

STUDENT COMMENTS

THE ROLE OF DEFENSE COUNSEL IN SOVIET CRIMINAL PROCEEDINGS

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I. INTRODUCTORY COMPARISON OF THE RIGHT TO COUNSEL IN THE UNITED STATES AND IN THE SOVIET UNION

In the United States, the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹ The United States Supreme Court has construed the sixth amendment guar-

¹ U.S. CONST. amend. VI.

antee to apply to the "critical" stages of criminal proceedings.² The accused must be advised of his right to counsel before he is placed in a line-up³ or subjected to in-custody interrogation.⁴ It is increasingly customary to provide counsel for the indigent at either the initial appearance or the preliminary examination, although neither has been consistently termed a "critical stage" by the Supreme Court.⁵ The accused has a constitutional right to retained or appointed counsel at the arraignment,⁶ at trial, and on appeal,⁷ but the Court has not yet indicated whether the right to counsel extends to the sentencing stage.⁸ During those stages which have been termed "critical," the accused must be informed of his right to counsel. Unless he makes an "intelligent waiver" of his sixth amendment right, the proceeding may not be conducted until an attorney is present.⁹

In the Soviet Union, "the accused is guaranteed the right to defense" under article 111 of the Constitution of the U.S.S.R. As defined by the 1958 Principles of Criminal Procedure of the U.S.S.R. and the Union Republics [hereinafter referred to as the Principles of Criminal Procedure], the right to defense is broader than, but

² *United States v. Wade*, 388 U.S. 218, 224 (1967). "[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226.

³ *United States v. Wade*, 388 U.S. 218 (1967).

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁵ In *White v. Maryland*, 373 U.S. 59 (1963), the Court reversed the conviction of a man whose unnecessary plea of guilty (taken at the preliminary hearing when he was not represented by counsel) was introduced in evidence at the trial. In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court held that *White* was not controlling due to the differences in state procedures, and refrained from deciding whether the preliminary hearing was always a "critical stage" of criminal proceedings. Instead, it ruled more narrowly that failure to appoint counsel where testimony taken at the preliminary hearing was subsequently admitted at the trial constituted a denial of the accused's right to be confronted with the witnesses against him.

⁶ *Hamilton v. Alabama*, 368 U.S. 52 (1961).

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁸ The Court did rule, in *Townsend v. Burke*, 334 U.S. 736, 741 (1948), however, that there had been a denial of due process when an uncounseled defendant was sentenced "on the basis of assumptions concerning his criminal record which were materially untrue." The federal courts, relying on *Powell v. Alabama*, 287 U.S. 45 (1932), have held that the sixth amendment guarantee extends to the sentencing stage because a lawyer is needed to call the court's attention to mitigating circumstances as well as to counsel the accused on the advisability of an appeal.

⁹ *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The alternatives to appointing counsel during an in-custody interrogation are to refrain from conducting the proceeding or to provide an equally effective guarantee of the defendant's fifth and sixth amendment rights. *Id.*; *United States v. Wade*, 388 U.S. 218, 239 (1967).

inclusive of the right to counsel.¹⁰ Strictly speaking, the right to counsel in the Soviet Union is therefore a statutory, not a constitutional guarantee.

The Soviet criminal process, patterned after the system developed in Continental European countries, consists of the following stages: initiation of the case; inquiry or preliminary investigation, during which investigatory agencies gather evidence both for and against the accused by interrogating experts, witnesses, and the accused as well as by conducting searches, seizures, examinations, and views of the scene of the crime; bringing to trial, which is a judicial review of the conclusion to indict; trial, during which evidence gathered at the pretrial investigation plus any supplemental evidence is presented to the court for a determination of guilt or innocence; cassation, which is an appellate review of both the facts and the law; and supervisory review, which is an appellate review of the law after the judgment has taken legal effect.¹¹ Perhaps the two most distinctive features of the Soviet system are its emphasis on pretrial investigatory activities and the active participation of the court in eliciting evidence at the trial.¹²

The Soviet system therefore differs considerably from that familiar to American lawyers. Nevertheless, there is a striking similarity between the pattern of development of the right to counsel in the United States and in the Soviet Union. In both countries, primary emphasis was first placed upon the right to counsel during the trial. In 1920, the All-Russian Central Executive Committee decreed that if a state or social accuser participates in a trial, the accused has an obligatory right to counsel, meaning that counsel must be appointed if he is not retained by the ac-

¹⁰ The right to defense, secured to the accused by article 19, is defined in article 21 as follows:

The accused shall have the right: to know what he is accused of and to give explanations concerning the accusation presented to him; to present evidence; to submit petitions; to become acquainted with all the materials of the case upon completion of the preliminary investigation or inquiry; to retain defense counsel; to participate in the judicial examination in the court of first instance; to submit challenges; and to appeal from the actions and decisions of the person conducting the inquiry, the investigator, procurator, and court.

Analogous provisions can be found in the republic codes of criminal procedure. *E.g.*, R.S.F.S.R. 1960 CRIM. PRO. C. arts. 19, 46. Throughout this comment, reference will be made to the R.S.F.S.R. Code of Criminal Procedure unless otherwise indicated. An English translation of the Code is now available. *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES* (H. Berman & J. Spindler transl. 1966) [hereinafter cited as *SOVIET CRIMINAL LAW AND PROCEDURE*].

¹¹ For a fuller description of the Soviet system see Hazard, *Soviet Criminal Procedure*, 15 *TUL. L. REV.* 220 (1941). Although written prior to 1958, this is still an accurate description of the stages of Soviet criminal proceedings.

¹² H. BERMAN, *JUSTICE IN THE U.S.S.R.* 302-03 (1963). These features are not unique to Soviet criminal procedure; they are also characteristic of Continental European legal systems.

cused, although he may subsequently be dismissed at the accused's request.¹³ Since then, the obligatory right to counsel has been extended to cases in which the defendant is a minor, physically or mentally incapable of defending himself, or without command of the language in which the proceedings are conducted; cases in which there are two or more defendants whose interests conflict, one of whom has defense counsel; and cases in which the death penalty may be imposed.¹⁴ The accused may waive his right to counsel unless he is a minor or unable to conduct his own defense due to physical or mental defects, but the waiver must be voluntary.¹⁵ A recent decision by the U.S.S.R. Supreme Court stipulates that no waiver is voluntary unless (1) the defendant is informed of his right to counsel, and (2) counsel is present at the time of the waiver.¹⁶ This is a more complete guarantee of the right to counsel than that granted to American defendants by *Gideon v. Wainwright*!

As in the United States, efforts by legal theorists to advance the right to counsel to the pretrial stages of Soviet criminal proceedings have met with considerable opposition from members of the investigatory and law enforcement agencies. A compromise solution was finally incorporated into the 1958 Principles of Criminal Procedure. Counsel is now permitted to assist the accused in becoming acquainted with the materials gathered during the preliminary investigation and to petition the collection of additional evidence prior to the drafting of the indictment.¹⁷ The investigator must inform the accused of his right to counsel upon termination of the preliminary investigation, but the right may be waived, and counsel need not be present at the time of the waiver.¹⁸ Only minors and persons physically or mentally unable to defend themselves enjoy an obligatory right to counsel from the moment an accusation is presented at the beginning of the preliminary investigation.¹⁹ When an inquiry is held in lieu of a

¹³ Decree of Oct. 21, 1920, art. 47, [1920] 83 S.U. R.S.F.S.R. Item 407.

¹⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 49. Counsel is also obligatory whenever the accused requests the appointment of counsel in the Uzbek and Moldavian Republics. B. GALKIN, SOVETSKII UGOLOVNO-PROTSESSUAL'NYI ZAKON (Soviet Criminal Procedure Law) 201 (1962). Failure to provide counsel constitutes grounds for vacating a conviction and remanding the case for a new trial. R.S.F.S.R. 1960 CRIM. PRO. C. arts. 342, 345(4). For a summation of the circumstances under which counsel was obligatory prior to 1958 see Bekeshko, *Zashchita kak protsessual'naia funktsiia v sovetskom ugolovnom protsesse* (Defense as a Procedural Function in the Soviet Criminal Process), in VOPROSY UGOLOVNOGO PRAVA I PROTSESSA (Problems of Criminal Law and Procedure) 247-48 (1958).

¹⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 50.

¹⁶ Karapetian, [1966] 4 Bull. Verkh. Suda S.S.S.R. 26 (Sup. Ct. U.S.S.R. 1966).

¹⁷ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 22; R.S.F.S.R. 1960 CRIM. PRO. C. art. 47.

¹⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 50, 149, 201.

¹⁹ *Id.* art. 49.

preliminary investigation, the accused is denied all right to counsel until the case is brought to trial.²⁰ There is currently a sharp division of opinion on whether counsel may participate in the bringing to trial when the accused has not been represented during the investigatory stages.²¹ If counsel takes part in the preliminary investigation, however, he is permitted to appear at the bringing to trial when summoned by the court.²²

Unlike the American system of sentencing, Soviet judges announce both the verdict and the sentence at the close of the trial, during which the accused enjoys an obligatory right to counsel.²³ At the cassational stage, on the other hand, counsel's participation is permitted, but not required,²⁴ and counsel is barred from the supervisory review except "when necessary," and then only if summoned by the court.²⁵

Recently, pressure has been mounting to extend the right to counsel to the beginning of the preliminary investigation and to make counsel's presence mandatory during the appellate stages of the proceedings.²⁶ Clearly this indicates that Soviet jurists, at least, consider counsel's presence an essential element of the accused's constitutional "right to defense." On the other hand, on the basis of such political proceedings as the Great Purge trials, Western observers have often concluded that Soviet lawyers are more interested in defending the interests of the state than in defending the interests of their client. This dichotomy of opinion reflects not only a lack of information on the part of Western observers, but also a failure to appreciate the impact of Soviet legal and political institutions upon the right to counsel. In an effort to foster a clearer understanding of the importance of counsel's assistance to the average Soviet defendant, this comment will describe the structure and duties of the practicing bar, discuss the Soviet lawyer's concept of his duty to defend, depict counsel's present functions during each stage of the criminal process, and suggest his future role in Soviet criminal proceedings. Whenever possible, reference will be made to the actual, as opposed to the theoretical functioning of the Soviet criminal process. Soviet research materials tend to focus on the law in books, however, and it is very difficult for Western commentators to obtain meaningful

²⁰ *Id.* art. 47.

²¹ For a fuller discussion of this controversy see text accompanying notes 465-68, *infra*.

²² R.S.F.S.R. 1960 CRIM. PRO. C. art. 223; Vydrina, *Obespechenie podsudimomu prava na zashchitu po novomu UPK RSFSR* (Guaranteeing the Accused the Right to Defense under the New RSFSR Code of Criminal Procedure), [1961] 4 Sov. IUST. 16.

²³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 303.

²⁴ *Id.* art. 335.

²⁵ *Id.* art. 377.

²⁶ Shafir, *Pravo na zashchitu v sovetskom ugovnom sudoproizvodstve i vozmozhnosti ego rasshireniia* (The Right to Defense in Soviet Criminal Proceedings and the Possibilities for its Expansion), [1967] 2 S.G. 1 P. 47.

information concerning the operation of Soviet law in action.

II. DESCRIPTION OF THE SOVIET PRACTICING BAR

Lawyers appearing as defense counsel in the Soviet Union are drawn from that segment of the legal profession known as "advocates."²⁷ Collectively, they are referred to as the *advokatura* (practicing bar) and are organized into "colleges of advocates," which are voluntary, self-governing associations of persons engaged in legal practice.²⁸ On rare occasions, "jurisconsults" (lawyers employed by state enterprises, collective farms, and other institutions or organizations as house counsel) are called upon to act as defense counsel for members of the organizations on whose staffs they serve as legal advisers.²⁹ Near relatives or legal representatives of the accused and other persons to whom the accused entrusts his defense may also be permitted to serve as defense counsel during the trial by ruling of the court, but such persons cannot take part in the preliminary investigation.³⁰ Since the vast majority of defendants are represented by advocates, this comment will concern itself solely with that segment of Soviet defense lawyers.

A. Early History of the Advokatura

The *advokatura* has had an interesting, if somewhat complex history. The Imperial bar was abolished immediately after the Revolution, as were all other existing judicial institutions of the

²⁷ Advocates correspond roughly to private practitioners in the United States. Friedman & Zile, *Soviet Legal Profession: Recent Developments in Law and Practice*, 1964 Wis. L. Rev. 32. In addition to serving as defense counsel, they also act as representatives of plaintiffs and defendants in civil suits. Law of July 25, 1962, Statute on the *Advokatura* of the R.S.F.S.R., art. 1, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.). The Statute on the *Advokatura* has been translated and annotated by Friedman & Zile, *supra*.

²⁸ Law of Oct. 27, 1960, Law on the Court Organization of the R.S.F.S.R., art. 23, [1960] 40 Ved. Verkh. Sov. R.S.F.S.R. Item 593; Law of July 25, 1962, art. 1, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.).

The phrase "voluntary" is used to distinguish colleges of advocates from state organizations. Dubkov, *Demokraticheskie osnovy organizatsii i deiatel'nosti sovetskoi advokatury* (Democratic Foundations of the Organization and Activities of the Soviet *Advokatura*), [1962] 6 S.G. I P. 108, 109. It tends to be misleading, however, because private practice has been abolished and only members of the college may work as advocates. See text accompanying notes 68-72, *infra*.

²⁹ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 22; R.S.F.S.R. 1960 CRIM. PRO. C. art. 47; NAUCHNO-PRAKTICHESKII KOMMENTARIJ K UGOLOVNO-PROTSESUAL'NOMU KODEKSU R.S.F.S.R. (Scholarly-Practical Commentary to the Criminal Procedure Code of the R.S.F.S.R.) 118-19 (V. Boldyrev ed. 1963) [hereinafter cited as R.S.F.S.R. KOMMENTARIJ]; SOVIET CRIMINAL LAW AND PROCEDURE 118-19.

³⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 47; R.S.F.S.R. KOMMENTARIJ 119. In practice, defense lawyers are almost exclusively advocates. M. CHEL'TSOV, SOVETSKII UGOLOVNIY PROTSESS (Soviet Criminal Proceedings) 102 (1962).

Russian Empire.³¹ The first revolutionary decree on judicial administration did acknowledge the continuing need for legal representation of persons charged with the commission of crimes, however, and provided that any citizen of either sex of good character and with full civil rights could act as defense counsel.³² Although the underlying intent was to eliminate the members of the Imperial bar from the legal profession, many former lawyers continued to serve as defense counsel.³³ In 1918, recognition was given to the need for an organized bar. Only persons elected to the "colleges of persons dedicated to advocacy" could practice for a fee.³⁴ The fee was paid to the advocate, but was then turned over to the college for distribution among the members.³⁵ In an effort to curb the unregulated practice of law, the right to appear without a fee was subsequently restricted to relatives of the accused and representatives of state or social organizations.³⁶ The Decree on the People's Courts of the R.S.F.S.R. placed the colleges under the control of the executive committees of the local and provincial soviets and introduced the concept of a salaried practicing bar.³⁷ Client's fees were collected by the courts and credited to the budget of the People's Commissariat of Justice.³⁸ Advocates were paid a salary equivalent to that received by the people's judges.³⁹ Dissatisfied with the salaried bar, the government instituted the "labor duty" system in October 1920.⁴⁰ The local soviets drew up lists of citizens capable of acting as defense counsel, and whenever a person was summoned to duty, his employer was obligated to free him temporarily from his employment while continuing to pay him his regular wages.⁴¹ The labor duty system marked the nadir in the history of the *advokatura*, for it led to the practice of

³¹ Decree of Dec. 5 (Nov. 22), 1917, arts. 1, 3, [1917] 4 S.U. R.S.F.S.R. Item 50. For other accounts of the history of the *advokatura* see Bilinsky, *The Lawyer and Soviet Society*, 14 PROBLEMS OF COMMUNISM 62 (March-April 1965); Friedman & Zile, *supra* note 27; Hazard, *Law Practice in Russia: The Organized Bar in the U.S.S.R.*, 35 A.B.A.J. 177 (1949); Kucherov, *The Legal Profession in Pre- and Post-Revolutionary Russia*, 5 AM. J. COMP. L. 443 (1956); Lapenna, *The Bar in the Soviet Union and Yugoslavia*, 12 INT'L & COMP. L.Q. 631 (1963); Malone, *The Soviet Bar*, 46 CORNELL L.Q. 258 (1961); Razi, *Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe*, 48 CALIF. L. REV. 776 (1960).

³² Decree of Dec. 5 (Nov. 22), 1917, art. 3, [1917] 4 S.U. R.S.F.S.R. Item 50.

³³ Friedman & Zile, *supra* note 27, at 33; Hazard, *supra* note 31, at 177.

³⁴ Decree of March 7 (Feb. 22), 1918, arts. 24-25, [1918] 26 S.U. R.S.F.S.R. Item 420 (All-Russian Central Executive Committee).

³⁵ Kucherov, *supra* note 31, at 454.

³⁶ Hazard, *supra* note 31, at 178.

³⁷ Decree of Nov. 30, 1918, arts. 40-42, [1918] 85 S.U. R.S.F.S.R. Item 889 (All-Russian Central Executive Committee).

³⁸ *Id.* art. 48.

³⁹ *Id.* art. 42.

⁴⁰ Decree of Oct. 21, 1920, art. 43, [1920] 83 S.U. R.S.F.S.R. Item 407.

⁴¹ *Id.* arts. 43, 48.

law by persons with no continuing legal experience.⁴² When they refused or failed to appear, salaried legal advisers connected with the local departments of justice had to appear in their stead.⁴³

In the early 1920's, the New Economic Policy was introduced in an effort to rebuild the country's war-torn economy. The state maintained control of the "commanding heights" (large-scale industry, transportation, finance, etc.), but permitted private enterprise to operate in the spheres of small-scale industry, trade, and agriculture. To provide the legal and economic stability necessary for the encouragement of private enterprise, codes regulating civil and criminal substantive and procedural law were enacted and the Soviet bar was rejuvenated and organized into "colleges of defenders."⁴⁴ When the mixed economy of the 1920's was supplanted by a socialist economy in the 1930's, the 1923 R.S.F.S.R. Code of Criminal Procedure and the 1922 "colleges of defenders" were retained by the Soviet government. The bar was not reorganized until the Statute on the *Advokatura* of the U.S.S.R. was passed in 1939, following the adoption of a new all-union Constitution in 1936.⁴⁵ The 1936 Constitution also called for the enactment of an all-union code of criminal procedure, but none was ever adopted.⁴⁶ Following Stalin's death, a new wave of legal reforms swept the Soviet Union, including the passage of the all-union Principles of Criminal Procedure in 1958 and the republic statutes on the *Advokatura* in the early 1960's, which marked a shift in control over the Soviet bar from the federal to the republic governments.⁴⁷

B. Recent History of the *Advokatura*

Although the Soviet bar has thus been reorganized twice since 1922, its basic structure has remained unchanged, making it possible to describe the present-day organization of the *advokatura* in the context of its historical development since the establishment of the first colleges of defenders under NEP.

⁴² Hazard, *supra* note 31, at 178.

⁴³ Decree of Oct. 21, 1920, art. 44, [1920] 83 S.U. R.S.F.S.R. Item 407 (All-Russian Central Executive Committee); Kucherov, *supra* note 31, at 455.

⁴⁴ R.S.F.S.R. 1923 CRIM. PRO. C.; Decree of May 25, 1922, [1922] 69 S.U. R.S.F.S.R. Item 902 (All-Russian Central Executive Committee).

⁴⁵ Decree of Aug. 16, 1939, [1939] 49 S.P. S.S.S.R. Item 394.

⁴⁶ U.S.S.R. CONST. art. 14(u). The provision was amended in 1957. The all-union government is now authorized to establish fundamental principles of criminal procedure; the republic governments are to formulate codes of criminal procedure reflecting the all-union principles, but developing the procedures to be followed by the republic legal institutions in greater detail.

⁴⁷ *E.g.*, Law of July 25, 1962, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.).

1. ORGANIZATION OF THE COLLEGES OF ADVOCATES

The colleges of advocates are termed "self-governing" institutions by Soviet jurists.⁴⁸ The general assembly of members, which convenes at least once a year, is the highest governing body of the college. It is empowered to elect the other two governing bodies (the presidium and the financial auditing commission) as well as to make decisions on questions concerning the work of the college.⁴⁹ It has been suggested that the general assembly is the legislative, and the presidium the executive branch of the college. However, the presidium's powers are more extensive than those normally granted to an executive organ. Elected every two years, the presidium admits and expels advocates from membership in the college; directs the activities of the consultation offices (the individual law offices into which the college of advocates is divided); exercises control over the quality of work of the advocates; and takes disciplinary measures against persons who have failed to comply with the internal regulations of the college.⁵⁰

The self-governing character of the college of advocates is significantly limited, however, by the control which governmental agencies are permitted to exercise over it. Administrative authorities at the governmental level at which the college is established are empowered to organize, direct, and control the activities of the college.⁵¹ In addition, general supervisory control is exercised over the colleges in the R.S.F.S.R. by the Juridical Commission of the R.S.F.S.R. Council of Ministers.⁵² Both the commission and aforementioned administrative authorities may expel an advocate for demonstrated unsuitability in the performance of his duties, systematic violation of the college's internal regulations, misconduct which brings discredit upon the calling of an advocate, and the commission of a crime.⁵³ The administrative authorities also have the right to exclude an advocate from admission to the college within one month of the date they are notified of his acceptance;⁵⁴ reverse the decision of the college's presidium refusing to admit an applicant or expelling a member;⁵⁵ and reverse decisions of the general assembly or the presidium which do not conform to the law or to the Statute on the *Advokatura* of the

⁴⁸ Dubkov, *supra* note 28, at 110-11.

⁴⁹ Law of July 25, 1962, arts. 16-17, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.).

⁵⁰ *Id.* arts. 18-19.

⁵¹ *Id.* art. 5; SOVIET CRIMINAL LAW AND PROCEDURE 121. In Russian, *kontrol'* means supervisory, not operative control.

⁵² Law of July 25, 1962, art. 5, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.); Friedman & Zile, *supra* note 27, at 44.

⁵³ Law of July 25, 1962, art. 13, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.).

⁵⁴ *Id.* art. 11.

⁵⁵ *Id.* art. 14.

R.S.F.S.R.⁵⁶ Similar forms of governmental control were exercised over the *advokatura* under the 1922 and 1939 statutes, although in 1922 the colleges were placed under the general supervision of the provincial courts, rather than the Ministry of Justice.⁵⁷

2. INCREASED PROFESSIONALIZATION OF THE ADVOKATURA

Since 1922, there has been a steady trend toward an increased professionalization of the *advokatura*, as evidenced by the rising standards for admission to the college of advocates.⁵⁸ In 1922, a person was eligible to become an advocate if he had two years of legal practice or academic legal training.⁵⁹ The standards were raised in 1939 to admit only persons with four years of legal training; two years of academic training plus one year of practical experience; or three years of practical experience as a judge, procurator, investigator, or jurisconsult.⁶⁰ In 1962, the qualifications were again tightened, admitting only "citizens of the U.S.S.R. who have had a higher education in law and not less than two year's experience in legal work."⁶¹ Persons with a higher legal education but without two years of legal experience may be accepted as candidates to the college on a six-month probationary basis. In exceptional cases, persons with at least five years of legal experience, but without a legal education, may be admitted by permission of the administrative authorities.⁶² Today, over 80 percent of the Russian Republic advocates have a higher legal education.⁶³ There are also other signs of the *advokatura's* increasing prestige. Of the 7,000 advocates in the R.S.F.S.R., approximately 4,400 are members of the Communist Party.⁶⁴ While it might be expected that these persons would hesitate before presenting a vigorous defense, Feifer reports that "[a]s often as not, the best defenses [are] made by Communists."⁶⁵ Twenty-six advocates were elected to local soviets in the Russian Republic in 1962; 105 advocates were chosen as delegates in the 1967 elections.⁶⁶ And

⁵⁶ *Id.* art. 20.

⁵⁷ Hazard, *supra* note 31, at 179-80.

⁵⁸ For a discussion of the professionalization of the *advokatura* see Friedman & Zile, *supra* note 27, at 34-39.

⁵⁹ Hazard, *supra* note 31, at 180.

⁶⁰ Decree of Aug. 16, 1939, arts. 6-7, [1939] 49 S.P. S.S.S.R. Item 394; Kucherov, *supra* note 31, at 457.

⁶¹ Law of July 25, 1962, art. 9, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.).

⁶² *Id.*

⁶³ Kukarskii, *Sovetskoi Advokature—45 Let* (Soviet *Advokatura—45 Years Old*), [1967] 10 Sov. IUST. 1. The educational qualifications of advocates immediately after World War II are discussed in Kucherov, *supra* note 31, at 459.

⁶⁴ Kukarskii, *supra* note 63, at 1.

⁶⁵ G. FEIFER, *JUSTICE IN MOSCOW* 238 (1964).

⁶⁶ Kukarskii, *supra* note 63, at 1. This sharp increase would seem to indicate that for the first time, a significant number of lawyers are taking

while it has traditionally been the pattern for Soviet judges to become advocates, in 1967 over 90 advocates were elected to preside over people's and regional courts in the R.S.F.S.R.⁶⁷ This evidence of the *advokatura's* increasing prestige is of particular importance in studying the role of defense counsel in Soviet criminal proceedings because an advocate who does not feel a strong sense of professional responsibility is not apt to conduct a vigorous defense, nor is he apt to command the respect of the court.

3. ABOLITION OF PRIVATE PRACTICE

Private law practice, permitted during the period of the New Economic Policy, was increasingly restricted during the period of industrialization and collectivization in the early 1930's.⁶⁸ In 1939, private practice was abolished except for the few instances when it was permitted and regulated by the People's Commissar of Justice.⁶⁹ Today, private practice is unauthorized, and it is only the members of the colleges of advocates who are permitted to perform an advocate's functions.⁷⁰ Since there are no private practitioners in the Soviet Union, an accused person (or persons acting on his behalf) must go to a consultation office in order to secure the services of a defense lawyer. The accused may request to be represented by a particular advocate whose reputation is well-known or who has been recommended to him by a friend.⁷¹ But if that advocate is unavailable or overburdened, the manager of the consultation point is empowered to assign another.⁷²

4. ESTABLISHMENT AND COLLECTION OF FEES

Fees for legal services used to be collected by the advocates, who then placed a certain percentage of their fees into a general fund for the maintenance of the college and operation of the consultation offices. The state regulated the fee paid by industrial workers and employees, but all other clients were free to negotiate a fee with their advocates.⁷³ In 1939, the system was revised. Fees were fixed by the manager of the consultation office in ac-

an active role in politics in the Soviet Union. See Berman, *The Struggle of Soviet Jurists Against a Return to Stalinist Terror*, 22 SLAVIC REV. 314, 320 (1963).

⁶⁷ Kukarskii, *supra* note 63, at 1. Writing in 1964, Feifer remarked that there was a tendency for judges to become trial lawyers—the new job gave them less prestige, but more money. He asserted that the reverse rarely happened. G. FEIFER, *supra* note 65, at 234.

⁶⁸ Kucherov, *supra* note 31, at 456; Lapenna, *supra* note 31, at 634; Mironenko, *Counsel for the Defense*, 10 INSTITUTE FOR THE STUDY OF THE U.S.S.R. BULLETIN No. 9, at 37, 38 (Sept. 1963).

⁶⁹ Decree of Aug. 16, 1939, art. 5, [1939] 49 S.P. S.S.S.R. Item 394; Friedman & Zile, *supra* note 27, at 34, 44; Hazard, *supra* note 31, at 180.

⁷⁰ Law of July 25, 1962, art. 4, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.); Friedman & Zile, *supra* note 27, at 43-44.

⁷¹ G. FEIFER, *supra* note 65, at 234.

⁷² Law of July 25, 1962, art. 25(b), [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.).

⁷³ Hazard, *supra* note 31, at 180.

cordance with regulations issued by the U.S.S.R. People's Commissariat of Justice establishing upper limits for each type of legal service rendered.⁷⁴ Payment was made to the consultation office, which retained a fixed percentage for the maintenance of the college and the office and paid the balance earned to each lawyer at the end of the month.⁷⁵ No compensation was received for services rendered gratuitously. In fact, the system encouraged paid work while unpaid work was slighted or avoided.⁷⁶ In essence, each lawyer worked for state-regulated rates adjusted by the manager in accordance with the lawyer's skill, the difficulty of the task assigned, and the client's ability to pay. The result was a great inequality among the advocate's earnings, coupled with a disproportionate desire to serve the affluent client.⁷⁷

Nothing was done on an all-union basis to change the fee system until 1965, when the State Committee on Labor and Wages and the All-Union Central Council of Trade Unions adopted a Standard Regulation on Remuneration for the Work of Attorneys⁷⁸ and a Standard Instruction on the Procedure for Remunerating Legal Assistance Provided by Attorneys to Citizens, Enterprises, Institutions, State Farms, Collective Farms and Other Organizations.⁷⁹ In an effort to alleviate the disparity between earnings and to eliminate the advocate's dependence on his client's wealth, the standard regulation provides that each attorney shall receive a minimum salary of 75 rubles per month.⁸⁰ In addition, a ceiling is set on the maximum amount to be received by each attorney at the end of the month. Initially, an attorney may receive a maximum monthly remuneration of 140-60 rubles after no more

⁷⁴ Decree of Aug. 16, 1939, art. 25, [1939] 49 S.P. S.S.S.R. Item 394.

⁷⁵ Hazard, *supra* note 31, at 265. By rule of thumb, the percentage could not exceed 30% of the fee. This limitation was specifically set forth in the Law of July 25, 1962, art. 44, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.).

⁷⁶ Lapenna, *supra* note 31, at 639 & n.15. In recent years, however, emphasis has been placed upon the importance of rendering free legal services. Friedman & Zile, *supra* note 27, at 46.

⁷⁷ Barkan, *Right to a Defense or to a Defender*, *Izvestia*, April 18, 1964, at 3, transl. in 16 C.D.S.P. No. 14, at 27, 28 (1964); Friedman & Zile, *supra* note 27, at 45.

Several attempts were made by individual colleges to alter the system. In Rostov, the income of the college was divided among all advocates proportionately to the amount and quality of their work, including services rendered gratuitously by the college. Lapenna, *supra* note 31, at 639 n.15. In Gomel, guaranteed salaries were set for defense attorneys based on their qualifications, seniority, and experience. Barkan, *supra* at 28.

⁷⁸ Changes in Remuneration for the Work of Attorneys and the Legal Assistance they Provide to the Population, Enterprises, and Organizations, [1965] 20 Sov. Iust. 12, transl. in 4 Sov. L. & Gov't No. 4, at 55 (1965).

⁷⁹ *Id.* On the basis of the standard regulation and the standard instruction, the councils of ministers of the union republics are to adopt republic regulations on remuneration for the work of attorneys. *Id.*

⁸⁰ *Id.*

than 30 percent of his fees has been paid to the college of advocates. Should the advocate's fees exceed that amount, he may receive 50 percent of the remaining sum, but no more than an additional 70-80 rubles (one-half of his monthly remuneration).⁸¹ If an advocate appears on behalf of an indigent client who has an obligatory right to counsel, he is remunerated from the funds of the presidium within the limits of the sums appropriated for these purposes.⁸²

The evils against which the 1965 regulations were directed have been eliminated, but equally perplexing problems have arisen in their stead. Disgruntled advocates have charged that the new regulations reward the lazy and punish the ambitious, highly successful defense attorneys whose hard earned fees are retained by the consultation office and paid out to advocates unable to earn the minimum salary on their own.⁸³ Furthermore, the regulations take into account neither an advocate's education, nor the length, amount, and quality of his service.⁸⁴ It has been pointed out that this makes the standard regulations inconsistent with the spirit of the 23rd Party Congress, which emphasized the importance of material incentives to the point of approving the unabashed pursuit of profit.⁸⁵

It is possible that the standard regulations will be revised to reflect the dictates of the 23rd Congress. In the meantime, Soviet advocates will undoubtedly continue the long-established practice of accepting a monetary remuneration from their clients "on the side"—a bonus which is not reported to the college, but which usually equals and often exceeds the advocate's legitimate fee.⁸⁶ The custom originated in 1918, when lawyers were first placed on salaries.⁸⁷ It has remained in vogue ever since, despite the fact that the practice of *MIKST* (Maximum Exploitation of the Client Above the Fixed Charge) has been declared illegal and is grounds for expulsion from the college under the 1962 Statute on the

⁸¹ *Id.* at 55-56. An advocate receives 20 rubles for participating in a preliminary investigation, and if his participation lasts for more than two days, he receives up to 7 rubles for each additional day. Up to 25 rubles may be charged for the handling of a criminal case in the court of first instance. If the trial lasts more than one day, up to 40 rubles may be charged, with an additional charge of up to 10 rubles per day when the trial lasts for more than three days. An appeal costs 7 to 15 rubles, with an additional charge for complex cases. *Id.* at 56-57. A ruble is the equivalent of \$1.11 (U.S.).

⁸² *Id.* at 56.

⁸³ Chetunova, *The Right to Defend*, *Literaturnaia Gazeta*, Sept. 22, 1966, at 2, transl. in 18 C.D.S.P. No. 38, at 19 (1966).

⁸⁴ These factors were taken into account by the colleges that introduced the salary system in Gomel. Barkan, *supra* note 77, at 28.

⁸⁵ Chetunova, *supra* note 83, at 19.

⁸⁶ G. FEIFER, *supra* note 65, at 234-35; Friedman & Zile, *supra* note 27, at 45-46.

⁸⁷ Friedman & Zile, *supra* note 27, at 45-46; Hazard, *supra* note 31, at 178.

Advokatura of the R.S.F.S.R.⁸⁸ Feifer reports that while he was in Moscow in 1962, for example, a lawyer who had accepted large sums of money "on the side" was charged with misuse of an official position, but the charges were dropped before the case came to trial.⁸⁹ In all probability, such criminal sanctions would not be applied today on the grounds that the present system of remuneration does not provide adequate material incentives as defined by the 23rd Party Congress.⁹⁰ Nevertheless, it would be desirable to revise or remove the ceiling on maximum salaries in order to legitimize the collection of fees in accordance with the lawyer's skill and experience.

III. THE ADVOCATE'S CONCEPTION OF HIS DUAL RESPONSIBILITY TO THE CLIENT AND TO THE STATE

A. *Institutional Influence of the College of Advocates*

The trend toward an increased professionalization of the bar, evidenced by the abovementioned reforms in the statutes governing the *advokatura*, has had a decided influence on the advocate's conception of his duty to his client versus his duty to the state. While it cannot be denied that the state's control over the lawyer is greater in the Soviet Union than it is in the United States or Western Europe, neither can it be denied that the Soviet advocate has a professional responsibility to the accused as well as to the state.⁹¹ This dual responsibility is reflected in the description of his duties contained in the 1962 Statute on the *Advokatura* of the R.S.F.S.R. On the one hand, he is to serve the state by helping to strengthen socialist legality and by actively participating in propaganda for Soviet law—a task which entails the reading of numerous public lectures.⁹² On the other hand, he is "to make use of all ways and means recognized by law in defense of the rights and legal interests of citizens . . . who seek his legal assistance."⁹³ The fact that this provision has no equivalent in prior law suggests the increasing importance of counsel's responsibility to the accused in Soviet criminal proceedings.⁹⁴

⁸⁸ Law of July 25, 1962, art. 13(c), [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.); Bilinsky, *supra* note 31, at 70; Kucherov, *supra* note 31, at 460-61; Izvestia, Feb. 24, 1961, transl. in 13 C.D.S.P. No. 8, at 34 (1961).

⁸⁹ G. FEIFER, *supra* note 65, at 235.

⁹⁰ Cf. Agranovsky, *A Trial and a Cause*, Izvestia, June 4, 1967, at 5 and June 8, 1967, at 8, transl. in 19 C.D.S.P. No. 23, at 17 (1967).

⁹¹ Friedman & Zile, *supra* note 27, at 35-36; SOVIET CRIMINAL LAW AND PROCEDURE 124.

⁹² Law of July 25, 1962, arts. 2, 30, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.); Friedman & Zile, *supra* note 27, at 42-43; Razi, *supra* note 31, at 798-99.

⁹³ Law of July 25, 1962, art. 31, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.).

⁹⁴ Friedman & Zile, *supra* note 27, at 62.

Defense counsel in any organized society can place primary emphasis upon serving the interests of his client only if he is a member of an autonomous professional organization capable of supporting him in resisting the pressures exerted by the state.⁹⁵ The autonomy of the Soviet college of advocates is restricted in that fees are regulated by the state and the college is subject to supervisory control exercised by administrative authorities empowered to make or review decisions regarding the expulsion from or admission of members to the college.⁹⁶ On the other hand, the *advokatura* has become increasingly conscious of its need for internal cohesion, as evidenced by the statutory mandate that the advocate "be a model of strict and unswerving observance of Soviet law, of moral purity, and of unimpeachable conduct, under constant obligation to perfect his knowledge, [and] to increase his ideological-political level and professional qualifications . . ." ⁹⁷ To assist the advocate in complying with this provision, many colleges hold monthly meetings to review and analyze their members' work experiences.⁹⁸ It has recently been suggested that these sessions would do more to improve the quality of Soviet advocacy if they gave greater recognition to persons who have conducted a successful defense, and if they made a more penetrating analysis of the reasons for other advocates' failures.⁹⁹ A

⁹⁵ See Friedman & Zile, *supra* note 27, at 37.

⁹⁶ See text accompanying notes 51-56, *supra*.

"A close analysis of the new legislation on the *advokatura* confirms the impression that the state has been willing to grant professional autonomy only within rigidly prescribed limits." Friedman & Zile, *supra* note 27, at 38.

"The organization of the legal profession in collegia under the general direction of the Ministry of Justice of each Soviet Republic and the fact that attorneys practice their profession not individually, but in collectives facilitates control by the state." Razi, *supra* note 31, at 795.

"[B]y giving the executive committees [of Soviets] the right to nullify the decisions made by the collegium presidiums and to present demands concerning the admission or expulsion of collegium members—thereby turning the defense counsel into a *chinovnik* [a low-level official or clerk in the bureaucracy.—Transl.]—the new regulations adopted in some republics essentially hinder the defense from becoming an independent side in criminal proceedings." Chetunova, *supra* note 83, at 19.

⁹⁷ Law of July 25, 1962, art. 30, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.); Friedman & Zile, *supra* note 27, at 62.

⁹⁸ Friedman & Zile, *supra* note 27, at 62. For a first-hand account of a monthly meeting held by the criminal section of the Moscow Collegium of Lawyers see G. FEIFER, *supra* note 65, at 94-95.

⁹⁹ Sukharev, *Pressing Problems Facing the Soviet Legal Profession*, [1964] 10 S.G. 1 P. 3, transl. in 3 Sov. Law & Gov't No. 4, at 40, 43 (1965); Sukharev, *Zashchishchat', no ne vygorazhivat'* (To Defend, but not To Shield [the Accused from his Just Punishment]), [1967] 18 Sov. Iust. 15.

"[The colleges of advocates] often neglect to send an observer to the court when a member attorney is pleading a case, and consequently are unable to hold group critiques of the manner in which the attorney conducted the defense." Bilinsky, *supra* note 31, at 70.

The presidium is empowered to reward especially outstanding advo-

greater emphasis has also been placed on the importance of training young advocates in the art of conducting a skillful defense.¹⁰⁰

The college of advocates has not merely played an educational role in assisting counsel to fulfill his professional responsibility to his client. It has also sought to protect him against interference by the state in the performance of his duties. In his daily work, the advocate confronts "the state" in the persons of the judge and the procurator (the prosecuting attorney at the trial who is also charged with the "general supervision of socialist legality").¹⁰¹ Professionally and institutionally, the advocate is independent of the court and procuracy by virtue of his membership in the college of advocates.¹⁰² Nevertheless, in many instances the judge and procurator have been known to interfere in the work of the *advokatura*. In one typical instance, the procurator's office (exercising its supervisory powers) sent a letter to the college of advocates in Kuibyshev accusing three defense attorneys of protecting "known criminals."¹⁰³ In another, the court directed a special ruling to the college of advocates objecting to the conduct of one of its attorneys who had requested the acquittal of a man ultimately convicted by the court.¹⁰⁴ In such

cates by means of commendation, a bonus, or a valuable gift. Law of July 25, 1962, art. 39, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.). It has been suggested that this power be extended to the managers of the consultation offices. Sukharev, *Zashchishchat', no ne vygorazhivat', supra* at 15.

¹⁰⁰ Sukharev, *Zashchishchat', no ne vygorazhivat', supra* note 99, at 15.

¹⁰¹ Bilinsky, *supra* note 31, at 69.

"The Soviet jurist does not look upon the prosecutor as the sole representative of the State. He sees in the judge a similar agent, specializing in the settling of disputes and in the punishment of criminals." Hazard, *Legal Education in the Soviet Union*, 1938 Wis. L. Rev. 562.

For a more complete discussion of the procurator's functions see text accompanying notes 271-75, *infra*.

¹⁰² Dubkov, *supra* note 28, at 111-12; SOVIET CRIMINAL LAW AND PROCEDURE 124.

¹⁰³ Chetunova, *supra* note 83, at 18.

¹⁰⁴ Sukharev, *Uluchshit' rabotu advokatov po osushchestvleniiu zashchity grazhdan na predvaritel'nom sledstvii i v sude* (The Work of Advocates in Carrying Out the Defense of Citizens at the Preliminary Investigation and in Court Should be Improved), [1965] 12 Sov. Iust. 16, 18.

As Sukharev points out, article 321 of the 1960 R.S.F.S.R. Code of Criminal Procedure does not empower the court to issue a special ruling concerning an advocate's position regarding the guilt or innocence of his client. Sukharev, *supra* at 18. As a matter of fact, neither the Code nor the Commentary makes any reference to the advocate as a potential recipient of a court's special ruling. R.S.F.S.R. KOMMENTARIJ 579-80. It has been suggested, however, that a special ruling could appropriately be directed to an advocate if he violated the rules of procedure or conducted himself in a disrespectful manner during the trial. R. RAKHUNOV, UCHASTNIKI UGOLOVNO-PROTSESSUAL'NOI DEJATEL'NOSTI (Participants in Criminal Procedure Activities), 217-18 (1961); Sukharev, *supra* at 18; Taylor, *Soviet Courts in the Social Complex*, 23 RUSSIAN REV. 49, 55 (1964).

Chetunova reports one instance in which a special ruling criticized

cases, the college is able to serve as a buffer between the advocate and the state. It conducts an investigation to determine whether the advocate actually used illegal methods of defense (*i.e.*, contacting witnesses to influence them in favor of the accused, distorting evidence collected by the investigating agencies, filing unfounded motions, etc.).¹⁰⁵ If the charges are unfounded, as they were in the above two cases, the advocate's name is cleared.¹⁰⁶ If the advocate has violated the internal regulations of the college, shown a "negligent or bad faith attitude toward the fulfillment of his duties," or committed "other acts which bring discredit on the calling of an advocate," he may be subjected to disciplinary proceedings before the presidium of the college.¹⁰⁷ Penalties normally range from reproof, reprimand, or severe reprimand to expulsion.¹⁰⁸ The disciplinary decision must be reached in the presence of the advocate and may be appealed to the administrative authorities supervising the college's activities.¹⁰⁹

The power of the college to protect its members against state interference is limited, however, because disciplinary proceedings may also be instituted by governmental agencies—the administrative authorities supervising the college's activities or the Juridical Commission of the Russian Republic.¹¹⁰ When this procedure is followed, the presidium is deprived of its power to serve as an initial buffer between the advocate and the state; it cannot refuse to conduct a disciplinary hearing on the grounds that the charges are not well-founded. On the other hand, the presidium does preside over the hearing and, under the appropriate circumstances, it could impose a light penalty or no penalty at all. The admin-

defense counsel for failing to exhaust all means and methods for introducing evidence tending to acquit the accused or to mitigate his responsibility. Chetunova, *supra* note 83, at 18. This use of the special ruling is sanctioned by the Commentary. R.S.F.S.R. KOMMENTARI 68. Soviet jurists maintain that the accused's interests are not so seriously affected by counsel's failure to defend as to require the reversal of a judgment because the court, procurator, and investigator have a responsibility to ascertain circumstances tending to acquit the accused or mitigate his guilt. U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 14; R.S.F.S.R. KOMMENTARI 68.

¹⁰⁵ Chetunova, *supra* note 83, at 18. Although advocates are often criticized merely for providing a vigorous defense of their client's interests, there are also some advocates who do use illegal methods of defense. Bilinsky, *supra* note 31, at 69-70; Friedman & Zile, *supra* note 27, at 36-37.

¹⁰⁶ Chetunova, *supra* note 83, at 18; Sukharev, *supra* note 104, at 18. In the case described by Sukharev, the appellate court reversed the lower court's decision, but did not repeal the special ruling. Several advocates have urged that appellate tribunals repeal unfounded special rulings to clear the advocate's name. Stetsovskii, *O protsessual'noi samostoitel'nosti advokata-zashchitnika* (On the Procedural Independence of an Advocate-Defense Counsel), [1966] 16 Sov. Iust. 12; Sukharev, *supra* note 104, at 18.

¹⁰⁷ Law of July 25, 1962, art. 40, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.).

¹⁰⁸ *Id.* art. 41.

¹⁰⁹ *Id.* art. 42.

¹¹⁰ *Id.*

istrative authorities would be powerless to appeal the decision, but if they considered an advocate's errors sufficiently grave, they could expel him from the college under article 13 of the 1962 Statute on the *Advokatura* of the R.S.F.S.R.¹¹¹

B. *The "Great Debate" on the Role of Defense Counsel in Criminal Proceedings*

The college of advocates therefore does provide a certain measure of institutional and professional support in assisting its members to resist state interference in the performance of their duties. Nevertheless, the advocate who vigorously champions the interests of his client in confrontations with the state accepts a substantial risk—particularly when the case has political overtones. It is perhaps for this reason that Soviet lawyers have heatedly debated the nature of their duty to defend the accused in criminal proceedings. The phrases "flung back and forth" have changed over the decades, but the opposing camps have remained essentially the same: those who emphasize the advocate's duty to the state versus those who stress his duty to the client. The changes in the language of the debate have not been insignificant, however, for with each alteration in phraseology, the debaters have moved a little closer to regarding the advocate as an active opponent of the prosecution in adversary proceedings conducted before a neutral magistrate.

1. "AIDE TO THE COURT" VS. "REPRESENTATIVE OF THE CLIENT"

When the debate opened in the 1940's, Chel'tsov maintained that defense counsel's primary duty is to serve as an "aide to the court."¹¹² In the Soviet Union, it is the function of the court in criminal proceedings "to secure the correct application of the law, so that every person who commits a crime shall be subjected to a just punishment, and not a single innocent person shall be criminally prosecuted or convicted."¹¹³ Chel'tsov considered it counsel's duty to assist the court in attaining this goal by presenting all the facts which tend to prove the accused's innocence or mitigate his guilt. His focus, however, was not upon counsel's conduct of a vigorous defense, but upon the ascertainment of the objective truth. He believed that counsel has a duty to reveal the facts of the case to the court even if they are detrimental to his client's position.¹¹⁴

¹¹¹ *Id.* art. 13. Only the advocate can appeal a decision of the presidium. *Id.* art. 42.

¹¹² M. CHEL'TSOV, *ADVOCAT V SOVETSKOM UGOLOVNOM PROTSESSE* (Advocate in the Soviet Criminal Process) 53 (1954); R. RAKHUNOV, *supra* note 104, at 60.

¹¹³ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 2; R.S.F.S.R. 1960 CRIM. PRO. C. art. 2.

¹¹⁴ M. CHEL'TSOV, *supra* note 112, at 17, 63; M. CHEL'TSOV, *supra* note 30,

Strogovich conceded that an advocate serves as an aide to the court, but denied that this is his primary function. Rather, he regarded the advocate as a "representative of his client" whose foremost responsibility is to defend the legal interests of the accused.¹¹⁵ To support his theory, he stressed the fact that an advocate is selected, paid, and dismissed by his client—not by the court.¹¹⁶

The hypothetical situation used to illustrate the fundamental differences between the two schools of thought was that of an advocate who believes his client guilty despite the latter's plea of innocence. This particular situation was used because it hypothesizes an advocate faced with a difficult decision: Should he argue for the accused's acquittal against the dictates of his conscience, or should he drop the defense of his client or admit his client's guilt and simply plead mitigating circumstances? (The latter alternative is available in the Soviet Union because the trial continues despite a plea of guilty; counsel may argue for an acquittal in such a situation, or merely plead mitigating circumstances in an effort to reduce the sentence.) The proponents of the advocate as an "aide to the court" maintained that counsel could withdraw from the defense of the accused under the hypothetical situation, for to argue in favor of the client's acquittal would only obstruct the court in its search for objective truth. If the advocate continued as defense counsel, he could admit his client's guilt and plead mitigating circumstances, provided he found them present in his client's case.¹¹⁷

Strogovich objected vehemently to the contention that counsel could drop the defense of the accused. It was one thing for a

at 104. Chel'tsov's views have been summarized in Bilinsky, *supra* note 31, at 67-68; Kucherov, *supra* note 31, at 466.

Vyshinsky was also a proponent of the theory that counsel is an "aide to the court." Bilinsky, *supra* note 31, at 65, 67.

¹¹⁵ Strogovich, *Protssessual'noe polozhenie zashchitnika v sovetskom ugolovnom protsesse* (Procedural Position of Defense Counsel in Soviet Criminal Proceedings), in *ZASCHCHITA PO UGOLOVNYM DELAM* (The Defense in Criminal Cases) (1948).

¹¹⁶ Strogovich, *Protssessual'noe polozhenie zashchitnika v sovetskom ugolovnom protsesse* (Procedural Position of Defense Counsel in Soviet Criminal Proceedings), [1959] 3 SOTS. ZAK. 25. Strogovich's views have been summarized in N. POLIANSKIĬ, *OCHERK RAZVITIA SOVETSKOI NAUKI UGOLOVNOGO PROTSESSA* (Essay on the Development of Soviet Scholarship on Criminal Procedure) 119 (1960); Bilinsky, *supra* note 31, at 67; Kucherov, *supra* note 31, at 463.

¹¹⁷ M. CHEL'TSOV, *supra* note 112, at 64; Kucherov, *supra* note 31, at 461-62. Chel'tsov was forced to abandon his theory following the passage of the 1958 Principles of Criminal Procedure. In 1962, he wrote that an advocate may neither withdraw from the defense of an accused nor announce to the court that he is in complete agreement with the accusation and that he has no arguments in favor of the accused. M. CHEL'TSOV, *supra* note 30, at 103. He still maintains that counsel's duty to the state takes precedence over his duty to his client, however. *Id.*

procurator to drop the charges against a person he considered innocent; it was quite another for an advocate to abandon the defense of a person charged with committing a crime, even though his client might not be innocent. Counsel should continue to represent a man regardless of the weight of the evidence against him.¹¹⁸ He should also actively defend the "legal interests" of the accused.¹¹⁹ Strogovich thus advocated a more vigorous role for defense counsel in Soviet criminal proceedings. But since he defined the defendant's "legal interests" as the right to be acquitted when he was innocent and to receive a just sentence when he was guilty, Strogovich differed from Chel'tsov primarily in that he felt the accused should be given the benefit of the doubt.¹²⁰ If counsel were uncertain of his client's guilt, he should argue for his acquittal; if he were convinced of his client's guilt, he should make no reference to facts detrimental to his client's position. Instead, he should make a persuasive plea for a reduced sentence based on mitigating circumstances, which Strogovich believed were present in any criminal case.¹²¹

2. COUNSEL AS A PROCEDURALLY INDEPENDENT FIGURE VS. COUNSEL AS A FIGURE PROCEDURALLY ALLIED WITH HIS CLIENT

Following Stalin's death, a renewed emphasis was placed on socialist legality in an effort to prevent a return to Stalinist terror.¹²² Chel'tsov's theory was denounced because it required an advocate to prejudge his client's guilt. If he found his client at fault, he was to become a "second accuser," admitting his client's guilt and limiting his defense to a discussion of mitigating circumstances.¹²³ Strogovich's conception of the advocate as a "representative of his client" was also criticized on the grounds that defense counsel does not appear in court "in place of" his client, as in civil proceedings. Rather, he serves as an assistant to the accused, who must be present during the trial and who is entitled to take an active part in the proceedings.¹²⁴

¹¹⁸ Strogovich, *supra* note 115, at 35-36.

¹¹⁹ Bilinsky, *supra* note 31, at 68.

¹²⁰ R. RAKHUNOV, *supra* note 104, at 212; Bilinsky, *supra* note 31, at 68.

¹²¹ Kucherov, *supra* note 31, at 463.

¹²² Berman, *supra* note 66, at 314.

¹²³ Sinaiskii, *Osnovnye voprosy zashchity v ugovnom protsesse* (Fundamental Problems of Defense in Criminal Proceedings), [1961] 5 S.G. i P. 70, 72; Sokolov, Tsubin & Iarshenets, *Rol' i zadachi advokatury v svyazi s dal'neishei demokratizatsiei sovetskogo ugovnogo protsessa* (The Role and Duties of the *Advokatura* in Connection with the Further Democratization of Soviet Criminal Proceedings), in *NOVOE SOVETSKOE ZAKONODATEL'STVO I ADVOKATURA* (New Soviet Legislation and the *Advokatura*) 22 (1960).

¹²⁴ B. GALKIN, *supra* note 14, at 200; R. RAKHUNOV, *supra* note 104, at 214-16; A. TSYPKIN, *SUDEBNOE RAZBIRATEL'STVO V SOVETSKOM UGOLOVNOM PROTSESSE* (The Judicial Examination in Soviet Criminal Proceedings) 28-29 (1962); Sokolov, Tsubin & Iarshenets, *supra* note 123, at 22; Ul'ianova, *Protessual'noe polozhenie advokata v sovetskom ugovnom protsesse*

It might have been thought that the passage of the Principles of Criminal Procedure in 1958 would end the debate over the role of defense counsel in Soviet criminal proceedings. Article 23 provides that "an advocate shall not have the right to withdraw from the defense of an accused after he has accepted it."¹²⁵ It also states that "defense counsel shall be obliged to make use of all means and methods of defense indicated in the law for the purpose of explaining the circumstances tending to acquit the accused or to mitigate his responsibility, and to render the accused necessary legal aid."¹²⁶ Nevertheless, the debate continued, the focus being upon the proper interpretation of article 23.

Having rejected the theories that counsel is an "aide to the court" or a "representative of his client," a new school of thought headed by Ul'ianova, a Soviet advocate, proposed that counsel is a procedurally independent figure—-independent of the court and prosecution, on the one hand, and of the accused, on the other.¹²⁷ While counsel can participate in a case only with the consent of his client, he is not a "servant or slave to the accused"¹²⁸—not a "machine for the defense programmed by the defendant."¹²⁹ He is the subject of independent procedural rights,¹³⁰ and is therefore free to select his own methods of defense. He must take his client's requests into consideration, but he is not bound by them;¹³¹ he is subordinate only to the law and to his own conscience.¹³² Were it otherwise, he would not be able to fulfill his dual responsibility of defending his client and assisting the court in the administration

(The Procedural Position of an Advocate in Soviet Criminal Proceedings), [1958] 9 SOTS. ZAK. 36.

¹²⁵ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 23.

¹²⁶ *Id.* In 1962, Perlov thought that the passage of the R.S.F.S.R. Statute on the *Advokatura* would "put an end to the argument as to whether the lawyer is merely the representative of his client and whether, in defending his client, he is required to assist the court in the proper solution of the case." Perlov, *Problems of Further Development of Democratic Principles of Criminal Procedure in the Light of the Program of the Communist Party of the Soviet Union*, [1962] 4 S.G. I P. 86, transl. in 1 Sov. L. & Gov't No. 2, at 48, 58 (1962).

¹²⁷ Ul'ianova, *O protsessual'nom polozenii advokata i ego pozitsii po delu* (On the Procedural Status of the Advocate and his Position in a Case), [1966] 3 SOTS. ZAK. 60. The writers of the R.S.F.S.R. Commentary adopted Ul'ianova's theory in explicating article 51 of the 1960 R.S.F.S.R. Code of Criminal Procedure, which is essentially the same as article 23 of the Principles of Criminal Procedure. R.S.F.S.R. KOMMENTARIJ 126.

¹²⁸ Natanzon, *O printsipakh ugovovnoi zashchity* (On the Principles of Criminal Defense), [1958] 5 SOTS. ZAK. 53-54; Ul'ianova, *supra* note 124, at 36, 39.

¹²⁹ Tsubin, *Ob effektivnosti sudebnoi zashchity* (On the Effectiveness of Legal Defense), [1966] 7 SOTS. ZAK. 65, 67.

¹³⁰ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 23; R.S.F.S.R. 1960 CRIM. PRO. C. art. 51.

¹³¹ Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 23-24; Ul'ianova, *supra* note 124, at 36.

¹³² Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 24.

of justice.¹³³

In developing her theory, Ul'ianova might have placed primary emphasis upon counsel's independence from the prosecution and upon the value of adversary proceedings in helping the court to ascertain the objective truth.¹³⁴ Instead, she stressed the importance of counsel's independence from the client. This is illustrated by her views concerning counsel's duty to use "all means and methods of defense indicated in the law." She interpreted article 23 as meaning that an advocate has no right to employ illegal defense methods, nor does he have a right to use legal methods in defense of the client's illegal interests.¹³⁵ Since Ul'ianova defined "illegal interests" as an accused's desire to escape the just measure of punishment for committing a crime, she had actually reverted to Chel'tsov's earlier theory that counsel must prejudge his client's guilt before selecting an appropriate method of defense, and that he may seek an acquittal only if he is convinced of his client's innocence.¹³⁶ Ul'ianova did differ with Chel'tsov on one point. If an advocate should find his client at fault, Ul'ianova did not recommend that he only admit his client's guilt or withdraw from the defense of the accused. Instead, she suggested that counsel remain silent on the issue of guilt and confine his remarks to a discussion of the mitigating circumstances.¹³⁷ A few

¹³³ *Id.* at 27; Ul'ianova, *supra* note 127, at 60.

¹³⁴ Indeed, this was one of the original tenets of Ul'ianova's theory, but it was soon overshadowed by the undue emphasis placed upon counsel's independence from his client. Ul'ianova, *supra* note 124, at 38. Recently, Matvienko has made an effort to restore the original emphasis on counsel's procedural independence from the prosecution. E. MATVIENKO, *SUDEBNAYA RECH'* (Forensic Speech) 21-24 (1967).

¹³⁵ Ul'ianova, *supra* note 124, at 38-39.

¹³⁶ Ul'ianova, *supra* note 127, at 61; Ul'ianova, *supra* note 124, at 39.

It was implicit in Ul'ianova's theory that counsel has the right "to evaluate the evidence in accordance with his inner conviction." Although article 17 of the Principles of Criminal Procedure grants this right only to the court, procurator, and investigator (persons charged with the responsibility of deciding whether to terminate the case), several of Ul'ianova's followers maintained that counsel would have nothing to say to the court if he did not evaluate the evidence and determine his position regarding his client's guilt prior to the trial. Alekseev, *Osnovy ugovnogo sudoproizvodstva Soiuza SSR i soiuznykh respublikh i dal'neishee razvitie ugovno-protsessual'nogo zakonodatel'stva* (The Principles of Criminal Procedure of the U.S.S.R. and the Union Republics and the Further Development of Criminal Procedure Legislation), [1959] 2 PRAVOVEDENIE 95; Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 25-26.

¹³⁷ Ul'ianova, *supra* note 127, at 60; Ul'ianova, *supra* note 124, at 37; accord, T. NEISHTADT, *SOVETSKII ADVOKAT* (The Soviet Advocate) 19 (1958); Grekov, *Pozitsiia advokata v protsesse dolzhna byt' osnovana na zakona* (The Position of the Advocate in Legal Proceedings Should Be Founded in Law), [1965] 10 SOTS. ZAK. 55-56; Nanikishvili, *Pozitsiia advokata v ugovnom protsesse* (The Position of the Advocate in Criminal Proceedings), [1965] 6 SOTS. ZAK. 35; Natanzon, *supra* note 128, at 53; Vydrin, *Obespechenie podsudimomu prava na zashchitu po novomu UPK RSFSR*

of Ul'ianova's followers, on the other hand, did adhere to Chel'tsov's theory. They asserted that if an advocate becomes absolutely convinced of his client's guilt after making every effort to discredit the prosecution's case, he may acknowledge his inability to refute the accusation in his closing speech.¹³⁸

A similar rift arose between Ul'ianova and her followers concerning counsel's right to withdraw from the defense of an accused. They agreed that counsel may obtain a substitute when he is unable to continue in the service of his client due to circumstances beyond his control, such as illness.¹³⁹ But Ul'ianova denied counsel's right to withdraw from the defense of his client under any other circumstances,¹⁴⁰ whereas a few of her followers maintained that prior to the trial, a truly independent lawyer should be able to drop the defense of a "guilty client who insists upon his innocence."¹⁴¹ Nanikishvili, another advocate, assumed the most extreme position, arguing that if the evidence gathered prior to trial proves the accused's guilt, the accused confesses, counsel agrees to defend him, and the accused then unexpectedly denies his guilt during the trial, counsel has the right to inform the court of his withdrawal from the case.¹⁴²

Because Ul'ianova's theory could be carried to such extremes, a number of Soviet jurists, including Sinaiskii and Stetsovskii, sought to denounce her conception of the advocate as a procedurally independent figure. They noted that all too often a "procedurally independent" advocate would acknowledge his client's guilt only to have the court of first instance or the appellate tribunal find his client innocent.¹⁴³ They did not take issue with Ul'ianova's contention that defense counsel is independent of the prosecution, nor did they dispute her view that the advocate who endeavors to assist the court often unwittingly turns into a second accuser.¹⁴⁴ They agreed that counsel has a dual responsibility to defend the accused and to assist in the administration of justice, but felt that if counsel directed his efforts toward skillfully representing his client, he would automatically promote the administration of justice by assisting the court to ascertain the objective truth.¹⁴⁵ In

(Guaranteeing to the Defendant the Right to Defense under the New Code of Criminal Procedure of the R.S.F.S.R.), [1961] 4 Sov. Iust. 16-17.

¹³⁸ Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 25-26.

¹³⁹ R.S.F.S.R. KOMMENTARIJ 128; Vydria, *supra* note 137, at 17.

¹⁴⁰ Ul'ianova, *supra* note 127, at 60; accord, T. NEISHTADT, *supra* note 137, at 18-19; Alekseev, *supra* note 136, at 101; Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 27.

¹⁴¹ A. LEVIN, P. OGNEV & V. ROSSEL'S, ZASHCHITNIK V SOVETSKOM SUDE (Defense Counsel in the Soviet Court) 103-04 (1960).

¹⁴² Nanikishvili, *supra* note 137, at 36-37.

¹⁴³ Sinaiskii, *Advokat dolzhen zashchishchat'* (An Advocate Must Defend), [1966] 11 SOTS. ZAK. 64, 65; Stetsovskii, *supra* note 106, at 13-14.

¹⁴⁴ Sinaiskii, *supra* note 143, at 64; Sinaiskii, *supra* note 123, at 70-71.

¹⁴⁵ Sinaiskii, *supra* note 123, at 70-71, 74; Sukharev, *supra* note 104, at 17.

denunciation of Ul'ianova's theory, they argued that counsel cannot possibly be regarded as fully independent because he participates in the case only with the consent of the accused and may not withdraw from the case once he has accepted the defense.¹⁴⁶ Emphasis should therefore be placed not upon counsel's "independence" from his client, but upon the "solidarity" of the bond between the advocate and the accused.¹⁴⁷

Sinaiskii and Stetsovskii objected to the view that an advocate has the right to drop the defense of a client who refuses to admit his guilt because it (1) contradicts the plain language of article 23 of the Principles of Criminal Procedure,¹⁴⁸ and (2) violates the accused's constitutional right to defense by conditioning his right to retain an advocate upon his willingness to confess his guilt.¹⁴⁹ They noted that counsel can never be certain of his client's guilt until the court has rendered its final judgment.¹⁵⁰ This led them to conclude that it is far better for counsel to risk defending the guilty than to leave the innocent defenseless.¹⁵¹

Sinaiskii's and Stetsovskii's second criticism was directed against Ul'ianova's statement that counsel can defend only the "legal interests" of the accused. They argued that article 23 does not restrict an advocate's activities to the defense of his client's "legal interests," as defined by Ul'ianova; it obligates counsel to employ all legal means and methods to obtain the acquittal of an accused or the mitigation of his sentence.¹⁵² It does not entitle counsel to prejudge his client's guilt, nor does it sanction counsel's public acknowledgment of his client's criminal responsibility.¹⁵³ It therefore limits counsel's activities only in that it prohibits him from using illegal defense methods, such as introducing false documents

¹⁴⁶ Sinaiskii, *supra* note 143, at 65; Stetsovskii, *supra* note 106, at 12.

¹⁴⁷ Sinaiskii, *supra* note 123, at 72; Tsubin, *supra* note 129, at 67.

¹⁴⁸ "An advocate shall not have the right to withdraw from the defense of an accused after he has accepted it." U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 23. The R.S.F.S.R. Commentary indicates that Sinaiskii and Stetsovskii correctly interpreted the above provision. R.S.F.S.R. KOMMENTARIJ 128.

¹⁴⁹ Sinaiskii, *supra* note 143, at 65; Stetsovskii, *supra* note 106, at 13-14; Stetsovskii, *Otkaz advokata ot zashchity obviniamogo* (Withdrawal of an Advocate from the Defense of an Accused), [1967] 7 Sots. ZAK. 59-60.

¹⁵⁰ Stetsovskii, *supra* note 106, at 12.

¹⁵¹ Zaitsev, *Voprosy morali v zashchite po ugolovnym delam* (Ethical Problems in Defending Criminal Cases), [1963] 22 Sov. IUST. 13, 14.

¹⁵² "Defense counsel shall be obliged to make use of all means and methods of defense indicated in the law for the purpose of explaining the circumstances tending to acquit the accused or to mitigate his responsibility, and to render the accused necessary legal aid." U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 23.

¹⁵³ Sinaiskii, *supra* note 143, at 65; Sinaiskii, *supra* note 123, at 75. Sinaiskii and Stetsovskii denied counsel's right to evaluate the evidence in accordance with his inner conviction. Sinaiskii, *supra* note 143, at 65; Sinaiskii, *supra* note 123, at 72; Stetsovskii, *supra* note 106, at 12-13; see note 136 *supra*.

or perjured testimony, lying, or distorting or juggling the facts of the case.¹⁵⁴ At the same time, it imposes a positive obligation upon counsel to argue for his client's acquittal.¹⁵⁵ He should attempt to refute the accusation by demonstrating that his client did not participate in the commission of the crime or by attacking the weak points in the prosecution's case to disprove the sufficiency of the evidence.¹⁵⁶ If his client's guilt has been convincingly established during the trial, counsel need not argue for an acquittal in his closing speech. But if his client still maintains that he is innocent, counsel ought not to express a contrary opinion.¹⁵⁷ Instead, he should ask the court to consider the accused's testimony in determining the issue of guilt, and if the court decides to convict, request that it consider reducing the charges or mitigating the sentence for reasons set forth by counsel in his closing speech.¹⁵⁸

To support their interpretation of counsel's duty to defend, Sinaiskii and Stetsovskii cited article 47 of the 1960 R.S.F.S.R. Code of Criminal Procedure, which states that "the same person may not be defense counsel for two accused persons if the interests of one of them conflict with the interests of the other." They argued that article 47 would not be necessary if counsel were expected to determine which of the two accused persons was guilty and then advise the court of his decision.¹⁵⁹ The inclusion of article 47 in the Code was rather premised upon the belief that counsel may never take any action harmful to the position of his client—he may never become a second accuser.¹⁶⁰

Zaitsev, an adherent to Sinaiskii's theory, suggested that the attorney-client privilege provides another justification for counsel's remaining silent on the issue of guilt during the trial. According to article 33 of the 1962 Statute on the *Advokatura* of the R.S.F.S.R., an advocate is not to divulge information communicated to him by his client, nor is he to be interrogated as a witness

¹⁵⁴ A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 14; Sinaiskii, *supra* note 123, at 72, 75. Intentionally prolonging, delaying, or interrupting the proceedings have also been termed illegal methods of defense. R.S.F.S.R. KOMMENTARIJ 125; Sukharev, *Pressing Problems*, *supra* note 99, at 41-42.

¹⁵⁵ Sinaiskii, *supra* note 123, at 74.

¹⁵⁶ Chaikovskaia, *The Lawyers*, *Izvestia*, March 22, 1963, transl. in 15 C.D.S.P. No. 12, at 28 (1963); Sinaiskii, *supra* note 143, at 65.

¹⁵⁷ Sinaiskii, *supra* note 143, at 65.

¹⁵⁸ Chaikovskaia, *supra* note 156, at 28; Sinaiskii, *supra* note 123, at 76; Zaitsev, *supra* note 151, at 14.

¹⁵⁹ Sinaiskii, *supra* note 123, at 74. Failure to provide more than one advocate for two or more defendants with conflicting interests constitutes grounds for a new trial. Chelondaev, Komakov & Aleshkov, [1967] 3 Bull. Verkh. Suda R.S.F.S.R. 5 (Crim. Div. Sup. Ct. R.S.F.S.R. 1966).

¹⁶⁰ T. NEISHTADT, *supra* note 137, at 20. An advocate must also defend his client's interests without turing into a second accuser of the other defendant. Nikiforov, *Zashchita pri protivorechivnykh interesakh podsudimyykh* (Defense when Defendants have Conflicting Interests), [1964] 4 Sov. Iust. 13.

concerning the circumstances of the case which became known to him in connection with the fulfillment of his obligations as defense counsel.¹⁶¹ The provision does not literally prohibit counsel from reporting otherwise than as a witness information which was not communicated to him by his client.¹⁶² However, it does explicitly prohibit an advocate from divulging the contents of a confession which his client made to him in private. Zaitsev therefore felt that the attorney-client privilege, coupled with counsel's obligation to defend the accused, justified his remaining silent when the accused denied his guilt, even if counsel were aware of facts tending to prove that his client had committed the crime.¹⁶³

C. *Recent Trends: Counsel as an Adversary of the Prosecution*

The debate continues, and the role of defense counsel has still not been clearly defined. At best, one can point to the development of two complementary trends: (1) the Soviet bar is becoming increasingly independent of the judiciary and procuracy, as evidenced by the recent reforms in the statutes governing the *advokatura*; and (2) the individual advocate is becoming more closely associated with the procedural position of his client. In fact, several jurists, including Strogovich and Sinaiskii, like to refer to the "one-sided" or adversary character of counsel's role in Soviet criminal proceedings.¹⁶⁴ Strogovich, in particular, has endeavored to establish the concept of Soviet criminal proceedings as adversary proceedings in which

the prosecutor upholds the indictment in court, the defendant defends himself, the defense attorney defends him, and the court makes an active and comprehensive examination of the facts of the case, hears and takes into consideration

¹⁶¹ Law of July 25, 1962, art. 33, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.).

For a history of the attorney-client privilege see Kucherov, *supra* note 31, at 466.

For a history of article 33, see Friedman & Zile, *supra* note 27, at 63; SOVIET CRIMINAL LAW AND PROCEDURE 125-26.

¹⁶² SOVIET CRIMINAL LAW AND PROCEDURE 126.

¹⁶³ Zaitsev, *supra* note 151, at 15.

¹⁶⁴ A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 15-16; E. MATVIENKO, *supra* note 134, at 21; Bekeshko, *Zashchita kak protsessual'naiia funktsiia v sovetskom ugovnom protsesse* (Defense as a Procedural Function in Soviet Criminal Proceedings), in VOPROSY UGOLOVNOGO PRAVA I PROTSESSA (Problems of Criminal Law and Procedure) 243 (1958); Chetunova, *supra* note 83, at 18; Perlov, *Alphabet of the Law*, *Izvestia*, Jan. 12, 1967, at 4, transl. in 19 C.D.S.P. No. 2, at 32 (1967); Sinaiskii, *supra* note 143, at 65; Strogovich, *Adversary Proceedings and Trial Functions in Soviet Criminal Procedure*, [1962] 2 PRAVOVEDENIE 106, transl. in 1 Sov. L. & Gov't No. 3, at 11, 12-13 (1962-63); Tsubin, *supra* note 129, at 67.

The Commentary, which adopts Ul'ianova's theory that counsel is procedurally independent, concludes by stating that "the position of defense counsel is characterized by the one-sided nature of his activities." R.S.F.S.R. KOMMENTARIJ 126.

the arguments offered by the parties, does not take sides and does not confine itself to the data presented before it, but employs all means to find the truth.¹⁶⁵

1. POLITICAL TRIALS

Persons familiar with the recent political trials in the Soviet Union might question the validity of characterizing Soviet criminal proceedings as adversary proceedings. At the Powers trial, for example, the Soviet Union had an opportunity to demonstrate to the Western world that the 1958 Principles of Criminal Procedure effectively safeguard the rights of the accused.¹⁶⁶ Even so, it has been suggested by Grzybowski, an American commentator, that Power's counsel could have conducted a more vigorous defense.¹⁶⁷ Likewise, according to the transcript available in the West, the advocates for Siniavsky and Daniel (two Soviet writers charged with anti-Soviet agitation and propaganda¹⁶⁸) spoke hardly a word throughout the entire trial.¹⁶⁹ It is possible that they were taken by surprise when Siniavsky and Daniel, who had admitted their guilt during the preliminary examination, denied their guilt during the trial.¹⁷⁰ For whatever reason, no witnesses were

¹⁶⁵ Strogovich, *supra* note 164, at 12, 15-16.

¹⁶⁶ Grzybowski, *The Powers Trial and the 1958 Reform of Soviet Criminal Law*, 9 AM. J. COMP. L. 425-26 (1960); Razi, *supra* note 31, at 804 n.98.

The Stalin regime had severely curtailed or abolished the procedural rights (including the right to counsel) of persons charged with serious counterrevolutionary crimes. Decree of Nov. 5, 1934, On the Special Board under the People's Commissar of Internal Affairs, [1935] 11 S.Z. S.S.S.R. Item 84; R.S.F.S.R. 1923 CRIM. PRO. C. arts. 466-73 (Amendments based on U.S.S.R. Laws of Dec. 1, 1934, and Sept. 14, 1937; repealed 1956); SOVIET CRIMINAL LAW AND PROCEDURE, *supra* note 10, at 70-71.

"[O]nly a small number of attorneys were authorized to act as defense counsels in political trials [under Stalin] When they did appear in political trials, moreover, they were expected to give evidence of their loyalty to the Bolshevik regime, often with the result that, instead of defending the accused, they joined the prosecution in heaping accusations on him." Bilinsky, *supra* note 31, at 66.

¹⁶⁷ Grzybowski, *supra* note 166, at 427-31, 440.

¹⁶⁸ "Agitation or propaganda carried on for the purpose of subverting or weakening Soviet authority or of committing particular, especially dangerous crimes against the state . . . or circulating or preparing or keeping, for the same purpose, literature of such content, shall be punished by deprivation of freedom for a term of six months to seven years" R.S.F.S.R. 1960 CRIM. C. art. 70.

¹⁶⁹ ON TRIAL 27 (M. Hayward transl. 1966); Brumberg, *Writers in Prison*, 15 PROBLEMS OF COMMUNISM 65, 72, 75 (March-April 1966).

The trial opened on February 10, 1966, and lasted four days. ON TRIAL, *supra* at 26.

¹⁷⁰ ON TRIAL, *supra* note 169, at 28; Feofanov, *Here the Law Reigns*, *Izvestia*, Feb. 11, 1966, at 4, transl. in 18 C.D.S.P. No. 6, at 3-4 (1966).

"[I]t was significant that for the first time political defendants were not forced to plead guilty." Raymont, *U.S. Experts See Rights Gain at Soviet Trial*, *N.Y. Times*, Feb. 16, 1966, § 1, at 9, col. 1. (quoting Harold J. Berman).

called by the defense and the advocates apparently reserved all of their comments for the closing speeches, of which we have no record.¹⁷¹ Siniavsky and Daniel were thus left to conduct their own defense.¹⁷² Both men were convicted; Siniavsky was sentenced to seven years of forced labor and Daniel to five.¹⁷³

Iosif Brodsky, a young Russian poet charged with violating the anti-parasite laws, was somewhat more fortunate. His counsel, Mme. Toporova, made a very concerted effort to obtain her client's acquittal, despite the fact that the case had political overtones.¹⁷⁴ Advocate Toporova first requested a medical examination to determine whether Brodsky's health kept him from regular work.¹⁷⁵ When the psychiatrist's report indicated that psychopathic traits existed in Brodsky's character but that he was capable of regular work, Toporova proved not only the quantity, but also the quality of Brodsky's poetry and translations, and insisted that he was neither living off unearned income nor leading an idle and parasitic way of life. In her closing speech, she dwelt upon the insufficiency of the evidence and charged that the procurator had resorted to the use of impermissible methods in attempting to obtain a conviction.¹⁷⁶ Despite counsel's efforts, Brodsky was sentenced to five years of hard labor in 1964, but it was reported in 1966

¹⁷¹ ON TRIAL, *supra* note 169, at 2, 27; Feofanov, *The Logic of a Fall*, *Izvestia*, Feb. 16, 1966, at 4, transl. in 18 C.D.S.P. No. 6, at 6 (1966).

¹⁷² To obtain a conviction under article 70 of the R.S.F.S.R. Criminal Code, the prosecution had to show that the defendants *intended* to subvert and weaken the Soviet system. ON TRIAL, *supra* note 169, at 22-23; *The Writer and Soviet Law*, THE NEW LEADER, Feb. 14, 1968, at 13, 15. Siniavsky and Daniel concentrated upon disproving intent. The transcript of the trial has been translated in ON TRIAL, *supra* note 169. In Berman's opinion, they were successful; he believes that the use of the statute against the writers indicates the great concern of the Soviet authorities in maintaining ideological unity. Raymont, *supra* note 170.

¹⁷³ It has been suggested that the two writers received such severe sentences because they refused to enter pleas of guilty. ON TRIAL, *supra* note 169, at 29; Raymont, *supra* note 170.

¹⁷⁴ The anti-parasite law provides that persons "who avoid socially useful work [or] derive nonlabor income from the exploitation of land plots, automobiles, or housing" are subject to deportation from two to five years if they fail to heed an initial warning concerning their parasitic way of life. Edict of May 4, 1961, art. 1, [1961] 10 SOV. IUST. 25 (Presidium of the Supreme Soviet of the R.S.F.S.R.). Since the law is "principally a device for getting rid of vagrants and putting them to work," its application to a poet suggests that ideological considerations were of the utmost importance to the prosecution. H. BERMAN, *JUSTICE IN THE U.S.S.R.* 85 (1963).

Brodsky was fortunate in being permitted the right to counsel. Since the statute's sanctions are considered "administrative measures," the violator's trial is not governed by the Code of Criminal Procedure. The right to counsel is only granted subject to the court's discretion. *Id.* at 295.

¹⁷⁵ *The Trial of Iosif Brodsky*, THE NEW LEADER, Aug. 31, 1964, at 6-7.

¹⁷⁶ *Id.* at 7-17. The account of counsel's closing speech is not verbatim because the reporter was discovered just prior to the oral arguments and ordered by the judge to cease writing. *Id.* at 15.

that he was at liberty in his home city of Leningrad.¹⁷⁷

The recent arrests of literally hundreds of Soviet intellectuals on charges ranging from the distribution of anti-Soviet propaganda to armed conspiracy have again raised the question of the effectiveness of defense counsel in political cases.¹⁷⁸ Reports on the trials in Moscow, Leningrad, and the Ukraine indicate that the accused persons have been granted the right to counsel, but it is impossible to assess the skill and vigor with which they have been defended because the trials have been closed to the public or open only to a select audience.¹⁷⁹ Many of the defendants have entered pleas of not guilty, but all have received heavy sentences.¹⁸⁰ This may be an indication that the defendants have been more willing than their advocates to oppose the constituted authority of the Soviet regime. On the other hand, it may simply indicate that the adversary process operates in form, but not in substance during the trials of political dissidents; the formalities of the rules governing criminal procedure are observed, counsel presents a vigorous defense, but the court's judgment is actually determined prior to the trial. That the latter speculation is more accurate is suggested by the fact that advocates for the four intellectuals tried in Moscow were showered with roses by the waiting crowd as they emerged from the courtroom.¹⁸¹ In either case, however, the accused's right to defense is severely restricted, and it would seem that the post-Stalin procedural reforms have not appreciably improved the position of Soviet citizens charged with the commission of political crimes.

¹⁷⁷ Grose, *Soviet Editor Appeals to Writers to Withstand Political Crimes*, N.Y. Times, April 14, 1966, § 1, at 10, col. 4; *The Trial of Iosif Brodsky*, *supra* note 175, at 17.

"Soviet jurists have privately criticized the decision in the Brodsky case from a legal point of view, since Brodsky was in fact working—that is, in addition to writing his own (unpublished) poems he was translating poetry for publication—and was not living on nonlabor income." *The Writer and Soviet Law*, *supra* note 172, at 15.

¹⁷⁸ Blake, *This is the Winter of Moscow's Dissent*, N.Y. Times, March 24, 1968, (Magazine), at 25; Kalb, *The Soviet Trials*, SATURDAY REV., Feb. 17, 1968, at 19.

In 1967, 150-300 persons were arrested in Leningrad and charged with armed conspiracy. Since January 1966 more than 200 intellectuals have been arrested and secretly tried in the Ukraine for distributing pamphlets in defense of Ukrainian culture and of the use of the Ukrainian language in the Ukrainian Republic. In September 1967 three young men were tried for organizing a demonstration in Moscow against the arrest of some literary figures a few days earlier. And in January 1968 four young intellectuals were tried for circulating an underground magazine. Blake, *supra* at 122, 124, 126; Kalb, *supra* at 21; *Ukrainian Intellectuals Plead for Justice*, (1968) (Radio Liberty Research Paper No. 22).

¹⁷⁹ Blake, *supra* note 178, at 124, 129; *Ukrainian Intellectuals Plead for Justice*, *supra* note 178, at 11.

¹⁸⁰ Blake, *supra* note 178, at 126, 129; Kalb, *supra* note 178, at 21.

¹⁸¹ Kalb, *supra* note 178, at 21.

2. NONPOLITICAL TRIALS

On the other hand, the role of defense counsel in the Soviet criminal process cannot be appraised solely upon the basis of the political trials. Over 90 percent of the *advokatura's* case load consists of nonpolitical cases, ranging from first-degree murder to petty theft and hooliganism.¹⁸² It is the functions performed by the advocate during the preliminary investigation, trial and appeal of these cases that most accurately describes the role of defense counsel in Soviet criminal proceedings, although the biased atmosphere pervading the political trials may eventually erode the advocate's confidence and sense of professional responsibility during the nonpolitical trials as well. The remainder of this comment will therefore focus upon the activities performed by counsel during the successive stages of the Soviet criminal process. The purpose of each stage will be described, counsel's duties will be defined, and the suggested reforms in the accused's right to counsel will be evaluated. Throughout the discussion, one theme will be self-evident: Soviet jurists have recently begun to appreciate the importance of a vigorous defense; the current suggestions for new reforms are all designed to enhance counsel's position as an adversary in the trial of nonpolitical cases.

IV. INITIATION OF A CRIMINAL CASE AND THE CONDUCT OF THE INQUIRY

A criminal case in the Soviet Union may be initiated by decree of a procurator, investigator, agency of inquiry, or judge¹⁸³ whenever there exist "sufficient data indicating the indicia of a crime."¹⁸⁴ Complaints may be brought by individuals, social organizations, state enterprises, institutions, or officials.¹⁸⁵ Criminal proceedings may also be initiated upon the basis of a confession or the direct discovery of indicia of a crime by an agency of inquiry, investigator, procurator, or court.¹⁸⁶

A. Description of the Inquiry

Once a case has been initiated, it is the duty of an agency of

¹⁸² Scanlan, *Soviet Criminal Law and Procedure: "Star Chamber" or Clinical Jurisprudence?* 19 *Rocky Mt. L. Rev.* 261, 268 (1947). Feifer gives a first-hand account of several nonpolitical trials held in Moscow People's Courts and City Courts in 1962. G. FEIFER, *JUSTICE IN MOSCOW* (1964).

¹⁸³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 112. The procurator must approve the decree to initiate a criminal case rendered by an investigator or agency of inquiry. *Id.* arts. 112, 116.

¹⁸⁴ *Id.* art. 108. The Commentary indicates that both the character and quality of the evidence must be considered when determining whether to initiate a criminal case. There must be evidence of the commission of a crime—there need not be a suspect. The evidence must provide an "objective basis" for believing that a crime has been committed. R.S.F.S.R. KOMMENTARIJ 241.

¹⁸⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 108(1)-(3).

¹⁸⁶ *Id.* art. 108(5)-(6). Cases initiated by the court or procurator are referred for an inquiry or preliminary investigation. *Id.* art. 115.

inquiry (normally the police)¹⁸⁷ to take measures to prevent or suppress the crime,¹⁸⁸ and to conduct urgent investigative actions to establish and preserve traces of the crime: view, search, seizure, examination, detention and interrogation of suspects, and interrogation of victims and witnesses.¹⁸⁹ Normally, no measure of restraint (signed promise not to depart, personal surety, surety of social organizations, confinement under guard¹⁹⁰) is applied until enough evidence has been gathered to support the presentation of an accusation indicating the crime charged and the circumstances of its commission; i.e., no measure of restraint is applied until the defendant becomes an "accused."¹⁹¹ However, in two circumstances a person may be held as a "suspect." First, when a person suspected of committing a crime is caught in the act or immediately thereafter; when eyewitnesses directly indicate the given person as the one who has committed the crime; when obvious traces of the crime are discovered on the suspect or on his clothing, either where he is or in his dwelling; and when the suspect has attempted to escape, has no permanent place of residence, or has not been identified, the person may be detained (confined under guard) as a suspect for a maximum of 72 hours.¹⁹² And second, in "exceptional instances," a measure of restraint may be applied against a person suspected of committing a crime for a maximum of ten days prior to the presentation of an accusation.¹⁹³

B. *Procedural Rights of the Suspect*

A "suspect" has specific procedural rights of which he must be

¹⁸⁷ In the R.S.F.S.R., agencies of inquiry include the police; commanders of military units, heads of correctional labor institutions, and captains of ocean-going vessels in cases of crimes committed by persons under their supervision; and agencies of state security, state fire supervision, and border protection in cases of violations of laws within their jurisdiction. *Id.* art. 117.

¹⁸⁸ *Id.* arts. 112, 118.

¹⁸⁹ *Id.* art. 119. An investigator may also detain and interrogate a person suspected of committing a crime. *Id.* art. 127.

¹⁹⁰ *Id.* art. 89.

¹⁹¹ *Id.* art. 144.

¹⁹² *Id.* art. 122. Notice of the detention must be sent to the procurator within 24 hours, and the procurator must sanction the confinement under guard or free the person detained within 48 hours. *Id.* This provision is necessitated by the constitutional guarantee that "no person shall be placed under arrest except by decision of a court of law or with the sanction of a procurator." U.S.S.R. CONST. art. 127.

¹⁹³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 90. The Commentary suggests that the circumstances of the case and the personality of the accused must be taken into consideration when determining whether to apply a measure of restraint. For example, if an extended period of time were needed to verify the evidence gathered, and if there were reason to believe that during that period the suspect might disappear or prevent the establishment of the truth, a measure of restraint could be applied for a maximum of 10 days. R.S.F.S.R. KOMMENTARIJ 215.

informed by the agency of inquiry.¹⁹⁴ Like an accused, he has the right to challenge the interpreter and the person conducting the inquiry,¹⁹⁵ present evidence,¹⁹⁶ give explanations, submit petitions, and appeal from the actions and decisions of the person conducting the inquiry, the investigator, or the procurator.¹⁹⁷ He may give testimony concerning the circumstances which serve as the ground for his detention or confinement under guard, and may also be interrogated concerning other aspects of the case known to him.¹⁹⁸ Unlike the accused, however, he has no right to counsel.¹⁹⁹

Interrogation of a suspect prior to the presentation of an accusation has been justified on the grounds that (1) it permits an innocent person to clear his name before he is formally charged with the commission of a crime,²⁰⁰ and (2) it enables law enforcement agencies to obtain information essential to the apprehension of criminals.²⁰¹ The justification is laudable, but in practice, agencies of inquiry have tended to take advantage of a suspect by questioning him as if he were an accused person without granting him an accused's procedural rights. The most flagrant violations occurred in the 1930's, when persons were detained as suspects until the preliminary investigation had been completed and a decision had been made to terminate the case or to draw up an indictment.²⁰² A suspect was asked whether he considered himself

¹⁹⁴ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 58, 123. The person conducting the inquiry is also obligated to secure the possibility of the suspect's exercising his procedural rights. *Id.*

¹⁹⁵ *Id.* art. 64, 66. A challenge may be submitted if the interpreter or person conducting the inquiry is (1) a participant in the case as a party, witness, or legal representative; (2) a relative of a participant in the case; or (3) otherwise personally interested in the case. *Id.* art. 59.

¹⁹⁶ *Id.* art. 70.

¹⁹⁷ *Id.* art. 52.

¹⁹⁸ *Id.* art. 76. The interrogation of a suspect is narrower in scope than the interrogation of an accused. A suspect is interrogated solely to enable the agencies of inquiry to verify the evidence against him. More extensive questioning must await the presentation of the accusation. Nevertheless, a suspect's testimony can be submitted in evidence and may become the basis for a court's judgment if it contradicts evidence subsequently given by the same person at the preliminary examination or in court. *Id.* art. 69; R.S.F.S.R. KOMMENTARIJ 179.

¹⁹⁹ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 52, 120.

²⁰⁰ Schlesinger, *The Discussion on Criminal Law and Procedure*, 10 SOVIET STUDIES 293, 302 (1959).

Opponents of this theory maintain that no one should be questioned until sufficient evidence has been gathered to support an accusation. *Id.*

²⁰¹ B. GALKIN, SOVETSKII UGOLOVNO-PROTSESSUAL'NYI ZAKON (Soviet Criminal Procedure Law) 204-05 (1962); V. LUKASHEVICH, GARANTII PRAV OBYVINIAMOGO V SOVETSKOM UGOLOVNOM PROTSESSE (Guarantees of the Rights of the Accused in Soviet Criminal Proceedings) 122 (1959).

²⁰² B. GALKIN, *supra* note 201, at 221; V. LUKASHEVICH, *supra* note 201, at 120; Roshchin, *Protsessual'noe polozenie podozrevaemogo v sovetskom ugolovnom protsesse* (Procedural Position of the Suspect in Soviet Criminal Proceedings), [1957] 9 S.G. I P. 69, 70. When this procedure was fol-

guilty, how he had committed the crime, and who his accomplices had been (questions normally asked of the accused), but he was not informed of the charges against him, nor was he granted an accused's right to refuse to testify or to give false testimony.²⁰³ Instead, he was treated as an ordinary witness and threatened with criminal liability for perjury or for refusing to testify.²⁰⁴ In 1937, a circular by the General Procurator of the U.S.S.R. ordered a halt to this practice, forbidding the questioning of suspects altogether.²⁰⁵ Since the 1930's marked the nadir in the annals of socialist legality, however, it is impossible to assess the extent to which the mandate was actually implemented.

The drafters of the recent legislation on criminal procedure sought to strike a compromise. Persons deemed "suspects" may now be questioned, but the term is narrowly defined and a suspect enjoys the procedural rights of an accused during the interrogation.²⁰⁶ Unfortunately, there are indications that the letter of the law is not always complied with in practice. For example, the law provides that a suspect must be informed of the crime he is suspected of committing before the interrogation begins,²⁰⁷ but the Commentary indicates that for tactical reasons, this information may be withheld until the interrogation is well under way.²⁰⁸ Likewise, a suspect is not subject to criminal liability for know-

lowed, the suspect was presented with an accusation, interrogated as an accused, and presented with the materials of the preliminary investigation all in one day. Roshchin, *supra* at 70.

²⁰³ V. LUKASHEVICH, *supra* note 201, at 121; Roshchin, *supra* note 202, at 70.

²⁰⁴ B. GALKIN, *supra* note 201, at 220-21; V. LUKASHEVICH, *supra* note 201, at 114-17.

²⁰⁵ B. GALKIN, *supra* note 201, at 221; V. LUKASHEVICH, *supra* note 201, at 121; Roshchin, *supra* note 202, at 71; Strogovich, *O podozrevaemom* (On the Suspect), [1961] 2 Sots. ZAK. 33, 37.

²⁰⁶ A suspect has no right to counsel during an interrogation, but neither does an accused unless he is a minor or incompetent to conduct his own defense. See text accompanying notes 302-06, *infra*.

Prior to the adoption of the 1960 R.S.F.S.R. Code of Criminal Procedure, it was suggested that "anyone suspected of committing a crime" be deemed a suspect. Karneeva, *Podozrevaemyi v sovetskom ugolovnom protsesse* (The Suspect in Soviet Criminal Proceedings), [1959] 4 Sots. ZAK. 35-36. Strogovich and Roshchin objected to this definition because it was so broad that citizens could be questioned before any evidence had been collected against them. Roshchin, *supra* note 202, at 75; Strogovich, *supra* note 205, at 35. Strogovich's suggestion that the definition of a suspect be limited to persons detained on suspicion of committing a crime or to whom a measure of restraint had been applied prior to the presentation of an accusation was adopted by the drafters of the Code. R.S.F.S.R. 1960 CRIM. PRO. C. art. 52; Strogovich, *supra* note 205, at 35-37.

²⁰⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 123.

²⁰⁸ R.S.F.S.R. KOMMENTARI 269. If a measure of restraint is applied, the suspect will be informed of the charges against him prior to the interrogation because the decree to apply the measure of restraint must be announced to him and it indicates the crime which he is suspected of committing.

ingly giving false testimony²⁰⁹ or for refusing to testify.²¹⁰ But nothing in the Code of Criminal Procedure requires an agency of inquiry to so inform a suspect, and the commentary indicates that a person conducting an inquiry may "warn" the suspect that his testimony will be "carefully verified,"²¹¹ thereby inducing him to tell the truth.

The suspect's right to defense is certainly better protected under the present Code of Criminal Procedure than it was in the 1930's. Nevertheless, opportunities for abuse continue to exist, and as long as a suspect is not permitted to have counsel inform him of his procedural rights, it can be anticipated that agencies of inquiry will be successful in obtaining coerced confessions and other information which would not otherwise be readily available to them. For this reason, it has been suggested by at least one Soviet jurist that the right to counsel be extended to the interrogation of suspects in serious criminal cases.²¹²

C. *Inquiry or Preliminary Investigation: Denial of the Right to Counsel*

Once an agency of inquiry has conducted urgent investigative activities, including the interrogation of suspects, two courses of action are open to it. In serious criminal cases, a preliminary investigation is obligatory and the case must be transferred immediately to an investigator.²¹³ Supplementary search and investigative operations may be conducted by the agency of inquiry, but only upon request of the investigator.²¹⁴ In less serious cases, the agency of inquiry retains jurisdiction over the case. It conducts

²⁰⁹ If a witness knowingly gives false testimony, he is subject to deprivation of freedom for not more than one year. R.S.F.S.R. 1960 CRIM. C. art. 181.

²¹⁰ If a witness refuses to testify, he may be punished by correctional tasks for a term not exceeding six months, by a fine not exceeding 50 rubles, or by social censure. *Id.* art. 182.

²¹¹ R.S.F.S.R. KOMMENTARIJ 269. On the other hand, it is a violation of procedural law for an agency of inquiry to tell a suspect that he is criminally responsible under articles 181-82 of the 1960 R.S.F.S.R. Criminal Code. R.S.F.S.R. KOMMENTARIJ 129.

²¹² Kovalev, *Rasshirit' uchastie zashchitnika na predvaritel'nom sledstvii* (The Participation of Defense Counsel in the Preliminary Investigation Should be Expanded), [1967] 23 Sov. IUST. 23.

²¹³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 119. A preliminary investigation is also obligatory in cases involving minors or persons unable to conduct their own defense. *Id.* art. 126. The case must be transferred to the investigator within 10 days. *Id.* art. 121.

For a discussion of the relationship between the inquiry and the preliminary investigation see Shatilo, *Sootnoshenie doznaniia i predvaritel'nogo sledstviia po novomu zakonodatel'stvu* (Interrelationship of the Inquiry and the Preliminary Investigation under the New Legislation), [1961] 10 SOTS. ZAK. 34-36.

²¹⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 119.

an inquiry, collecting the evidence which supports the conclusion to indict and which subsequently constitutes the basis for considering the case in court.²¹⁵ The inquiry is generally governed by the rules established for conducting a preliminary investigation. There are two exceptions, however: (1) it must be conducted within a shorter period of time,²¹⁶ and (2) defense counsel is not permitted to participate.²¹⁷

1. HISTORY OF THE DELIMITATION BETWEEN THE INQUIRY AND THE PRELIMINARY INVESTIGATION

The present delimitation between the inquiry and the preliminary investigation was first made in prerevolutionary Russia, where an inquiry constituted an "administrative" or "police" investigation.²¹⁸ The rules of criminal procedure did not govern agencies of inquiry, nor did the information obtained during an inquiry have evidentiary value at the trial.²¹⁹ A preliminary investigation, on the other hand, was conducted in compliance with the Code of Criminal Procedure, and the dossier compiled during the investigation did have probative value in court.²²⁰ When the Bolsheviks came to power, the two types of pretrial investigation were formally retained, but the distinctions between them were largely eliminated.²²¹ Both proceedings are now governed by the Code of Criminal Procedure, and the data collected by agencies of inquiry and by investigators have equal evidentiary weight.²²²

The retention of two distinct types of pretrial investigation has been upheld on the theory that if "less serious crimes" requiring the use of "less complex investigative techniques" are sent to agen-

²¹⁵ *Id.* art. 120. An agency of inquiry may terminate the case or draw up a conclusion to indict, depending upon the sufficiency of the evidence. *Id.* art. 124.

²¹⁶ An inquiry must be completed within one month unless special permission is obtained from the procurator exercising supervision over the case, in which case it may be extended one more month. Only in exceptional cases may the inquiry be prolonged indefinitely by the R.S.F.S.R. Procurator, Chief Military Procurator, or U.S.S.R. Procurator General. *Id.* art. 121. A preliminary investigation is to be completed within two months, may be extended another two months, and may be prolonged indefinitely only in exceptional circumstances. *Id.* art. 133.

²¹⁷ *Id.* art. 120. There are two other exceptions, but neither affects the defendant. *Id.*

²¹⁸ N. ZHOGIN & F. FATKULLIN, *PREDVARI TEL'NOE SLEDSTVIE V SOVETSKOM UGOLOVNO M PROTSESSE* (Preliminary Investigation in Soviet Criminal Proceedings) 49 (1965); Grzybowski, *supra* note 166, at 438-39; Perlov, *supra* note 126, at 48. The prerevolutionary Russian delimitation between an inquiry and a preliminary investigation was based upon the Continental European pattern of pretrial proceedings.

²¹⁹ Grzybowski, *supra* note 166, at 439; Perlov, *supra* note 126, at 48.

²²⁰ Grzybowski, *supra* note 166, at 439; Perlov, *supra* note 126, at 48.

²²¹ N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 49; Perlov, *supra* note 126, at 48.

²²² R.S.F.S.R. 1960 CRIM. PRO. C. art. 120.

cies of inquiry, persons conducting preliminary investigations will be permitted to concentrate their energies on more difficult cases.²²³ In 1962, however, Perlov voiced an objection to the "artificial demarcation" between the inquiry and preliminary investigation.²²⁴ He charged that the only difference between the two proceedings was the name of the agency conducting the investigation, yet persons whose cases were handled by agencies of inquiry were denied the right to counsel.²²⁵ To eliminate this injustice and to streamline the administration of pretrial proceedings, Perlov suggested that all investigatory agencies be combined into a single investigatory apparatus. If that were not immediately possible, he proposed that the Code of Criminal Procedure be revised to eliminate all remaining differences between the inquiry and the preliminary investigation, thereby guaranteeing a suspect the right to counsel during the inquiry.²²⁶

2. EXPANSION OF THE RIGHT TO COUNSEL DURING THE PRETRIAL INVESTIGATION

Neither of Perlov's suggestions was adopted, but in 1963 a step was taken to extend the right to counsel to a greater number of defendants during the investigatory phase of Soviet criminal proceedings. Investigators in the agencies of protection of public order were empowered to conduct preliminary investigations²²⁷ and were given jurisdiction over approximately 40 types of criminal offenses for which they had previously conducted inquiries.²²⁸

²²³ A. KOBLIKOV, PRAVO NA ZASHCHITU NA PREDVARITEL'NOM SLEDSTVII (Right to Defense at the Preliminary Investigation) 54 (1961); N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 52, 56-57. It has also been suggested that the operative-search measures undertaken by agencies of inquiry are so different from the investigative techniques employed by investigators that the two types of pretrial investigation should remain separated. Strogovich, Kalenov & Gertsezon, *The New Laws on the Judicial System, the Criminal Code, and the Code of Criminal Procedure of the Russian Federation*, [1961] 1 S.G. 1 P. 24, transl. in 1 Sov. L. & Gov't No. 1, at 33, 41 (1962).

²²⁴ Perlov, *supra* note 126, at 50.

²²⁵ *Id.* at 48-49.

²²⁶ *Id.* at 50. Galkin approved Perlov's suggestion. B. GALKIN, *supra* note 201, at 211.

²²⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 125 (as amended by Edict of April 6, 1963). Prior to 1963, investigators of the agencies of protection of public order only conducted inquiries. N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 51.

²²⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 126 (as amended by Edict of April 15, 1963). The decree reduced from 50% to 10-15% the number of cases in which an inquiry is conducted. N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 32. The reform was praised for permitting agencies of inquiry to devote more time to their "police" functions by relieving them of their investigatory duties. *Id.* at 52-53; Zhogin, *Izmenenie zakona o podsledstvennosti i zadachi prokurorskogo nadzora za sledstviem i doznaniem* (Change in the Law on the Gathering and Scrutiny of Evidence and the Tasks of

This increase in the number of cases in which a preliminary investigation was conducted automatically increased the number of cases in which the accused was guaranteed the right to counsel. In fact, counsel is now denied only in cases of relatively minor criminal offenses,²²⁹ and even then, a person charged with the commission of such a crime may be given a preliminary investigation upon order of a court or procurator.²³⁰

3. SUGGESTED REFORM: EXTENSION OF THE RIGHT TO COUNSEL TO THE INQUIRY

Despite the advances registered by the 1963 legislation, pressures have continued to exist for a more comprehensive reform. It has recently been suggested that a suspect be granted the same right to counsel as that currently accorded an accused during the preliminary investigation; *i.e.*, the right to counsel upon completion of the inquiry during the period that a suspect becomes familiar with the materials of the case.²³¹ Many cases handled by agencies of inquiry are quite complex, and it is believed that counsel's presence is essential to the realization of the suspect's right to defense. In answer to objections that counsel's presence would interfere with and prolong the conduct of an inquiry, it is asserted that counsel would enter the case only after the inquiry had been completed, and that counsel would probably not be requested unless the case were so complex that the suspect would be unable to conduct his own defense.²³²

It is difficult to explain the failure thus far to adopt such a reform, especially since it has been proven that counsel's presence does not unduly obstruct the conduct of the preliminary investigation. Indeed, it would seem that an even more drastic reform would be desirable: counsel should be permitted to enter the case from the time that a suspect is informed of the charges against him, rather than from the time that he is presented with the materials of the inquiry. This would permit an advocate to

Procuratorial Supervision over the Investigation and Inquiry), [1963] 9 SOTS. ZAK. 3, 5.

²²⁹ The crimes subject to investigation by an agency of inquiry are defined by the R.S.F.S.R. 1960 CRIM. C. arts. 96 (para. 1), 97, 158, 162 (para. 1), 163, 168-69, 197-201, 206 (paras. 1 & 3), 209.

²³⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 126; R.S.F.S.R. KOMMENTARI 116.

²³¹ Perlov, *Nauka sovetskogo uolovnogo protsesssa i sovershenstvovanie zakonodatel'stva* (Study of Soviet Criminal Proceedings and the Improvement of Legislation), [1967] 11 SOTS. ZAK. 37, 42; Shafir, *Pravo na zashchitu v sovetskom ugolovnom sudoproizvodstve i vozmozhnosti ego rasshireniiia* (The Right to Defense in Soviet Criminal Proceedings and the Possibilities for its Expansion), [1967] 2 S.G. I P. 47, 48.

²³² Shafir, *supra* note 231, at 48; Shein, *Zashchitnik na predvaritel'nom sledstviu v sovetskom ugolovnom protsesse* (Defense Counsel at the Preliminary Investigation in Soviet Criminal Proceedings), [1962] 6 S.G. I P. 118, 120.

advise the suspect of his procedural rights, particularly during the interrogation by the agency of inquiry, and would also enable counsel to assist his client in the presentation of evidence. Such a right to counsel is currently enjoyed only at the preliminary investigation by minors and persons physically or mentally unable to conduct their own defense. It has been suggested, however, that a similar guarantee be extended to all defendants. Until such a reform has been instituted at the preliminary investigation, it is highly unlikely that it will be advanced to the inquiry. Therefore, a more complete discussion of the proposal will be reserved for the section below on the preliminary investigation.²³³

V. PRELIMINARY INVESTIGATION

A. Description of the Preliminary Investigation

The preliminary investigation is conducted by an investigator who is expected to collect evidence both for and against the accused.²³⁴ The investigation is supposed to be completed within two months, but it may be prolonged an additional two months with the permission of a procurator, and in exceptional cases it may be prolonged indefinitely.²³⁵ A wide variety of activities are conducted by the investigator. He is empowered to conduct a view of the scene of the crime,²³⁶ to seize articles and documents of significance for the case,²³⁷ and to conduct a search of persons²³⁸ or premises²³⁹ if he has sufficient grounds to suppose that instruments of the crime or other articles of significance for the case will be uncovered. An accused, suspect, witness, or victim may be examined to establish traces of the crime or particular marks upon his body,²⁴⁰ and investigative experiments reproducing the circumstances of the crime may be performed to verify and specify data collected during earlier phases of the preliminary investigation.²⁴¹ Ordinary citizens who are not interested in the

²³³ See text accompanying notes 393-443, *infra*.

²³⁴ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 14; R.S.F.S.R. 1960 CRIM. PRO. C. art. 20; R.S.F.S.R. KOMMENTARIJ 65-66. The preliminary investigation closely parallels the French *instruction criminelle*, described in Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441 (1960).

²³⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 133. In nonpolitical cases, an emphasis seems to be placed upon the importance of completing the preliminary investigation within two months. N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 84.

²³⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 178-80.

²³⁷ *Id.* art. 167. The seizure of postal and telegraphic correspondence is also permitted with the sanction of a procurator or in accordance with a ruling of a court.

²³⁸ *Id.* art. 172. The procedure for conducting all searches and seizures is described in *id.* arts. 170-71.

²³⁹ *Id.* arts. 12, 168.

²⁴⁰ *Id.* art. 181.

²⁴¹ *Id.* art. 183.

case must be present as witnesses during the conduct of all the above investigative activities.²⁴² If the investigation has been conducted in compliance with the Code of Criminal Procedure and if it has been accurately reported, the witnesses sign the record of the investigative activity and testify in court should a dispute arise concerning the propriety or impartiality of the investigative activity. If the investigation has not been conducted as reported, they may refuse to sign the record, and if procedural violations have occurred, they may complain to the supervising procurator.²⁴³ Unfortunately, there is no empirical evidence indicating the extent to which these witnesses actually do provide an adequate safeguard of the accused's procedural rights in the absence of counsel during the early phases of the preliminary investigation. It can be speculated, however, that they rarely criticize the conduct of the preliminary investigation, particularly since they have no legal training and since they serve as witnesses on a short-term basis only, taking a temporary leave of absence from their regular jobs.

In addition to collecting real evidence, the investigator is empowered to interrogate the accused,²⁴⁴ victim,²⁴⁵ and other witnesses²⁴⁶ and to carry out a confrontation between two persons in whose testimony there are substantial contradictions.²⁴⁷ A line-up of persons or objects may be presented for identification to a witness, victim, suspect, or accused,²⁴⁸ and expert examinations are frequently conducted during the preliminary investigation.²⁴⁹ It is interesting to note that witnesses are not required to attend any of the above investigative activities, although the need for a disinterested observer would seem to be at least as critical during a line-up or interrogation as during the conduct of a search or seizure.

On the basis of the evidence so collected, the investigator makes a decision to terminate the case or to draw up a conclusion to indict.²⁵⁰ If the case is brought to trial, the evidence gathered during the preliminary investigation also becomes the basis for consideration of the case in court. The court is bound neither by the scope of the preliminary investigation nor by the investigator's

²⁴² *Id.* arts. 135, 169, 179, 183.

²⁴³ *Id.* arts. 135, 176, 182-83; R.S.F.S.R. KOMMENTARIJ 287-88.

²⁴⁴ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 150-52. For a fuller discussion of this investigatory activity see text accompanying notes 411-34, *infra*.

²⁴⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 161.

²⁴⁶ *Id.* arts. 158, 160.

²⁴⁷ *Id.* arts. 162-63. It has been suggested that the confrontation of witnesses serves the function of a cross-examination. Anton, *supra* note 234, at 442.

²⁴⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 164-66.

²⁴⁹ *Id.* arts. 184-94. For a fuller discussion of this investigative activity see text accompanying notes 440-41, *infra*.

²⁵⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 199.

appraisal of the evidence collected, and the judgment is to be founded only on evidence considered directly by the court during the trial.²⁵¹ However, it is primarily the evidence uncovered during the preliminary investigation which actually forms the basis for the court's judgment; very little supplemental evidence is either requested or presented.²⁵² Instead, the court verifies the evidence collected during the preliminary investigation and interrogates the defendant and the key witnesses called by the investigator.²⁵³ If discrepancies arise between the testimony given during the preliminary investigation and that given during the trial, the court may conclude that the earlier testimony is more trustworthy and adopt it as the basis for its final judgment.²⁵⁴ The significance of the preliminary investigation should therefore not be underestimated, particularly with respect to the importance of protecting the accused's right to defense. The outcome of the trial is very apt to be determined by the evidence collected during the preliminary investigation. If the investigation is properly conducted, the dossier compiled will be so complete that very few innocent persons will be convicted.²⁵⁵ To attain this result, however, either the investigator must be absolutely impartial, or the defendant must actively participate in the presentation of evidence. Since it is highly probable that Soviet investigators have an accusatory bias,²⁵⁶ it would seem desirable to permit counsel to assist the accused in presenting evidence favorable to the defense during the early stages of the preliminary investigation in all cases, not just in those involving minors or persons physically or mentally unable to conduct their own defense.

B. Unique Characteristics of the Preliminary Investigation

1. PRIVATE PROCEEDING

There are two unique characteristics of the preliminary investi-

²⁵¹ *Id.* arts. 240, 301; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 181. Prior to the passage of the U.S.S.R. 1958 Principles of Criminal Procedure, there was no provision requiring courts to base their judgment strictly on evidence considered at the trial. B. GALKIN, *supra* note 201, at 213.

²⁵² N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 86. The file (dossier) of a case contains a written record of the investigative activities with real evidence appended. It is presented to the court for its examination prior to the trial. R.S.F.S.R. 1960 CRIM. PRO. C. arts. 141, 217. Parties to the case may petition the presentation of supplemental evidence. *Id.* arts. 276, 294.

²⁵³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 240; R. RAKHUNOV, *supra* note 104, at 119.

In Soviet criminal proceedings, the judge leads the interrogation of witnesses and of the accused. R.S.F.S.R. 1960 CRIM. PRO. C. arts. 280, 283. At the end of the preliminary investigation, the investigator draws up a list of witnesses to be summoned to the trial which is examined and approved by the procurator. *Id.* arts. 206, 216.

²⁵⁴ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 281, 286.

²⁵⁵ Anton, *supra* note 234, at 441, 456.

²⁵⁶ See text accompanying notes 265-67, 282-85, *infra*.

gation: it is conducted in private and the proceedings are inquisitional, rather than adversary in form. Divulgence of the data of a preliminary investigation without permission of an investigator or procurator is a violation of Soviet criminal law.²⁵⁷ The purpose of this prohibition is twofold: it makes it easier for the investigator to obtain evidence, and at the same time, it protects the accused against the release of prejudicial information prior to the decision to indict.²⁵⁸

2. INQUISITIONAL PROCEEDING

a. Judicial or procuratorial supervision

Because the preliminary investigation is an inquisitional proceeding, the parties do not control the presentation of the evidence. Instead, the investigator is charged with the responsibility of adducing evidence for and against the accused. It is therefore of the utmost importance that he be impartial, independent of both the prosecution and the defense, and knowledgeable of the law. During the early years of the Soviet regime, an effort was made to meet these criteria by making the investigators officials of the courts and by giving the courts supervisory powers over their activities.²⁵⁹ In 1922, however, the procuracy (a prerevolutionary Russian institution for the supervision of legality²⁶⁰) was reestablished and empowered to supervise the conduct of the preliminary investigation.²⁶¹ The investigators thus remained officials of the courts, but came under the dual supervision of both the courts and the procuracy.²⁶² To eliminate the resulting inefficiency, it

²⁵⁷ R.S.F.S.R. 1960 CRIM. C. art. 184; R.S.F.S.R. 1960 CRIM. PRO. C. art. 139. These same provisions also apply to information collected during the inquiry.

²⁵⁸ R.S.F.S.R. KOMMENTARIJ 290; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 90-91. If the case is terminated at the end of the preliminary investigation, this prohibition prevents the release of information damaging to the innocent person's reputation. The protection offered the accused is not as complete as it is in France, however, because the Soviet press is permitted to release information and evaluate the evidence prior to the trial. Only recently has this prejudging of criminal cases been subjected to criticism. See Anton, *supra* note 234, at 443.

²⁵⁹ SOVIET CRIMINAL LAW AND PROCEDURE 75; Iasinskii, *O protsessual'noi samostoiatel'nosti sledovatel'ia* (On the Procedural Independence of the Investigator), [1964] 9 S.G. I P. 64; Zhogin, *Isotriia razvitiia i sovershenstvovaniia predvaritel'nogo sledstviia v SSSR* (History of the Development and Improvement of the Preliminary Investigation in the U.S.S.R.), [1967] 1 SOTS. ZAK. 3, 4-6.

In France and Germany, an impartial judicial magistrate (a *juge d'instruction* or *Untersuchungsrichter*) presides over the preliminary investigation and there is a right of appeal to the court if the accused's procedural rights are abused. SOVIET CRIMINAL LAW AND PROCEDURE 75; Anton, *supra* note 234, at 442-43.

²⁶⁰ H. BERMAN, *supra* note 174, at 240-41.

²⁶¹ *Id.* at 242.

²⁶² SOVIET CRIMINAL LAW AND PROCEDURE 75-76; Grodzinskii, *Protsessual'*

was decided in 1928-1929 to transfer all supervision over the preliminary investigation to the procuracy and to make the investigators officials of the procuracy.²⁶³

It was said that supervisory control by the courts had proven ineffective because judicial action could not be taken until the investigation was completed. The opportunity for effective supervision was to be greatly enhanced by transferring the investigators to the procuracy because it would locate the investigator and the supervising procurator in the same office, thereby permitting the procurator to observe the investigator in action.²⁶⁴ The reform had one serious drawback, however. The procuracy is also the prosecuting arm of the Soviet legal system, and by transferring the investigators to the procuracy, the reform jeopardized their impartiality.²⁶⁵ Many Soviet jurists maintain that the investigators have not acquired an accusatory bias because the function of the procuracy during the preliminary investigation is to supervise the legality of the proceedings, not to uphold the accusation.²⁶⁶ Western commentators, on the other hand, assert that this is too formalistic an appraisal of the investigator's position. Ultimately, it is the duty of the procuracy to prosecute. This makes the investigator's position at best ambiguous, and at worst deserving of the charge that it is tinged by the procuracy's accusatory bias.²⁶⁷

b. *Organization and functions of the procuracy*

In order to analyze the two opposing viewpoints, it is necessary to describe briefly the organization and functions of the procuracy. The distinctive feature of the procuracy from an institutional standpoint is its organizational unity. The procuracy is headed by the Procurator General of the U.S.S.R., who is appointed by the Supreme Soviet of the U.S.S.R. for a seven-year term (the longest term of appointment in the Soviet governmental system).²⁶⁸ The

noe polozenie sledovatel'ia (Procedural Position of an Investigator), [1959] 6 SOTS. ZAK. 19; Iasinskii, *supra* note 259, at 65; Zhogin, *supra* note 259, at 6-7. The court had the final say because it retained jurisdiction over appeals from participants in the preliminary investigation. The procurator could only assume jurisdiction over appeals regarding the investigator's illegal conduct, delays in the investigation, and improper application of measures of restraint. Grodzinskii, *supra* at 19; Zhogin, *supra* note 259, at 7.

²⁶³ SOVIET CRIMINAL LAW AND PROCEDURE 76; Grodzinskii, *supra* note 262, at 20; Zhogin, *supra* note 259, at 7, 9.

²⁶⁴ SOVIET CRIMINAL LAW AND PROCEDURE 76.

²⁶⁵ Iasinskii, *supra* note 259, at 65.

²⁶⁶ M. CHEL'TSOV, SOVETSKII UGOLOVNYI PROTSESS (Soviet Criminal Proceedings) 32 (1962); R. RAKHUNOV, *supra* note 104, at 119, 122, 127, 153.

²⁶⁷ G. FEIFER, *supra* note 182, at 93, 132; Ginsburgs, *The Soviet Procuracy and Forty Years of Socialist Legality*, 18 AM. SLAVIC REV. 34, 56 (1959).

²⁶⁸ U.S.S.R. CONST. art. 114; SOVIET CRIMINAL LAW AND PROCEDURE 109; Ginsburgs, *supra* note 267, at 50.

Procurator General appoints the republic and regional procurators and approves the appointment of area, district and city procurators by the republic procurator.²⁶⁹ The institution is therefore completely centralized, and unlike other governmental agencies, which are dually subordinated, it is free from local control.²⁷⁰ This enables it to exercise one of its primary functions: supervisory control over the execution of the laws and the observance of legality by executive, administrative, and judicial agencies.²⁷¹ It is in this connection that the procuracy supervises the observance of legality by agencies of inquiry and preliminary investigation.²⁷² It must "strictly watch out that not a single citizen is subjected to illegal or unfounded criminal prosecution or to any other unlawful reservation of rights" and "watch over the undeviating observance by agencies of inquiry and preliminary investigation of the legally established procedure for investigating crimes."²⁷³ In addition to its supervisory functions, however, the procuracy is also charged with the responsibility of instituting²⁷⁴ and prosecuting criminal proceedings.²⁷⁵ It is therefore difficult to determine whether an investigator attached to the procuracy would be more or less impartial than one attached to the court. To the extent that an investigator is influenced by the activities of the prosecuting arm of the procuracy's staff, he is certainly not capable of conducting an impartial, objective preliminary investigation. But to the extent that the investigator is associated with the organizational unity, independence, and authority of the supervisory branch of the procuracy, he may well enjoy more prestige and a better reputation for impartiality than he would as a court

²⁶⁹ U.S.S.R. CONST. arts. 115-16. SOVIET CRIMINAL LAW AND PROCEDURE, *supra* note 259, at 109; Ginsburgs, *supra* note 267, at 51.

²⁷⁰ SOVIET CRIMINAL LAW AND PROCEDURE 109-10; Ginsburgs, *supra* note 267, at 50-51.

Most governmental agencies are dually subordinate to both local and higher authorities. The exemption of the procuracy from dual subordination was intended to ensure the uniform application of the laws. The procuracy is the "watchdog of legality" *for*, not *against*, the central authorities, however. It is not independent of the Communist Party. SOVIET CRIMINAL LAW AND PROCEDURE 110-11.

²⁷¹ SOVIET CRIMINAL LAW AND PROCEDURE 110-11. A historical account of the development of the procuracy's various functions may be found in Ginsburgs, *supra* note 267, at 34.

²⁷² Edict of May 24, 1955, Statute on Procuratorial Supervision, art. 3, [1955] 9 Ved. Verkh. Sov. S.S.S.R. Item 22.

²⁷³ *Id.* art. 17.

"A procurator shall be obliged to consider, within the time established by law, complaints addressed to him or received by him against actions of agencies of inquiry and of preliminary investigation and to inform the complainants of the decisions taken on their complaints." *Id.* art. 21.

The procurator's specific supervisory powers with respect to the preliminary investigation are listed in R.S.F.S.R. 1960 CRIM. PRO. C. art. 211.

²⁷⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 211(1)(a).

²⁷⁵ *Id.* art. 248.

official.²⁷⁶ Perhaps for this reason the drafters of the Principles of Criminal Procedure decided to retain procuratorial supervision over the preliminary investigation, but simultaneously sought to increase the independence of the investigator's position vis-à-vis the supervising procurators.²⁷⁷

c. Increased independence of investigatory agencies

The R.S.F.S.R. Code of Criminal Procedure empowers investigators of the procuracy, investigators of agencies of protection of public order, and investigators of agencies of state security to conduct a preliminary investigation.²⁷⁸ All of the investigators are subject to procuratorial supervision, but an effort has been made to increase their procedural independence by (1) giving them sole responsibility for making decisions concerning the course of the investigation and the performance of investigative actions,²⁷⁹ (2) authorizing them to give binding instructions directly to agencies of inquiry concerning the conduct of search and investigative actions,²⁸⁰ and (3) permitting them to disagree with the instructions of the procurator concerning the decision to prosecute a person as the accused, the nature of the crime, the scope of the accusation, and the decision to terminate the case or bring the accused to trial. In the event of a disagreement, the investigator may submit the case with his written objections to a higher procurator, and the higher procurator may not order the investigator to take any action against the dictates of his inner conviction based on a thorough, complete, and objective consideration of all the evidence in the case.²⁸¹

The independence of the investigator is somewhat illusory, however. In the event of a disagreement, the higher procurator can terminate the case²⁸² or, should he decide to indict, either

²⁷⁶ H. BERMAN, *supra* note 174, at 243; SOVIET CRIMINAL LAW AND PROCEDURE 76, 78.

²⁷⁷ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 30; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 59.

²⁷⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 125.

²⁷⁹ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 30; R.S.F.S.R. 1960 CRIM. PRO. C. art. 127. An exception is made for instances when the law requires that the procurator's sanction be obtained. The purpose of the procuratorial sanction in these instances, however, is to protect personal or property rights, not to curb the investigator's independence. R. RAKHUNOV, *supra* note 104, at 136.

²⁸⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 127. Previously, the investigator had to transmit his instructions to the agencies of inquiry through the supervising procurator. N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 60.

²⁸¹ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 71, 127; R.S.F.S.R. KOMMENTARIJ 276. On all other matters (primarily the illegality of particular investigative actions) the procurator's instructions are subject to appeal, but are otherwise binding on the investigator. R.S.F.S.R. KOMMENTARIJ 276; R. RAKHUNOV, *supra* note 104, at 141.

²⁸² R.S.F.S.R. 1960 CRIM. PRO. C. arts. 127, 211 (2) (i).

transfer the case to another investigator or conduct the preliminary investigation himself.²⁸³ The individual investigator may not be forced to act against his inner conviction, but the accused derives no benefit from the investigator's independence. The outcome of the preliminary investigation still depends upon the decision of a supervisory procurator. The question therefore remains whether enough has been done to eliminate the real dangers of abuse in placing the investigators under procuratorial control. Institutional reforms have been suggested to eliminate the present organizational bond between the supervising procurator and the investigator: it has been recommended (1) that the investigator's section be severed from the procuracy and established as an independent agency;²⁸⁴ or (2) that the administrative subordination of the investigators to the supervisory section of the procuracy be completely eliminated.²⁸⁵ A more effective step toward protecting the accused against an investigator's accusatory bias, however, would be the extension of the right to counsel to the preliminary investigation.

C. Right to Counsel During the Preliminary Investigation

1. HISTORY

Immediately after the Bolsheviks came to power, counsel was temporarily permitted to participate during the preliminary investigation. At first, defense attorneys enjoyed an unrestricted right of participation,²⁸⁶ but soon this was changed; counsel could be excluded "in the interests of discovering the truth."²⁸⁷ The limitation was justified on the ground that many defense attorneys were lawyers who had practiced under the Tsarist regime and who therefore had a special interest in obstructing the ascertainment of

²⁸³ *Id.* arts. 127, 211(2)(c). To enhance the procedural independence of the investigator, it has been suggested that the procurator should avoid exercising his powers to conduct all or part of the preliminary investigation. R. RAKHUNOV, *supra* note 104, at 154-55.

²⁸⁴ Iasinskii, *supra* note 259, at 72.

It might have seemed that the creation of an investigatory division within the agency of protection of public order in 1963 would increase the procedural independence of those investigators because they are not located in the procuracy's offices. However, procuratorial supervision over these investigators, who now conduct approximately 50% of the preliminary investigations in the Soviet Union, has been extremely strict. Supervising procurators are present in person during the conduct of many of their investigative activities. The investigators of the agencies of protection of public order therefore enjoy no greater independence from the supervising procurators than do the investigators of the procuracy. *Id.* at 69-70.

²⁸⁵ *Id.* at 72.

²⁸⁶ Decree of Dec. 5 (Nov. 22), 1917, art. 3, [1917] 4 S.U. R.S.F.S.R. Item 50.

²⁸⁷ Decree of Nov. 30, 1918, art. 34, [1918] 85 S.U. R.S.F.S.R. Item 889 (All Russian Central Executive Committee).

the truth.²⁸⁸ Finally advocates were barred altogether from attending the preliminary investigation.²⁸⁹

Not until the late 1930's did the Soviets place enough confidence in the loyalty of their advocates to once again consider permitting them to participate in the preliminary investigation.²⁹⁰ Prior to the adoption of the Principles of Criminal Procedure in 1958, the question was heatedly debated.²⁹¹ It was generally agreed that counsel should be admitted to the preliminary investigation. No agreement could be reached, however, regarding the precise moment at which counsel should be permitted to enter the case.²⁹² Several jurists suggested that counsel be admitted from the beginning of the preliminary investigation. They maintained that without counsel, the accused's right to defense during the preliminary investigation could not be realized because the defendant did not know enough about the law to present pertinent evidence.²⁹³ Furthermore, counsel's presence was considered necessary to protect the accused against the investigator's accusatory bias²⁹⁴ and to serve as a witness on behalf of the accused should he charge the investigator with violating his procedural rights.²⁹⁵

The opponents of this theory objected that counsel's presence during the early stages of the preliminary investigation would not only delay the proceedings, but also obstruct the investigator in ascertaining the objective truth and in waging his fight against crime.²⁹⁶ They proposed that counsel should not be admitted until the preliminary investigation had been completed and the accused presented with materials of the case.²⁹⁷ Counsel could

²⁸⁸ V. LUKASHEVICH, *supra* note 201, at 88.

²⁸⁹ R.S.F.S.R. 1923 CRIM. PRO. C. art. 250. Counsel was not permitted to enter the case until the time of the trial. A. KOBLIKOV, *supra* note 223, at 52.

²⁹⁰ Vyshinsky was the first Soviet jurist to suggest extending the right to counsel to the preliminary investigation, and then he felt that counsel should be excluded from political cases. N. POLIANSKI, *supra* note 116, at 137.

²⁹¹ *Id.* at 138.

²⁹² *Id.* at 138-39; Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 31.

²⁹³ Bekeshko, *supra* note 164, at 252-53; Kaminskaiia, *O prave obviniaemogo na zashchitu v stadii predvaritel'nogo rassledovaniia* (On the Accused's Right to Defense at the Stage of the Preliminary Investigation), [1958] 9 S.G. I P. 97-98; Schlesinger, *The Discussion on Criminal Law and Procedure*, 10 SOVIET STUDIES 293, 302 (1959).

²⁹⁴ Bekeshko, *supra* note 164, at 253; Kaminskaiia, *supra* note 293, at 98-99; Taras, *Problems of Revision and Retrial—The Rights of the Defendant in Light of the Draft Basic Principles of Soviet Criminal Procedure*, 10 SOVIET STUDIES 213, 226 (1959).

²⁹⁵ Kaminskaiia, *supra* note 293, at 99; Schlesinger, *supra* note 293, at 302. It was also suggested that counsel could prevent the defendant from bringing unfounded charges of abuse against the investigator. Kaminskaiia, *supra* note 293, at 99.

²⁹⁶ Kaminskaiia, *supra* note 293, at 97; Perlov, *supra* note 231, at 39.

²⁹⁷ N. POLIANSKI, *supra* note 116, at 141; Bekeshko, *supra* note 164, at 253.

then assist the accused in becoming acquainted with the materials of the preliminary investigation and petition supplementary evidence prior to the drafting of the conclusion to indict. The accused's right to defense would be adequately protected, and the conduct of the preliminary investigation would not be unnecessarily obstructed.²⁹⁸

A cogent rebuttal was advanced by those who thought that counsel should participate from the beginning of the preliminary investigation. They asserted that an advocate obligated to use only lawful methods of defense would not obstruct the conduct of the investigation.²⁹⁹ On the contrary, he would improve the completeness and objectivity of the evidence collected. And although slight delays might occur, they would be counterbalanced by the improved quality of the evidence.³⁰⁰ Furthermore, in many instances counsel's presence would shorten the length of the preliminary investigation because he could prevent the investigator from following up on false leads.³⁰¹

Despite the persuasiveness of the rebuttal, the debate was won by those who advocated that counsel not be admitted until the accused is presented with the materials of the case at the end of the preliminary investigation.³⁰² Only minors³⁰³ and persons who are physically³⁰⁴ or mentally incapable of conducting their own defense³⁰⁵ now enjoy an obligatory right to counsel from the beginning of the preliminary investigation.³⁰⁶

²⁹⁸ N. POLIANSKII, *supra* note 116, at 141; Bekeshko, *supra* note 164, at 253.

²⁹⁹ Schlesinger, *supra* note 293, at 302. Counsel would only be acquainted with those materials which the accused is permitted to see during the investigation. Kaminskaiia, *supra* note 293, at 98.

³⁰⁰ Bekeshko, *supra* note 164, at 253; Kaminskaiia, *supra* note 293, at 99.

³⁰¹ Schlesinger, *supra* note 293, at 302.

³⁰² U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 22; R.S.F.S.R. 1960 CRIM. PRO. C. art. 47.

The formula adopted by the drafters of the Principles of Criminal Procedure represented a compromise solution between the liberal jurists, who wanted defense counsel to be admitted from the beginning of the preliminary investigation, and the procuracy, which wanted to exclude counsel altogether. Bilinsky, *The Lawyer and Soviet Society*, 14 PROBLEMS OF COMMUNISM 62, 69 (March-April 1965).

³⁰³ Minors are persons under 18 years of age. R.S.F.S.R. 1960 CRIM. PRO. C. art. 391.

³⁰⁴ Persons who are deaf, dumb, or blind are physically incompetent to conduct their own defense. R.S.F.S.R. 1960 CRIM. PRO. C. art. 49(2).

³⁰⁵ Persons mentally incompetent to conduct their own defense are those who are legally responsible for their acts (*i.e.*, not legally insane), but who lack the mental capacity to exercise their right to defense without the assistance of counsel. It has been held that a person only slightly mentally retarded does not enjoy a right to counsel from the beginning of the preliminary examination. Moshkov, [1967] 2 Bull. Verkh. Suda R.S.F.S.R. 8 (Crim. Div. Sup. Ct. R.S.F.S.R. 1966).

³⁰⁶ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 22; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 47, 49. Since counsel is obligatory at the trial for

2. VOLUNTARY WAIVER OF THE RIGHT TO COUNSEL

Although in theory defense lawyers may now always be admitted from the end of the preliminary investigation, in practice, advocates have actually participated in less than 50 percent of the preliminary proceedings.³⁰⁷ This has caused a great deal of concern over the voluntariness of the accused's waiver of his right to counsel.³⁰⁸ Numerous errors have been discovered in the methods by which investigators inform the accused of his right to counsel during the preliminary investigation. As the following discussion will illustrate, there is a striking similarity between the means by which Soviet investigators and American police officers dissuade the defendant from employing the services of counsel during pre-trial investigatory proceedings.

In the Soviet Union, a defendant must first be informed of his right to counsel at the time he is presented with the accusation.³⁰⁹ If he is entitled to counsel from the beginning of the investigation, this information must be conveyed to him before he is presented with the accusation so that counsel can attend the presentation and subsequent questioning of the accused.³¹⁰ A de-

persons without command of the language in which the proceedings are conducted, persons whose interests conflict and one of whom has defense counsel, and persons charged with crimes punishable by death, it has been suggested that counsel also be made obligatory for these persons from the moment they are presented with the materials of the preliminary investigation. *Id.* art. 49(4)-(6); Liakhovich & Itskov, *Uchastie advokata v predvaritel'nom sledstvii* (Participation of an Advocate in the Preliminary Investigation), [1960] 5 SOTS. ZAK. 47-48; Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 34-35; Vorob'ev, *Strogo sobliudat' prava obviniamogo na zashchitu* (The Accused's Right to Defense Should be Strictly Observed), [1963] 17 Sov. IUST. 5, 6.

³⁰⁷ Shein, *supra* note 232, at 119. The figures in this article may be somewhat low because they are for 1959-1960.

³⁰⁸ The waiver of the right to counsel must be completely voluntary, and "shall be permitted only upon the initiative of the accused himself." R.S.F.S.R. 1960 CRIM. PRO. C. art. 50; R.S.F.S.R. KOMMENTARIJ 124. The accused's waiver is binding upon the investigator unless the accused is a minor or unable to conduct his own defense due to physical or mental defects. R.S.F.S.R. 1960 CRIM. PRO. C. art. 50.

³⁰⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 149. More evidence is needed to hold a person as an accused than to hold him as a suspect. An accusation cannot be presented until evidence has been adduced indicating the event of the crime, the identity of the perpetrator, the intent with which the crime was committed, and the absence of circumstances excluding responsibility for the criminal act. *Id.* arts. 143-44; R.S.F.S.R. KOMMENTARIJ 294; A. KOBLIKOV, *supra* note 223, at 6; Karneeva & Genrikov, *Osobennosti otsenki dokazatel'stv na raznykh etapakh predvaritel'nogo sledstviia* (Distinctive Features of the Appraisal of Evidence at Various Stages of the Preliminary Investigation), [1966] 9 S.G. I P. 74, 76.

The procedure for summoning the accused is described in R.S.F.S.R. 1960 CRIM. PRO. C. arts. 145-47.

³¹⁰ R.S.F.S.R. KOMMENTARIJ 301-02. If the accused's counsel cannot appear within two days, a substitute (temporary or permanent) must be appointed by the investigator. *Id.* at 302.

fendant whose right to counsel arises at the end of the investigation must receive a second warning when the case has been terminated and he is informed of his right to become acquainted with the materials of the preliminary investigation.³¹¹

In practice, the explanation of the accused's right to defense is given orally, and a note to this effect is made on the decree to prosecute, which is signed by the accused.³¹² There are certain problems inherent in such a procedure, however. At the beginning of the preliminary investigation, the accused is informed of a wide range of procedural rights constituting his right to defense.³¹³ If he subsequently alleges that he was never apprised of his right to counsel, it is difficult to determine whether this information was transmitted to him.³¹⁴ A few investigators have therefore had the accused's procedural rights printed on the decree to prosecute, which is signed by the defendant and immediately returned to the investigator.³¹⁵ This adequately verifies the fact that the accused received formal notification of his right to counsel, but does not indicate whether he read the statement and understood its meaning. The latter is doubtful because the investigator rarely supplements the written statement with an oral explanation. Moreover, the accused is apt to be concentrating upon the charges brought against him at the time that he reads and signs the decree to prosecute. In an effort to solve the problem, it has been suggested that the written explanation of the accused's right to defense be printed in duplicate and that it list the address and telephone number of the local consultation office. The explanation could then be signed by the accused and the duplicate copy given to him for future reference at a time when he would not be preoccupied with the contents of the accusation.³¹⁶

Since the accused is normally informed orally of his right to counsel, the investigator's attitude toward the *advokatura* tends

³¹¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 201.

³¹² *Id.* art. 149; Shein, *Vstuplenie zashchitnika v delo na predvaritel'nom sledstviu* (Entrance of Defense Counsel into a Case at the Preliminary Investigation), [1962] 20 Sov. Iust. 8, 9.

³¹³ The accused must be informed of his right:

to know what he is accused of and to give explanations concerning the accusation presented to him; to present evidence; to submit petitions; to become acquainted with all the materials of the case upon completion of the preliminary investigation or inquiry; to have defense counsel from the moment provided by article 47 of the present Code; to participate in the judicial examination in the court of first instance; to submit challenges; and to appeal from the actions and decisions of the person conducting the inquiry, the investigator, procurator and court. R.S.F.S.R. 1960 CRIM. PRO. C. art. 46.

He must also be informed of the inviolability of his person (he may not be subjected to arrest without sanction of a procurator) and of his right to give testimony. *Id.* arts. 11, 77, 152.

³¹⁴ Shein, *supra* note 312, at 9.

³¹⁵ *Id.*

³¹⁶ *Id.*; Shein, *supra* note 232, at 120.

to color the tone and content of the warning. It is therefore significant that a large percentage of investigators consider counsel's presence a hindrance to the efficient performance of their duties.³¹⁷ This is reflected in the formalistic way in which they inform the accused of his right to counsel. The language of the Code of Criminal Procedure is uttered verbatim, but no effort is made to explain its meaning.³¹⁸ If an inspector harbors a deep distrust of the *advokatura*, he may actually recommend that the accused waive his right to counsel,³¹⁹ asserting that an advocate can perform no useful function during the preliminary investigation and that his services are therefore a waste of money.³²⁰ If that does not dissuade the accused, the investigator may suggest that "things will go better for him" if he does not request counsel until the trial.³²¹ Similarly, when an advocate has been retained by relatives for a defendant confined under guard, the investigator may "forget" to inform him of this fact, hoping that the accused will decide to waive his right to counsel.³²²

³¹⁷ *Improvement of Investigative Work—An Important Condition for the Further Strengthening of Socialist Legality*, [1964] 11 S.G. 1 P. 3 transl. in 3 Sov. L. & Gov't No. 4, at 23, 29 (1965). In reality, since counsel does not enter the case until the end of the preliminary investigation, it is only a poorly conducted investigation which will be hindered or delayed by counsel's petitions after he becomes acquainted with the materials of the case. A. KOBLIKOV, *supra* note 223, at 48; Vorob'ev, *supra* note 306, at 6.

³¹⁸ N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 289; Liakhovich & Itskov, *supra* note 306, at 47; Vorob'ev, *supra* note 306, at 6.

³¹⁹ N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 289; Aleshin & Furer, *Ne dopuskat' uschemleniia zakonnykh prav obviniaemogo i zashchitnika na predvaritel'nom sledstvii* (Infringement of the Legal Rights of the Accused and Defense Counsel at the Preliminary Investigations Should Not Be Permitted), [1965] 6 Sov. IUST. 24, 25; Shein, *supra* note 232, at 118, 119; *Uchastie zashchity v predvaritel'nom sledstvii—vazhnaia garantiia sobliudeniia sotsialisticheskoi zakonnosti v ugolovnom protsesse* (Participation of the Defense in the Preliminary Investigation—An Important Guarantee of the Observance of Socialist Legality in Criminal Proceedings), [1960] 6 Bull. Verkh. Suda S.S.S.R. 30, 31.

³²⁰ N. IAKUBOVICH, OKANCHANIE PREDVARITEL'NOGO SLEDSTVIA (End of the Preliminary Investigation) 31 (1962); Kaganovich, *Narusheniia prav obviniaemogo na zashchitu* (Violations of the Accused's Right to Defense), [1960] 3 SOTS. ZAK. 27; Shein, *supra* note 232, at 119; Vorob'ev, *supra* note 306, at 6.

³²¹ Gershingorin, *Strogo sobliudat' pravo obviniaemogo na zashchitu* (The Accused's Right to Defense Should Be Strictly Observed), [1961] 6 Sov. IUST. 22; Shein, *supra* note 232, at 119.

³²² N. IAKUBOVICH, *supra* note 320, at 31; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 289; Gershingorin, *supra* note 321, at 22; Liakhevich & Itskov, *supra* note 306, at 47; Stremovskii & Teplinskii, *Polozhitel'nye rezul'taty uchastiia zashchitnika na predvaritel'nom sledstvii* (Favorable Results of Defense Counsel's Participation in the Preliminary Investigation), [1961] 24 Sov. IUST. 13.

The defendant may still waive his right to counsel after being informed that an advocate has been hired for him. Karneeva, *Uchastie zashchitnika v predvaritel'nom sledstvii* (Participation of Defense Counsel in the Preliminary Investigation), [1960] 10 Sov. IUST. 13, 14. However, it has been

Every one of the above practices is a violation of the accused's right to defense and constitutes grounds for remanding the case for a supplementary investigation.³²³ To comply with the requirements of the Code of Criminal Procedure, the investigator must not only recite the language of the Code, but must also explain its meaning and secure the possibility of the accused's exercising his right to defense.³²⁴ When informing the accused of his right to counsel, he must describe the services performed by an advocate during the preliminary investigation. If the defendant is confined under guard, he must inform him of his right to have his legal representative or relatives retain counsel for him.³²⁵ If the defendant is indigent, the investigator must tell him that counsel may be appointed free of charge.³²⁶ And finally, in the event that counsel is retained, the investigator must warn the defendant that the presentation of the dossier can be postponed no longer than five days from the date the preliminary investigation is terminated.³²⁷ If the defendant's advocate is unable to appear within that length of time, the defendant must obtain a substitute or waive his right to counsel during the preliminary investigation.³²⁸

suggested that the advocate should be present at the time of the waiver. Aleshin & Furer, *supra* note 319, at 25.

³²³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 232(2); A. KOBLIKOV, *supra* note 223, at 44; Liakhovich & Itskov, *supra* note 306, at 47.

Some courts merely issue a special ruling to the investigator directing his attention to the violation. R.S.F.S.R. 1960 CRIM. PRO. C. art. 321. The special ruling does not adequately protect the accused's right to be acquainted with the materials of the preliminary investigation with counsel's assistance, however. Vorob'ev, *supra* note 306, at 6.

³²⁴ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 58, 149, 201; A. KOBLIKOV, *supra* note 223, at 46; Gershingorin, *supra* note 321, at 22; Shein, *supra* note 312, at 9; Vorob'ev, *supra* note 306, at 6.

³²⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 48. If the defendant indicates a desire to have counsel, the investigator must communicate this information to the defendant's legal representative or relatives. R.S.F.S.R. KOMMENTARIJ 121; Krzhepitskii, *Predely i poriadok uchastiia zashchitnika v predvaritel'nom sledstvii* (Limits and Procedure of Defense Counsel's Participation in the Preliminary Investigation), [1959] 7 SOTS. ZAK. 36.

³²⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 48; R.S.F.S.R. KOMMENTARIJ 121-22. In confirming the voluntariness of the defendant's waiver of his right to counsel, the investigator must ask him if he understands that counsel can be provided free of charge. *Id.* at 124.

³²⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 201; Shein, *supra* note 312, at 9.

³²⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 48, 201; Karneeva, *supra* note 322, at 13; *Uchastie zashchity v predvaritel'nom sledstvii*, *supra* note 319, at 31.

Substitute counsel may be appointed by the investigator at the defendant's request, but it is a violation of the accused's right to defense for an investigator to appoint a substitute before five days have elapsed. Shirokov, [1965] 3 Bull. Verkh. Suda R.S.F.S.R. 12 (Crim. Div. Sup. Ct. R.S.F.S.R. 1964) (remanded for supplementary investigation). The defendant is entitled to have the originally retained advocate represent him at the trial. Karneeva, *supra* note 322, at 13.

A waiver of the right to counsel on the basis of all the above information would most certainly be voluntary. However, in light of the investigators' accusatory bias and lack of appreciation for counsel's participation during the preliminary investigation, it can be speculated that the accused seldom receives a full and impartial explanation of his rights. It has therefore been suggested that a member of the college of advocates be permitted to inform a defendant of his right to counsel during the preliminary investigation.³²⁹ Unless and until this suggestion is adopted, it would be desirable to universalize the practice of a few investigators who request the accused to sign a statement indicating that he voluntarily waived his right to counsel.³³⁰ Such a statement would provide a certain measure of protection against coercion, and would also eliminate the courtroom squabbles between the investigator and the accused (the only two witnesses to the action) as to whether the accused requested or waived his right to counsel during the preliminary investigation.³³¹

3. OBTAINING THE SERVICES OF AN ADVOCATE

If the accused decides to exercise his right to counsel, there are three ways in which an advocate may be engaged. The accused may contact the local consultation office and sign an agreement there to retain counsel unless he is confined under guard.³³² If he is being held incommunicado, he may obtain counsel through his legal representative, relatives, or friends.³³³ Should these persons be unable or unwilling to assist him, or should the accused be indigent, he may request the investigator to appoint counsel for him.³³⁴ Such a request is not necessary when counsel is obligatory; the investigator must appoint an advocate to represent the defendant unless one is retained by the accused, his legal representative or relatives.³³⁵ Gratuitous legal services are provided by

³²⁹ Shein, *supra* note 232, at 120. This procedure is followed when there is an obligatory right to counsel during the trial. See text accompanying note 502, *infra*.

³³⁰ A. VASIUTIN & I. LIVSHITS, UGOLOVNO-PROTSESSUAL'NYE AKTY DOZNA-NIA I PREDVARITEL'NOGO SLEDSTVIA (Criminal Procedure Documents of the Inquiry and Preliminary Investigation) 160 (1967); Shein, *supra* note 312, at 9.

³³¹ Shein, *supra* note 312, at 9.

³³² R.S.F.S.R. 1960 CRIM. PRO. C. art. 48; A. KOBLIKOV, *supra* note 223, at 52; Karneeva, *supra* note 322, at 13.

³³³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 48; A. KOBLIKOV, *supra* note 223, at 52; Karneeva, *supra* note 322, at 13.

³³⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 48; A. KOBLIKOV, *supra* note 223, at 52; Karneeva, *supra* note 322, at 13. The accused's request must be honored. R.S.F.S.R. KOMMENTARIJ 121; N. IAKUBOVICH, *supra* note 320, at 37; A. KOBLIKOV, *supra* note 223, at 45; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 290.

³³⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 49; A. KOBLIKOV, *supra* note 223, at 45; Karneeva, *supra* note 322, at 13. Failure to appoint counsel can result

the college of advocates when the accused is indigent.³³⁶ If counsel is obligatory, the accused is not required to reimburse the advocate for his services unless he is convicted, in which case a "reasonable charge" for counsel's services will be included in the court costs.³³⁷

A technical reading of the Code of Criminal Procedure has led at least one Soviet investigator to assert that counsel may only be engaged at the precise moment the preliminary investigation is terminated.³³⁸ But most Soviet jurists disagree, asserting that a more liberal reading of the Code works to the advantage of all concerned: the accused is able to obtain the advocate of his choosing; counsel can make plans to appear in advance; and the investigator does not have to delay the presentation of the case materials to the accused if counsel is retained prior to the termination of the preliminary investigation.³³⁹

4. ACCEPTING THE DEFENSE OF AN ACCUSED

An accused is entitled to dismiss his lawyer at any time.³⁴⁰ A replacement may be obtained or the accused may decide to conduct his own defense.³⁴¹ An advocate enjoys no parallel privilege, however. Once he has accepted the defense of an accused, he is not permitted to withdraw from the case.³⁴²

in a reversal or remand of the case for a supplementary investigation. R.S.F.S.R. KOMMENTARIJ 122.

³³⁶ R.S.F.S.R. KOMMENTARIJ 121-22; N. IAKUBOVICH, *supra* note 320, at 37; *Uchastie zashchity v predvaritel'nom sledstvii*, *supra* note 319, at 31; see text accompanying note 82, *supra*.

³³⁷ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 107, 322; R.S.F.S.R. KOMMENTARIJ 581.

³³⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 201; Dubovik, *Iz praktiki oznakomleniia obviniaemogo i zashchitnika s materialami ugovonnogo dela v poriadke st. 201 UPK RSFSR* (From the Practice of Acquainting the Accused and Defense Counsel with the Materials of a Criminal Case Under the Procedure Prescribed by Article 201 of the R.S.F.S.R. Code of Criminal Procedure), [1964] 23 Sov. Iust. 8. The statement does not refer to cases in which the accused enjoys an obligatory right to counsel from the beginning of the preliminary investigation.

³³⁹ Aleshin & Furer, *supra* note 319, at 24; Shein, *supra* note 312, at 10.

³⁴⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 50.

³⁴¹ R.S.F.S.R. KOMMENTARIJ 124-25; Karneeva, *supra* note 322, at 14.

A case may be remanded for supplementary investigation or a new trial if the person conducting the proceeding forces an accused to accept the services of a particular advocate over his objection. Ramazanova, [1966] 1 Bull. Verkh. Suda S.S.S.R. 22 (Sup. Ct. U.S.S.R. 1965). A minor or a person unable to conduct his own defense must have the assistance of counsel, but it has been suggested that his request for a change of counsel should be honored. Ul'ianova, *Zashchita po delam o prestupleniakh nesovershennoletnikh* (Defense in Cases of Crimes Committed by Minors), [1966] 5 Sov. Iust. 12, 13.

³⁴² U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 23; R.S.F.S.R. 1960 CRIM. PRO. C. art. 51; Law of July 25, 1962, art. 34, [1962] 15-16 Sov.

The major issue raised by this statutory mandate concerns the circumstances under which counsel may decline to take a case.³⁴³ It has been suggested that counsel may refuse to accept the defense of an accused if he is overburdened with other cases, suffering from illness, or planning to go on vacation.³⁴⁴ In certain instances, he will be prohibited by law from accepting the defense when there is a danger of a conflict of interests.³⁴⁵ It has also been suggested that an advocate may decline to take a case if the defendant insists on the use of illegal defense methods. To the

IUST. 31 (Supreme Soviet U.S.S.R.).

The sanction for withdrawal is reproof, reprimand, or expulsion from the college of advocates. Law of July 25, 1962, arts. 40-41, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.). It is generally felt that an advocate who participates in the preliminary investigation should continue through the trial. Some jurists suggest that counsel may withdraw from a case between the trial and the appeal. Sokolov, Tsubin & Iarzhnets, *supra* note 123, at 33; Sonin & Vaisman, *Zashchita po delam nesovershennoletnikh* (Defense in Cases of Minors), [1965] 1 Sots. ZAK. 56, 57.

³⁴³ A secondary issue concerns the point in time at which the defense has been accepted. It has been suggested that counsel accepts the defense of an accused from the moment the manager of the consultation office assigns him to a case. Stetsovskii, *supra* note 106, at 14; Ul'ianova, *supra* note 127, at 61. Many advocates feel that this is too early, however. Nor do they agree with those who say that counsel accepts the defense from the moment he is formally admitted to the case by the investigator. R. RAKHUNOV, *supra* note 104, at 218. This is a procedural act performed at a time prescribed by law, and must necessarily take place only after an advocate has been retained by the accused. Stetsovskii, *supra* note 149, at 60. Instead, they suggest that counsel accepts the defense from the time that he meets with the accused, becomes acquainted with the case, and signs an agreement to defend. Only at this point does he have enough information to know whether he is prohibited by law or by his professional code of ethics from conducting the defense. Friedman & Zile, *supra* note 27, at 32, 64; Sokolov, Tsubin & Iarzhnets, *Rol' i zadachi advokatury v svyazi s dal'neishei demokratizatsiei sovetskogo ugolovnogo protsessa* (The Role and Duties of the *Advokatura* in Connection with the Further Democratization of Soviet Criminal Proceedings), in *NOVOE SOVETSKOE ZAKONODATEL'STVO I ADVOKATURA* (New Soviet Legislation and the *Advokatura*) 33-34 (1960); Stetsovskii, *supra* note 106, at 14; Stetsovskii, *supra* note 149, at 59-60. If counsel is appointed by the investigator, he accepts the defense from the moment he is designated by the consultation office to appear in the case. Sokolov, Tsubin & Iarzhnets, *supra* at 34.

³⁴⁴ Stetsovskii, *supra* note 149, at 59; Ul'ianova, *supra* note 127, at 61.

³⁴⁵ The R.S.F.S.R. Statute on the *Advokatura* forbids an advocate to handle a case (1) when he is related to an official taking part in the investigation; (2) when he has previously performed legal services for a person whose interests conflict with the accused's; (3) when he has participated earlier in the case as an official, expert, interpreter or witness; and (4) when he has received information from other defendants in the case in confidence and that confidence cannot be broken. Law of July 25, 1962, arts. 32-33, [1962] 15-16 Sov. Iust. 31 (Supreme Soviet U.S.S.R.); Stetsovskii, *supra* note 149, at 59. Similarly, the R.S.F.S.R. Code of Criminal Procedure stipulates that the same person may not be defense counsel for two accused persons if the interests of one conflict with the interests of the other. R.S.F.S.R. 1960 CRIM. PRO. C. art. 47.

extent that "illegal methods" means the falsification of documents or the bribing of witnesses, it is generally agreed that such a demand does constitute a valid basis for refusing to accept the defense.³⁴⁶ There are a few Soviet jurists, however, who maintain that an advocate may also refuse to take a case if he considers the accused guilty and the accused insists on pleading innocent.³⁴⁷ This theory has been soundly denounced by the majority, who assert that counsel may not prejudge the defendant's guilt before deciding whether to represent him during the preliminary investigation.³⁴⁸ Certainly the majority must continue to prevail if the accused is to benefit from his constitutional right to defense in the Soviet Union.

5. FUNCTIONS PERFORMED BY AN ADVOCATE WHO ENTERS A CASE FROM THE END OF THE PRELIMINARY INVESTIGATION

When counsel enters the case from the end of the preliminary investigation, his functions are threefold: to obtain supplementary evidence favorable to the accused; to protect the accused's procedural rights; and to safeguard the accused's substantive rights. Before counsel can perform any of these duties, he must first become acquainted with the materials of the preliminary investigation. Absolutely all the evidence in the case must be presented to the accused and his lawyer in filed and numbered form.³⁴⁹ They may study the materials independently or together.³⁵⁰ Normally, since counsel is more familiar with the contents of a dossier, he screens the materials first and points out pertinent evidence to the accused.³⁵¹ No limitation is placed on the time devoted to

³⁴⁶ Goldiner, *On Defense Lawyer's Ethics*, 10 S.G. 1 P. 95 (1965), transl. in C.D.S.P. No. 12, pt. 2, at 2 (1966); Zaitsev, *supra* note 151, at 14. This is a valid ground for refusing to accept the defense because the advocate is prohibited by law from using illegal methods of defense during the conduct of a case. R.S.F.S.R. 1960 CRIM. PRO. C. art. 51. If the accused insists on their use, he will have to dismiss the advocate and conduct his own defense. *Id.* art. 50.

³⁴⁷ Nanikishvili is the leading proponent of this theory. Nanikishvili, *supra* note 137, at 36.

³⁴⁸ Goldiner, *supra* note 346, at 3; Zaitsev, *supra* note 151, at 14. This controversy reflects the opposing viewpoints expressed in the debate over the role of defense counsel discussed in text accompanying notes 127-63, *supra*.

³⁴⁹ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 201, 202(2); R.S.F.S.R. KOMMENTARI 374.

³⁵⁰ R.S.F.S.R. 1960 CRIM. CODE art. 201. Normally, counsel and the accused study the materials independently in order to save time. N. IAKUBOVICH, *supra* note 320, at 38; Karneeva, *supra* note 322, at 14. If the materials are studied together, counsel must be sure that the accused acquaints himself with them personally, and not through counsel. Kagano- vich, *supra* note 320, at 28.

³⁵¹ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 201, 202(2). N. IAKUBOVICH, *supra* note 320, at 38; Karneeva, *supra* note 322, at 14.

this final stage of the preliminary investigation,³⁵² but if counsel deliberately prolongs the examination of the materials as a delay tactic, the investigator may fix a period within which the examination must be completed and submit it to the procurator for his approval.³⁵³ On the other hand, the investigator must not impose an unreasonable limitation, as when one investigator allowed the accused only three hours to acquaint himself with a 347-page dossier. The trial court held that this constituted a violation of the accused's right to defense and remanded the case for a supplementary investigation.³⁵⁴

Counsel may request to meet with the accused in private prior to the presentation of the dossier or after the materials of the preliminary investigation have been examined.³⁵⁵ In either case, the primary topic for discussion will be the presentation of petitions for supplementary evidence.³⁵⁶ The reason for requesting a private meeting is to encourage free and full disclosure on the part of the accused.³⁵⁷ Investigators are prone to misinterpret the request for privacy, however, and refuse to leave the room for fear the meeting will obstruct the administration of justice.³⁵⁸ As Soviet commentators point out, the investigator's fears are groundless and it is a violation of the Code of Criminal Procedure to deny counsel the right to meet with the accused alone.³⁵⁹

Once counsel has become acquainted with the materials of the preliminary investigation, he is able to determine what supplemental evidence is necessary to strengthen the case for the ac-

³⁵² N. IAKUBOVICH, *supra* note 320, at 41; Shein, *Protsessual'naia deiatel'nost' zashchitnika na predvaritel'nom sledstvii* (Procedural Activities of Defense Counsel at the Preliminary Investigation), [1963] 3 Sov. IUST. 11, 12.

³⁵³ R.S.F.S.R. KOMMENTARI 374; N. IAKUBOVICH, *supra* note 320, at 41; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 291; Shein, *supra* note 352, at 12.

Special problems arise when a defendant dismisses three or four advocates while becoming acquainted with the materials of the case. Each advocate must be permitted to examine the entire file, and this substantially delays the drawing up of a conclusion to indict. Dubovik, *supra* note 338, at 9.

³⁵⁴ Minosian, [1966] 3 Bull. Verkh. Suda S.S.S.R. 26 (Mil. Div. Sup. Ct. U.S.S.R. 1965). Violations of this type are apt to occur when the investigator does not allot sufficient time at the end of the investigation for becoming acquainted with the materials of the case and then discovers that his two-month period for conducting the investigation has almost come to a close. Aleshin & Furer, *supra* note 319, at 25.

³⁵⁵ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 202; R.S.F.S.R. KOMMENTARI 376; Karneeva, *supra* note 322, at 14; *Uchastie zashchity v predvaritel'nom sledstvii*, *supra* note 319, at 32.

³⁵⁶ Karneeva, *supra* note 322, at 14.

³⁵⁷ R. RAKHUNOV, *supra* note 104, at 219.

³⁵⁸ Kaganovich, *supra* note 320, at 29.

³⁵⁹ R.S.F.S.R. KOMMENTARI 375-76; Kaganovich, *supra* note 320, at 29; *Uchastie zashchity v predvaritel'nom sledstvii*, *supra* note 319, at 30.

cused. There is no limitation on the types of evidence which may be adduced, and both counsel and the accused are empowered to present supplemental evidence at the end of the preliminary investigation.³⁶⁰ The primary problem facing the defense is therefore how to obtain the evidence.³⁶¹ Written documents and other items of real evidence in the possession of the accused, his friends or relatives may be turned over to defense counsel and presented to the investigator.³⁶² An advocate can also demand from state and public organizations "certificates, character references and other documents relevant to . . . [the case]" through the consultation office.³⁶³ Only a limited amount of evidence can be obtained in these ways, however. All other evidence must be procured by petitioning the investigator to interrogate additional witnesses; obtain specified articles or documents; or conduct a supplementary expert examination, confrontation, or investigative experiment.³⁶⁴ This seriously limits counsel's ability to collect evidence favorable to the defense because the investigator may, and often does, deny petitions for supplemental evidence. Counsel's

³⁶⁰ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 46, 51, 70, 201, 202(4); Shein, *supra* note 352, at 12.

³⁶¹ Shein, *supra* note 352, at 13; Sokolov, Tsubin & Iarzhnets, *supra* note 343, at 38.

³⁶² R.S.F.S.R. KOMMENTARIJ 165; Iakubovich, *Uchastie advokate v dokazyvanii po ugovnomu delu* (Participation of an Advocate in Presenting Proof in a Criminal Case), [1963] 11 SOTS. ZAK. 42, 43; Karneeva, *supra* note 322, at 15; Shein, *supra* note 352, at 13.

³⁶³ Law of July 25, 1962, art. 26, [1962] 15-16 Sov. IUST. 31 (Supreme Soviet U.S.S.R.); R.S.F.S.R. KOMMENTARIJ 165; Iakubovich, *supra* note 362, at 43; Karneeva, *supra* note 322, at 15; Shein, *supra* note 352, at 13; Vydria, *supra* note 137, at 17.

³⁶⁴ R.S.F.S.R. CRIM. PRO. C. art. 204; Kaliaev, *Iz opyta uchastiia zashchity v predvaritel'nom sledstvii* (From the Experience of Defense Counsel Participating in the Preliminary Investigation), [1964] 9 Sov. IUST. 16; Karneeva, *supra* note 322, at 15; Liakhovich & Itskov, *supra* note 306, at 49; Shein, *supra* note 352, at 13; Vatman & Kisenishskii, *Rol' advokata v osushchestvlenii prava obviniamogo na zashchitu* (Role of an Advocate in Effecting an Accused's Right to Defense), [1962] 8 Sov. IUST. 20.

Any evidence may be petitioned which has not been considered by the investigator during the earlier part of the preliminary investigation and which is relevant to the issues in the case. Iakubovich, *supra* note 362, at 44.

There are times when the accused and counsel disagree on the merits of petitioning a particular item of evidence. Those who regard counsel as a procedurally independent figure maintain that either counsel or the accused may submit petitions in his own name over the objections of the other. *Id.*; see text accompanying notes 127-42, *supra*. Those who emphasize the procedural alliance between counsel and the accused recommend that the accused be permitted to submit petitions in his own name, and that counsel be forbidden to denounce them, but that counsel not be permitted to present a petition over the objections of the accused. If he does, they suggest that he advise the accused of his right to obtain the services of another advocate. Liakhovich & Itskov, *supra* note 306, at 50; Shein, *supra* note 352, at 12; see text accompanying notes 143-63, *supra*.

only recourse is to appeal the denial of the defense petition to the supervising procurator.³⁶⁵ As unsatisfactory as this system may seem to lawyers trained in the Anglo-American tradition that evidence is procured by the parties, there are certain functions of the investigator which will probably never be transferred to the *advokatura*. For example, the summoning of experts and witnesses will undoubtedly continue to be a privilege reserved to the investigator as long as the preliminary investigation is conducted as an inquisitional, not an adversary proceeding. On the other hand, it is quite possible that in the future counsel will be empowered to collect real evidence from individuals through the consultation office of the college of advocates.³⁶⁶ The adoption of such a reform would greatly enhance the accused's right to defense because the evidence adduced at the preliminary investigation is extremely critical to the outcome of the trial.

When counsel petitions supplemental evidence, he may be present with the permission of the investigator during the performance of the investigative activities.³⁶⁷ Apparently, it is a privilege which is all too rarely exercised.³⁶⁸ When counsel does participate, he is permitted to submit questions to the person being interrogated and to observe the manner in which the investigative activity is being conducted. Procedural violations may be brought to the investigator's attention, and if they are not corrected immediately, counsel may make a note of them in the written record of the investigative action.³⁶⁹ Since errors in the conduct of the preliminary investigation serve as grounds for reversing a conviction and since counsel's interrogation of defense witnesses may bring out information unsolicited by the investigator, counsel's presence during these supplementary investigative activities is critical to the accused's exercise of his right to defense. It has therefore been recommended that Soviet advocates play a more active role in the conduct of investigative actions petitioned by the defense.³⁷⁰

The second function performed by counsel at the end of the preliminary investigation is the protection of the accused's procedural rights. An advocate is specifically empowered to challenge

³⁶⁵ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 131, 218; Iakubovich, *supra* note 362, at 43, 45. For a discussion of the investigator's frequent failure to grant defense petitions and counsel's problems in submitting appeals see text accompanying notes 379-92.

³⁶⁶ Stetsovskii, *Uchastie zashchitnika v dokazyvanii po ugovolnomu delu* (Participation of an Advocate in Presenting Proof in a Criminal Case), 6 Sov. IUST. 14, 15 (1967).

³⁶⁷ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 202(7); A. KOBLIKOV, *supra* note 223, at 51; Iakubovich, *supra* note 362, at 43.

³⁶⁸ Vatman & Kisenishskii, *supra* note 364, at 20.

³⁶⁹ R.S.F.S.R. KOMMENTARIJ 376; A. KOBLIKOV, *supra* note 223, at 51.

³⁷⁰ A. KOBLIKOV, *supra* note 223, at 52; Gershingorin, *supra* note 321, at 22; Iakubovich, *supra* note 362, at 42.

an investigator, procurator, expert, or interpreter who has previously participated in the case in another capacity or who has a personal interest in its outcome.³⁷¹ He may also "bring complaints to the procurator against actions of the investigator which violate or prejudice the rights of defense counsel or the accused."³⁷² Finally, a catch-all clause empowering counsel to submit petitions with respect to "all other questions of significance for the case" has been cited as authority for presenting petitions regarding such procedural matters as a reduction of the measure of restraint and the joinder or disjoinder of cases.³⁷³

The catch-all clause also serves to justify the performance of counsel's third function: safeguarding the substantive rights of the accused. In fulfilling this duty, counsel frequently presents petitions requesting a change in the classification of a crime or demands that the case be terminated.³⁷⁴ It is particularly important that the latter request be made at the end of the preliminary investigation, for if it is granted, the accused will be spared the anguish of a public trial and the stigma which attaches to a defendant after the conclusion to indict has been presented.

6. VIOLATIONS OF THE ACCUSED'S RIGHT TO DEFENSE

Despite the fact that investigators are obliged to grant well-founded petitions,³⁷⁵ statistics show that no more than 80 percent, and often as few as 40 percent of the defense petitions presented in a given year receive favorable treatment.³⁷⁶ Partial blame for this phenomenon can be laid upon defense counsel. Some petitions are not well-founded; they are presented merely to delay the

³⁷¹ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 23, 51, 63, 64, 66, 67, 202(5). For a fuller discussion of the grounds for a challenge see note 195, *supra*. The procedure for ruling on a challenge is described in R.S.F.S.R. 1960 CRIM. PRO. C. art. 130.

³⁷² R.S.F.S.R. 1960 CRIM. PRO. C. art. 202(6).

³⁷³ *Id.* art. 202(4); R.S.F.S.R. KOMMENTARIJ 376; R. RAKHUNOV, *supra* note 104, at 219; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 95-96.

³⁷⁴ R.S.F.S.R. KOMMENTARIJ 376; R. RAKHUNOV, *supra* note 104, at 221; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 96; Kaljaev, *supra* note 364, at 16; Shein, *supra* note 352, at 12; Shein, *supra* note 232, at 118; Vatman & Kisenishskii, *supra* note 364, at 20. For a discussion of the circumstances under which a case may be terminated see text accompanying notes 444-49, *infra*.

³⁷⁵ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 131, 204.

³⁷⁶ Gushchin, *O zashchite na predvaritel'nom sledstvii* (On the Defense at the Preliminary Investigation), [1961] 22 Sov. Iust. 22; Kaljaev, *supra* note 364, at 16; Stremovskii & Teplinskii, *supra* note 322, at 13. In Rostov, in 1961, 57% of the petitions for supplemental evidence, 43% of the petitions to terminate the case, and 37% of the petitions to change the classification of the crime were granted. Kaljaev, *supra* note 364, at 16; Stremovskii, *Advokaty uspešno vynolniaiut svoi zadachi* (Advocates Successfully Carry Out Their Duties), [1962] 8 Sov. Iust. 7. Approximately 20% of the petitions denied by investigators were subsequently recognized by the courts.

proceedings.³⁷⁷ And some petitions are not drafted until long after the advocate has become familiar with the materials of the case, making it difficult for the investigator to complete the preliminary investigation within the allotted time.³⁷⁸ Nevertheless, the bulk of the blame must be placed upon the investigators. They assume a formalistic attitude toward petitions presented by the defense, often rejecting them without providing a reasoned explanation for their action.³⁷⁹ When time is of the essence, they deny a petition on the understanding that it can be presented again in court.³⁸⁰ Almost inevitably they take advantage of a series of loopholes in the Code of Criminal Procedure to cut off the accused's right to appeal.³⁸¹ The Code sets no time within which an investigator must take action on defense petitions. The investigator's decision to deny a petition is therefore postponed until the day that jurisdiction over the case is transferred to the procurator. Several days later the accused is finally informed of the investigator's action. By the time he is able to present an appeal to the procurator, the procurator has referred the case to court for a judicial review of the conclusion to indict.³⁸² Since the procurator no longer has jurisdiction, the accused's right to appeal is effectively cut off and the petition must be submitted again for consideration by the court.³⁸³ The result is often a remand for a time-

³⁷⁷ Bilinsky, *supra* note 302, at 70; Gushchin, *supra* note 376, at 22; Sokolov, Tsubin & Iarzhnets, *supra* note 343, at 32.

³⁷⁸ Dubovik, *supra* note 338, at 9. The investigation must normally be completed within two months. For a discussion of the possible extensions see note 216, *supra*.

³⁷⁹ Kalinaev, *supra* note 364, at 17; Karneeva, *supra* note 322, at 15.

"If the investigator denies a petition, in whole or in part, he shall be obliged to render a decree indicating the reasons for denial." R.S.F.S.R. 1960 CRIM. PRO. C. art. 131; R.S.F.S.R. KOMMENTARIJ 282.

³⁸⁰ N. IAKUBOVICH, *supra* note 320, at 50.

³⁸¹ Kalinaev, *supra* note 364, at 17; Savitskii, *Nuzhny garantii prava na obzhalovanie postanovlenii sledovatelja* (Guarantees of the Right to Appeal the Investigator's Decisions Are Needed), [1965] 24 Sov. Iust. 19; Shafir, *supra* note 231, at 49.

³⁸² A procurator must refer a case to court within five days of the time it is referred to him by an investigator. R.S.F.S.R. 1960 CRIM. PRO. C. art. 214.

³⁸³ "After referral of the case to court, all petitions and complaints in the case shall be referred directly to the court." *Id.* art. 217. The appeal can be cut off in this manner because "[u]ntil its resolution, the bringing of an appeal shall not suspend the execution of the action appealed from, if such is not found necessary by the . . . investigator, or the procurator, as appropriate." *Id.* art. 218.

Although the procurator no longer retains jurisdiction to satisfy an appeal, it has been pointed out that a procurator exercising his general supervisory powers can reprimand the investigator and protest the court's decision on appeal if it refuses to grant what the procurator considers to be a well-founded petition.

Occasionally the defense petition can be considered by the court at the bringing to trial. In many instance, however, the case will have been brought to trial by the time counsel is notified that the procurator no

consuming and disruptive supplementary investigation.³⁸⁴

It is not surprising that counsel's response has been to bypass the procurator.³⁸⁵ In 1961, 41 percent of the petitions denied by investigators in the Russian Republic were appealed to the procurator; in 1962, it had dropped to 34 percent; and by 1964, it was down to 14 percent.³⁸⁶ The result has been an increase in the number of petitions presented to the court and a simultaneous increase in the number of cases remanded for a supplementary investigation.³⁸⁷ Even more alarming, however, is the trend to bypass the investigator. Petitions for supplemental evidence are now being presented for the first time to the court, partly as a delay tactic, partly in hopes that they will receive more favorable consideration, but partly because there is no actual right of appeal from an investigator's decision.³⁸⁸

To eliminate the loopholes which have caused this chain reaction, a four-step reform has been suggested by a number of Soviet jurists. Their proposals are identical in broad outline; it is only in the details that they differ. As a first step, it has been agreed that article 218 of the R.S.F.S.R. Code of Criminal Procedure should be revised so that a procurator cannot refer a case to court pending appeal of an investigator's decision.³⁸⁹ Secondly, a definite time period for drafting defense petitions should be established. Twenty-four hours from the time that counsel and the accused have become fully acquainted with the materials of the case has been suggested.³⁹⁰ Thirdly, all investigators should be required to rule on defense petitions within a specified number of hours—24 and 72 have been recommended.³⁹¹ And fourthly, counsel should be given approximately 48 hours to appeal the investigator's denial of his petition.³⁹² Adoption of such a reform would not only improve the quality of the preliminary investigation, but would also speed the administration of justice because all questions regard-

longer has jurisdiction over it. This postpones the presentation of the appeal until the beginning of the trial in the court of first instance. *Id.* arts 223, 226, 239; Savitskii, *supra* note 381, at 19.

³⁸⁴ Savitskii, *supra* note 381, at 19.

³⁸⁵ N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 96; Karneeva, *supra* note 322, at 15.

³⁸⁶ Savitskii, *supra* note 381, at 19.

³⁸⁷ Karneeva, *supra* note 322, at 15; Savitskii, *supra* note 381, at 19.

³⁸⁸ R.S.F.S.R. KOMMENTARIJ 126; Bilinsky, *supra* note 302, at 70; Kaganovich, *supra* note 320, at 29; Shein, *supra* note 352, at 12; Sokolov, Tsubin & Iarzhnets, *supra* 343, at 32.

³⁸⁹ Savitskii, *supra* note 381, at 20-21.

³⁹⁰ *Id.* at 20.

³⁹¹ Kaliaev, *supra* note 364, at 17; Savitskii, *supra* note 381, at 21; Shafir, *supra* note 231, at 49; Tsubin, *Ob effektivnosti sudebnoi zashchity* (On the Effectiveness of Legal Defense), [1966] 7 SOTS. ZAK. 65, 67.

³⁹² Kaliaev, *supra* note 364, at 17; Savitskii, *supra* note 381, at 21; Shafir, *supra* note 231, at 49; Tsubin, *supra* note 391, at 67.

ing the conduct of the preliminary investigation would be resolved prior to the bringing to trial.

7. EXTENSION OF THE RIGHT TO COUNSEL TO THE BEGINNING OF THE
PRELIMINARY INVESTIGATION

a. *Suggested reforms*

In addition to the specific reforms discussed above, proposals for an extension of the right to counsel to the beginning of the preliminary investigation are now being advanced with increasing frequency.³⁹³ The most liberal jurists are advocating counsel's active participation in all cases during all phases of the preliminary investigation from the moment the accusation is presented.³⁹⁴ The more moderate jurists are suggesting that certain restrictions be placed upon the right to counsel during the early stages of the preliminary investigation. For example, Kovalev proposes that counsel be admitted from the beginning of the investigation only in serious or complex criminal cases.³⁹⁵ Lukashevich suggests that counsel be permitted to enter the case only after the accused has first been interrogated.³⁹⁶ And several jurists recommend that counsel be permitted to attend only those investigative activities which cannot be duplicated in court.³⁹⁷

There is certainly adequate precedent for extending the right to counsel to the beginning of the preliminary investigation. In France, lawyers play an active role during the *instruction criminelle*.³⁹⁸ In Czechoslovakia, Romania, Hungary, and East Germany,

³⁹³ Perlov, *supra* note 231, at 39.

³⁹⁴ Chetunova, *The Right to Defend*, Literaturnaia Gazeta, Sept. 20, 1966, at 2, transl. in 18 C.D.S.P. No. 38, at 18 (1966); Kuprishin, *The Defense Counsel and the Investigation*, Izvestia, Sept. 15, 1967, at 3, transl. in 19 C.D.S.P. No. 37, at 23 (1967); Shein, *supra* note 232, at 120.

³⁹⁵ Kovalev, *Rasshirit' uchastie zashchitnika na predvaritel'nom sledstvii* (The Participation of Defense Counsel in the Preliminary Investigation Should Be Expanded), [1967] 23 Sov. Iust. 23. More specifically, he suggests that counsel participate from the beginning of the preliminary investigation (1) when the accused is charged with a crime punishable by imprisonment for five or more years, or (2) when an accusation is presented to two or more persons in one case. *Id.*

³⁹⁶ V. LUKASHEVICH, *supra* note 201, at 90. Lukashevich's proposal reflects the French practice of permitting (not requiring) the accused to make a statement before counsel enters the case. A formal interrogation is then held at which counsel does participate and during which the accused may be closely questioned on the facts of the case. Anton, *supra* note 234, at 448.

³⁹⁷ N. POLIANSKII, OCHERK RAZVITII SOVETSKOI NAUKI UGOLOVNOGO PROTSESSA (Essay on the Development of the Soviet Scholarship on Criminal Procedure) 139 (1960); Taras, *supra* note 294, at 225. Visits to the scene of the crime, post-mortem examinations, and the interrogation of witnesses who cannot appear at the trial are frequently cited as examples of investigative activities which counsel should be permitted to attend. *Id.*

³⁹⁸ SOVIET CRIMINAL LAW AND PROCEDURE 74; Anton, *supra* note 234, at 448.

counsel is permitted to enter the case from the time the accusation is presented.³⁹⁹ And in the Soviet Union, minors and persons physically or mentally unable to conduct their own defense benefit from a lawyer's services.⁴⁰⁰

Sound arguments have been advanced by those who advocate an extension of the right to counsel. They assert that the typical defendant has no knowledge of the law and is therefore unable to exercise his right to defense without counsel's assistance.⁴⁰¹ Assuming the investigator has at least a slight accusatory bias,⁴⁰² they maintain that he should be confronted by an "equal adversary"—a man legally trained and capable of evaluating the evidence.⁴⁰³ If counsel were admitted from the outset, he could assist in developing the case by petitioning the production of pertinent evidence.⁴⁰⁴ Like the investigator, he could submit a written evaluation of the case materials and present a list of witnesses to be summoned to the trial.⁴⁰⁵ Finally, if violations of the accused's procedural rights occurred, counsel could object and request that remedial action be taken immediately, thereby eliminating the need for a supplementary investigation.⁴⁰⁶

b. Established precedent: right to counsel from the beginning of the preliminary investigation for minors and persons physically or mentally unable to conduct their own defense

To appreciate the value of counsel's participation during the early phases of the preliminary investigation, it is helpful to study the role played by an advocate in cases involving minors and persons unable to conduct their own defense. Counsel enters these cases from the moment the accusation is presented.⁴⁰⁷ Prior to that time, he may examine the materials providing a basis for the decree to prosecute.⁴⁰⁸ This enables him to prepare for the

³⁹⁹ V. LUKASHEVICH, *supra* note 201, at 84-86.

⁴⁰⁰ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 22.

⁴⁰¹ Kuprishin, *supra* note 394, at 23; Shafir, *supra* note 231, at 48-49; Shein, *supra* note 232, at 120.

⁴⁰² For a discussion of the controversy concerning the existence of an accusatory bias among investigators see text accompanying notes 265-67, 282-85, *supra*.

⁴⁰³ Kuprishin, *supra* note 394, at 23.

⁴⁰⁴ Chetunova, *supra* note 394, at 18; Shafir, *supra* note 231, at 49.

⁴⁰⁵ Chetunova, *supra* note 394, at 18.

⁴⁰⁶ *Id.*

⁴⁰⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 47. Apparently, there have been instances when an investigator has prevented the presentation of the accusation until the end of the preliminary investigation by holding the accused as a suspect during the early stages of the investigation. Sonin & Vaisman, *supra* note 342, at 57.

⁴⁰⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51; L. KARNEEVA, PRIVLECHENIE V KACHESTVA OBVINIAMOGO (Prosecution as the Accused) 67-68 (1962); Stetsovskii, *Postanovlenie o privilechenii v kachestve obviniamogo i zashchita ot pred' 'avlennoogo obvineniia* (Decree to Prosecute as the Accused and

presentation of the accusation and the subsequent questioning of the accused. Counsel must be permitted to attend the presentation of the accusation so that he can observe the manner in which the accused is informed of the charges brought against him and of his procedural rights.⁴⁰⁹ At this point, counsel can also determine whether to protest the severity of the measure of restraint.⁴¹⁰

The interrogation of the accused takes place immediately after the presentation of the decree to prosecute.⁴¹¹ The procedure for interrogating the accused passes through three distinct stages. At the outset, the investigator asks the accused whether he considers himself guilty. Then the accused is requested to give testimony concerning the charges brought against him. This testimony is not to be interrupted by questions from the investigator. When the accused has completed his narration, the investigator poses questions to clarify and supplement certain portions of the testimony.⁴¹²

Defense against the Presented Accusation), [1965] 19 Sov. IUST. 11, 12-13; *Uchastie zashchity v predvaritel'nom sledstvii*, *supra* note 319, at 31.

⁴⁰⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51(1); R.S.F.S.R. KOMMENTARIJ 114; Elesin, *Prisutstvie zashchitnika pri pred'iaavlennii nesovershennoletnemu obvinenniu i svidanie s obviniaemym* (Defense Counsel's Presence at the Presentation of the Accusation to a Minor and Meeting with the Accused), [1963] VESTNIK MOSKOVSKOGO UNIVERSITETA, Seria 10, Pravo, 45.

⁴¹⁰ It is the procurator who has primary responsibility for supervising the application of measures of restraint. "No person shall be placed under arrest except by decision of a court of law or with the sanction of a procurator." U.S.S.R. CONST. art. 127. Nevertheless, counsel may present a petition requesting a reduction in the measure of restraint applied to his client. R.S.F.S.R. 1960 CRIM. PRO. C. art. 202(4).

A measure of restraint may be applied "if there exists sufficient grounds for supposing that an accused will hide from . . . a preliminary investigation . . . , or that he will hinder the establishment of the truth in a criminal case, or that he will engage in criminal activity *Id.* art. 89. Other circumstances considered when selecting a measure of restraint are the gravity of the accusation, the personality of the suspect or accused, the nature of his occupational activities, his age, the state of his health, and his family situation. *Id.* art. 91.

The measures of restraint which may be applied include the following: signed promise not to depart; personal surety; surety of a social organization; confinement under guard. *Id.* arts. 89, 93-96.

The maximum period for confinement under guard is nine months. Special permission must be obtained from a procurator to prolong confinement under guard beyond the initial two-month period. *Id.* art. 97. "A procurator shall be obliged to release immediately any person illegally deprived of freedom or kept under guard for more than a term provided by law . . ." *Id.* art. 11.

⁴¹¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 150. The interrogation is held immediately after the presentation of the accusation so that the accused will not have time to fabricate testimony. N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 227. A short recess can be taken for the accused to refresh his memory, however. R.S.F.S.R. KOMMENTARIJ 303; N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 228.

⁴¹² R.S.F.S.R. 1960 CRIM. PRO. C. art. 150; R.S.F.S.R. KOMMENTARIJ 304; Elesin, *supra* note 409, at 46. The emphasis will be on free narration if the defendant confesses, and on the subsequent interrogation if the accused denies his guilt. N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 230-32.

This same procedure is followed, regardless of whether the accused admits or denies his guilt. The purpose of the interrogation is to obtain additional evidence; it does not matter whether it is favorable to the prosecution or the defense.⁴¹³

Counsel has a statutory right to be present at the interrogation of the accused,⁴¹⁴ and when he does attend, his first duty is to listen carefully to the accused's testimony so that he can correct any errors in the written record of the proceedings.⁴¹⁵ If the accused pleads guilty, counsel must determine whether the act to which he confesses contains all the elements of the crime charged. If not, counsel must call this to the investigator's attention.⁴¹⁶ Counsel should also direct the investigator's attention to any violations of the accused's procedural rights which may occur during the interrogation.⁴¹⁷ If no remedial action is taken, he may complain to the procurator.⁴¹⁸ Finally, with the investigator's permission, counsel may direct questions to the accused.⁴¹⁹ This permits him to bring out all the facts favorable to the defense at an early stage in the proceedings. If the investigator feels that counsel's questions are improper or irrelevant, he may forbid the accused to answer, but he must enter the excluded questions in the record.⁴²⁰

It would seem that counsel's primary concern at this stage of the preliminary investigation would be to warn his client against the dangers of confessing. It is true that an uncorroborated confession can no longer be made the sole basis for a conviction in the Soviet Union, as it was during the Great Purge trials of the 1930's in cases involving certain counterrevolutionary crimes.⁴²¹ Corroboration is now required because the drafters of the Code of Criminal Procedure realized that an innocent person may confess under duress,⁴²² may confess to protect another,⁴²³ or may admit his guilt

⁴¹³ N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 225-26.

⁴¹⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51(1).

⁴¹⁵ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51(3), 151; R.S.F.S.R. KOMMENTARIJ 127; Elesin, *supra* note 409, at 47.

⁴¹⁶ Elesin, *supra* note 409, at 46.

⁴¹⁷ *Id.* at 47; Sokolov, Tsubin & Iarzhnets, *supra* note 343, at 37.

⁴¹⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 202(6), 218; Rakhunov, *Pred'iavlenie obvineniia i dopros obviniaemogo* (Presentation of the Accusation and Interrogation of the Accused), [1961] 4 SOTS. ZAK. 41, 43; Sokolov, Tsubin & Iarzhnets, *supra* note 343, at 37.

⁴¹⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51(1); R.S.F.S.R. KOMMENTARIJ 127; R. RAKHUNOV, *supra* note 104, at 220; Sokolov, Tsubin & Iarzhnets, *supra* note 343, at 37.

⁴²⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51; Rakhunov, *supra* note 418, at 43. Leading questions are improper. R.S.F.S.R. KOMMENTARIJ 305.

⁴²¹ H. BERMAN, *JUSTICE IN THE U.S.S.R.* 70-71 (1963); B. GALKIN, *supra* note 201, at 182; *SOVIET CRIMINAL LAW AND PROCEDURE* 92; Bilinsky, *supra* note 302, at 67.

⁴²² A. KOBLIKOV, *supra* note 223, at 12-13; Strogovich, *Judicial Error*, *Literaturnaia Gazeta*, May 23, 1964, at 2, transl. in 16 C.D.S.P. No. 39, at 23,

out of ignorance of the law when in fact he has not committed an act containing the elements of the crime charged.⁴²⁴ Nevertheless, a confession confirmed by the totality of the evidence in the case may still be used as a basis for a conclusion to indict at the end of the preliminary investigation or as a basis for a conviction at the end of the trial.⁴²⁵ It is therefore interesting to note that counsel rarely requests to meet with the accused in private prior to the conduct of the interrogation.⁴²⁶ He seems to rely upon the investigator to warn the accused of his right to remain silent. The accused is told that under the Code of Criminal Procedure he has "a right," not "a duty" to testify,⁴²⁷ and that a refusal to testify will not be regarded as evidence of his guilt.⁴²⁸ Apparently the

24 (1964). Investigators are now forbidden to obtain the accused's testimony by use of force, threats, or any other illegal means. U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 14; R.S.F.S.R. 1960 CRIM. C. art. 179; R.S.F.S.R. 1960 CRIM. PRO. C. art. 20. However, psychological pressures may still be exerted. R.S.F.S.R. KOMMENTARIJ 305; G. FEJFER, *supra* note 182, at 91-92. And after an accused has been confined under guard for several months, there is little difference between the results obtained through the use of psychological pressures and those obtained by means of brute force—the accused will say what the investigator wants to hear. In this connection it is interesting to note that prior to the adoption of the Principles of Criminal Law, investigators sought to have "frank confession" included as a ground for mitigating criminal responsibility. This would have enabled them to "reward" a defendant who confessed, regardless of his motives. Schlesinger, *supra* note 293, at 303-04. Instead, "sincere repentance" is now listed as a circumstance mitigating criminal responsibility. R.S.F.S.R. 1960 CRIM. C. art. 38(9).

⁴²³ Feofanov, *Nikolaiev v. Nikolaiev*, *Izvestia*, Oct. 5, 1967, transl. in 19 C.D.S.P. No. 40, at 33-34 (1967); Strogovich, *supra* note 422, at 24.

⁴²⁴ Nanikishvili, *supra* note 137, at 35-36; Sukharev, *Pressing Problems*, *supra* note 99, at 41-42.

⁴²⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 77; Decree of March 18, 1963, Strict Adherence to Law by Courts in Criminal Trials, [1963] 3 Bull. Verkh. Suda S.S.S.R. 3 (Sup. Ct. U.S.S.R.), transl. in 2 Sov. L. & Gov't No. 2, at 17, 20 (1963); Strogovich, Kalenov & Gertsezon, *supra* note 223, at 40. Failure to corroborate a confession constitutes grounds for a remand to conduct a supplementary investigation. R.S.F.S.R. 1960 CRIM. PRO. C. arts. 232, 258; Stetsovskii, *supra* note 408, at 12. A supplementary investigation was ordered in the case of Mirzoian when the only evidence supporting the indictment was a confession which Mirzoian alleged was coerced. Mirzoian, [1963] 6 Bull. Verkh. Suda S.S.S.R. 37, transl. in 1 Sov. STAT. & DEC. No. 4, at 12, 14-17 (Sup. Ct. U.S.S.R. 1963).

⁴²⁶ See L. KARNEEVA, *supra* note 408, at 68; Elesin, *supra* note 409, at 49-50.

⁴²⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 77; R.S.F.S.R. KOMMENTARIJ 180. The burden of proof is on the state to prove the defendant's guilt. U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 14; R.S.F.S.R. 1960 CRIM. PRO. C. art. 20. For a discussion of the presumption of innocence in Soviet criminal proceedings see text accompanying notes 481-94, *infra*.

Unlike the accused, witnesses may be prosecuted for refusing to answer an investigator's questions. R.S.F.S.R. 1960 CRIM. C. art. 182; R.S.F.S.R. 1960 CRIM. PRO. C. art. 73.

⁴²⁸ R.S.F.S.R. KOMMENTARIJ 181; V. KAMINSKAJA, POKAZANIJA OBYVIN-AMOGO V SOVETSKOM UGOLOVNO M PROTSESSE (Testimony of the Accused in

investigator's warning alone is inadequate, however, because the vast majority of Soviet defendants do take advantage of their "right to testify."⁴²⁹ It would therefore seem advisable for counsel to request a private meeting with his client prior to the interrogation in which he could encourage his client to remain silent as opposed to confessing his guilt. The one exception to this rule might be the case of a client whose guilt is so clearly proven that it would be to his advantage to confess because "sincere repentance" is one of the mitigating circumstances taken into consideration by the court when selecting the measure of punishment.⁴³⁰

Should the accused decide to testify in his own defense, counsel ought to warn him that it is better to remain silent than to lie. A defendant bears no criminal responsibility for giving false testimony in the Soviet Union,⁴³¹ but such testimony has been used as circumstantial proof of guilt if it was proven that the defendant intentionally lied to escape criminal responsibility.⁴³² Likewise, there are many Soviet jurists who believe that false testimony can properly be regarded as an aggravating circumstance⁴³³ despite the fact that it has been termed a violation of the accused's right to defense to increase his sentence for failing to tell the truth.⁴³⁴

After the interrogation of the accused, counsel and his client normally meet in private to discuss the nature of the charges, the accused's procedural rights, and the evidence to be submitted on behalf of the defense.⁴³⁵ The investigator then begins to conduct investigative activities which counsel is entitled to attend regardless of whether they are initiated by the prosecution or the defense.⁴³⁶ If he cannot be present, he may request to be informed

Soviet Criminal Proceedings) 36, 43 (1960); A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 130.

⁴²⁹ V. KAMINSKAIA, *supra* note 428, at 35-36. Apparently French defendants also almost invariably make statements. Anton, *supra* note 234, at 448.

⁴³⁰ R.S.F.S.R. 1960 CRIM. C. art. 38(9).

⁴³¹ R.S.F.S.R. KOMMENTARIJ 181; Kosogor & Smirnov (Crim. Div. Sup. Ct. R.S.F.S.R. [no date]), in COLLECTION OF DECREES OF THE PLENUM AND PRESIDUM AND RULINGS OF THE JUDICIAL DIVISION FOR CRIMINAL CASES OF THE SUPREME COURT OF THE RSFSR, 1961-63, at 75 (L. Smirnov ed. 1964), transl. in 1 SOV. STAT. & DEC. No. 4, at 18, 19-20 (1963). Witnesses, on the other hand, may be prosecuted for giving false testimony. R.S.F.S.R. 1960 CRIM. C. art. 181.

⁴³² R.S.F.S.R. KOMMENTARIJ 67-68; V. KAMINSKAIA, *supra* note 428, at 37-39, 41; Petrukhin, *Imeut li dokazatel'stvennoe znachenie lozhnye pokazaniia obviniaemogo* (Does the False Testimony of the Accused have any Evidentiary Value), [1965] 7 SOV. IUST. 15.

⁴³³ Petrukhin, *supra* note 432, at 17.

⁴³⁴ V. KAMINSKAIA, *supra* note 428, at 45; A. KOBLIKOV, *supra* note 223, at 24. False testimony is not listed as an aggravating circumstance in R.S.F.S.R. 1960 CRIM. C. art. 39.

⁴³⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51; Elesin, *supra* note 409, at 50.

⁴³⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51(2); Karneeva, *supra* note 322, at 14. It has been suggested that counsel may be excluded if his presence

of the results.⁴³⁷ When he does attend, he is permitted to interrogate witnesses and victims (with the permission of the investigator) and to observe the manner in which searches, seizures, views, examinations, confrontations of witnesses, identifications, and investigative experiments are conducted.⁴³⁸ If procedural violations occur, or if the investigation is not conducted in an impartial manner, he may request the investigator to take remedial action or direct a complaint to the procurator.⁴³⁹ Counsel's presence is particularly important during the conduct of expert examinations. The accused is entitled to select or challenge an expert, examine the expert opinion, attend the expert examination, and submit supplemental questions.⁴⁴⁰ Since a certain amount of expertise is required to read and evaluate an expert opinion and to formulate intelligent questions, counsel's assistance is an absolute prerequisite to the accused's exercise of these procedural rights.⁴⁴¹

As a matter of fact, it is difficult to understand how a "healthy adult" is able to conduct his own defense during the early stages of the preliminary investigation. Proponents of the status quo maintain that counsel's presence from the beginning of the investigation would be superfluous for such adults because the investigator and procurator are already obligated to assist the accused in refuting the accusation.⁴⁴² Moreover, disinterested witnesses are also available to ensure the impartial conduct of investigative activities and to report the occurrence of any procedural irregularities violating the accused's right to defense. These arguments are not convincing, however. In the first place, there is good reason to believe that the agencies of investigation conduct the preliminary investigation with an accusatory bias. Since the ordinary defendant is totally unfamiliar with either substantive or procedural criminal law, he is not equipped to conduct his own defense without the services of an advocate. And secondly, since the witnesses to investigative activities are laymen without any legal training, they are not as well prepared as counsel to detect procedural violations and to provide a check on the thoroughness and impartiality with which investigatory proceedings are con-

would intimidate the person being interrogated (as in cases involving sex crimes), if information might be divulged which should not be made public, or if the investigator is unable to inform counsel in advance of the time and place for the investigative activity. Iakubovich, *supra* note 362, at 44.

⁴³⁷ Karneeva, *supra* note 322, at 14.

⁴³⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 51(2); Karneeva, *supra* note 322, at 14; Sokolov, Tsubin & Iarzhnets, *supra* note 343, at 37.

⁴³⁹ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 202(6).

⁴⁴⁰ *Id.* art. 185. The procedure for conducting an expert examination is described in *id.* arts. 184, 186-94.

⁴⁴¹ *Id.* art. 51(2); R.S.F.S.R. KOMMENTARIJ 347, 349, 361-62.

⁴⁴² R.S.F.S.R. 1960 CRIM. PRO. C. art. 19; R.S.F.S.R. KOMMENTARIJ 63-64, 68.

ducted. Furthermore, they are present at only a limited number of activities—views, searches, seizures, investigative experiments, and examinations—whereas counsel would also be present at the interrogation of the accused, experts, and witnesses.

It is true that the preliminary investigation is an inquisitional proceeding, and that counsel would therefore play a somewhat limited role in the collection of evidence even if he were admitted from the beginning of the investigation. However, the adoption of the suggested reform to expand the types of evidence which counsel can procure through the consultation office would place him in an excellent position to improve the completeness and objectivity of the preliminary investigation. And even if the reform were not adopted, counsel's presence during the early phases of the investigation would serve as an important procedural safeguard of the accused's right to defense. Requests could be submitted immediately after the presentation of the accusation for a reduction in the charges or a termination of the case. Counsel could detect and object to procedural violations as they occurred, thereby eliminating the need for many supplementary investigations. He could elicit information which the investigator might otherwise never solicit by cross-examining witnesses favorable to the prosecution and by interrogating witnesses favorable to the defense. And if he were permitted to evaluate the evidence collected during the investigative activities, he could submit a brief for the court to compare with the appraisal of the evidence submitted by the investigator. None of these activities would be inconsistent with the inquisitional form of the preliminary investigation. They would simply improve the quality of the evidence by introducing an adversary figure charged with the limited responsibility of eliminating any accusatory bias from the conduct of the investigatory proceedings.

D. Conclusion to Indict or Terminate the Case

After the supplementary investigative actions requested by the defense at the end of the preliminary investigation have been conducted, the investigator signs a conclusion to indict or a decree to terminate the case.⁴⁴³ Termination of a case may be ordered if the accused is innocent, as when the act committed does not contain the elements of a crime⁴⁴⁴ or "the participation of [the] accused in the commission of the crime has not been proved, and . . . all possibilities for collecting supplementary evidence have been exhausted."⁴⁴⁵ A case may also be terminated if the accused is

⁴⁴³ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 199, 207-09.

⁴⁴⁴ *Id.* art. 5(2). Termination may also be ordered "in the absence of the event of the crime." *Id.* art. 5(1).

⁴⁴⁵ *Id.* art. 208(2). Since the phraseology of this provision does not make it clear that the accused is innocent, a new ground for terminating

guilty, as when the statute of limitations has run,⁴⁴⁶ the act committed or the person committing it has ceased to be socially dangerous,⁴⁴⁷ the accused has been pardoned,⁴⁴⁸ or the defendant has been released to a correctional agency for re-education.⁴⁴⁹ A copy of the decree to terminate must be sent to the procurator. If the decree assumes the accused to be guilty, it may be appealed to the procurator within five days, thereby permitting the accused to establish his innocence.⁴⁵⁰

A conclusion to indict contains a summary description of the evidence collected during the preliminary investigation, including the arguments advanced by the defense and the results of their verification.⁴⁵¹ The procurator has five days in which to examine the materials, check for procedural violations, and decide whether to return the case for a supplementary investigation, terminate the case, or confirm the conclusion to indict (in which case he may change the classification of the crime or the measure of restraint).⁴⁵² If the procurator confirms the conclusion to indict, the case is referred to the court that will conduct the bringing to trial.⁴⁵³

a case has been suggested: "The accused did not commit the crime." Savitskii, *Po povodu ugovovno-protsessual'nykh garantii prava nevinovnogo na rehabilitatsiiu* (Apropos of the Criminal Procedural Guarantees of the Innocent Person's Right to Rehabilitation), [1965] 9 S.G. 1 P. 48, 52.

⁴⁴⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 5(3).

⁴⁴⁷ *Id.* art. 6.

⁴⁴⁸ *Id.* art. 5(4).

⁴⁴⁹ *Id.* arts. 8-9. A case may also be terminated when it is transferred to a comrade's court. *Id.* art. 7.

⁴⁵⁰ *Id.* art. 209. The Code permits an appeal from any termination, but in reality, it is only persons who are seeking to establish their innocence that take advantage of the Code's provision. Savitskii, *supra* note 445, at 55.

It has been recommended that the Code explicitly prohibit the termination of a case on the assumption that the accused is guilty if the defendant expresses a desire to prove his innocence at trial. Savitskii, *supra* note 445, at 53-54. Such a right is currently granted when a case is terminated because the statute of limitations has run or because the accused has been pardoned. R.S.F.S.R. 1960 CRIM. PRO. C. art. 210. It has also been suggested that the accused be permitted to become acquainted with the materials of a terminated case so that he can determine whether to appeal the investigator's decree. Savitskii, *supra* note 445, at 55-56.

⁴⁵¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 205. Appended to the conclusion to indict is a list of witnesses which the investigator feels should be summoned to the trial. *Id.* art. 206.

⁴⁵² *Id.* art. 214-16. The procurator's supervisory powers are explicitly set forth by the Code. *Id.* arts. 211-13. At this time, the procurator may also consider appeals from actions of an investigator. *Id.* arts. 218-20.

⁴⁵³ *Id.* art. 217. The bringing to trial must be held within 14 days of the date of referral. *Id.* art. 221.

VI. BRINGING TO TRIAL

A. *Description of the Bringing to Trial*

The bringing to trial is a judicial review of the conclusion to indict. The proceeding is conducted by a single judge, unless he disagrees with the findings of the conclusion to indict or considers it necessary to change the measure of restraint, in which case he is joined by two people's assessors in an "administrative session."⁴⁵⁴ The only evidence considered by the court is that collected during the inquiry or preliminary investigation.⁴⁵⁵ The purpose of the review is to determine whether a prima facie case has been made out; i.e., whether the facts set forth would substantiate the accusation if subsequently proven at the trial.⁴⁵⁶ In determining whether to bring the accused to trial, the court considers: (1) whether it has jurisdiction over the case; (2) whether the evidence gathered is sufficient for consideration of the case at trial; (3) whether the procedural requirements of the Code have been met during the inquiry and/or preliminary investigation; (4) whether the criminal law is correctly applied to the acts imputed to the accused; (5) whether the proper measure of restraint has been selected; and (6) whether circumstances exist to warrant termination of the case.⁴⁵⁷ The court may decide to bring the accused to trial,⁴⁵⁸ return the case for a supplementary investigation,⁴⁵⁹

⁴⁵⁴ *Id.* arts. 221, 224. For a description of the people's assessors see text accompanying notes 505-10, *infra*.

Between 1929 and 1934, the procuracy presided over the bringing to trial. N. POLIANSKII, *supra* note 397, at 142. The theoreticians of the early Stalinist era agreed that to assign this power to the court would imply a lack of confidence in the procuracy, and that the court would then be duplicating the procuracy's function of controlling the work of the investigatory agencies. Bilinsky, *supra* note 302, at 67. But in 1934, the judiciary was again charged with the responsibility of reviewing the conclusion to indict. The proceeding is conducted by the same judge that presides over the trial. Soviet jurists praise the procedure because it eliminates poorly prepared cases and permits the judge to become acquainted with the issues prior to the trial. Hazard, *Soviet Criminal Procedure*, 15 *TUL. L. REV.* 220, 229 (1941).

⁴⁵⁵ V. LUKASHEVICH, *GARANTII PRAV OBYNIAMOGO V STADII PREDANIJA SUDU* (Guarantees of the Rights of the Accused at the Stage of the Bringing to Trial) 59-60 (1966); N. ZHOGIN & F. FATKULLIN, *supra* note 218, at 180.

⁴⁵⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 221; N. POLIANSKII, *supra* note 397, at 146-47; Hazard, *supra* note 454, at 229; Tsyppkin, *Predanie sudu i pravo na zashchitu* (The Bringing to Trial and the Right to Defense), [1961] 4 *PRAVOVEDENIE* 92, 93.

⁴⁵⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 222(1)-(8).

⁴⁵⁸ *Id.* arts. 226(1), 227. The court may reduce the charges sanctioned by the procurator, but may not increase them without returning the case for a supplementary investigation. R.S.F.S.R. KOMMENTARIJ 405-06.

⁴⁵⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 226(2). A case may be returned for a supplementary investigation if insufficient evidence has been gathered, if the procedural requirements of the Code have not been met, or if grounds exist for charging a more serious crime. *Id.* art. 232.

refer the case to the proper jurisdiction,⁴⁶⁰ or terminate the proceedings.⁴⁶¹

B. *Right to Counsel During the Bringing to Trial*

In theory, the bringing to trial is a very important stage of the criminal proceedings because it represents the first opportunity for an impartial magistrate to review the findings of the preliminary investigation. The court is to detect and remedy any procedural violations evident in the written record of the investigative activities. It should also seek to eliminate any accusatory bias manifest in the materials gathered during the preliminary investigation. In practice, however, the judicial review of the conclusion to indict is normally formalistic and perfunctory.⁴⁶² There are several possible explanations for the judiciary's mechanistic approach to the bringing to trial. The materials examined by the court have already been reviewed by the procurator, and he has expressed his belief that a prima facie case has been made out. The court's review is therefore somewhat superfluous, particularly since the same materials will be examined in greater detail at the trial. A second possible explanation for the court's perfunctory review of the indictment is that neither the procurator nor defense counsel attends the bringing to trial unless he has presented a petition or unless an administrative session has been called, in which case only the procurator's presence is obligatory.⁴⁶³ The court is therefore reviewing the materials of a proceeding which it did not attend without the benefit of evaluative comments by those who did participate. Under these circumstances, it is not surprising that the bringing to trial fails to perform the functions it was designed to accomplish.

Defense counsel is not only excluded from the courtroom (with certain exceptions) during the bringing to trial. He is also forbidden to accept the defense of an accused under certain circumstances during the conduct of this proceeding. If counsel has

⁴⁶⁰ *Id.* arts. 226(4), 231.

⁴⁶¹ *Id.* arts. 226(5), 234. For a discussion of the reasons for terminating a case see text accompanying notes 444-49, *supra*.

⁴⁶² Decree of March 18, 1963, *Strict Adherence to Law by Courts in Criminal Trials*, [1963] 3 Bull. Verkh. Suda S.S.S.R. 3, 8 (Sup. Ct. U.S.S.R.), transl. in 2 Sov. L. & Gov't No. 2, at 17, 20 (1963); Kirienko, Zus' & Daev, *Prava obviniaemogo v stadii predaniia sudu* (Rights of the Accused in the Stage of the Bringing to Trial), [1967] 9 S.G. 1 P. 150; Radzhabov, *Spornye voprosy predaniia sudu* (Controversial Problems of the Bringing to Trial), [1967] 3 Sots. ZAK. 35.

⁴⁶³ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 223-24. The procurator's presence is obligatory during an administrative session because such a session is called only when the judge disagrees with the findings of the conclusion to indict or considers it necessary to change the measure of restraint approved by the procurator prior to the bringing to trial. *Id.* art. 221; R.S.F.S.R. KOMMENTARI 402.

been admitted to the preliminary investigation, he may participate during the bringing to trial to advise his client on the presentation of petitions and appeals.⁴⁶⁴ But if an inquiry has been held in lieu of the preliminary investigation, there is a division of opinion concerning the right to counsel during the judicial review of the conclusion to indict. The R.S.F.S.R. Code of Criminal Procedure states that "defense counsel shall be permitted from the moment the accused is brought to trial" in cases in which a preliminary investigation is not conducted.⁴⁶⁵ Many Soviet jurists maintain that the accused is not brought to trial until the court has confirmed the conclusion to indict, meaning that the accused enjoys no right to counsel until preparations are underway for the trial.⁴⁶⁶ In practice, however, judges presiding over the bringing to trial of cases in which an inquiry has been held do permit advocates to assist an accused from the moment the court assumes jurisdiction over the case.⁴⁶⁷ Recently, several jurists have suggested that this practice is in compliance with the Code if "the moment the accused is brought to trial" is interpreted as meaning the moment the court assumes jurisdiction, rather than the moment the court's decree to prosecute is rendered.⁴⁶⁸

1. COUNSEL'S FUNCTIONS DURING THE BRINGING TO TRIAL

Defense counsel's functions during the bringing to trial are numerous, but statistics show that even the most important of these duties are rarely performed by Soviet advocates. One purpose of the bringing to trial is to allow an advocate to appeal the investigator's denial of defense petitions. Yet less than 8 percent of these appeals are presented at the bringing to trial; the remaining 92 percent are submitted for the first time at the trial.⁴⁶⁹ Likewise, counsel is entitled to present petitions eliciting supplemental evidence, challenging the judge or the court's jurisdiction, objecting to procedural violations and irregularities in the conclusion to indict, or requesting the termination of a case, a change in the qualification of a crime, or a reduction in the measure of restraint.⁴⁷⁰ Such petitions are rarely presented, however, just

⁴⁶⁴ N. POLIANSKII, *VOPROSY TEORII SOVETSKOGO UGOLOVNOGO PROTSESSA* (Problems of the Theory of Soviet Criminal Procedure) 201 (1956); Radzhabov, *supra* note 462, at 36; Shafir, *supra* note 231, at 47, 49; Tsypkin, *supra* note 456, at 102.

⁴⁶⁵ R.S.F.S.R. CRIM. PRO. C. art. 47.

⁴⁶⁶ R.S.F.S.R. KOMMENTARIJ 116-17; V. LUKASHEVICH, *supra* note 455, at 133-34.

⁴⁶⁷ V. LUKASHEVICH, *supra* note 455, at 140; Tsypkin, *supra* note 456, at 101.

⁴⁶⁸ Shafir, *supra* note 231, at 49-50; Tsypkin, *supra* note 456, at 102-03. *Contra*, V. LUKASHEVICH, *supra* note 455, at 130-31.

⁴⁶⁹ V. LUKASHEVICH, *supra* note 455, at 124, 138. These figures are for Leningrad from 1962-1965.

⁴⁷⁰ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 223; R.S.F.S.R. KOMMENTARIJ 400-01; Radzhabov, *supra* note 462, at 36; Tsypkin, *supra* note 456, at 101.

as additional evidence is not often adduced by the defense during the bringing to trial.⁴⁷¹ It has been suggested that counsel's failure to submit defense petitions is attributable to the fact that neither counsel nor the accused receives a copy of the conclusion to indict after it has been sanctioned by the procurator.⁴⁷² If the procurator has revised the investigator's conclusion to indict, this makes it impossible for the defense to know the precise nature of the charges until after the bringing to trial.⁴⁷³

2. SUGGESTED REFORMS

A more likely explanation for counsel's failure to present petitions, however, is that he must be summoned by the court (within its discretion) to support defense petitions submitted during the bringing to trial, whereas he can present the same petitions at the opening of the trial (where counsel is obligatory) and be assured an opportunity to explain their content.⁴⁷⁴ This has led numerous Soviet jurists to suggest that counsel's presence during the bringing to trial ought to be mandatory under certain circumstances. Tsypkin has recommended that counsel's participation be obligatory if the accused is a minor or unable to conduct his own defense due to physical or mental defects.⁴⁷⁵ Lukashevich believes that counsel should automatically be admitted upon his request to explain defense petitions.⁴⁷⁶ And Shafir carries this concept one step further, suggesting that counsel's participation be mandatory upon his request to attend an administrative session (at which the procurator's presence is already obligatory).⁴⁷⁷

Persons opposed to the adoption of such reforms maintain that counsel's presence in the courtroom during the bringing to trial is unnecessary because the procurator appears in his supervisory, not his accusatory role, and he is therefore able to protect the accused's right to defense.⁴⁷⁸ But if there is reason to believe that

⁴⁷¹ Ginzburg, *Metodika zashchity v sudebnom sledstvii* (Methods of Defense in the Judicial Examination), [1964] 5 Sov. Iust. 20, 22; Shafir, *supra* note 231, at 50.

⁴⁷² V. LUKASHEVICH, *supra* note 455, at 127-28. Lukashevich also criticizes the failure of procurators to inform the accused of his right to present evidence and petitions during the bringing to trial. He suggests that a written explanation of the accused's right to defense be printed in duplicate and signed by the accused, after which the accused should receive the duplicate copy for future reference. *Id.* at 126-27.

⁴⁷³ *Id.* at 128. Lukashevich recommends that the accused be given a copy of the revised conclusion to indict at the time the procurator refers the case to court. *Id.* at 129.

⁴⁷⁴ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 223, 225, 276.

⁴⁷⁵ Tsypkin, *supra* note 456, at 103-04.

⁴⁷⁶ V. LUKASHEVICH, *supra* note 455, at 144.

⁴⁷⁷ Shafir, *supra* note 231, at 50.

⁴⁷⁸ V. LUKASHEVICH, *supra* note 455, at 110; N. POLIANSKII, *supra* note 397, at 146; R. RAKHUNOV, *supra* note 104, at 162.

investigators occasionally show an accusatory bias, there is even more reason to believe that the procurators themselves are influenced by their dual role as prosecutors and supervisors of socialist legality.⁴⁷⁹ For this reason alone, then, it would seem advisable to make counsel's presence mandatory during the bringing to trial. There are additional advantages to be derived from counsel's participation in the courtroom, however. The bringing to trial ought to represent a summation of the pretrial proceedings at which all errors in the conduct of the preliminary investigation are corrected before determining whether to send the case to trial.⁴⁸⁰ If the presentation of appeals and petitions for supplemental evidence is postponed until the beginning of the trial, the result may well be the time-consuming and disruptive remand of the case for a supplementary investigation at the end of which it is discovered that the case should have been terminated at the end of the preliminary investigation. Due to the perfunctory nature of the court's review of the conclusion to indict, however, and due to counsel's failure to request a termination of the case at the bringing to trial, the grounds for termination were not discovered until the trial in the court of first instance. Counsel's participation in the courtroom during the bringing to trial would therefore be advantageous in that it would encourage an advocate to present appeals and petitions prior to the trial and in that it would prompt the court to conduct a less formalistic review of the conclusion to indict.

C. *Presumption of Innocence in the Soviet Criminal Process*

The decision to bring the accused to trial is not a determination of his guilt.⁴⁸¹ The Code of Criminal Procedure does not explicitly state that the accused is presumed innocent until he is proven guilty. However, no inference of guilt may be drawn from the mere fact of indictment; it is only the court of first instance that can determine the question of guilt or innocence following the presentation of evidence at the trial.⁴⁸² The accused has no obligation to present evidence,⁴⁸³ and the court may not "assume"

⁴⁷⁹ G. FEIFER, *supra* note 182, at 132; see text accompanying notes 265-77, *supra*.

⁴⁸⁰ V. LUKASHEVICH, *supra* note 455, at 125; Shafir, *supra* note 231, at 50.

⁴⁸¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 221; R.S.F.S.R. KOMMENTARIJ 397; Tsytkin, *supra* note 456, at 93.

⁴⁸² U.S.S.R. CONST. art. 102; U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE arts. 7, 43; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 13, 303, 309; V. LUKASHEVICH, *supra* note 455, at 56; N. POLIANSKII, *supra* note 464, at 192; SOVIET CRIMINAL LAW AND PROCEDURE 82.

⁴⁸³ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE arts. 14, 21; R.S.F.S.R. 1960 CRIM. PRO. C. art. 20 (no right to shift burden of proof to the accused); *Id.* arts. 46, 70 (right, but not duty of accused to present evidence); B. GALKIN, *supra* note 201, at 173; A. KOBLIKOV, *supra* note 223, at 15; N. POLIANSKII, *supra* note 464, at 191; SOVIET CRIMINAL LAW AND PROCEDURE 82.

the accused guilty in the absence of positive proof.⁴⁸⁴ On the other hand, the burden of proof is not solely upon the prosecution; excepting the defendant, all participants in the trial, including the judge, have an obligation to elicit or present evidence.⁴⁸⁵ For this reason, Berman has suggested that "Soviet law embodies the presumption of innocence in the general sense of the phrase but not in the technical meaning attached to it in English and American law."⁴⁸⁶

The accuracy of Berman's statement is illustrated by the outcome of a public dispute in the Soviet press in 1964 over the existence of a presumption of innocence in the 1958 Principles of Criminal Procedure. Strogovich, a leading legal theorist, wrote in the newspaper *Literaturnaia Gazeta* that the Principles should be interpreted as follows: "Until the court . . . has finally decided the case, the defendant is not considered guilty . . . no matter how grave and convincing the evidence arrayed against him."⁴⁸⁷ Filimonov, an investigator, took issue with Strogovich. Writing in the same newspaper, he asserted that

[t]he law gives the investigatory agencies the right to bring charges against someone and to interrogate him as the accused, and hence to recognize him as guilty. And the prosecutor brings to trial and, in criminal proceedings, accuses a person who is already guilty in the eyes of the investigatory agencies, i.e., in the eyes of the authorities. And the court merely verifies to what extent the individual brought to trial and accused by the prosecutor is guilty and whether or not this offender deserves criminal punishment.⁴⁸⁸

If Filimonov had said that the investigator must be convinced that he has gathered sufficient evidence to support a conviction in court, no one would have quarreled with his statement.⁴⁸⁹ How-

⁴⁸⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 301 (judgment of court based only on evidence considered at trial); *Id.* art. 309 (conviction may not be founded on assumptions and shall be decreed only if defendant's guilt is proven during trial). Shapiro, [1964] 2 Bull. Verkh. Suda S.S.S.R. 44, transl. in 1 SOV. STAT. & DEC. NO. 4, at 28 (Crim. Div. Sup. Ct. U.S.S.R. 1963); A. KOBLIKOV, *supra* note 223, at 15; N. POLIANSKII, *supra* note 464, at 192; SOVIET CRIMINAL LAW AND PROCEDURE 82.

⁴⁸⁵ SOVIET CRIMINAL LAW AND PROCEDURE 83-85.

⁴⁸⁶ *Id.* at 87. In this respect, the Soviet system is not unlike the Continental European systems. *Id.*; Hazard, *Soviet Socialism and Due Process*, 48 MICH. L. REV. 1061, 1068-69 (1950).

⁴⁸⁷ *Literaturnaia Gazeta*, Aug. 18, 1964, at 2, transl. in 16 C.D.S.P. No. 39, at 24 (1964). Article 7 of the U.S.S.R. 1958 Principles of Criminal Procedure to which Strogovich was most specifically referring reads as follows: "No person may be deemed guilty of committing a crime and subjected to criminal punishment except by judgment of a court."

⁴⁸⁸ *Literaturnaia Gazeta*, *supra* note 487, at 24.

⁴⁸⁹ Soviet jurists emphasize the fact that the presumption of innocence is a procedural safeguard permitting the accused to assert his innocence

ever, by asserting that the investigator has the right to determine the issue of guilt and that the court has no right to acquit once the accused has been brought to trial, Filimonov drew the criticism of Chaikovskaia in the newspaper *Izvestia*.⁴⁹⁰ Chaikovskaia accused Filimonov of espousing a theory which had its roots in the Stalinist era "when they would come for a man in the night, [and] by morning he would already be called an enemy of the people."⁴⁹¹ Filimonov considered Chaikovskaia's statement libelous, and filed a suit against Chaikovskaia and *Izvestia* to restore his offended honor and dignity.⁴⁹² The court ruled against Filimonov, indicating that his position was contrary to the Principles of Criminal Procedure.⁴⁹³ To erase all doubt about the matter, Gorkin, the Chairman of the U.S.S.R. Supreme Court, published an article in *Izvestia* asserting that "only the court is competent to say, in its verdict, whether or not the defendant is guilty of the crime that has been committed. . . . It is clearly contrary to legislation to assert that the prosecutor brings to trial 'a person who is already guilty' . . ."⁴⁹⁴ The presumption of innocence is therefore firmly established in Soviet law although the principle is not explicitly enunciated in the Code of Criminal Procedure.

*D. Preparation for the Trial and the Accused's Obligatory
Right to Counsel*

After a determination has been made to bring the accused to trial, the judge or court in administrative session must determine whether a state accuser (*i.e.*, a procurator) will participate during the trial and whether to permit as defense counsel the person selected by the accused or whether to appoint an advocate for the trial.⁴⁹⁵ If a procurator is to participate during the judicial

until the court's judgment has been decreed. It does not mean that the investigator or procurator considers the accused innocent at the end of the preliminary investigation. In fact, if they do consider the accused innocent, the case should be terminated, not sent on to trial. V. LUKASHEVICH, *supra* note 455, at 52-53, 56; Gorkin, *On Socialist Justice*, *Izvestia*, Dec. 2, 1964, at 3, transl. in 16 C.D.S.P. No. 48, at 21 (1964).

⁴⁹⁰ Chaikovskaia, *Dangerous Innocence*, *Izvestia*, Sept. 10, 1964, at 3, transl. in 16 C.D.S.P. No. 37, at 33, 34 (1964).

⁴⁹¹ *Id.* Strogovich wrote a reply to Filimonov in which he noted the similarity between Filimonov's theory and Vyshinsky's theory that "maximum probability" of guilt is sufficient for conviction. Strogovich, *supra* note 422, at 23.

⁴⁹² Strogovich, *Truth, the Court, the Prosecutor*, *Literaturnaia Gazeta*, Dec. 17, 1964, at 2, transl. in 17 C.D.S.P. No. 4, at 11 (1965).

⁴⁹³ *Id.*

⁴⁹⁴ Gorkin, *supra* note 489, at 21. As Strogovich pointed out, the Code of Criminal Procedure also explicitly states that a judge shall render a decree to bring the accused to trial "without predetermining the question of guilt." R.S.F.S.R. 1960 CRIM. PRO. C. art. 221.

⁴⁹⁵ R.S.F.S.R. 1960 CRIM. PRO. C. art. 228. Failure to determine whether a procurator will participate is reversible error. Filimonova, [1964] 6 Bull.

examination,⁴⁹⁶ counsel is obligatory for the accused.⁴⁹⁷ Counsel is also obligatory if the accused is a minor, one of two or more persons whose interests conflict and one of whom has defense counsel, or if he is physically or mentally unable to conduct his own defense, without command of the language in which the proceedings are conducted, or charged with a crime punishable by death.⁴⁹⁸ In all of the above instances, the accused may retain his own counsel.⁴⁹⁹ If he is unwilling or financially unable to do so, however, the court must appoint an advocate to represent him during the trial.⁵⁰⁰ The accused may waive his right to counsel, and presumably the privilege is exercised with some frequency (although statistical information on this subject is unavailable), but the waiver must be voluntary.⁵⁰¹ In this connection, the Supreme Court of the U.S.S.R. has ruled that an advocate's presence is an absolute prerequisite to the voluntary waiver of an accused's obligatory right to counsel at the trial.⁵⁰²

Verkh. Suda R.S.F.S.R. 8, transl. in 1 Sov. STAT. & DEC. No. 4, at 20, 21-22 (Crim. Div. Sup. Ct. R.S.F.S.R. 1963). The court also sets the time and place for the trial, determines which persons to summon as experts and witnesses, and decides whether to consider the case in closed judicial session. R.S.F.S.R. 1960 CRIM. PRO. C. art. 228.

⁴⁹⁶ "Judicial examination" is the Soviet term for a trial in the court of first instance.

⁴⁹⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 49(1). If an accused waives his right to counsel without knowing that a procurator will participate in the proceedings, the waiver is not considered voluntary and the case can be remanded for a new trial. Filimonova, [1964] 6 Bull. Verkh. Suda R.S.F.S.R. 8, transl. in 1 Sov. STAT. & DEC. No. 4, at 20, 22 (Crim. Div. Sup. Ct. R.S.F.S.R. 1963).

⁴⁹⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 49(2)-(6). Failure to appoint counsel in any one of these situations is grounds for a new trial. Razbitkova, [1963] 5 Bull. Verkh. Suda S.S.S.R. 33 (Mil. Div. Sup. Ct. U.S.S.R. 1963); Kartinin, Zakharov & Sorokin, [1964] 7 Bull. Verkh. Suda R.S.F.S.R. 15 (Tul'skii Reg. Ct. 1964).

⁴⁹⁹ If retained counsel can appear within a reasonable length of time, it is a violation of the accused's right to defense for the court to appoint a substitute. Shaburov (Crim. Div. Sup. Ct. R.S.F.S.R. [no date]), in COLLECTION OF DECREES OF THE PLENUM AND PRESIDUM AND RULINGS OF THE JUDICIAL DIVISION FOR CRIMINAL CASES OF THE RSFSR, 1961-1963, at 333 (L. Smirnov ed. 1964); A. TSYPKIN, SUDEBNOE RAZBIRATEL'STVO V SOVETSKOM UGOLOVNOM PROTSESSE (Judicial Examination in Soviet Criminal Proceedings) 33 (1962); Nanikishvili, *Ne dopuskat' narusheniia prava obviniaemogo na zashchitu* (Don't Permit Violations of the Accused's Right to Defense), [1964] 11 Sots. ZAK. 15.

⁵⁰⁰ R.S.F.S.R. 1960 CRIM. C. art. 49. The fact that the accused is not confined under guard, and therefore able to retain counsel, does not relieve the court of its obligation to appoint counsel if none has in fact been retained. Bukharin, [1963] 3 Bull. Verkh. Suda R.S.F.S.R. 11 (Crim. Div. Sup. Ct. R.S.F.S.R. 1962) For a more complete discussion of the retention and appointment of counsel see text accompanying notes 332-39, *supra*.

⁵⁰¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 50. An accused's waiver of his right to counsel does not prevent the continued participation of a procurator. Aleshin, [1967] 5 Bull. Verkh. Suda R.S.F.S.R. 11 (Crim. Div. Sup. Ct. R.S.F.S.R. 1966).

⁵⁰² Karapetian, [1966] 4 Bull. Verkh. Suda S.S.S.R. 26 (Sup. Ct. U.S.S.R.

VII. TRIAL

A. Description of the Trial

The trial in the court of first instance is conducted by one judge and two people's assessors.⁵⁰³ The judge is elected for a term of five years, and he normally has a formal legal education.⁵⁰⁴ The people's assessors are laymen elected for a two-year term.⁵⁰⁵ They serve on the trial bench no more than two weeks a year, and are paid regular wages during the time they are discharging their duties in court.⁵⁰⁶ These lay judges serve the same function as a jury by relating legal theory to social environment.⁵⁰⁷ Unlike a jury, however, they decide both questions of fact and law.⁵⁰⁸ Furthermore, they exercise equal voting rights with the judge, making it possible for them to overrule his position.⁵⁰⁹ In practice, however, the people's assessors normally defer to the judge's professional opinion, particularly since the judge instructs them on the law and is present when the vote is taken on the verdict.⁵¹⁰

The trial in the Soviet Union is perhaps the most adversary phase of the criminal process in that a procurator normally appears to support the accusation,⁵¹¹ and an advocate participates on behalf of the defense.⁵¹² Nevertheless, the trial still retains certain

1966) (remanded for a new trial). A similar rule obtained under the 1924 U.S.S.R. Principles of Criminal Procedure. Bekeshko, *Zashchita kak protsessual'naiia funktsiia v sovetskom ugovnom protsesse* (Defense as a Procedural Function in Soviet Criminal Proceedings), in *VOPROSY UGOLOVNOGO PRAVA I PROTSSESA* (Problems of Criminal Law and Procedure) 248-49 (1958).

⁵⁰³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 15; Law of Oct. 27, 1960, art. 10, [1960] 40 Ved. Verkh. Sov. R.S.F.S.R. Item 593. People's courts, regional courts, and republic supreme courts may all assume original jurisdiction over a criminal case depending upon its importance. SOVIET CRIMINAL LAW AND PROCEDURE 102-03; Hulicka, *The Judicial System in the U.S.S.R.*, 42 SW. SOCIAL SCI. Q. 162, 163-64 (Sept. 1961).

⁵⁰⁴ Law of Oct. 27, 1960, arts. 28, 33, 41, 49, [1960] 40 Ved. Verkh. Sov. R.S.F.S.R. Item 593; G. FEIFER, *supra* note 182, at 83-84; SOVIET CRIMINAL LAW AND PROCEDURE 101; Hulicka, *supra* note 503, at 162.

⁵⁰⁵ Law of Oct. 27, 1960, art. 28, [1960] 40 Ved. Verkh. Sov. R.S.F.S.R. Item 593; SOVIET CRIMINAL LAW AND PROCEDURE 101; Hulicka, *supra* note 503, at 162.

⁵⁰⁶ Law of Oct. 27, 1960, arts. 15-16, [1960] 40 Ved. Verkh. Sov. R.S.F.S.R. Item 593.

⁵⁰⁷ Scanlan, *Soviet Criminal Law and Procedure: "Star Chamber" or Clinical Jurisprudence?* 19 ROCKY MT. L. REV. 261, 271 (1947).

⁵⁰⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 15; Law of Oct. 27, 1960, art. 11, [1960] 40 Ved. Verkh. Sov. R.S.F.S.R. Item 593; Hazard, *supra* note 486, at 1066.

⁵⁰⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 306; G. FEIFER, *supra* note 182, at 82.

⁵¹⁰ G. FEIFER, *supra* note 182, at 81-82; Hazard, *supra* note 486, at 1066; Hulicka, *supra* note 503, at 162.

⁵¹¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 248.

⁵¹² *Id.* art. 249.

characteristics of an inquisitional proceeding, particularly since it is the judge who conducts the presentation of the evidence.⁵¹³ After reading the conclusion to indict and asking the accused how he pleads, the judge interrogates the defendant, victim, witnesses and experts, views real evidence, and publicly discloses documents and records.⁵¹⁴ This eliminates the need for a rigorous cross-examination, and it is often said that an air of informality prevails during a criminal trial in the Soviet Union.⁵¹⁵ The court's judgment must be based upon evidence considered at the judicial examination.⁵¹⁶ The materials of the preliminary investigation must therefore be examined directly by the court, and testimony taken during the preliminary investigation cannot be considered by the court in reaching its verdict unless substantial contradictions exist between the testimony given during the preliminary investigation and that given by the same person at the trial.⁵¹⁷ The Soviet rules of evidence are not complex. The judge may exclude evidence which is immaterial or irrelevant to the issues in the case.⁵¹⁸ He may also exclude evidence which has been obtained in violation of the rules of criminal procedure.⁵¹⁹ There is no prohibition on the use of hearsay, however, provided the source is identified and there is no better evidence available.⁵²⁰

B. Functions Performed by Defense Counsel During the Trial

1. JUDICIAL EXAMINATION

Defense counsel performs several important functions during the early stages of the trial. After the accused has been brought to trial, he and his lawyer are permitted to become acquainted with

⁵¹³ *Id.* art. 243.

⁵¹⁴ *Id.* arts. 70, 240, 276, 278, 280, 283, 287, 288-89, 291-93. The court must maintain an objective, impartial attitude in eliciting evidence and interrogating witnesses. *Id.* art. 243; Anashkin, *Sudeiskaia aktivnost' i ob'ektivnost'* (Judicial Activity and Objectivity), [1967] 7 Sov. Iust. 3, 4.

⁵¹⁵ Scanlan, *supra* note 507, at 270.

⁵¹⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 301; Decree of March 18, 1963, *Strict Adherence to Law by Courts in Criminal Trials*, [1963] 3 Bull. Verkh. Suda S.S.S.R. 3, 8 (Sup. Ct. U.S.S.R.), transl. in 2 Sov. L. & Gov't No. 2, at 17, 20 (1963).

⁵¹⁷ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 240, 281, 286; Decree of March 18, 1963, *Strict Adherence to Law by Courts in Criminal Trials*, [1963] 3 Bull. Verkh. Suda S.S.S.R. 3, 8 (Sup. Ct. U.S.S.R.), transl. in 2 Sov. L. & Gov't No. 2, at 17, 20 (1963). Apparently contradictions are frequently discovered and, in practice, reference is often made to testimony given during the preliminary investigation. G. FEIFER, *supra* note 182, at 86.

⁵¹⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 243, 280, 283, 288; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 104; Hazard, *supra* note 454, at 231; Scanlan, *supra* note 507, at 271.

⁵¹⁹ Decree of March 18, 1963, *Strict Adherence to Law by Courts in Criminal Trials*, [1963] 3 Bull. Verkh. Suda S.S.S.R. 3, 8 (Sup. Ct. U.S.S.R.), transl. in 2 Sov. L. & Gov't No. 2, at 17, 20 (1963); N. IAKUBOVICH, *supra* note 320, at 138.

⁵²⁰ Hazard, *supra* note 454, at 231.

the materials of the case.⁵²¹ Counsel's primary duties in examining the case materials are to discover procedural errors made during the pretrial stages and to determine what new evidence should be presented on behalf of the defense at the trial. He therefore checks to be sure that the written records of the pretrial proceedings are complete and that they have been properly signed.⁵²² He compares the accusation and the conclusion to indict to determine whether new charges have been added in the latter. If they have, counsel may request a supplementary investigation to permit the accused to defend himself against the new charge prior to the trial.⁵²³ Counsel then examines the sufficiency of the evidence to determine whether a petition should be presented to reduce the charges or terminate the case.⁵²⁴ Finally, he consults with the accused to consider the possibility of submitting or petitioning the production of additional evidence in favor of the defense.⁵²⁵

Petitions to correct procedural errors, reduce the charges, terminate the case, or reduce the measure of restraint, petitions to summon new witnesses and experts or to acquire real evidence and documents, and petitions challenging the court, procurator, expert, or interpreter may be submitted at the beginning of the trial.⁵²⁶ Complex petitions for supplemental evidence are often postponed until that evidence becomes logically necessary to the development of the defendant's case,⁵²⁷ and complaints concerning the court's procedural errors are always submitted during the trial.⁵²⁸ Until recently, counsel tended to ignore the importance of presenting such petitions. Advocates concentrated all their energies on composing a persuasive closing argument.⁵²⁹ It is now recognized, however, that a closing argument carries little weight if it is not based upon a solid evidentiary foundation.⁵³⁰ For this reason, advocates are being urged to play a more active role in the presentation and evaluation of evidence during the early

⁵²¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 236.

⁵²² A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 40-47.

⁵²³ *Id.* at 47.

⁵²⁴ *Id.* at 47-48.

⁵²⁵ A. TSYPKIN, *supra* note 499, at 26.

⁵²⁶ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 258-60, 272, 276; R.S.F.S.R. KOMMENTARIJ 496; A. TSYPKIN, *supra* note 499, at 26. All of these petitions may be presented prior to the trial if the court has time to conduct a hearing. R.S.F.S.R. KOMMENTARIJ 424. If a petition is denied at the beginning of the trial, this does not preclude its resubmission later in the trial. R.S.F.S.R. 1960 CRIM. PRO. C. art. 276; R.S.F.S.R. KOMMENTARIJ 468.

For a discussion of the grounds for presenting a challenge see note 195, *supra*.

⁵²⁷ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 91-92.

⁵²⁸ Tsubin, *supra* note 391, at 65.

⁵²⁹ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 73.

⁵³⁰ *Id.*; E. MATVIENKO, *supra* note 134, at 77.

stages of the trial.⁵³¹ At the same time, judges are being cautioned against rejecting well-founded petitions submitted by the defense, a practice which has been all too prevalent in the past.⁵³²

Since the trial is the most adversary phase of Soviet criminal proceedings, with the procurator appearing in his accusatory rather than his supervisory role,⁵³³ it is essential that an advocate present a vigorous defense.⁵³⁴ If his client denies his guilt, he should first develop the defense theory in questioning the accused and then present real evidence and witnesses to support an acquittal.⁵³⁵ If his client acknowledges his guilt, an advocate may either argue for an acquittal on the grounds that the confession was coerced or plead mitigating circumstances in an effort to obtain a reduced sentence.⁵³⁶ In either case, he should make every effort to disclose the weaknesses or inconsistencies in the prosecution's case.⁵³⁷ This may be done by cross-examining the victim, experts, and other witnesses, challenging the sufficiency of the evidence corroborating a confession, objecting to the admission of evidence obtained in violation of the Code of Criminal Procedure, or alleging the failure of the prosecution to prove the elements of the crime.⁵³⁸ Since the burden of proof is not upon the accused, it is

⁵³¹ Decree of March 18, 1963, *Strict Adherence to Law by Courts in Criminal Trials*, [1963] 3 Bull. Verkh. Suda S.S.S.R. 3, 8 (Sup. Ct. U.S.S.R.), transl. in 2 Sov. L. & Gov't No. 2, at 17, 21 (1963); A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 73-74; E. MATVIENKO, *supra* note 134, at 78; Vatman & Kisenishskii, *supra* note 364, at 21.

For a discussion of the means by which an advocate may obtain evidence see text accompanying notes 360-64, *supra*.

⁵³² *Izvestia*, March 11, 1967, at 5, transl. in 19 C.D.S.P. No. 10, at 37 (1967); Perlov, *Alphabet of the Law*, *Izvestia*, Jan. 12, 1967, at 4, transl. in 19 C.D.S.P. No. 2, at 32 (1967).

⁵³³ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 40; R.S.F.S.R. 1960 CRIM. PRO. C. art. 248; A. TSYPKIN, *supra* note 499, at 20-22.

⁵³⁴ R.S.F.S.R. KOMMENTARIJ 441, 450; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 72; T. NEISHTADT, SOVETSKII ADVOKAT (Soviet Advocate) 23 (1958). An advocate is explicitly granted equal procedural rights with a procurator. U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 38; R.S.F.S.R. 1960 CRIM. PRO. C. art. 245.

⁵³⁵ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 249; R.S.F.S.R. KOMMENTARIJ 450-51, 510-11; V. KAMINSKAIA, *supra* note 428, at 140; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 101-02; Stetsovskii, *Uchastie zashchitnika v dokazyvanii po ugolovnomu delu* (Participation of an Advocate in Presenting Proof in a Criminal Case), 6 Sov. IUST. 14 (1967).

⁵³⁶ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 51, 249; R.S.F.S.R. KOMMENTARIJ 450-51; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 101-02; Stetsovskii, *supra* note 535, at 14.

⁵³⁷ Stetsovskii, *supra* note 535, at 15.

⁵³⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 280, 283, 287-89; T. NEISHTADT, *supra* note 534, at 26-27.

The critical examination of an expert opinion is a very important function of defense counsel during the trial. An advocate must have sufficient knowledge of an expert's field to pose supplemental questions, interrogate the expert concerning his opinion, and to determine when it is necessary to petition for the appointment of a second expert. R.S.F.S.R. 1960 CRIM.

possible for an advocate to win a case solely on the basis of these latter defense tactics without putting in any positive proof of his client's innocence.⁵³⁹

2. CLOSING ARGUMENT

After the judicial examination is completed, the court hears oral arguments by the prosecution and the defense before retiring to its chambers to reach a verdict. The oral arguments constitute a summation of the judicial examination; no reference may be made to evidence which was not considered at the trial.⁵⁴⁰ Defense counsel's closing speech serves three important functions: it assists the accused in exercising his right to defense; it assists the court in decreeing a judgment based on the objective truth; and it assists the Communist Party in educating the masses to live by the precepts of Soviet criminal law.⁵⁴¹ This third function is of particular importance when the trial is removed from the courtroom and conducted at the headquarters of the collective whose members have been charged with the commission of a crime. Feifer, an American observer of Soviet courtroom practice, reports that approximately one-fifth of all criminal cases are conducted in this manner, and notes that the crowds—often numbering in the hundreds—express their opinion regarding the accused's guilt by uttering loud boos and shouts throughout the entire proceeding.⁵⁴²

In carrying out the first of his duties—to assist the accused in exercising his right to defense—counsel confronts certain problems of an ethical nature. The procurator is permitted to withdraw from the accusation in his closing speech if he becomes convinced during the judicial examination that there is insufficient evidence to support a conviction. (The procurator's withdrawal is not binding on the court and the trial proceeds as if this action had not been undertaken.⁵⁴³) The right of the procurator to withdraw from the accusation has caused a few Soviet jurists to assert a parallel

PRO. C. arts. 288-90; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 147-49, 152-53; T. NEISHTADT, *supra* note 534, at 27-28; A. TSYPKIN, *supra* note 499, at 58-60.

⁵³⁹ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 43; R.S.F.S.R. 1960 CRIM. PRO. C. art. 309; E. MATVIENKO, *supra* note 134, at 76.

For a discussion of the presumption of innocence in Soviet law see text accompanying notes 481-94, *supra*.

⁵⁴⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 295; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 165-67; E. MATVIENKO, *supra* note 134, at 74; A. TSYPKIN, *supra* note 499, at 61.

⁵⁴¹ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 171; E. MATVIENKO, *supra* note 134, at 4-5; Ekmekchi, *Vospitatel'noe znachenie rechi advokata v sude* (Educational Significance of an Advocate's Speech at the Trial), [1964] 10 SOTS. ZAK. 58, 60.

⁵⁴² G. FEIFER, *supra* note 182, at 107-11.

For a discussion of the parental or educational aspects of Soviet law see H. BERMAN, *supra* note 421, at 282-84.

⁵⁴³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 248.

right of defense counsel to express his opinion on the issue of guilt, even if it means renouncing his client's innocence.⁵⁴⁴ That this theory has been implemented in practice is evidenced by Feifer's account of counsel's closing speech in the case of Kushelova and Zharikova, tried for "theft by a group of persons in accordance with a preliminary agreement" in a Moscow people's court:

Yes, Zharikova is guilty—truly guilty. She must be punished. She committed a crime and in our society no crime can go unpunished. . . . But the punishment must be fair and sensible. . . .

I must now touch briefly upon another aspect of this case—the judicial aspect. My client has denied that she and Kushelova made a preliminary agreement among themselves to commit their crime. I must tell you frankly that I myself do not believe this. You have seen how mistrustful I was when I questioned her about her intentions. I simply cannot believe that she went to the Luzhniki market with Kushelova without having reached an understanding beforehand to take an illegal action.⁵⁴⁵

It is small wonder that the majority maintain that counsel may not refute his client's plea of innocence, even if he believes him guilty! Instead, they assert that he must remain silent on the issue of guilt, disclose the weaknesses in the prosecution's case, and plead mitigating circumstances.⁵⁴⁶ Nor should counsel's strategy change if the procurator withdraws from the accusation. Since the procurator's decision is not binding on the court, counsel must still present a vigorous defense in an effort to obtain a definite acquittal for his client.⁵⁴⁷

A second problem confronting defense counsel concerns the use of alternatives. Those who would have an advocate express his opinion on the issue of guilt also assert that counsel should not argue in the alternative. Instead, he should select a position on the question of guilt and maintain that position throughout his closing speech.⁵⁴⁸ Jurists who insist upon counsel's supporting

⁵⁴⁴ Iakubovich, *supra* note 362, at 45; Ekmekchi, *supra* note 541, at 59; Kul'berg, *Iuridicheskii analiz v zashchitel'noi rechi advokata* (Juridical Analysis in the Advocate's Speech for the Defense), [1965] 2 Sov. Iust. 17, 18.

⁵⁴⁵ G. FEIFER, *supra* note 182, at 242-43.

⁵⁴⁶ E. MATVIENKO, *supra* note 134, at 100; Stetsovskii, *Otkaz advokata ot zashchity obviniamogo* (Withdrawal of an Advocate from the Defense of an Accused), [1967] 7 Sots. ZAK. 59, 60. The controversy concerning counsel's right to express his opinion on the issue of guilt in the closing speech is part of a larger controversy regarding the role of counsel in criminal proceedings discussed in text accompanying notes 112-63, *supra*.

⁵⁴⁷ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 222; A. TSYPKIN, *supra* note 499, at 65.

⁵⁴⁸ Kul'berg, *supra* note 544, at 19; Nanikishvili, *Pozitsiia advokata v ugolovnom protsesse* (Position of the Advocate in Criminal Proceedings), [1965] 6 Sots. ZAK. 35, 37; Ul'ianova, *O protsessual'nom polozenii advokata*

the accused's plea of not guilty, on the other hand, do favor the use of alternatives in the closing argument. If an advocate is not convinced of the accused's innocence, they recommend that he nevertheless urge the court to give careful consideration to the evidence supporting an acquittal. He should then argue in the alternative that even if his client is found guilty, a light sentence ought to be imposed on the basis of mitigating circumstances which counsel should then proceed to enumerate in his closing speech.⁵⁴⁹ In the context of Soviet criminal proceedings, where the verdict and the sentence are announced simultaneously, the use of arguments in the alternative would seem to be quite logical. Otherwise, counsel may devote his closing speech to a discussion of the reasons for acquittal, only to have the court decide to convict. The court may then impose a heavy sentence because it did not take into consideration certain mitigating circumstances which counsel could have emphasized had he argued in the alternative.

In assisting the court to achieve a just verdict, counsel analyzes the facts, the law, and the defendant's personality.⁵⁵⁰ If he considers the defendant innocent, he will argue for an acquittal on the basis of the facts, asserting that the elements of the crime have not been established or that the accused's participation in the commission of the crime has not been proved.⁵⁵¹ If he believes that the crime has been misclassified, he will argue on the basis of substantive law for a reduction in the charges.⁵⁵² And finally, should neither of the above arguments prove tenable, he will seek a light sentence by presenting mitigating circumstances based upon the accused's personality and life history.⁵⁵³

i ego pozitsii po delu (On the Procedural Status of the Advocate and his Position in a Case), [1966] 3 SOTS. ZAK. 60, 61. *Contra*, A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 220.

⁵⁴⁹ Boikov, *Eticheskije normy deiatel'nosti sovetskogo advokata* (Ethical Norms of the Activities of a Soviet Advocate), [1966] 10 Sov. IUST. 16, 17; Sinaiskii, *Advokat dolzhen zashchishchat'* (An Advocate Must Defend), [1966] 11 SOTS. ZAK. 64, 65; Stetsovskii, *supra* note 546, at 60.

⁵⁵⁰ A. TSYPKIN, *supra* note 499, at 61; Kul'berg, *supra* note 544, at 17; Vatman & Kisenishskii, *supra* note 364, at 21.

⁵⁵¹ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 204, 219; E. MATVIENKO, *supra* note 134, at 80, 91-92; T. NEISHTADT, *supra* note 534, at 28-29; A. TSYPKIN, *supra* note 499, at 61; Gol'diner, *Analiz dokazatel'stv i ustanovlenie fakticheskikh obstoiatel'stv v zashchitel'noi rechi* (Analysis of Evidence and the Establishment of Factual Circumstances in the Speech for the Defense), [1967] 14 Sov. IUST. 18-19.

⁵⁵² A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 219; E. MATVIENKO, *supra* note 134, at 80, 91; T. NEISHTADT, *supra* note 534, at 30; A. TSYPKIN, *supra* note 499, at 61; Gol'diner, *supra* note 551, at 19.

⁵⁵³ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 188; E. MATVIENKO, *supra* note 134, at 80, 102; T. NEISHTADT, *supra* note 534, at 30; Kul'berg, *Analiz motiva prestupleniia v zashchitel'noi rechi* (Analysis of the Motives of the Crime in the Speech for the Defense), [1963] 24 Sov. IUST. 17; Kul'berg, *Issledovanie lichnosti podsudimogo v ugolovnoi zashchite* (Examination of the Defendant's Personality in Criminal Defense), [1966] 22 Sov. IUST. 16.

In fulfilling his obligation to the party, counsel devotes the opening or closing paragraphs of his speech to a denunciation of the crime committed (or not committed) by his client. If his client has pleaded innocent, counsel merely comments upon the adverse effect of criminal activity upon the development of a socialist society's goals and institutions.⁵⁵⁴ If the accused has acknowledged his guilt, however, an advocate is expected to dwell upon the circumstances causing or facilitating the commission of the crime.⁵⁵⁵ The hope is that the members of the audience will be spurred to eliminate the causative factors in the process of building a socialist society and that they will be deterred from engaging in similar criminal activity in the conduct of their personal lives.⁵⁵⁶ The courtroom is thus transformed into a classroom, and counsel becomes responsible for developing a sense of legal consciousness among the members of the audience.⁵⁵⁷

3. DECREE OF THE COURT'S JUDGMENT

After completion of the oral arguments, the defendant has the right to speak the last word.⁵⁵⁸ The court then retires to the conference room for a secret session at the end of which a judgment of conviction or acquittal is decreed.⁵⁵⁹ In either case, a copy of the decree must be handed to the defendant within three days,⁵⁶⁰ at which time the record of the judicial session must also be made available to the defendant and his counsel for their signatures, examination, and corrections.⁵⁶¹ Since an appeal may be taken by either the defense or the prosecution, it is important that counsel examine the record carefully and request the addition or correction of any information favorable to the defense.⁵⁶² Such requests are considered by the presiding judge alone, unless he disapproves of the suggested change, in which case he calls two people's assessors (at least one of whom was present at the trial) to assist him in considering the request.⁵⁶³ When necessary, counsel may be summoned to explain his petition for a change in the written record of the trial.⁵⁶⁴ There are two critical defects in this pro-

⁵⁵⁴ E. MATVIENKO, *supra* note 134, at 6; Ekmekchi, *supra* note 541, at 58.

⁵⁵⁵ Ekmekchi, *supra* note 541, at 58-60.

⁵⁵⁶ *Id.* at 60.

⁵⁵⁷ H. BERMAN, *supra* note 421, at 281-84.

⁵⁵⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 297.

⁵⁵⁹ *Id.* arts. 302, 309.

⁵⁶⁰ *Id.* art. 320.

⁵⁶¹ *Id.* art. 264-65.

⁵⁶² A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 224; A. TSYPKIN, *supra* note 499, at 71; Vydria, *Protsessual'naiia forma rassmotreniia del sudom vtoroi instantsii i garantii prav lichnosti* (Procedural Form For the Examination of a Case by the Court of Second Instance and Guarantees of the Rights of an Individual), in *NOVOE SOVETSKOE ZAKONODATEL'STVA I ADVOKATURA* (New Soviet Legislation and the *Advokatura*) 47 (1960).

⁵⁶³ R.S.F.S.R. 1960 CRIM. PRO. C. art. 266.

⁵⁶⁴ *Id.*

cedure: the panel of judges which presides over the trial is not always the same panel that considers the suggested corrections; and counsel is not permitted to attend the consideration of his requested changes unless he is summoned at the court's discretion. To eliminate these defects, it has been suggested that the written record be corrected at the end of the trial prior to the court's determination of its judgment.⁵⁶⁵ This would automatically enable counsel to attend the review of his suggested corrections and would also ensure consideration of the requested changes or additions by the panel of judges that presided over the trial.

VIII. APPELLATE REVIEW

A. Description of the Cassational And Supervisory Instances

There are two types of appellate review in Soviet criminal proceedings. The prosecution and the defense have one right of appeal to the regional or republic supreme court immediately above the trial court in the judicial hierarchy.⁵⁶⁶ This is termed a "cassational appeal" (if brought by the defense) or a "cassational protest" (if brought by the prosecution).⁵⁶⁷ It is based upon the entire trial record, and must be filed within seven days.⁵⁶⁸ At the end of that time, the judgment decreed by the court of first instance becomes final.⁵⁶⁹ A final judgment may only be reviewed "by way of supervision," and then only upon request of the procuracy or one of the presidents or vice-presidents of the regional and supreme courts.⁵⁷⁰ Unlike the cassational instances, in which there is a right of appeal to only one court, review by way of supervision may take a case through a series of appellate courts, culminating in the Supreme Court of the U.S.S.R.⁵⁷¹ It is more limited than the cassational appeal or protest, however, in

⁵⁶⁵ Shafir, *supra* note 231, at 50-51.

⁵⁶⁶ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 44; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 325-26; SOVIET CRIMINAL LAW AND PROCEDURE 87-89, 103; Hazard, *supra* note 454, at 233; Ostrovskii, *Obzhalovanie prigovora vstupivshogo v zakonnuu silu* (Appeal of a Judgment Which Has Taken Legal Effect), [1966] 23 Sov. Iust. 19. There is no right of appeal from verdicts of the republic supreme courts; appellate review must be by way of supervision. U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 44; R.S.F.S.R. 1960 CRIM. PRO. C. art. 325. Extending the right of appeal to the prosecution as well as the defense is a common practice in Continental European legal systems. SOVIET CRIMINAL LAW AND PROCEDURE 87.

⁵⁶⁷ R.S.F.S.R. 1960 CRIM. PRO. C. art. 325.

⁵⁶⁸ *Id.* art. 328; Hazard, *supra* note 454, at 233.

⁵⁶⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 356. If a cassational appeal or protest is brought, execution of the judgment is suspended and the judgment does not take legal effect until the case has been considered by the appellate court. *Id.* arts. 330, 356.

⁵⁷⁰ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 48; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 354, 371; SOVIET CRIMINAL LAW AND PROCEDURE 88-89; Hazard, *supra* note 454, at 234.

⁵⁷¹ SOVIET CRIMINAL LAW AND PROCEDURE 89, 103-04.

that the parties are not permitted to appeal in their own names; they must first persuade a member of the upper echelons of the procuracy or a president or vice-president of a high court that the final judgment is unfounded or illegal; the request for a review by way of supervision is then brought in the name of one of these public officials.⁵⁷² The theory underlying this dual system of appellate review is that the parties are first given one opportunity to appeal the trial court's errors. Should they fail to take advantage of this opportunity, however, or should the cassational instance fail to correct the trial court's errors, the persons charged with the supervision of legality in the Soviet legal system are permitted to initiate a supervisory review in order to rectify the lower court's mistakes.⁵⁷³

In many respects, there is little difference between the two types of appellate review. A panel of professional judges presides over both the cassational and supervisory instances.⁵⁷⁴ In both proceedings, the court reviews questions of fact as well as of law.⁵⁷⁵ In fact, the cassational appeal or protest is in essence a partial trial de novo because new evidence may be submitted by the parties.⁵⁷⁶ The court in each instance may leave the judgment unchanged, vacate the judgment and remand the case for a new investigation or judicial consideration, vacate the judgment and terminate the case, or change the judgment of the trial (or appellate) court.⁵⁷⁷ To protect the accused, several limitations have been imposed upon the appellate courts by the 1958 Principles of Criminal Procedure. Protests on the grounds of the lightness of the sentence, termination of the case, or acquittal must be reviewed by way of supervision within one year.⁵⁷⁸ A judgment of acquittal may not be vacated by way of cassation except upon the prosecution's protest.⁵⁷⁹ A conviction may not be vacated in order to apply the law for a graver crime or a more severe punishment unless the prosecution has protested on these grounds.⁵⁸⁰ And although the appellate court may reduce the charges or mitigate the punishment, it may not itself increase the punishment or apply

⁵⁷² R.S.F.S.R. 1960 CRIM. PRO. C. arts. 371, 376; Ostrovskii, *supra* note 566, at 19.

⁵⁷³ G. FEIFER, *supra* note 182, at 205; Hazard, *supra* note 454, at 235.

⁵⁷⁴ G. FEIFER, *supra* note 182, at 287.

⁵⁷⁵ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 45; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 332, 380.

⁵⁷⁶ R.S.F.S.R. 1960 CRIM. PRO. C. art. 337; SOVIET CRIMINAL LAW AND PROCEDURE 88-89.

⁵⁷⁷ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 339, 378.

⁵⁷⁸ *Id.* art. 373; U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 48.

⁵⁷⁹ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 47; R.S.F.S.R. 1960 CRIM. PRO. C. art. 341.

⁵⁸⁰ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 46; R.S.F.S.R. 1960 CRIM. PRO. C. art. 340.

the law for a graver crime.⁵⁸¹ Instead, it must remand the case for a supplementary investigation or new judicial consideration.⁵⁸²

B. Right to Counsel During Appellate Proceedings

The primary difference between the two appellate proceedings lies in the accused's right to counsel. In the cassational instance, "counsel may participate,"⁵⁸³ whereas in the supervisory instance, the court summons defense counsel only "when necessary."⁵⁸⁴ In practice, this has meant that counsel actively participates in the cassational instance, but performs very few functions during the supervisory review.⁵⁸⁵

1. COUNSEL'S FUNCTIONS DURING APPELLATE PROCEEDINGS

Following the decree of a trial court's judgment, the first problem confronting an advocate is often whether he should submit an appeal without his client's consent. There is a sharp division of opinion on this subject. Those jurists who adhere to the theory that an advocate is procedurally independent of his client assert that counsel can submit an appeal in his own name over his client's objections provided he first explains to his client his intended course of action and gives him an opportunity to exercise his right to change lawyers.⁵⁸⁶ The opponents of this theory maintain that counsel cannot submit an appeal unless his client is in full accord.⁵⁸⁷ It is difficult to assess which is the better position. If an advocate is convinced of his client's innocence but his client is too timid to appeal, it would seem desirable for counsel to appeal over his client's objections. On the other hand, if the accused is definitely guilty of committing a crime, and the question is one of its classification, the accused might understandably be reluctant to appeal on the grounds that a lesser crime should have been charged. If the case is remanded for a new trial by the appellate court and "circumstances are established in the new consideration

⁵⁸¹ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE arts. 46, 48; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 340, 350, 380.

⁵⁸² U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 52; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 348, 353, 380, 382.

⁵⁸³ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 45; R.S.F.S.R. 1960 CRIM. PRO. C. art. 335.

⁵⁸⁴ R.S.F.S.R. 1960 CRIM. PRO. C. art. 377.

⁵⁸⁵ R.S.F.S.R. KOMMENTARIJ 693; E. KUTSOVA, SOVETSKAIA KASSATSIIA KAK GARANTIIA ZAKONNOSTI V PRAVOSUDIJI (Soviet Cassation as a Guarantee of Legality in Justice) 16 (1957); Vatman & Kisenishskii, *supra* note 364, at 21.

⁵⁸⁶ E. KUTSOVA, *supra* note 585, at 50; A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 229-32; Grekov, *Pozitsiia advokata v protsessie dolzhna byt' osnovana na zakone* (The Position of an Advocate in Legal Proceedings Should be Founded in Law), [1965] 10 Sots. ZAK. 55, 56; Vydria, *supra* note 562, at 69, 73.

⁵⁸⁷ R.S.F.S.R. KOMMENTARIJ 585; R. RAKHUNOV, *supra* note 104, at 224.

of the case which evidence the commission by the accused of a graver crime," the punishment for the graver crime may be applied and the accused will have worsened his position by submitting the appeal.⁵⁸⁸ Under these circumstances, it might be better for an advocate who is convinced that the judgment is not well-founded to forego the appeal and direct his efforts toward persuading an appellate judge or member of the procuracy to initiate a supervisory review after the judgment has become final.⁵⁸⁹

Assuming that a cassational appeal or protest is filed, the court must inform counsel of the time and place for consideration of the case.⁵⁹⁰ It is particularly important that counsel attend because typically only one of the three judges has acquainted himself with the materials of the case prior to the judicial session.⁵⁹¹ He opens the session by reporting to the other members of the court the substance of the case and the arguments of the appeal or protest. The procurator then substantiates the protest or defends the legality of the judgment.⁵⁹² If counsel is not present to verbalize his objections to the protest or his reasons for submitting an appeal, his arguments (submitted in writing prior to the judicial session)⁵⁹³ are not apt to be considered.⁵⁹⁴ This is particularly true since a cassational appeal or protest is frequently processed in less than an hour, giving the two judges who have not read the record little opportunity to evaluate counsel's written brief.⁵⁹⁵

When an advocate appears to support an appeal, he must rest his argument for changing or vacating the judgment on one of the following grounds: (1) the inquiry, preliminary, or judicial investigation was one-sided or incomplete; (2) the court's findings do not correspond to the factual circumstances of the case; (3) a substantial violation of criminal procedure law has occurred; (4) the substantive criminal law has been incorrectly applied; or (5) the court's punishment does not correspond with the gravity of the

⁵⁸⁸ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 353, 382.

⁵⁸⁹ R. RAKHUNOV, *supra* note 104, at 225.

⁵⁹⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 336. Failure to so inform counsel constitutes reversible error. Zhdanov, [1964] 6 Bull. Verkh. Suda S.S.S.R. 24 (Sup. Ct. U.S.S.R. 1964). Counsel must also be informed of any changes in the time or place for consideration of the cassational appeal or protest. Kichiev, [1963] 2 Bull. Verkh. Suda S.S.S.R. 39 (Mil. Div. Sup. Ct. U.S.S.R. 1962).

⁵⁹¹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 338; G. FEIFER, *supra* note 182, at 287.

⁵⁹² R.S.F.S.R. 1960 CRIM. PRO. C. arts. 335, 338.

⁵⁹³ *Id.* art. 327. It is reversible error for the court to consider a cassational protest before receiving defense counsel's written objections. Chernysheva [1966] 3 Bull. Verkh. Suda S.S.S.R. 29 (Mil. Div. Sup. Ct. U.S.S.R. 1965).

⁵⁹⁴ A. LEVIN, P. OGNEV & V. ROSSEL'S, *supra* note 141, at 311, 318.

⁵⁹⁵ G. FEIFER, *supra* note 182, at 287-88.

crime or the personality of the convicted person.⁵⁹⁶ If he bases his appeal upon one of the first two grounds, he will devote most of his time to analyzing the evidence presented at the trial or collected during the preliminary investigation.⁵⁹⁷ If he bases his appeal upon the third ground, he can automatically obtain a reversal by showing that: (1) the case should have been terminated; (2) the judgment was rendered by an illegally constituted court; (3) the case was considered in absence of the accused or defense counsel when their presence was obligatory; (4) the secrecy of the judge's conference room was violated; (5) the judgment was not signed by one of the judges; or (6) the case file lacks a record of the judicial session.⁵⁹⁸ An appeal on the fourth ground requires an analysis of substantive criminal law,⁵⁹⁹ and an appeal on the fifth ground normally entails the presentation of new facts characterizing the accused's personality.⁶⁰⁰ If counsel attends the supervisory review, he performs precisely the same functions.⁶⁰¹ Moreover, his participation in the supervisory instance would seem to be just as important as in the cassational instance, because the supervisory review is also conducted by three judges, only one of whom has become acquainted with the materials of the case in advance.⁶⁰² In the absence of counsel, it has been reported that the prepared judge often influences the vote of his colleagues.⁶⁰³

2. SUGGESTED REFORM

Under these circumstances, it is not surprising that numerous proposals have been advanced in recent years to strengthen the right to counsel during the appellate stages of the Soviet criminal process. Adoption of such reforms has been blocked by jurists who maintain that counsel is not necessary to protect the accused's right to defense during an appellate review because the procurator appears in his supervisory, not his accusatory role. He may protest

⁵⁹⁶ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 49; R.S.F.S.R. 1960 CRIM. PRO. C. art. 342.

⁵⁹⁷ R.S.F.S.R. 1960 CRIM. PRO. C. arts. 343-44; A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 257, 264-65.

⁵⁹⁸ R.S.F.S.R. 1960 CRIM. PRO. C. art. 345. Any other substantial violation of criminal procedure law will also suffice as grounds for reversal. *Id.*; Ostrovskii, *Osobennosti uchastiia advokata v kassatsionnoi instantsii po ugovolnym delam* (Peculiarities of an Advocate's Participation in the Cassational Instance in Criminal Cases), [1965] 19 Sov. IUST. 14.

⁵⁹⁹ R.S.F.S.R. 1960 CRIM. PRO. C. art. 346; A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 270.

⁶⁰⁰ R.S.F.S.R. 1960 CRIM. PRO. C. art. 347; A. LEVIN, P. OGNEV & V. ROSSEL's, *supra* note 141, at 285; Ostrovskii, *supra* note 598, at 15.

⁶⁰¹ U.S.S.R. 1958 PRINCIPLES OF CRIMINAL PROCEDURE art. 49; R.S.F.S.R. 1960 CRIM. PRO. C. arts. 377, 379.

⁶⁰² R.S.F.S.R. 1960 CRIM. PRO. C. art. 377; Tupchiev, *Poriadok rassmotreniia ugovolnykh del v nadzornoii instantsii* (Procedure for the Examination of Criminal Cases in the Supervisory Instance), [1963] 23 Sov. IUST. 11.

⁶⁰³ G. FEIFER, *supra* note 182, at 291.

the mildness of the sentence or the lightness of the crime charged, but he may also recommend vacating or changing an unfounded judgment.⁶⁰⁴ The rebuttal is obvious. The procurator is actually assisting the accused only when he seeks to reduce or mitigate the judgment. When he protests the lightness of the sentence, he is appearing as an accuser, and unless counsel is permitted to participate, the accused is left with no one to speak on his behalf.⁶⁰⁵ It would therefore seem advisable for the Soviets to adopt Shafir's proposal that counsel be made obligatory during the cassational and supervisory instance if: (1) the accused is a minor or unable to conduct his own defense due to physical or mental defects; (2) the accused has been sentenced to death; or (3) the procurator has protested the mildness of the court's judgment.⁶⁰⁶ In all other instances, counsel should be permitted to participate in the cassational or supervisory review upon the defendant's request, instead of upon the court's summons.⁶⁰⁷ Such a reform would adequately protect the accused's right to defense without making counsel's presence mandatory in those instances when his participation would not in fact be necessary in view of the procurator's position that the sentence should be mitigated or the charge reduced.

IX. CONCLUDING REMARKS

The role of defense counsel in the Soviet Union must be evaluated within the context of Soviet criminal proceedings, which are primarily inquisitorial, rather than adversary in form. The inquiry, preliminary investigation, bringing to trial, trial, cassational appeal, and supervisory review are all conducted by a figure whom the law regards as neutral. This figure is empowered to elicit evidence both for and against the accused's position as well as to render a decree regarding the disposition of the case. His neutrality has caused many Soviet jurists to conclude that the right to counsel is not an essential element of the accused's right to defense. In fact, they assert that counsel's services are superfluous because the accused is empowered to present evidence, petitions, and appeals and the investigator, judge, and procurator are legally obligated to assist him in conducting his own defense. Furthermore, they maintain that counsel's presence would unnecessarily obstruct the conduct of pretrial and appellate proceedings.

⁶⁰⁴ Grun, *K voprosu o predelakh prav nadzornoj instantsii* (Concerning the Problem of the Limits of Rights of the Supervisory Instance), [1961] 23 Sov. IUST. 8-9; Vydria, *supra* note 562, at 108.

⁶⁰⁵ N. POLLANSKII, *supra* note 397, at 165, 178-79.

⁶⁰⁶ Shafir, *supra* note 231, at 52-53. A similar proposal was made prior to the passage of the 1958 Principles of Criminal Procedure, but was not adopted. E. KUTSOVA, *supra* note 585, at 16-17.

⁶⁰⁷ Chetunova, *supra* note 394, at 19; Perlov, *Nauka sovetskogo ugolovnogo protsessa i sovershenstvovanie zakonodatel'stva* (The Study of Soviet Criminal Proceedings and the Improvement of Legislation), [1967] 11 Sots. ZAK. 37, 39; Shafir, *supra* note 231, at 52-53; Tsubin, *supra* note 391, at 66.

Significantly, the trend today is away from this restrictive interpretation of the accused's right to defense. Soviet criminal proceedings have become increasingly adversary in form, a change which has been marked by the introduction of the right to counsel from the end of the preliminary investigation for all defendants. Pressures are currently mounting to extend the right to counsel to the beginning of the inquiry and preliminary investigation and to strengthen the right to counsel at the appellate stages of the criminal process. The adoption of the suggested reforms would seem to be advantageous because the accused, who has no formal legal training, would no longer have to rely upon the assistance of the investigator and procurator—persons who frequently display an accusatory bias in performing their duties during pretrial and appellate proceedings.

An extension of the right to counsel to the pre- and post-trial stages of the Soviet criminal process, however, would not automatically strengthen the accused's right to defense. Certain limitations currently placed upon counsel's participation in Soviet criminal proceedings, such as the restrictions placed upon his right to obtain evidence, would first have to be removed. Until counsel is permitted to obtain real evidence from any source through the consultation office of the *advokatura*, for example, it will be difficult for him to conduct a vigorous defense. Likewise, an advocate's presence will not appreciably enhance the accused's right to defense unless the advocate feels a professional responsibility to champion the interests of his client in the latter's confrontation with the state. There are certain signs of the *advokatura's* increasing prestige, including the rising standards for admission into the college of advocates with emphasis on solid university training, the increased participation of advocates in Soviet politics, and the rising rate of the *advokatura's* membership in the Communist Party. This increased prestige has prompted many Soviet advocates to give more serious thought to the nature of their responsibility to the client versus their duty to the state. The *advokatura* has thus become relatively independent of the judiciary and the procuracy (the representatives of the state in Soviet criminal proceedings) and the individual advocate has become more closely allied with the procedural position of the accused. In fact, many advocates have begun to refer to the adversary character of counsel's participation in Soviet criminal proceedings, indicating that they now appreciate more fully the precise nature of their professional responsibility to the client.

There is one limitation on the effectiveness of counsel's participation in Soviet criminal proceedings which will probably not be removed within the foreseeable future. Western commentators have frequently noted that the concepts of due process and individual civil liberties are not as highly valued in the

Soviet Union as they are in the Western world. This necessarily limits the effectiveness of the right to counsel, particularly during political proceedings. Since the passage of the Principles of Criminal Procedure in 1958, it has been customary for counsel to participate during the trials of political dissidents, but more often than not, counsel's presence has appeared to be a relatively insignificant factor. The courts have routinely convicted the defendants despite the persuasiveness with which counsel has refuted the accusation. It is this aspect of Soviet criminal proceedings which has prompted many Western observers to underestimate the usefulness of counsel's defense, particularly when they have looked upon counsel's performance at political trials as a gauge of his effectiveness during nonpolitical proceedings. On the other hand, it is this same aspect of Soviet criminal proceedings which does indeed make the right to counsel a somewhat tenuous guarantee of the accused's right to defense. Because the protection of an individual's civil liberties is not of primary concern during the conduct of political trials in the Soviet Union, the right to counsel must essentially be understood as a statutory right circumscribed by certain limitations imposed in the interests of the state—limitations which may fluctuate depending upon the tenor of the times and the stability of the regime.

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