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Richard Arens

Frederick W. Killian

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USE OF PSYCHIATRY IN SOVIET CRIMINAL PROCEEDINGS

Part II

Psychiatry and Criminal Procedure

Richard Arens and Frederick W. Killian

Part I under the title above was published in Number 2 of the present volume—July-August—pages 136 to 149. As already indicated in that place Richard Arens has worked in the field of public law and has published in this field. In 1949-1950 he was graduate fellow at Yale University Law School. He is a member of the District of Columbia Bar and is at present Assistant Professor of Law at the University of Buffalo, Buffalo, N. Y.

Frederick W. Killian is Associate Professor of Sociology in Clark University, a member of the New York Bar and a frequent consultant on questions relating to public law.—EDITOR.

In the Soviet Union, as in all social orders, we find two general and methodologically separable phenomena, (1) the situation as it "is," and (2) the situation from the point of view of the "ought to be." Since the revolution of 1917, as we have indicated, the first Soviet construction of criminal justice and procedure as an "ought to be" has been superseded by another "ought to be" which restored the more traditional concepts of law in terms of the Western experience. How this new "ought" is actually operating cannot be stated and described in final terms. Sweeping conclusions are not warranted. Yet, so far as the available literature goes, it appears that certain interesting and promising trends are unfolding which have relevance to what is happening in the United States. But as we stated in Part I of this study (This JOURNAL, July-August, 1950) operations must be seen as parts of the culture in which they operate. Total dependence upon documents is not warranted. Neither is total rejection of the current literature in order. We have tried to set forth our understanding of the officially described trends and perspectives. Obviously further verification and new critical approaches are required for final confirmation. In presenting the statements contained herein we wish to make it explicit that the Soviet descriptions of the "ought to be" do not necessarily reflect the "is" accurately. With this in mind we offer the following as an assay of a current situation.

Paradoxical though it may seem, while the dominant mood of Soviet forensic psychiatry is conservative, few, if any, vestiges of conservatism are perceived in the actual relation of Soviet criminal procedure to psychiatric matters. On the contrary, Soviet *law* appears to have made far-reaching strides in the abandonment of the traditional and in the exploration of new methodologies. Indeed, it would appear that a promising integration of psychiatric and judicial fact-finding functions

has been achieved. This will be seen as the process ranging from the initiation of proceedings to the verdict after trial is described.

PSYCHIATRISTS IN PRE-TRIAL PROCEEDINGS

Psychiatrists may put in their first formal appearance at the time of the preliminary examination. Their presence, in fact, at that stage is mandatory, whenever "the mental state of the accused or witness raises any doubt in the mind of the judge or of the investigating official."¹ This requirement embodies no empty formalism and is not readily evaded. Thus in 1939 the Supreme Court of the U.S.S.R. reversed and remanded a case in which reversal of a conviction had been based upon the judicial determination, arrived at without benefit of psychiatric expert evidence, that the defendant had been in a state of alcoholic intoxication which rendered him "non-accountable" to the law.² One infers that the deviant behavior characteristic of intoxication, interpretable in different ways, gives sufficient notice of the possibility of mental aberration to raise the requisite doubts in the minds of reasonable judges. Such doubts should be raised, according to official Soviet psychiatry, every time that abnormality is suggested to the investigating official concerning the subject of his investigation by the latter's response to interrogation, the information furnished by other witnesses, the reports of his behavior in prison, the absence of adequate motivation, and in some cases, an inexplicable brutality in the perpetration of the crime.³ The texts are particularly insistent in urging exhaustive psychiatric examination of offenders characterized by inadequate motivation and extreme brutality despite the absence of any traceable history of mental or emotional disturbance.⁴

Though the determination of the propriety of psychiatric examination and the appointment of psychiatric experts is within the discretion of the investigating official, requests for psychiatric examination, and even requests for the appointment of specific psychiatrists may be made by the accused as well as his relatives. These requests, the Soviet spokesman maintain, are almost invariably met by the authorities.⁵

To facilitate proper psychiatric determination of the mental state of the accused in the course of the preliminary examination, Soviet direc-

1. UGOLOVNO-PROTSESSUALNY KODEKS, Art. 63.

2. The decision has been interpreted as enhancing the psychiatric role in Soviet criminal proceedings. For discussion of case see BUNEEV AND FEINBERG, *SUDEBNAYA PSIKHIATRIA* (Moscow 1947), p. 14. Cf. Berman, *Principles of Soviet Criminal Law* 56 *YALE LAW JOURNAL*, 803, 816 (1947).

3. *Id.*, p. 22, cf. VNUKOV AND FEINBERG, *SUDEBNAYA PSIKHIATRIA* (Moscow 1936), p. 23.

4. BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 25.

5. *Id.*, pp. 14, 15, c.f. VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, p. 15.

tives have repeatedly urged the investigating officials to be guided by the following questions in all cases of the use of psychiatric expertise:⁶

1. Have the parents or nearest relatives of the accused suffered from mental or nervous ailments, from syphilis, alcoholism . . . or from physical deformities; have they ever been guilty of crime and have there been any cases of suicide among them?

2. Has the accused ever presented any deviations from the norm in childhood or in adolescence . . . ?

3. In relation to accused who are women, have there been any manifestations of mental or nervous illness during pregnancy, childbirth, the period following childbirth, or the period of breast-feeding?

4. What is the past history of serious illness (physical and mental) suffered by the accused? Has he experienced any serious physical traumata, contusions, and wounds, particularly such as were accompanied by a loss of consciousness? . . . Has he ever attempted suicide?

5. Has the accused been in military service, if so, has he participated in combat; if discharged, why?

6. Does the accused have a history of syphilis, alcoholism, or narcomania . . . ?

7. What was the social milieu of the accused (what were the conditions under which he lived and worked) ?

8. Who noticed at what time the manifestations giving rise to suspicions concerning the mental disturbance of the accused and what did . . . (these manifestations) comprise (sharp changes in personality and mode of living, habits, inclinations, predispositions and non-predispositions toward the environment) ?

9. Has the accused ever been a patient in a mental institution?

Materials based upon these questions are compiled by the investigating officials with the occasional help of psychiatric experts as part of the official record of the criminal proceeding. The resulting case history is the product of the joint labors of laymen and experts, analogous, in this country, to a case history compiled by social workers under psychiatric guidance. The role of the social workers is assumed by the Soviet investigating officials who are charged by law to investigate, with equal zeal, all the incriminating, exonerating, aggravating and mitigating matters related to the legal responsibility of the accused.⁷ Whether

6. *SBORNIK TSIRKULAROV I RAZYASNENIYAKH NARODNOVO KOMISARIATA YUSTITSII RSFSR* (Moscow 1934), p. 262, *cf.* earlier directive discussed in ZELITCH, *SOVIET ADMINISTRATION OF CRIMINAL LAW* (1931), p. 175.

7. *UGOLOVNO-PROTSESSUALNY KODEKS*, Art. 111.

or not Soviet investigating officials are adequately equipped to discharge this function in the realm of mental and emotional disturbance is not easily ascertained. Soviet directives have recognized the existence of inadequate psychiatric knowledge in the ranks of the investigating officials⁸ and have therefore attempted to systematize the psychological phase of the investigation⁹ by the use of the questions outlined above. It would appear that Soviet officials are selected with some care with respect to professional qualifications.¹⁰ The particular pattern of operations, coordinating the psychiatric function with "judicial fact-finding," if even partly on its way to realization in the Soviets, is at least directed towards the operational unification of the administration of justice. Logically speaking, such an integration must rest upon normative factors and the norms must be tested in operation. Different cultures will impose different norms in terms of policies formulated for specific applications. A separate and particular study needs to be made concerning the relation of these underlying assumptions to actual Soviet practice, a task which is not properly part of this presentation.

In the Soviet Union, a trend toward unification has been established in which, at least, the investigating official (comparable in one respect to our social worker attached to the court, for probation reports), enjoys a function as effective if not more so, than with us. This would follow, if for no other reason, because in the Soviets the function which serves the purpose of social work with us is more closely integrated into their ideology than is social work in ours. Since the Soviets train both psychiatrists and investigators officially, their investigator's case history should necessarily be better adapted to psychiatric usages within their operational scheme of the administration of justice than is the social case work history in comparable relation in the United States.¹¹

8. SBORNIK TSIRKULAROV I RAZYASNENIYAKH NARODNOVO KOMISARIATA YUSTITSII RSFSR, *supra*, note 6, p. 261.

9. *Ibid.*

10. For qualifications of Soviet investigating officials at an early stage of Soviet development see ZELITCH, *SOVIET ADMINISTRATION OF CRIMINAL LAW*, p. 351 (1931).

11. For statement concerning "Social Work in the USSR," see Joseph Wortis, *Soviet Psychiatry*, Baltimore, The Williams & Wilkins Company, 1950, p. 70. "There is no profession of trained social workers in the USSR today," says Wortis, and he continues: "The trade unions have become the major inheritor of most of the functions we assign to social work." ". . . It seems hardly necessary to point out that the concept of private philanthropic social service, as aid and succor to those individuals who are unable to take care of their needs, is completely inapplicable to the Soviet Union. See also his Chap. XI entitled "Psychiatry, Morality and the Law." It is difficult to document the inadequacy of social work in the United States by citations of short, relevant statements. Here, social work is regarded as a new and growing profession. It is well known that the present demand for trained social workers far exceeds the supply and this is expected to continue for some years. It must be recalled that social work in the United States (and in England) began as a private charity function and even today its use is resisted by many "middle class" persons even though they contribute to the community chests and are expected to have these services available. The depression years greatly enhanced social work growth, the recent war stimulated psychiatric

This initial socio-psychological investigation is followed by a psychiatric interview and the submission of the psychiatric diagnosis accompanied by an opinion concerning the "accountability" of the accused.¹² Psychiatric testing in the course of the preliminary examination will not, as a rule, avail itself of laboratory facilities of the more usual type or, presumably, of such aids as the psychometric tests or narcosynthesis. The conclusions are generally embodied in written report which is officially required to be in language intelligible to the court.¹³

social work. Public social work in the United States is vastly lacking in trained personnel and private social agencies are often spoken of as small, select agencies pointing the direction ahead. In other words, social work ideas and ideologies have been retarded by the prevalent emphasis in American life on "success," "the self-made man," "rugged individualism" and other catch words of the rationalization process. In spite of this, vast strides have been made here and there. But the process of unification and over-all service and of correlation still must be largely developed out of experience. Many courts and probation offices have poor and some have practically no such services; see specifically for services to the courts article by THORSTEN SELLIN in SOCIAL WORK YEAR BOOK (1947) entitled ADULT OFFENDERS. See also THE JUVENILE COURT AS AN INSTITUTION by FREDERICK W. KILLIAN THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Jan. 1949. For general references on this subject see: ESTHER LUCILE BROWN, SOCIAL WORK AS A PROFESSION, N. Y., Russell Sage Foundation, 1942; ROBERT M. MACIVER, THE CONTRIBUTION OF SOCIOLOGY TO SOCIAL WORK, N. Y., Columbia University Press, 1931. See also by ESTHER LUCILE BROWN, *Comparative Developments in Social Work, Medicine and Law*, THE FAMILY, Vol. 24, pp. 243-255. One of the most widely used general treatments on social work in the United States (WAYNE McMILLAN, COMMUNITY ORGANIZATION FOR SOCIAL WELFARE, Chicago, University of Chicago Press, 1945) and a fine technical analysis is still very heavily direction pointing. See also ARTHUR FINK, THE FIELD OF SOCIAL WORK, Rev. ed., N. Y., Henry Holt and Co., 1949.

12. See VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, p. 27.

13. For a good description in English of form requirements see BERMAN AND HUNT, CRIMINAL LAW AND PSYCHIATRY: THE SOVIET SOLUTION, 2 STAN. L. REV. 635, 653, 654 (1950).

Cf. requirements for the non-psychiatric Soviet medical report in SBORNIK OFITSIALNIKH I SPRAVOVOCHNIKH MATERIALOV PO SUDEBNOMEDITSINSKOI EKSPERTIZE (Moscow, 1946), p. 30.

An example of international significance of a Soviet psychiatric pre-trial report is furnished by the records of the first Nuremberg war crimes trial. It will be recalled that at the outset of the Nuremberg proceedings, Hess had claimed emotional and mental illness, rendering him incapable of preparing his defense. His counsel had made application for his examination by Swiss psychiatrists. In denying the application, the tribunal had appointed a commission of British, American, French and Soviet psychiatrists and neurologists to report on his mental state. A British, a joint American and French, and a Soviet report were respectively submitted to the tribunal in due course. Agreement was reached by all three on the major issue posed by the inquiry. In almost identical language the reports rejected the contention of insanity while conceding the presence of a degree of amnesia which might prove handicapping to the defense. In submitting the most elaborate report of all, the Soviet medical delegation had made these points:

1. Delusions of persecution experienced by the defendant are not symptomatic of schizophrenic paranoia. They are explainable instead in terms of a "psychogenic paranoid reaction, that is, the psychologically comprehensible reaction of an unstable (psychologically) personality to the situation . . ."

2. The defendant's amnesia, though genuine, is not the result of mental disease, but is of hysterical origin of "a conscious-intentional (simulated) character," which in view of his sanity at the time of his flight to England "does not exonerate him from his responsibility under the indictment."

By way of formal conclusions, the Soviet medical delegation pronounced Hess "not insane in the strict sense of the word," adjudged him "an unstable person, which in technical terms is called a psychopathic personality," declared his amnesia to be genuine albeit a product of hysterical tendencies, and recommended narco-analysis for a clarification of the situation. See NAZI CONSPIRACY AND AGGRESSION, OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, vol. 1, pp. 97-105 (194).

Where the psychiatric examination clearly indicates the presence or absence of "accountability" the expert's work will probably be over.¹⁴ In the presence of "accountability" the case will take its usual course, through the courts, but the accused may "protest" the determination of his sanity even at this stage to the office of the government Prosecutor.¹⁵ Where "accountability" is negated by psychiatric findings accepted by the investigating official, an accusation would appear to be deprived of its legal foundations, insofar as "accountability" constitutes a jurisdictional prerequisite for penal action.¹⁶ The termination of the criminal proceeding would therefore be indicated by the code.¹⁷ Such an analysis leaves out of account one important factor. This is that the jurisdictional basis of a subsequent accusation need not be undermined since the courts may order the application of purely medical rather than penal measures.¹⁸ A case of this type may therefore be submitted to a court or may, alternately, be terminated beforehand by the investigating official.¹⁹

The course of Soviet criminal justice is rarely so smooth. It is inevitable that a large number of psychiatric findings after an admittedly cursory examination does not represent a sufficient basis for legal conclusions.

The indicated course for Soviet investigating authorities in such situations is manifold. They may directly consult with further psychiatric experts, who may be summoned to appear in the offices in which the preliminary investigation is held.²⁰ They may submit the question of "accountability" to a psychiatric commission in a proceeding entitled "ambulatory expertise."²¹ This has the advantage of a systematic professional review of all available facts, which, however, is counterbalanced by an absence of anything more intensive than a cursory medical examination which supplements the preceding one. This ambulatory expertise is acceptable only in the event of unanimous medical agreement.²² They may, preferably, according to Soviet psychiatric writings, seek the help of "Stationary Expertise."²³ This implies placement of

14. See VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, p. 27.

15. UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 212.

16. See UGOLOVNY KODEKS RSFSR, Art. 11.

17. UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 202.

18. See also *ibid.*: "The investigation is suspended only in such cases where it has succeeded in gathering the data necessary for the accusation. If such data have not been uncovered the investigation is not suspended but terminated."

19. See Art. 11, *supra*, note 16.

20. UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 203.

21. UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Arts. 169, 174.

22. See BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 27.

23. *Ibid.*

24. *Id.*, pp. 29-33; see also Soviet directive *O Proizvodstve Sudebno—Psikhiatricheskoj Ekspertizy USSR*. February 17, 1940, cited therein.

the accused for exhaustive examination and "protracted observation" in special medical institutions;²⁴ where the average sojourn in such cases has been estimated as thirty days.²⁵ Here all approved medical and psychological tests are available. While no valid information on the "up-to-dateness" of Soviet methods can be obtained, one may speculate that forms of narcosynthesis may be employed in the course of the "Stationary Expertise," in view of the insistence by the Soviet psychiatrists on the use of narcosynthesis in the examination during the Nuremberg trial.²⁶ Conclusions concerning the mental state of the accused are drawn by a psychiatric commission on the basis of all of the medical findings arrived at in the course of the hospitalization. It is interesting to note that Soviet psychiatrists deem a specific conclusion on the subject of "accountability" to be indispensable.²⁷ In this context the most recent available Soviet legal psychiatric text states a requirement for the form of the psychiatric report which is basically identical with that articulated for general medical reports, discussed in conjunction with the problems of psychiatric examination in the offices of the investigating officials.²⁸ The report is to include the "introduction," a past history of "subjective and objective" factors, a detailed description of the physical, neurological and mental state of the accused and the results of laboratory tests, and a conclusion.²⁹ Here, as well as in the cases of the types of psychiatric examination, discussed above, an accepted finding of "accountability," will result in referral of the case to court in the regular course of criminal prosecution, while a finding of "non-accountability" may result in referral of the case to court for purposes of applying non-punitive medical measures or, alternately, presumably in cases where the "non-accountability" was related to "temporary insanity" in the termination of the criminal proceedings.³⁰ One must note, in this connection, that it is wholly conceivable under Soviet Code practice that the "Stationary Expertise" be invoked in the course of a trial rather than at the time of the preliminary investigation and that this result in the inevitable postponement of the judicial hearing.³¹

24. BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 29. See UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 203.

25. BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 33.

26. See 1 NAZI CONSPIRACY AND AGGRESSION, OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY (1946) 101, 102.

27. BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 33.

28. See note 13, *supra*.

29. BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2.

The reproduction of this form, albeit in changed order, has been achieved by the Soviet psychiatrists at Nuremberg. See 1 NAZI CONSPIRACY AND AGGRESSION, OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY (1946), 100-105.

30. See notes 17-19, *supra*.

31. See UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 273.

THE PSYCHIATRIC ROLE IN CRIMINAL COURT

The role of the psychiatrist, however, is not restricted to the peripheral parts of the criminal proceeding but leads him directly into the criminal court. The appearance of the psychiatrist in the People's Court may be brought about in several ways. Where the defendant has not been subjected to previous psychiatric examination, psychiatric evidence may be sought at the behest of the court or alternately at the request of defense counsel,³² who does not enter the case until the completion of the preliminary examination.³³ Where an earlier psychiatric examination has been had further psychiatric evidence may be requested whenever the initial diagnosis is questioned by court, defense or prosecution.³⁴ The presence of the psychiatrist in the courtroom, moreover, may be grounded on no other motivation than that of attempting to gain supplementary information for diagnostic purposes.³⁵ The utility of such last-minute psychiatric surveillance of the courtroom process has been illustrated by a writer in a Soviet legal periodical by recounting the following case:³⁶

The defendant had been charged with an attempt at the murder of his wife. Though the victim had survived the assault the defendant had on his personal initiative surrendered to the police with the announcement that he had killed her. The findings of the "stationary expertise" had not excluded the possibility of a "pathological affect" but had not been conclusive on the subject. Outside of a lapse of memory concerning the act the defendant had shown no detectable abnormalities. In routine fashion the trial disclosed that almost twenty-four hours had been allowed to elapse from the time of the defendant's arrest to the time of his first interrogation. On inquiry by prosecuting counsel this was explained as necessitated by the fact that the defendant, had fallen asleep immediately after declaring that he had killed his wife, and that he had not responded to any means designed to rouse him which included dousing with cold water. On awakening after twelve hours the defendant had no recollection of what transpired. The elicited information, added to the results of the earlier medical examinations, sufficed for the submission of a definite diagnosis. The defendant was declared to be suffering from a "pathological affect" and was held "not accountable."

Where circumstances warrant, the court may postpone hearing and refer the matter of the defendant's mental state to any established form of psychiatric "expertise."³⁷

32. See BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 34.

33. See UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 2150.

34. See BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2. Cf. VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, pp. 31, 32.

35. See BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, pp. 34, 35.

36. Leshtshinski, *Znachenie i Mesto Sudebno—Psikhiatricheskoi Ekspertizy na Sude 4 SOTSIALISTICHESKAYA ZAKONNOST (1937)* cited in BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, pp. 36, 37.

37. UGOLOVNO—PROTSESSUALNY KODEKS, RSFSR, Art. 273. A further available type of "expertise" not discussed in the text is one where an attempt at diagnosis is made by the

RIGHTS OF PSYCHIATRISTS IN CRIMINAL PROCEEDINGS

Throughout these proceedings the Soviet psychiatric expert enjoys a unique status as regards rights, privileges and duties.

From the time of the preliminary examination the psychiatric expert, in common with all other expert witnesses, is entitled to familiarize himself with all the facts which are necessary for the formation of his professional opinion.³⁸ In practice this requires, in addition to other assistance, the disclosure of the files of the investigating official to the psychiatrist. In the absence of adequate official cooperation in this process the psychiatrist may refuse to submit his diagnosis³⁹ and may lodge a complaint against the investigating official with the office of prosecution for the wrongful infringement of the "rights" secured to him as an expert by the Code.⁴⁰ If several psychiatrists have been called they may invoke the right of mutual consultation on their labors.⁴¹ A unanimous conclusion arrived at through consultation may be submitted by one psychiatrist as the representative of the group.⁴² In a majority decision, under such auspices, the right of minority dissent is preserved by the requirement that each psychiatrist file a separate opinion.⁴³

The rights of the Soviet psychiatrist at the trial are encompassed by an enigmatic Code section providing that experts are to remain in court throughout the proceedings save where the court on its own initiative or at the request of either party finds it necessary to order their removal.⁴⁴ In practice this section has been used for according the widest possible latitude to the expert.⁴⁵ With its help the Soviet expert witness has been elevated from the status of a mere witness to a position of near participation in the rendering of verdict and judgment. While Soviet writers will deny such a conclusion, they will admit that the "expert" cannot be likened to a "witness" and that his position in the courtroom is *sui generis*,⁴⁶ as in continental practice. They will

development and analysis of a case history without a direct examination of the patient. This is occasionally resorted to for purposes of re-examining the findings of provincial psychiatrists by the staffs of central psychiatric institutes of the USSR, and in cases where distance poses obstacles to direct psychiatric contact. See BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 37.

38. UGOLOVNO—PROTSESSUALNY KODEKS, RSFSR, Art. 171.

39. *Ibid.*

40. *Id.*, Art. 212.

41. *Id.*, Art. 172.

42. *Id.*, Art. 173.

43. *Ibid.*

44. *Id.*, Art. 275.

45. The section in fact has been interpreted by Soviet psychiatric writing as conferring a "right," subject to limitation only in exceptional situations. See VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, p. 36.

46. STROGOVICH, UCHEBNIK UGOLOVNOVO PROTSESSA (Moscow, 1938), pp. 97, 99.

admit too, that the role of the expert in court proceedings is one of actual participation in the interrogation of all witnesses and examination of all exhibits with a bearing on the subject of the expert inquiry.⁴⁷ In this, too, there is no marked deviation from Continental practice. The Kharkov War Crimes trial of 1943 where medical experts were invited to question the witnesses illustrates this practice.⁴⁸

Supplementing these "rights," the Soviet psychiatrist in court is vouchsafed the right of unhampered and generally uninterrupted oral exposition of his findings. This is the consequence of a law of evidence devoid of restrictions in the field of relevance.⁴⁹

Furthermore, the right of consultation with fellow experts, established by the rules governing the preliminary examination, seem to be carried over in effect to the courtroom.⁵⁰

Last, not least, the Soviet psychiatrist is accorded the right of remuneration and reimbursement for his services.⁵¹

The only requirement imposed on the Soviet psychiatrist as distinguished from the Anglo-American, is embraced in the duty to make findings on "accountability,"⁵² in the light of his knowledge of the Criminal Law,⁵³ and recommendations for treatment or punishment based on his knowledge of the facilities available in the locality.⁵⁴ The latter at least appears to involve an extension even of Continental practice.

WEIGHT OF PSYCHIATRIC EVIDENCE

But the real role of psychiatry in Soviet criminal proceedings cannot become apparent before evaluating the weight attached to psychiatric testimony by the Soviet courts. The role of the expert as at least a superior witness must be plain. It is enhanced by the general absence of the "battle of experts" in Soviet courts. A non-accusatorial system of criminal law administration, coupled with an amplitude of opportunity

47. *Id.*, 101. For an interesting U. S. trend, see Wilbert F. Crowley, *Psychiatry and the Criminal Law—Legal Aspects*, in SYMPOSIUM ON MEDICO-LEGAL PROBLEMS, Ed. Samuel A. Levinson (Series Two), Phila., J. B. Lippincott, 1949, pp. 162-176.

48. For an almost verbatim official account in English see *Moscow News*, December 18th, 1943 and succeeding issues. For example of Central Continental practice see DER FALL MAREK, Vienna (1927).

49. See UGOLOVNO—PROTSESSUALNY KODEKS, RSFSR, Art. 57.

50. Soviet psychiatric texts discuss the right of psychiatric participation in the trial and the right of psychiatric consultation in the same breath without differentiating the procedural stages at which the latter exists. See VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, p. 36; BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 44; An American observer of the Soviet legal scene has affirmatively asserted the existence of a right of such consultation during trial. See ZELITCH, SOVIET ADMINISTRATION OF CRIMINAL LAW (1931), p. 219.

51. UGOLOVNO—PROTSESSUALNY KODEKS RSFSR, Art. 65.

52. See BUNEEV AND FEINBERG, *op. cit.*, *supra*, note 2, p. 45.

53. See VNUKOV AND FEINBERG, *op. cit.*, *supra*, note 3, p. 39.

54. *Ibid.*

for inter-psychiatric consultation at all stages of the criminal proceeding seriously minimize the professional clash to which we are accustomed in this country. It is not unnatural under the circumstances that a Soviet prosecutor should not "search for a medical expert who will necessarily support the accusation. He simply invites a state medical institution to assign one of its staff for the required examination, or the defendant is placed in such an institution for observation."⁵⁵ In such a state, expert evidence, in contrast to some American case law,⁵⁶ is the most compelling evidence which can be mustered. It is hardly surprising, therefore, that the rejection of expert conclusions is not encouraged. An important obstacle is interposed by requiring a rejection of a psychiatric diagnosis by a Soviet court to be justified by a separate and "detailed" opinion.⁵⁷

The restrictions placed upon psychiatric expert testimony in the first case of *United States v. Hiss*⁵⁸ would be totally inconceivable under Soviet criminal justice.

American and Soviet practice thus present us with the spectacle of Dr. Binger and his Soviet counterpart: a study in contrasts.

CONCLUSION

For Soviet experience in the use of psychiatry in criminal proceedings, it seems at least possible to suggest the following with the hope that further investigation will make more certain the precise extent of its application: within the restrictions imposed by a return to traditionalism, an enlightened use of forensic psychiatry has been facilitated by an enlargement of the criteria of responsibility to include the test analogous to "irresistible impulse" in addition to the test analogous to the Mc-

55. ZELITCH, *op. cit.*, *supra*, note 50, p. 220. See CROWLEY, *supra*, note 49.

56. See McAuliffe v. Metropolitan Life Insurance Co., 93 N.J.L. 189, 107 A. 258 (1919). But cf. St. Louis Mining & Smelting Co. v. State Industrial Commission, 113 Okl. 179, 241, p. 170 (1925).

57. See UGOLOVNO—PROTSESHUALNY KODEKS, RSFSR, Art. 298. For a case based on this article see—SUDEBNAYA PRAKTIKA VERKHOVNOVO SUDA S.S.S.R. (1946) Vypusk IV (XXVIII), p. 28, Case No. 23, Delo Askerovoi i Gasanovoi.

58. See New York Times, June 4, 1949, p. 1, col. 4:

"Mr. Hiss is on trial . . . on two counts of perjury. The Federal indictment is based upon testimony by Mr. Hiss that he never gave State Department documents to Mr. Chambers, and that he had not seen the 48-year-old former Communist after Jan. 1, 1937.

While Mr. Chambers resumed his testimony on the fourth day of the trial, Dr. Carl Binger, psychiatrist, studied his words and actions intently from a seat just behind the defense counsel table."

and *id.*, July 1, p. 4, col. 7:

"Judge Kaufman overruled government objections to Dr. Carl Binger, psychiatrist, and permitted him to take the stand for the defense. Mr. Stryker propounded a forty-five-minute-long hypothetical question . . . He wanted Dr. Binger's opinion on the mentality of Mr. Chambers, but the judge upheld Mr. Murphy's objection to the answer. However, Mr. Murphy noted that 'a grave injustice has been done to the government because the jury heard the hypothetical question'."

Naghten Rules. It would also seem that there has been an enlargement of the role of the psychiatrist in criminal proceedings which is a decisive step on both doctrinal and operational levels.

These developments alone should make the use of psychiatry in Soviet criminal proceedings well worth watching.