading.

Soviet law, in its socialist aspects, presents us with a forecast of the kind of legal system that goes with a planned economy. I have identified as the most important aspects of such a legal system: (1) the interrelation of plan and law, (2) the development of a socialist law of property and contract, and (3) the extension of economic crimes.

1. In a planned economy the state has a double function. It is on the one hand the economic sovereign; it is the supreme banker, the supreme industrialist, the supreme landholder. On the other hand, the state is an economic citizen as well; *its* business enterprises, *its* collective farms, are entities subject to *its* laws. The state is both sovereign and subject; it both plans and operates the economy.

This dualism is made explicit in Soviet law. The plan is elaborated by planning and regulating organs according to certain procedures in which the operative organs participate. Certain criteria, economic and legal, must be followed in composing and articulating it. These procedures and criteria constitute what might be called the *law of the plan,* a field of law nonexistent in our society. On the other hand, the execution of the plan is put in the hands of government corporations, that is, of legal entities with capacity to sue and be sued and with rights of property and contract. The law of government corporations exists outside the Soviet Union; nowhere else, however, has it been extended so far. Every Soviet government agency which carries on economic operations (as distinct from one that merely plans or regulates) is now coming to be treated as a corporation.

It has been said by American reporters that a Soviet citizen cannot sue the state. That is true, in the sense that one cannot sue the USSR as such, or the RSFSR, or the Supreme Soviet, or the Council of Ministers. A Soviet citizen may, however, sue any

operative organ of the state. He may sue, for example, the Chief Administration of the Army Air Forces for the wrongful death of a near relative. He may sue the village or city or regional soviet or executive committee on obligations arising from breach of contract, injury to person or property, or unjust enrichment. He may sue enterprises, trusts, glavki, and, in some instances, ministries. The suability of these operative state organs is now finding expression in the recognition of their corporate personality.

The concept of the corporation, taken over by capitalism from the medieval church, today again shows its capacity for survival and new development. Operating without a joint stock and as an agency of the state, the government corporation obtains, through its legal form, autonomy in its dealings with others and unity in its internal structure. It is peculiarly adapted to commercial methods and to managerial control. It gives scope for greater flexibility than is possible with regular government departments.

On the other hand, by giving jurisdiction in disputes between state economic organs to a special system of courts, the planned economy protects the governmental functions of those organs (the fulfillment of plans), while at the same time providing for the adjudication of their rights and duties. The Soviet Gosarbitrazh has been an important growing-point of the law; its decisions have prepared the way for new administrative and legislative policy as well as for new judicial policy in the regular system of courts.

2. When private ownership is the rule and state ownership the exception, the character of state ownership is assimilated to that of private ownership. The state, in its proprietary functions, appears as another private party. But in a planned economy, where industry and agriculture are nationalized, state ownership changes its character. It is not ownership in the old sense. The character of private ownership now becomes assimilated to that of state ownership.

This development is apparent in the contrast between Soviet

property law of the NEP codes, still theoretically in force, and that of the Five-Year Plans as now practiced. The NEP law adopted from the continental European legal tradition the conception of ownership as individual and exclusive, with independent and coequal units holding their land or goods in absolute right. This "Roman" idea of absolute private property, with complete and indivisible title, has also made inroads during the past hundred and fifty years upon the traditional English conception, inherited from feudalism, of property relations between dependent and ranked units, of derivative tenure, of "splinters of ownership."

The feudal property regime linked estates in land with status in society. This involved a union of political and proprietary relations, a fusion of public and private law. *Dominium* meant both "ownership" and "lordship." Feudal tenures were intimately bound up with political and military service. With the development of the modern English state, particularly in the seventeenth century, much feudal lore was revived and fashioned into an elaborate structure of property relationships (life estates, future interests) designed once again to link land law with political power and political service, but this time in the interests of the landed gentry, whose political position was buttressed by the system of family settlements which such land law protected.

Against a property law conceived in terms of lasting relationships based on marriage and inheritance, the French Revolution and the Napoleonic codes brought to bear a property law conceived in terms of transitory commercial relationships based on contract. Land and chattels came to be dealt with more and more as a manifestation of the will of the owner; the transfer of property as a meeting of minds. This meant the assimilation of the law of real property to the law of personal property—the abolition of tenurial survivals and of fictitious procedures of transfer, the development of the power of a life tenant to render the land freely alienable even when it is subject to a family settlement, the simplification of title registration. In America, particularly, it

meant the divorce of proprietary rights from direct political-social-economic responsibility.

The past generation has seen a general reaction against conceptions of absolute ownership. Both in Europe and America there has been more and more stress on a functional approach to property in terms of the apportionment of use, possession, and disposition. This is most evident in our commercial law, in which the question of title has lost most of its former importance and instead the nature of the goods, the type of transaction, the assumption of risk, and similar factors have become determinative of the rights of the parties.

The planned economy pushes the reaction against absolute ownership to its extreme. Soviet property law has been recreated along functional lines. Legal distinctions are generally made to correspond to economic differences. This is not always successful; for example, generally speaking the means of production fall under socialist ownership and the means of consumption under personal ownership, but in fact most cattle in the Soviet Union are personally owned, and the consumers' goods produced by state business enterprises are part of state ownership until they are sold. On the other hand, the Soviets have not hesitated to apply different legal norms to different types of property, according to their social-economic functions. Collective-farm land, railroad land, municipal land, forest land, are each subject to special laws. This differentiation is made possible, if not inevitable, by the fact that different administrative bodies are set up to control these various types of land.

At the same time, Soviet law has returned to conceptions of dependent and derivative tenure, and to a fusion of public and private law. One may say of Soviet law what Holdsworth has said of older English law: "There are a large number of interests, recognized and protected by law, which may co-exist in the same piece of land at the same time." This may be seen in Soviet law on all levels of ownership. An individual citizen may own his house, but he holds the land of the state. A collective farm is con-

sidered to have "absolute" ownership of its property, but this ownership must be defined in terms of the public-law, public-economic role of the collective farm in the national political-economic order. For effective administration of the industrial process it has been found necessary to restore certain proprietary rights in state business enterprises—rights limited by the purpose for which they have been restored. A peasant household holds its land, in a sense, of the collective farm to which it belongs (since if the peasant leaves the collective farm he may forfeit it). The collective farm in turn holds its land, in a sense, of the Ministry of Agriculture (which under certain circumstances may transfer it), and perhaps also of the Council of Ministers, the Politburo, the State. Proprietary relations on all levels have an administrative and public, as well as a domestic, personal character. The very word "private" has been replaced by the word "personal" throughout Soviet legal literature.

What has been said of property is equally true of contract. In regard both to personal contracts and to commercial contracts, the planned economy seeks to give frank expression, in its legal system, to the actual economic relations which exist in the community as a whole. We have seen that contracts for the transfer of scarce and important commodities are treated differently from contracts for the transfer of more plentiful commodities. Here, too, the rights of economic organs are limited by the powers of their administrative superiors, and the rights of individual citizens are viewed as part of the entire social-economic process. A Soviet citizen may become rich, but he cannot, through his wealth, directly influence economic development; he can invest only in government bonds or in the state bank. He may make contracts, but he may not "speculate."

Behind the relationships of property and contract, constantly replenishing them, is the Plan. Planning gives conscious direction to the whole economy. Property and contract, which in the past have been symbols of rapid economic development, are restored in a planned economy as elements of continuity and stability.[2]

3. There is a tendency to judge an economic system primarily in

terms of its efficiency, its "rationality." Here we can maintain a certain objectivity. "Private property," a "free market," and other symbols of economic individualism, no longer evoke the same passions that they once did. Today we tend to ask of an economic system, "Will it work?"

However, in dealing with law, the question "Will it work?" cannot be divorced from the question "Is it just?" We come up sharply against the question of the justice of socialist law when we consider the new economic crimes which it creates.

We are shocked that a Soviet business manager who sells superfluous equipment may be punished by imprisonment for two to five years. Is this an inevitable concomitant of a planned economy?

Here again we must view Soviet law from the perspective of our own law as it is developing, and not as it was. In recent years we, too, have extended the domain of criminal law to new spheres. The Securities and Exchange Act, for example, makes it a criminal offense, in certain cases, to market securities without a full and fair disclosure of the condition of the corporation. The anti-trust laws rely not merely on civil suits but also on criminal penalties. To evade the tax laws may subject the taxpayer to a criminal indictment. "As society has grown more complex," writes George Dession, "we have witnessed an ever growing resort to criminal as well as other sanctions to maintain and extend public order in the realms of trade and commerce, of labor-management relations, of ideological conflicts, and of national security."

On the whole, we rely on the "other" sanctions. We dismiss the administrator who has been negligent in his duties. We prefer to invoke economic remedies even in the case of the tax evader. During the war we punished the employer who violated the wage freeze by refusing to allow him to deduct the total wages of his enterprise as a business expense in computing his income tax.

In the last analysis, however, our administrative law depends on criminal sanctions. A crime is by definition a violation of a legal standard set by the government. As the government takes more

and more responsibility for setting legal standards for the economy, criminal law inevitably grows. In addition, the very circumstances which compel the creation of public controls may also stimulate new social attitudes which lead to resentment of violations, and this resentment is apt to find expression in criminal sanctions.

The Soviet distinction between theft of personal and theft of state property is probably an essential feature of a planned economy. The socialism of Plato went even farther than that of the Soviets in this respect; his *Laws* in one place provide the death penalty for theft of state property "no matter whether of a small or great amount, whether by guile or force."

The creation of such new crimes as "thriftlessness" on the part of state business managers, "malicious nonfulfillment of contracts," "absenteeism," and the rest, seems also to be intimately connected with the socialist character of the Soviet system. "Soviet law," writes the English criminologist Mannheim, "is no longer exclusively interested in fighting such comparatively minor derangements in the *distribution* of goods [such as theft]; its primary aim is to help to *extend production* and to *preserve existing* goods." He cites Haldane's statement: " 'Thou shalt not steal' is replaced by 'Thou shalt not waste' as property becomes socialized."

Mannheim attributes this to a new attitude towards public property on the part of the Soviet people, "to the emphasis universally laid on the 'we'-feeling, the sense of common ownership, to be found in particular among the younger generation in present-day Russia."[3] Yet there is no evidence that theft of socialist property is severely frowned on by the population generally, as distinct from the public authorities. On the contrary, stealing in the factories is very widespread and is apparently socially acceptable, while stealing the personal belongings of one's neighbor is infrequent and dishonorable. The reason for the severity of the Soviet laws regarding crimes against socialist property may be just the opposite of what Mannheim supposes.

Here the factor of poverty enters in. The poverty of the economy

as a whole and of the individuals within it strongly conditions the nature both of Soviet planning and of Soviet law. It is clear that, generally speaking, as commodities become plentiful a greater contractual freedom is allowed for their disposition and a greater decentralization of administrative control takes place in regard to them. The relation of contract and plan is thus worked out, in part, in terms of the scarcity of the products involved. Similarly, the poverty of the economy—and not merely its planned character—tends to make waste "criminal." But the poverty of individuals breeds those very crimes which the poverty of the economy makes the state anxious to prevent: crimes against socialist property.

It may be argued, therefore, that Soviet law is the law of a scarcity economy, rather than of a planned economy as such. Certainly the character of Soviet social institutions generally has been very strongly influenced by the decision to sacrifice all other goals to that of rapid industrialization. This has meant forced saving on a large scale, severe restrictions on consumer goods, and the blind elimination of small capitalist producers. It has meant discontent on the part of the people and repression on the part of the rulers. To many observers the special conditions under which socialism has developed in Russia makes Soviet experience seem irrelevant to problems confronted by more advanced countries.

Despite the cogency of this argument, it seems undeniable that Soviet experience reveals some of the difficulties and dangers inherent in all forms of socialism—and at the same time some of the ways in which those difficulties and dangers can, with varying degrees of success, be met. Indeed, it may be that planning, at least in the sense of centralized public direction of all branches of the economy, depends on relative scarcity. In an economy of abundance there is no necessity for total planning. This is implicit in the provisions of Soviet law itself.

Both partisans and antagonists of the Soviet system tend to view Soviet institutions in terms of the extent to which they embody

Marxist theory. This frame of reference has served as a starting point for the present study. Marx said: Economics is basic; law is superstructure, designed to serve the interests of the ruling economic class. Stalin says: Within the Soviet Union we have eliminated class exploitation and antagonism; our law reflects the classless—or class-conflictless—socialist character of our planned economy. Having analyzed the socialist component of Soviet law —that is, those aspects of the legal system which implement and protect the planned economy—we may inquire to what extent it is a concrete expression of Marxism.

Affirmatively, three outstanding features of Soviet law may be traced to its Marxist heritage. The first is its collectivist character. The Marxist principle of totality, of the basic unity of all social relations, finds expression in the integration of politics and economics and in the conscious treatment of legal problems as social problems. Even a lawsuit between two Soviet citizens has an explicit social character, since the state is interested in fixing responsibility. This is especially important in cases involving state business enterprises, where Gosarbitrazh has the duty of "signalizing" gross misconduct on the part of directors to the appropriate administrative organ or to the prosecutor's office.

Second, the dialectical character of Soviet socialist law manifests its Marxist orientation. Despite the struggle for stability, Soviet law changes rapidly to meet changing conditions. It is not static or conceptual. It tolerates logical contradictions and inconsistencies even more readily than our law does. The emphasis on the social-economic purpose of rights is still strong, despite the restoration of the "formal-juridical" element as having equal importance. The drive for strict legality is itself conceived in the interests of dynamic social development.

Third, the influence of Marxist theory may be seen in the Soviet emphasis on extralegal and nonlegal means of social control, and the subordination of law to those extra- and nonlegal means. Marxism is a theory of power. Law is created by the social order, which

itself, however, is considered to be based ultimately on force. When its existence is threatened, the social order may be compelled, for its own preservation, to abandon law and to revert to its ultimate sanction. Thus Soviet law is always precarious; the secret police may step in at any time. Marxism is also a theory of social harmony. The communist society, in its ideal form, requires only a minimum either of force or of law. In order to reach its goal, the socialist order therefore stresses the development of nonlegal social sanctions, especially those associated with membership in the Communist Party and with Party propaganda and agitation.[4]

Despite these characteristics, the Soviet legal system, even in its socialist aspects, cannot be explained satisfactorily as a Marxist system. The very existence of law under socialism is an innovation in Marxist theory, and a contradiction of the spirit of Marxism if not its letter. In addition, many of the features of Soviet law which are considered by the Soviet rulers to be peculiarly socialist bear striking resemblance to the law of those societies which they condemn as capitalist.

In seeking to construct an affirmative theory of law, the Soviet rulers are handicapped by their Marxist heritage. The Marxist features of the Soviet legal system are limiting features. But in spite of Marxism the Soviet rulers have found law necessary—necessary to the planned economy itself—not only because of the rationality and calculability which a legal system provides, but also because of the assurance which it gives to those who operate the economy that their acts will be judged according to some standard of rightness. The rational allocation of resources requires a reasonable adjudication of rights and duties.

PART II

RUSSIAN LAW

4

MARXISM AND THE RUSSIAN HERITAGE

To analyze Soviet law only in terms of the theory and practice of socialism would be to content ourselves with a one-dimensional picture. A legal system can never be the product of an "ism" alone —no matter how much the rulers of a country may so desire. Despite the will of the Soviet rulers, despite the tightness of their dogma, there are historical forces at work in the shaping of the Soviet legal system. Soviet law is not merely socialist law; it is Russian law. It is the historical Russian background of Soviet law which gives it its second dimension and which allows us to see it in a larger perspective.

That Soviet law is rooted and grounded in the Russian past is now implicitly recognized by Soviet jurists themselves, who, in preparing their new codes, are not merely studying the works of Marx and Engels, Lenin and Stalin, but are searching carefully the historical records of prerevolutionary Russian law. Indeed, the Restoration of Law under Stalin is closely associated with the rehabilitation of prerevolutionary Russian traditions; both movements serve the need for continuity and stability. This finds expression in the Soviet law schools, where the history of Russian law is now a required subject and where the Latin language, previously disparaged as a symbol of juridical formalism, has been restored to a place of importance as the language of Roman law, in which Russian law has historical roots. The return to older tradition is also evidenced by the revived prestige of law professors who were trained under the *ancien régime*—men who came under a cloud after the

NEP was abandoned, but to whom Vyshinsky, in 1937, could refer as "those honest jurists who, being educated to and penetrated by the old legal culture and science, were unable, just because of their weak Marxist-Leninist preparation, effectively to resist the saboteurs"—the "saboteurs" being such erstwhile leaders of the Soviet legal profession as Krylenko and Pashukanis, who (with Vyshinsky himself) had effectively hounded the prerevolutionary jurists from public life. With the aid of the new Vyshinsky, and his strong "Marxist-Leninist preparation," they have been restored.

It is not suggested that Soviet Russian law is the same as prerevolutionary Russian law. "We are no longer the Russians we were before 1917, and our Rus is not the same, our character is not the same," stated Andrei Zhdanov in 1946. This statement is undoubtedly true. Yet it must be understood as expressing not only a divergence between Soviet and pre-Soviet Russia, but also, and at the same time, a sense of identification between them. Who are "we Russians"? What is "our Rus"? What does Zhdanov the Marxist mean by these terms?

Marxist theory and Russian history are strange bedfellows. In the cold, systematic, impersonal science of Marx and Engels, every conclusion follows relentlessly from its premises. The only permissible passion is that of bitterness at the injustices of history. Man is stripped of all his clothing, all his "superstructure," and left naked on the rock of economics. In this, classical Marxism is the complete reduction, the *ultima ratio,* of Western rationalism—not rationalism in the specific nineteenth-century sense but rather in the sense characteristic of the Western mind since the eleventh and twelfth centuries; Marx and Engels were rationalists in that they sought to rationalize life, to give order and form to human history, to see society in terms of cause and effect. They fought all nonrational elements—tradition, patriotism, religion, "ideology." They fought Reason, too—that is, nineteenth-century Faith in Reason, Reason with a capital *R.* They reduced all enthusiasms, all passions, all "isms," to economic and social laws.

A reverential statement of Lenin regarding his master sheds

light on the extent to which classical Marxism derives its method from the whole tradition of Western thought. Lenin says that Marx took the best from German philosophy, English economics, and French socialism. Lenin might have gone further: Marx took something from Western medieval scholasticism as well. Not without accuracy has Marx been called the last of the schoolmen. The Marxian dialectic itself, though usually attributed to Hegel and in fact derived from him by Marx, goes back to Abelard's eleventh-century book *Sic et Non,* and to the method expressed in the title of Gratian's epoch-making legal treatise, published about 1140, "A Concordance of Discordant Canons."

How different is the cast of mind and the way of life usually associated with the Russian tradition! The Orthodox East has repeatedly reproached the West for its excessive emphasis on reason, science, and law. Even the Russian Westernizers, that segment of the Russian intelligentsia which deplored Russia's backwardness and urged a conscious imitation of the West, did so with a passion and a capacity for intense exaggeration that astounded and shocked the West. To the West even the Russian Westernizer has often seemed "Eastern."

To view Russia as "East" makes sense, however, only within strict historical limits. Russia is obviously not China, or India, or Persia. Moreover, even if one confines oneself to the proposition that Russia is Russia, one must still note certain important historical affinities with Western Europe. In her foreign policy, Russia has faced East and West, again and again in her history shifting direction from one to the other; and domestically, she has been torn by an internal conflict between those who have sought inspiration in the Western tradition and those who have tried to build on Byzantine and Asiatic foundations. This dualism is manifest again in the Russian Revolution. The reception of Western philosophy, Western economics, and Western political science, in their Marxist form—in the form of a Western theory which no Western country had hitherto found palatable—is characteristically Russian. In the hands

of the Bolsheviks, the rejected stone of the West became the head of the corner.

It becomes necessary, therefore, if we are to understand Soviet law, to articulate it into the context of Russian history. Here, too, we cannot avoid comparison; and here, too, we shall find a challenge. For a study of Russian legal history brings into clear focus the polarity that has existed between Russian history and Western history for almost a thousand years. The main events which shaped the development of Western law from the eleventh to the nineteenth century had only distant repercussions in Russian history. Until the middle of the nineteenth century, at least, Russian law remained largely outside the common tradition which has informed the various legal systems of the West—from Poland and Austria-Hungary to England and America. The study of Russian law therefore challenges us to rediscover the unity of Western law. Indeed, the most fruitful approach to a study of the historical Russian component of Soviet law is to look first at the Western legal tradition and then to compare and contrast it with the main features of Russian legal development.

5

THE WESTERN LEGAL TRADITION

Legally, there is no such thing as Western law; there is only English law, French law, German law, and the laws of the other sovereign European and American states. Yet if one looks at legal history from the perspective of a non-Western culture, it becomes apparent that, despite the inroads of nationalism in recent centuries, there is a strong family likeness in the legal systems of the various nations of the West; as Edmund Burke wrote almost two hundred years ago, "the law of every country of Europe is derived from the same sources."

Indeed, one of the primary facts distinguishing Western Civilization as a whole from the Russian or other non-Western traditions is its concept of law, and in particular its exaltation of law as a fundamental basis of unity in society. Belief in the existence of a "fundamental law" to which governments must adhere or else risk overthrow as despotisms is characteristically Western. It finds expression in the English concept of the Rule of Law as well as in the German idea of the *Rechtsstaat.* This is not to say that there have not been, in the West, significant relapses into illegality, as well as times when the predominant philosophy has been one of a common brotherhood transcending law. We are shocked by the wholesale confiscation of private property by the Bolsheviks in 1917; yet the Republican administration, in freeing the slaves without compensation after the Civil War, carried out one of the most colossal confiscations of all times. Revolution is as much in the Western tradition as Law. In fact the history of Western law must be seen

partly in terms of the great total revolutions which, through bloodshed and violence, as well as through apocalyptic visions of a society so perfect as to have no need of law, have laid the basis for new legal categories and concepts.

Looking backward over the centuries we see that each of the great European revolutions ultimately produced new law. Scholars generally agree that the Napoleonic civil, commercial, and criminal codes of 1804–1808, whose influence spread not only throughout the West but into other parts of the world as well, were a product of the French Revolution of 1789, with its Reign of Terror and its foreign wars. The French codes revolutionized Western legal systems by the very philosophy of codification implicit in them: through the summation and systematization, in chapters and paragraphs, of the entire mass of existing rules, decisions, statutes, and customs, the codes sought to give certainty and equality in the application of law. A restraint was thereby exercised on judges and legislators—against arbitrariness, against privilege. In their substantive provisions as well, the Napoleonic codes introduced a new epoch in Western legal history, particularly through individualistic and contractualistic conceptions of property relations. As we have already seen, ownership was defined in terms of the absolute right of the individual to do with his property as he wills. "Title" was conceived as complete and indivisible. The transfer of property could thus be dealt with as a meeting of minds. This meant the divorce of proprietary rights from direct political privileges and responsibilities.

The connection between the English Revolution of 1640–1689 and the English Common Law is more controversial than that between the French Revolution and the Napoleonic codes, since the seventeenth-century English legal reformers asserted that they were only "restoring" the medieval and Anglo-Saxon tradition which had been abrogated during a hundred and fifty years of Tudor "despotism." Yet it cannot be denied that this so-called "restoration" was a step into the future, that it inaugurated a new era in the development

of the English legal system. In the field of public or constitutional law this is clear, for the doctrine of parliamentary supremacy, and the founding of the political power of parliament on the social and economic power of the landed gentry, was new in the seventeenth century. New, too, was the increased power of the judiciary, composed largely of the younger sons of the landed gentry (the older sons going into Parliament). The principle was established that judges were not removable at the will of the monarch but served "on good behavior" (*quamdiu se bene gesserint*). As the repositories of the ancient legal traditions (newly discovered and hardly called ancient before the seventeenth century), the judges had wide powers of discretion; it was against these large discretionary powers of the judiciary that the French Revolution and the Napoleonic codes were, in part, a reaction. (French writers still identify the English judicial system with the *ancien régime.*) These principles of English constitutional law had important repercussions in other fields of law as well—in the law of property and contract, in family law, in inheritance, and in other branches. Minus the military and ecclesiastical aspects of feudalism, minus also the feudal institution of vassalage, English judges and legislators fashioned a new "feudal" structure of private-law relations, built on a system of family settlements. "Real property" was conceived in terms not of transitory commercial relationships based on contract, as in the later French Civil Code, but in terms of lasting relationships based on marriage and inheritance.

The French Revolution reacted against the aristocratic ideas which had spread throughout Europe in the wake of the English Revolution. The English Revolution was, in turn, a reaction against the monarchical ideas which had been given dominance by the German revolution of 1517—the Reformation. The German Reformation, too, is associated with the production of new law. It went hand in hand with the movement known as the Reception of Roman Law, which swept the continent of Europe and almost engulfed England as well. This was more than a mere reception

of ancient law; it was a recreation of the medieval Roman-and-canon legal system out of which it grew and against which it reacted.

When Martin Luther publicly burned the canon law books, he performed both a religious and a political act—symbolizing the revolt against the Roman Catholic conception of a visible, legal Church and the desire to purge the existing political and legal regime of ecclesiastical influence. The success of the Protestant Reformation of the Church meant the transfer of initiative in law and government to new secular classes, with new territorial jurisdictions; and it was these new political states—the principalities—which needed a legal system. The sixteenth-century German princes (and their monarchical counterparts in France, England, and elsewhere) had the task of organizing their territorial jurisdictions without the aid of men whose allegiance was to the pope. In Germany they did so by sponsoring the growth of a new class of secular jurists, and a secular civil service. They also had the task of reorganizing the relations of groups and classes within their territorial jurisdictions, once the power of the Church—and especially the monasteries—was broken. In Germany they did so by extending Roman Law to spheres into which the Romano-canonical law of the medieval Church had only slightly penetrated.

As the nineteenth-century French system exalted the code (and hence the legislature, which alone can change the code), and as the seventeenth-century English Common Law exalted the judiciary, so the modern Roman Law of sixteenth-century Germany exalted the learned jurist and civil servant, who shapes the law in terms of principles and concepts. German law professors, for example, had actual cases submitted to them, as a body, for decision. This reliance on professors and state councillors and princely advisers had implications not only for the newly emerging bureaucratic "rational" State, but for private law as well. It made possible the development of legal abstractions—such as Contract, Ownership, Inheritance. Both on the Continent and in England, for

example, the separation of contract from tort—that is, the distinction between breaking an agreement with another and doing him injury—dates from the sixteenth century. The Reception of Roman Law on the Continent, with its repercussions in England, may be said to have produced our modern conception of freedom of contract. It also produced our modern conception of freedom of wills—freedom, that is, to leave by will both land and personal property.

If we push further into the past, we find that the cornerstone of all the legal systems of the West was laid in the eleventh and twelfth centuries, through a law movement which also was the result of a violent revolution. In the year 1075 Pope Gregory VII declared the secession of the Church from the Empire; in so doing, he proclaimed for the first time the conception of the Roman Catholic Church as a separate legal entity, distinct from secular law, with the pope as its legal head and the papal *curia* as a court of last resort throughout Western Christendom. In his *Dictatus Papae,* the revolutionary document in which this conception was proclaimed, it was stated for the first time that appeals could be taken from the courts of bishops to the court of the bishop of Rome. Wars were fought before Europe accepted this usurpation of what had previously been the jurisdiction of the Emperor, who up to this point had considered himself the real head of the Church and the appointer of popes. A whole new legal system was established before the interrelations of Church and Empire, and the internal relations within each, could be stabilized on the new basis.

From the so-called renovation of Roman and canon law of the eleventh and twelfth centuries dates the richness of the legal tradition of all the nations of the West. Throughout Western Europe there emerged then, for the first time, lawyers, law schools, law treatises, hierarchies of courts, and a science of law. European jurists, working on the primitive customs of the various Germanic peoples, on the laws of the Frankish empire (and especially the feudal charters of immunity and privilege which had assumed in-

creasing importance with the decentralization of imperial authority in the ninth, tenth, and eleventh centuries), on the liturgy and sacraments of the Church, and on the *Digest* of the Byzantine Emperor Justinian (which, after many centuries of oblivion in the West, was then, conveniently, rediscovered)—read into these legal materials certain principles which were new to the history of law. Much of their legal science bore an ideal and abstract character. Yet the secular legal systems of the Western nations, forged in the fires of national revolutions from the sixteenth century on, are founded on these innovations of the eleventh and twelfth centuries; each successive wave of great legal reform in the succeeding centuries is a further development and elaboration of them. For purposes of analysis, we may classify the changes in law which took place at that time under the headings of three leading principles: the principle of Reason, the principle of Conscience, and the principle of Precedents.

Reason, in this context, signifies the principle that conflicting customs, statutes, cases, and doctrines may be reconciled by analysis and synthesis. For the medieval lawyer this meant a dialectical method of investigating texts, a method which had been developed in theology by such men as Abelard and applied to law by canonists such as Gratian. The medieval dialectic—as contrasted with the ancient Greek dialectic, which was essentially a method of classification—enabled European jurists not merely to distinguish and analogize rules of law, as the Greco-Roman jurists had done, but to analyze basic ideas. The Eastern Roman law of Justinian's time and before had proceeded from the premise that legal propositions were to be applied on the basis of their authority, more authoritative statements having weight over less authoritative. Such-and-such was the rule because so-and-so had said it, and no reasons had to be given. The emphasis was on the application of semisacred texts and the use of the right words and categories. An illustration of the authoritarian and liturgical character of Eastern Roman law may be seen in the fifth-century Law of Citations, which named

five great jurists whose writings should be considered authoritative, stating that in case of a difference among these five on a particular issue, the opinion of Gaius should prevail, unless there was a three-to-two split among the five authorities, in which case the majority should prevail. Another illustration may be found in the decree of Justinian prohibiting any commentaries on his code.

In the eleventh and twelfth centuries, Western jurists seized on the great law books of the Eastern Roman Empire in a quite new spirit. Now the older Roman legal categories and classes were transmuted into ideas and concepts. Negotiability was a new and characteristic discovery of this period. A claim was for the first time something that could be assigned. In the Roman law of Justinian contract had been interpreted in terms of the intention of the parties, but intention was determined by the words uttered or the acts performed; now intention became a concept, not just a category, and the same words could be considered to manifest different intentions when spoken under different circumstances. "Legal proof"—proof based on the mere authority of great jurists or on formal procedures, as in the earlier Roman law, or on the sworn testimony of oath-helpers, who had to swear the oath of the accused "without slip or trip," or on ordeals of fire and water, as in the Germanic and Anglo-Saxon law—gave way to "rational proof": the judge's mind had to be convinced, and the judgment based on his convictions. In fact, these medieval jurists insisted that all law conform to reason; they identified law with reason. Just as the medieval theologian asserted that Reason governs the universe, so the medieval lawyer said that law governs all human relations, including even the relation of the sovereign to his subjects. The doctrine that "where there is a wrong there is a remedy"—that is, a legal remedy—became the basis of procedural law. Everything was susceptible of being either legal or illegal. Thus, from what we have called the principle of Reason there developed the idea that the law is complete, that it covers all situations; and the idea that the law is supreme, that it governs all men.

The principle of *Conscience* means that the judge must find the law not only in books or in reason, but also in his own conscience. This was first stated in an eleventh-century tract which declared that the judge must judge himself before he may judge the accused—that he must, in other words, identify himself with the accused since thereby (it was said) "he will know more of the crime than the criminal himself."[1] A new science of pleading and procedure was created "for informing the conscience of the judge" (*ad informandum conscientiam judicis*). A written complaint, written summons by the court, and written records were introduced for the first time. The right to direct legal representation by professional lawyers, interrogation by the judge, exceptions to jurors, special pleas (dilatory and peremptory)—all of which were unknown to earlier Roman law as well as to tribal German law—were now established. From the idea of the importance of the conscience of the judge was elaborated the concept of judicial discretion. The judge was thereby transformed from an umpire to a lawgiver. Moreover, as Reason was associated with the ideas of the supremacy and the completeness of law, so Conscience was associated with the idea of the equality of law, since in conscience all litigants are equal; and from the idea of equality, or equity, came the systematic protection of the poor and helpless against the rich and powerful, the enforcement of relations of trust and confidence (as in English law, for example, when a man leaves property to another "for the use of" a third person, and the second man is considered a "trustee"; or when two persons exchange mutual promises, with nothing more, and the court treats these promises as legally binding), and the granting of so-called personal remedies such as specific performance of a contract (instead of mere damages for its breach) and injunctions.[2] Here, too, Western law was distinguished both from the older Frankish law and the Eastern Roman law; for although both these latter systems were infused with equitable conceptions —the Byzantine law, in particular, protecting the wife against the husband, the ward against the guardian, the debtor against the

creditor—in neither were these equitable conceptions made systematic, and in both procedure remained archaic and intensely formal, lacking a developed concept of judicial discretion.

The principle of *Precedents* signifies an emphasis on cases and case law as the basis for legal development. Although the doctrine of precedents won for itself a special place in English law from the seventeenth century on, the common belief that the Anglo-American system is unique in relying on past decisions is a mistaken one. Judges may be influenced by previous cases, as cited by the lawyers, without mentioning them in their opinions and without accepting a strict doctrine of "standing by decisions" (*stare decisis*). The judicial *technique* differs in England or America on the one hand and in France or Germany or Russia on the other. Here we cite cases as authority for a decision, though we have developed to a fine art the ability to distinguish one case from another, whereas the continental technique is to rely on cases as illustrations of the law, although in writing its final opinion the court only rarely mentions the cases which were relied upon. This is a technical difference and should not obscure the fact that throughout Europe, wherever the influence of the Roman-and-canon law system was felt, the rule developed that decisions are to be based, at least in part, on precedents, and at the same time are to make precedents for the future.

As Spengler has said, all Western law bears the stamp of the future, all classical law the stamp of the moment. Although in the Eastern Empire certain judges came to be appointed by the emperor instead of by the parties themselves, they were still appointed for the particular case and not permanently; and although there was a great emphasis on argumentation from hypothetical cases, this casuistry must be sharply distinguished from case law as it developed in the West.

Precedents make history. The rule of precedents is thus associated with the idea of the growth of a single body of law. Growth would be impossible if every court could undo the work of every other. Hence the necessity for a hierarchy of courts, with appeals

from lower to higher tribunals; hence the necessity for forms of action—typical complaints which were standardized as similarities appeared in the cases for which writs were demanded; hence the necessity for reports of decisions and collections of statutes; hence the necessity for maintaining a close connection between legislation and judicial decision.

The jurisprudence of the eleventh and twelfth centuries gradually permeated the legal consciousness of the West. It found expression not only in the creation of a new system of canon law, but also in the development of the secular law of the various nations. Under its stimulus the tribal customs of the Western peoples were slowly transformed, in the later Middle Ages, into national legal systems, and feudal economic relations into feudal legal relations. As an example of the common tradition which informs all Western legal systems, one need only mention the decree of the Fourth Lateran Council of 1215 abolishing the ordeal—a legislative act of the Church which forced every country of the West to put its criminal law on a new basis, since without the participation of the priests the ordeals, which had been the princpal mode of proof in criminal cases, could not be performed. Moreover, with the end of the Catholic Middle Ages, the medieval legal tradition did not stop but was instead transmuted into various national forms. Each of the great national secular revolutions of modern European history has involved a nationalization and secularization of medieval law. Moreover, each of these national revolutions has had an impact on the other countries of the West. Despite the innumerable changes which have been made over the centuries, the three basic principles of Reason, Conscience, and Precedents—and the ideas associated with them of the supremacy and completeness of law, the equality of law, and the growth of law—remain the foundation of the legal system of every Western people.

It is more than mere coincidence that only now, with the collapse of the European system of national states and the rise to power of Russia, a country which has remained outside the mainstream

of Western history, are we able to rediscover the unity and continuity of the Western legal tradition which modern nationalisms have for so long observed. The Russian Revolution is only superficially a European revolution. The legal system which it is producing is only in part a Western system. To understand it we must study it in the context of the Russian legal tradition which is its heritage.

THE WESTERN LEGAL TRADITION

Year	*Revolution*	*Law Movement*	*Constitutional Principles*	*Private-law Contributions*
1075	Papal Revolution	Renovation of Roman-and-Canon Law	Visible, hierarchical, legal church; separation of church and state.	Principles of Reason, Conscience, and Precedents.
1517	German Reformation	Reception of Roman Law	Absolute monarchy; secular civil service (Bureaucratic, Rational State).	Freedom of contract; freedom of wills; conceptualist law.
1640	English Revolution	Restoration of Common Law	Parliamentary system; landed aristocracy; judiciary independent of politics.	Family settlements; feudal property law without feudalism; traditionalist law.
1789	French Revolution	Napoleonic Codes	Individualist democracy; separation of powers; government by public opinion.	Absolute private property conceived in contractual terms; contractualist law.

6

THE SPIRIT OF RUSSIAN LAW

A mere description of the laws in effect in Russia in October 1917 will not tell us the nature of the legal system which the Soviet regime inherited from the prerevolutionary tsardom. A legal system is more than the laws in force at a given moment. Law is a monument of history, constructed over many centuries, not simply out of words and documents but out of human actions and human lives. Law is more than rules; it is the legal profession, the law schools, the technique and tradition of judging, administering, and legislating. Law is also the sense of law, the law-consciousness, of the people. These things exist not only in space but also in time. How deeply they are embedded in the institutions of a society may depend in part on the length of time they have existed, and even more on the historical circumstances surrounding their origin and development. This is obvious in the case of our own legal institutions, such as trial by jury, the writ of habeas corpus, or the power of judicial review of the constitutionality of legislation; it is equally true of the legal institutions of other countries, however codified the law of those countries may be.

Particularly when we are dealing with a legal system which claims to be entirely new, and which seeks its chief justification not in the past but in the ideology of a Revolution, it is necessary to view it historically. For the past works on us without our knowing it, and by rejecting the past we may in fact bind ourselves to it more closely than by accepting it.

Usually a Revolution revolts not against the whole past but against that part of the past which immediately preceded it: its effect, therefore, may be to restore the still older past. Nicholas II and the tsars of the nineteenth century are anathema to the Soviet regime, but Peter the Great and Ivan the Terrible are once again heroes. The rehabilitation of Russian history since the mid-1930's compels us to ask what parts of the Russian past are being selected and what are being rejected or ignored. We must also try to discover what, in the Russian past, is working on Soviet development subconsciously.

These questions take us as far backward in Russian history as we have had to go in order to find the sources and the main lines of growth of Western legal institutions. Russian legal history, too, goes back a thousand years, and important features of Soviet law date from each epoch of that long development. To make sense out of Soviet law we must therefore try to make sense out of Russian legal history as a whole.

THE COMMON SOURCES OF RUSSIAN LAW AND WESTERN LAW

When we are tempted to talk of Russia as "East," we must remember that, historically, Russian social and legal institutions emerged from a background very similar to that of the West. The Slavic peoples who lived in the ninth and tenth centuries in what is now Russia seem to have had a social order not essentially different from that of the Germanic peoples who settled down in the West in the fourth and fifth centuries. They produced an essentially similar law. Moreover, the Slavs, like their Western cousins, were converted from paganism to Christianity, and through Christianity became heirs to the Roman law of the Empire and the canon law of the Church. It is likewise important to remember that the Eastern and Western Church, despite provincial differences, was at this time essentially a unity, and that the Eastern and Western Roman Empire was also ideologically one despite the political rivalry of Rome and Constantinople. Thus both Russia and the West, in the year

1000, looked to the canon law of the Church councils and to the Roman law of the Christian emperors.

The diverging streams of Russian and Western legal history must thus be recognized as having a common source in the older (pre-eleventh-century) Eastern Roman law. With all the changes that have taken place over the centuries, this fact remains of primary significance in the comparison of Soviet and American law today.

It is Roman law which, in the first place, has given both Russia and the West a common legal vocabulary and a common system of legal distinctions. We classify law in the Roman fashion—into the law of persons and of things, into obligations arising from contract and obligations arising from personal injury, and so on. Of course the words and categories have changed in meaning over the centuries. Nevertheless it is something to have a basic legal language. Without this common ancestry, Soviet and American lawyers would hardly be able to understand each other.

In the second place, the Roman Empire was the source from which both Russia and the West received the notion that a state may be organized by law; the notion, that is, that on the one hand the state should give expression to its policy and its administration in institutions of public law, and that on the other hand the state has the function of giving expression to the interrelations of its subjects among each other in institutions of private law. Indeed, the whole concept of legislation as a primary source of lasting law emerged in Byzantium. Together with this should be mentioned the Byzantine institutions of summons by the court (instead of by the plaintiff), execution of judgment by the court, judgment by default, appeals to the emperor, and a procedure by which the judge was allowed to conduct the trial in terms of rules laid down by public authority instead of merely supervising a submission to arbitration. Justice, instead of proceeding from a voluntary contract, was now imposed from above.

In the third place, both Russian law and Western law are indebted to the Byzantine emperors for the emphasis on the subjective

elements of intent (*animus*), consent, fault—as distinct from the objective facts of a legal relationship. Under the influence of Christianity, what a man had in mind became in some instances as important in law as what he said or did. For example, in the earlier Roman law, if two people become co-owners of a piece of property—for instance, by buying it together—they were held to have by that fact entered into a contract of partnership (*societas*), since they had voluntarily joined in a common enterprise. In Byzantine Roman law, however, everything depended not on the existence of a common enterprise but on the intention to enter into a contract of *societas*. The parties had to have it in mind, as indicated by their words or acts. Likewise, in the law of personal injury, the mental element came to have much greater significance, distinguishing negligence from mere accident.

Finally, a significant moral or ethical contribution was made by the Christian emperors of the East to the ancient Roman law. We have mentioned that Byzantine law sought to protect the weak against the strong, the wife against the husband, the ward against the guardian, the debtor against the creditor. Another example is the rule that a man in lawful possession of another's land should be reimbursed for improvements which he made on the land. This was part of the very strong Byzantine conception that no man should be enriched unjustly at the expense of another—a doctrine which entered Anglo-American law only in the eighteenth century, when Lord Mansfield resurrected it from the lawbooks of Justinian.

These were some of the features of Eastern Roman law which made it great and which have given it survival value for fifteen hundred years and more, both in Russia and in the West. Yet it has survived in two quite different ways. In the West it was systematized and transformed into a new type of legal system. In Russia it merged with Slavic custom, exercising a civilizing influence but not revolutionizing that custom and not itself undergoing revolutionary change.

RUSSIAN LAW IN THE KIEVAN PERIOD, 862–1240

The most striking difference between early Russian and early Western law is a difference in time. The Russians were five hundred years behind the West. Clovis, the Merovingian king of the Franks, was converted to Christianity in the year 486; Vladimir, the ruler of Kievan Russia, in 988. The development of Russian law from the eleventh to the sixteenth centuries is in many ways a recapitulation of Frankish legal development from the sixth to the eleventh centuries.

The first written law of Russian history begins with the rules of the blood feud. "If a man kills a man the following relatives of the murdered man may avenge him: the brother is to avenge his brother; the son, his father; or the father, his son; and the son of the brother of the murdered man or the son of his sister, their respective uncle. If there is no avenger, the murderer pays 40 *grivna* wergeld. . ." reads Article 1 of *Russkaia Pravda,* a collection of laws supposed to have been compiled under Yaroslav the Wise (ruled 1015–1054).[1] This whole compilation, comparable to the old *leges barbarorum* of the Germanic peoples of the West, such as *lex Salica, lex Frisionum,* or the laws of Alfred the Great, testifies to a public order which existed, when it did exist, primarily as between families within a clan (or territorial grouping of clans), but which was relatively powerless to reach down into the internal relationships of a household. At best it was interfamily law, analogous to our modern international law. Within the family there was the law of that family, determined by clan custom. The first Russian chronicle, the twelfth-century *Chronicle* of Nestor, depicts the barbaric character of this interfamily custom; wife-capture and general promiscuity were among its characteristic features. The father-husband dominated his family completely: they were his property. Each clan, the chronicler tells us, had its own custom, "not observing the law of God but themselves creating their own law."

Into this primitive social and legal order came the Eastern Orthodox Church, bringing with it, in the eleventh and succeeding centuries, Byzantine art and culture and also Byzantine law, which was an integration of Roman and canon law. It was under the influence of the Church that the tribal customs were at last restated and reformed in *Russkaia Pravda*—just as five hundred years earlier the Church had influenced the restatement and reformation of the Western *leges barbarorum*. Later editions of *Russkaia Pravda* show still more marked traces of Byzantine influence, as, for example, in the provision that the master should be liable for the crime of his slave, as well as in the abolition of the blood feud and in the prohibition against killing a slave for doing injury to a free man.

Russkaia Pravda was a compilation consisting chiefly of lists of penalties to be paid by wrongdoers to those whom they injured. If one cut off another's arm, one must pay him 40 *grivna;* if a finger, 3 *grivna;* if a mustache or a beard, 12 *grivna.* For stealing a horse, 3 *grivna.* And so on. This system of money composition, or fixed prices for injuries, is a middle stage between crude self-help and a system of public penalties; it is a system familiar to most peoples at a certain stage of their legal development. In later editions of *Russkaia Pravda* fines payable to the prince were imposed in addition to compensation to the injured party.

The judicial procedure in Kievan Russia was exceedingly primitive. Litigation was voluntary; the judge had no power to compel an unwilling defendant to appear. The plaintiff and defendant settled on the issues to be litigated, and the judge simply refereed the contest, which was decided by oath (kissing the cross), or by ordeal of fire or water. Later, witnesses became important, but they too resembled the primitive oath-helpers of Germanic law. Not the state but the injured party prosecuted criminal actions. There was no system of appellate review, no hierarchy of courts. There was no distinction between judicial and political or administrative

functions; princes, local officials, landowners, and church officials judged those groups of people, respectively, who were under their political or economic or spiritual jurisdiction.

The primitiveness of the legal system of Kievan Russia will not shock those who are familiar with Anglo-Saxon and Germanic or Frankish law before the eleventh century. What is shocking is the fact that to a great extent this system continued to exist in Russia down to the fifteenth and sixteenth centuries and even thereafter. This means that the revolutionary legal development which took place in the West in the eleventh and twelfth centuries found no counterpart in medieval Russia. Indeed, in many respects they were not paralleled until the great law reforms of the mid-nineteenth century. This is a time-lag of not merely fifty or a hundred years but of 750 or 800 years, and it requires more than a superficial explanation.

THE TARTAR YOKE, 1240–1480

The conquest of Russia and most of the Eurasian continent by the Mongols in the thirteenth century, and their domination for almost 250 years, exercised a deteriorating influence of the first magnitude upon Russian legal development. At the same time, so long a period of foreign rule could not but shape the course of development of Russian institutions in a positive way as well.

At first the flourishing culture of Kievan Rus, with its many churches and its great art and literature, was completely crushed under the yoke of the cruel, uncouth Tartar nomads. Violence and massacres were followed by systematic exaction of tribute and general disorganization. One direct result of this upon Russian legal institutions was a general lowering of moral standards and, specifically, an increase in the severity of Russian criminal law.

In a positive sense, Mongol influence on the Russian system of civil law, that is, of interpersonal (noncriminal) legal relations, was negligible. The conquerors were interested almost exclusively

in tribute; they took some interest in public administration for the purpose of ensuring the regular flow of tribute. Otherwise they left the law of the subject peoples more or less alone. The Russian civil law as it existed during the period of Mongol domination had almost nothing in common with the civil law by which the Mongols governed their own internal personal and property relations; indeed, the Russian legal materials of this period simply carry further (and not very much further) the provisions of the earlier *Russkaia Pravda.*

In public law, however, in the legal relations of the various branches of government with each other and with the people, the Mongol influence was very great indeed. How far this was a direct influence and how far indirect is a hotly disputed question. Some scholars attribute the emergence of ideas of autocracy and of universal compulsory service in fifteenth- and sixteenth-century Russia to the fact that the Mongols had "laid the basis" for these ideas by their own political and legal system; and in respect to the Russian system of administration, of taxation, and of military organization, these scholars go still further, saying that they were actually received from the Mongols. Others deny all this categorically.[2] It is not necessary, for our purposes, to enter the lists on either side. It is sufficient to note that certain new political-legal institutions emerged during and after the Mongol conquest, if only as a Russian response to Mongol oppression, and that these new institutions took a form remarkably similar in some respects to that which they had had in Mongol law, if only because a conquered people is often forced, in liberating itself, to adopt the ways and methods of the conqueror. Whether Russian law *would have* developed along the same lines *even if* there had been no subjection to the Tartar yoke, is a hypothetical question which need not detain us. If indeed the Mongol influence in certain respects was merely to accelerate certain processes which had begun independently beforehand, then that in itself compels us to take seriously the Mongol impact on the development of Russian law.

That impact made itself felt above all on the position of the Grand Princes of Muscovy, who became, in the course of time, chief tax-gatherers for the Mongol overlord, the Great Khan, and who were thereby able to consolidate the power of Muscovy over the other Russian principalities as well as their own power over their subjects.

By using and enlarging the power of the princes of Muscovy for administrative and taxing purposes, the Tartars in effect selected the instrument for Russian unification and consequently for their own overthrow. At the same time, by their own political organization, and particularly by the absolutism of the khan, the Tartars provided an example of how unity could be achieved. The Mongol social and economic order was predominantly nomadic and tribal, but the power of the khan was imperial in character. He ruled over many clans, and he demanded absolute and unqualified obedience from all his subjects. At the same time he required of them public service. Apparently, those who were not called up to fight were obliged at certain seasons of the year to work for a certain number of days on public structures or in other public works, and in any case to serve one day each week in the employ of the khan.

The *Yasa,* or Code, of Genghis Khan (ruled 1206–1227) assigned to each person in the empire a specific position in service to the State, from which he could not depart without penalty of death. Women were obliged to replace the men of the household if the latter defaulted. All were equal in service. In the words of Vernadsky, "This principle [of universal compulsory service] was later on incorporated into the practice of the Tsardom of Moscow, which, in a sense, might be considered an offspring of the Mongol Empire."

SOURCES AND DEVELOPMENT OF MUSCOVY LAW, 1480–1689

We have noted the marked similarity between the law of the Russian principalities prior to the Mongol invasion and that of the

earlier Anglo-Saxon and Frankish kingdoms of the West. This type of law persisted in Russia throughout the Mongol period. For example, the judicial charter enacted in 1467 by the popular assembly of the city of Pskov is an advanced version of the *Russkaia Pravda.* By the end of this period, however, Russian law began to veer away from the earlier type.

In public law, centralism and autocracy became the dominant features. In 1498 Ivan the Great called himself "Tsar-Autocrat chosen by God." His grandson Ivan the Terrible (tsar, 1547–1584) spelled out the concept of autocracy in clear terms: "The rulers of Russia," he wrote, "have not been accountable to any one, but have been free to reward or chastise their subjects. . . The Russian autocracy . . . has been ruled in all things by sovereigns, not by notables and magnates." Ivan specifically contrasted the autocratic nature of the Russian tsardom with the contractual basis of the Polish monarchy.

The Muscovy tsardom built its autocracy in part on the ruins of the Mongol despotism. It also developed further the Mongol principle of universal compulsory service. Ivan the Terrible broke the power of the hereditary nobility, the boyars, and created a new nobility bound to the tsar by military and civil service. The boyars as a class had developed from the personal bodyguard of the early princes, which in time became the household staff of the princes and was then gradually dispersed territorially by the gift of lands (often with charters of immunity giving them governmental powers) to the individual household officials. This, too, has its exact parallel in Frankish law. But in the West, in the tenth, eleventh, and twelfth centuries, the landed nobility was transformed from dispersed royal household assistants into political vassals, bound to the king by feudal contract with mutuality of rights and duties; and these vassals, in turn, were served by subvassals and ultimately by the peasants, who were converted into serfs under manorial authority. In Russia no such system of feudal law developed. Prior to the rise of the Muscovy tsardom, men who were

in military or economic service to an overlord had the right of departure, and the practice of passing from one allegiance to another was widespread, on all levels, from the lowest to the highest, except for the relatively small class of indentured laborers or slaves. In particular, the boyars could go from prince to prince without losing their independent patrimonial property. But with the unification of Russia under the princes of Moscow, the nobles who attempted to transfer their allegiance to another potentate were not only apt to have their land confiscated but also might find their families annihilated and themselves executed. Thus a great many boyars were either crushed or else transformed in effect into state officials. Alongside the old patrimonial estate (*votchina*) there was created a new type of estate, called *pomestie*. The landholder, or *pomestchik*, was the recipient of a grant of land from the tsar on condition of service, but if the tsar became displeased with the pomestchik he could simply revoke the grant. There was still no feudal contract, no reciprocity of rights and duties. The concept of fealty was only rudimentary. At first the pomestchik's land was not even heritable. This was feudalism, in the economic sense, but without feudal law. As Vernadsky has put it, "The *pomestchik* was not the Tsar's vassal; he was merely the Tsar's servitor."

With the binding of the nobility to the tsar by compulsory service, it followed logically that the peasantry should be bound to the soil. Otherwise the *pomestchiki* were in danger of losing their peasants and being unable to fulfill their economic and military duties to the monarch. The bondage of the peasants came more slowly than the bondage of the nobles. By a decree of 1581 peasants were prevented from leaving their landlords' estates in certain prohibited years. Not until 1649 was this prohibition established for all years and all peasants. The peasants still retained many personal rights and could still own movable property, and they were still full-fledged citizens who exercised such elective rights as existed in judicial and administrative and political institutions.

The position of the Russian peasant in this period was essentially different from that of the serfs under Western feudalism. Not only did Russian serfdom come five hundred years after Western serfdom; it also came in an entirely dissimilar context. The peasants were bound to the land of a bound nobility; hence the peasants, too, were in effect servitors of the tsardom.

If there were no more to be said, the Muscovite tsardom might look for all the world like a later Russian adaptation of the Khanate of Mongolia. But there is another side to the picture. The Muscovy tsardom was built not only on the ruins of the Mongol autocracy but also on the ruins of another quite different autocracy, that of the emperors of Byzantium. Moreover, the Muscovy tsars inherited not only the autocracy of Byzantium but also the religion of Byzantium—Christianity—and this exercised a mitigating and broadening influence that was of the profoundest importance.

The autocracy of Byzantium was founded on the unity of Church and Empire; the Empire was not merely a secular state for the administration of political matters—it had a spiritual function as well, a religious function, and was thus indissolubly bound up with the Church. There was no effective separation of Church and State. The Empire was believed to be sacred, holy, part of God's plan for the salvation of mankind. The emperor was responsible for the religious life of the people; he was Protector of the Church and appointed the chief ecclesiastics. "I am caesar and priest," said the eighth-century Emperor Leo the Isaurian.

With the fall of Constantinople to the Turks in 1453, it came to be widely believed, not only in Russia but throughout Eastern Christendom, that the Orthodox kingdom of Muscovy should succeed to the Byzantine heritage. This found literary expression in the letter of a monk named Philotheus to Tsar Basil III (1505–1533), in which he wrote: "The first Rome fell owing to its heresies, the second Rome fell a victim to the Turks, but a new and third Rome has sprung up illuminating the whole universe like a sun. The first

and second Rome have fallen, but the third will stand till the end of history, for it is the last Rome. Moscow has no successor; a fourth Rome is inconceivable."

The conception of Moscow as the successor to the Rome of the West and the Rome of Byzantium gave a spiritual character to the Muscovy tsardom which has no parallel in the Mongol despotism. Tsar Ivan the Terrible, for all his barbarism, taught that a tsar must not only govern the body politic but must also save souls. The tsardom was a missionary state. The Tsar-Autocrat was "chosen by God" to introduce Christian principles into secular life. Unlike the Mongol khanate, which was tolerant of all religions, the Muscovy tsardom introduced into Russia a State Orthdoxy which permitted no dissent.

In the West, the polarization of Church and State has had the effect of limiting the scope of state power, of restricting it to more or less secular functions. In addition, the Church, because of its separate legal existence, has been able to reinforce constitutional restrictions upon secular authority, and has even sponsored the right of tyrannicide. In Russia the fundamental unity of Church-State, or State-Church, has helped to prevent the development of similar restrictions on the scope of state action. On the other hand, at least during the heyday of the conception of Moscow as the Third Rome, the religious character of the empire had a certain limiting effect upon the activities of the tsar. This was manifested in a semilegal conception of the right of high dignitaries of the Church to intercede in behalf of the victims of the tsar's displeasure or to beg the tsar to reform that which was incompatible with the Christian religion. Such intervention by the Church could be made only in the form of petitions. The decision lay with the tsar and nothing of a legal character could be done to alter that decision. When in 1568 Philip, Metropolitan of Moscow, fearlessly condemned the excesses of Ivan the Terrible's persecution of the old nobility, reproaching him for the absence of law and justice in Russia and petitioning him to change his ways, Philip was ar-

rested and murdered by the tsar's henchmen.[3] Yet this right of petition, which has a special name in Russian (*pechalovanie*), was not meaningless. We shall see that it persists in a secular form as one of the saving graces of the Soviet system.

Byzantium had an important influence not only on the religious conceptions of Muscovy, but also on its legal system, both ecclesiastical and secular. The ecclesiastical code simply incorporated later Byzantine law. On the secular side, Eastern Roman law served as a model in the first instance for the establishment of a national system of courts. At the top there was now established as a permanent body the Boyars' Duma, or king's council, in which a special commission for judicial matters heard cases for which no law was known to exist or in which there was some doubt as to the interpretation of the applicable law. Under this commission were some forty special boards, called *prikazy,* each of which had jurisdiction over a particular problem such as land, serfs, robbery, foreigners, cavalry, infantry, Siberia. There was a great deal of overlapping and no principle of organization except apparent expediency. Financial, administrative, and judicial functions were completely interlocked. Under the prikazy were governors of provinces—appointed and paid by the tsar—and elected judges, who lived by fees received from the litigants. The jurisdiction of the governors and the judges also overlapped.

In spite of the confusion this was a new and more advanced phase of development in Russian law. The powers of the judges were increased. Not the parties but the court now determined the question of whether or not it had jurisdiction over a dispute. The defendant was brought to court not by the plaintiff but by a local official to whom the court isued a writ of summons. The old accusatory procedure, which put the judge in the position of an arbitrator and left the conduct of the trial largely to the parties, was now replaced in certain types of cases, notably the most serious criminal cases, by an inquisitional procedure, in which the judge himself took a large part in questioning the accused and running

the trial. Representation of the parties now came to be allowed, though such representation was confined to relatives or friends of the litigants who were not allowed to be paid for their services. Ordeals began to disappear, and by a decree of 1556 trial by combat was abolished and trial by oath, with kissing of the cross, was substituted for it. These and other reforms were embodied in brief codes, the *Sudebniki,* or Court Manuals, of 1497 and 1550, the *Stoglav* (an ecclesiastical code consisting of one hundred articles) of 1551, various manuals on special subjects, and finally, in 1649, a more comprehensive code, the *Sobornoe Ulozhenie.*

Yet the legal system of Muscovy was crude and primitive nonetheless. Procedure remained complicated and formalistic; there was no oral procedure—all pleadings and testimony had to be in writing. In certain types of cases the decision was reached by casting lots. The transition from proof by oath-helpers to proof by witnesses was not complete; the witnesses were still people who swore that what the plaintiff or the defendant said was true. Corruption was very widespread; the system of paying the local judges from the pockets of the litigants was a form of legalized bribery. Even in civil cases a defendant who could not pay the judgment was whipped.

THE PETERSBURG EMPIRE, 1689–1861

The effect of Peter the Great (1689–1725) on Russia has been compared to that of a peasant beating a horse with his fist. A giant of a man both in physique and intellect, Peter exerted a personal influence on Russia to which there is perhaps nothing comparable in the history of the West except the influence of Charlemagne on the Frankish Empire. The comparison with Charlemagne has significance for our understanding of Russian law. Where the legal tradition is weak, the personality of the ruler becomes of crucial importance.

Peter carried out a secularization of the Russian state and a

modernization of Russian life in the Western image. He discarded the priestly robes of the Muscovite tsars and donned a military uniform; from 1721 he was called not tsar but emperor (imperator). He cut the beards of the nobility and the civil service. He abolished the patriarchate and set up a Holy Synod, controlled by a lay official, to govern the Church. He brought in scholars and experts from Western Europe to transform Russia. He established an Academy of Sciences on the Western model although it was not until 1755 that the first Russian university, the University of Moscow, was founded. He created a modern "regular" army. He built canals and modernized commerce. He took the first big steps toward the industrialization of Russia, himself establishing factories which he subsequently transferred from state to private ownership.

Peter also reorganized the Russian government on European lines, taking Sweden and Germany as his principal models. In 1708 the country was divided into new administrative units. In 1711 a Senate was established to replace the old Boyars' Duma as the supreme administrative and judicial organ under the tsar, who appointed its members. The old prikazy were replaced in 1718 by a system of "colleges," twelve in number, for the army, the navy, foreign affairs, commerce, finance, justice, industry, mining, and other branches. In 1722 Peter created the Procuracy, headed by a Procurator General with a staff both in the capital and in the provinces; its function was to watch over the legality of the acts of the various governmental organs, including the Senate, and in general to act as the "eye of the sovereign."

This was an attempt to incorporate into the Russian social order, at one stroke, a public-law system similar to that which had been developed in Western Europe over centuries. The attempt was bound not to succeed for two reasons. In the first place, the basic principle of autocracy was preserved intact. It was not simply that the monarch remained supreme. There were monarchies, and absolute monarchies, in Western Europe, too. But under the

absolute monarchies of the West, the kings ruled—at least most of the time—by law, that is, by means of legal procedures that had roots in the whole structure of society. In Tudor England, for example, the king, for all his absolutism, governed "in his council in his parliament." Further, the public law institutions of the West were not created by these monarchs but were *given;* they were established long before absolutism developed, when kings were weak and only the Church was strong—and they therefore had ultimately an extrapolitical, extralegal sanction. The Russian emperors, on the other hand, ruled by their personal power and authority and merely used legal devices, which *they* created, to assist them, discarding these devices at will.

The second reason for the failure of the attempt of Peter the Great and his successors actually to Westernize the Russian system of public law and administration lay in the absence of a decent system of private law on which to build. For in the West, at least, public law and private law are interdependent. This means two things. It means, first, that the rational organization of governmental functions is bound up with a rational system of settling disputes among subjects; law and justice at the top replenishes, and is replenished by, law and justice on the lower levels. It means, second, that the personnel, the cadres, upon whom the rational functioning of government must depend are produced out of the experience of local and private legal or political activity. It is extremely difficult to produce good administrators and legislators and judges when seven-eighths of the population are illiterate slaves without legal rights. But this is exactly what Peter the Great and the eighteenth-century Russian monarchs who followed him, such as Catherine the Great (1762–1796), sought to do.

In fact important law reforms of Peter and Catherine resulted in the enslaving of the Russian peasantry. Under the Muscovy tsardom there had existed both serfs and slaves. The slaves, or indentured laborers, had no legal personality but were considered as chattels. For purposes of taxation of the pomestchiki, who

paid on the basis of the number of peasants working on their estates, Peter lumped the serfs and the slaves into one category. This paved the way for the landlords to usurp absolute power over both classes. By the time of Catherine, the landowners had been given the right to punish their serfs, to exile them to Siberia, and to sell them separately from the land. This policy was encouraged by the emperors for reasons of state, since the increased power of pomestchiki over the serfs meant an increased ability to perform their duties not only as taxpayers and general economic agents of the emperor, but also as his military agents with the responsibility of supplying recruits for his army. Gradually, however, the pomestchiki freed themselves from their earlier bondage to the tsar. Their lands had already become heritable in the seventeenth century, and in 1782 the earlier severe restrictions on rights in the subsoil and in timber suitable for shipbuilding were abolished. This meant the establishment of a concept of absolute private property in land, and the word "property" or "ownership" (*sobstvennost'*) appeared in Russian law then, in 1782, for the first time. It was restricted, however, to the nobility. This partial freeing of the nobility from their earlier position of servitude to the tsar made the situation of the subservient peasantry morally intolerable.

The Petersburg emperors wished to establish a Western legal system on Russian soil. They strove to create stable legal forms for governmental and private activity. Peter the Great regularized the procedure for publication and registration of laws with this in mind. Catherine the Great drew up vast plans for legal reform, drawing on the most advanced Western legal thought, including Montesquieu's *Spirit of Laws* and Beccaria's *On Crime and Punishment.* What was actually achieved, however, consisted, for the most part, in minor improvements in administration. How pathetic the imperial efforts proved is strikingly illustrated in the repeated attempts during a period of 115 years to codify the chaotic mass of contradictory statutes, ordinances, and decisions, that was ac-

cumulating. Ten successive commissions sat for this purpose, the first beginning in 1700, the last ending in 1815, without success. Not until 1832 did a collection of laws appear, and in 1833 a code —the first since 1649.[4]

The Code (*Ulozhenie*) of 1649 had been written to put in order the laws which existed at that time. However, it was drawn up very hastily, in less than three months, and therefore it was short and contained many gaps. When Peter the Great came to the throne forty years later, over fifteen hundred new legislative acts had been passed, many of them in contradiction with the provisions of the 1649 Code. In 1700 Peter issued a decree ordering that a commission be established to compare the Ulozhenie with the subsequent legislation. This commission sat continuously from 1700 to 1703; the results of its efforts consisted in an incomplete draft of a concordance of the laws covered in the first three chapters of the Ulozhenie.

Peter then decided that it would be better simply to abolish at one stroke all that legislation enacted since 1649 which was not in accord with the provisions of the Ulozhenie. But in order to know which legislation to abolish it was necessary, again, to try to collect the statutes and compare them with the 1649 Code. A second commission was appointed, which sat from 1714 to 1718; it succeeded in composing a draft of ten chapters of what was called a code of concordance *(svodnoe ulozhenie)*. This effort also remained without consequence.

In 1720 a new approach was conceived. It was decided to write a new code which would reform the Ulozhenie on the lines of the Swedish and Danish codes. As the first great jurist in Russian history, Michael Speransky, wrote over a hundred years later: "It is easy to form an idea of the obstacles which would be encountered in this new approach—by the diversity of languages, by the radical differences between the two systems of law, and above all by the anomalies and the contradictions of our legislation which, not yet being reduced to a body, offered no possibility of

distinguishing with certainty that which should be considered as law in force and that which should be regarded as abolished." The third commission was abandoned in 1727.

The next seven commissions swung back and forth between the idea of a concordance of existing legislation and the idea of an entirely new codification. All that was actually produced, however, were drafts, mostly incomplete, and these remained unrevised and unconfirmed. The members of the commissions, chosen generally by the nobility of the various provinces, were unable even to build on the work of those commissions which had preceded them, since each left only short extracts of the laws which it had collected and the number of new and contradictory decrees kept mounting.

Finally, in 1826, Speransky was charged with the task, and succeeded in publishing in 1832 a Complete Collection *(Polnoe Sobranie)* of the Laws of the Russian Empire. This was simply a forty-two volume reproduction, in chronological order, of the more than 30,000 legislative enactments which had been passed since 1649. Half of the acts were either abolished or modified by subsequent acts, or else were only repetitions of previous acts. This made it necessary for judges and officials to cite ten decrees instead of two, "thus offering," as Speransky said, "a vast field for fraud and chicanery." Moreover, it was impossible for a judge or official to know for sure whether he had the whole law, since —again to quote Speransky—"the constituent parts of one and the same law are often dispersed over a whole century, so that one of its parts appears, for example, in the code of 1649, a second in the regulation of 1741, a third in a supplement of 1830."

Speransky explains as follows the failure of the ten commissions to arrive at a collection of laws or to compile a systematic code:

In respect to the efforts to collect the laws, the difficulties, according to Speransky, were "innumerable." Few of the legislative acts were printed. The chanceries entrusted with the registering of the laws were badly organized, and their archives were in dis-

order. Most of the decrees were in the form of manuscripts adressed directly to the tribunals and boards concerned with their execution. In respect to the efforts to compose a new code, Speransky states that the commissions were hampered by the fact that their members were also charged with other governmental duties and that consequently there was a high turnover of membership, as well as by the fact that there were no people who combined both the practical and theoretical ability necessary for a task of this kind.

But Speransky's analysis goes still deeper. He recognized that a collection of laws, and even a code, is not the same thing as a legal system. He believed that Russia, lacking a strong tradition of law, would have to create its legal system artificially rather than organically, by starting with a complete collection, moving on to a systematic codification, and then proceeding to commentaries and principles upon which a legal system could finally be based. He wrote:

> In all states where the Roman law predominates cases rarely present themselves . . . which were not foreseen and [whose outcome was not] determined by the laws, since the number of laws is great and their ensemble is definite and extensive. The judicial order can thus proceed and be fulfilled, so to speak, on its own, without having need of recourse to the legislative power. There the principle can be established that in the absence of a clear and precise law, the judge has the power to decide according to the general principles of the law; since these principles exist already in the body of Roman laws, sanctioned by time and experience.
>
> Among us, however, the number of laws was, in the first place, insufficient, and the judge was continually obliged to have recourse to the legislator. Hence that mass of separate decrees and of decisions of the Boyars' Duma. With legislation in this condition it was not possible to permit the judges to decide according to general principles of law, since the principles were in no wise established. When consequently the number of legislative acts increased, other difficulties then presented themselves: the complication, the dismemberment, the uncertainty of the laws; difficulties perhaps even more serious than the very absence of law. Hence it is here above all that the door is opened to chicanery, to false applications [of laws], to arbitrary decisions, covered with the veil of legality; it is here that one finds the origin and the motive of an ever increasing number of

new interpretations and authoritative decisions which leave in their wake new complications. How can one break out of this circle?—The only way is to classify all the legislative enactments, to form a homogeneous ensemble, to make a body of laws.

A "body of laws" was finally made, largely through the efforts of Speransky himself, in 1833. Yet this code, the *Svod Zakonov,* the first Russian code of any kind since 1649 and the first systematic presentation of law as a whole in all of Russian history, was largely an adaptation of the Napoleonic codes. Its fifteen volumes did indeed contain Russian, and not French, laws; but the general rules and definitions were French, and the underlying system of classification, the ensemble, was French.

The first three editions of the *Svod Zakonov,* in 1833, 1842, and 1857, reflect law reforms that had been wrung from the tsars in the first half of the nineteenth century. The Napoleonic wars had brought Russia into contact with the West in a new way. Previously such contact had been chiefly diplomatic, intellectual, and commercial and had been undertaken largely on the initiative of the rulers. Now, by invading Russia, Napoleon brought the French Revolution, whose ideas he proclaimed, right to the doors of the Russian people; in repulsing Napoleon's armies, and in marching to Paris, Russian troops, in their turn, saw and experienced Western culture on its home grounds. The result was a genuine revolutionary movement, at first among certain elements of the nobility; then, in the next generation, among sections of the middle class; and finally, by the end of the nineteenth century, among people who claimed, at least, to represent the peasants and the emerging proletariat. The demands of the intelligentsia of these three classes, successively, were more than the reforming, Westernizing emperors had bargained for. They struck at the roots of autocracy itself. The question which confronted Russia during the entire nineteenth and the early twentieth century was whether the law reforms on the surface of the social order could keep ahead of the revolu-

tionary ferment underneath. The answer was given in 1917: they could not.

The *Svod Zakonov,* impressive as it was as a piece of literature, did not—and could not—create for Russia a real legal system organic to the social structure and meeting the crying need for justice. In the first place, its leading principles were largely borrowed from abroad and did not arise from the experience and events of Russian history. In the second place, it was only a document and for its execution it was necessary to have a class of professional lawyers and judges and administrators—a class which in 1833 was only barely beginning to emerge in Russia. In the third place it left the masses of people, the peasantry, outside and below the law, and the rulers, the emperors, above and beyond it.

Consider, first, the position of the peasantry. The ninth volume of the *Svod Zakonov,* which was concerned with serfdom, included certain laws in mitigation of the peasant's lot. In 1827 the purchase of serfs without sufficient land for their sustenance had been prohibited. In 1833 it was forbidden to separate families by sale. But the difficulty with such laws was in the enforcement. The nobleman was supreme on his estate; he was the administrator and the policeman for the serfs under his control. A law of 1842 reveals the situation quite clearly: it called for a definition by the landowners of the duties of the peasants subject to them—but it left the matter entirely to their good will. In fact, the landowner could transfer his serfs freely from one job to another, and it was not unusual for him even to arrange their marriages. As late as 1840 there were over a million household serfs in the personal service of their lords, divorced from the soil entirely. The nearest that the law came to protecting the serfs against the nobility was the publication of "tables" in Poland in 1846 and of "inventories" in the southwestern provinces in 1853, consisting of lists and definitions of peasant liabilities. Reform was certainly not outrunning the revolutionary situation.

Consider, next, the position of the emperor. Alexander I (1801–

1825) had come to the throne with liberal ideas of establishing a constitutional monarchy, with a representative machine and an independent judiciary. Speransky, who was called "the right hand of Alexander," was chosen to draw up a Plan for implementing these ideas. Speransky's Plan, which was a judicious mixture of Anglo-American, French, Russian, and original political principles, was never adopted. Other constitutional proposals met a similar fate. Alexander did, however, modernize public law by enlarging the judicial functions of the Senate, and by replacing the system of "colleges" with a Committee of Ministers, establishing eight ministries for war, navy, foreign affairs, interior, justice, finance, commerce, and education. He also took Speransky's suggestion of a State Council to advise on legislative matters. The Senate, the Committee of Ministers, and the State Council thus represented a *de facto* distribution of judicial, administrative, and legislative functions. In addition Alexander made some reforms in local administration, setting up special councils to advise the governors in the provinces. His successor, Nicholas I (1825–1855), organized the Imperial Chancery to include a so-called Second Section which was responsible for systematizing the laws, and which supervised the promulgation of the Complete Collection in 1832 and of the Code of Laws of 1833; and also a more famous Third Section which had charge of the police power, with the duty of exiling "suspicious and harmful persons." The Third Section instituted political repression and persecution against those whose views were considered dangerous from the point of view of the imperial authority. The *Svod Zakonov* makes no bones about the nature of that authority. Volume I, Article 1, begins with the words: "The All-Russian Emperor is an autocratic and unlimited monarch. Obedience to his supreme power not only from fear but also from conscience is ordained by God Himself."

The Russian judicial system of the mid-nineteenth century lives up to the worst possible expectations. It was organized on a class basis, with separate courts and different punishments for the no-

bility, the clergy, the urban population, and the remnants of the free peasantry. The intellectual and moral level of the judges was notoriously low; bribery was almost universal. The courts were in the control of the centrally appointed provincial governors. Procedure was still entirely written, the evidence being presented in the form of documents prepared by the police. Trial was secret, with the judges appearing in public only to pass sentence or to hand down a judgment. There was a confusion of jurisdictions and instances, with unlimited delays. In 1831, for example, in the province of Petersburg there were discovered on investigation to be 120,000 undecided cases in the courts. There was no professional bar. Legal education was poor. The establishment of a Second Section of the Chancery to systematize the law, and the publication of the *Svod Zakonov,* could not significantly alter a situation such as this. As with the legal position of the peasantry and the emperor, as with the whole system of public administration, so with the judicial order, too, reform was far behind the revolutionary demands which had been fermenting among the intelligentsia for two generations.

THE PETERSBURG EMPIRE, 1861-1917

It was Speransky's idea that the promulgation of a systematic code would serve as a first step in the construction of a Russian legal system, and that the second step would consist in the publication of interpretations and commentaries. That is in fact what happened. In the 1830's and 40's and 50's the beginnings of a Russian legal literature appeared. A class of Russian jurists emerged, educated abroad in the capitals of Europe. In the 1860's, the decade of the Great Reforms in Russia, these jurists constituted at the same time the most progressive and the most practical section of the intelligentsia. With the support of Alexander II (1855–1881), who was aware that a thoroughgoing reformation of Russian social institutions must come, and that if it did not come peacefully from

above it would come violently from below, these jurists took the third step toward the creation of a Russian legal system. At the instance of the emperor, they drew up a plan for the reorganization of the entire court system. This plan was adopted in November 1864. It was the most enthusiastically received of all the reforms, and perhaps the most fruitful. Even the Soviets praise it. It is the cornerstone of all subsequent legal development in Russia down to the present day.

Before considering the judiciary reform in detail, however, it is necessary to note two reforms with which it was associated and upon which it was dependent: the abolition of serfdom in 1861 and the creation of organs of local self-government in 1864 and 1870. The emancipation of the serfs gave them legal rights and hence a stake in the legal system. It did not mean, however, that the emancipated serfs in fact acquired private ownership of the land now made available to them. The land was transferred to the *mir,* the local communal organization of peasants, which divided it among its members according to the size of their families, with periodic redistributions. The landowners, on the other hand, retained their portion of the land in private ownership. Also, owing to the half-heartedness of the emancipation, the peasants remained economically bound to the nobility. The centuries of legal bondage, however, were ended.

The reform of local government emphasized the fact of the peasantry's newly acquired citizenship. In each county representatives were elected by the private landowners, by the peasant commune, and by the townspeople; these representatives in turn elected an Executive Committee for a three-year period. The new organs of rural government, called collectively the *Zemstvo,* were given control of the schools, medical care, charity, roads, and other problems of local administration. They obtained funds for these purposes from local taxation, particularly of real property. In 1870 a program of municipal self-government was instituted similar to the Zemstvo reform.

With the establishment of the legal rights of the peasants and local self-government, the reform of the judicial system could be undertaken on a new basis, without the worst evils of class privilege and bureaucratic centralism.

The main features of the 1864 judiciary reform were: (1) the establishment of a court system independent of administrative officials, with judges irremovable except for judicial misconduct; (2) the elimination of class courts, with the exception that special district, or *volost',* courts remained for the peasants; (3) the institution of justices of the peace (on the English model) to be elected by the Zemstvo and town assemblies; (4) the introduction of the principle of the publicity of legal proceedings; (5) the introduction of oral pleadings and oral testimony; (6) the introduction of trial by jury in criminal cases; (7) the creation of a hierarchy of courts, with appeals from the trial court to an appellate court on questions of law and fact, and recourse to a third instance, the so-called court of cassation, on points of law only (two courts of cassation were established in the Senate, one for criminal cases and one for civil); (8) the establishment of the right to be represented in court by a lawyer; (9) the setting up of a professional bar; (10) the placing of pre-trial investigation in criminal cases in the hands of an examining magistrate, on the model of the French *juge d'instruction,* who was under the control of the court rather than of the prosecuting arm as before.

In the 1870's and 1880's, particularly under Alexander III (1881–1894), there was a general reaction and many of the reforms were taken back. The acquittal in 1878 of Vera Zasulich, who shot the governor of St. Petersburg for ordering the flogging of a student revolutionary, was followed by the withdrawal of the right to jury trial in cases of crimes by officials, resistance to official regulations, murder or wounding of officials, crimes of the press against censorship, and especially important crimes against the state. In 1885 restrictions were placed on the independence of the judges; the judges of the lower courts were made more dependent on the

president of the appellate court and on the Minister of Justice, and any judge could now be dismissed by a disciplinary board not only for negligence in the performance of his duties but also for offenses against morality or otherwise blameworthy activity committed outside his judicial office. In 1887 the principle of the publicity of trials was violated by the establishment of a procedure behind closed doors whenever, in the opinion of the court or of the Minister of Justice (and, in special cases, of the governor of the province or the Minister of Internal Affairs), public trials could endanger public morality, religion, the state or public order. In 1889 the jurisdiction of most of the justices of the peace was transferred to new officials called "land captains" (*zemskie nachal'niki*), appointed by the Minister of Internal Affairs, on nomination by the governor of the province. The land captains also exercised administrative power over the affairs of the village, so that the principle of separation of judicial and administrative offices was violated. In 1890 the Zemstvo reform was also weakened by the provision that the peasants could only nominate candidates for the Zemstvo assembly, while the selection from among those candidates was to be made by the provincial governors. This measure was repealed after the 1905 Revolution, and in 1912 the judicial functions of the land captains were eliminated and the elective justices of the peace restored.

The reaction of the eighties produced its own reaction in the Revolution of 1905, which brought a new wave of drastic law reforms. Now a representative legislature, the Duma, was established, based on a general election (though the system of voting was heavily overweighted in favor of the landed gentry) and, for the first time in Russian history, political parties. The Duma enacted social legislation of a far-reaching character. Shortly before the convocation of the First Duma, payments by the peasants for the land which had been granted to them under the 1861 emancipation had been abruptly terminated. Under the Stolypin reform, the peasant was now given the right to own his land privately,

in an attempt to create a new class of small peasant proprietors. This was a serious attempt to reconstruct the very foundations of the Russian social and economic order. Another wave of reaction accompanied the Stolypin reform. By 1917, however, the autocracy had become a hollow legal shell. When Nicholas II (1894–1917) ordered the dismissal of the Duma in February 1917, its members refused to dissolve; instead they set up a Provisional Executive Committee, and when, three days later, Nicholas abdicated the throne, a Provisional Government was established. Headed later by the mild socialist Kerensky, the new government completed the transformation of Russia into a liberal democratic Western state. Now the electoral system was purged of its class character and universal suffrage was instituted for both sexes at the age of eighteen; measures for agrarian reform were undertaken; trade unions, first legalized in 1905, were freed from various restrictions; plans were made for the democratic election of a Constituent Assembly to draw up a constitution and determine the form of government Russia should have in the future. Reform and Revolution had merged. In fifty years the Russian legal system had caught up with the eight-hundred-year-old legal development of the West. Or so it seemed.

It is not the function of this book to explain the causes of the Bolshevik Revolution of October 1917. But its occurrence forces us to consider two hypotheses regarding the development of Russian law from 1864 to 1917. The first is the hypothesis that that legal development, brilliant as it was, took place only on the surface of Russian life, that it was not actually an incorporation of the fundamentals of Western law into the Russian tradition, but largely an adoption of Western forms without the substance, and that it did not penetrate into the consciousness of the Russian people as a whole, particularly the peasants. The second and closely connected hypothesis is that the transformation of Russia into a Western state with a Western constitutional and legal framework did not interest the Russian people as a whole (again, particularly

the peasants), and that they were therefore prepared (for the sake of peace and land) to support a revolution which went *against* the liberal democracy of the February Revolution, *against* the constitutional monarchy of the 1905 Revolution, and *against* the individualist, rationalist, and legalist direction of the nineteenth-century reforms altogether.

The first hypothesis takes us to a closer examination of the deficiencies of the law reforms of the 1860's and thereafter. These deficiencies appear not so much in what was done as in what was not done. What was done was to receive Western legal norms and institutions. What was not done was to receive the basic principles underlying Western law—the principles which I have designated as Reason, Conscience, and Precedents.

In the West, the principle that law must conform to Reason is associated, as we have seen, with the doctrine that the law is supreme, governing all men, and that it is complete, governing all human relations. Speransky noted that in the West there was an ancient body of law, the Roman law, which served as a basis for the judge to decide by "common sense" in cases for which no applicable statute existed. But this same body of law exists in the Russian tradition, which is even closer than Western history to the Byzantine Emperor Justinian and his *Digest;* and it is not generally thought to exist in the Anglo-American legal tradition, where the common sense of the judges is par excellence a chief source of law. The belief that the law is supreme and complete, conforming to Reason even as the universe conforms to Reason, is a fiction—or a faith—that dates not from Justinian but from the eleventh-century Papal Revolution and the accompanying renovation of Roman and canon law. Russian legal history provided much less basis for such a belief. In fact there remained in Russian legal history, down to 1906 at least, the unlimited autocratic power of the tsar. Moreover, down to 1917 there were whole spheres of activity, both in public and in private life, for which no legal definition of rights and duties existed. In public life questions of high

policy were decided, as B. H. Sumner has put it, "not by any regularized procedure or definite body, but by shifting procedures and by the interplay of various bodies and various favorites or outstanding persons revolving round a formally supreme sovereign, whose sanctions, whether nominal or not, had to be obtained by means that varied with the personal characteristics of this or that sovereign." Moreover, despite the formal declaration of the independence of the judiciary, the administrative-political branch of government, and particularly the Ministry of Internal Affairs, continued to exercise compulsion over it. It is a tribute to the integrity of the Russian judges of the late nineteenth and early twentieth centuries, but not to the Russian legal system, that special steps were taken to reduce their power: extending the grounds for removability, for example, and also making temporary judicial appointments. But apart from pressure on the judiciary there was the extensive authority of the secret police over the population generally, including the right of administrative exile of political suspects. From 1906 to 1917 military courts condemned thousands of revolutionaries and semirevolutionaries to death for various illegal activities. In private law, too, the Western notion that everything is legal or illegal, that all political, economic, and social relations ought to be given legal expression and foundation, did not penetrate. Particularly in regard to land held in common by the peasantry, property rights continued to remain hidden and undefined, in spite of the fact that there were statutes dealing with them.

The Western principle that the judge must find the law also in his conscience—that he must identify himself with the accused or the litigant before him, that he must be not only rational but also "fair"—carries with it the doctrine of the equality of law. In conscience all are equal. Again it is no reproach to the Russian judges of the late nineteenth and early twentieth centuries that the doctrine of equality before the law, though stated in principle, did not penetrate as deeply as in the West. In general, Russian

judges after 1864 were conscientious and fair, but the system under which they operated continued to make sharp distinctions between different estates, different nationalities, and different religious groups. In the first place, the peasants were partly under the jurisdiction of special courts, and from 1889 to 1914 they were under the land captains. In the second place, the peasants and workers were subject to corporal punishment up to 1904. In the third place, even after the judicial functions of the land captains were removed in 1912, they continued to exercise administrative powers over the peasants, and to exercise them often arbitrarily. For the peasants, constituting the vast majority of Russians, the judiciary reform remained to a large extent façade. Likewise in respect to nationality and religious belief certain legal disabilities continued to exist.

Finally, the Western principle that law is a living, growing process, moving into the future with its eye on the past, which is here designated as the principle of Precedents since it finds its clearest expression in the development of a body of case law —this principle, too, was not established in prerevolutionary Russian legal development. Taught law, which has given toughness to the legal tradition of the West, was in Russia too divorced from actual legal practice. The law schools and law writers were often more concerned with the Roman law of Western Europe than with their own law, much less the cases in their courts. It has been suggested that this was perhaps for better rather than for worse, given the Russian past; and perhaps it would have changed had there been given a different future. But it imparted to Russian legal literature and to the teaching of law a quality of abstractness which impeded the development of a legal tradition. This had its effect on the courts. Despite a development toward greater reliance on previous decisions, the Ruling Senate, as the supreme court, tended to decide cases on the basis of edicts then in force with little reference to past or future, while in the local peasants' courts unlearned magistrates administered justice on the basis of custom and mor-

ality. In practice, Russian law, like its Byzantine ancestor, bore the stamp of the moment rather than the stamp of the future.[5]

The evidence tends to support our first hypothesis. Expressed more sympathetically to the old Russian regime, it is simply this: that half a century was not enough time in which to build a Western legal system, in the full sense, on Russian soil.

POSITIVE VALUES OF RUSSIAN HISTORY

Our second hypothesis is that Russia did not particularly want a Western legal system and that it was prepared for a revolution which in its basic idea went against Western legal and political conceptions, whether of the nineteenth-century monarchy, of the post-1905 aristocracy, or of the Kerensky democracy. This takes us to a consideration of what generally Russia did want. Here we must look to another side of the Russian heritage, a side which has been obscure to Westerners because of their very preoccupation with law and legality.

There are at least four redeeming qualities of Russian life which have given Russia greatness, each originating in a different era of Russian history. The first has to do with the character of human, or interpersonal, relations in society. It originated in Kievan Russia with the development of a special brand of Christianity, Russian Orthodoxy, different from both the Greek Orthodoxy of Byzantium (though it was officially received from Byzantium) and the Roman Catholicism or subsequent Protestantism of the West. It differed from Byzantine Christianity in that it was little concerned with theology, philosophy, or dogma in the strict sense. Until the nineteenth century the Russian Orthodox Church produced very few theologians or philosophers, and none of any great stature. Even today the dogma of Russian Orthodoxy is difficult to identify, with large scope left for individual divergencies. Russian Christianity differed from Western Christianity, on the other side, in that it was not so institutional, not so dominated by the priesthood, not so political in its interest or in its basic structure.

Despite the politics of the priesthood at the top, which since Peter the Great was under the thumb of the State, the Church for most Russians was an invisible community of the faithful, a "communion of saints." The Russians did not, however, share the Protestant emphasis on individual faith and conscience. Instead, the Russian Church stressed liturgy; Christianity from the beginning has been for the Russian a profound *aesthetic* experience, influencing his personality and the quality of his life and binding him together with others in that common experience. The sense of the community of all men as comprising a single congregation, bound by common ritual, common liturgy, and ultimately by a common sense of brotherhood, was a major unifying factor in saving Russia from being swallowed up by the Mongols, and it persisted through the succeeding centuries. In the nineteenth century a name was found for this quality; it was called *sobornost'*, which means "conciliarity" (*sobor* is, literally, "council"), a spirit of reconciliation, togetherness. It is a sense that life exists only between people, that the individual derives his personality from membership in the community of believers, that, in Maynard's phrase, "truth resides in the congregation."

Maynard, Berdiaev, and others who have stressed this feature of Russian Orthodoxy as central in Russian history, have been severely criticized by some, who assert that this is simply the nineteenth-century Slavophile conception transferred to the whole Russian past and future. By their criticism, these scholars tend to identify themselves with the nineteenth-century Russian Westernizers, who deplored the non-Western elements of Russia's past and believed that her only hope lay in developing closer affinity with the West. Slavophiles and Westernizers opposed each other in a struggle which lasted not only up to the Russian Revolution but which continues, in concealed form, to this day. Stalin, who has often reiterated his desire that Russia shall in the shortest possible time "catch up with and surpass the West," and who has in the past not concealed his admiration for Western technology as well

as for certain Western ideas, now excoriates the modern Soviet Westernizers as victims of "cosmopolitanism."

It is not necessary here to fight out the battle of East and West in Russia, the famous Slavic Soul versus the equally famous Russian dependence on and affinity with Western Europe. Each side tends to exaggerate certain aspects of Russian history. Sir Bernard Pares has rightly said that in every Russian there is both Slavophile and Westernizer.

It *is* necessary, however, to assert that the weakness throughout most of Russian history of any tradition of individualism, rationalism, and legalism, is not merely a negative thing; that it has also its positive counterpart—a strong tradition of collective social consciousness which relies for its motivation less on reason than on common faith and common worship, and which finds expression less in legal formality and "due process" than in more spontaneous and more impulsive responses.

The two and a half centuries of Mongol domination added a second quality to Russian life, that of universal compulsory service. We have seen how this was embodied in the Mongol legal system, and how it was taken over by the Muscovy tsardom, which bound all classes to the State. At the same time the harshness of the principle as inherited from the Mongols was mitigated by the sense of inner community, the voluntary acceptance of common bondage, which was carried on through the Christian tradition.

A new element was also introduced by the Muscovy tsardom through its inheritance of the Byzantine conception of the empire as sacred, not merely a secular State but a holy Church, and of the emperor as appointed to rule in matters spiritual as well as political. This meant the establishment of a State Orthodoxy, hostile to opposition and dissent in matters of belief. This, too, has remained as an important element of Russian life.

The Petersburg empire made a sharp break with the past—almost as sharp as that which was later made by the Bolshevik Revolution. Yet in spite of this break, the three qualities of which

we have spoken remained. Now, however, a new element was added by very reason of this break. "Westernization" is not the same thing as being Western. The result of the conscious imitation of Western Europe by the Russian imperial nobility of the eighteenth century, and by the nobility and the intelligentsia of the nineteenth century, was to create a tension between East and West within Russia itself, and especially a tension between the partially Westernized upper classes and the non-Westernized masses of peasantry. This was a tension of classes and a tension of ideas. It was manifested under Peter the Great in a release of technical energy, a *furor technicus,* which enabled the Russian state to take enormous leaps in the direction of state-controlled economic development. The fourth element of Russian life might be called *the energy of Westernization;* it is most strikingly symbolized in the various economic measures of state intervention which were taken by the emperors of the eighteenth and nineteenth centuries. Industrialization in prerevolutionary Russia was not widespread in terms of the economy as a whole, but it was large-scale in terms of the size of state-owned factories and the dimensions of state-directed commerce. Railroads, banking, and certain aspects of production itself were concentrated largely in the hands of the state; and with the development of capitalism in the nineteenth century, a good deal of private business was from the beginning "big business."

Again and again through the centuries Westerners who have been brought in contact with Russia have been shocked and baffled by the relative lawlessness of Russian life. Compared to life in the West it has seemed haphazard, inconstant, arbitrary, and aimlessly cruel. At the same time they have been impressed by the extraordinary warmth and spontaneity of the Russians, by their capacity for service and self-sacrifice, by their devotion to and faith in Holy Mother Russia, by their amazing *élan* and energy. Historically weak in lawgivers and jurists, Russia has been from the beginning strong in heroes and in saints. It has been strong

in its sense of community, and strong in centrally directed energy, administrative initiative at the top. Many of the greatest Russians have despised the legalism of the West, where, in the scornful words of the nineteenth-century Slavophile Kireevsky, "brothers make contracts with brothers." They have looked to spontaneous personal and administrative relationships rather than to the formality of law, with its time-consuming emphasis on due process and its rationalism. The peasants looked to the tsar as "little father" rather than as mere monarch. The unity of the Russian empire of 1917 was still, in the eyes of the Russian people as a whole, not essentially political or legal, in the Western sense, but moral and religious.

WESTERN AND EASTERN LAW

ROME ⟵⟶ CONSTANTINOPLE

Germanic, Slavic tribes
Frankish, Byzantine Church-Empires

1054: SCHISM OF WESTERN AND EASTERN CHURCH

1075: PAPAL REVOLUTION
Roman-and-Canon Law; Feudal Law; beginnings of national legal systems

(13th century: Rise of Italian city-states; Development of Law Merchant)

1517: GERMAN REFORMATION
Reception of Roman Law

1640: ENGLISH REVOLUTION
Restoration of Common Law

1789: FRENCH REVOLUTION
Napoleonic Codes

KIEVAN RUS, 862–1240: *Russkaia Pravda* (comparable to Frankish *leges barbarorum*); Influence of Russian Orthodox Christianity (*sobornost'*)

MONGOL YOKE, 1240–1480: *Yasa* of Genghis Khan; Influence of Mongol principle of universal compulsory service; Continuation of *Russkaia Pravda* in judicial charters of Pskov and Novgorod

MUSCOVY TSARDOM, 1480-1689: Court Manual (*Sudebnik*) of 1487; Code (*Ulozhenie*) of 1649; Influence of messianic conception of Moscow as the Third Rome

PETERSBURG EMPIRE, 1689–1917:
(a) Attempts of successive code commissions to systematize laws and decrees; Westernization of the nobility.

(b) Code (*Svod Zakonov*) of 1833; Judiciary Reform of 1864; Westernization of the intelligentsia; Reform and Reaction

1914: WORLD WAR

1917: RUSSIAN REVOLUTION

7

THE RUSSIAN CHARACTER OF SOVIET LAW

"Just as a contemporary Frenchman who is asked, 'What makes France great?' will at once reply, 'Descartes and Rousseau, Voltaire and Hugo, Baudelaire and Bergson, Louis XIV, Napoleon and the Great Revolution,' our grandsons will answer the question, 'What makes Russia great?' by saying with pride, 'Pushkin and Tolstoy, Dostoevsky and Gogol, Russian music, Russian religious thoughts, Peter the Great and the great Russian Revolution.'" These words of the Russian *émigré* Ustrialov, written in the first years after the Revolution, may be matched by the statement of another Russian *émigré,* Nicholas Berdiaev, some twenty-five years later: "In 1917 we believed that Communism had swallowed up Russia; today we see that Russia has swallowed up Communism."

Many of the resemblances between the Soviet system and the tsarist system exist because the internal conditions faced by the Soviet rulers are similar to those faced by their predecessors. The vastness of the area to be governed, the existence within that area of a multitude of diverse peoples with different languages and traditions, the very low standards both of material and of cultural life—these are factors which severely limit the choice of political and legal methods. The prerevolutionary Russian Prime Minister, Count Witte, said in 1905, when the government was under attack from all sides: "The world should be surprised that we have any government in Russia, not that we have an imperfect government. With many nationalities, many languages and a nation largely illiterate, the marvel is that the country can be held together even

by autocracy." To such internal factors must be added the external problem of military defense. Ever since the expulsion of the Mongols, the Russian state has been a military state; with repeated invasions from north, south, east and west, it has sought to keep its population militarized and mobilized. It is more than symbolic that both in Soviet and in prerevolutionary Russia, certain serious crimes against the state, even when committed by civilians, have been under the jurisdiction of military courts.

The persistence of the same internal and external conditions is not, however, the only explanation for the persistence of similar political and legal institutions. Institutions do not arise spontaneously and automatically from the social environment; they must be created and fostered. The people who create and foster them have received certain ideas and traditions from their parents and their parents' generation, and these transmitted ideas and traditions have a life of their own, in time, and in fact condition the "conditions." There is a social heredity, a heritage, as well as a social environment. A people has a past and a future; it does not merely live in space from moment to moment.

Moreover, there may be breaks in historical continuity and yet conceptions and institutions of an earlier period may survive those breaks and reappear in a later period in new forms. In this way many medieval English conceptions and institutions were revived and reshaped in the seventeenth century, after a hundred and fifty years of "Tudor despotism."

It is in this sense that we may say that Soviet Russia has inherited the old Russian religious conception of the state, and with it the institutions for the repression of all heresies. Conversely it has *not* inherited the legal conception of the state which has had so strong an influence in the West, and which was beginning to develop so rapidly in Russia itself in the late nineteenth and early twentieth centuries.

The Soviet state is not a secular but a religious state, in the sense that it is founded on an idea and a mission. Stalin stands for an

orthodoxy. Like the sixteenth-century princes of Muscovy, he takes responsibility for both the political and spiritual life of his subjects and expects from them not only respect but also worship. The embalming of Lenin to preserve him incorruptible forever and the glorification and adulation of Stalin as the "Father of the Soviet Peoples," whose portrait is omnipresent and who in public is spoken of in terms appropriate to a deity, remind one inevitably of the prerevolutionary Russian conception of the tsar as a religious figure. Of course such tendencies are not restricted to Russia. Hitler, too, wanted to be both emperor and pope in Germany. America, also, is founded on an idea and a mission. But that does not alter the fact that it is the Russian tradition upon which the Soviets have built, consciously and unconsciously, and that important elements of that tradition help to explain important features of Soviet law and politics.

We know that Marxism, the idea upon which the Soviet state is founded, was originally a Western theory. Under Lenin and Stalin, however, Marxism has been Russified. It has been converted from a science of society into a dogma, and this dogma has in turn become ritualized. Stalinism in Russia is chanted, not merely spoken; it is to be believed *in,* not merely believed. Soviet public speech has a liturgical character. The guardians of this liturgy, the new priesthood, are the members of the Communist Party, the "vanguard" who must show the way and take the responsibility.

If we consider the Russian Communist Party from the political and legal point of view, its links with the Russian religious heritage become apparent. The Party occupies a position in relation to the Soviet state in some respects similar to that which the Church occupied in relation to the tsarist state in the Muscovy period. As the tsar was the Protector of the Church, and its virtual head, so Stalin is the protector and virtual head of the Party. As the Church had no legal or constitutional position in politics, but influenced it indirectly and informally, so the Party is mentioned in the Soviet Constitution only twice, once as the "leading core" of all public

and social organizations and once as one of the organizations which has the right to nominate candidates for political office; though in fact it is closely identified with the State indirectly and informally through the Party membership of the political leaders. As the Church stood for the idea upon which the old Russian state was based, Russian Orthodox Christianity, so the Party stands for Marxism, the creed by which all Soviet political action is justified.

In its internal structure the Party resembles nothing so much as a religious order. In the words of the Party Rules of 1939, "The Party is a united militant organization bound together by a conscious discipline which is equally binding on all its members. The Party is strong because of its solidarity, unity of will and unity of action, which are incompatible with any deviation from its program and rules, with any violation of Party discipline, with factional groupings, or with double-dealing. The Party purges its ranks of persons who violate its program, rules or discipline." Its organization is hierarchical, with lower units sending representatives to higher units, the highest body being the Politburo which, technically, is elected by the Central Committee, though actually the Politburo controls the Central Committee. The Party Rules proclaim as one of the guiding principles of this organizational structure "the absolutely binding character of the decisions of higher bodies upon lower bodies." Before a policy decision on a particular subject is made, there is open discussion and debate; once the Party line is laid down, however, there must be absolute acceptance. Such is the principle of Party Orthodoxy.

Of the relation of the individual member to the Party, the Rules state the following duties and rights:

It is the duty of a Party member: (a) to work untiringly to improve his political knowledge and to master the principles of Marxism-Leninism; (b) strictly to observe Party discipline, to take an active part in the political life of the Party and the country, and to put into practice the policy of the Party and the decisions of its bodies; (c) to set an example in his observance of work discipline and State discipline, to master the technique of his work and constantly to improve his industrial or eco-

nomic qualifications; (d) constantly to strengthen the ties with the masses, promptly to respond to the needs and demands of the working people, and to explain to the masses the policy and decisions of the Party.

A Party member has the right: (a) to take part in free and business-like discussion at Party meetings or in the Party press of practical questions of Party policy; (b) to criticize any Party worker at Party meetings; (c) to elect and be elected to Party organs; (d) to demand to be present in person whenever decisions are taken regarding his activities or conduct; (e) to address any question or statement to any Party body, up to and including the Central Committee of the CPSU(B).

In the "right to address any question or statement" (strictly qualified as it is by Party interpretations of what kinds of inquiries are permitted) is preserved the ancient Russian right of petition; it is the only legal action which a member may take against decisions of the organization, though these decisions may affect his personal life profoundly.

Such a body is hardly a political party. It represents no class, no special political-interest group; for though it is called the "vanguard of the proletariat," it boasts of the fact that its membership is drawn from the managerial and professional class (the "intelligentsia") and the peasantry as well as from the working class. The Party is rather the "central core of conscious socialists," the "shock troops" in all phases of social, economic, and political life. It is the new "communion of saints."

The legacy of tsarism may also be seen in the repressive features of the Soviet political system, which go hand in hand with State Orthodoxy. The same right of administrative exile of political enemies exists in the Soviet statute books as in the tsarist; by a law of November 5, 1934, the People's Commissariat of Internal Affairs is empowered to exile, banish, or intern in correctional labor camps for a period up to five years, persons found to be "socially dangerous." The tsarist Ministry of Internal Affairs used the term "untrustworthy," but the substance of the matter was the same. In tsarist Russia as in Soviet Russia, persons who committed no other

crime but that of having the wrong friends or the wrong opinions could be banished to Siberia, by a secret administrative hearing, without any right of appeal to the courts. The horror stories that come to us today from the Soviet labor camps must be read against the background of the reports of the prerevolutionary Siberian prisons.

There can be no comparison of the prerevolutionary police repression with the Soviet system of terror in terms of its extent or its barbarism; the secret agents of the tsarist Ministry of the Interior were amateurs compared to their Soviet successors.[1] Nevertheless it is important to recognize that the seeds of Soviet lawlessness were sown in the prerevolutionary period. This in no way justifies Soviet lawlessness. If anything it makes it more despicable; Stalin and his cohorts spent enough time in the hands of the tsarist police to have learned the evil, if not the futility, of the method of force and repression. Instead they seem to have been more impressed with its efficiency. This is a partial explanation of their readiness to exploit the weakness of the Russian legal tradition as a means of crushing all opposition.

At the same time, Russia's historic legal backwardness has been a source of embarrassment to the leaders in their efforts to provide stability and order. That they have suffered from this is well illustrated in their unsuccessful attempts to produce an adequate codification. Here we find a suprising recapitulation, during the past thirty years, of the experience of the ten code commissions before Speransky.

Having proclaimed the abolition of all tsarist laws, the Soviet regime—one would have thought—was in a position easily to systematize its own new legislation. A month after the Revolution a division was established within the new People's Commissariat of Justice of the Russian Republic for the express purpose of preparing "a complete collection of the prevailing laws of the Russian Revolution." Apparently this division did nothing. Three years later, in 1920, another resolution provided for the establishment within the

Commissariat of Justice of a new division to be charged with codifying existing decrees and directives. (This had nothing to do with the preparation of civil, criminal, or other codes, which are statements of basic rules of law and which may be overridden by legislative and administrative decrees.) Again little or nothing was accomplished. With the formation of the various republics into a federal USSR in 1923, a new commission was established for the purpose of "systematizing and unifying the legislative data and directives" of the federal government. This the commission started to do in 1925, noting, however, that such a task "presents, under our conditions, an extremely complicated problem, requiring intensive, careful, and rather prolonged preparation," and stipulating that "the first step in this preparation must be the simple, systematic collection of all the extant all-union laws in force at the present time." The result of the labor of this commission was the publication of a five-volume collection of laws, which the compilers themselves characterized as being merely "material for future consolidation and codification." In 1927 another codifying commission was created, which codified some 4000 acts in force as of January 1, 1929, summarizing them in 746 paragraphs. This code, however, was not confirmed, since, in the words of a recent Soviet writer, "many of the norms [consolidated in the code] had already been revised or were in the process of revision."[2] Since the 1929 attempt, no over-all systematization of Soviet laws has been made.

In respect to the codes of civil law, criminal law, land law, labor law, and so forth—codes in the proper sense of the word—a similar situation exists. The 1936 Constitution called for the promulgation of new all-union codes to replace the various codes of the different republics, most of which date from the early twenties. Fourteen years have passed, and many code commissions have sat, but no all-union codes have appeared. Undoubtedly one reason for this is the fact that there is no complete collection of statutes and regulations in force.[3]

The state of Soviet legislation is appallingly chaotic. The charge

which Speransky leveled against the confusion of Russian laws from the seventeenth to the nineteenth centuries is applicable again today. Obsolete laws remain unrepealed. Statutes and orders may be published in a whole variety of newspapers and journals; the Soviet lawyer or judge can never be sure that he has all the relevant laws before him. There is no systematic reporting of cases (though the Supreme Court publishes digests of the ones it considers most important). Furthermore, laws of 1924 and 1925 expressly provided for the withholding of legislative and administrative acts from publication, upon special order of certain leading governmental bodies. There are, therefore, as there were to a far more limited extent in prerevolutionary Russia before 1906, secret statutes.[4]

Finally, there is the problem of the gap between the law as written and the law as practiced—a gap which exists in every society, but which, by comparison with Western standards, is extraordinarily large in Russia. A French student of Russian law observed in 1877 that "of all the countries of Europe the Russian Empire is perhaps the one where the written law has the least absolute validity and remains the most often a dead letter."[5] This has a familiar ring. At least twice the Soviet Constitution has been changed by decree and only later amended in the proper manner to conform to the changes. The first election of judges took place in 1949, although the constitutional provision requiring such an election dates from 1936. The type of directive most frequently encountered in Soviet legal literature is one that calls attention to the failure of administrative or judicial organs to follow the provisions of a particular law and directs that henceforth the illegal practices be discontinued.

On the other hand, while the Soviets have inherited the backwardness of the Russian legal tradition—reinforced by the loss through revolution of the best legal minds of the *ancien régime*—they have also inherited many of its achievements. The jurists who have written the Soviet codes, the judges who have presided over the Soviet tribunals, the people who have brought suits into court

or who have been prosecuted—were brought up in prerevolutionary Russia and received certain basic conceptions of law from the past. Many of them studied in prerevolutionary Russian law schools. Especially since the mid-1930's they have been consciously drawing on the resources of their earlier education.

The Soviet judicial system, for instance, is patterned in general after the prerevolutionary Russian system, which in turn was strongly influenced by Western models. Soviet criminal law has built on the nineteenth and early twentieth-century reforms, with the Russian criminal code of 1903, in many ways the most advanced in the world at that time, serving as an example. Soviet property concepts, particularly those relating to the property relations of the peasant household, derive from the legal experience of the past. The list could be lengthened indefinitely, but these three examples—judicial administration, criminal law, and the law of the peasant household—provide excellent illustrations of the specific Russian component of Soviet law. They have much in common with Western law, and yet they also contain important non-Western elements; they are Russian, and the more they have been "socialized" the more Russian they have remained.

JUDICIAL ADMINISTRATION: THE PROCURACY

For the most part, the American lawyer in Moscow would not have much difficulty in acclimating himself to the Soviet system of trials and appeals; the French or German lawyer would have even less. But there is one feature of the judicial system which would be quite unfamiliar to the Western lawyer, and he would soon discover that in many ways it is the most important institution of the whole system. That is the Procuracy.

The Soviet Constitution states that "supreme supervisory power over the strict execution of the laws by all ministries and institutions subordinated to them, as well as by public servants and citizens of the USSR, is vested in the Procurator General of the USSR."

The Procurator General is appointed by the Supreme Soviet for a term of seven years; he, in turn, appoints procurators of republics, territories and regions, and confirms the appointment by the republican procurator of area, district, and city procurators. "The organs of the Procurator's Office," states the Constitution, "perform their functions independently of any local organs whatsoever, being subordinate solely to the Procurator General of the USSR."

The "supreme supervisory power" of the Procuracy takes many diverse forms. The procurators keep watch over the entire system of administration, to see that executive and administrative bodies do not overstep their legal authority. They sit in as consultants on sessions of the local city councils and receive copies of orders and regulations issued by regional and republican and federal executive-administrative organs. When the procurator considers that an act is in violation of the Constitution or the decrees of the government, he may "protest" to the executive-administrative organ immediately superior to the body which has issued it. If a ministry has exceeded its authority, the procurator's protest is lodged with the Council of Ministers. The procurator also is supposed to supervise the legality and correctness of actions of the Ministry of the Interior, the police, the organs of criminal investigation, and the corrective-labor institutions.

In respect to the judicial system, the Procuracy's functions are still broader. It has the power to order the arrest of those suspected of crime, and it appoints the examining magistrates who conduct the pre-trial investigations of criminal cases. It is the prosecuting arm in criminal trials. But beyond that, the procurator watches all civil proceedings and may initiate or enter any lawsuit at any stage on either side. Further, he may appeal, by way of protest, any decision, civil or criminal, of any court below the level of the Supreme Court of the USSR. He may move to reopen any case after the decision has been handed down. Before an appellate court renders its opinion in any case, it must hear the opinion of the procurator.

Finally, the Procuracy maintains a special section to which anyone can write a letter or send a telegram if he thinks he has been unjustly arrested or unjustly convicted.

How does this work in practice? As far as the supervisory power over administrative acts is concerned, we do not have sufficient information on which to base a judgment. On the local level, the danger seems to lie less in the possibility that the Procuracy will be unable to check the abuses of administrators than in the possibility of its assuming too much control; on the national level, one may well doubt how much actual power the Procuracy has, for example, to check the excesses of the Ministry of the Interior. These are necessarily conjectures, however, since in this sphere the Procuracy's protests are confined to administrative bodies and are not reported. In respect to the supervisory power over the administration of justice, however, we have the digests of cases issued by the Supreme Court of the USSR as well as the discussion of cases on all levels, chiefly in legal periodicals. Also we have the accounts of former Soviet lawyers now in this country. Here the evidence is very strong (despite some Soviet press reports of bribery and corruption of individual procurators) that *where no question of political loyalty is involved* the Procuracy performs its "protest" functions on the whole honestly and impartially. Furthermore, the courts are by no means under compulsion to grant the procurator's appeal or to agree with his opinion. Many cases are reported in which the Procuracy protests the *conviction* of a man accused of a crime; in case after case, both civil and criminal, the appellate court sustains the decision of a lower court which the procurator has protested.

Certain of the functions of the Procuracy are performed by government attorneys (or procurators) in other legal systems. In no other system, however, as far as this writer has been able to discover, is there a law of public protest on the same scale. The Soviet Procuracy is the protector of all litigants who are victims of what it, the Procuracy, considers to be an unjust or doubtful judicial or

administrative decision. Indeed, all appellate cases before the Supreme Court of the USSR must come either on protest of the Procurator General of the USSR or else on motion of the court itself.

How are we to explain this unusual aspect of Soviet law? We may explain it sociologically, in terms of the conditions of Soviet society and the needs and conceptions of the Soviet rulers. We shall see later its consonance with a parental legal system, which treats the litigant as a ward of society. But we must also explain it historically, in terms of the ideas and traditions which are part of the Russian cultural heritage. The office of the Procuracy was not invented by the Soviet regime. It was adopted from prerevolutionary Russian law. Here, however, we meet an interesting fact: the Procuracy as it exists under the Soviets resembles not so much the Russian Procuracy of the post-1864 period as that of the period before the Great Reforms.

Peter the Great founded the Procuracy in 1722. From the beginning the two functions of prosecution and supervision were linked. The Procuracy served as an instrument of control over the newly founded Senate, which at that time was both a privy council and a supreme court. Later, when procurators' offices were established in the provinces, they were made subordinate to the Procurator General so that central supervision might be exercised over the provincial governors. In 1802 the Procurator General was transformed into the Minister of Justice, and the Procuracy was subordinated to that body, in a renewed effort to free the provincial procurators from the governors. As in Soviet Russia, so in the early nineteenth century the procurators attended meetings of the various administrative and executive bodies and read their resolutions and decrees to see whether they conformed to law. Again as in Soviet Russia, when a breach of the law was found it was reported to the superior executive-administrative authority—at that time the provincial governor; though in certain cases it was reported to the Ministry of Justice.

The 1864 reform, together with subsequent legislation, tended to confine the activities of the Procuracy chiefly to the prosecution of criminal cases and the presenting of opinions to the appellate courts in civil or criminal matters. To this extent, at least, the Procuracy after 1864 was very much like the corresponding office under French law. The procurators did retain, however, a number of administrative functions, participating as members of various provincial boards. But the procurator was a voting member of these boards and could not protest a decision of the majority—just the reverse of the Soviet practice. In civil cases the right of protest was confined to certain types of cases. In criminal cases the Procuracy was separated from the pre-trial investigation of criminal cases, the pre-trial investigator becoming an independent judicial officer, under the trial court.

In some respects the Soviet Procuracy marks a return to the type of procuracy of the eighteenth century, before the 1802 constitutional reforms of Alexander I. It is not part of the Ministry of Justice, and, theoretically at least, it supervises the legality of the acts of that department as well.

We may learn something of the nature and function of the Soviet Procuracy by studying its eighteenth-century counterpart. Under Peter, judicial administration was so bad that the Senate, acting as the Supreme Court, was unable to control the activities of the various local courts; further, the judicial branch was closely interlocked with the administrative branch, and hence subject to the pressures of local expediency. Peter therefore sought to construct a hierarchy parallel to the judicial and administrative, to be the "eye" of the monarch. The Procuracy which he established bore some resemblance to the old French system of *procureurs,* but its supervisory powers went far beyond those of the French model.

With a similar problem before them, it was natural for the Soviet rulers to reach back into the recesses of their own tradition and to develop the Procuracy along the earlier lines. It was in their heritage; it was Russian; and at the same time it went back be-

yond the hated "bourgeois liberalism" of the late nineteenth century.

The Soviets have adapted the old Russian Procuracy to their own needs, chief of which is the uniform enforcement, by all branches of government and by all citizens, of the policies of the state as enacted into law. As "the eye of the state," the Procuracy, in its protest functions, calls attention to those courts and other official bodies which step outside the bounds of Soviet legality. In this respect it performs a function which in the United States is performed unofficially by the press, citizens' committees, and other organs of public opinion.

THE SUBJECTIVE SIDE OF CRIME

Founded on prerevolutionary Russian criminal law, Soviet criminal law has, for that very reason, much in common with Western conceptions of crime and punishment. Yet the Soviets have added a great deal that is new. Some of the new features seem to be an inevitable accompaniment of a planned economic order; these have been discussed in the context of Socialist Law. But much of what the Soviets have added stems from historic Russian conceptions of man and society, conceptions which have developed from early times but which now, in many instances for the first time, are finding expression in law.

Here it is important to avoid a "Russian oversimplification." It is not implied that the new features of Soviet criminal law are unique to the Soviets, nor that they are to be explained solely in terms of the Russian past. Other legal systems may have similar features, stemming from their own history and from their own circumstances. Yet it is a striking fact that despite the similarities between all legal systems, each is peculiarly related to the culture from which it stems. To understand a people's law it is necessary to understand that people and its specific qualities. Indeed, identical rules of law often take on quite different significance in two dif-

ferent legal systems, and the difference in significance may often be explained—or at least illuminated—by the different traditions underlying those systems.

Soviet conceptions of crime and the criminal have deep roots in the Russian Orthodox conception of the corporate character of sin. The Russian peasant has traditionally called the criminal "unfortunate one"—a victim of society or of his own human temptations or perhaps of both. In Maynard's words, "The thief [to the Russian] is a sinner who ought to repent; the person injured by the theft may be expected to retaliate upon him: but other members of the community will naturally pity the sinner and help him to win absolution." Indeed, the community shares in his guilt. Such a conception has nonlegal and even anti-legal implications. If the criminal differs from others only in being more unfortunate, there seems to be no moral justification for prosecuting him. If the community shares in his guilt, why single him out for trial? If it is absolution that he requires, why send him to prison?

This basic antagonism between a religious and a legal conception of crime is well expressed in the novels and stories of Dostoevsky and Tolstoy. In *The Brothers Karamazov,* Dostoevsky visualizes a society in which "everything will become Church"; in such a society, he writes, a thief will not be punished by law but will be regenerated and reformed. He has Father Zossima declare:

> All these sentences to exile with hard labour, and formerly with flogging also, reform no one, and what's more, deter hardly a single criminal, and the number of crimes does not diminish but is continually on the increase. You must admit that. Consequently the security of society is not preserved, for, although the obnoxious member is mechanically cut off and sent far away out of sight, another criminal always comes to take his place at once, and often two of them. If anything does preserve society, even in our time, and does regenerate and transform the criminal, it is only the law of Christ speaking in his conscience. It is only by recognizing his wrong-doing as a son of a Christian society—that is, of the Church—that he recognizes his sin against society—that is, against the Church. So that it is only against the Church, and not

against the State, that the criminal of today can recognize that he has sinned.

In a society in which there were no State as such, or in which the State were included in the Church (instead of vice versa), "society would know whom to bring back from exclusion and to reunite to itself."[6]

This apocalyptic vision of Dostoevsky corresponded with deep religious and social attitudes of the Russian people—not generally of the Westernized intelligentsia, perhaps, but of the peasants and those who were close to the peasants. To a certain extent it was shared by lawyers, too, and we shall see some illustrations of it in the Russian criminal code. But where shall we find illustrations or proof of the existence of such attitudes among the peasants? Such humble people did not write law books.

Such humble people did, however, sit on juries. Fortunately we have some record of their verdicts and some accounts of their comments. The report of Maurice Baring in 1914 is worth quoting at length:

> The chief characteristic of the Russian jury is its leniency, its indulgence, its tendency to acquit . . . Many characteristic stories exist in Russian literature, and a still greater number float about in the flotsam and jetsam of current talk, illustrating by striking instances the peculiar psychology of the Russian jury.
>
> It is said that a jury once returned a verdict of "innocent with extenuating circumstances." Garin, the author, tells how his house was once set on fire by a peasant, and how without much difficulty he collected overwhelming evidence against a particular peasant for deliberate arson. The peasant was tried before a jury of peasants in the Canton Court. His guilt was clearly proved. Nobody had any doubt but that the verdict would be "guilty." The peasants on the jury did not deny the prisoner's guilt, but were of the opinion that six years' penal servitude—the sentence the prisoner would have received for arson—was disproportionately heavy.
>
> "Two years in prison," they reasoned—wrote the foreman, narrating the case to Garin—"would be enough to instill wisdom in him; but to send him to penal servitude is too much. In what are his wife and chil-

dren guilty? What will they do without a bread-winner? . . . Their final argument was that it was a fine day, and the sun was shining spring-like; how could they ruin a man on such a fine day? They were sorry for the gentleman, but still more sorry for the orphans and the wife. Nobody was ever ruined on account of a fire. It was God's will, and must be accepted as such."

"It was only afterwards," says Garin, the sufferer in the incident and the teller of the story, "that it became clear to me that what from our point of view may seem the greatest injustice is from the point of view of the people the expression of the highest justice in the world." Immediately after the incident, Garin was obliged to leave the village where it occurred. He revisited the place two years later. "I was at once met," he writes, "by a deputation of peasants, whose spokesman made me a kind of speech in which he said that the peasants were very glad to see me; and that they were very glad for my sake that the prisoner had been acquitted; that the Lord had not allowed me to be burdened with a sin, in interfering with what was not my business but God's—the hounding of criminals. "The Lord saved thee from sin," they said to me; "all the good which thou didst us has remained to thee, and has not been in vain. The Lord punished them." And finally he tells how the peasants narrated the bad end the criminals had come to, taking it as a matter of course that such things belonged to the sphere of Providence, and not to that of man.

Baring adds:

The story is characteristic. I could quote many others of the same kind—stories in some cases which are startling in their unexpectedness, and in the difference of the point of view from that prevailing in other classes and in other countries. But strange as this point of view may seem, it will generally be found that there is in it a basis of common sense and an element of sound fairness. The Russian peasant juryman is indifferent to legal subtleties, and often quite unaffected by forensic evidence, which he looks on as a thing made to order, bought and sold. He will judge by his conscience, and according to his own code of morals, which, if indulgent, is none the less definite.[7]

One of the leading students of the Russian jury tells of a case in which the jurors reported the verdict "without leniency," at the same time staring the criminal in the face. "This happens very

seldom," the author states, "and it means that they are very indignant; in most instances the severity of a sentence makes the jurors very bashful, and they look away and cast down their eyes." In another case one officer, A, took an examination for another, D, passed it, served four years in the army under the name of D, and upon his return handed over his papers to D. D then passed for a captain, until the fraud was discovered and both A and D were brought to trial. Both were acquitted. "The fact that A had done a favor without mercenary motives and at great cost, together with his voluntary military service for four years, was accredited to him; as for D, the jurors took into consideration the fact that he was in a situation close to extreme necessity: actually, having twice before failed the officer's examination, he was subjected to the threat of his father to deprive him forever of all financial aid."[8]

Some of the qualities characteristic of the peasant jury appeared also in the Russian criminal code. Church penance at the discretion of a priest was one of the measures of punishment which a Russian court could apply in certain cases. Sentences for ordinary crimes were, by our standards, light: for murder in the first degree (intentional and premeditated), fifteen to twenty years of penal servitude; for murder in the second degree (intentional but unpremeditated), twelve to fifteen years; for murder committed under the influence of strong emotional excitement, the maximum sentence was eight years of penal servitude. Certain more reprehensible types of murder—for example, the murder of near relatives, or murder by torture—were punishable by penal servitude for life. The death penalty was inflicted only for attempts on the life of the Imperial Family and for treason. On the other hand, deportation to Siberia was the penalty for public blasphemy of Christianity; for conversion, by means of force or threats, of a Christian to a non-Christian faith or of a Russian Orthodox to another Christian belief; as well as for "showing audacious disrespect for the supreme authority, or contempt for the form of government or for the order of succession to the throne, by pronouncement or reading in public

of speeches or words, or by spreading of works or pictures by public exhibition."

Further, in many types of crime the Russian judge was given wide leeway in choosing between maximum and minimum sentences; and here the code instructed him to increase the punishment according to the following standards: "(1) the more there was intent and premeditation in the acts of the criminal; (2) the higher his status, calling and degree of education; (3) the more illegal and unconscionable the inducements to commit the crime . . . (6) the more there were broken special personal obligations to the place in which the crime was committed and to the persons against whom it was committed . . ."

In stating the circumstances to be considered as mitigating guilt and decreasing punishment, the code began with the voluntary confession of the guilty person before he was suspected.

Running throughout these provisions of Russian law, and manifested in the attitudes of the Russian jury, is a special concern for the mentality of the criminal, his motivation, his orientation. It was not so much the criminal act that was to be punished as the criminal himself, the man; in punishing him, his whole personality was to be taken into account, including in particular his personal relationship to the whole community. In this sense, a strong element of subjectivism existed in the Russian law applicable to the punishment of criminals.

The Soviets have taken over this subjectivism and have extended it beyond the sphere of punishment to the definition of crime itself. The subjective side of crime, that is, the criminal intent (guilty mind, *mens rea*) of the accused, has been given significance beyond that generally accorded it in the legal systems of the West. In this respect the Soviet system has adapted prerevolutionary Russian social and religious conceptions to areas of law into which they have not previously penetrated.

This may be illustrated by the Soviet law of criminal negligence. It is the general rule of civilized legal systems, including both the

prerevolutionary Russian and the Soviet, that a man shall not be liable to criminal punishment unless he was in some way at fault in committing the act with which he is charged. If, for example, he committed it while walking in his sleep, or if his act was for some other reason not his fault, he cannot be said to have committed a crime. But suppose a man makes a mistake which has disastrous consequences—shoots at what he thinks is a bear, for example, only to find that it was actually his hunting companion. In such cases, it is in the tradition of Anglo-American law to inquire whether a "reasonable man" would have foreseen the consequences of the act which was committed, and to hold the accused to the standard of foreseeability or care maintained by society generally. The courts would ask: Was the hunter exercising that degree of care which a reasonably prudent man would have exercised under the circumstances? Should he, by ordinary standards of reasonableness, have foreseen that the figure in the distance might actually be a man and not a bear? In the closely related situation of a man who intentionally commits a criminal act which has, however, unforeseeable consequences, the Anglo-American law assumes that the actor intended such consequences and punishes him for them regardless of his actual intent. If, for example, a man strikes another on the nose intending only to cause him pain, but the victim happens to be a hemophiliac and consequently bleeds to death, the actor may be held for murder or for manslaughter, depending on whether the assault is a serious crime (felony) or a minor crime (misdemeanor).

In continental European law, there is less talk of the "reasonable man." Nevertheless most European legal systems, though not all, hold the accused to objective standards of foreseeability and care.[9] Also, in continental European law generally, one may be punished for a crime which one did not intend to commit but which resulted from another intentional criminal act, though this class of cases has been more strictly limited in continental than in Anglo-American law.

Soviet law takes a different approach to this problem. The question of whether the actor ought to have foreseen the consequences of his act is not considered in the light of an objective (or generalized) standard of foreseeability (that of the reasonable man); nor is it considered in the light of the social danger of the consequences themselves. Like other systems, Soviet law requires that a person who is careless or negligent, and who ought to have foreseen that harm to another might result from his carelessness or negligence, should be held liable for causing that harm. But it determines whether or not he should have foreseen the consequences on the basis of a subjective (or concrete) standard: it asks "whether under the given circumstances the given personality, with its individual capacities, development, and qualifications, could have foreseen the consequences which occurred."[10]

A Soviet treatise states:

> The objective criterion may serve only for the original orienting of the act which has been committed. Certain requirements of foreseeability are worked out in the exercise of a particular profession; certain requirements of foreseeability in the sphere of everyday customary relations are created by the rules of socialist common life. It is necessary to start from these in order to clarify the real possibility of foresight of the criminal consequences by the given person. But in order to establish the presence of this possibility it is necessary to clarify the subjective qualities of the given person—his knowledge, his qualifications, and so forth . . . For persons who possess special knowledge and high development there will be a real possibility of foresight of the criminal consequences in cases where for other persons, committing the same act but not possessing such knowledge and such [a high level of] consciousness, it would not be possible to establish the presence of this possibility.[11]

The author of the treatise cites cases. In 1939 one Safronov was accused of criminal negligence in directing a railroad locomotive and of thereby causing a collision. The Criminal Code imposes heavy sanctions on "breach of labor discipline by transport workers," which is listed among "crimes against the administrative order which especially endanger the USSR." Breach of the rules of op-

eration of locomotives is made punishable by deprivation of liberty for a period up to ten years when such violation endangers life or property. Safronov's defense was that he was not at fault in failing to foresee that his acts would have harmful consequences, since he had only recently been transferred to the position of commander of the locomotive brigade and had not had sufficient instruction. The Plenum of the Supreme Court sustained this defense, stating that "Safranov, a Stakhanovite, was promoted from his job as a locksmith to the office of commander three days before the accident; he directed the technical work, but did not know the instructions and signals for the movement of trains; when he was appointed to be brigade commander of the train he was not properly instructed in his duties."

The other cases cited by the author of the textbook all have reference to so-called "official crimes," that is, offenses committed by persons in responsible positions due to their negligence in carrying out their duties. The Criminal Code states no standard of foreseeability in these cases. It merely states the punishment for the offensive act, sometimes qualifying this with the condition "if such act resulted in or could have resulted in" harm of a particular kind. Soviet judges and jurists, however, have interpreted the code provisions in such a way as to require the subjective standard of foreseeability which they say prevails throughout Soviet criminal law as a whole. There is no felony-murder or misdemeanor-manslaughter rule.

Prerevolutionary Russian criminal law took into account social position, calling, and education in meting out punishment for a criminal act. Soviet law follows the older law in this, but it goes further; it takes those factors into account in determining whether a crime was committed at all or whether, on the contrary, the act should be considered merely accidental. This means in practice that an educated or more intelligent man is held to a higher standard of care than an ignorant or unintelligent man. Members of the Communist Party are apt to be treated more severely by the courts

than nonmembers. "You are a member of the Party, one of the vanguard; you should have known better," the judge will say.

Thus not merely the act but the "whole man" is tried. At the same time his crime is considered in the context of the "whole community." This tends to increase the severity of penalties attached to conduct which from the viewpoint of individual morality may not be highly blameworthy, but which it is desired to stamp out in the community as a whole. Thus while Soviet criminal law may appear, from our point of view, most merciful in the handling of certain crimes, it may also appear extremely ruthless in the handling of other crimes. The Soviets have carried over and even extended the leniency of prerevolutionary Russian law in the punishment of murder, assault, rape, arson, and the like—and its harshness in the punishment of ideological and political crimes. The murderer is punished by ten years' deprivation of liberty—the counterrevolutionary by death.[12] Also, when the Soviet state is campaigning to eliminate a certain type of crime it increases the sanctions against it. For example, there is an intensive struggle to stamp out the practice of wife-capture, child marriage, polygamy, and other so-called "survivals of kinship life," which are still part of the *mores* of the Central Asiatic people. Polygamy is therefore severely penalized in the Turkmen Republic, though it is only lightly treated in White Russia, for example, where it is not "socially dangerous." The individual shares, so to speak, the guilt or innocence of the community. A still more striking example of shared guilt is the ruthless provision of the Criminal Code that family members may be liable to punishment for the desertion from the army of one of their number, even though they knew nothing of the criminal act and had no control over it.

Also stemming from the conception of crime as both an individual and a corporate act is the considerable emphasis on the ritual act of confession and repentance as prerequisite to absolving both the person and the community. Here, perhaps, lies the underlying significance of the famous confessions of Bukharin, Rakovsky,

and others who were tried for counterrevolutionary "wrecking" in the late 1930's. Whether these confessions were voluntary or extorted, the fact remains that they met a felt need for the reidentification of the accused with Russia and with the Revolution, both of which, they said, they had betrayed. Only so could there be an expiation of their sins and a purification of the community.

The emphasis on the subjective side of crime thus has implications far beyond the determination of standards of foreseeability in cases of criminal negligence. It is closely connected with the central concern of Soviet politics and law with the state of mind of the Soviet people. This has roots in prerevolutionary conceptions of both the role of the state and the nature of crime and punishment. These prerevolutionary conceptions, however, are now for the first time being given systematic political and legal formulation.

THE LAW OF THE PEASANT HOUSEHOLD

The Soviet collective farm is sometimes treated as a historical outgrowth of the prerevolutionary Russian peasant commune, or *mir*. The two are comparable, however, only in a negative sense: in neither is the land privately owned by the individual peasants. Of the direct historical connection between the two it can only be said that in collectivizing agriculture the Soviets could capitalize on the absence in Russian history of a strong tradition of private peasant ownership of the land.

Matters are different, however, regarding the peasant household, with its house-and-garden plot, farm implements, livestock, and crops produced on the plot. Here there is a striking similarity between the new and the old, and a direct historical outgrowth of one from the other.

The individual peasant on a Soviet collective farm has a double legal personality. On the one hand he is a member of the collective farm, working the land owned by the collective farm, paid by it on the basis of what he produces for it, voting at its meetings. On

the other hand he is a member of the household in which he lives, working the small plot of land owned by the household, sharing in the proceeds of its joint labors, participating in its management. He is thus doubly collectivized.

Comparable to the Great Family of the Serbs and Croatians which died out in the last century and perhaps to the customary household of India, the Russian peasant household also echoes primitive Germanic and early Irish family organization.

The household is defined by the Soviet Land Code as "a family-labor association of persons jointly engaged in agriculture." It may consist of any number of persons, related by blood or not, who are linked by a joint domestic economy as well as by communal ownership of its agricultural property. Gsovski sums up its internal legal relationships as follows:

> For adult membership in the household, relation by blood or marriage must be combined with participation in the conduct of common farming through the contribution of labor or money. Minors and aged persons are members by virtue of their family ties and life under the same roof. Still, a household is not identical with a family, although the family forms its foundation. A household may consist of a single person without family. On the contrary, sons and daughters who carry on separate farming or are engaged in other outside trades, live apart, and do not contribute to the welfare of the "parental" household, are not considered members of such household. Under the Land Code, a six-year period of such separation results in loss of membership. Members who sign a contract for outside jobs with government agencies and register them with the management continue to be members for the duration of the contract. Those leaving for study, military or government service, by appointment or election, continue to be members for the entire period of their absence. Strangers informally taken into the family life and joint work (quasi-adopted members, *priymaki*) are, unless working for definite wages, members of the household with the standing of relatives. The membership of each household is officially recorded.
>
> Property of the household, which consists of all articles appertaining to the common farming and life, is the common property of all members including minors, the aged, and quasi-adopted strangers. However, in contradistinction to joint property under the Civil Code, no member has a

definite share in the common property. It is common property undivided into shares, and no member may in any way convey his or her interest in it. Membership may be increased by marriage, birth, or admittance of strangers; it may also be decreased by death and separation. But the death of a member is not followed by descent and partition. A household is not considered a legal entity; nevertheless, its common property continues to exist undivided, regardless of the change of membership. A member's share is realized only if the household is broken up completely or is partitioned by the separation of one or several members who form a new household. Even in such case, no particular rules define the share, and the whole distribution is a matter of agreement and custom. During the existence of the household, a member has in fact no share in its property but merely an indefinite share in the customary use of the property; he simply enjoys such benefits and comforts as the common life of the household can offer.[13]

The management, use, and disposal of the property of the peasant household are in the members as a whole; in the absence of unanimity, according to the Soviet legal literature, a majority vote of the adult members is decisive. The members select a head of the household to administer it and to represent it in business matters. Such head may be deposed by the members, with the authorization of the public authorities, and another appointed in his place. Property of the household may not be attached in payment of the debts of individual members (including the head of the household) contracted by them for their personal needs.

In a 1946 case involving a contract made in 1940 for the purchase of a building constituting part of a peasant household plot, the Moscow Regional Court ordered the contract dissolved and the purchase price of 26,000 rubles refunded, on the ground that the seller, a man named Evmenov, who was apparently the head of the peasant household, "had no right to conclude the above-mentioned contract involving the sale of a part of the house, since he was not the owner of the house." The court added: "The contested building belongs to all the members of the peasant household, and Evmenov acted without their consent in selling it."[14]

Centuries of Russian history are embodied in the institution of

the Soviet peasant household. Originating in ancient times, it has survived many different forms of agricultural organization. Both before and after the emancipation of the serfs, it was closely connected with the peasant commune, which consisted of the heads of the households who assembled in general meeting and elected elders. Before emancipation, the commune regulated the use of common fields, fisheries, forests, and so forth, and distributed and redistributed the three-course open fields among the households. It was also responsible for tax apportionment among the households. It represented the peasantry in their relations with the landlords. After emancipation, the nature and functions of the commune remained essentially the same, only now it dealt directly with the state instead of with the landlord and his bailiffs; and now the periodic redistribution of the newly allotted land among the households gained increased significance.

The great legal and economic difference between the prerevolutionary peasant commune and the Soviet collective farm is that the entire property of the commune was used by the households which comprised it. The commune itself, as a collective entity, did not conduct agricultural operations. However, even in the commune a sharp distinction was made between the "fields" which were subject to redistribution and the house-and-garden plots which belonged to the separate households in perpetuity. Through collectivization the Soviets have withdrawn the fields from the households and have turned them over to the ownership and operation of the collective farm, membership in which is not by households but by individuals; the individuals cultivate the collective fields through teams and brigades organized by the collective farm.

In the early 1930's, after collectivization was introduced, leading Soviet authorities on land law considered that "the peasant household will not be united but absorbed by collective agriculture. . . With the introduction of collective farms, the household as a separate unit is doomed." This approach, which was accompanied by violent and lawless incorporation of peasant households into the

new collectives and a general disregard of their property rights, was finally abandoned in 1935, with the promulgation of a Standard Charter for Artels (collective farms) in which the rights of the household were restored. In an address to the Drafting Committee on the Standard Charter, Stalin stated that so long as the collective farms are not rich enough to satisfy the personal needs of its members, "it is better to admit straightforwardly, openly, and honestly that a household in a collective farm should have its own personal farm plot, a small one, but its own." In fact the peasant households have had increasing economic significance in the total picture of Soviet agriculture. They supply the USSR with a large proportion of its meat and dairy produce, vegetables, fruit, honey, and they own most of its cattle.

The reasons for retaining the household plots are by no means solely economic, however. Even on very wealthy collective farms, where more than enough is produced collectively to satisfy the needs of the members, the peasant household retains its importance. There is a profound social and psychological reason as well. The peasants have clung to their households, and the Soviet rulers, despite their ideological antagonism to this "petty bourgeois" survival of the prerevolutionary past, have been compelled to yield to this age-old "family collectivism." In the end they have yielded gracefully, however. They have proclaimed the peasant household as a socialist institution, and have given it new legal protection. A special category of property, peasant household property, has been recognized—different from personal property, different even from joint property, and different from collective and state property. The status of the household has been defined and regularized. Serious attention has been given to the difficult problems that arise in regard to the rights of members of the household among each other as well as the rights of the household as against the collective farm. The provisions of the Land Code have been supplemented by statutes and by administrative decisions.

In prerevolutionary Russian law similar legal problems arose re-

garding the status of the peasant household. The Emancipation Statutes and other legislation referred to the household but nowhere defined it. It was left to the courts to do so, on the basis of local customs. A series of decisions by the prerevolutionary Supreme Court laid down certain rules which are roughly equivalent to the subsequent Soviet legislation on the subject. However, these rules were not systematized and no general principles were stated which could serve as a basis for such systematization.[15]

The Soviets have built on the prerevolutionary court decisions. They have come forward with a general theory of peasant household ownership, based upon principles derived from the unique Russian experience rather than from Western doctrines. They have integrated peasant household law into collective farm law. Yet here as elsewhere in Soviet law, administrative bodies play a very important role, and the unsystematic character of the Soviet administrative process—the absence of established norms and fixed procedures—makes it difficult to judge the effectiveness of the Soviet peasant household in terms of concrete application of the general principles that have been elaborated. Most legal problems arising within a household, or between a household and the collective farm, are resolved administratively, by the district soviet executive committee or by the organs of the Ministry of Agriculture. The administrative findings of fact are conclusive upon the courts, should there be a resort to the judicial process.

In illustration we may cite a 1944 decision, Dogadin versus the Collective Farm "Red Ploughman," as reported officially in the journal "Court Practice of the Supreme Court of the USSR":

> Dogadin brought suit in the People's Court against the collective farm "Red Ploughman" to recover damages caused as the result of illegal withdrawal from him of his garden plot.
>
> The People's Court of the Nogin District of Moscow Province rejected Dogadin's suit in its decision of 6 September 1943. The Court College for Civil Cases of the Moscow Provincial Court affirmed the decision of the People's Court in its opinion of 21 September 1943.
>
> In accordance with the protest of the President of the Supreme Court

of the USSR, the Court College recognized that the decision of the People's Court and the opinion of the Provincial Court must be set aside on the following grounds:

The question of the right to use garden plots attached to a peasant home is decided by land agencies and not by a court. By its ruling of 7 July 1943, No. 36, which was present in the record, the Nogin District Executive Committee found that the withdrawal of the garden plot from Dogadin was illegal, and, therefore, the court had no right to concern itself with this question in its decision. In spite of this fact, the court rejected Dogadin's suit solely for the reason that the collective farm–defendant, in withdrawing the garden plot from Dogadin, acted in accordance with law.

Since the withdrawal from Dogadin was found to be illegal by the competent agencies, the court must decide on the rehearing only the question of the value of materials and labor which Dogadin had expended on the plot which was taken from him.

On the basis of what has been set forth, the Court College for Civil Cases of the Supreme Court of the USSR at its session of 12 April 1944 ordered:

The decision of the People's Court of the Nogin District of 6 September 1943 and the opinion of the Moscow Provincial Court of 21 September 1943 are set aside and the case remanded for rehearing in the same court with a different bench and with the participation of the Procurator.[16]

8

EASTERN AND WESTERN LAW

When we talk of law, we do not think merely of the rules in force at a given moment but rather of a way, or process, of ordering human affairs. There are, of course, other ways. There is the way of terror. "Lynch law" is not law, if only because it is spontaneous and violent. The secret administrative trial of persons accused of being "socially dangerous" is not law, if only for the reason that it is secret and arbitrary. Deliberation (a "fair hearing"), publicity, the consistent application of established norms and standards, are essential features of the law way of ordering human affairs.

Terror may be legalized. A duly enacted law authorizing lynching would be an unjust law, according to civilized standards, but it would be a law. To lynch would then be legal; it would not, however, be a law way of ordering human affairs. War may be legal, under rules of international law; but a legal war between two countries is a settlement of their differences by force, and not by law.

Law differs not only from terror and force, but also from other ways or processes of governing human relations, such as the exercise of economic pressures (through the "forces" of the market, for example), or of family pressures, or of religious sanctions. These other forms of social relations may be subjected to law, may be legalized, but they are distinct from law, which is itself a special and unique form of social relations.

Law in this sense is the product of long historical experience and not merely of the momentary "will" of the sovereign. The

modern theory that the supreme lawmaker (parliament) is omnicompetent, and may enact any law it pleases, has obscured the fact that law in a deeper sense, like the institution of the family, or like religious belief, is not an article of manufacture but rather a living, growing tradition. Law is a way of life. It lives only by being passed on from generation to generation, consciously, by people who are dedicated to this task. Law in this sense is intimately bound up with a people's whole historical development.

If we view Russian history as a whole, and compare it with the history of the West, we see at once that perhaps the most striking difference between the two histories is the relative deficiency of the role of law as a special and unique form of Russian social relations. The emergence in the nineteenth century, finally, of a class of lawyers, the separation then for the first time of the judicial from the administrative function, the development in the fifty years before the Bolshevik Revolution of a legal system as such, came as part of the Westernization of Russia. The Russian jurists consciously borrowed from Germany, from France, from England; previously, in the seventeenth and eighteenth centuries, Peter the Great and his successors had borrowed from Sweden, from Hungary, from Saxony, from Italy.

Russian law, therefore, challenges us to rediscover the unity and continuity of the Western legal tradition. Russian law proves that the different national legal systems of the West are in reality variations on a single theme. To Speransky, the distinctive features of English law, as compared with continental systems, appeared as differences in technique rather than in fundamental principles. In the face of the Russian challenge it is time for Europeans and Americans to overcome the nationalistic bias of traditional legal historiography and to rediscover the common sources from which all the legal systems of the West are derived.

At the same time, Russian legal history requires that we view Soviet developments in a larger perspective, seeking to understand them in the light of generations and centuries and not merely in

terms of the day-to-day or year-to-year machinations of the regime in power. Stalin is not the ultimate master of Russia's fate; on the contrary, Russia is the ultimate master of Stalin's fate. It is part of Stalin's "realism" that he has again and again yielded to the pressures of tradition—with which, as a Marxist Revolutionary, he presumably has little sympathy. Stalin has himself attempted to integrate Soviet law into the whole movement of Russian legal history.

Above all, the polarity of Russian and Western history over the past thousand years poses the question of the relationship between the law way and other ways of ordering the affairs of society. The West has exalted law, with its principles of Reason, Conscience, and Precedent; it has fostered the doctrines of the supremacy and completeness of law, its basis in equality, its capacity for growth. It has by the same token tended to forget that law itself is ultimately dependent on the existence of nonlegal realities. Law is not its own justification, nor is it its own sanction. Behind it must lie the "consent of the governed," as manifested in community self-consciousness, common service, a sense of common purpose and destiny. The traditional Russian appreciation of spontaneous, informal social relations, based on an inner intuition of group membership, is a challenge to us to find the link between the political-legal and the moral-spiritual aspects of our own heritage.

By the same token, Western law is a challenge to Russia. In the nineteenth century Russian jurists accepted the challenge of the West and sought to build a Russian legal system in the Western image. The Soviets are now building both on the Westernized Russian legal tradition of the late nineteenth and early twentieth centuries and on the nonlegal social and personal values which have been central in Russian life from early times. They are seeking to reconcile Eastern and Western elements in Russian social relations. They are trying to develop a specifically Russian legal system, giving legal forms and legal sanctions to the traditional Russian conceptions of the "whole man" and the "whole com-

munity." Yet they are unwilling to sacrifice certain traditional habits and beliefs which stand in the way of this goal.

The Soviet regime has sought to create a system of law which conforms to reason. Soviet jurists have applied their powers of analysis to concepts such as ownership, contracts, the relation of administrative action to judicial decision, the elements of criminal intent, and so forth and so forth. A belief in the completeness of law has been fostered. The supremacy of law has been declared in principle, and judges have been required to base their decisions on established norms and standards rather than on mere considerations of economic expediency. But this movement toward reason, analysis, legality, is seriously impeded by a fundamental belief that life is essentially beyond reason and law, and by a fundamental unwillingness to trust in reason and law absolutely. Hence whole spheres of life still remain outside the law, particularly in the realm of politics and policymaking, where reliance is placed on nonrational, nonlegal factors of force and violence, on the one hand, and of moral unity and common faith on the other. The personality of the rulers still plays a dominant role; personal influence is a crucial factor in impeding the movement for stability of laws.

Likewise one is struck by the Soviet struggle for the development of a principle of judicial conscience. The Soviet judge is an important means of reconciliation of the abstract "will of the state" with the personal actions of individual citizens. He is a figure in whom the state seeks to have public confidence reposed. He identifies himself with the parties who come before him. He does equity. He has not merely the interests of the state but also the interests of the litigant at heart. Indeed, the People's Courts often show a remarkable leniency, a tendency to acquit, a tendency to mitigate the harshness of the law; on appeal, they are sometimes rebuked for their soft-heartedness. But even here, the conscientious attitude of the Soviet judge is manifested in a procedure far more

informal than that of the West, and subject, therefore, to far greater pressure from outside. Soviet judges are not irremovable. In 1947 the Plenum of the Supreme Court of the USSR found it necessary to issue a directive ordering lower courts to exclude from their proceedings all sorts of special pleas by organizations and individuals not party to the action, "as being irreconcilable with the principle that the court is subject only to the law."

Again, the increased stress on past decisions, together with the recognition that Soviet law is a growing historical system, is a significant development of the past fifteen years; yet here, too, there is a limitation imposed by the weakness of the Russian legal tradition, which still tends to be blown about by every wind of fashionable doctrine. Party directives may tell judges to "intensify the struggle against thefts in the factories," or to make examples of managers who have tampered with the books, or to bear down on some other activity which the Party is seeking to "liquidate." In addition, legislation may be enacted without difficulty or delay. As a result, case law loses something of its importance, and historical growth is swamped under by rapid shifts in policy.

It would be a mistake, however, to concentrate on the weaknesses of the Russian tradition and to underestimate its strength. In demanding absolute obedience from its subjects and, beyond that, in seeking active belief on their part in the institutions of socialism, the Soviet state draws on the resources of a tradition in which the dualism of secular and spiritual never penetrated. The Soviet rulers can speak of the socialist family as a sacred institution, of work as a sacred duty, of socialist property as "sacred and inviolable"—in part because the word "sacred" is meaningful to the Russian people. They can conscript a portion of the youth into the State Labor Reserves in part because universal compulsory service is not new in Russian history. They can help to justify and make palatable the rapid industrialization of economic life by a reminder of the *furor technicus* of Peter the Great. Whether they can ultimately consolidate these positive features of Russian life into a

stable legal system, in the Westernizing tradition of the late nineteenth and early twentieth centuries, remains to be seen.

The conflict between law and unlaw still goes on in Russia. One should not conclude that law is the loser simply on the basis that it suffers many defeats. It also scores many victories. In terms of the direction in which events are moving, the "Struggle for Law" during the past fifteen years remains one of the most important internal developments in Soviet Russia since 1917. To it Buligin perhaps owes his life, Safronov his acquittal, Dogadin his household land and money compensation, and countless other Soviet citizens the protection of their rights.

PART III
PARENTAL LAW

9

LAW OF A NEW TYPE

One of the most significant internal developments in the Soviet Union, marking a new phase in the Revolution, has been the elaboration during the past thirteen years of an affirmative theory of the socialist state and socialist law. All other states, it is now claimed, are instruments of class domination; the Soviet state, existing in a classless society, is a "new type of state" with a "new type of law," "essentially different from all types of law known to history."[1]

Yet now that Soviet law has been proclaimed to be socialist law, law of a new type, and not merely (as before) an accommodation of the proletarian dictatorship to legal survivals of the bourgeois past, some of the most striking innovations of the first twenty years of the Revolution have been abandoned. In the name of socialism many elements familiar to capitalist systems have been reintroduced, and in the name of Soviet patriotism many institutions of the pre-revolutionary Russian past have been restored. From the Left, Trotsky, Koestler, and other former Communists have spoken of these changes since the mid-1930's as "The Great Betrayal"; from another standpoint, Timasheff, Sorokin and other Rusian *émigrés* have viewed them as "The Great Retreat." "After long years of destruction and experimentation, feverish efforts were made to restore the situation which existed at the outbreak of the Revolution or even earlier," writes Timasheff.[2]

Socialism has become Russian and respectable. Even the new Soviet legal theory is now the acme of respectability: Soviet law "recognizes no class distinctions"—it provides "equal justice for

all"—it represents "the will of the whole people." Revolutionary legality has become strict legality.

In fact an American lawyer would not have too great difficulty in accommodating himself to the Soviet legal system as manifested in the positive law proclaimed by the state. He would find many basic principles, precepts, doctrines, and rules of contract law, tort law, criminal law, family law, procedure, and various other branches of the legal tree essentially the same in the Soviet system as in the German, French, Swiss, Italian, English or American. This similarity is due in part to the fact that the Soviet state, for all its socialism, must meet fundamental social and economic needs similar to those that confront "capitalist" states; it also stems from the common Roman derivation of both Russian and Western Law, from the impact of later Western legal developments on prerevolutionary Russia, and from the Soviet reliance on German, Swiss, and French law in the preparation of the NEP codes. The American lawyer would have to reconcile himself to the Marxist emphasis on economic integration and public control of business; and he would have to adjust to the strong Russian spirit of collective consciousness, universal service, and dedication to the mission of Moscow, as well as to the dynamic and energetic quality of Russian government. But he would have to make similar (though not so radical) reconciliations and adjustments were he to practice law in England, for example, which has its own strong historical tradition of community spirit, service, and mission, and which is now incorporating into that tradition a nationalization of the economy as well.

Of course our American lawyer in Moscow would be shocked at the extent to which illegal and extralegal activity is still accepted as normal; but that would hardly strike him as manifesting a new type of law, except in the most ironic sense.

Yet Soviet law, even apart from manifestations of revolutionary terror and Russian ruthlessness, is in fact quite different from the law of socialist England (or wartime America). The differences are not immediately apparent in the codes, statutes, decisions, and

rules of positive law. They become apparent only if one looks to certain basic conceptions which underlie these external normative acts.

Here it is necessary to add a third dimension to our study. We have explained Soviet law, in the first instance, as a Marxian socialist response to the social and economic problems which have confronted the Soviet regime. To this analytical dimension we have added a historical dimension, explaining Soviet law in terms of inherited traditions and experiences as they have imposed themselves on the habits and memories of both the rulers and the people. Yet some of the most important aspects of Soviet law stand outside the categories "socialist" and "Russian"; they cannot be satisfactorily explained either by the logic of socialism or by the experience of Russian history or by both together. We are compelled, therefore, to approach our subject once more, from a quite different angle.

To understand a legal system it is necessary to distinguish between the official law proclaimed by the state and the unofficial law which exists in the minds of men and in the various groups to which they belong. Each of us has his own conceptions of rights, duties, privileges, powers, immunities—his own law-consciousness. And within each of the communities in which we live—the family, school, church, factory, commercial enterprise, profession, neighborhood, city, region, nation—there is likewise an unofficial and largely unwritten pattern of obligations and sanctions. The official law of the state, with its authoritative technical language and its professional practitioners, cannot do violence to the unofficial law-consciousness of the people without creating serious tensions in society. At the same time, official law is more than a reflection of popular law-consciousness; it also shapes it, directly or indirectly.[3]

This distinction between official and unofficial law is essential to a full understanding of the peculiar blending of Marxist theory and Russian history into a "new type" of law. It was the prophecy of classical Marxism that once class domination is eliminated, and once the economy is publicly integrated and rationalized, it will

not be necessary to put conflicting claims through the wringer of legal reasoning, judicial conscience, and precedents. Marx and Engels foresaw a classless society in which disputes would be settled by the spontaneous, unofficial social pressure of the whole community, by the group sense of right and wrong or at least of expediency. They saw a precedent for this in the condition of certain primitive peoples who have no positive law, no state, but instead punish aberrational behavior through informal, spontaneous group sanctions. As among primitive societies at the beginning of history, so in classless society at the end of history, they said in effect, control will exist only in the habits and standards of the whole people, in the *mores* of the good society. This moral consciousness implicit in the Marxist utopia is something less than law-consciousness in the sense in which that word has been used. Nevertheless the two go together. Both are psychological rather than official. One is the feeling of what one *ought* to do, the feeling of being morally bound; the other is the feeling of what one *has* to do, the *feeling* of being *legally* bound.

The idea of a society without official law goes down hard in a culture such as that of the West, where positive law tends to be treated not as merely one particular means of social control but rather to be identified with social control altogether, so that every social norm, or at least every norm tolerated by the state, is assimilated to positive law. Everything tends to be positively legalized or illegalized. There is no case which does not fall under *some* rule. But in Russia, where both law-consciousness and positive law remained rudimentary through the centuries, where whole spheres of life were left outside the realm of law, the Marxist vision found an echo in the hearts and minds of the people. The Russian revolutionaries were not primarily interested in creating, ultimately, a new legal order, in the external, positive sense; they were interested rather in creating, ultimately, a new sense of justice, as between man and man. They seized on the Marxist promise that, with the elimination of the bourgeoisie and the abolition of all survivals of

capitalism, the community would come to be regulated like a family, like a kinship society, by customary standards, by unofficial law, rather than by positive law. This corresponded to the historic Russian ideal of the regeneration of man and to the Russian conception of a society based on love and on service, a society with a mission. Only now such a society was to spring from the materialist conception of history, from class struggle and the end of class struggle, rather than from Christian faith in the Kingdom of God and (in Dostoevsky's phrase) from the transformation of the State into the Church.

The Russian Marxist vision of the withering away of (official) law under socialism has now been abandoned for the foreseeable future. "Law—like the state—will wither away only in the highest phase of communism, with the annihilation of capitalist encirclement," wrote Vyshinsky in 1938. Only then "will all learn to get along without special rules defining the conduct of people under the threat of punishment and with the aid of constraint." Thus even with the achievement of communism in Soviet Russia alone, about which there is considerable talk, law will remain. Nevertheless, the withering-away idea has repercussions on the Soviet legal system as now practised. For the element of Soviet socialist law which makes it "law of a new type" is its focus on law-consciousness, the law in the minds of men, and its deliberate attempt to shape and develop law-consciousness through the medium of official law.

LAW AS A TEACHER AND PARENT

Of course every system of law educates the moral and legal conceptions of those who are subject to it. In the *Digest* of Justinian it is explicitly recognized that the task of law is the moral improvement of the people. Thurman Arnold describes the judicial trial as a "series of object lessons and examples." "It is the way in which society is trained in right ways of thought and action, not by

compulsion, but by parables which it interprets and follows voluntarily."[4] Mr. Justice Brandeis was a leading exponent of the view that the courts should recognize the importance of their educational function.

Nevertheless, the educational role of law has not been traditionally regarded as primary. Law has been conceived primarily as a means of delimiting interests, of preventing interference by one person in the domain of another, of enforcing rights and obligations established by the voluntary acts of the parties insofar as that is compatible with the social welfare. It has been assumed that the persons who are the subjects of law, the litigants or potential litigants, know their own interests and are capable of asserting them, that they are independent adults whose law-consciousness has already been formed. In some cases this goes so far, under our adversary procedure, as to enable the judge to sit back as an umpire while the opposing lawyers do battle with each other. The subject of law in our system, "legal man," has been the rugged individualist, who stands or falls by his own claim or defense and is presumed to have intended the natural and probable consequences of his acts. To educate his legal conceptions is no mean task. It requires a very good judge even to try it. At best he will succeed in educating only indirectly, secondarily, by seeing that justice is done.

In the Soviet system, on the contrary, the educational role of law has from the beginning been made central to the concept of justice itself.[5] Law still has the functions of delimiting interests, of preventing interference, of enforcing the will and intent of the parties—but the center of gravity has shifted. The subject of law, legal man, is treated less as an independent possessor of rights and duties, who knows what he wants, than as a dependent member of the collective group, a youth, whom the law must not only protect against the consequences of his own ignorance but must also guide and train and discipline. The law now steps in on a lower level, on what in the past has been a prelegal level. It is concerned with the relationships of the parties apart from the volun-

tary acts by which their alleged rights and duties were established; it is concerned with the whole situation, and, above all, with the thoughts and desires and attitudes of the people involved, their moral and legal conceptions, their law-consciousness. Soviet law thus seeks not simply to delimit and segregate and define, but also to unite and organize and educate. The result is the creation of entirely new legal values within a framework of language and doctrine which otherwise appears conventional and orthodox.

It is apparent that the Soviet emphasis on the educational role of law presupposes a new conception of man. The Soviet citizen is considered to be a member of a growing, unfinished, still immature society, which is moving toward a new and higher phase of development. As a subject of law, or a litigant in court, he is like a child or youth to be trained, guided, disciplined, protected. The judge plays the part of a parent or guardian; indeed, the whole legal system is parental.

It should be understood that the words "parental" and "educational" as used in this context are morally neutral. The parent or guardian or teacher may be cruel or benevolent, angry or calm, bad or good. He may dislike the child. But he is responsible for the child's upbringing. To speak of "parental law" is therefore not so much to describe the state which proclaims and applies the law as to describe the assumptions which are made regarding the nature of the citizen and his relationship to the state. To say that under Soviet law the state has extended the range of its interests and its powers is not enough. The state has sought in law a means of training people to fulfill the responsibilities now imposed on them—and it has made this function of law central to the whole legal system. The conception of man presupposed in the procedural and substantive rules is thereby changed. Man is a child or youth to be trained and protected—protected not against the state itself, but against others and against himself.

"Parental law" may be implicit in the actual practice of socialism as such. It surely has deep roots in Russian history. Yet it is essential

to isolate the parental features of Soviet law from both its socialist and its Russian background, for parental law is not restricted to socialism or to Russia. According to Karl Llewellyn, "our own law moves steadily in a parental direction."[6]

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10

THE EDUCATIONAL ROLE OF THE SOVIET COURT

The Soviet court plays a double role in the education of popular law-consciousness. On the one hand it is an instrument for teaching law to the public generally. On the other hand it is a means of educating the parties who come before it with their grievances.

Special pains are taken in the Soviet Union to make law a part of the general education of the average citizen. Courses in law are offered in the universities to students not specializing in law. Lawyers are required to give lectures on law at meetings of trade unions and other organizations. Law is popularized in pamphlets and tracts written for the general public. The lay assessors who sit with the judges in the three-man People's Courts are given short courses in law prior to their undertaking their duties. The elections of People's Judges which took place throughout the Soviet Union in 1949 were accompanied by a tremendous propaganda campaign in the press, on the radio, and in street speeches and interviews. In this campaign Soviet law was praised as a synthesis of personal and collective interests, and various aspects of labor law, housing law, family law, criminal law, and other fields immediately concerning the general population were discussed.

During the campaign, one judge reported on seventy cases he had heard having to do with suits against railroads, in sixty-three of which judgment was for the plaintiff, with total recoveries amounting to 146,000 rubles. He went on to describe railroad inefficiency and to urge the creation of a moral atmosphere which would

eradicate negligence and theft.[1] The press not only boasted of the achievements of Soviet justice but also criticized deficiencies in judicial administration. *Pravda* reported on the role of the courts in restoring workers to their jobs if they were wrongfully dismissed, citing a case in which a particular People's Court had reinstated a worker who was fired ostensibly because of a general layoff of personnel whereas it appeared on trial that the real reason for his discharge was a critical remark which he had made at a factory meeting.[2]

It may be doubted how effective Soviet legal propaganda is in making drugstore lawyers out of Ivan and Andrei. Much of law is by nature technical, requiring years of special training to understand. In addition, popular legal literature in the Soviet Union is of a very low quality. Nevertheless, it is significant that these efforts are taken to make law comprehensible to the layman, and that the judges themselves are made vehicles of such education, being required to report back to their electors.

With 300,000 agitators active in the judiciary election campaign of 1949, virtually the entire electorate voted. Of the single slate of candidates, 53 per cent were not members of the Communist Party, and 39.2 per cent were women. Apparently at least 30 per cent, and probably more, had no legal education.[3] It may thus be seen that not only did the elections have a "popular" flavor, but the lower courts themselves are "popular" in composition. A serious defect from the point of view of the quality of judicial administration, the lack of legal education of so many People's Judges nevertheless serves to bring official law and popular law-consciousness closer together.

In the conduct of trials, also, Soviet judges both on the higher and lower levels are supposed to be continually aware of the effect of their decisions upon the attitudes of the public. In an address on "The Educational Significance of the Soviet Court," delivered and printed in 1947, I. T. Goliakov, then Chief Justice of the Supreme Court of the USSR, stated that "the publicity of our court [pro-

cedure] means the attraction of the widest public into the courts."[4] For this purpose, he said, "the court arranges its sessions at such time as is most favorable for the toilers to attend." In addition the court may hold "demonstration trials" of important criminal cases in the enterprises and collective farms where the crimes were committed.

"Trying the case in great detail," Goliakov stated, "strictly observing the law, the court step by step discloses the whole picture of the crime or the civil dispute. It raises the explanations of the parties to a higher level, transforming the whole trial not into a spectacle, as the selfish bourgeois court does, but into a serious instructive school for educating those attending the session to observe and respect law and justice."

In a speech given in 1946 President Kalinin also stressed the role of the judge as a teacher. "As a good artist is able wonderfully to paint a landscape, so a skillful, politically developed judge brings to light during the judicial trial, during a particular, concrete case, all those internal processes that go on in our country." Every decision of the judge must therefore be "as convincing as it is sound," said Kalinin, "so that not only he himself and the people's assessors, but also all the persons attending the session should . . . understand [its] correctness."

A still more important test, however, of the significance of the educational role of the Soviet court is in the actual law of procedure as applied in the trial of cases.[5] Here it is necessary to recognize the points of similarity between Soviet procedure and that of other systems, in order to appreciate the points of difference.

Soviet criminal and civil procedure resembles Western procedure generally in providing for a bilateral hearing, in public, with oral testimony and the right of confrontation of witnesses, and with judgment based on rational as contrasted with purely formal proofs. Appeals may be taken. Parties may be represented by lawyers; in fact Soviet law goes so far as to provide that in criminal cases if the accused refuses to have a lawyer, the prosecution is not al-

lowed to be represented either, and the court conducts the trial itself.

CRIMINAL PROCEDURE

The most obvious difference between Soviet and Anglo-American criminal procedure lies in the emphasis placed by the Soviets upon pre-trial investigation and upon the active participation of the court in the trial itself. Here Soviet law is in the continental European tradition. A preliminary examination is held, in which an examining magistrate (investigator) interrogates the accused and the witnesses and examines evidence prior to preparing the indictment, a document in which the charges and the evidence against the accused are stated in detail.

The Code of Criminal Procedure does not provide any punishment for the accused for failing to coöperate at the pre-trial examination, and enjoins the investigator from using "violence, threats, or similar methods"; the investigator, it is stated, "shall not have the right to refuse the request of the accused or of the complaining witness to interrogate witnesses or examine experts and to collect other evidence if the facts or circumstances sought to be established may have significance for the case"; the accused must be asked questions the answers to which would tend to exonerate him as well as questions directed toward proving his guilt, and he must be informed of his right to examine any part of the record, including adverse evidence of which he knows nothing. In the trial proper the prosecutor cannot introduce evidence not previously known to the defendant. On the other hand, appeals from abuses of pre-trial procedure may be taken only to the Procuracy, not to the courts.

Mr. Justice Jackson, in describing his experiences at the Nürnberg trial of German war criminals, writes: "It was something of a shock to me to hear the Russian delegation object to our Anglo-American practice as not fair to the defendant. The point of the observation was this: we indict merely by charging the crime in general terms and then we produce the evidence at the trial. Their

method requires that the defendant be given, as part of the indictment, all evidence to be used against him—both documents and the statements of witnesses . . . [Our] method, it is said, makes a criminal trial something of a game. This criticism is certainly not irrational."[6]

At the trial, the burden of proof of the facts alleged in the indictment is on the prosecutor. However, the judge plays an active part in interrogating the defendant and the witnesses on both sides, and in calling his own impartial experts when necessary. Admissibility of evidence is left to the discretion of the court, though the verdict is supposed to be based on relevant evidence only.

As outlined in the code, Soviet criminal procedure has much in common with general European practice, which places more stress on "inquisitional" features and less on "accusatory" than does Anglo-American law. In a broader perspective, however, both Soviet and American criminal law are a mixture of the so-called inquisitional and accusatory systems. Our judges may and sometimes do interrogate witnesses; they may and sometimes do summon their own impartial experts to testify; they in fact "rule the court" by their decisions about the admission and exclusion of evidence. On the Soviet side, on the other hand, the adversary features of the trial have been increasingly stressed. Both the prosecutor and the defense counsel question the witnesses and argue their respective cases, and the defendant also may put questions personally, at any time during the trial. In the discussions of criminal and civil procedure now taking place, pending the drafting of new All-Union codes, the adversary aspect is being reëmphasized, and it has been proposed that the Soviet court should grant to the judge powers of a character between those granted in the English and the French procedures: in particular, that the judge should actively conduct the trial without being required to await the introduction of evidence by the parties, but that the parties should commence the interrogation on the adversary principle. It was noticeable in the war crimes trials at both Nürnberg and Tokyo that the Soviet law-

yers were very interested in American techniques of cross-examination, and it would not be surprising to find signs of American influence on this aspect of Soviet criminal procedure in the future.

What is significant about Soviet criminal procedure, however, is not its division into pre-trial and trial stages and its emphasis on the leading role of the judge, but rather its educational or parental character, both in its adversary and in its inquisitional aspects. The mere fact that the prosecution and the defense are on an equal basis, each presenting its own side of the case, does not in itself deprive the trial of its educational or parental role. On the contrary, the fact that the parties defend their own rights may itself be a means of teaching them to assume and learn responsibility. On the other hand, the mere fact that the procedure is "inquisitional," with the judge determining the order of witnesses and himself interrogating them, does not in itself guarantee its educational or parental character. The judge may maintain complete formality, and may treat the parties in every way as independent adults.

The clue to the nature of both Soviet criminal and civil procedure lies in Article 3 of the Judiciary Act of 1938:

> By all their activities the courts shall educate the citizens of the USSR in the spirit of devotion to the motherland and the cause of socialism, in the spirit of strict and undeviating observance of Soviet laws, of care for socialist property, of labor discipline, of honesty toward public and social duty, of respect for the rules of socialist common-life.

In criminal procedure, both the pre-trial investigation and the trial proper, and, in the trial, both the adversary and the inquisitional aspects, are designed to fulfill this educational purpose.

From the educational-parental standpoint, the following features of Soviet criminal procedure, though not necessarily uniquely Soviet, are noteworthy illustrations of a shift of emphasis which Soviet law as a whole has carried further than other modern systems.

1. The preliminary investigation is directed toward clarifying the entire situation in the mind of the accused as well as in the records of the investigator.

2. The "entire situation" sought to be clarified includes not merely the circumstances of the case, in the usual sense of that phrase, but also the whole "case history" of the accused, including any past misconduct, his attitude toward the Revolution, his entire motivation and orientation. The examiner is required to seek the answer to such questions as: Did the commission of the crime take place under coercion, threat, or by reason of economic strain? Was the alleged offender at that moment in a state of hunger or destitution? Was he influenced by extreme personal or family conditions? Was he in a state of strong excitement?

3. Upon indictment, the trial commences with the court's interrogation of the accused directed, again, to his entire biography. Whether or not he has relatives outside the USSR, whether or not he is a member of the Party, whether or not he has been in trouble before, whether or not he has earned rewards for outstanding achievement of any kind, whether or not he took an honorable part in the Great Fatherland War—these and similar questions make it clear that it is not simply the offensive act that is to be punished or exonerated, but the man himself.

4. It is the duty of the court to protect the accused against the consequences of his ignorance, to clarify to him his rights, to call expert witnesses in his behalf when needed whether or not he so requests.

5. On appeal the higher court not only reviews the entire case, both on the law and on the facts, but may also receive evidence not offered in the original trial.

6. The death of a convicted person does not prevent an appeal or a reopening of the case if newly discovered circumstances may lead to the rehabilitation of his reputation.

7. In imposing a sentence, the court has a large range of penalties from which to choose, including public censure, confiscation of all or part of the criminal's property, a money fine in the form of the monthly deduction of a certain percentage of the criminal's pay (so-called "correctional labor tasks"), deprivation of political rights

and of particular rights of citizenship, prohibition to carry on a particular trade or profession, as well as deprivation of liberty in corrective labor camps and imprisonment. The punishments prescribed in the Criminal Code often leave to the court a very large leeway between the minimum and maximum. In addition the discretionary power of the court is enhanced by the doctrine of analogy, despite the limitations imposed on this doctrine since the mid-1930's, and particularly in the provision that punishment may be omitted altogether if the accused is not socially dangerous at the time of the trial.

Behind these characteristic features of Soviet criminal procedure lies a new conception of the role of law. In the words of former Chief Justice Goliakov, "The most important function of the Socialist state is the fundamental remaking of the conscience of the people."[7] The chief task of Soviet law, according to another prominent writer, is to educate the people to Communist social-consciousness, "ingrafting upon them high, noble feelings."[8]

In 1947 a Soviet writer criticized the one-judge session established in 1940 for cases of absenteeism on the ground that it lacks "the strickness, officiality, and solemnity" of the regular three-judge court, and that "consequently the educational and deterrent significance of these judicial procedures is undoubtedly diminished."

Soviet criminal procedure deals with the "whole man," but it deals with him in a particular way, as a teacher or parent deals with a child. The court is interested in all aspects of his development, and especially in his mental and psychological orientation, because it is its task to try to "remake" him, or at least to make him behave. The Soviet judge may upbraid or counsel the accused, explaining to him what is right and what is wrong in a socialist society. Even if he is acquitted, the court may deliver an official "admonition," that is, a warning of the dangers involved in conduct which is in itself not criminal but which may lead to criminal activity. If he is convicted, the court imposes punishment as a sign of the state's disapproval or condemnation of both him and

his criminal act. Punishment is intended, according to Soviet legal theory, to cause the criminal "a definite suffering."[9] Thereby, it is implied, he will be at least purged and perhaps reformed.

It is not our intention to portray the Soviet criminal court as poles apart from the American criminal court. They have much in common. The difference is a subtle one. The Soviet criminal trial has the atmosphere not so much of our regular criminal courts as of our juvenile courts.

CIVIL PROCEDURE

The implications of the concept of law as parent and teacher run throughout Soviet civil procedure as well. There is, for example, widespread opportunity for use by public agencies of what in American law is called interpleader—an action by a third party to have the conflicting rights of two other parties adjudicated. Thus a Soviet trade union may institute a suit in the name of a member against an employer, without the member's authorization. A local soviet may bring an action on an invalid contract in the name of one of the parties, in order to have determined its (the local soviet's) rights to any unjust enrichment. As we have already seen, the Procuracy may institute a civil suit between two parties if it considers that the "interests of the state or of the toilers" so requires, and it may intervene in any case on behalf of either party, and may "protest" any decision to a higher court.

Moreover, once the case is before the court, not merely the issues litigated but any issue arising from the situation may be adjudicated. If evidence of criminal activity appears in a civil suit the court is required to certify the facts to the Procuracy. As stated by a recent textbook: "In deciding the concrete property disputes of the parties, the court is obliged at the same time to clarify those economic and organizational inadequacies which create the situation out of which disputes arise. On the ground of the defects and inadequacies, established by the court, in the work of state, coöperative, and social organizations, special orders should be handed down (in-

terlocutory orders) and directed to the corresponding organs."[10]

The will of the parties as to the disposition of the case is not decisive, once the court has jurisdiction. Even if they choose to compromise, or if the plaintiff wishes to drop the action, the court may proceed to judgment. It may grant the defendant an unsought remedy against the plaintiff. It may give a remedy beyond the scope of the prayer for relief.

As in criminal procedure, the court in civil cases is concerned not merely with deciding the facts and issues before it, but also in clarifying them to the parties. This is expressed forcefully in Article 5 of the Code of Civil Procedure:

> It is the duty of the court to strive in every way to clarify the actual rights and relationships of the litigants; for this purpose the court is not confined to pleadings and materials submitted by the litigants but must, by interrogation of the parties, see to it that all the essential facts of the case are clarified and supported by the evidence, thus rendering to toilers applying to the court active aid in the protection of their rights and lawful interests, so that their lack of legal information, low level of literacy, and similar circumstances may not be utilized to their disadvantage. The court shall explain to parties applying to it their rights and the necessary formalities in the required procedure and warn them of the consequences resulting from acts and omissions in this procedure.

One is struck by the general informality of the Soviet civil trial. Behind this informality lies the educational and parental role of the court. As the atmosphere of the Soviet criminal trial approximates that of our juvenile courts, so the atmosphere of a Soviet civil suit may perhaps bear an analogy to that of our domestic relations courts.

PROCEDURE IN GOSARBITRAZH

Although there is no pre-trial investigation in civil suits generally, the procedure of Gosarbitrazh in intercorporate litigation is marked by a preliminary preparation of the case by the judge-arbiter. He studies in advance the materials and documents presented by the parties as well as supplementary materials received from them

at his own request. He may summon officials of the disputing enterprises for preliminary explanation of any circumstances. He may join other parties as participants in the case on his own motion. He may investigate questions not raised by the complaint and answer, if such questions appear to him to be relevant.

Though now considered to be bound by the Code of Civil Procedure, Gosarbitrazh nevertheless proceeds even more informally and "parentally" than the regular courts. The hearings generally take place with only six participants—the judge-arbiter and his legal counsel, and a representative of each of the litigating enterprises together with the lawyers for each enterprise.

"The active creative role of the arbiter in the Arbitrazh procedure," according to a recent writer, "does not overshadow, however, the role of the disputing parties, does not diminish their activity in the defense of their interests. On the contrary, the rules of consideration of disputes by Arbitrazh give the parties a broad initiative and independence, require from the parties an active defense of their economic interests, in the struggle for the fulfillment of plan."[11]

Here, too, however, as in criminal and civil procedure generally, the judicial contest is waged against the background of a more intimate relationship among all the participants, a relationship more akin to that of a family than to that of an impersonal "civil" society.

If we look for an analogy in American law which will throw light on Gosarbitrazh procedure, we may find it in our proceedings in bankruptcy and corporate reorganization, where the judge-referee often makes his own "preliminary investigation" of the case, consulting personally in advance with the various parties involved, though the bankruptcy hearing itself is governed by the regular rules of evidence and procedure. Happily, the analogy bears out our thesis: the Soviet litigant is treated not as an independent and self-sufficient "individual" but rather as someone more helpless, more dependent, more to be protected, guided, and if necessary "reorganized."

II

LAW AND PSYCHIATRY

Soviet criminal procedure, like that of other countries, provides for a hearing of both prosecution and defense, directed toward ascertaining the facts of the case and the applicable law. Did the accused commit the act with which he is charged? Is the act prohibited by law? Did he commit it intentionally or negligently? If negligently, ought he to have foreseen the consequences of his negligence? These and similar questions are standard and required, both there and here.

We have seen, however, in treating the Russian component of Soviet law, that in cases of criminal negligence the Soviet court applies a subjective standard of foreseeability; its chief inquiry is not what an objective, average, "reasonable" man would have foreseen, but what this particular accused should have foreseen, in the light of his own background and capacities. We have seen a source of this subjectivism in traditional Russian concepts of crime and the criminal, in which attention is centered not on "this act" but on the "whole man", in the context of the "whole community."

To this we may now add that Soviet criminal procedure is peculiarly adapted to an investigation of the state of mind of the accused, by virtue of both the pre-trial investigation and the leading role of the judge, as well as by its general informality and its atmosphere of intimacy.

It would be a mistake, however, to see in Soviet criminal procedure merely a means of bringing to light all aspects of the crime, the criminal, and the situation. To present a romantic picture of

Soviet law would be to falsify it completely. The purpose of the Soviet judicial system is not to "do justice" in some abstract sense. The purpose is educational—again, without any romantic connotation, not educational for the sake of being educational, but rather for the purpose of inculcating, in Lenin's phrase, "discipline and self-discipline" in the Russian people, so that the system may work.

The Soviet criminal court is interested in the state of mind of the accused, his mentality, in order to help shape and influence his thinking, his attitudes, whether by public censure or by severer penalties, and in order thereby to help to develop in the public mind standards of legal responsibility. The court is a conscious instrument for forming the character both of the parties before it and of members of society generally. Its chief function is as a means of inculcating the feeling of legality and of respect for law as such, the love of country and of family, respect for property, a conscientious attitude toward work, fear of punishment, desire for reward and advancement. Because this is not simply an incidental aspect of its activities, but its principal aim and objective, new legal procedures and norms have been developed to meet it, and, indeed, a whole new type of law.

It is to be noted that the psychological premise underlying the educational role of law is that the conscious attitudes of people may be influenced by conscious decisions and actions of legislators, administrators, and judges. Soviet psychology is anti-Freudian in that it plays down the role of the subconscious and exalts the social over the sexual. At the same time, as we have seen in an earlier chapter, the Leninist conception of consciousness as an intellectual process has been transformed by the Stalinist emphasis on its emotional content. It is the impelling factors, rather than the cognitive, that are now stressed. It is conscious loyalty, conscious fears and desires, conscious sense of responsibility, that Soviet law now attempts to instill.

A crucial question for Soviet law, therefore, is how to deal with the offender for whom it is claimed that by reason of mental illness

he is incapable of maintaining legal standards of responsibility. On what basis should this claim be accepted or rejected? If it is accepted, what should the court do?

Here the Soviets, through institutions of parental law, have taken a long step toward the solution of an age-old conflict between the standards of medical science and the requirements of an effective legal order. The ancient Greeks had differentiated between paranoias, amentias, hypochondrias, and other mental diseases; but the Greeks never succeeded in incarnating their philosophical ideas in a stable legal system as such. The Romans, on the other hand, with their impatience with Greek subtleties and their genius for legal classification, lumped the various mental illnesses together under the legal term *insaniens*. The eminent psychiatrist Jelliffe, in calling attention to this development, adds scornfully: "Hence arose on a complex generality the word insanity. Its stupidities will cling to it and chiefly in that muddy stream of thinking used by lawyers to the present day."

To the psychiatrist who is called on to testify regarding the mental condition of an alleged criminal, the tests of insanity devised by the lawyers seem to have little or no relevance to the medical tests of mental illness. The law has developed criteria based on the intellectual capacity to know the nature of one's acts (and within that, to "know right from wrong") and on the volitional capacity to control one's impulses. For the sake of the legal order, the assumption is made that normal man is a free moral agent. Psychiatry, on the other hand, treats the offender as a patient, and seeks to classify the illness of which he is a victim, without reference to social or moral standards. The psychiatrists are unwilling to sacrifice their patients to the demands of "Roman" legalism, just as the lawyers are unwilling to sacrifice the legal order to the vagaries of "Greek" science.

The Soviets started out in the "Greek" tradition. At first they went so far as to take the question of insanity out of the hands of the courts altogether. Article 14 of the "Leading Principles of Criminal

Law" of 1919 stated: "A person shall not be subject to trial and to punishment for a deed which was committed in a condition of mental illness. . . To such persons shall be applied only medical measures and measures of precaution." The language of this provision was so broad as to have the effect of placing all persons who pleaded mental illness immediately under the jurisdiction of the medical administration.

It should be recalled that at that time it was the official position of Soviet jurisprudence that crime altogether is essentially not a legal but a medical problem and that as such it would ultimately be solved only by rooting out the social-economic evils of capitalism which give rise to it. Combining Marxian sociology with Lombrosian criminology, the Soviet psychiatrists studied the types of crime committed by various types of deviant personalities, attempting to explain the deviant personality, in turn, in terms of social conditions. Free will was denied. In a resolution "On Legislation and the Criminal Question" adopted by the First All-Union Conference on Psychiatry and Neurology in 1925, it was stated: "The idea of imputability [that is, criminal responsibility, sanity], as constructed in the studies on free will, must be eliminated from Soviet legislation and replaced with the idea of social dangerousness and socially dangerous conditions, which are stipulated by the neuropsychiatric deviations of the criminal."

The criminal codes of 1923 and 1926 reintroduced "Roman" conceptions of legal insanity. Article 10 of the 1926 Criminal Code, still in force, provides that punishment (called in the language of the time "measures of social defense of a judicial-correctional character") may be applied to persons who have committed "socially dangerous acts" only in cases in which the persons (1) acted intentionally, that is, foreseeing the socially dangerous nature of the consequences of their acts; or (2) acted negligently, that is, not foreseeing the consequences of their acts, although they should have foreseen them. Article 11 then goes on to say that "measures of social defense of a judicial-correctional character may not be

applied to persons who have committed a crime while in a condition of chronic mental illness, or of temporary disorder of mental activities, or in any other ill condition, if these persons could not realize the nature of their acts [literally: account to themselves in their acts] or direct them, and also to those persons who, although they acted in a condition of mental balance, had become mentally ill at the time of the execution of the sentence. To such persons may be applied only measures of social defense of a medical character." A note to this article states that it "does not apply to persons who have committed a crime in a state of intoxication."

By these provisions, the traditional tests of intellectual and volitional capacity are restated and jurisdiction is apparently restored to the courts. In fact, however, their effect has been quite different in the two principal phases of Soviet legal development. Until the mid-1930's, the question of criminal insanity was actually decided by the psychiatric expert, who, according to provisions of the Code of Criminal Procedure, is summoned whenever the mental health of the accused is in doubt, whether at the pre-trial examination or at the trial itself. If the psychiatric expert decided that the accused was mentally ill, he was almost invariably committed or released; and if the case proceeded to trial, the court rarely rejected the psychiatrist's conclusions. Thus, although the Criminal Code provided for legal tests of insanity, the tests actually applied were the medical-psychiatric tests of mental illness.

Soviet psychiatrists concerned with the examination of persons suspected or accused of having committed "socially dangerous acts" rejected, in this period, the "juridical scholasticism" of an analysis in terms of will and intellect. The nature of their examination was governed at first by an official circular of the People's Commissariat of Justice, which prescribed that they ask certain questions directed to the discovery of the case history of the alleged offender, but said nothing as to the determination of his intellectual or volitional capacities, in the legal sense. In fact, in those days the psychiatric definition of mental illness amounting

to nonresponsibility extended to minor mental disorders which were subsumed under the so-called reactive conditions. In the early years, drug addicts were considered *ipso facto* nonresponsible, and even cases of simple intoxication and strong emotional excitement were similarly classified. Although there was some tightening up in the mid-1920's, a leading jurist wrote in 1929 that excitement produced by a heavy insult might serve as a basis for a finding of nonresponsibility on the ground of "pathological affect." In the early thirties the scorn for legalism reached a new height, and the importance of the medical-psychiatric test seems to have increased still further. At the same time, the question of legal insanity was now decided by the psychiatrists largely in terms of "expediency"—that is, what seemed best for the particular offender and for society in each case.

In 1935 and subsequently, Soviet psychiatrists were under fire for having succumbed to "the influence of Western European science," particularly that of the Lombrosian school of criminology which sees the criminal as a biological type and "explains social forms of behavior by constitutional peculiarities of the personality." In 1936 certain large psychiatric institutions were reprimanded for the "theoretical mistakenness and practical perniciousness of extending the interpretation of schizophrenia." In 1938 the Director of the Serbski Institute of Court Psychiatry, which is the leading organ concerned with the problem of psychiatric examination of persons accused of crime, was attacked for "failing to draw any conclusions for himself from the break in the legal front of wrecking." "The treatment of the problems of imputability and nonimputability by the Institute of Court Psychiatry coincided in fact with the wrecking tendencies of Krylenko," it was stated.

The upheaval of the mid-1930's in forensic (court) psychiatry is closely related to the upheaval in law, on the one hand, and the upheaval in psychology on the other. In all three fields there was a new emphasis on moral responsibility and freedom of will. The official textbook on criminal law both in its 1943 and its 1948 edi-

tions is distinguished for its sharp rejection of the psychological premises of the earlier criminology. After quoting a long definition of freedom of will by Engels—closing with the sentence: "Freedom of the will is nothing else but the capacity to reach decisions with a knowledge of the facts"—the 1948 textbook adds: "This concept of the freedom of the human will, which is fundamentally different from all bourgeois philosophy, Marxism puts at the basis of criminal responsibility."

This was closely related, of course, to the new drive for "stability of laws," which, on the practical side, was directed against the widespread prevalence of recidivism. Too many persons absolved from punishment on the grounds of nonimputability were back in the courts again on fresh charges.

The psychiatrists had run away with the field. Now it was insisted that they, as forensic psychiatrists, concern themselves not solely with the criminal as a personality but also with the requirements of the legal order. Indeed, the discipline of forensic psychiatry was now for the first time clearly identified as involving not merely a doctor-patient relationship but a much more complex relationship in which the psychiatrist and the court share in the application to the accused of both medical and legal norms. Specifically, it was now demanded of the court psychiatrists that they discontinue stating their conclusions, as one criticism put it, "in language incomprehensible to the court and to the organs of investigation," and, affirmatively, that they formulate their opinion as to imputability on the basis not only of medical but also of legal criteria. At the same time, the final decision as to imputability was now placed in the hands of the court.

This certainly does not mean that court psychiatry has been thrown overboard, or even that its importance has diminished. It means rather that the psychiatrists have been asked to become more judicious. Whereas in 1922, 46.5 per cent of all psychopaths examined by the Serbski Institute were declared nonimputable, and 29.3 per cent "partly imputable," the percentage in 1945 was 12 per cent

nonimputable and the category "partly imputable" had long since been abolished altogether. Doctrines of reactive conditions were modified to allow more room for imputability. The label schizophrenia was broken down into more precise differentiations for the same reason.

PRESENT SOVIET TESTS OF RESPONSIBILITY

Under the Soviet law as now interpreted, whenever any doubt arises as to the mental health of a person accused of crime, the court is obliged to decide the question of his imputability on the basis of both the medical-psychiatric and the juridical criteria. In making its decision, the court relies in part on the conclusions of psychiatric experts, which likewise must be based on both the medical-psychiatric and the juridical criteria.

This is no solution in itself of the substantive problem of what constitutes legal responsibility, nor is it a reconciliation of the "Greek" and "Roman" *theories*. It is, however, a reconciliation of "Greek" and "Roman" *practice*, in that the decision is made only after carefully weighing both sets of criteria in the balance. The juridical criteria are decisive; under Article 11 of the Criminal Code, the mentally ill offender is exempt from punishment only if he lacks either the capacity to know the nature of his acts or the capacity to direct them. On the other hand, the medical-psychiatric criteria, though not decisive, are nevertheless relevant and the court must pass on them. This is also covered by Article 11, which states that punishment is not applicable to crimes committed in a condition of chronic mental illness, temporary disorder of mental activities, or any other mental illness—provided that the intellectual and volitional tests are met.

Although it has been emphasized since the mid-1930's that in no case is the mere fact of a particular mental illness conclusive, nevertheless Soviet psychiatric and legal literature has tended to associate certain types of medical-psychiatric conditions with nonimputability. This is inevitable, because both the psychiatric and the

judicial diagnosis are in those terms. Thus prolonged deprivation of narcotics, malaria in its secondary stages, mental derangements associated with epidemic encephalitis, and other similar specified conditions, are listed as "temporary disorder of mental activities" which, under Article 11, *may* give rise to nonimputability. Similarly, "any other ill condition" under Article 11 includes various psychopathies, neuroses, psychogenic reactions.

The result of the conscious juxtaposition of medical-psychiatric and legal criteria is to compel the court to consider in detail the physical, neurological, and psychiatric condition of the accused in determining the question of his nonimputability. If the court fails to relate its conclusion as to imputability specifically to the medical-psychiatric diagnosis, its decision may be reversed on appeal. For example, in 1939 the Railway Collegium of the Supreme Court of the USSR reversed a conviction, on the ground that according to the record of the case the accused committed the crime while in a state of unconsciousness due to intoxication, and that hence he was nonimputable. This decision was in turn reversed by the Plenum of the Supreme Court, on the ground that the assertion of the Railway Collegium that the accused was nonimputable was not based on expert psychiatric testimony. In another more recent case one Potapov, charged with anti-Soviet agitation, was subjected to expert psychiatric examination and found imputable. His conviction was nevertheless reversed by the Supreme Court, and the case remanded for retrial, on the ground that the experts did not give a detailed description of the physical, neurological, and psychiatric condition of the examinee, and did not state explicitly whether or not he suffered from any disease. While both these cases were decided on the basis of procedural requirements, they indicate that the substantive test of criminal insanity includes more than the finding that the accused lacked the capacity to "account to himself in his acts" or to direct them; it also includes the finding that he suffered from a certain kind of mental disorder; and the two findings are interdependent.

As a consequence Soviet courts find themselves in the position of having to reach explicit conclusions of a medical-psychiatric character. Thus in a postwar case in the Supreme Court of the USSR, the accused, charged with embezzlement, offered in defense a report certifying that he suffered from an "amoral syndrome." The Supreme Court asked the Serbski Institute of Forensic Psychiatry the following question: "Is the assertion correct that the indicated 'amoral syndrome' is 'organically preordained' in the psychopath and leads with fatal inevitability to the commission of this or that crime?" The Serbski Institute answered: "The formation of the psychopathic personality is to a great extent determined by external influences, by social factors. In particular this concerns complex psychic formulations such as concepts of morality, ethics, social duty, and so forth. Given identical psychopathic attributes, a different social make-up and differing conduct among various psychopaths is possible. The assertion . . . must be considered incorrect from the point of view of Soviet forensic psychiatry . . . as exactly related to Lombrosian and neo-Lombrosian tendencies in forensic psychiatry and the criminal law." We must presume (since we do not have the official report of the case) that not only did the court find the accused imputable but it also adopted as a rule of Soviet law the psychiatric principle stated by the Serbski Institute.[1]

FORENSIC PSYCHIATRIC PROCEDURE

It has long been recognized that the crucial problem in forensic psychiatry is procedural rather than substantive—that is, that the legal tests of insanity, particularly in countries which provide for jury trial, is less important than the methods adopted for ascertaining whether the tests are met. This is inherent in the problem of reconciling in practice two standards of responsibility that are irreconcilable in theory.

The procedural problem arises first in the sorting out of mentally disordered offenders before trial, second in the methods of proof

during trial, and third in the disposition of the offender upon conviction or acquittal. In all three aspects, Soviet criminal procedure offers interesting and challenging solutions to the difficulties inherent in the conflict between a legal and a psychiatric approach to criminology.

1. During the pre-trial investigation, if any doubt arises about the psychiatric condition of the accused, or of any witness, it is obligatory for the examining magistrate to call in a qualified psychiatric expert. In addition, the accused (or the witness) may call a psychiatric expert of his own choosing. The experts may examine all the materials in the case, and may request additional materials. In case there are two or more experts, they may consult with each other. If they are unanimous, they submit a joint report, but if there is disagreement they present separate reports.

If the examining magistrate considers the testimony of the psychiatric experts to be insufficiently clear or complete, he may order a new examination by other experts. The accused, who has the right to see the experts' conclusions, may also obtain a new examination if he is dissatisfied. In difficult cases, the examinee may be sent to a psychiatric hospital for prolonged observation before trial.

The report of the expert is embodied in an official report, which is presented to the court, on indictment, as part of the records of the preliminary examination. The form of the report is prescribed by official instructions. It is supposed to be couched in language understandable to the court personnel, and to avoid evaluative terms such as "autistic," "negativistic," "ambivalent," as well as descriptive passages discussing in technical terms the psychopathological peculiarities of the particular examinee.

The report of the forensic psychiatric expert consists of the following parts:

a. The formal introductory statement, including the specific charge against the examinee.

b. A description of the personality development of the examinee, including objective information from the family, reports of psy-

chiatric investigative nurses and of institutions, as well as relevant statements of the examinee himself.

c. A description of the general somatic condition, including a statement as to the general body type.

d. Reports of standard tests covering gross neuropathology.

e. Results of laboratory investigations.

f. Description of psychiatric condition. Here it is specified that statements are required as to consciousness, orientation, emotion, volition, and intellect. A statement of the reaction of the examinee to the case itself and to the psychiatrist, along with evidence as to the presence or absence of psychiatric disorders (attacks, hallucinations, and so forth) is also required.

g. Conclusions and recommendations: the psychiatric diagnosis, decision as to imputability or nonimputability, answers to any other questions posed by the examining magistrate, and, where the accused is found to be nonimputable, recommendation of hospital treatment or of release under the supervision of the district psychiatrist.

2. At trial, the sanity (imputability) of the accused is not presumed but must be proved by the prosecution. The experts who examined the accused in the preliminary examination may be called to testify orally. The accused may again call new experts of his own. If the forensic psychiatric testimony is unclear, or if there is a disagreement among the experts, the court may on its own initiative, or at the request of the accused or the prosecution, order a new examination by new experts, whose procedure is governed by the same rules as those relating to pre-trial *expertise.*

The conclusions of the experts are not binding on the courts. However, in case the court disagrees with their conclusions, it must state in detail the reasons for its disagreement.

Like other experts and witnesses generally, forensic psychiatric experts are reimbursed for their expenses, including those resulting from absence from their usual occupation. In addition, the psychiatric experts are paid for their services in examining and testifying at both the pre-trial investigation and the trial. The amount of their

fees is determined according to a schedule issued by the Ministry of Justice. Such expenses and fees may be assessed to the accused if he is guilty, provided he is not indigent; if he is not guilty, they are assessed to the state treasury. The psychiatrist called in as an expert either by the investigator or by the court or by the accused may not without sufficient reason refuse to appear and to give his conclusions. In addition, heavy penalties may be imposed on experts for giving false testimony.

Only medical doctors who have had psychiatric training may qualify as forensic psychiatric experts.

3. After trial, if the offender is found nonimputable, the Soviet court may apply "measures of social defense of a medical character." These include commitment to a psychiatric hospital either for "compulsory treatment," in which case he may be discharged only by court order, or (in less serious cases) "on general grounds," with discharge at the discretion of the medical administration. In addition the court may commit the nonimputable offender to the supervision and treatment of the district psychiatrist or to the care of relatives.

Prior to 1935 the regulations governing post-trial procedure were obscure. As interpreted, offenders could be committed to psychiatric hospitals at any stage of the pre-trial investigation upon recommendation of the forensic psychiatrist. Discharge was entirely in the hands of the medical administration. According to a 1935 Instruction of the People's Commissariats of Justice and Health, only the court may commit and in cases involving "compulsory treatment," which constitute the vast majority, a court order is required for discharge.

LESSONS OF THE SOVIET EXPERIENCE

The plea of nonresponsibility ("not guilty by reason of insanity") is troublesome by its very nature. The court is asked to decide whether or not the defendant falls into a category of persons who are, so to speak, outside the law. In making that decision, it must apply criteria appropriate to legal science; if it accepts without

question the criteria of medical-psychiatric science, some of the most basic assumptions underlying the whole legal system are threatened. This is particularly true if the psychiatrists deny the validity of such categories as freedom of will and moral responsibility altogether. On the other hand, by entertaining tests of intellectual and volitional capacity the courts necessarily involve themselves in a consideration of the processes of the human psyche. If they base their conclusions on premises which are medically and psychiatrically unsound, the legal order itself must in the long run suffer.

In this country we have done very little, in actual legal practice, to modify traditional modes of resolving the dilemma. The law remains, with some important exceptions, what it was a century ago. The psychiatrists, again with some important exceptions, continue to press their demands on the basis that, ultimately, the criminal responsibility of the mentally ill should be left to them.

The Soviet solution is to ask both the psychiatrists and the courts to compromise—the psychiatrists to state the legal implications of their medical-psychiatric conclusions, the courts to state the medical-psychiatric diagnosis upon which their legal conclusions depend. This solution will not satisfy the purists in either camp. On the one hand, it compels the psychiatrist to go beyond his traditional competence and at the same time leaves the final say in the hands of persons without psychiatric training. On the other hand, it compels the court to go beyond its traditional competence as well, and at the same time places heavy reliance on the medical-psychiatric expert. The two tests, psychiatric and legal, remain logically as irreconcilable as ever; both are used, and the court must simply decide whether the mental disorder was of such a character, according to the medical-psychiatric testimony, as to make it desirable to apply more leniently or more strictly the legal test of intellectual and volitional capacity. "Desirable according to what standards?" remains a critical question.

In determining the answer to that question it is necessary to

evaluate the role of expert testimony in Soviet pre-trial and trial procedure. The Soviet court expert is not a witness, in the strict sense. In this respect Soviet law follows continental European practice in general. However, the Soviet system does not go so far in eliminating the adversary features of expert testimony as, for example, the Italian system, in which the defense is not allowed to question the court experts. It differs, on the other hand, from certain other continental systems in which the contentious element is retained, in that the Soviet procedure authorizes the court to summon new experts to testify whenever the disagreement of opposing experts leaves the question in doubt.

The Soviet court expert is considered to be independent both of the witnesses and of the court (or the pre-trial investigator). He is spoken of as a "consultant" of the court. It is noteworthy, however, that the basis for impeaching the court expert is the same as that for impeaching the judges. In the case of experts called by the accused, partiality is minimized by the possibility of joint consultation with court and prosecution experts, as well as by the general informality of Soviet trial procedure.

Both in pre-trial and in trial procedure, the Soviet psychiatric expert is given broad powers. Most of the proposals for broadening the scope of psychiatric examination and testimony which have been made by American criminologists find expression in Soviet law. However, this is not only rendered easier by the fact that Soviet doctors generally are in the employ of state institutions, but also the leeway of the psychiatric expert is thereby limited. The state may more easily subordinate his science to its needs. The Ministries of Justice and Health may direct him to narrow his definition of nonimputability. In the case of political dissidents tried for counterrevolutionary activity in the administrative procedure of the Ministry of the Interior, the forensic psychiatrist may find his role as an impartial expert reduced to a minimum. Also, the offender committed to a psychiatric hospital, or his relatives, may not apply to the courts for discharge through a writ of habeas

corpus, but apparently may only appeal within the administrative order. Again the question arises of the ultimate standard by which the choice is made as to the disposition of the mentally ill offender.

Here some light is shed by the phrase "measures of social defense of a medical character." The Soviet court's focus is not so much on insanity as a defense to the charge of a criminal act, as on how to deal with the social danger of mental illness. To this end the medical profession is introduced to legal tests of social danger and legal procedures of meeting it, and the legal profession is taught something of the psychiatric tests of mental illness. Indeed, the chief lesson of Soviet law in this field perhaps lies in the widespread effort, through courses in both law schools and medical schools, to educate the lawyers and the doctors in their joint responsibilities toward the ill offender. From 1933 to 1945, 6,304 law students and 4,807 medical students took courses in forensic psychiatry, and 2,998 court investigators and 1,289 psychiatrists received some training in this field.

Again, to romanticize the picture would be to falsify it. The role of punishment has been enhanced, that of "treatment" reduced. The whole tendency has been away from individualization of disposition on a medical-psychiatric basis and toward an increasing extension of the category of "responsibles." The reason for this is the clue to the Soviet solution of both the substantive and the procedural problems raised by criminal nonresponsibility. Underlying the Soviet definitions and methods is the desire to maintain the mentally ill in the effective performance of their social roles—and to keep them going, if possible, as normal persons. The purpose is not to promote the welfare of the individual, for his own sake, but to maintain his social productivity, in this sense to educate him, for society's sake. It is the task of the courts to make a deliberate choice of the means by which this may be achieved, within the legal standards established for the proper functioning of society as a whole.

12

LAW AND THE FAMILY

"The family is ceasing to be a necessity both for its members and for the state," wrote Alexandra Kollontai, *enfant terrible* of the Russian Revolution, in 1919. The chapter headings of her pamphlet on "Communism and the Family" well express the mood of the first years of the Soviet regime: "Workers Learn to Exist without Family Life," "Individual Housekeeping Doomed," "The Dawn of Collective Housekeeping," "The Child [Brought up by] the Communist State." Here was ready-made copy for a righteous foreign press.

The more responsible Party leaders fought the tendency toward social and moral anarchy that accompanied the early phase of the Revolution. Lenin, in a famous quotation, attacked the "theory that in a communist society to fulfill sexual desires and love drives is as simple and meaningless as to drink down a glass of water." "From this 'glass of water' theory," he wrote, "our youth has gone mad, gone completely mad. It has become the evil fate of many young men and girls. Its devotees assert that this is Marxist theory. Thank you for such Marxism!"

Nevertheless the belief that the institutions of marriage and the family would eventually disappear under communism was more than an excrescence of war and revolution. It was part of a deeply rooted philosophy, and its exponents found passages in Marx and Engels to justify it. The theory of the "withering away of the family" was in fact officially maintained until the mid-1930's. It must be understood, however, that the attack of the responsible

leaders was directed not against the family as such, but against the family as an economic and legal unit. It was not marriage itself that would disappear but the formal institution of marriage; family life would continue, but it would entail no economic or legal responsibilities; the family would be transformed into a free association, bound only by the free will of its members.

This was good classical Marxism. In *The Origin of the Family, Private Property and the State.* Engels had argued that monogamy emerged with private property and the need of the father to pass his estate on to his own children, that it was a means of subjection of one sex by the other, and that it appeared, significantly, at the same time as the first class oppression, that of slaves by their masters. Through the successive stages of civilization, Engels wrote, the institution of the family has served to protect the ruling class in its control of property. In the classless society of the future, the economic basis of monogamous marriage would disappear, and with it the supremacy of men, infidelity, prostitution, the degradation of divorce law. Bound only by love and affection, the family would at last be free to flourish; "monogamy, instead of declining, will finally become a reality—for the men as well."

Classical Marxism thus extended the contractual, or consensual, conception of the family which had already come to play an important role in Western family law in the eighteenth and nineteenth centuries. In Russia, however, up until the Revolution, the family was considered in law to be founded essentially on a religious, or sacramental, conception. A religious marriage ceremony was required. Marriage between members of the Eastern Orthodox or Roman Catholic Church and non-Christians was prohibited entirely, as was marriage between Protestants and pagans. Persons over eighty were forbidden to wed, on the theory (as stated at a synod of 1744) that "marriage is established by God for the increase of the human race, which is completely hopeless to expect from anyone eighty years old." Grounds for divorce varied according to religious faith, and suits for divorce were heard only in the ec-

clesiastical courts of the various confessions. The Russian Roman Catholic was bound by Catholic family law, the Russian Protestant by the canon law of his denomination, the Russian Mohammedan by his own religious customs.

The brunt of the Bolshevik attack on family law was therefore directed toward its secularization, toward the liberalization of divorce, and toward the emancipation of women and children, as first steps in the "withering away" process.

In the mid-1930's, the theory that the family would disappear as a legal and economic entity was violently assailed as a "left deviation." The new ideological campaign went hand in hand with legislation imposing liability on parents for the torts and crimes of their children, restricting abortions, introducing bonuses for mothers of large families, charging fees for successive registration of divorces, and finally, in 1944, establishing for the first time a judicial process of divorce. Today, in the words of a prominent Soviet writer on the family, "the people of the USSR are convinced that not only in a socialist, but even in a perfect communist society, nobody will be able to replace the parents—the loving father and mother." The family is now considered to be a prime necessity both for its members and for the state, and, more than that, the state attempts through law to form the moral and legal consciousness of the family members in such a way as to promote family stability.

This is not to say that many of the socialist elements of the earlier family law do not remain. At the same time, the sacramental conception of prerevolutionary Russian family life has an echo in the Soviet idea, developed since the mid-1930's, of the sacredness of the "socialist" family. "Soviet marriage reveals the spiritual side of marriage, its moral beauty, inaccessible to capitalist society," *Pravda* declared in 1936, during the debates on the law restricting abortions. In welcoming the 1944 reform of family law, *Pravda* again emphasized the "spiritual side" of marriage and parenthood and the contribution of family life to the development of the "full-valued" personality. "A woman who has not yet known the joy of

motherhood," it was stated, "has not yet realized all the greatness of her calling."

The ideals of family life are now linked with the new religion of Soviet socialism, which draws in part on Marxist theory and in part on the Russian heritage. Perhaps more significant than this symbiosis, however, is the attempt—new both to Marxism and to Russia—to use family law as an instrument for maintaining the inner unity of the family, for educating the family members as to their legal responsibilities toward each other, and for inculcating in them an attitude of respect for, and observance of, those legal responsibilities. A new social conception of family law has thus been added to the sacramental and consensual conceptions.[1]

This may be illustrated by developments in the law relating to (1) parents and children, (2) husband and wife, and (3) marriage and divorce.

PARENTS AND CHILDREN

Parents have a moral responsibility to bring up their children to be honest and law-abiding. Is that a legal responsibility as well? It was officially made such in the Soviet Union by the law of May 31, 1935, which authorized the police to fine parents up to 200 rubles for "indecent conduct and street hooliganism" of their children and by the law of July 29, 1935, which imposed civil liability on parents for torts committed by their children.

The relation of parent and child within the family is somewhat altered by these statutes. What had been a purely moral aspect of their relationship now became legal. That this may be an actual and effective psychological change is illustrated by the success reported by two towns in Oregon which adopted similar measures, one in 1947, the other in 1949. By passing an ordinance providing up to $200 fine and 100 days in jail for parents whose children commit misdemeanors, the town of Baker, after all other measures had failed, was able to break up a juvenile gang and to reduce delinquency by an estimated 90 per cent.[2]

The manner in which Soviet law reaches into areas of the parent-child relationship hitherto left to informal social sanctions finds striking illustration in a 1941 case in which bad treatment of a youth by his step-mother, the father acquiescing, led the boy to despondency and finally to suicide. The father, a neuropathologist, and the step-mother, a school teacher, were indicted for the crime of bringing a minor to suicide. The step-mother was sentenced to five years' deprivation of liberty and forbidden to teach for five years thereafter; the father was sentenced to two years' deprivation of liberty.

Another example of the role of the Soviet court in cultivating a sense of legal responsibility between parents and children is found in a novel judicial decision exacting support for needy parents from a daughter who did not have an independent wage but was dependent on her husband, by levying on the daughter's share of the community property of her and her husband.

The parental-educational role of the court is emphasized in suits for custody of children. Here, too, the stress since the mid-1930's has been on the predominant right of the parent, and particularly the mother. In the case of Khazhaliia versus Shvangiradze, decided in the Supreme Court of the USSR in 1944, the plaintiff sued his former wife for the custody of their two-year-old son. The case is reported in the official digest of the USSR Supreme Court as follows:

> The People's Court of the Second Precinct of the City of Kutaisi, by its decision of 5 May 1943, ordered the son taken away from the mother and placed in the custody of the father on the grounds that the father was an Assistant Professor who worked as Deputy Director of the Kutaisi Pedagogical Institute and could provide the child with a responsible communist upbringing. The mother, who was a student of the Institute, was found not to have the means to take care of the child, and did not have enough time to pay attention to the child's upbringing.
>
> The Court College for Civil Cases of the Supreme Court of the Georgian S.S.R. affirmed the decision in its opinion of 31 May 1943.

On the basis of the protest of the President of the Supreme Court of the USSR, the Court College held that the decision of the People's Court and the opinion of the Supreme Court of Georgia should be set aside for the following reasons:

The conclusions of the Court on the basis of which it found it possible to take the child from its mother, Shvangiradze, and give it to the father for its upbringing cannot be recognized as correct. In deciding the question of taking a child away from its parent in accordance with the requirements of Art. 51 of the Code of Laws for Marriage, the Family and Guardianship of the Georgian SSR, the court must consider solely the interests of the child. In doing so the court must bear in mind that the interests of the child are not secured solely by the material conditions necessary for its upbringing. Better material conditions of a father are not reason for taking a two-and-a-half-year-old child away from its mother. Since the father of the child had better material conditions, he was not deprived of the right to provide the child with supplementary material aid by means of alimony payments. To take a child of such an age away from its mother and give it to its father can be accomplished only under conditions in which the mother deprives the child of necessary material care and does not give it a normal upbringing. No facts of this nature appeared in the case. As was evident from the testimony of the witnesses Machavariani, Gabidzashvili and Lordkipanidze, the child was being reared and was developing under normal conditions. The mother, grandmother and grandfather were taking care of the child. The occupation of the mother at work, studies and elsewhere could not be the basis for taking her child away from her.

On rehearing of the case the court must request the participation of representatives of the agencies of guardianship and trusteeship and conduct an investigation of the living conditions of the parties through these agencies.

On the basis of what has been set forth the Court College for Civil Cases of the Supreme Court of the USSR at its sitting of 29 April 1944 declared:

The decision of the People's Court of the Second Precinct of the City of Kutaisi of 5 May 1943 and the opinion of the Supreme Court of the Georgian SSR of 31 May 1943 is set aside and the case remanded for retrial in the same court with a different bench of judges and with the participation of the Procurator and representatives of the agencies of guardianship and trusteeship.

This is a far cry from the attitude expressed in 1920 by Goikhbarg, principal author of the 1918 Family Code, in explaining the abolition of adoption (soon thereafter to be restored): "Our [state institutions of] guardianship . . . must show parents that the social care of children gives far better results than the private, individual, inexpert and irrational care of individual parents who are 'loving' but, in the matter of bringing up children, ignorant."

HUSBANDS AND WIVES

Soviet official law has also served to foster in the people new moral and legal attitudes toward the rights and duties of women. Here there have been two main emphases. The first, which was part of the original Bolshevik program, is on the deliverance of women from their traditional legal disabilities and their emancipation from all subservience to their husbands. The second, which has accompanied the Stalinist drive toward stabilization of social relations since the mid-1930's, is the encouragement of strong bonds of marriage and of motherhood.

The Bolsheviks sought from the beginning to introduce women into all phases of social, economic, and political life. Women went into industry, the learned professions, politics, and even the army, in large numbers and often in positions of leadership. There are over 250,000 women engineers and technicians in Soviet Russia. More than 100,000 women are doctors, comprising well over half the total number of doctors. The proportion of women lawyers and judges is not nearly so high, though it is nevertheless probably far higher than in any other country. During the war some 120,000 Soviet women were awarded combat decorations, and sixty-two received the title of Heroine of the Soviet Union.

Under the Soviet Constitution, women have the right to an equal wage for equal work. Attempts to obstruct the emancipation of women are punished under the Criminal Code as counterrevolutionary crimes. Parents, relatives, or guardians who prevent a woman from entering into a marriage, or who persecute her after she has married against their will, have been held punishable under

the criminal law. A husband may be prosecuted for rape of his wife, and a man who has entered into marriage for the purpose of using a woman in sexual relations, and with the intention of obtaining a divorce thereafter, is also guilty of rape (so-called rape by deceit), as is anyone who uses the pressure of a superior position or an economic obligation to induce another to enter into sexual relations. The wife may recover civil damages from her husband for personal injury or breach of contract. She is free to keep her own name, to choose her occupation or profession, to have an equal share in the conduct of a common household, or to live apart if she prefers. She owns the property which she brought with her into the marriage and has common ownership with her husband of all the property acquired during the marriage.

With the shift of emphasis from woman as wage earner to woman as wife and mother, the principle of her equality with her husband has not been abandoned. In 1939, in her property relations with her husband, the wife was declared to have joint control of property acquired during marriage to the extent that the husband cannot alienate it without her consent. Moreover, the economic position of the mother has been reinforced by the payment of sizable money allowances on the birth of the third and each subsequent child, with the provision that these grants are the personal property of the mother and not part of the community property of the spouses. In addition, maternity leaves for women factory workers and office employees have been increased from sixty-three to seventy-seven calendar days. and annual vacations must be timed to precede or follow maternity leave; women are not to be given overtime work after four months of pregnancy, and women with infants are to be exempted from night work throughout the period of nursing. The network of crèches and nurseries, which in 1940 cared for over seven million children under seven years of age, has been considerably extended.

As a symbol of the value which the state places upon the bearing of children, the Motherhood Medal, second and first class, the

Order of the Glory of Motherhood, third, second, and first class, and the honorary title of Mother Heroine are now conferred (with corresponding money allotments) on mothers of five, six, seven, eight, nine, and ten or more children.

MARRIAGE AND DIVORCE

Early Soviet law reflected a conception of the family as based primarily on descent rather than on marriage. An attempt was made to separate the question of marriage from the question of the family. This found expression in the doctrine of full equality of all children whether born in or out of wedlock. The unmarried mother could demand support during and immediately after pregnancy from the putative father of the child; the father had, moreover, the full paternal obligation of maintenance, support, and supervision of his natural child, who in turn had full rights of inheritance from his father.

The technical problems involved in this solution were very great. The Procuracy was troubled with the problem of tracking down missing fathers. The courts were troubled with the problem of finding methods of establishing paternity. Even after the establishment of paternity, enforcing payments for support proved difficult. Moreover, it came increasingly to be felt that the marriage of the parents was essential to the welfare of the children.

The new family decree of 1944 eliminated the paternity suit from Soviet jurisprudence. In so doing it emphasized again the importance of the marriage relationship to family life. At the same time, the unmarried mother now receives from the state an allowance for the support of her child until it reaches the age of twelve, and if she has three or more children she is entitled to the regular allowances for mothers of large families in addition to her special allowance as an unmarried mother. She may, however, put her child in a state institution if she so desires. Thus the child born out of wedlock is no longer treated as his father's child; instead the state has stepped in to assume a large part of the paternal obligation.

Originally Soviet law had treated marriage as a *de facto* relationship arising from mutual consent and cohabitation. Civil registration of marriage, which had been introduced in 1917 as a weapon against the influence of the clergy, was declared optional in the 1926 Code; registration was simply evidence of, and did not itself constitute, marriage. To register a bigamous marriage was a punishable offense, but the second marriage was not necessarily void. As late as 1938 a textbook on family law stated that if a man registered a marriage in Moscow with X, and then moved to another place and entered into a factual marriage with Y, "it is clear that according to the whole spirit of Soviet law all juridical consequences of marriage arise not with X but with Y." This view was based on a circular of the People's Commissariat of Justice of 1934 stating that "in the decision of the question of the existence of a marriage according to Soviet legislation, it is necessary to proceed from the position that factual marriage is the decisive fact." Indeed, bigamy itself was a sociological rather than a legal concept, punishable only in those areas such as the Central Asiatic republics where it was considered to be a socially dangerous "relic of tribal society, based on the exploitation of woman's toil."

With the reaffirmation of the importance of the family in 1935 and 1936, the courts and law-writers became more emphatic in their disapproval of bigamy. It was stated in 1938 that "there can be only one marriage at a time" and that when disputes arise over inheritance and two people claim to be wives "the court must decide which is the actual marriage"—a sharp contrast to the earlier rule that the property could be divided between the two. Also it was held in a 1938 case that a marriage registered illegally, with a prior registered marriage undissolved, does not create any juridical consequences for the parties, since "the registration of the second marriage was illegal and subject to annulment." Meanwhile the courts became stricter in their requirements for proof of *de facto* marriages. This development culminated in the 1944 legislative provision that "only a registered marriage shall create the

rights and duties of spouses prescribed in the present Code."

The new requirement of registration is more than an administrative matter. To emphasize its constitutive nature it is provided that there shall be a "solemn procedure" with "suitable premises properly furnished," and the issuance of "certificates duly drawn up."[3]

It is in the new divorce procedure, however, that the parental-educational nature of the new Soviet family law is most clearly revealed. A petition for the dissolution of a marriage, including a statement of the reasons therefor, is submitted to the People's Court, and a fee of 100 rubles is paid. The court summons both parties to ascertain the motives for the divorce, as well as to establish what witnesses are to be summoned. Announcement of the filing of a petition for divorce is published in the local newspaper at the petitioner's expense. The People's Court is obliged to take steps to reconcile the parties. If no reconciliation is effected, the petitioner has the right to file a petition for divorce with the next higher court. Only in that court may the divorce be granted, in which case the court also determines the custody and support of the children, establishes a procedure for the division of property, restores to the parties their original surnames if they so desire, and fixes the sum to be paid by one or both spouses on issuance of the certificate of divorce. On the basis of the court's decision, the Bureau of Vital Statistics draws up the certificate of divorce, makes a corresponding entry in the internal passports of the parties, and collects from one or both a sum ranging from 500 to 2000 rubles as directed by the court.

In discussing the measures which the People's Court should take to reconcile the parties, Soviet commentators have stated:

> It is impossible to expect any ready-made recipes. Here experience, tact, and the authority of the court are necessary. Far from always do the spouses come into court with a firm decision to separate. Often the suit is the result of a recent quarrel, the product of impetuousness and not a thought-out decision. Some the court may reconcile by means of a quiet explanation of the incorrectness of their behavior; it may convince others of the necessity of explaining to each other in court and forgiving each other; and to others it may give time for reconsideration.

Thus Soviet husbands and wives, in seeking divorces, become, in effect, wards of the court. Soviet divorce law is designed in the first instance to unite the family, to heal its wounds. The emphasis is transposed to the realm of unofficial law.[4]

Soviet legislation has so far refrained from stating on what grounds the higher court should grant the divorce, upon failure of reconciliation. It may be assumed that one reason for this omission is the fact that the lawmakers had no past experience upon which to draw and preferred to leave room for experimentation. Informal instructions were sent to the judges, however, stating typical conditions under which divorces should be granted, such as adultery, desertion, cruelty, and the like. From the reports appearing in Soviet law journals and other legal literature it is possible to detect the emergence of a judge-made tradition of divorce law, similar to the growth of certain phases of English common law. A general principle is laid down that "divorce should be granted only in those cases where it is actually impossible to reëstablish the broken family, where the breach between the spouses is so deep that it is impossible . . . to prolong their married life." By application to various types of cases, this principle is developing into particular rules and doctrines. Mere incompatibility may not serve as a ground for divorce, it is said, when the parties have been married for eight years and have three children, though in the case of a more recent marriage where there are no children a different result might be reached.[5]

In the case of two grandparents, sixty-five and sixty-one years old respectively, who after forty years of married life quarreled over how to bring up their grandchildren, a decision granting the divorce was reversed by the Supreme Court of the RSFSR. One may visualize the reconciliation procedure in the People's Court in such a case, with the judge, perhaps a youngster in comparison, giving fatherly counsel to the old couple on the rights and obligations of marriage in the new socialist society.

Concepts of civil obligation of contract and tort play a very minor

role, if any, in Soviet divorce law. Anglo-American doctrines preventing the granting of divorce in cases where the petitioner has "connived" with or "condoned" the misconduct of the respondent, or where there has been "collusion" or "recrimination," would be entirely incomprehensible to the Soviet jurist, while the common American practice of granting uncontested divorces automatically would (since 1944) be equally alien.

Divorce is expensive in the Soviet Union and difficult but by no means impossible to obtain. This in itself manifests a parental conception of the state, which insists on maintaining the legal structure of the family. Still more significant, however, is the procedure established for divorce and the standards evolved for its adjudication. The law enters into family relationships at what has hitherto been a pre-legal level, playing the role of parent and educator, giving guidance to Soviet citizens in the moral and legal responsibilities of marriage, seeking to define those responsibilities in terms of the past and future of the family, its capacity for fruitful growth.

Here, too, it must not be supposed that the underlying policy is a sentimental or romantic regard for the family for its own sake. The new developments have come as responses to pressing problems—the alarming spread of juvenile delinquency in the early thirties, the tremendous numbers of abortions (over 12,000 a month in Moscow, according to one report), the rising divorce rate (38.3 divorces per 100 marriages in Moscow in the first half of 1935). Undoubtedly the state's interest in an increase of population has been another important factor. In this connection the phrase "parental law" takes on an almost literal connotation. At the same time, the implementation of population policy by an all-out drive to strengthen the inner unity and stability of the family is characteristic.

Not the least of the many considerations which led to the change in the Soviet approach to the family was the emergence of a new conception of law itself—law not simply as a means of social control but rather as a means of active social development.

13

PRE-CONTRACT DISPUTES

Parental law seeks to discipline and educate the sense of legal responsibility which exists in the minds of men. The Soviet court does not merely define and distribute the rights and duties of the parties; it also attempts to develop in them an awareness of what is "correct," a sense of, and a respect for, the "rules of socialist common-life."

This is not merely a new sociological concept of the role of law. It is also a new *legal* concept—that is, it involves the creation of new procedures, new substantive rules, new fields of law altogether. Areas of life hitherto left entirely to informal and spontaneous social sanctions are now subjected to official legal action. A striking example of this is the emphasis on reconciliation procedure in divorce, in which all the authority of the legal system is brought to bear on the parties' sense of responsibility before any possibility arises of an actual adjudication of their dispute.

A similar manifestation of the role of court procedure in the disciplining and educating of popular law-consciousness may be seen in the judicial settlement of so-called pre-contract disputes between state business enterprises. We have previously considered the legal relations of such enterprises in the light of the needs of a socialist economy. Yet socialism is not a sufficient explanation of the legal phenomenon of the pre-contract dispute. A socialist economy could exist without this legal phenomenon; a similar legal phenomenon could exist, though it would have to be quite different in form, without socialism.

Each year a campaign is carried on in the Soviet Union for the

timely conclusion of annual contracts between the sellers and purchasers of goods. In the case of the scarcest and most important commodities, the annual contracts concluded by the parties may have little to add to the plans of distribution issued by the top economic organs: in many cases, however, there may be considerable leeway for "detailization." Again, in the case of the scarcest and most important commodities, the contract may be superfluous in the sense that the plan may impose a direct obligation to transfer the goods; in many cases, however, the goods may not move without a contract. In any case, the seller will not feel secure in delivering his product without the signed promise of the buyer that he will accept and pay for it, and particularly without an agreement as to the penalties to be imposed for failure to perform, the times and methods of payment, and similar matters.

Suppose, however, that the parties are unable to agree on the terms of a contract, although plans of distribution impose on them the obligation to enter into one. Since 1934 it has been possible, under such circumstances, for either party to bring suit in Gosarbitrazh to have the disagreement resolved, or for the Council of Ministers (which promulgated the plan of distribution) to institute such a suit, or for Gosarbitrazh itself to initiate the action. In almost all cases the suit is brought by one of the parties, usually the supplier.

Pre-contract disputes are often concerned with the attempt of one or both of the parties to avoid liability for nonperformance. For example, Gosarbitrazh in pre-contract cases has ruled against the inclusion of a term in the contract giving the supplier the right unilaterally to decrease the quantity of goods to be supplied if the supplier received orders for the same product from other enterprises. It has ruled against a clause which would release the supplier from the obligation to deliver if certain materials were not received from a third party—in one case, for example, if the railroad failed to furnish empty cars for shipment of the goods. (In such a situation the supplier would have recourse against the rail-

road on the basis of a separate contract with it, but would be liable to the buyer nonetheless.)

Other pre-contract disputes have involved the question of the penalty clause which is required to be inserted in all contracts between Soviet state business enterprises. Penalties for nonperformance, to be paid to the injured party, apart from losses proved to have been suffered from such nonperformance, may be measured at a percentage of the cost of the goods or of their price, or they may be fixed at a definite sum. Generally it is required that penalties be proportionate to the significance of the sale, the character of the obligation, and the degree to which performance has been rendered. In the absence of an agreement by the parties, Gosarbitrazh will fix a penalty, independent of damages, if suit is brought on the contract.

In deciding pre-contract disputes, Gosarbitrazh does not act as an arbitrator attempting to reconcile the parties, but rather as a court or administrative board. It hears the parties and renders a decision based upon the plans, the general law, the Basic Conditions of Supply and "general contracts" drawn up by superior organs, and the circumstances of the particular transaction. The effect of its decision, however, is not to adjudicate rights and duties arising from a contract, but rather to help the parties create the contract. The activity of Gosarbitrazh in this respect is part of a general pre-contract campaign whose purpose is to inculcate "business discipline," to teach business managers the correct principles of planning and contracting. In fact, however, the business managers often resort to Gosarbitrazh solely to clear themselves of responsibility for executing contracts on terms of which they do not approve. Fearing an unpleasant reaction from superior economic organs, they seek to transfer the responsibility to Gosarbitrazh.

Soviet business enterprises in pre-contract disputes, like Soviet husbands and wives in divorce procedure, "go to school" to the law. The law enters prior to contracting, prior to the divorce trial. It attempts not merely to remedy misbehavior but to prevent it by teaching its principles in advance. Parental law is preventive law.[1]

14

LAW AND LABOR

There is an inevitable conflict between the specific economic functions of management and of labor, which no amount of socialism can overcome. It is a function of management *as management* to seek efficiency in the form of greater productivity and lower operating costs. It is a function of labor *as labor* to seek adequate compensation, conditions of health and safety, and workers' welfare in general.

Economically, this conflict of functions is governed under pure capitalism by the forces of the market (especially the labor market), under pure socialism by the plan. We know, however, that the market under twentieth-century capitalism is not free from the plans of large corporations, national labor unions, and government, while Soviet planning, on the other hand, is (as we have seen) strongly conditioned by the relation of supply to demand, by the needs of a money economy, by the requirements of "business accountability." In both systems, law is a necessity if a balance is to be struck between total centralization and total decentralization.

The conflict between the functions of management and of labor is regulated in the Soviet system directly by the state. This is implicit in socialism, if by socialism is understood the planning and operating of the economy by the state. But the common subordination of management and labor to the state tells us nothing of their interrelationship with each other. *How* does the state regulate their conflict of functions? The answer to this question cannot

be deduced from the mere fact of socialism; it may vary considerably from one socialist state to another.

Presumably every socialist state, in the sense in which we have defined socialism, will seek to identify itself with the interests both of management and of labor, and thereby to minimize their mutual conflict. In the Soviet system the managers are state officials; the labor unions are state organs. The director of a state business enterprise belongs to the union local. Both the director and the union chairman are almost invariably members of the Communist Party. In addition, both management and labor receive government assignments and orders concerning rates of wages, standards of output, funds for social insurance, and conditions of work in general. By such means the Soviet state seeks to merge the conflicting interests, and even the conflicting functions, of management and labor into a larger harmony. In the interests of society, the Party, and the state it is explicitly required that the labor union devote itself to the increase of efficiency and productivity and that management keep constantly in mind the needs and desires of the workers.

Nevertheless they retain their separate and conflicting functions. Management is given most of the power to administer matters concerning production, while labor unions have almost complete control over workers' welfare. Despite strict supervision from the top, considerable leeway is left for local implementation of centrally determined policies. This gives opportunity for clash between the efficiency-oriented functions of the director and the welfare-oriented functions of the union. It is here that labor law comes in.

FUNCTIONS OF UNION AND MANAGEMENT

The factory committee within a Soviet plant is divided, typically, into at least six subcommissions. (1) The Wage Commission represents the union in matters of wage rates and classifications, and stimulates "socialist competition" among workers on the basis of piecework payments; (2) the Labor Protection Commission is

concerned with matters of hours, conditions, health, safety; (3) the Council on Social Insurance administers workmen's compensation, health insurance, old age pensions, vacation pay, maternity leave, and the like; (4) the Welfare Commission has charge of workers' housing, cafeterias, crèches, and so forth; (5) the Commission on Cultural Work runs workers' clubhouses, vacation camps, and other recreational facilities, and is responsible for education and propaganda; (6) the Commission on Inventions and Rationalization stimulates workers' suggestions for improvement of efficiency, sees to it that they are utilized and that the workers are properly remunerated for them, and also instructs new workers in their jobs and attempts in every other way possible to increase output.

Management is prohibited from interfering arbitrarily with union activities; penalties ranging up to one year's imprisonment or 1000 rubles fine may be imposed for such illegal acts as the dismissal of a working union official without the consent of superior union agencies. On the other hand, management has "one-man control" of the organization of production and finance, with the final say in hiring and firing as well as in promoting and demoting, and with power to distribute bonuses from special funds such as the so-called Director's Fund. The Director's Fund consists of a percentage of planned profit ranging from 2 to 10 per cent, and of profit beyond plan ranging from 25 to 75 per cent. Half of it must be contributed to workers' welfare; the other half is paid out in awards to individual workers and employees. Of prizes won by the plant in production contests, 30 to 40 per cent must be utilized for workers' welfare, with the remainder distributed as individual bonuses.

Union and management within an individual plant exercise their respective functions under the control of superior bodies. We have already seen that management is part of an industrial as well as a territorial hierarchy, being subordinate on the one hand to its superior trust, glavk, and ministry and, on the other hand, to the

local, district, republican, and federal executive organs. The factory committee of the union is likewise part of a dual hierarchy: it sends delegates to the district council of the particular industry to which it belongs, which in turn is represented on the regional council, from which delegates are sent to the All-Union Central Council of Trade Unions; at the same time, these councils are organized on a territorial basis by district, regional, and republican committees, the republican committee also sending delegates to the All-Union Central Council of Trade Unions. In addition a compromise has been made with the principle of craft unionism, in that trade union sections have been established for certain crafts such as toolmakers, fitters, engineers-technicians, and others.

As management operates under plans enunciated at the top and articulated successively by the ministry, glavk, and trust, so the factory committee works on the basis of regulations which descend from the All-Union Central Council of Trade Unions down through the regional and district councils.

THE ROLE OF LAW IN LABOR RELATIONS

If all went smoothly and efficiently in the Soviet industrial system, we could content ourselves with an analysis of the distribution of functions between labor and management, within the over-all administrative framework of the planned economy. It would not be necessary to speak either of rights or of law.

Foreign observers, both friendly and hostile, often assume that such is indeed the case. Sympathizers with Soviet socialism, believing that the Soviet state identifies itself with the proletariat, assume that the administrative machinery works effectively and without serious hitches to protect the worker. Antagonists of Soviet socialism, believing that the Soviet state identifies itself with the managerial function of organizing production, assume that the administrative machinery works equally well to oppress the worker. A benevolent socialist state, says the sympathizer, has no need of labor law as such, since there is no fundamental conflict of inter-

ests between labor and management, but only a separation of functions. A despotic socialist state, says the antagonist, has no use for labor law as such, since it recognizes no rights either of labor or of management, but only imposes functions on both, which it enforces not legally but administratively.

We have seen in the first part of our study that such reasoning is based on an outmoded conception of Soviet socialism. In respect to the organization of industry and to the distributive system, it has been found necessary to restore law. Planning is not enough; there must also be contracts, and contractual responsibility. Administration is not enough; there must also be rights of possession, use, and disposition. Fiat and decree are not enough; there must also be adjudication on the basis of established norms. Socialism itself, as a social-economic order based on integral state planning, has required the restoration of orthodox legal principles.

In confronting the problem of Soviet labor relations, it is possible to offer a similar analysis. As "business accountability" is essential if the enterprise is to play a responsible role in the fulfillment of its planned tasks, so a certain degree of union autonomy is necessary if the workers are to accept their responsibilities. As profits are both an incentive for and a test of sound commercial methods, so piece-rates and bonuses, with the consequent inequalities of remuneration, are an incentive for and a test of effective work methods.

However, Soviet labor law is far less susceptible than property and contract law of an adequate explanation on this basis. Property and contract as legal institutions have been influenced to a very considerable degree by capitalist economic development over the centuries. Socialism started out by rejecting them. The Soviet system now struggles to restore them as institutions of a planned economy. But labor law in the modern sense, as comprising the system of legal relations between union and management, is largely a twentieth-century product. It is not so much a manifestation of capitalism as a compromise forced on capitalism by a

society which has grown too complex to permit the unrestricted play of market forces. Moreover, workers' control within each factory, which is perhaps the original definition of "socialist" labor law, is entirely alien to the Soviet system. Therefore it adds little to our understanding of Soviet labor law to interpret it, like Soviet property and contract law, as a mixture of socialist and capitalist ingredients.

In some ways Soviet labor law is as much Russian as it is socialist. Direct employment of industrial workers by the state goes back to Peter the Great and to the use of state serfs in industrial establishments. Serfdom also leaves its traces in the Soviet attempts to tie the worker to his job through the requirement of managerial permission to quit, though criminal penalties for absenteeism, through refusal of social security benefits to those who have worked in a particular plant for less than a certain amount of time. Other forms of Soviet labor relations correspond to still older Russian traditions. All Soviet citizens are subject to call for work of a temporary nature in connection with floods or fires or other disasters, or with road construction if a labor shortage exists in a particular area. This is strongly reminiscent of Mongol law, with its principle of universal compulsory service. The equal subservience of both management and labor recalls the principle established by the Muscovite tsars that all classes owe official duty to the state. In certain features of the internal life of the Soviet factory, particularly as represented in the institution of the Comrades' Court, there are survivals of the sense of group identity which stems from the Russian Orthodox religious tradition of Kievan Rus.

Yet Soviet labor law is best explained neither as Socialist Law nor as Russian Law, but as Parental Law. By its purpose and its nature it protects, guides, and trains both management and labor, educating them in discipline and self-discipline, inculcating in them a sense of their mutual rights and duties. This may be illustrated by two important aspects of Soviet labor law: the collective contract and the settlement of labor disputes.

THE COLLECTIVE CONTRACT

Collective contracts between union and management were introduced into general practice in Russian industry immediately after the October Revolution, at first with respect to private industry, later in the nationalized sector as well. However, those were hectic times, and in practice the unions generally ran the enterprises. As War Communism progressed, the government attempted to mobilize labor on the principle of conscription and to regulate labor relations by decree.

With the retreat into the NEP in 1921, government regulation of wages and working conditions was for the most part reduced to the establishment of certain minimum standards. Now for the first time Soviet law encouraged actual collective bargaining, in the sense of free arms-length negotiation without complete subservience to strict state control. During this period trade unionism developed as a movement of both economic and political significance.

The adoption of the First Five Year Plan in 1928 brought an end to both trade unionism and free collective bargaining. The collective contract was retained as a means of expressing the relations between labor and management—chiefly on the level of the individual plant rather than on an industry-wide basis as under the NEP; but those relations were now largely established by economic legislation, rather than by a free or semi-free market. A pattern of wages, hours, standards of output, conditions of work, was created by top planning and administrative organs; within this pattern, union and management agreed upon their respective rights and duties. The All-Union Central Council of Trade Unions became a state organ, replacing the People's Commissariat of Labor.

It is difficult to determine exactly how much leeway has been left to local decision, within the over-all pattern. The picture is confused by the nominal discontinuance of collective contracts in 1935. The reasons for this discontinuance are not clear. Soviet

textbooks on labor law published in 1938 and 1944 did not even mention collective contracts. In 1946 it was explained that "detailed regulation of all aspects of [labor] relations by normative acts of the state has not left room for any kind of contractual agreements concerning various labor conditions. Thus collective contracts have outlived themselves in the period under consideration." In fact, however, agreements between union and management continued to be concluded throughout these years at the level of both plant and industry.[1]

In regard to health and safety, general rules were promulgated by the All-Union Central Committee of Trade Unions, on the basis of which industry-wide agreements were entered into by the union central committee of the industry and the appropriate people's commissariat or other economic organ. However, the factory committee and the plant management were also permitted to conclude 'labor-safeguarding agreements," which prescribed the utilization of funds assigned for those purposes. Also supplementary agreements on health and safety for the larger shops within a plant could be concluded by the shop chief and the shop committee.

Similarly in respect to workers' welfare, despite the absence of collective contracts in name, union and management entered into agreements on the disposition of funds assigned for housing, medical care, and similar benefits, and also on the distribution of those portions of the Director's Fund and other special funds which were to be allocated to welfare.

Until 1941 it was the practice to conclude plant agreements on rules of hiring and firing, basic obligations of management and labor, and so forth (the so-called Rules of Internal Order). At that time, however, model rules were issued by the Central Council of Trade Unions and confirmed by the Council of Ministers, to be applied to conditions in each industry by agreement between the union central committee and the appropriate ministry. Here, too, some room was left for supplementary agreements on the plant level, but only when special conditions so warranted.

Control over wage rates and output norms showed a similar trend toward centralization in the period immediately preceding the war. In 1938 individual ministries were forbidden to authorize changes in wage schedules without permission of the Council of Ministers. However, despite this virtual freezing of wages, some leeway for local decision was still left by reason of the frequent definition of wage schedules in terms of minimums and maximums. In 1939 a procedure was established by which orders for the revision of output norms must be agreed upon by the Central Council of Trade Unions and the appropriate ministry, subject to confirmation by the Council of Ministers. But again we find that initiative in revising output norms may be taken on the local level, though since 1939 it is in the hands of the shop chief with the approval of the plant manager, the union local "participating" in the revision but its approval or consent no longer being required. In 1947 collective contracts were suddenly reintroduced in name. Now the various agreements of the past and the matters previously left to informal coöperation are again formalized in one document.

It is clear from the nature of the new collective contracts, as well as from what Soviet writers say of them, that they are designed primarily to play a parental and educational role in the life of the Soviet industrial plant. An intensive campaign of mass indoctrination accompanies the promulgation as well as the fulfillment of the new agreements. Together with this, efforts are made to stimulate the initiative of the rank-and-file workers in the shaping of the agreements and in their enforcement. Above all, by delineating the exact areas of responsibility of management and labor, the contracts serve to bring home to both sides the nature of their rights and duties in the implementation of state plans for production and welfare.

The collective contract in each plant is drafted by the union local and the director on the basis of an industry-wide model contract worked out by the union central committee and the ministry, and a letter of instructions containing planned tasks for the plant

during the coming year (including planned production, labor productivity, wages, costs; funds for housing, cultural needs, health and safety; and the like). The draft is supposed to be discussed in detail at meetings of all workers, as well as on the radio and in the press. New proposals may be suggested from the floor at union meetings, and if they are rejected an explanation is to be given on the spot. Then the revised draft is considered at a meeting of all plant employees or, in the case of large plants, at a factory conference. The final contract, signed by union and management, is forwarded to the appropriate ministry and to the union central committee to be checked once more against planned assignments and existing legislation and then to be registered.

The nature of the Soviet collective contract may be seen in the following provisions of the 1947 Model Collective Contract for Enterprises of the Ministry of the Transport Machinery Industry:

1. *Joint obligations*—the obligation of management, factory committee, employees, workers, engineering and technical personnel: ". . . to guarantee the unconditional fulfillment and overfulfillment of the state plan established by the government on the basis of the development of socialist emulation, the most rapid assimilation of new technique, increase in technical knowledge and production skills, establishment of firm discipline of labor, elimination of defects in the organization of labor and industry, observance of the strictest economy in the expenditure of materials and financial resources and a decisive struggle against spoilage and spoilers."

2. *Obligations of the enterprise:* ". . . . to take the necessary steps to guarantee the fulfillment and overfulfillment by workers of the established standards of output, the organization of technical instruction, timely and adequate repair of equipment and machine-tools, technical assistance to rationalizers and inventors, organization of the rapid introduction of suggestions to the established standards and over the fixed periods of time, carrying out the construction and repair of housing."

3. *Obligations of workers and employees:* ". . . . to best use the working day, to work without spoilage, conscientiously and in the time allotted for the fulfillment of production tasks, to carefully treat the equipment, instruments, materials and other plant property as sacred socialist property."

4. *Obligations of the factory committee:* ". . . to systematically check the conformity of the system of payments applied to the ones authorized . . . to exercise control over the observance of existing legislation on labor discipline and rules of employment authorized by the management . . . to carry on en masse explanatory and educational work concerning the complete introduction of the socialist discipline of labor . . . to offer workers and employees a certain number of permits for rest homes and sanitaria."[2]

The collective contract drafted on plant level implements the model contract by stating specific obligations. For example, the draft of the 1947 collective contract worked out for the Artillery Plant J. V. Stalin of the Ministry of Munitions of the USSR contained the following obligations of the enterprise: to construct a school for workers' children with a capacity for six hundred pupils; to build a clinic for workers in the plant; to construct and put into operation one five-story apartment house, three three-story apartment houses, and three two-story apartment houses, with an over-all space of 6000 square meters.[3]

The parental-educational role of the Soviet collective contract, both in its general and its specific provisions, is apparent from the means established for its enforcement. So far, possibilities of court action by either party have been left extremely vague. It is stated by Soviet jurists that "the bilateral obligations [of union and management] acquire [through the collective contract] legal force"; however, the sanctions thus far applied appear to be in the first instance moral, and secondly administrative.

Each of the subcommissions of the union factory committee is assigned the task of exercising "daily supervision" of the specific

portion of the contract which falls within its sphere of competence. Superior union agencies check on superior management agencies, as well as on the union local. Every three months the plant management and the union local are required to conduct a survey of contract fulfillment and to report their findings to a meeting of all plant workers as well as to higher management and union organs. The stated purpose of this "mass check" is to stimulate worker participation and interest, and at the same time to create an opportunity for popular pressure by the workers on both management and union.

Conferences of top management and union leaders have resulted in official criticisms of union leaders for permitting management violations. According to an editorial of October 16, 1948, in the leading labor newspaper, *Trud*, "incorrect, harmful relations between the factory administration and the union factory committee have arisen in several enterprises . . . Businesslike relations are supplanted by domesticity and mutual backscratching. It is clear that under these conditions criticism and self-criticism are not genuinely developed, insufficiencies and failures are hushed up."

Moral pressure may be supplemented by economic sanctions. The union may refuse to permit a manager who is guilty of violations to share in the production prize won by his plant. Sanatoria permits, housing priorities, insurance benefits, and so forth, are distributed in such a way as to favor workers who overfulfill their norms.

In addition to such pressures, discipline is maintained by administrative penalties imposed on officials by superior organs, ranging from reprimand to dismissal. According to the usual rule of continental administrative law, such penalty may be appealed one administrative level above the chief who imposed it. Also union officials may in some cases impose administrative fines on plant managers; thus a fine up to 500 rubles may be exacted by the chief technical inspector, who is an official of the union central committee, for violation of the safety agreement. Here, too, the director is allowed

only an administrative appeal, in this case to the presidium of the union central committee.

Despite some tentative assertions to the contrary by Soviet commentators, it is highly questionable whether the new collective contracts create any civil obligations, that is, any claims enforceable in the judicial process. This would seem to follow from the very nature of the Soviet collective contract.

The word "collective" and the word "contract" have a meaning in the context of Soviet labor law quite different from the meaning they have in American labor law. A contract in the American sense (and in the sense applicable to Soviet commercial contracts between state business enterprises) is a voluntary establishment of mutual rights and duties by persons possessing a certain degree of independence, expressed in the phrase "legal capacity," or "capacity to contract." The negotiation of contracts between labor unions and employers is called "collective" bargaining in our law because union and management each is a collective entity. However, the word "collective" in Soviet labor law refers neither to the union nor to management but to the enterprise as a whole. It is the enterprise which is the collective. The union local is not considered a legal entity at all (though the superior union agency is, and may be responsible for acts of the local confirmed by it). The "collective contract" is the plant program. It is indeed negotiated, within fixed limits, by union and management, and it creates mutual rights and duties in both; but the parties lack the "capacity to contract," in our sense of that phrase, and the rights and duties which are created are on the borderline between the moral and legal spheres of human behavior. They are "unofficial" rights and duties.

Thus by the very nature of Soviet labor law the area of free bargaining is severely restricted, and the right to strike is reduced to a formality. Strikes have occasionally occurred in Soviet Russia, but they have no status in law. In some instances the strike leaders have been punished; in other instances the managers and other officials responsible for the workers' grievances have been dismissed and the

workers' demands granted. But in any event the problem is dealt with by informal administrative action, for it stands entirely outside the established legal order of labor relations.

Behind the Soviet collective contract stands the unity of the enterprise, the shop community. The purpose of the collective contract is to guide the collective through the coming year of its life. Such guidance is not achieved, however, simply by an administrative distribution of functions, but also by a bilateral allocation of rights and duties by union and management, designed primarily to prevent disputes by inculcating in workers and officials a sense of responsibility of a moral-legal character.

"Why does the collective contract raise . . . responsibility?" asks a leading Soviet writer on labor law. "Because it is an agreement between concrete persons dealing with the assumption of a series of concrete obligations. Because this agreement embodies the will of the given collective. . . [Because] each obligation is considered and adopted by the whole collective. . . Because these obligations involve weighing every possibility and summarize tremendous lower-echelon experience."[4]

"The Soviet collective contract," states the same writer, "contains not only legal norms, but also norms of socialist morality." It is an instrument for educating "public opinion." It is a "school for communism." Its underlying purpose is to utilize the authority of official law for instilling in popular law-consciousness a sense of mutual rights and duties which, if perfectly developed, would make the official legal system itself superfluous.

SETTLEMENT OF WORKERS' GRIEVANCES

Not all aspects of Soviet labor law operate quite so close to the level of unofficial law-consciousness as does the collective contract. Claims by a worker for wages for work done, for reinstatement with back pay, for reclassification of his job, for overtime pay, for payment for time lost in changing jobs, and similar matters, as well as claims by management for damage to property by a worker, for

recovery of a fine for violation of the rules of employment, and the like, are settled by a grievance procedure analogous to that of many American industrial enterprises, with recourse to the People's Courts in certain cases. The fact of this analogy, however, should not obscure but rather clarify the parental-educational aspect of this type of arbitration and of adjudication.

The Soviet grievance committee, called the Rates and Conflicts Commission (RKK), is composed of one or more representatives of labor and an equal number of representatives of management. Cases generally come to it after failure to reach an agreement at the lowest stage of the grievance procedure, namely, discussion between the shop steward ("group organizer") and the foreman.

If the members of the RKK fail to reach an agreement, the dispute may be taken to the People's Court. It may be surmised—and it is so said by former Soviet lawyers now in this country—that in a large proportion of the cases that come before it, the respective representatives of labor and management do not see eye to eye and hence there is recourse to the courts. On the other hand, it is reported that during the first three months of 1940 the RKK of the Hammer and Sickle Plant, a large steel mill in Moscow, handled 268 cases and decided a slight majority of them in favor of the union.

An appeal may be taken from the decision of the RKK to the People's Court only if the decision has been disapproved by the labor inspector, a central union official. In addition, certain types of labor disputes may be brought directly to the People's Court without previous submission to the RKK.

Workers who appear as plaintiffs in labor cases are exempt from the payment of state fees and other court expenses, and are entitled to the free legal services of the union lawyer. The court must consider a labor case not later than five days after commencement of the suit. A decision in favor of a worker in an amount not higher than a month's earnings is subject to immediate execution, and a decision in an amount higher than a month's wages is subject to immediate execution to the extent of a month's wages. The

decision of the People's Court may be appealed or protested in the usual order.

There seems to be little doubt that the Soviet courts in general guard jealously the rights of workers in the labor cases which come before them. This appears not only from the case reports but also from the accounts of observers and former participants. It must be understood that Soviet legislation confines the freedom of workers within very narrow limits, and that even within this framework there are (as throughout the Soviet legal system) serious abuses. Yet it is interesting that Boris Konstantinovsky, who represented management, expresses an attitude not uncommon among corporation lawyers in complaining that in labor cases the Soviet courts tended to lean over backwards to decide for the worker. Boris Syssoeff, a former Soviet labor union lawyer now in this country, also confirms this impression.

Soviet grievance procedure, under the control of the regular courts, is based on the assumption that labor and management live together in a continuing relationship, and that the arbitration and adjudication of their disputes can serve as a means of maintaining the intimate and lasting character of that relationship. The parties to a labor case are not people who have made a deal with each other on the understanding that if one of them breaks it the other will sue for damages. The task of the labor arbitrator is one of preventing new disputes by careful handling of old ones. Hence the need for speedy and informal settlement, without the expense and bitterness of the traditional lawsuit. The parties must be better able to go on living with each other after it is over. They must both receive satisfaction. Is is they, their past and future, their growth and development, their feelings and their outlook, that is at issue—not merely the particular act which brought on the grievance. The particular act is only a symptom of an underlying disorder; grievance procedure is concerned with treating the underlying disorder.

This is Parental Law. It exists throughout Europe and America,

wherever industrial peace permits it. It is not peculiarly socialist, nor is it peculiarly Russian. In Soviet Russia it is distinguished by the heavy accent on compulsion, by the fact that the applicable norms are largely legislative in character, by the close supervision of the courts over the grievance procedure within the plant, and by the assumption that a board consisting of an equal number of representatives of management and labor can effectively reach agreement.

COMRADES' COURTS

Soviet labor law manifests its parental character in the institution of the Comrades' Court, an informal body either elected by the workers or else comprising all those present at the time, which sits in judgment on minor offenses committed within the plant.

Comrades' Courts were first instituted under War Communism as a means of raising labor discipline. Lenin praised their educational value in this regard. The preamble of the 1931 statute which now governs the Comrades' Courts states as their purpose "the greatest possible attraction of the social initiative of the broad masses of workers and employees in the struggle against breaches of labor discipline, disorganizations of production in enterprises and institutions, as well as against the undermining of labor discipline by survivals of the old way (drunkenness and the like)."

The jurisdiction of the Comrades' Court is entirely optional. It meets irregularly, as occasion may arise. It has the power to impose admonitions, reprimands, small fines in cases of petty crimes, and small amounts of damages in cases of personal injuries; it may also recommend dismissal of the offender by the management. Among the matters over which it may take jurisdiction are petty thefts; insults by word, deed, or writing; spread of false rumors; self-help and "hooliganism" not requiring criminal prosecution. The Comrades' Court exists not only in factories but also in housing units and in the villages.

The People's Court exercises general supervision over its activi-

ties, and may annul its decisions when they are in violation of law or when the Comrades' Court wrongfully took cognizance of the case.

The following description by Rebecca Timbres of a Comrades' Court trial which she and her husband witnessed in 1937, at a meeting of a medical workers' union in a factory seven hundred miles east of Moscow, gives a good impression of the role of "popular justice" in the shop community:

Well, we've seen a "comrade court" in action. It was entirely unexpected. The regular union meeting was crowded, as we met in the rather small room that was the surgical clinic in the daytime. Every chair was taken when, just before the meeting was opened, Dr. B—— entered, bringing in a chair from another room and placing it beside the chairman's table. He sat down, facing the rest of the people. He could not have known what was going to happen, or he never would have placed himself in such a prominent position.

After the regular business had been disposed of, the chairman said slowly, "Comrades, we have a very serious matter to discuss together. The morale of our union is being lowered by the actions of two of our doctors. A few days ago Dr. S—— was in the operating room of the hospital. A request for attention came from one of the workers in Marbumstroy. Without seeing the patient, Comrades, without a personal examination, Dr. S—— sent medicine to that man. How could she know what was wrong with him? Comrades, that was very bad technique. But Dr. S—— is not here tonight to speak for herself, as she is on duty at the hospital, so I shall now pass to a much more grave offense. Dr. B——," he turned to the Mariiski doctor who had brought the chair in, "you are accused of—graft!"

In all my experience as a nurse, I have never seen a man change color the way Dr. B—— did: his sallow complexion had the greenish-gray pallor of putty. Graft is a prison offense. And then we saw the union meeting turned into an informal court. (We were told later that if minor misdemeanors can be adjusted within the union itself for the morale of the union and the community and the rehabilitation of the individual, the action is preferable to taking the case to the civil court. In case it cannot be handled within the limits of the union or the adjustment is not satisfactory, it is then turned over to the regular court.)

The chairman continued: "You are accused of taking money directly

from the patients in your clinic instead of sending them to the registrar to pay for their medicine. What have you to say?"

Dr. B——'s face regained some of its natural color while the chairman had been speaking, and at the question he rose, keeping his hand on the table as if to steady himself. He then enacted one of the cleverest scenes I have ever witnessed—he conducted an able and witty defense of the *absent* Dr. S——, saying that the man who had asked for the medicine was an old nuisance anyhow. He was well known to be thoroughly "uncooperative." For instance, he never tried to go to the clinic in the daytime, but seemed to wait until things were the very busiest at the hospital to make his requests. He was dreaded by all the hospital workers, was extremely neurotic, and everyone knew that all he ever needed was five grains of aspirin for the psychological effect. Of course there was a million-to-one chance that one day he really might have something the matter with him, but if he did you could be assured he or his family would camp out in the hospital until he got the attention needed. So he asked the union to excuse the action of Dr. S——, who had been terribly overworked and had not felt that it was fair to the other patients in the hospital to go to the home of this man who was known so well to all the staff of the hospital as a "demander."

It wasn't long before Dr. B.—— had the sympathetic ear of the union, although we realized he was laying a background for his own defense. For a man accused of a serious offense to care so much about justice that he would defend someone else—well, he must be a pretty good fellow after all. Everyone makes mistakes of judgment, at times! And when he turned to his own case, the members listened very carefully.

"As for me—one day last week the registrar went home ill. I took the money from my patients that one time, and then I just didn't like to make them go through still another change of routine, so I did not send them back to the registrar on her return. I assure the union that I had no motive that was unworthy in this. I have the money carefully put away at home and will return it tomorrow, intact, to the registrar, and the instance will not occur again. I appeal to the union to say if I have not been diligent as the chief of the ——— clinic, have not been a faithful member of the union, paying my dues, and participating loyally in its proceedings; and I ask that I receive the assurance of confidence in my honesty and integrity. I put myself in your hands."

The meeting was then thrown open for discussion. Men and women rose all over the room to speak for or against the physician. In case of adverse comment, the line was based on "principle," never on an attack

on a personal basis. After half an hour the consensus of opinion seemed to be that Dr. B—— conducted a valuable clinic in an excellent spirit of devotion to science and the State, was skillful as a physician, had been very careless in regard to the money but probably had not meant to do anything wrong, and that if he would pay the sum back the next day as he had promised, nothing more need be said, and the case would be considered closed.

As the meeting adjourned I noticed that Dr. B—— was greeted cordially by members of the union, even those who had found it necessary to criticize him. The whole procedure seemed to be accepted in an objective way by both Dr. B—— and the union members (after the first shock was overcome by Dr. B—— at the beginning of the meeting). But there is no doubt in my mind that the consensus of opinion, if it had been unfavorable, could have as objectively landed Dr. B—— in prison, if the union had felt that he had deliberately planned to defraud the dispensary.[5]

15

ECONOMIC, OFFICIAL, AND COUNTERREVOLUTIONARY CRIMES

We return again to criminal law, for it is central to the whole Soviet legal system. It receives far more attention in Soviet legal literature than any other branch of law. Its constructs and postulates are basic to every other branch.

Socialism, we have seen, involves an extension of the domain of criminal law to new areas. New economic crimes are created to protect socialist property, to prevent and punish the negligence or willful misconduct of state business managers, to deter workers from tardiness and absenteeism. New "official crimes" and "crimes against the administrative order" provide sanctions against willful or negligent breach of planning discipline by officials and administrators. New "counterrevolutionary crimes" are devised to protect the state against deviations from the fundamental principles of the established order.

Whether or not a planned economy can operate without such an extension of criminal sanctions, whether or not our own movement toward increasing public control of business will be accompanied by an analogous development in the field of economic, official, administrative, and ideological crimes, are questions that cannot be answered with any assurance. The heavy Soviet reliance on criminal law may be explained in part by circumstances not themselves integral to socialism as such; the Soviet regime not only came to power by bloodshed and terror but also carried out the collectivization of agriculture thirteen years later by ruthless and arbitrary

methods, thereby alienating large sections of the population; the Soviet regime embarked upon planning as a means of very rapid industrialization, with forced saving and hence enforced poverty, thereby creating conditions conducive to popular resistance and evasion; the Soviet regime was for many years a victim of its own fanatical adherence to the Marxist-Leninist philosophy, with its too great optimism about the future and its too great pessimism about the past, the combination leading to an extreme intolerance of "backwardness"; the Soviet regime has been threatened repeatedly by the hostility of foreign powers and by the antagonism of many of its own people, as well as by intraparty conflicts for positions of power, with the result that it tends to overcompensate for its sense of insecurity.

To the qualifications imposed by the special circumstances under which socialism has been introduced in the Soviet Union must be added other qualifications imposed by the heritage of Russian history. The Russian Revolution is a universal and world-wide event, with implications for all mankind; but it is also a Russian event, a product of Russian experience, "made in Russia." It is as Russian as the Puritan Revolution of 1640 was English. If the Russian Leninists followed the doctrine of the German Karl Marx, so did the English Cromwellians follow the doctrine of the Genevan John Calvin. And the Puritans also had a universal and world-wide vision which they spread not only throughout the British Isles but also across the sea to new continents. Yet finally the Revolution settled down to its English dimensions. As Eugen Rosenstock-Huessy has shown, all the great European revolutions of modern history have had to strike a balance between their universal goals and their national limitations.

Russia has its own long tradition of autocracy, on the one hand, and social solidarity and universal service on the other. In this tradition, the man who offends against his neighbor sins in the sight of God and of the whole community of the faithful. This strong sense of the communal character of individual misconduct,

reinforced by a belief in the absolute and sacred authority of the ruler, stems from a Russian Orthodox Christianity which goes back to Kievan Rus, from two-and-a-half centuries of Mongol domination, from the Muscovy tsardom, and, despite its program of Westernization, from the Petersburg empire. Soviet socialist law draws on the resources of this tradition in its emphasis on crime and punishment. To us, for example, it seems unnatural that an administrator who is seriously remiss in performing his duties should be sent to prison, even though someone may have suffered from his misconduct; we assume that the man should be dismissed from his job, and perhaps subjected to a lawsuit by the injured person. We are therefore apt to be shocked to read that during the war Soviet officials who were negligent in handling the payment of allotments to soldiers' wives and who failed to show a "receptive and sympathetic attitude toward relatives of men in the armed forces" were deprived of liberty up to five years. It is impossible to know whether the Russian people as a whole approved of such severe sanctions; one might argue from the leniency of the prerevolutionary Russian juries, and from the religious conception of the criminal as a sinner to be dealt with ultimately by Providence, that the Russian people might have disapproved. Either way, however, the wrongdoer is considered to have offended against the whole community; not only his administrative superior but also the state itself, in the name of the whole community, is under a duty to intervene to deal with him directly.

To understand the Soviet emphasis on criminal law it is necessary to add to the requirements of socialism and the psychology of the Russian people a third dimension. The Soviet state is interested not merely in securing the smooth functioning of the economy and in protecting the community against wrongdoers, but also in training the people to be loyal, moral, conscientious, responsible citizens. It does not leave this educational function to the family, the school, the church, the union, the business enterprise, or other unofficial groups. The state itself officially takes the ultimate responsibility

for "the fundamental remaking of the conscience of the people"; indeed, that is its "most important task."

Soviet law cannot be understood unless it is recognized that the whole Soviet society is itself conceived to be a single great family, a gigantic school, a church, a labor union, a business enterprise. The state stands at its head, as the parent, the teacher, the priest, the chairman, the director. As the state, it acts officially through the legal system, but its purpose in so acting is to make its citizens into obedient children, good students, ardent believers, hard workers, successful businessmen.

Criminal law is a means whereby the state may act officially, in its own name, to exert discipline on the people. To leave the disciplinary function in the case of official misconduct to administrative superiors, for example, might be an equally effective sanction so far as preventing repetition of the offense, but it would be pedagogically less effective than a criminal indictment, in which the entire authority of the state is publicly brought to bear both on the offender and on his misconduct. Similarly, "malicious nonfulfillment of contracts" could be left to the economic sanction of a civil suit, but this would be an abdication by the state of the parental-educational role which it has assumed.

Not only the emphasis on criminal law, but the emphasis on the offender himself, his intellectual and moral capacity, his attitudes and his motivation, must be viewed in the light of the parental character of the legal system as a whole. Here several cases in the Soviet courts tell the story in a dramatic way.

The first, decided in 1944, involved fraudulent keeping of accounts on a sheep farm run by a corrective labor camp. The manager of the sheep farm, a woman named Polezhaeva, together with three prisoners who held the positions of zootechnician, veterinary, and accountant, respectively, were charged with concealing the death of a large number of lambs from a commission which inspected the farm and with having also prepared fictitious reports stating that wolves had killed the lambs of nine ewes. As a result,

the sheep farm, which was then transferred to new management, had a shortage of eighty-nine lambs and nine ewes. The Karaganda Provincial Court found all four, together with two other prisoners who as "group leaders" also were found to have concealed shortages of lambs, guilty of the crime of abuse of official authority under Article 109 of the Criminal Code. Article 16 was applied to bring the prisoners under the classification of officials, by analogy. The six defendants were ordered to pay the farm management the value of the eighty-nine lambs and nine ewes.

The case was reviewed by the Supreme Court of the Kazakh Republic, which affirmed the sentence of Polezhaeva, but reversed the conviction of the other defendants "on the ground that as prisoners they were not responsible under the Articles relating to crimes committed by responsible officials, and that they could be held responsible for their faults in performing their duties only by administrative action."

On protest of the Procuracy, the Supreme Court of the USSR reversed the holding of the Kazakh Supreme Court on the question whether prisoners of a corrective labor camp could be held responsible for official crimes. Relying on a 1936 directive of the Plenum of the Supreme Court, the court stated that "the criminal activities of prisoners who are performing the functions of responsible officials . . . may be treated as crimes of responsible officials by analogy."

On the other hand, in considering the question of the guilt of the defendants, the court gave the following analysis:

> There is no evidence in the case indicating mercenary interest on the part of the persons convicted. It must be stated that it has been established beyond doubt that the keeping of the records of the sheep on the farm was organized poorly, that there was no regular account of the sheep, and that there could have been some abuses as a result. There is no proof in the record that any of the persons permitted theft of the sheep. There is also no proof that any of the persons named concealed the death of [any] sheep . . .
>
> [As] is evident from what has been set forth above, it has not been

proved in the record that the criminal relationship of the convicted persons to their duties caused serious consequences in the form of a material loss for Karlag [the corrective labor camp], since it is not established in the record that the alleged losses are actual losses and not bookkeeping losses which occurred because the death of the sheep were not taken into consideration at the time they occurred. Since, therefore, the record does not establish serious consequences, and since mercenary interests of the convicted persons are not established, it follows that their actions cannot incur criminal penalties but only an administrative fine . . . Being in agreement with the Protest, the [Criminal] Collegium orders the prosecutions terminated . . .

This decision was based in part on a provision of the Criminal Code that the sanctions applicable to official crimes shall not be imposed in cases of misconduct "which by their degree of seriousness do not require the application of measures of social defense and incur disciplinary responsibility in the administrative order."

But it was also based in part on the absence of "mercenary interests." If the motives of the defendants had been evil, their actions might presumably have achieved a higher "degree of seriousness" in the eyes of the judges.[1]

This is not an isolated instance of the Supreme Court's concern for the motivation of the accused, especially in cases of economic and official crimes. In a postwar case involving the charge of speculation, in which a woman had sold certain personal articles of clothing for 3150 rubles, the court could have restricted its discussion to the strict question of whether or not she carried on these transactions with the intent to make a profit. Instead it inquired into her purpose in a broader sense, and held that since she sold the goods in order to buy food for her family, she was not guilty of speculation. The lower court had found her guilty on the basis of the fact that she had a house, furniture, and other property to the value of 58,000 rubles. She therefore did not "need" the 3150 rubles. In reversing her conviction, the Supreme Court seems to have been evaluating her motivation, rather than her intent.[2]

The question of motivation becomes especially crucial in re-

lation to the so-called counterrevolutionary crimes. These include not only crimes directed to the overthrow of the government, such as espionage or treason, but also crimes against the basic economic, political, and social principles for which the Revolution stands. To emphasize the ideological character of counterrevolutionary crimes, the following provision was added to the Criminal Code in 1927: "By virtue of the international solidarity of interests of all toilers, the aforementioned acts shall be considered counterrevolutionary also when they are directed against any other toilers' state, although [such state] is not a part of the USSR."

Counterrevolutionary crimes are distinguished from "especially dangerous crimes against the administrative order" (such as mass disorder, armed banditry, counterfeit of currency, "crimes undermining the system of transport," and so forth), by the fact that the former must be directed explicitly against the principles of the Revolution. Thus stirring up animosity against a particular nationality may constitute a counterrevolutionary crime if there is actual counterrevolutionary intent; if, however, the reason for the act is merely a "survival of prerevolutionary prejudices," it will be punished as an especially dangerous crime against the administrative order.

The maximum penalty for certain counterrevolutionary crimes was, until the abolition of capital punishment in 1947, death by shooting, with confiscation of property. In 1943 death by hanging was ordered for malicious treason. In 1947 the maximum punishment was reduced to deprivation of liberty for twenty-five years. In January 1950 capital punishment was restored for treason, espionage and sabotage.

Very few cases of counterrevolutionary crimes are reported in Soviet legal literature. This is undoubtedly because of the power of the Ministry of the Interior to deal with political suspects secretly in an unreported administrative procedure. The most famous reported cases are the purge trials of 1936-1938, culminating in the case of the "anti-Soviet bloc of Rights and Trotskyites." Undoubted-

ly these were among the most remarkable trials in the history of law; compared to them, the postwar political trials in Eastern Europe appear as caricatures. In the Moscow cases, some of the greatest intellects of the Russian Revolution, speaking with what appeared to foreign observers to be complete conviction and sincerity, recounted unbelievable stories of their own perfidy and asked not for pardon but only for the opportunity publicly to confess their sins. Most of them were executed. That some of the defendants were guilty of some of the plots to which they confessed seems certain. Nevertheless, these were not trials in the ordinary sense, but great public demonstrations, designed to be "convincing" so that all should "understand the correctness" of the verdicts. They thus represent in a very striking if exaggerated form the spirit of Soviet law.

Apart from the great purge trials, only two officially reported cases charging counterrevolutionary criminal activity have come to the attention of the author. One is that of Potapov, cited earlier as an example of Soviet procedure in cases in which the sanity of the accused is in issue. The second is the following, as reported in full by the Supreme Court of the USSR:

In accordance with the decision of the Military Tribunal of the Ural Military District, dated 4 November 1943, one K was acquitted of the charge under paragraph 2 of Article 58^{10} of the Criminal Code of the RSFSR that he had systematically uttered anti-Soviet opinions.

This decision was protested by way of cassation by the Military Procurator of the Ural Military District to the Military College of the Supreme Court of the USSR, which in its decision, dated 14 December 1943, refused to accede to the protest and left the acquittal in force.

The Procurator of the USSR then sent a protest to the Plenum of the Supreme Court of the USSR requesting the setting aside of the decision of the Military Tribunal and the decision of the Military College and the remanding of the case for rehearing, beginning with the stage of pretrial investigation.

Having discussed the protest of the Procurator of the USSR, the Plenum of the Supreme Court of the USSR finds that this protest cannot be acceded to for the following reasons:

1. Internal contradictions appear in the protest. On the one hand there is an affirmation that the fact of systematic anti-Soviet agitation by K is established beyond debate by the evidence in the case; while on the other hand the Procurator in his protest states, in proposing that the opinion of the Military College affirming the acquittal in the case be set aside, that the acquittal was based upon evidence which was insufficiently scrutinized and verified.

2. From the evidence in the case it is apparent that the accusation against K, who did not plead guilty, is based on the testimony of a number of witnesses. In evaluating this testimony one must take into account that those of the witnesses who were examined in court changed their testimony in part from that which they had given in the preliminary examination, adding nothing to the opinions which they had ascribed to K, and which were of a general character and relating primarily to the military formation in which he served. In view of this fact these opinions lose their character as calumny. Moreover, one must take into account the requirements of Article 319 of the Code of Criminal Procedure of the RSFSR, which require a court in evaluating evidence to take into consideration all the evidence in the case as a whole. In applying this requirement of the law to the case of K, it is necessary to note that the decision as to K's guilt cannot be based exclusively on the testimony of witnesses, attributing one or another opinion to him. In such a case it is necessary also to evaluate K's personality, as well as the conditions and circumstances in which these opinions were expressed. By considering such circumstances the question can be decided correctly as to whether the testimony of certain witnesses is plausible, and also the real character and meaning which K put into his opinions, regardless of the external form in which he clothed them.

From the record of the case it is apparent that beginning with 1917 K uninterruptedly and faultlessly has served in the Red Guard and subsequently in the Red Army, and was sentenced to life imprisonment by the Kolchak court martial for his active participation in the civil war. Having been a member of the All-Union Communist Party (Bolshevik) for twenty-three years, K has never conducted himself in the past in a negative manner which would compromise him as an honest citizen devoted to his motherland. Under such conditions it is possible to recognize as plausible K's explanation that the witnesses incorrectly interpreted the true meaning of his opinion, relating to one of the most offensive episodes of the charge concerning an evaluation of the Constitution of the USSR. As to the other opinions incriminating K, although these opinions

are often clothed in rough unworthy form and contain politically incorrect formulations, however, from all the circumstances of the case and considering K's personality, it is clear that these opinions were not only not evoked by any orientation against Soviet authority, which is an indispensable condition for finding them counterrevolutionary, but, on the contrary, in view of all the evidence in the case, it is clear that all these opinions were directed toward the strengthening of military discipline. This conclusion arises in particular from the testimony of one of the witnesses to the accusation, named Bespalov, who acknowledged that K was a demanding person in connection with discipline.

Taking into consideration, for the reason given, that the charge of anti-Soviet agitation against K does not accord with all the circumstances of the case when considered in their entirety, and also that remanding of the case for retrial is not necessary in view of the fact that the court, in issuing an acquittal, affirmed by the Military College, acted precisely in accordance with the requirements of Article 319 of the Code of Criminal Procedure of the RSFSR, the Plenum of the Supreme Court of the USSR declares:

The Protest of the Procurator of the USSR in the case is denied.[3]

The test of criminal liability here is not a particular intentional act but rather the defendant's total orientation. There is a transposition of emphasis away from "intent" and "will" as the center of gravity of substantive law. The court finds it necessary also to evaluate the defendant's personality.

While this transposition of emphasis is most apparent in the law of counterrevolutionary crimes, it extends throughout the entire criminal law. To a lesser but neverthless considerable extent it permeates civil law as well. It is present in labor law, in disputes between state business enterprises, in family law. It has its basis in the Soviet law of procedure. Indeed, as Maitland said of English legal development so it might be said of Soviet, that the substantive law seems to be secreted in the interstices of procedure. Through the informality and intimacy of the Soviet trial, through the freedom and power of the judge to interrogate the parties and the witnesses together, through the reliance on impartial experts and outside social agencies, through the protective atmosphere which surrounds

the entire proceedings—a foundation is laid for the court to "evaluate the personality" of the parties, and to deal with them as young, growing, dependent "students of communism."

We have called this Parental Law, by way of analogy to the role of the parents in the family and in order to suggest that Soviet law is built on the foundation of a new concept not merely of society and the state but also of man himself.

16

PARENTAL LAW AND PERSONAL FREEDOM

The average citizen whether in Russia or in the United States has recourse to the formal processes of law only as a last resort. He knows that law is expensive and time consuming. Its language and its procedures are forbidding. Only when he has a serious claim, and when all other methods of satisfying it have failed, will he ordinarily consult a lawyer and if necessary bring suit.

In considering his suit, the court, too, acts on the assumption that legal adjudication is an extraordinary method of resolving disputes. It will not generally grant him a remedy unless he has been materially damaged, and it will require that the damage result from the acts of the defendant according to certain standards of causation, and that many other considerations be met, including some of a purely formal character.

Underlying the expensiveness of law in time and money, and the severe substantive and procedural requirements which must be met before a legal remedy will be granted, is the belief that society has other, more satisfactory ways of resolving conflicts that arise within it. If a guest spills the soup, the hostess does not bring a lawsuit, even though the *faux pas* may have spoiled her party. If brothers have a serious quarrel over an inheritance, the decent way of settling it is not in court, and perhaps not even by legal standards. There are informal social processes, undefined practices and standards, by which we are able to adjust ourselves to situations when things go wrong. The pressures of family and friends, the advice of ministers and teachers, the help of social workers, and

many other similar forms of social control which are part of our "way of life," enable us to restore disrupted social equilibrium without becoming parties to a legal action. Even in business, it is usually better to find some less drastic way of settling things, regardless of one's legal rights.

What is still largely true of court action used to be true also of legislative and administrative action. Prior to the eighteenth and nineteenth centuries, the method of legislation was also an unusual means of maintaining order in society. Laws were enacted relatively rarely, and to last a very long time. Many spheres of life were entirely unregulated by statute. Before the twentieth century the same was true of administrative law. Far greater leeway was left for the informal, undefined sanctions of social habit and community folkways, on the one hand, and naked and arbitrary exercise of social, economic, and political power on the other.

More and more, we have seen the functions of the family, the school, the church, the factory, the commercial enterprise, and other unofficial associations, subjected to formal legislative, administrative, and judicial control. This has followed upon the increasing complexity of life in an age of huge cities, mass production, concentration of power. Disruptions in social equilibrium are more and more resolved not by general custom and not by arbitrary exercise of political or economic power but by official definition and decision, based on formal processes of deliberation and pleading, whether of a legislative, administrative, or judicial character. This is not socialism; it is simply the twentieth century.

The extension of official law, juristic law, to domains once left to the informal processes of family life, the school and church, the local community, work associations, business associations, and the like, has posed a crucial problem for twentieth-century man. Together with the extension of legal controls we are witnessing a withering of the inner strength of these associations. Here are relationships which are so close-knit as to require more spontaneous responses, relationships which are so delicate and so intimate as to

demand more mobility and flexibility than law traditionally allows. We are in danger that the life will go out of them, as they become subjected to the formal and time-consuming processes and definitions of law. "The letter killeth, but the spirit giveth life" is a saying which takes on new meaning as our social order becomes more and more legalized.

The significance of Soviet legal development lies in just this conscious extension of law to the most intimate social relations. The Soviet rulers have abandoned the original Marxist theory that the abolition of class struggle will in itself render law unnecessary, that a classless social order can live on informal, indefinite, unofficial social practices and standards. They have not officially abandoned their dream of such a time; but classless socialist law itself is now conceived as a means of producing it. In other words, the Soviets take their stand in the future, at the end of time, when life will be regulated by the norms and imperatives of social custom, as written in the conscience of mankind. Looking backward into the present from this end-time, they seek by the use of norms and imperatives of official law to form, in an official sense, the functions of the various social groups and associations to which their citizens belong. But they use official law to strengthen those groups and associations by appealing to the conscience of their members in terms of their legal rights and duties. They thus attempt to preserve the inner strength, the inner mobility and flexibility, of relationships of family, business, labor, and so forth—by the formal definitions and processes of law itself. In this way they apparently seek to check the social disintegration, depersonalization, and disenchantment which are produced by a mechanized, industrial, mass-production society.

We have seen that legal consequences follow from this conception of the role of law. Court procedure is informal and speedy; the judge protects the litigants against the consequences of their ignorance, and clarifies to them the nature of their rights and duties; there is elaborate pre-trial procedure directed toward un-

covering the whole history of the situation. The rule: "Let the punishment fit the crime" is supplemented (though not supplanted) by the rule: "Let the punishment fit the man." The law enters into family relationships at an earlier stage, for the purpose of preventing disruption. Throughout it is assumed that the parties live in a close and continuing relationship, which it is the purpose of law to foster.

To preserve and foster this relationship it is sought to give legal sanctions to moral obligations. A murder committed out of jealousy is punished more severely than ordinary murder, rather than less severely as in many other systems, because jealousy is considered an unworthy passion. A man standing on the shore is said to be under a positive legal duty to act to save a drowning man, whereas in most other systems that is simply a moral obligation. Thus the law is used for the purpose of eradicating antisocial, egoistic dispositions. However, this is more than an attempt to inculcate a sense of moral responsibility; it is desired also to instill a sense of legal responsibility. Official sanctions are invoked to make Soviet citizens think and feel not only in terms of what is morally right and wrong but also in terms of their legal rights and duties.

One may discern both maternal and paternal elements in this concept of law. Maternally, parental law is concerned with legal enforcement of basic conditions within which relations between individuals or between groups may be carried on in peace. A good example of maternal law is the provision of our National Labor Relations Act that labor and management must bargain in "good faith"; we do not care, officially, what kind of a collective contract is arrived at, provided that the parties sit around a table together and honestly attempt to reach some sort of agreement. A similar attitude is reflected in the provision of the Securities and Exchange Act for "full and fair disclosure" in the prospectus of a corporation; the law is not concerned with the actual condition of the corporation, so long as it is not concealed from the purchaser of shares. The mother wants peace and quiet in the household; she

is anxious that her children be well adjusted. Soviet law has many maternal aspects, but they are overshadowed by the paternal. The father demands success, achievement, performance. In the handling of criminal insanity, we have seen, every effort is made to maintain the borderline case as a productive member of society. In family law, the traditional grounds for divorce such as intolerable cruelty, desertion, and the like are explicitly related to the underlying aim of maintaining the family as a going concern. In labor law, the collective agreement must be the right agreement, conforming to the indices established by the state. In commercial law, the contracts are governed by over-all plans, and by "Basic Conditions" or "general contracts" established by superior organs: and if the parties still cannot agree they are besought to let Gosarbitrazh make the contract for them.

LAW AND TYRANNY

To many it has seemed that the use of words such as law and justice by Soviet leaders is simply an attempt to disguise the despotic character of their system; that in fact the Soviet state is a tyranny, in which personal rights are entirely swallowed up by a totalitarian regime that demands everything from its subjects and gives little or nothing in return.

By describing Soviet law as parental in character we have not intended to obscure but rather to make more vivid and meaningful the extent to which such a charge is valid. If the law promulgated and interpreted by the state plays the role of parent and teacher, and the minds and hearts of the people are to be educated and formed thereby, there can be no *legal* control of the state by public opinion. In our political-legal system the law-consciousness of individuals and groups stands opposite the power of the state to make positive law and acts as a check on that power. This legal opposition does not exist in Soviet Russia. The Soviet state is not governed by public opinion; it may bow to it, but it is not bound by it. This may be seen in the very system of elections and representation. The

Supreme Soviet, like the medieval parliament, is primarily a means of transmitting the wishes of the sovereign to the people, and secondarily a means of informing the sovereign of the mood of the people and their general condition. The representatives may express the grievances of their constituents, but of genuine debate there is almost none. The elections themselves are a ceremonial demonstration of solidarity; there is music, and dancing in native costumes, and competition to be first at the polls, but there are no programs competing for popular acceptance, and only a single slate of candidates. The Soviet regime is very anxious to have popular endorsement; again and again it has changed its direction because of popular resistance; but the initiative in political action is at the top—the people have, at best, the power to say yes or no to what they are offered. Even if they dare to say no, the state may disregard their will. A striking example of this occurred in 1936 when the proposal to institute a strict law on abortions was thrown open to public discussion. When it appeared that the sentiment in the cities, at least, was strongly in favor of the existing system of free abortions for all who desired them, public discussion was suddenly called off, and shortly thereafter the proposed law was enacted.

Although freedom of speech, press, and assembly is proclaimed in Article 125 of the Soviet Constitution, these freedoms are explicitly limited "in conformity with the interests of the working people, and in order to strengthen the socialist system," and their guarantee is stated to be simply the "placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings," and so forth. The Constitution thus makes certain minimum concessions to public opinion and civil rights. Its emphasis, however, is on political and economic organization, and on equality (particularly of nationalities and of sexes) and social security. Marx said that "personal freedom is possible only in the collectivity." Russian Orthodox Christianity stresses not the collectivity so much as collective consciousness, common faith. In

any case the freedom of the individual mind or will is minimized.

Moreover, the Soviet political system is hierarchically organized. Each executive-administrative organ has large discretionary powers, subject to the control of its superior organs. The jurisdiction of each is limited territorially, but to a large extent it is unlimited as regards the nature of what it may do.[1] This means that corruption and abuse of power are controlled primarily by those higher in the chain of command and not so much, as in this country, by restrictive rules of substantive and procedural law.

Finally, the omnicompetence of the state and its hierarchical principle of organization make it possible for the Party and the secret police to function without public control. The legal system, as the established public order, must compete for sovereignty with the Party. The state rests on the pillar of Party as well as on the pillar of Law—and thirdly, it rests on the pillar of Plan. There has been an attempt to legalize Party and Plan; but Law is still a junior member of this trinity. The effect of severe political and economic repression is to impair the collective community spirit which it is the function of law to foster. Fear sets in, and with it, mutual distrust and atomization.

Nevertheless, the parental character of Soviet law sets limits to the arbitrariness of state action. The Soviet state and its officials are bound by the parent-child, teacher-pupil relationship just as the Soviet people are bound. It is true, the state is a total state, in the sense that it takes responsibility for all aspects of social life; the Soviet fetishism of the state is shocking. But the Soviet state is responsible *to* Soviet society, as well as *for* it. A constant struggle goes on against bureaucratism; the large number of prosecutions brought against officials for gross negligence in the performance of their duties testifies to this, as does the extension of the power of the courts to adjudicate, on the basis of civil law, disputes involving state business enterprises and administrative organs. Apart from their suits against each other, such state organizations may be sued by individuals for injuries to person or property and for breach

of contract. Moreover, the procurator, who is the watchdog of the state both in civil and criminal law, and who may appear in any case on behalf of either side, is met by the judges in a spirit of strict legality; they do not hesitate to quash his protests when they find the law to be against him.

Soviet law treats the individual as a child or youth, as a dependent member who needs to be trained and guided in the interests of the whole as conceived by the state; but the state identifies itself with the individual. Without that identification, the Soviet state loses its reason for being (whether that be defined in Marxist or in Russian terms or in both) and its claim to popular support. To believe that the Soviet state is not seriously concerned with maintaining its reason for being and its claim to popular support is to misread the whole history of the Russian Revolution.

Every dictatorship depends in some degree on mass support. Lacking a strong tradition on which to rely, with no fifty or one hundred years of established political authority, the dictator looks to popular acceptance as his chief bulwark. Absolute monarchies tend to smash aristocracies and seek popularity among the lower classes.

But "the masses" are a precarious foundation on which to erect a lasting edifice. Stalinist Russia, especially since the mid-1930's, has been attempting to build traditions, and particularly legal traditions. This is the challenge which Soviet law presents to Marxism, with its basic contempt for tradition, as well as to the Russian heritage, which, despite its strong spiritual qualities, has lacked tradition in an organic sense. "There are no sacred traditions amongst us, especially in the educated classes," says Svidrigaïlov in Dostoevsky's *Crime and Punishment*. "At the best some one [Vyshinsky?] will make them up somehow for himself out of books or from some old chronicle."

The Soviet social order is highly dynamic, characterized by tremendous and rapid change. There is nevertheless considerable evidence that the Soviet leaders have had forced upon them the

task of attempting to bring stability into the social order. They have been in power for a long time. Too much power undoubtedly corrupts, but it also imposes its own limitations. In 1917 and 1918, thinking first that the regime might collapse in a few weeks, and later that world revolution was around the corner, Lenin had to act fast. After thirty years Stalin has more patience; he seems to be thinking in terms of *lasting* power. Undoubtedly he is also thinking in terms of the succession to power on his death. The Revolution is in process of settling down.

But this process is not an easy one. The first and the second phase of the Revolution are in conflict. Because of the absence of political parties in Soviet Russia, or for that matter of any real freedom of public opposition, the conflict is concealed. One may see it somewhat, perhaps, in the informal struggle between the Communist Party and the Russian Orthodox Church. The restoration of real freedom of worship to non-Party members is a signal triumph for stabilization; but the six million Party members and the sixteen million Young Communists are forbidden to go to Church. The very fact that this prohibition must be reiterated in emphatic terms tells us a great deal about the conflict. Recently the Young Communist *Pravda* printed a letter from one of its readers asking if Party principles permitted him to be married in a church ceremony, his fiancée being a believer and not a Young Communist. The answer, of course, was no.

The position of the Church has symbolic importance, since the Church explicitly differs from the Party on at least one fundamental question of "ideology," but the underlying conflict goes much deeper. The inner position of the Party is challenged not only by the Church but also by the family, by one-man management, by property and contract, by the legal system itself. With respect to the Church, however, the challenge is more difficult to conceal; one cannot by any stretch of Marxist terminology talk about the new "socialist" Church as one talks about the new "socialist" family, the new "socialist" law, the new "socialist" ruble. All these tradi-

tional elements of stability are, however, a challenge not to the external political strength of the Party but to its inner position as "leader, guide, and teacher." They foster independent loyalties. The Party therefore tightens its external control over them; but the tension between them, though not overtly manifested, is there. It is a tension within the system, a tension within the Revolution itself. How it will be resolved depends in part on how seriously the Soviet rulers take the development of their own legal system over the past fifteen years.

From the standpoint of the West, the development of Soviet law requires a revision of some of our conceptions of the Soviet system. The popular view of the Soviet state as a police state run by a gang of professional revolutionaries, whose actions are governed solely by the desire to extend their own power, is a dangerous half-truth. Even from a chauvinist standpoint it means that the inner strength of the enemy is seriously underrated. From the standpoint of the establishment of a creative peace it means that possible avenues of reconciliation between conflicting systems are irrevocably cut off. From the standpoint of our own development it means that we learn little from Soviet experience, profiting neither from its blunders nor from its successes.

We may learn from the socialist character of Soviet law that socialism is not an end in itself; nor is capitalism; and that the balance between personal initiative and social-economic integration is one which must be struck again and again in any going legal system. We may learn from the Russian heritage of Soviet law that the cohesive character of community life is an essential foundation of law, which must somehow find legal expression if law is to keep in contact with basic psychological and spiritual drives in society. Above all, we may learn from the parental character of Soviet law the great potentialities and the grave dangers inherent in the development of positive law as a guardian and teacher of the law-consciousness of persons and groups.

In their focus on the parental and educational role of law, with

its conception of the litigant, the subject of law, as a youth to be guided and trained, the Soviets have made a genuine response to the crisis of values which threatens twentieth-century society—a response which has not merely a Marxist and a Russian but a universal significance. They have found a basis for law in a new conception of man—a conception which is by no means uniquely Soviet but which, with variations, is widely shared in this generation, especially in the totalitarian countries. We should not allow the violence and injustice which has accompanied the birth and growth of this conception to obscure its underlying significance. Indeed, we are in a sense indebted to the Russians for their excesses, for thereby the word "revolution" has lost its charm in the West for all but a lunatic fringe, and we are better able to seek our own equilibrium between change and continuity. At the same time we must recognize that our evolution is connected with their revolution. That is true whether we react blindly against the Russian Revolution, or slavishly imitate it, or creatively make our own response to the world-wide breakdown out of which it emerged.

Such a response would accept the Soviet challenge by attempting to integrate our own law around a conception of man which is fuller and more balanced than the Soviet conception. Man is not uniformly the dependent and growing youth of Soviet law, nor is he uniformly the reasonable man of our legal tradition. The varieties of social experience call forth many diverse aspects of his personality. Depending on his situation, he may have the helplessness of a child, the youth's capacity for dedication and service, the self-confidence and assertiveness of a young man, the prudent maturity of middle age, the wisdom of old age. A healthy legal system must give reflection in procedural and substantive rights and duties, at appropriate times and appropriate places, to all the various phases of man's true nature.

NOTES

BIBLIOGRAPHICAL NOTE

Since this book does not attempt to present an exhaustive study of Soviet law, but merely to suggest its broad outlines and its chief implications, footnote references have been kept to a minimum. Scholars who would like to pursue particular points may wish to consult the author's previous articles in various legal periodicals, where citations to Soviet sources may be found. These articles include: "Soviet Family Law in the Light of Russian History and Marxist Theory," *Yale Law Journal,* LVI (1946), 27; "Principles of Soviet Criminal Law," *Yale Law Journal,* LVI (1947), 803; "Commercial Contracts in Soviet Law," *California Law Review,* XXXV (1947), 191; "Soviet Property in Law and in Plan," *Pennsylvania Law Review,* XCVI (1948), 324; "The Spirit of Soviet Law," *Washington Law Review,* XXIII (1948), 152; "The Challenge of Soviet Law," *Harvard Law Review,* LXII (1948–49), 220, 449; and, with Donald H. Hunt, "Criminal Law and Psychiatry: The Soviet Solution," *Stanford Law Review,* II (1950), 635. In general Soviet sources in these articles are not repeated in the present book. Grateful acknowledgment is made to the above-mentioned legal periodicals for their permission to use passages from the articles cited.

In addition, the author wishes to urge those readers who seek a more exhaustive treatment of particular branches of Soviet law to consult Vladimir Gsovski, *Soviet Civil Law,* 2 vols. (1948–1949). Volume II of Gsovski's erudite work contains translations of various Soviet codes and statutes. The present book has profited much from Gsovski's treatise.

The pioneer in Soviet legal studies in the United States is Professor John N. Hazard of Columbia University, whose excellent articles on various aspects of Soviet law, too numerous to mention here, may be found listed in the *Index to Legal Periodicals.* In addition to these articles, Professor Hazard has also compiled, with the collaboration of Morris L. Weisberg, a valuable source book of "Cases and Readings on Soviet Law" (New York: Parker School of Foreign and Comparative Law, Columbia University, 1950; mimeographed), which includes numerous cases in the Soviet courts. The author is indebted to Professor Hazard for permision to use his translations of several of these cases, which appear here at pages 238, 273, and 277.

Finally, reference should be made to Rudolf Schlesinger's *Soviet Legal Theory* (London, 1945), which is valuable as a Western Marxist or neo-Marxist approach to the subject.

CHAPTER I: MARXISM—LENINISM—STALINISM

1. G. Plekhanov, *Fundamental Problems of Marxism* (New York: International Publishers, n. d.), p. 72.

2. Karl Marx, *A Contribution to the Critique of Political Economy* (New York, 1904), p. 11. The entire passage, a famous one in the literature of Marxism, is as follows: "The general conclusion at which I arrived and which, once reached, continued to serve as the leading thread in my studies, may be briefly summed up as follows. In the social production which men carry on they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material powers of production. The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness. At a certain stage of their development, the material forces of production in society come in conflict with the existing relations of production, or—what is but a legal expression for the same thing—with the property relations within which they had been at work before. From forms of development of the forces of production these relations turn into their fetters. Then comes the period of social revolution. With the change of the economic foundation the entire immense superstructure is more or less rapidly transformed. In considering such transformations the distinction should always be made between the material transformation of the economic conditions of production which can be determined with the precision of natural science, and the legal, political, religious, aesthetic or philosophic—in short ideological forms in which men become conscious of this conflict and fight it out. Just as our opinion of an individual is not based on what he thinks of himself, so can we not judge of such a period of transformation by its own consciousness; on the contrary, this consciousness must rather be explained from the contradictions of material life, from the existing conflict between the social forces of production and the relations of production. No social order ever disappears before all the productive forces, for which there is room in it, have been developed; and new higher relations of production never appear before the material conditions of their existence have matured in the womb of the old society. Therefore, mankind always takes up only such problems as it can solve; since, looking at the matter more closely, we will always find that the problem itself arises only when the material conditions necessary for its solution already exist or are at least in the process of formation. In broad outlines we can designate the Asiatic, the ancient, the feudal, and the modern bourgeois methods of production as so many epochs in the progress of the economic formation of society. The bourgeois relations of production are the last antagonistic form of the social process of production—antagonistic not in the sense of individual antagonism, but of one arising from con-

ditions surrounding the life of individuals in society; at the same time the productive forces developing in the womb of bourgeois society create the material conditions for the solution of that antagonism. This social formation constitutes, therefore, the closing chapter of the prehistoric stage of human society."

3. See Friedrich Engels, *Herr Eugen Duehring's Revolution in Science (Anti-Duehring)* (Moscow, 1947), p. 417. The chief significance of the phrase "wither away" lies in its implication of a gradual process: it was the answer of Marx and Engels to Bakunin and the Russian anarchists who proposed the immediate "abolition" of the state.

4. Roscoe Pound, "Fifty Years of Jurisprudence," *Journal of the Society of Public Teachers of Law* (1937), p. 20.

5. Friedrich Engels, Introduction to Karl Marx, *The Class Struggles in France, 1848–1850* (New York, 1934), p. 20.

6. A. G. Goikhbarg, *Osnovy chastnogo imushchestvennogo prava* (Foundations of Private Property Law; Moscow, 1924), p. 9. He goes on: "The conception of law is wrapped up in such a mystical veil . . . that its replacement by another, a new one, which would embrace those regulative norms, those organizational rules which we are compelled to apply in the transitional period preceding the final and all-embracing spread of the communist structure—such a replacement would be extraordinarily expedient. But there are terms which, so to speak, are sucked in with the mother's milk. To the list of such terms belongs also the term 'law.' "

7. E. B. Pashukanis, *Obshchaia teoriia prava i marksism* (General Theory of Law and Marxism; Foreword to 2nd edition, Moscow, 1926). This work is translated into German but not into English. Pashukanis was the Director of the Institute of Soviet Construction and Law of the Academy of Science of the USSR, and chief editor of the leading Soviet political-legal journal, *Soviet State and Law,* until his final denunciation early in 1937. In 1930 he made a recantation of certain relatively minor tenets of his theory, only to reaffirm its principal features. The quotations that follow are taken from this speech, entitled *Sovetskoe gosudarstvo i revolutsiia prava* (The Soviet State and the Revolution of Law; Moscow, 1930). The theories of Pashukanis are discussed in Gsovski, *Soviet Civil Law,* I, 166*ff;* in Rudolf Schlesinger, *Soviet Legal Theory;* in numerous articles by John N. Hazard in various legal periodicals. A penetrating analysis may also be found in Lon L. Fuller's article "Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory," *Michigan Law Review,* XLVII (1949), 1157.

8. Quoted by Gsovski, I, 170.

9. *Sobranie uzakonenii i rasporiazhenii RSFSR* (Collection of Laws and Orders of the RSFSR), 1919, No. 66, Art. 590.

10. On the similarities between continental European and Anglo-American law, see Chapter 5.

11. Certain German courts, the so-called Schöffengerichte, are similarly constituted.

12. To register a divorce it was simply necessary for either spouse to notify the Bureau of Vital Statistics (ZAGS). This was often done by post card.

13. There is an excellent discussion of the provisions of the civil code relating to tort and contract in Gsovski, I, 415*ff*, 485*ff*.

14. As late as 1934 Stalin spoke of socialism as meaning the complete abolition of social classes. See Stalin, *Leninism* (11th ed.; New York: International Publishers, 1942), p. 344.

15. Stalin's statements in the early 1930's left no doubt as to the necessity for the state, with all its coerciveness, during the period of transition *to* socialism. As for the state *under* socialism, he carefully avoided saying that it would continue to exist, though at the same time he attacked those who sat back and did nothing in anticipation of its withering away.

16. See Aaron Yugow, *Russia's Economic Front for War and Peace* (1942), pp. 5-6.

17. From Pashukanis' 1930 speech on the Soviet State and the Revolution of Law.

18. Andrei Ia. Vyshinskii, *Sudoustroistvo v SSSR* (Judiciary of the USSR; 3rd ed., Moscow, 1936), p. 24. Krylenko, People's Commissar of Justice until 1937, was even more outspoken in his statements that law must be subordinated to "expediency."

19. J. N. Hazard, "Correcting Misinterpretations of Soviet Law" (mimeographed; Moscow, 1937), pp. 4-5.

20. The Cheka (Extraordinary Commission for Combating Counterrevolution, Sabotage, and Breach of Duty by Officials), established in December 1917 as a commission attached to the Council of People's Commissars, was abolished in 1922 and its functions assigned to a new body, the GPU (State Political Administration), a department of the RSFSR Commissariat of the Interior. When the USSR was formed in 1923, the GPU was transformed into the OGPU (federal GPU). In 1934 the OGPU was transformed into a federal People's Commissariat of the Interior (NKVD), which, however, has many functions besides that of "combating counterrevolution." It is also in charge of the investigation of crimes generally, penal institutions, vital statistics, administration of highways, and much else. See Gsovski, I, 234*ff*. See also below, p. 84, and note 19.

21. The Church has had to pay a price for its new privileges. Its publication, the Journal of the Moscow Patriarchate, praises Stalin as the divinely appointed leader of the Soviet peoples and professes to see in Communism the realization of Christian principles. Nevertheless, the Journal expressly differs, as it must, with the atheism of the Soviet state. This is the only public voice of dissent on fundamental ideological issues which exists in Soviet Russia. While a "scientific" Marxist approach is taught in the schools, atheism

is no longer "preached." See *New York Times,* December 6, 1949, p. 18, col. 1.

22. During the war peasant households encroached to a large extent on the land of the collective farms. After the war the collective land appropriated by the households was restored to the collective farms. To this extent the statement in the text requires some qualification.

23. The term "dictatorship of the proletariat" is still used, though far less frequently. It has reference primarily to the Soviet state in its foreign relations. Malenkov, in his 1947 speech to the Cominform, said: "The class struggle in all its acuteness has now shifted from the Soviet Union to the international arena. That is where a contest of two systems is now taking place—capitalist and socialist." Domestically, there are supposed to be no hostile classes to dictate to. The state is considered to represent not merely the "workers" as such but all the "toilers"—a word which includes everyone in the Soviet Union. In this way Marxism may be applied to the explanation of non-Soviet development and in fact disregarded in the explanation of the internal social order.

24. Vyshinsky's 1938 work *Sovetskoe gosudarstvennoe pravo* ("Soviet Constitutional Law" or "Soviet State Law") is available in an American translation misleadingly entitled *The Law of the Soviet State* (New York, 1948). The quotations which follow are taken from this work and from two articles by Vyshinsky, "Osnovnye zadachi nauki sovetskogo sotsialisticheskogo prava" (Basic Tasks of the Science of Soviet Socialist Law) and "Voprosy prava i gosudarstva u Karl Marksa" (Questions of Law and of State [as treated] in [the works of] Karl Marx), in *Sovetskoe Gosudarstvo* (Soviet State), 1938, Nos. 4 and 3 respectively.

25. It should be noted that Vyshinsky had written with considerably greater caution than Pashukanis and Krylenko, and that he had stressed the importance of law for the transition period. See A. Ia. Vyshinskii, *Revolutsionnaia zakonnost' na sovremennom etape* (Revolutionary Legality at the Present Stage; Moscow, 1933). At that time, however, he was not so important a figure as he later became.

26. See Alfred G. Meyer, "Lenin's Theory of Revolution" (unpublished doctoral dissertation, Harvard University, 1949).

CHAPTER 2: THE SOCIALIST CHARACTER OF SOVIET LAW

1. Walton Hamilton and Irene Till, "Property," *Encyclopaedia of the Social Sciences* (1934).

2. In addition there are in certain industries socalled *kombinats,* each comprising several plants producing complementary products. Also there still exist examples of an older form of combine, the *ob"edinenie* (union). The structure of Soviet industry is in fact very complex; a simplified version is given here for illustrative purposes.

3. Since the war there have been some signs of reversal of this trend, though the evidence is far from clear. Molotov and Mikoyan seem to have been elevated to a higher policy-planning board. It is doubtful, however, that there is any fundamental change in the character of the Politburo as a whole, especially in view of the fact that the membership has remained fairly constant since the late 1930's.

4. See the pamphlet *Political Economy in the Soviet Union* (New York: International Publishers, 1944), a translation of a Soviet article of 1943 which stirred up considerable discussion among American economists. See also *American Economic Review,* XXXIV (1944), 531, 862; XXXV (1945), 127, 137, 660. The article, which has remained the basic statement of Soviet economic theory, was designed to counteract the excesses of the teleological school of the early thirties, and reflects the official position from the mid-thirties on. See above, pp. 31-32.

5. "The *policy of industrialization* in the U.S.S.R. is not merely an expression of historical conditions for the construction of socialism in a backward country. If socialism had been introduced in a highly industrialized country like the United States, the consequence would have been a further rapid growth of industrialization—in a new form and a new sense. There would have been complete automatization of industrial processes on the basis of an enormous home market and of exports to backward industrial countries. Other forms of the growth of industrialization would have been the rapid industrialization and mechanization of agriculture, the reconstruction of cities on new principles, and many other forms of exceptionally intensive industrial activity. . ." (V. V. Obolensky-Ossinsky, "The Nature and Forms of Social Economic Planning," *Social Economic Planning in the U.S.S.R.,* Report of the Delegation from the U.S.S.R. to the World Social Economic Congress, Amsterdam [Schiedam, 1931] pp. 28–29).

6. "Of course it would be an absurd and uncritical approach to presume that Marx and Engels could foresee and foretell the concrete, practical way to employ the law of value in the interests of socialism," state the anonymous authors of the 1943 article (see note 4). The measurement of value in terms of labor-time is inadequate because "the labor of the citizens of a socialist society is not qualitatively uniform." Inequalities of labor spring from the differences between industry and agriculture, between intellectual and manual work, between skilled and unskilled work, between highly mechanized branches of production and those not so highly mechanized. "All this signifies," states the article, "that the hour (or day) of work of one worker is not equal to the hour (or day) of another. As a result of this the measure of labor and measure of consumption in a socialist society can be calculated only on the law of value. The calculation and comparison of various kinds of labor, are not realized directly, by means of the 'natural measure of labor'—labor time—but indirectly, by means of accounting and comparison of the products of labor, of commodities. These products of

labor in a socialist economy are, on the one hand, use values, *i.e.*, material goods needed for the satisfaction of various needs of society. On the other hand, the products of socialist labor have value [*i.e.*, labor value—HJB]. From this follows the utilization of such instruments as trade, money, etc., as tools of a planned socialist economy."

7. M. I. Bogolepov, "Finansovaia Sistema SSSR" (Financial System of the USSR; mimeographed, undated, approximately 1937, available at American Russian Institute, New York), pp. 55, 74.

8. Bogolepov, *Soviet Financial System* (1945), pp. 8-9.

9. It should be noted that in the past other theories have also been developed to explain the concept of ownership in Soviet law. See Gsovki, I, 390*ff*. The theory here presented, sponsored particularly by Venediktov, seems to come closest to a description of the actualities.

10. The journal *Arbitrazh* has not been received in this country since 1940 and has apparently been discontinued.

11. V. N. Mozheiko and Z. I. Shkundin, *Arbitrazh v sovetskom khoziaistve* (Arbitrazh in the Soviet Economy; Moscow, 1938), pp. 10, 21. The same position is taken in the 1948 edition of this work.

12. Most of the cases discussed here are digested in the appendix to Berman, "Commercial Contracts in Soviet Law," *California Law Review,* XXXV (1947), 191. The cases on transfer of basic equipment are discussed in A. V. Venediktov, *Sovetskaia gosudarstvennaia sotsialisticheskaia sobstvennost'* (Soviet State Socialist Ownership; Moscow-Leningrad, 1948), pp. 371*ff*. Sources of the quotations from Soviet legal literature may be found in the article cited.

The official reports of cases decided in Gosarbitrazh are not published. Until 1940 they were occasionally digested and discussed in the journal *Arbitrazh* (see note 10). Others are mentioned or discussed in articles in other legal periodicals and in treatises. Because of the fact that only a tiny fraction of the total number of cases is available to us, it is impossible to draw any hard and fast conclusions as to the law in force at any given moment. However, the relatively few cases that we do have, especially when taken in connection with the analyses of legal writers, serve as good illustrations of the kinds of problems which Gosarbitrazh faces and the ways in which it handles them. In addition, Professor Boris Konstantinovsky, who practiced before Gosarbitrazh for eleven years prior to his leaving the Soviet Union in 1942, has recounted to the author many of the hundreds of cases which he tried in that court and has confirmed the picture presented here.

State business enterprises also appear as parties in the regular civil courts in certain types of cases. There some of the official reports of Supreme Court decisions are published, but the selection of cases to be published is made by the court itself. Despite the fact that reports of cases in the civil courts are far more abundant, a similar qualification has to be made as to their value as

source material. They are useful as illustrations of what Soviet courts have on occasion said and done.

13. Venediktov states that the enterprises of the trust were given independence in 1931, according to legislation of that year, but that the statute was misinterpreted by the writers and in actual practice. See Venediktov, p. 780.

14. "The Council of People's Commissars of the USSR takes note of the following important deficiencies in the conclusion and fulfillment of contracts in 1935: (*a*) the substitution, in a series of instances, for low and intermediate business organizations, of centers of economic systems, which have concluded detailed general contracts without regard for the concrete particularities and problems of lower organizations subordinate to them; (*b*) the unpermissible practice of delivering goods to low organizations on orders of superior organs, without orders of the low organizations; (*c*) the unsatisfactory performance of contracts, in a series of instances. . . Proceeding from this, the Council of People's Commissars of the USSR directs: the basic form of contracts for 1936 shall be Direct Contracts concluded predominantly by low and intermediate links of (the various) economic systems . . ." (Decree of the Council of People's Commissars of the USSR, "On the Conclusion of Contracts for 1936," January 15, 1936. Coll. Laws, USSR, 1936, No. 3, Art. 27).

15. See Z. I. Shkundin, "Vliianie plana na obiazatel'stvo" (The Influence of Plan on Obligation), *Sovetskoe Gosudarstvo i Pravo* (Soviet State and Law), 1947, No. 2, p. 34.

16. See Chapter 13, "Pre-Contract Disputes."

17. Decree of the Council of Ministers, April 21, 1949, in *Sobranie Postanovlenii i Rasporiazhenii Soveta Ministrov SSSR* (Collection of Decrees and Orders of the Council of Ministers of the USSR), 1949, No. 9, Art. 68. See also I. Baranov, "Khoziaistvennyi dogovor—orudie vypolneniia gosudarstvennykh planov" (The Economic Contract—a Weapon for the Fulfillment of State Plans), *Planovoe Khoziaistvo* (Planned Economy), 1949, No. 5, p. 63.

18. Shkundin, "Vliianie," p. 43.

19. In 1943 the secret police functions of the Ministry (then People's Commissariat) of the Interior were delegated to a new People's Commissariat of State Security. See Merle Fainsod, "Recent Developments in Soviet Public Administration," *The Journal of Politics,* XI (1949), 679, 710.

20. Dmitri Buligin, "A Soviet Professor Speaks" (unpublished MS, 1949).

CHAPTER 3: SOCIALIST AND CAPITALIST LAW

1. In this connection a remark of President Roosevelt to Sumner Welles appears particularly apt. Welles writes: "[Roosevelt said that] he regarded the American form of democracy as being at the opposite pole from the original form of Soviet Communism. In the years which had elapsed

since the Soviet revolution of 1917, the Soviet system had advanced materially toward a modified form of state socialism. In the same way, the American polity since that time had progressed toward the ideal of true political and social justice. He believed that American democracy and Soviet Communism could never meet. But he told me that he did believe that if one took the figure 100 as representing the difference between American democracy and Soviet Communism in 1917, with the United States at 100 and the Soviet Union at 0, American democracy might eventually reach the figure of 60 and the Soviet system might reach the figure of 40. The gap between these two final figures it seemed to him would never lessen" (*Where Are We Heading* [New York, 1946], p. 37).

2. Gsovski (I, 432*ff*) draws quite different conclusions from the ones here presented. He considers the Soviet state business enterprises to be "sham corporations" and their contracts to be "sham contracts." His analysis is based, however, on a rather narrow conception of the nature of a corporation, and it would follow from his premises that the Tennessee Valley Authority, the Port of New York Authority, and other American government corporations, must also be considered "sham." Thus Gsovski finds the essence of a corporation to be the fact that a group of persons join and act together for a common purpose; he also argues that the fact that the Soviet state business enterprises issue no shares of stock and are incapable of holding title deprives them of legal personality. Not only our government corporations but also many private business corporations are formed for purposes other than joint enterprise, however. As to the issuance of stock and the capacity to hold title, stock is merely evidence of ownership and control, which is vested in the government anyway, and United States courts have generally treated the property of our government corporations as property of the United States.

Of course, it would be absurd not to recognize the difference between public and private corporations. However, the words "corporation," "property," "contract," are applicable to both.

Evsey Rashba points out that the legal system elaborated during the NEP has been further and further developed while at the same time the principle of planned economy is also extended to the limit. "Those engaged in economic activities can now be viewed, once again [that is, as under War Communism] as soldiers on a production front, subject to admonition and order. They can, on the other hand, be viewed as persons who continue to buy, to sell, and to transact all kinds of business. An economy having both these aspects cannot be regulated by simply reverting to the traditional law. . . This novel two-faced system, involving concepts which we have not learned about in law schools, must of necessity give rise to new legal techniques" (Evsey Rashba, Book Review, *Harvard Law Review,* LXIII [1950], 923).

3. Hermann Mannheim, *Criminal Justice and Social Reconstruction* (London, 1946), pp. 109*ff*.

4. For an excellent treatment of mass persuasion in the Soviet Union see Alex Inkeles, *Public Opinion in Soviet Russia* (Cambridge, Harvard University Press, 1950).

CHAPTER 5: THE WESTERN LEGAL TRADITION

The author is greatly indebted in the following pages to Eugen Rosenstock-Huessy. See especially Rosenstock-Huessy's *The Driving Power of Western Civilization* (Boston, 1949); *Out of Revolution: The Autobiography of Western Man* (Boston, 1938); *Die Europäischen Revolutionen* (Jena, 1932).

1. The entire quotation is very valuable: "Judicans enim alium qui est judicandus, condemnat se ipsum. Cognoscat igitur se, et purget in se quod alios videt sibi offerre. . . *Qui sine peccato est primus in eam lapidem mittat* (Joan. viii, 7). . . Nullus enim erat sine peccato in quo intelligitur omnes crimine fuisse reos. Nam venialia semper remittebantur per caerimonias. Si quod igitur peccatum in eis erat, criminale erat . . . Caveat spiritualis judex, ut sicut non commisit crimen nequitiae, ita non careat munere scientiae. Oportet ut sciat cognoscere quid debet judicare. Judicaria enim potestas hoc postulat, ut quod debet judicare discernat. Diligens igitur inquisitor, subtilis investigator, sapienter et quasi astute interroget a peccatore quod forsitan ignoret, vel verecundia velit occultare. . . Haec scribimus tibi, studiosa veritatis et amatrix certitudinis, de vera poenitentia, veram a falsa separantes. Quam nobis det experimento cognoscere, et ejus usque in finem dulcedinem sentire, qui tibi illustratione sui luminis praerogativum contulit bonitatis, et ipso stabilitatis in odorem [*sic*] suavitatis" ("De Vera et Falsa Poenitentia" c. xx. Migne, *Patrologia Latine,* XL, 1129–30 [pseudo-Augustinian, *circa* 1050]).

Rosenstock-Huessy states that the entire tract was incorporated by Gratian into his *Decretum,* as well by Peter Lombard into his *Sententiae.* He adds: "It expresses an idea which is quite foreign to antiquity and to classical Roman law, marking the transition from liturgical and sacramental thinking to a science of jurisprudence." Cf. Rudolph Sohm, *Das altkatholische Kirchenrecht und das Dekret Gratians* (Leipzig, 1918).

2. In the formative period of English legal history, prior to the fourteenth century, equity was administered in all the English courts, including the King's Bench and Common Pleas. See Harold D. Hazeltine, "The Early History of English Equity," in Paul Vinogradoff, ed., *Essays in Legal History* (Oxford University Press, 1913), p. 261. English development was unique, in that in the fourteenth and fifteenth centuries the common law courts restricted their jurisdiction largely to land law and ceased to grant equitable remedies. As a result equity came to be administered as such in the Chancellor's court. Only if law is treated as something distinct from equity can English law be treated in isolation from the rest of European law. See H. J. Berman, "Medieval English Equity" (unpublished *MS,* Harvard Law School, 1939).

CHAPTER 6: THE SPIRIT OF RUSSIAN LAW

The following pages represent an attempt to describe and interpret in a relatively few pages the whole of Russian legal history. Undoubtedly the lines are drawn too sharply, in the sense that many qualifying facts are omitted. As in the other parts of the book, the present purpose is to give a suggestive interpretation rather than an exhaustive description. Here, in particular, attention is directed to those aspects of Russian legal history which seem most meaningful for our understanding of Soviet law today. For this reason the author has felt justified in not dealing with the unsuccessful efforts to establish representative governments in the formative stages of Russian development. Students of Russian history will also miss reference to the fact that serfdom was never universal, the fact that the peasant commune did not exist in certain large areas, and many other similar facts important in themselves but not important enough to alter the essential outlines of the picture here presented.

The influence of Professor George Vernadsky of Yale University will be noticed in many parts of the chapter. See especially George Vernadsky, *A History of Russia* (rev. ed.; New Haven, 1944); *Medieval Russian Laws* (New York, 1947); *Ocherk istorii prava Rossiiskogo gosudarstva XVIII i XIX vv.* (Outline of the History of the Law of the Russian State in the XVIII and XIX Centuries; Prague, 1924); "The Scope and Content of Chingis Khan's *Yasa*," *Harvard Journal of Asiatic Studies,* III (1938), 337; "Feudalism in Russia," *Speculum,* XIV (1939), 300.

1. *The Russkaia Pravda* of Yaroslav, and the revision of his sons, are translated, together with other medieval legal documents, by Vernadsky in *Medieval Russian Laws.*

2. See especially V. A. Riasanovsky, *Fundamental Principles of Mongol Law* (Tientsin, 1937).

3. Philip condemned Ivan to his face at a Church service. According to the report of Elert Kruse in 1572 (as given in F. von Adelung, *Reisende in Russland,* I, 266-267), Philip said: "Most merciful Tsar and Grand Duke, how long wilt thou shed the innocent blood of thy faithful people and Christians? How long shall unrighteousness last in this Russian empire? The Tartars and the heathen and the whole world knows that all other peoples have law and justice, only in Russia is there none; in the whole world evildoers who seek mercy from the authorities find it, and here in Russia there is no pity for the innocent and the righteous. Remember, however, although God lifts thee up in the world, thou art nevertheless a mortal man, and He will demand the innocent blood of thy hands. The stones under thy feet, if not the living souls, will complain, cry and judge over thee; and I must tell it to thee at God's command, even though I accept and receive death for it" (quoted in Valentin Gitterman, *Geschichte Russlands* [Zurich, 1944] I, 431).

4. The following description of the efforts at codification is taken largely

from M. M. Speranski, *Precis des notions historiques sur la formation du corps des lois russes,* traduit de russe (Saint-Petersbourg, 1833).

5. It is doubtless true that the "case method" is an Anglo-American and not a Continental European institution, strictly speaking. This fact is particularly important in comparing legal education on the Continent with that of the United States (though not so much of England). In the operation of the legal system itself, however, many scholars are coming to feel that the differences between the two systems have been greatly exaggerated. Although the Anglo-American tradition was developed largely without codes, it has always had a body of principles to perform many of the functions of the European codes; at the same time, continental European legal systems have not minimized the importance of cases, at least in practice. In any event the distinction between "case law" and "code law" is not relevant to the argument made here concerning the moment-to-moment character of the Russian legal system. I do not wish to exaggerate this point. On the surface there was little difference between the Imperial Russian system as it finally developed and European legal systems. Fundamentally, however, the Russian system does not seem to have been so firmly grounded in tradition. This applies both to its case law and to its codified principles, as well as to its legal education. The time dimension was not as essential a part of the legal system as in the West.

CHAPTER 7: THE RUSSIAN CHARACTER OF SOVIET LAW

1. Michael Karpovich, in reading the manuscript of this book, noted: "The case of Stalin is particularly illuminating. He was sent into administrative exile several times. The police knew that he was an important revolutionary, but they could not send him to hard labor or to prison *because they had no evidence against him.* Personally, I find in this a rather touching concern for legality."

2. A. N. Iodkovskii, "O kodifikatsii zakonodatel'stva Soiuza SSR" (On the Codification of the Legislation of the USSR) *Sovetskoe Gosudarstvo i Pravo* (Soviet State and Law), 1949, No. 4, p. 18.

3. A more fundamental reason for the long delay in producing new all-union codes is "the confused state of Soviet legal theory which was tossed about amidst the changing expositions of economic principles. It could not find its bearings in the struggle between the exigencies of day-to-day life and Marxian interpretation of Sovietism" (H. A. Freund, *Russia from A to Z* [Sydney, 1945], p. 347). See Chapter I.

4. See Gsovski, *Soviet Civil Law,* I, 224-229.

5. Ernest Lehr, *Eléments de droit civil russe* (Paris, 1877), p. xi.

6. *The Brothers Karamazov* (Modern Library ed.), pp. 72-74.

7. Maurice Baring, *The Mainsprings of Russia* (Thomas Nelson & Sons, Edinburgh, 1914), pp. 282*ff.* Quoted with permission of the publisher.

8. A. M. Bobrishchev-Pushkin, *Empiricheskie zakony deiatel'nosti russkago suda prisiazhnykh* (Empirical Laws of the Activity of the Russian Jury; Moscow, 1896), pp. 265-285. The author also deals with those types of situations in which the Russian jury was quite severe.

9. The German Supreme Court has declared the subjective standard to apply, but Mannheim states that nevertheless it "has really never treated the subjective standard seriously" (Hermann Mannheim, "Mens Rea in German and English Criminal Law," *Journal of Comparative Legislation and International Law,* XVII [1935], 100).

10. Vsesoiuznyi Institut Iuridicheskikh Nauk, *Ugolovnoe Pravo—Obshchaia Chast'* (All-Union Institute of Juridical Science, "Criminal Law—General Part"; Moscow, 1948), pp. 346*ff.* The "reasonable man" standard is explicitly rejected.

11. *Ibid.*

12. The history of capital punishment in Russia illustrates a tendency to fluctuate between the aspiration of humanitarian leniency and the demands of political firmness. According to the fourteenth-century manuscript of the Lavrentian chronicle, Vladimir Monomach in the year 1095 ordained: "Do not kill either the just or the unjust, nor command that he be killed; though he might deserve death, do not destroy a Christian soul." This may express what Maynard calls the Russian's "special horror of the legal enforcement, with all its paraphernalia and solemnity, of the capital sentence." (This theme recurs particularly in the writings of Dostoevsky, as, for example, in *The Idiot*). With the development of a modern criminal law in the fifteenth and sixteenth centuries, nevertheless, capital punishment was introduced, and the *Ulozhenie* of 1649 expanded the application of the death penalty to nearly all types of crimes. However, Russia seems to have been the first country in Europe actually to abolish capital punishment when the institution was under fire from the philosophers of the eighteenth-century Enlightenment. The absolute prohibition against execution, enacted by Empress Elizabeth in 1754, only remained in force for a brief period. From then on it was applied, but for political crimes only, down to February 1917. Both the Provisional Government and the Bolsheviks experimented with abolition, the Bolsheviks abolishing capital punishment first in June 1918 and again in 1919, each time restoring it after a few months when the political situation worsened. Its application was confined to political offenses and, after 1932, theft of state property. Always against it in theory, the Soviet government again abolished the death penalty in May 1947. The decree explicitly stated (and the commentators emphasized) that the reasons for the new law were: first, "the historic victory of the Soviet people" in the recent war and "their exceptional devotion . . . to the Soviet Motherland and government"; and second, that "the cause of peace can be considered secure despite attempts being made by aggressive elements to provoke war." The decree then stated: "Considering these circumstances and in response to the wishes of the trade

unions of workers and employees and other authoritative organizations expressing the opinion of large circles of people, the Presidium of the Supreme Soviet of the USSR feels that the application of death sentences is no longer necessary under peacetime conditions." In January 1950 the death penalty was restored, though on a somewhat more limited basis than before its abolition. See below, p. 276.

13. Gsovski, I, 116*ff*. Acknowledgment is made to Michigan University and to Dr. Gsovski for permission to use this passage. Gsovski's chapters on agrarian law are probably the best in his book.

14. *Sudebnaia Praktika Verkhovnogo Suda SSSR* (Judicial Practice of the Supreme Court of the USSR), 1946, IX (XXXIII), 13.

15. See Gsovski, I, 703.

16. *Sudebnaia Praktika Verkhovnogo Suda SSSR,* 1944, VI (XII), 28.

CHAPTER 9: LAW OF A NEW TYPE

1. See M. Kareva, *Rol' sovetskogo prava v vospitanii kommunisticheskogo soznaniia* (The Role of Soviet Law in the Education of Communist Consciousness), *Bol'shevik,* 1947, No. 4, p. 47.

2. Nicholas S. Timasheff, *The Great Retreat: The Growth and Decline of Communism in Russia* (New York, 1946), p. 225. The quotation refers specifically to the school and the family, but it also expresses the general theme of the book.

3. See L. I. Petrazhitskii, *Teoriia prava i gosudarstva v sviazi s teoriei nravstvennosti* (The Theory of Law and State in Connection with the Theory of Character; Saint Petersburg, 1909). Petrazhitskii gave the name "intuitive" law to the "law in the minds of men." See H. W. Babb, "Petrazhitskii: Science of Legal Policy and Theory of Law," *Boston University Law Review,* XVII (1937), 793.

4. Thurman Arnold, *The Symbols of Government* (New Haven, 1935), p. 129.

5. Lenin stated as the most important task of the new Soviet courts that of *"securing the strictest carrying out of the discipline and self-discipline of the toilers.* We would be ridiculous utopians if we imagined that such a task could be realized on the next day after the fall of the power of the bourgeoisie, that is, in the first stage of transition from capitalism to socialism, or (that it could be realized) without compulsion. *Without compulsion* such a task is completely unrealizable. The Soviet courts must be an organ of the proletarian state, realizing such compulsion. *And on them is imposed the huge task of educating the population to labor discipline"* (*Sochineniia* [Works] XXII, 424). The educational role of the courts continued to be emphasized. The changes in the mid-1930's only affected this idea insofar as they gave new dignity to the concept of law, which was now to survive into socialism and even communism. Of course law has never been con-

sidered the only or even the most important Soviet instrument of education, but since the mid-1930's its prestige has been considerably enhanced. At the same time there has developed a much greater respect for the educational value of traditional legal institutions—of criminal sanctions, for example. Law now educates by its very dignity and authority. This is a shift in emphasis which reflects the new goals of such "legal education." See the discussion in Chapter I.

6. Karl N. Llewellyn, "Lectures on Jurisprudence" (mimeographed; 1948). Llewellyn contrasts the "adversary" with the "parental" system, drawing for his definition of "parental" on the law of the New Mexican Pueblo Indians, the medieval Inquisition, and the Soviet trials of major political offenders. He lists the following characteristics of the parental system: (1) the court may dig up evidence for the defendant. (2) The court may make a prior investigation of facts. (3) The objective of the trial is reintegration of the offender with the Entirety; confession and repentance are normal preliminaries to a treatment viewed primarily as reëducational ("making an example," elimination of the offender, are out of key with the procedure, an extreme measure of panic; love for the Entirety and for the erring member is the proper emotional and intellectual keynote). (4) Criminal and civil offenses tend to merge, though reparation and restitution aspects are readily seen as involving private rights which need to be respected. (5) It is natural and right to draw into the case any past misconduct, even though previously punished, and defendant's attitude as well as his actions; prior good conduct can weigh in mitigation (the wrong was a mere lapse) or in severity (knowledge and experience entail extra responsibility); not the offense alone but the whole man is in question.

Llewellyn here focuses on the parental role of the court, particularly in its procedural aspects. Roscoe Pound uses the word "socialization" to describe the dominant tendency of American legal development in the twentieth century, focusing on the changes in substantive law. There is a close connection between Pound's "socialization" (which is not necessarily connected with socialism in the Soviet sense of a planned economy) and Llewellyn's "parentalism." Pound lists the following changes: (1) growing limitations on an owner's use of his own property, and notably on the antisocial exercise of rights; (2) growing limitations on freedom of contract; (3) growing limitations on an owner's freedom of disposition of his own property; (4) growing limitations on the power of a creditor or an injured party to exact satisfaction; (5) liability without fault. merging into the insurance principle of liability, making enterprises and ultimately the community as a whole responsible for agencies employed for their benefit; (6) increased assertion of public rights in basic natural resources ("the change of *res communes* and *res nullius* into *res publicae*"); (7) growing intervention of society through law to protect dependent persons, whether physically or economically dependent; (8) tendency to hold that public funds should respond for injuries to individuals by public

agencies; (9) replacement of a purely contentious conception of litigation by one of adjustment of interests; (10) reading of the obligation of contract as subject to the overriding requirement of reasonableness, of which, despite current confusion of grounds, the doctrine of frustration seems to be an example; (11) increased legal recognition of groups and persons in stable relations to each other as legal units instead of exclusive recognition of individuals and juristic persons as their analogues (the collective labor contract, and the "common rule" of an industry, and the labor union itself are examples); (12) the tendency to relax the rule as to trespassers (Roscoe Pound, *Outlines of Lectures on Jurisprudence* [5th ed.; Cambridge: Harvard University Press, 1943], pp. 43-48).

The idea of parental law and the idea of socialized law (in Pound's sense) are brought together in Petrazhitskii's phrase, "the socialization of the psyche."

Obviously many of the features of parental law exist in all legal systems. The reason that a new term such as parental law is needed is to indicate a shift in the center of gravity of the legal system. Any particular rule or institution of the Soviet legal system may be found in some other system; the ensemble, however, is different.

One difficulty with the word "parental" is that it may connote the idea of kinship in a literal sense. Of course the state does not literally reproduce the litigants in a parental system of law. "Parental" is used here in a broader and more figurative sense. The state, through law, plays the role of guardian, and the individual before the law is like a ward.

Any absolutism tends toward parentalism. Parental law should not, however, be identified with the absolute state as such. In many ways a more appropriate analogy may be made to the Church in its Roman Catholic, Anglican, or Eastern Orthodox forms. The priest is called father; the very word pope (*papa*) means father.

The Soviet writers do not use the phrase "parental law." A more appropriate Russian phrase might be *opekunskoe pravo,* "guardian law" (or law of guardian and ward). However, there is great stress in Soviet legal literature on the educational role of Soviet law, and here the word "educational" (*vospitatel'naia*) has a very wide connotation, implying rearing or upbringing. Whatever the particular word used, the crux of the matter is the focus on the role of law in the upbringing of people.

CHAPTER 10: THE EDUCATIONAL ROLE OF THE SOVIET COURT

1. *Gudok,* July 4, 1948.
2. *Gudok,* December 24, 1948.
3. *Izvestia,* March 18, 1949; *Pravda,* January 16, February 21, 1949.

4. I. T. Goliakov, *Vospitatel'noe znachenie sovetskogo suda* (The Educational Significance of the Soviet Court; Moscow, 1947). For English translation see I. T. Golyakov, *The Role of the Soviet Court* (Washington, 1948). The quotation is on page 17 of the translation.

5. It is difficult to give specific case illustrations for Soviet court procedure, since the verbatim records of Soviet trials are not available in this country. In the present chapter the author has relied not only on Soviet descriptions and discussions but also on information gained from interviews with former Soviet lawyers now in this country.

6. Robert H. Jackson, *The Nürnberg Case* (New York, 1947), pp. vi-vii.

7. Golyakov, *Role of the Soviet Court,* p. 16.

8. Kareva, *Bol'shevik,* 1947, No. 4, p. 47.

9. "The mark of punishment which distinguishes it from other measures of political compulsion is that it inevitably causes the criminal a definite suffering which is painful to him." "Punishment is the measure of state compulsion applied publicly by the court to the criminal, causing him suffering and expressing in the name of the state a condemnation of the crime and of the criminal" (Vsesoiuznyi Institut Iuridicheskikh Nauk, *Ugolovnoe Pravo—Obshchaia Chast'* [All-Union Institute of Juridical Science, "Criminal Law—General Part"; Moscow, 1943], p. 218).

10. Institut Prava Akademii Nauk SSSR, *Osnovy Sovetskogo Gosudarstva i Prava* (Institute of Law of the Academy of Sciences, "Foundations of Soviet State and Law"; Moscow, 1947), p. 633.

11. V. N. Mozheiko and Z. I. Shkundin, *Arbitrazh v sovetskom khoziaistve,* Arbitrazh in the Soviet Economy; Moscow, 1948), p. 52.

CHAPTER 11: LAW AND PSYCHIATRY

The present chapter appeared in expanded form, with footnote references to sources and extensive quotation of code provisions, statutes, and cases, in Harold J. Berman and Donald H. Hunt, "Criminal Law and Psychiatry: the Soviet Solution," *Stanford Law Review,* II (1950), 635.

1. In ruling that there is no such thing as an "organically preordained amoral syndrome," the Supreme Court and the Serbski Institute were following the post-1935 trend in Soviet psychology. In a 1936 decree of the Central Committee of the Communist Party, psychological testing in the schools was abolished on the ground that such testing was based "on the fatalistic theory that the child's fate is determined by his heredity and his environment." Henceforth a third factor, "training," was to be emphasized. By training (and "self-training") it is considered possible to overcome the deleterious effect of both heredity and environment. As Raymond Bauer has put it, the Soviets are attempting not only to dangle the carrot and crack the whip, but also to remake the horse ("The Conception of Man in Soviet Psychology"; unpublished doctoral dissertation, Harvard University, 1950).

CHAPTER 12: LAW AND THE FAMILY

1. The three conceptions—sacramental, consensual, and social (parental)—are not necessarily incompatible with each other. The sacramental view emphasizes the lifelong unity of marriage, based on divine ordinance. The consensual view emphasizes the element of voluntary partnership. The social (parental) conception stresses the need for family stability and the organized maintenance of it by legal and other means. The sacramental conception has been reduced to legal doctrine in canon law and has to a large extent passed over into secular law wherever Christianity has been the dominant religion. More and more, however, secular law has stressed consensual elements, and in many Western countries divorce by mutual consent is now tolerated in practice though not in official doctrine. The social conception is still for the most part unformulated, except for more or less vague judicial references to "public policy." All three conceptions find reflection in Soviet law.

2. Reported in an Associated Press dispatch in the *Boston Sunday Globe,* December 18, 1949, p. 50, col. 2.

The Soviet legislation of 1935 included a law of April 7 which abolished juvenile courts and subjected youths over 12 years of age to "all measures of criminal punishment." However, capital punishment continued to be prohibited, under Article 22 of the Criminal Code, for minors under 18. The harshness of the law of April 7, 1935, has been considerably mitigated in judicial practice. Special sessions for juvenile cases have been established, and milder treatment has been authorized. See H. J. Berman, in *Yale Law Journal,* LVI, 803, 817-818.

3. The formalities of marriage had come to be stressed even before the new legislation. This was undoubtedly connected with the new attitude toward religion. During the war wedding rings became available in the stores. Many couples who had had a registered marriage or else simply a *de facto* marriage were remarried by a church ceremony.

4. Although this is not the place for a detailed comparison of Soviet law with the law of other countries, it perhaps should be noted that Soviet Russia is by no means unique in having a reconciliation procedure in divorce. The ecclesiastical courts of the Russian Orthodox Church had such a procedure before the Revolution, and it is a feature of the secular law of many European countries and of at least two states of the United States. Other features of Soviet family law may likewise be found elsewhere. The emancipation of women, though perhaps carried further in the Soviet Union than anywhere else, is hardly a Soviet invention. Massachusetts, for example, provides that women shall receive equal pay for equal work.

5. For example, in a 1948 case the Supreme Court of the USSR reversed a decision of the Supreme Court of the Azerbaijan Soviet Socialist Republic, which had granted a divorce on the ground of mutual incompatibility, and remanded the case for retrial. The court said: "The decree of the Supreme Soviet of the USSR of July 8, 1944 . . . is directed to the strengthening in

every way of the family and of the marital life of the spouses. The dissolution of marriage can consequently take place only if such facts were established by the court which provide a basis for considering that the family has disintegrated and there is no possibility of its restoration." And further: "The reference to 'incompatibility,' without explanation of how it manifested itself, is obviously insufficient and cannot provide a basis for the decision pronouncing the dissolution of the marriage. The court also ought not to have overlooked the fact that the spouses have been married since 1945 and that they have a little boy" (*Sotsialisticheskaia Zakonnost'* [Socialist Legality], 1948, No. 5, p. 60).

CHAPTER 13: PRE-CONTRACT DISPUTES

1. Perhaps the closest American counterpart to the pre-contract case lies in counseling and planning by lawyers, who are increasingly being placed in the role of keeping their clients out of trouble and of settling controversies prior to litigation.

CHAPTER 14: LAW AND LABOR

1. Cf. "Collective Bargaining in the Soviet Union," *Harvard Law Review,* LXII (1949), 1191, 1196.

2. A. E. Pasherstnik, "Voprosy kollektivnogo dogovora v SSSR" (Questions concerning the Collective Contract in the USSR), *Sovetskoe Gosudarstvo i Pravo* (Soviet State and Law), 1948, No. 4, pp. 50-51. See M. L. Weisberg, "The Transformation of the Collective Agreement in Soviet Law," *University of Chicago Law Review,* XVI (1949), 444, 473.

3. V. M. Dogadov, "Etapy razvitiia sovetskogo kollektivnogo dogovora" (Stages in the Development of the Soviet Collective Contract), *Izvestiia Akademii Nauk SSSR, Otdelenie Ekonomiki i Prava* (Journal of the Academy of Sciences of the USSR, Division of Economics and Law), 1948, No. 2, p. 89.

4. Pasherstnik, p. 45.

5. Harry and Rebecca Timbres, *We Didn't Ask Utopia,* pp. 211*ff*. Copyright, 1939, by Prentice-Hall, Inc. Quoted by permission of the publisher.

CHAPTER 15: ECONOMIC, OFFICIAL, AND COUNTER-REVOLUTIONARY CRIMES

1. Reported in *Sudebnaia Praktika Verkhovnogo Suda SSSR* (Judicial Practice of the Supreme Court of the USSR), 1944, VI (XII), 19.

2. Case of Kharisova, *ibid.,* 1946, I (XXV), 22.

3. *Ibid.,* 1944, III (IX), 8.

CHAPTER 16: PARENTAL LAW AND PERSONAL FREEDOM

1. Maynard points out that the absence of a precise definition of the powers and functions of local government "is to be ascribed to certain funda-

mental assumptions of local government which go far back into Russian history. The local is a microcosm of the central authority, so far as civil administration is concerned. It may, and upon occasion it ought, to discharge any or all of the functions of government. There is no such thing as a doctrine of *ultra vires:* and no body of law which fixes and limits power. It can do anything within the area of its jurisdiction, for which it has the funds and the executive instruments. That local bodies sometimes use these powers in an eccentric way, we gather from a complaint by the Attorney General of the Union, of by-laws imposing fines of a hundred rubles for sleeping in a public place, and omitting to turn the water out of the bath after washing; and prohibiting the use of matches by children, old people, and persons of unsound mind. On the other hand, a local body may at any moment be overridden by the authority next above it, on any of its decisions and any of its actions" (Sir John Maynard, *The Russian Peasant and Other Studies* [London, 1942] pp. 450-451).

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