
Alyssa Katz

Follow this and additional works at: https://digitalcommons.lmu.edu/ilr

Part of the Law Commons

Recommended Citation

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.
Soviet Jews Under Soviet Law: 
A Practical Guide

I. INTRODUCTION.

There is no de jure anti-Semitism in the U.S.S.R., yet official Soviet anti-Semitism has become increasingly prevalent in the press and has long affected educational and job opportunities for Jews.¹ Many Soviet Jews see no future for themselves and their children. They see emigration as their only alternative.

Soviet emigration is to a great extent linked to foreign affairs.² Of major significance is the relationship the Soviet Union has with Israel. After the Arab-Israeli war in 1967, the Soviet Union ended diplomatic relations with Israel.³ The Soviets viewed Zionism — the belief in a Jewish national homeland⁴ — as an anathema to communist ideology.⁵ Hence, traditionally, Jews wishing to emigrate from the Soviet Union to Israel were viewed as traitors wishing to join the enemy.

The fate of Soviet Jewry is also linked with Soviet-American bilateral relations.⁶ This is clearly demonstrated by emigration statistics. Soviet emigration policy after the 1978-79 SALT II Nuclear Arms talks was more lenient than it was preceding the 1985 Summit Conference. Approximately 80,000 Jews were permitted to emigrate

---

¹ See infra notes 26-75 and accompanying text.
⁵ H. Shaffer, supra note 3, at 6-7; Hirszowicz, supra note 2, at 366. Marx saw assimilation into the population as the answer to the “Jewish Problem” of anti-Semitism. H. Shaffer, supra note 3, at 6-7; see infra notes 26-75 and accompanying text.
⁶ The Jewish Week, supra note 2, at 23; Watson, supra note 2, at 35; Soviet Union and Israel: We Must Talk, supra note 2, at 55; BUSINESS WEEK, supra note 2, at 49; Posner, supra note 2, at 35; McGrath, supra note 2, at 34.
in 1979 compared to approximately 1,000 in 1985.7 Today it is apparent that Soviet Jewish emigration has become a bargaining chip for world leaders.8

Soviet emigration policy is also linked with Soviet domestic law. There is no free right of emigration in the Soviet Union.9 Nevertheless, Soviet authorities have established exit visa application procedures for prospective emigres.10 For many it takes several months to obtain a visa, while others may wait a dozen years or more.11 Those who are officially denied exit visas are called "refuseniks."12

Since emigres are viewed as traitors to their country, many refuseniks are dismissed from their state jobs. They are then threatened with trial for the crime of "parasitism"—the avoidance of socially useful labor.13 Young men may be thrown out of school and then subjected to the draft.14 Many are sent to prison for knowledge of state secrets.15 Those sent to jail are called, by some in the West, "prisoners of conscience," since belief in Zionism is considered subversive by the Soviet government.16 Many have concluded that waiting for an international agreement is an impractical solution for those Jews who want to leave the Soviet Union as well as for those who await them on the outside. Another approach must be employed.

As an alternative to relying solely on international politics, the

7. The Jewish Week, supra note 2, at 23; Soviet Union and Israel: We Must Talk, supra note 2, at 55.
8. Charles, The Limits of Tolerance, MACLEAN'S, Nov. 25, 1983, at 32. During the summit meetings this journal reported: "According to senior administration officials Reagan is prepared to offer important trade concessions in return for significant Soviet improvements on the human rights agenda — specifically, a significant increase in exit visas for Jews and separated families and the release of political prisoners." Id. Another journal reported: "The president has a human-rights lever available which, if artfully used, might help some Soviet Jews to emigrate . . . Reagan's delicate task is to explore what a quid pro quo might be, without engaging in flesh trading." Watson, supra note 2, at 38.
10. See infra notes 282-321.
11. NATIONAL CONFERENCE ON SOVIET JEWRY, NEWSBREAK, Oct. 11, 1985. "Waiting to emigrate to Israel since 1967, Benjamin Bogomolny of Moscow retains the dubious distinction of being noted in the 1985 edition of the Guinness Book of World Records as 'the most patient refusenik.'" Id.
13. Konst. SSSR (Constitution) art. 60 (USSR) provides that "evasion of socially useful work is incompatible with the principles of socialist society." See also W. Butler, Soviet Law 274 (1983).
15. Id.
16. Id.
American attorney, armed with a sufficient knowledge of Soviet law, can act as an advocate for refuseniks and prisoners of conscience. For those who just want to leave and have not encountered trouble with the law, the attorney will explain to the Soviet authorities why it is not inconsistent with Soviet law to emigrate. For the unfortunate ones who have encountered trouble with the law or have had their rights as Soviet citizens denied, the attorney can file a petition on behalf of the defendant arguing the defense under Soviet law.

Yet, the Soviets cannot be compelled to acknowledge or act on these petitions as if they were filed by Soviet attorneys. Soviet authorities may view these petitions as officious action on the part of the American attorney and adopt an even harder line. On the other hand, since the death of Stalin, the Soviet Union has presented its legal system “with fundamental safeguards and due process.” Soviet lawyers appear frequently in the United States and international forums to defend their legal system. Thus, Soviets should be receptive to the petitions filed by American attorneys.

Moreover, even if the Soviets are willing to accept petitions, the manner in which the foreign attorneys intervene in human rights policies of a country must conform to the society in question. An appropriate strategy for a particular case must be employed in order to encourage a favorable response on the part of the Soviet authorities. For instance, if the lawyer pursues a tactic of quiet diplomacy, the Soviet Union might be able to back down without acknowledging that it is succumbing to public pressure. Further, since the Soviets may have little stake in keeping the prisoner, pursuing the matter quietly might be all that is required. Finally, with this strategy, the risk of aggravating the prisoner's situation is avoided. On the other hand, public confrontation might be the only workable strategy where the Soviet stakes in keeping the prisoner confined are higher. Examples

17. See generally Dershowitz, Representing Dissidents Abroad: Some Problems and Prospects, in LAW DAY SYMPOSIUM: "SOVIET JEWS UNDER SOVIET LAW" (UCLA Law School 1979). "The USSR will not ordinarily succumb to pressure from this country, except in special circumstances . . . Other countries such as South Africa, Taiwan, the Philippines, Mexico — are far more subject . . . to naked pressure from the American [government] . . ." Id. at 000457.

18. Id. at 000458; Salter, American Lawyers and Russian Dissidents: The Lawyer as Social Engineer, 12 INT'L L. 869 (1978).

19. Dershowitz, supra note 17, at 95.

20. Id.

21. Id. at 000460.

22. Id.
are cases where the prisoner comes from a high position in the Soviet Union and may allegedly possess state secrets. The attorney must be mindful of these alternatives at the outset.

In connection with the manner of the American attorney’s intervention, a related issue to consider before representation of a Soviet client is the identification of the client. The client may be the organization which sought the assistance of the lawyer, the emigre’s friends or relatives who have retained the lawyer, or the friends or relatives in the Soviet Union who are communicating with the lawyer. While the ultimate person affected by the attorney’s action is the prisoner or refusenik himself, he or she is rarely able to speak to outsiders. Hence, it is the former persons who ultimately decide which strategy to employ for the client. Additionally, the lawyer’s duty to his confined client is analogous to that of the duty to a fugitive: the lawyer must, in connection with friends and family of the dissident, make the decisions that he deems to be in his client’s best interest, consistent with what the lawyer believes the client’s directions would be. Thus, deciding what the client himself would want is a serious concern.

After considering the matters above, it is critical that the American attorney embarking on a mission to act as an advocate for Soviet Jews be familiar with the following: a historical perspective of the problem, the relevant constitutional rights afforded in the Soviet Union, the court system, the criminal procedural safeguards afforded the accused, the substantive criminal law, and the administrative procedures involved in emigrating. This Comment reviews each of these areas and discusses two specific cases to determine whether Soviet law was properly applied by the Soviet authorities in those instances. This analytical inquiry is designed to provide a general guide for the advocate.

II. HISTORICAL PERSPECTIVE OF THE JEWISH SITUATION IN THE U.S.S.R.

The pre-1917 history of Jews in Russia was one of anti-Jewish prejudice, hostility and often persecution. However, the social
revolution\textsuperscript{27} of Vladmir Ilyich Lenin appeared to provide some hope for Jewish life.\textsuperscript{28} Lenin emphasized the need for complete unity of Jewish and non-Jewish workingmen.\textsuperscript{29} He was a proponent of "scientific socialism,"\textsuperscript{30} whose founder, Karl Marx, "adjudged anti-Semitism a by-product of capitalist relationships inevitably destined to disappear under the new order."\textsuperscript{31} Yet, when Marx predicted that after the inevitable demise of capitalism, anti-Semitism would gradually disappear, he also forecasted the end of Judaism itself.\textsuperscript{32} To both Marx, and the Communist leaders, both Jewish and non-Jewish, the answer to the Jewish problem was assimilation into the population at large.\textsuperscript{33}

Religion and Zionism differentiated the Jewish population as opposed to assimilating it. Thus, both were detested by Marxist-Leninist ideology.\textsuperscript{34} Under Lenin, campaigns were initiated against all religions. In 1921, the Bolsheviks\textsuperscript{35} put a stop to religious education of persons under eighteen years of age and the criminal code forbade the teaching of religious beliefs to children in public or private schools.\textsuperscript{36} Until 1930, a special section of the party was set up to stifle those voices who decried acts against the Jewish religion as anti-Semitic.\textsuperscript{37} Jewish culture expressed through Yiddish-language theatres, schools, and newspapers was not discouraged\textsuperscript{38} but, Jewish religion and "Zionism" were attacked.\textsuperscript{39} Since the goal was and continues to be assimilation of the Jews into the general population, Jews had to be educated away from a notion of nationalism.\textsuperscript{40}

The late 1920's marked the beginning of a system of repression in
the Soviet Union as Stalin came into power. The Stalin years fostered an antagonistic attitude toward Jewish national life, which successive regimes have maintained. Stalin indicated a distrust for Jews allegedly because many Jews had relatives abroad and he feared foreign penetration through them.

In the 1930's, the Soviet leaders attempted to alleviate the Jewish problem by promoting resettlement in the Birobidzhan region, an isolated area in the far east of the U.S.S.R. This bleak area of the U.S.S.R., however, never attracted many Jewish settlers. Hence, the situation of the Jews did not improve, but, in fact, worsened.

The great purges of Soviet Jews in the 1930's brought with them the trials and executions of most of Lenin's Jewish friends. Ironically, Stalin urged, as do Soviet leaders today, that "Communists as consistent internationalists, cannot help being the implacable and sworn enemies of anti-Semitism" and that "anti-Semitism is a phenomenon profoundly hostile to the Soviet regime and is sternly repressed in the U.S.S.R." But within three years, Stalin signed a pact of friendship with Hitler. Attacks now focused on Jewish culture which had been left alone under Lenin's rule.

Stalin's successor, Nikita Khrushchev, later denounced Stalin's crimes, but never mentioned persecution of the Jews or official discrimination as one of the dictator's faulty policies. Khrushchev claimed that the Jewish people were treated like everybody else in the Soviet Union. Yet, while religious freedom was allegedly guaranteed in the U.S.S.R., those who did not abandon their faith for "philosophic atheism" found their career and political opportunities diminished. Further, under Khrushchev, most of the synagogues

41. E. JOHNSON, supra note 27, at 73; H. SHAFFER, supra note 3, at 8.
42. H. SHAFFER, supra note 3, at 8.
43. Id.
44. J. HAZARD, supra note 3, at 165.
45. H. SHAFFER, supra note 3, at 8.
46. Id.
47. Id. at 9.
48. Id.
49. Id.
50. Id. Hitler had begun exterminating the Jews and the Soviets befriended him.
51. Id. at 15. There was a short period of collective leadership in between Stalin and Khrushchev. Id. at 14.
52. Id. at 15.
53. Id. at 14.
54. Id. at 15.
were closed down and in 1964, the traditional baking of "matzoh" was forbidden. Khrushchev's attacks were not limited solely to the Jewish religion. But the Jewish religion was depicted as:

particularly immoral since it allegedly made money the God of the Jewish faith, as particularly reactionary and proimperialist since it presumably promoted allegiance to Israel, and as particularly inflammatory, since it promulgated the idea that the Jews were the chosen people, which supposedly evoked in religious Jews feelings of hatred against other people.

Khrushchev, like Stalin, claimed adherence to the principles of Marx and Lenin and hence the charge of anti-Semitism was and still is somewhat unclear. Yet, viewed against this ideological background, one can understand how Soviet leaders rationalize the official opposition to the continued existence of Jewish nationalism in the Soviet Union.

Moreover, Soviet relations with Israel have also affected the Soviet Jews. Although Stalin supported the founding of the Jewish state, by the early 1950's Soviet relations with Israel had begun to deteriorate. Israel's diplomats came to be treated as if they were agents of an enemy power. By 1954, the Soviets shifted to a pro-Arab policy and finally broke off all relations with Israel during the 1967 Arab-Israeli War.

Israel's victory in 1967 restored Jewish national pride to Soviet Jews. They saw emigration to the new state as their only hope for

---

55. "Matzoh" is the unleavened bread baked by Jews to memorialize their hurried exodus from Egypt. Exodus 23:15.
56. H. Shaffer, supra note 3, at 15. The Soviet officials justified this by claiming that there was a national grain shortage.
57. Id. at 15-16.
58. Id. (footnote omitted).
59. Id. at 16-17.
60. Rosenshaft, supra note 32, at 581.
61. H. Shaffer, supra note 3, at 18. The charge is unclear because what appears to be anti-Semitism, the leaders argue, is merely the Marxist-Leninist idea of assimilation in action. See supra notes 26-33 and accompanying text. For an explanation of how the Soviet Union could vote for the existence of the Israeli nation in light of its ideology, see H. Sachar, A History of Israel (1972).
62. J. Hazard, supra note 3, at 165.
63. H. Shaffer, supra note 3, at 18.
64. J. Hazard, supra note 3, at 165. This policy might be shifting slightly today.
survival.65 In conjunction with this hope, there was a restored interest in the Hebrew language and the history of the religion.66 From this point on, increasing numbers of Soviet Jews from all walks of life and from all parts of the U.S.S.R. have applied for emigration permits.67

The Brezhnev era displayed some sensitivity to the Jewish plight although primarily in response to Western political pressure.68 Following a famous speech by Premier Kosygin in 1966, a headline appeared in the newspaper Izvestia announcing a new emigration policy “under the banner of family reunification and implicitly, repatriation to the Jewish national homeland Israel.”69

By 1970, however, the Soviet leadership changed its policy on emigration.70 To demonstrate its new policy, the Soviets held a series of show trials.71 The first trial was in Leningrad in 1970. The defendants were a group of Soviet Jews who, after being refused exit visas to Israel, had allegedly conspired to hijack a plane — an event which never took place.72 The Jews were found guilty and the two alleged leaders were sentenced to the death penalty.73 The international outcry, however, forced the Soviet leaders to commute the sentence to long prison terms.74

From 1970 to date, Soviet emigration policy has essentially been linked to events of global significance and Soviet-American relations.75 This presents a very tenuous situation for those wishing to

67. H. SHAFFER, supra note 3, at 5.
68. Freedman, Soviet Jewry and Soviet American Relations: A Historical Analysis, in SOVIET JEWRY IN THE DECISIVE DECADE, 1971-80, supra note 65, at 41. Nixon was visiting China at the time which posed a political threat to the Soviets. Id. at 43.
69. Kolker, supra note 65, at 80-81. “This change in Kremlin policy was, of course, influenced by the newly emerging detente with the West, particularly improved bilateral relations with the United States and the increase in Soviet-American trade.” Id. at 81.
70. Freedman, supra note 68, at 42.
71. Id. These were the famous “Leningrad Trials.” See T. TAYLOR, COURTS OF TERROR 6-13 (1976).
72. Freedman, supra note 68, at 42.
73. Id.
74. Id. “It also had the effect of bringing the Soviet Jewish emigration question to the forefront of public attention in the United States and Western Europe and this in turn resulted in an international conference on Soviet Jewry in Brussels in February 1971.” Id.
75. Hirszowicz, supra note 2, at 366.

There seems to be a link between developments on Soviet-Jewish matters during the last decade, and events of global significance. The Six-Day War of June 1967 contributed greatly to a renaissance of national sentiment among the Jews of the
III. SOVIET LAW

The Constitution of the U.S.S.R. establishes the federal relationship between the Soviet Union and its fifteen constituent Union Republics.76 The Soviet constitutional system rejects the concept of separation of powers,77 but nevertheless sets up three branches of government: the legislative (as the dominant branch), the executive, and the judicial (the least important branch).78

The legislative branch — Supreme Soviet — adopts federal law in the Soviet Union.79 The individual union republics then develop their own laws in accordance with federal law.80 The Soviet Constitution carves out the jurisdiction of the U.S.S.R. and leaves to the union republics those powers not reserved to all-union jurisdiction.81

U.S.S.R. Increased Soviet involvement in the Middle East brought about a systematic and virulent propaganda campaign against Israel, Zionism and Jewry at large. This campaign directed at audiences both inside and outside the U.S.S.R., was intensified after the 1968 events, first in Poland and then in Czechoslovakia. The political ferment in these countries had its counterpart in the development of the general Soviet movement of dissent, which presented itself in some strength during the trial of the four in 1968. All this, in turn, created an atmosphere in which Soviet Jews also felt free to bring into the open their urge to emigrate. The orientation of Soviet foreign policy towards detente — a policy which suffered a temporary setback after the Czech invasion — inhibited the Russian authorities from bringing to bear the full weight of repression against the dissidents; this inhibition might have partly disappeared in 1973, when the Ostpolitik, Soviet-US exchanges, and the Helsinki Conference were already safely on their way. In the meantime, however, the broad movement of Jewish emigration to Israel which had developed received wide support in the West.

Id. (footnote omitted). For a detailed discussion of the link between Soviet Jewry and Soviet-American relations, see Freedman, supra note 68, at 38.

76. W. Butler, supra note 13, at 145.
78. Minan, supra note 77, at 1.
79. Id.
80. Id.
81. W. Butler, supra note 13, at 145.

Included within all-union jurisdiction are the establishment of general principles for the organisation and activity of all republic and local organs, ensuring the unity of legislative regulations in the country and enacting the FPL, national economic planning, state budget ... the revenue and taxation system, wage scales, declaring war or peace, the conduct of foreign trade, and representation of the U.S.S.R. in foreign relations. ... Four union republics contain within their frontiers 20 autonomous republics organised on the nationality principle.

Id.
A. Constitutional Law

1. General

Unlike the American view that a constitution stands for a limitation of arbitrary power that may be exercised by the state, limitation of state power has been a minor and relatively recent consideration for Soviet constitutional draftsmen.\(^8\) To Karl Marx, class rule was the main concern: "[T]he State in the hands of the working class would be an instrument for suppressing antagonistic class elements and realising the ultimate transition to communism . . . the State would [eventually] wither away."\(^8\) Until it is no longer needed, the State serves as the primary instrumentality to achieving world-wide communism.\(^8\) Hence, in the Soviet Union today, the state has virtually unlimited power.

Although an exhaustive analysis of the Soviet Constitution is beyond the scope of this Comment, a discussion of the basic individual protections it affords is relevant to the case of the refusenik or prisoner of conscience. The relevant section of the Constitution is part II: the state and the individual. This part includes chapter 6 which discusses citizenship in the U.S.S.R. and equality of citizens' rights, and chapter 7 which delineates the basic rights, freedoms and duties of citizens of the U.S.S.R.\(^8\)

2. Equal protection of the law

Article 34 of the 1977 Constitution of the U.S.S.R. embodies the doctrine of equal protection of the law. It provides that

Citizens of the U.S.S.R. are equal before the law without distinction of origin, social or property status, race or nationality, sex, education, language, attitude to religion, type and nature of occupation, domicile or other status. The equal rights of citizens of the U.S.S.R. are guaranteed in all fields of economic, social and cultural life.\(^8\)

Similarly, article 36 provides in pertinent part that "[c]itizens [of the U.S.S.R.] of different races and nationalities have equal rights."\(^8\)

---

\(^{82}\) Id. at 135.
\(^{83}\) Id.
\(^{84}\) Id.
\(^{85}\) KONST. SSSR (Constitution) pt. II (USSR).
\(^{86}\) Id. at art. 34. Similarly, article 156 provides for "[j]ustice in the equality of citizens before the law and court." Id. at art. 156.
\(^{87}\) Id. at art. 36.
Thus, it is clear from the language of these provisions that Soviet Jews are entitled to these rights in their capacity as Soviet citizens. It is critical that the advocate include this language in his petition on behalf of the refusenik.

3. Freedoms and duties

The theoretical underpinning of the rights and duties set out below must be recognized to understand why the Soviet Constitution seems to give with one hand what it takes back with the other. Soviet rights are not presumed inherent in man. To the Soviet legal mind, there are no natural rights but, rather, rights that stem from positive law, or rights granted by the state. Soviet law does not recognize such individual or group rights as the right of workers to strike, the right to emigrate, the right of spouses to live together, and the right to be unequal. Because they are unrecognized, a Soviet citizen may not claim any of these rights. For example:

[s]ince under Soviet law there is neither the right of spouses to live together not[sic] the duty of a spouse to reside at the same place as the other spouse, a spouse who applies for permission to emigrate cannot lawfully expect that if such a permission is granted that the other spouse and their children would automatically be included in such permission. This principle provides the theoretical framework for a common Soviet governmental practice of splitting up the family of a dissident who is eventually granted permission to leave the country.

Thus, a right is merely a lawful entitlement. It is devoid of moral significance.

In addition, it is presumed that any citizen who accepts a right granted under the law enters into a social compact with the Soviet state to fulfill the reasonable obligations that go along with that right. The state may subject the Soviet citizen to various sanctions if the citizen does not live up to his side of the contract. The citizen may be required to pay back the state since breach would be "tanta-

89. Id.
90. Id.
91. Id.
92. Id.
93. Id. at 31.
94. Id.
mount to unjust enrichment."95 Significantly, the state may subject the citizen to criminal punishment if the breach of the social compact violates any rule of criminal law.96 For example, under article 45, every citizen has the right to a free education. In exchange, anyone who exercises that right agrees to permit the Soviet society to derive benefits from the education.97 Thus, "should the Soviet citizen decide to emigrate to a foreign state prior to his attaining the age of retirement, the Soviet society reserves the right to obtain reparation from such a citizen."98

Further, the rights of an individual may be virtually ignored since Soviet law takes the position that group rights are superior to individual rights which must yield to the goals of the group.99 Article 39 grants full social, economic, political and personal rights.100 These rights, however, may not be enjoyed to the detriment of the state.101 Thus, every Soviet citizen has a legal duty to subordinate his individual rights to the interests of society.102 In concrete terms, "the right of a Soviet citizen to emigrate must yield to interests of Soviet national security . . . [and] an individual's freedom of speech must yield to the need to protect legitimate state secrets."103 The logical conclusion from these facts is that, against this backdrop, defending the refusenik is an uphill battle.

Nevertheless, the advocate must stress these qualified rights and freedoms set forth in the Soviet Constitution.104 For instance, the U.S.S.R. Constitution guarantees "full" social, economic, political and personal rights and freedoms for Soviet citizens.105 But, as noted, the enjoyment of these rights must neither be detrimental to the interests of society or state nor infringe upon the rights of other citizens.106

Citizens have the right to work,107 to rest,108 to receive health

95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. KONST. SSSR (Constitution) arts. 39-58 (USSR).
105. Id. at art. 39.
106. Id.
107. Id. at art. 40.
108. Id. at art. 41.
protection,\textsuperscript{109} to be maintained in old age,\textsuperscript{110} to be housed\textsuperscript{111} and to be educated.\textsuperscript{112} They have the right to enjoy cultural benefits,\textsuperscript{113} to freely pursue scientific, technical and artistic vocations,\textsuperscript{114} and to participate in the management of the state.\textsuperscript{115}

A Soviet citizen may criticize the shortcomings of state agencies, and officials are obliged to reply and take appropriate action within specific time limits.\textsuperscript{116} Persecution for criticism is prohibited and persons guilty of such persecution shall be penalized.\textsuperscript{117} Freedom of press is guaranteed and "[i]n accordance with the goals of communist construction," citizens have the right to associate in public organizations.\textsuperscript{118} Yet, as one writer points out, freedom to demonstrate means:

freedom to join with one's fellow workers to manifest public support for the policies of the state and Party. Very simply, Soviet law stresses an elementary fact of any Marxist socialist legal system: the bill of rights is not a suicide pact; its guarantees do not extend to those who oppose the government of the state.\textsuperscript{119}

Citizens of the U.S.S.R. are guaranteed freedom of conscience, that is, the right to profess any or no religion.\textsuperscript{120} Yet, within the same paragraph of this guarantee is a limitation: incitement of hostility and hatred in connection with religious beliefs is prohibited.\textsuperscript{121}

The family is protected by the state, and citizens are guaranteed inviolability of the person and home.\textsuperscript{122} A right to privacy is recognized and protected.\textsuperscript{123} The state is obliged to protect the individual freedoms of citizens.\textsuperscript{124} If the state fails to do so, citizens can lodge complaints against officials of the State and receive damages for

\begin{thebibliography}{99}
\bibitem{109} Id. at art. 42.
\bibitem{110} Id. at art. 43.
\bibitem{111} Id. at art. 44.
\bibitem{112} Id. at art. 45.
\bibitem{113} Id. at art. 46.
\bibitem{114} Id. at art. 47.
\bibitem{115} Id. at art. 48.
\bibitem{116} Id. at art. 49.
\bibitem{117} Id.
\bibitem{118} Id. at arts. 50-51.
\bibitem{119} Osakwe, supra note 88, at 35 (footnote omitted).
\bibitem{120} KONST. SSSR (Constitution) art. 52 (USSR).
\bibitem{121} Id.
\bibitem{122} Id. at arts. 53-55.
\bibitem{123} Id. at art. 56.
\bibitem{124} Id. at art. 57.
\end{thebibliography}
Moreover, the Constitution also defines a citizen’s duties to the U.S.S.R. The Constitution provides in relevant part that “[citizens'] exercise of [their] rights and liberties is inseparable from the performance by citizens of their duties.”

As well as a right, it is a duty to work in the U.S.S.R. and “evasion of socially useful labor is incompatible with the principles of a socialist society.” Citizens are obliged to preserve socialist property. They must safeguard the interests of the state and betrayal of the Motherland is the gravest crime against the people. Military service is a duty as is respect for national dignity of other citizens and rights and lawful interests of other persons. There are duties to bring up children as worthy members of society, to protect nature, and to preserve historically significant monuments. Finally, there is a duty to strengthen world peace.

In short, the balance between corresponding duties and rights demonstrate again that the concept of inherent, inalienable rights is alien to the Soviet government.

B. The Administration of Justice

The American attorney embarking on a mission to aid an aspiring emigre or a prisoner of conscience would certainly need to be familiar with the Soviet court system. The following is an overview of the administration of justice in the Soviet Union. Part VII of the Soviet Constitution, entitled “Justice, Arbitration and Prosecutor’s Supervision,” explains the major aspects of the Soviet judicial system. According to the Constitution, justice is administered only by the courts. The tasks of the Soviet courts are:

[to protect the social and state system of the U.S.S.R., the socialist economic system and socialist property; the political, labor, hous-

\[\text{References}\]

125. Id. at art. 58.
126. Id. at arts. 59-69.
127. Id. at art. 59.
128. Id. at art. 60.
129. Id. at art. 61.
130. Id. at art. 62.
131. Id. at arts. 63-64.
132. Id. at art. 66.
133. Id. at arts. 67-68.
134. Id. at art. 69.
135. Id. at pt. VII.
136. Id. at art. 51.
ing and personal and property rights of Soviet citizens, and the rights and lawful interests of state institutions, enterprises, collective farms and co-operatives, and other social organizations.\textsuperscript{137}

Cases are normally tried by a collegium of three persons consisting of a permanent judge and two "people's assessors."\textsuperscript{138} All three are elected.\textsuperscript{139} The people's assessors exercise all the rights of a judge but are expected to introduce a lay element into judicial proceedings.\textsuperscript{140} All procedural matters and questions are collectively settled by the bench. All three must adjudicate in strict conformity with the law and act independently from extra-judicial factors.\textsuperscript{141} Judgment is reached by a majority vote.\textsuperscript{142}

There are exceptions, however, to the rule of collective examination or examination by a judge and two people's assessors.\textsuperscript{143} A people's judge may individually consider minor offenses such as "petty hooliganism,"\textsuperscript{144} minor thefts, and certain insignificant civil cases. In addition, there is no collective examination after a case has been tried fully in a court of first instance.\textsuperscript{145} However, an appeal against its judgment may be heard by three permanent judges.\textsuperscript{146}

Moreover, the supreme supervisory power to ensure the strict observance of the law by ministries,\textsuperscript{147} institutions, organizations and officials is vested in the Procurator General of the U.S.S.R. (alternatively, Prosecutor General) and subordinate procurators.\textsuperscript{148} Yet the

\textsuperscript{137} Id.  
\textsuperscript{138} Id. at art. 152. Any Soviet citizen 25 years or older may be elected a people's assessor. W. BUTLER, supra note 13, at 95.  
\textsuperscript{139} KONST. SSSR (Constitution) art. 152 (USSR).  
\textsuperscript{140} Id. at art. 154.  
\textsuperscript{141} Id. at arts. 154-55. This is enforced by the ability of voters or the agency which elected them to recall them. Id. at art. 152.  
\textsuperscript{142} Id.  
\textsuperscript{143} Id. at art. 157.  
\textsuperscript{144} This is a crime similar to vandalism. Kelina, Substantive Criminal Law, in THE CRIMINAL JUSTICE SYSTEM OF THE USSR 135 (M. Bassiouni & V. Savitsky eds. 1979). Article 206 of the Penal Code of the U.S.S.R. defines hooliganism as "actions rudely violating social order and expressing obvious disrespect for society." Hooliganism accounts for twenty to thirty percent of all crimes in the Soviet Union. Id.; see also infra notes 269-71 and accompanying text.  
\textsuperscript{145} FUNDAMENTALS OF CRIM. PROC. art. 9, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 224.  
\textsuperscript{146} Id.  
\textsuperscript{147} One of the main concerns of the Ministry of Justice is efficiency of the courts. For details relating to this organ of government, see Savitsky, Institutions for the Administration of Criminal Justice, in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 32-37.  
\textsuperscript{148} KONST. SSSR (Constitution) arts. 164-68 (USSR).
Procurator's role is not limited to that of a safeguarder of legality. The Procurator's supervision also concerns the "execution of laws by agencies of inquiry and preliminary investigation." The Procurator's powers are curiously anomolous in that the Procurator is expected both to discipline and to further the investigatory process. Procuracy supervision also takes place in the courts. While obliged by law to ensure objective judicial consideration of the case, he must also prosecute the case on behalf of the state. Finally, procuracy supervision concerns institutions where individuals may be confined or detained, ranging from preliminary confinement to imprisonment. But in spite of these potentially conflicting roles, protests against judicial decisions are usually brought by the Procuracy section specially charged with reviewing criminal or civil cases.

Lastly, the role of the Bar or College of Advocates, according to the Constitution, is to provide legal assistance to citizens and organizations. Advocates give and draw up legal papers for both types of clients. They participate in civil hearings as representatives of plaintiffs, respondents or other parties involved. They participate in criminal cases from the preliminary investigation stage through trial and judicial review of sentences by higher courts. They serve as defense counsels of the accused, as representatives of victims, or as advocates for civil plaintiffs and respondents. Advocates are neither employed by, nor receive compensation from, the state.

C. Criminal Procedure

In light of the dark years of the Stalin regime, the Soviets today profess a strong determination for protection of citizens' rights. Today the Soviet Union proudly presents its legal system as one supported by fundamental safeguards and due process. This section will set forth the basic protections in criminal proceedings.

It is helpful to contrast the Soviet system to the American system

149. W. BUTLER, supra note 13, at 106.
150. Id.
151. Id.
152. Id. For a thorough discussion of the procuracy, see G. SMITH, THE SOVIET PROCU RACY AND THE SUPERVISION OF ADMINISTRATION (1978).
153. Savitsky, supra note 147, at 38.
154. Id.
155. Id. at 39.
156. Id.
157. Id. at 43.
158. Dershowitz, supra note 17, at 000458.
at the outset. The American system is "adversarial"; it operates on the assumption that an independent trier of fact, judge or jury, will determine what the truth is after each side presents its case. The two parties are adversaries in the sense that one side wins and the other side loses. On the other hand, the Soviet system is "inquisitorial". This system attempts to discern the truth by the cooperative efforts of the judge, prosecutor and defense attorney. Fact finding and not the application of legal principles is the concern of the inquisitorial system. All evidence is therefore admissible and considered.

1. Sources of law

The law governing criminal procedure is based on the Soviet Constitution which sets forth the principles underlying the structure and operation of the courts and the procurator's office. It is also based on the Fundamentals of Criminal Procedure of the U.S.S.R and the Union Republics as well as various other sources of law.

2. Initiation and inquiry of a criminal case

A criminal case may be initiated by a procurator, court, investigator or agency of inquiry. Any of these actors may set the initiation procedure in motion by issuing a decree to initiate or not initiate the case. The initiation stage is subject to procuracy supervision.

The investigation may take either the form of an inquiry or of a

159. Minan, supra note 77, at 4-5; see also W. Butler, supra note 13, at 307, 316.
160. Minan, supra note 77, at 5.
161. Konst. SSSR (Constitution) arts. 151-68 (USSR).
163. Id. at 232; Savitsky, Criminal Procedure in The Criminal Justice System of the USSR, supra note 144, at 77.
164. Id. at 78.

The significance of a decree to initiate a criminal case is that it puts in motion complex judicial machinery; without such a decree, no investigatory action, including those dealing directly with the limitation of rights of citizens (arrest, search, inspection, etc.) may be carried out.

The following circumstances give rise to the initiation of a criminal case: (1) reports, statements, or letters of citizens; (2) information received from trade-unions, Young Communist league (Komsomol) organizations, voluntary peoples' brigades protecting public order, comrades' courts, and other public organizations; (3) information received from enterprises; [sic] factories, institutions, and officials; (4) articles, notes, letters, etc., published in the press; (5) a confession; and (6) discovery of the indicia of a crime by the agency of inquiry, by the investigator, by the procurator, or by the court (Art. 108 of the CPC).

Id. (footnote omitted).
preliminary investigation; sometimes it may take the form of both. Where a preliminary investigation is mandatory, an agency of inquiry initiates the case. It determines that a crime has been committed and alleges by whom. This determination must be completed within ten days and turned over to an investigator for preliminary examination, which is conducted in most cases.

On the other hand, if a preliminary investigation is not mandatory, the agency of inquiry initiates the case and takes all steps to establish the facts that it must prove. Unlike a preliminary investigation, in an inquiry where preliminary investigation is not mandatory, defense counsel may not participate, nor may the victim or civil parties see any materials until trial.

Moreover, if an official conducting the inquiry has presented an accusation against the person and had interrogated him, the official may apply for a measure of preventive restriction — or measures preventing the suspected person from avoiding investigation and trial. The strictest measure of preventive restriction is detention, which is applied when the crime is of great danger to society. When this measure is employed, the agency of inquiry must give detailed written notification to the procurator within twenty-four hours. The procurator has forty-eight hours from receipt of notice within which to either sanction the detention (arrest) or release the accused.

Importantly, the Soviet Constitution provides that no one may be arrested other than on the basis of a judicial decision or sanction of a procurator. Arrest warrants must generally be issued by a judge or a procurator upon sworn complaint that a crime has been committed and that there is probable cause to suspect that the accused was responsible for its commission. As in the United States, there are

165. FUNDAMENTALS OF CRIM. PROC. art. 29, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 233; see also Savitsky, supra note 147, at 79.
166. FUNDAMENTALS OF CRIM. PROC. arts. 29-30, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 233-34; see also Savitsky, supra note 147, at 79.
167. Id. at 80-81.
169. Id.
170. Savitsky, supra note 147, at 62.
171. Id.
172. Id.
173. Id.
175. Id. at 503.
limited exceptions to this rule in extenuating circumstances.\textsuperscript{176}

3. Preliminary investigation

The codes of criminal procedure determine whether a preliminary investigation is necessary and which agencies are to investigate specific crimes.\textsuperscript{177} The investigator acts under the guidance and supervision of the procurator.\textsuperscript{178} At this stage there is no contest of parties or oral hearing since all three procedural functions — accusation, defense, and decision making — are in the control of the investigator.\textsuperscript{179}

The investigator then begins his search for evidence. The law in this area is very detailed. It provides for the manner of carrying out an action as well as measures safeguarding the rights of all persons interested in the case.\textsuperscript{180} Article 54 of the Constitution guarantees

As an exception to the general rule that all pre-investigative arrests must be carried out on the basis of a warrant issued by a court or a procurator, article 32 of the F.P. Crim. P. and article 122 of the RFSFR C.C.P. permit the investigator to carry out a warrantless arrest if one of the following conditions is met: a person is suspected of committing a crime for which punishment may be assigned in the form of deprivation of freedom, and such person is caught committing the crime or immediately after committing it; eyewitnesses directly identify the given person as the one who committed the crime; or obvious traces of the crime are discovered on the suspect, on his clothing or in his dwelling. Immediately upon making a warrantless arrest the arresting officer must draw up an arrest order (protokol zaderzhaniia) stating with specificity all relevant details about the arrest (i.e., time, place, basis, and the crime which the arrestee is suspected of having committed). The arrest order must be signed by the arrestee.

The criminal suspect's first meaningful due process protection is the safeguard against unlawful arrest. Like many other constitutional rights afforded to the suspect, however, his right to be free from warrantless arrests is not an absolute right. It may yield to overriding public security interests or to compelling law enforcement considerations. The officer who made a warrantless arrest must inform the procurator in writing of the arrest within twenty-four hours of such an arrest. Within forty-eight hours of receiving this written notification the procurator must decide whether to affirm the arrest or to order the immediate release of the arrestee. In short, under no circumstances may a warrantless arrestee be held for more than seventy-two hours without the decision of the procurator either to release him or to give written approval of the continued detention of the arrestee. Once the procurator approves of the continued detention of the arrestee, the pre-investigative arrest is upgraded to a pre-investigative detention.

\textit{Id.} at 503-04. This passage underlines two points. First, the Soviet criminal legal system appears to have many of the same features as its American counterpart. Second, the procurator is an extremely important person in the criminal process. Hence, he is the person to whom the advocate must address petitions.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} W. BUTLER, supra note 13, at 310.

\textsuperscript{178} \textsc{Fundamentals of Crim. Proc.} arts. 30-31, \textit{reprinted in The Criminal Justice System of the USSR}, supra note 144, at 234-35.

\textsuperscript{179} Savitsky, supra note 147, at 81.

\textsuperscript{180} \textit{Id.} at 82.
inviolability of the home. Thus, a search of a home can only be executed on the basis of a decree — analogous to a warrant — issued by an investigator or agency of inquiry, and approved by the procurator.\textsuperscript{181} If the search must be done immediately, the procurator must be informed within twenty-four hours.\textsuperscript{182}

Next, the investigator permits all parties involved, including defense counsel, to examine the material gathered.\textsuperscript{183} Any of these parties may petition for further investigation.\textsuperscript{184} If the investigator denies their request, they have the right to appeal.\textsuperscript{185} The investigator will then either issue an indictment or determine that the evidence does not establish guilt, or that no crime has occurred.\textsuperscript{186}

The procurator then verifies the investigation. He examines its objectivity, the sufficiency of the evidence and whether the rights of the accused have been respected.\textsuperscript{187} The case is then sent to the court for trial or returned for additional investigation or termination.\textsuperscript{188}

Finally, an administrative session is held by a judge, two people’s assessors and the procurator to determine whether there are sufficient grounds to bring the accused to trial. This session is dispensed with if the judge accepts that there are sufficient grounds.\textsuperscript{189}

\section*{4. Trial}

All parties, at least in theory, are equal before the court.\textsuperscript{190} In most cases, the procurator supports the State’s accusation.\textsuperscript{191} If the procurator appears in the case or if the law so requires, the accused must be represented by defense counsel, unless he expressly waives this right.\textsuperscript{192}

The defendant must be asked whether he understands the accusation and either acknowledges or denies his guilt.\textsuperscript{193} Acknowledg-
ment of guilt does not relieve the court of its responsibility to fully investigate the case. Witnesses appear for the purpose of assisting the court in ascertaining the whole truth and not ostensibly to promote the prosecution or defense. The witness is legally compelled to testify. The defendant, however, is not bound to testify, although refusal to testify will result in public disclosure of any statements made by the accused during the preliminary investigation.

Once the judicial investigation is completed, any one of the parties may orally address the court. The person brought to trial has the right to a virtually unlimited last word. The judge and people's assessors then hold a private conference to come to judgment. The person brought to trial must receive a copy of the judgment within three days of the court's decision.

The Constitution mandates that proceedings in all courts be open to the public. The law, however, provides for some exceptions. The court has a right to a closed hearing if the case involves sex crimes, juvenile crimes and or other sensitive information dealing with intimate aspects of the lives of persons involved. In addition, closed trials are held where an open hearing would be contrary to the interest of protecting state secrets. Nevertheless, all judgments must be pronounced public.

5. Appeal

A judgment of the court can be appealed by any participant in the judicial proceedings. The appellate court is known as a "court of cassation". These courts hear the appeal in open session and decide whether to remand the case for new investigation or judicial consideration, vacate the judgment or modify the judgment. "The review is done on the basis of the record of the case plus additional.

194. Id.
195. Id. at 315.
196. Id.
197. Id. at 315-16.
198. Id. at 316.
199. Id.
200. Id.
201. KONST. SSSR (Constitution) art. 157 (USSR).
202. Id.
203. Id.
204. FUNDAMENTALS OF CRIM. PROC. arts. 44-45, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 240-41.
205. Id.
Substantial procedural violations are grounds for reversal; for example, a case considered without defense counsel when participation is required will be reversed.\(^{208}\)

Additionally, "extraordinary review" or review by judicial supervision may occur with respect to a court's judgment that has already taken legal effect.\(^{209}\) Review by judicial supervision occurs only upon the protest of the chairman of a court or a higher level than that which rendered the judgment or on the protest of a procurator of a higher rank than the procurator who was involved in the last hearing on the judgment.\(^{210}\) Finally, the re-opening of a case may occur with respect to judgments having taken legal effect where newly-discovered evidence is disclosed.\(^{211}\)

6. Presumption of innocence

By the time a case reaches the trial stage the investigator and the procurator must be absolutely convinced of the accused's guilt or the case would not have been referred for trial.\(^{212}\) This raises serious doubts to American lawyers as to whether under such circumstances there exists a presumption of innocence under Soviet law.\(^{213}\)

Although the issue is of great debate among Soviet jurists themselves, many believe a presumption of innocence is embodied in the laws of criminal procedure.\(^{214}\) For instance, Soviet legislation does not place the burden of proving innocence on the accused.\(^{215}\) In addition, the court, procurator, investigator or agency of inquiry may not transfer the burden of proof to the accused.\(^{216}\) The judgment may be based only on evidence considered during the judicial investigation.\(^{217}\) Unless complicity in the crime is proved, there must be an acquittal.\(^{218}\) A conviction may not be based on presuppositions.\(^{219}\) Finally, on appeal, a judgment should be quashed if it is not supported by the

\(^{207}\) Savitsky, \textit{supra} note 147, at 90.

\(^{208}\) \textit{Id.}; see also W. Butler, \textit{supra} note 13, at 319.

\(^{209}\) Savitsky, \textit{supra} note 147, at 91-92.

\(^{210}\) \textit{Id.}

\(^{211}\) \textit{Id.} at 92.

\(^{212}\) W. Butler, \textit{supra} note 13, at 317.

\(^{213}\) \textit{Id.} (citing Fletcher, \textit{The Presumption of Innocence in the Soviet Union}, 15 UCLA L. REV. 1263 (1968)).

\(^{214}\) W. Butler, \textit{supra} note 13, at 317.

\(^{215}\) \textit{Id.}

\(^{216}\) \textit{Id.}

\(^{217}\) \textit{Id.}

\(^{218}\) \textit{Id.}

\(^{219}\) \textit{Id.}
In reality, however, the absence of defense counsel at the preliminary investigation creates a great risk of bias, in spite of the presumed objectivity of the investigator.221

7. Role of defense counsel

According to article 23 of the Fundamentals of Criminal Procedure, "[i]t shall be the duty of the defense counsel to make use of all legal means to bring to light circumstances exonerating the accused or mitigating his responsibility, and to render the accused all necessary legal aid."222

Advocates and representatives of trade unions may act as defense counsel.223 With permission of the court, close relatives may be allowed to act as defense counsel.224 An attorney-client privilege is recognized, as defense counsel may not be interrogated as a witness concerning facts of the case which he learned while acting as counsel.225

The accused may choose or request defense counsel.226 The request for counsel must be honored since the judgment would otherwise be vacated because of infringement of the accused's right of defense.227

The participation of defense counsel is mandatory if: (1) a state or social accuser takes part in the case; (2) the accused, due to physical or mental deficiencies, cannot exercise his right of defense himself; (3) the accused is a minor; (4) the accused does not know the language in which the proceedings are conducted; (5) the accused has committed a crime for which the death penalty may be imposed; (6) multiple defendants have conflicting interests and one of them already has defense counsel.228 Defense counsel is allowed to participate in the case

---

220. Id.
221. Id. at 317-18.
222. FUNDAMENTALS OF CRIM. PROC. art. 23, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 230; see also Savitsky, supra note 147, at 70.
223. FUNDAMENTALS OF CRIM. PROC. art. 23, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 230; see also Savitsky, supra note 147, at 70.
224. FUNDAMENTALS OF CRIM. PROC. art 47, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 242; see also Savitsky, supra note 147, at 70-71.
225. Savitsky, supra note 147, at 70-71 (citing article 72 of the Criminal Procedure Code).
226. Id. (citing article 48 of the Criminal Procedure Code).
227. Id.
228. Id.; FUNDAMENTALS OF CRIM. PROC. art. 22, reprinted in THE CRIMINAL JUSTICE SYSTEM OF THE USSR, supra note 144, at 229-30.
from the moment investigation is complete and the accused is given a record of the proceedings.\textsuperscript{229} However, in the last four instances, defense counsel must participate in the preliminary investigation as well. Finally, defense counsel may participate in any criminal case from the moment an accusation is presented if the procurator consents.\textsuperscript{230}

Defense counsel has the right to meet with the accused.\textsuperscript{231} He has the right to review all evidence and may make copies if necessary.\textsuperscript{232} He has the right to present evidence, enter petitions, make challenges, participate at trial, and file complaints against the investigator, procurator, and the court.\textsuperscript{233} With permission of the investigator, defense counsel may be present when the accused is questioned and when investigative actions in response to petitions of the accused or defense counsel are undertaken.\textsuperscript{234} Where defense counsel has the right to participate in the case from the moment of the accusation, he may be present at the presentation of the accusation, during questioning and other acts of investigation. With the investigator's permission, he may put questions to the accused, witnesses, the victim and experts.\textsuperscript{235} The investigator, however, can revoke the questions.\textsuperscript{236}

In relation to the Jewish situation in the Soviet Union, Soviet criminal procedure is a critical area for the American attorney to master. Most of the abuses of Jewish citizens' rights occur in this area. Many are in fact denied defense counsel or defense counsel's advocacy is improperly frustrated and thereby rendered ineffective. Although this Comment is a general guide, the author suggests some extra study be given to this area.

\textit{D. The Criminal Law}

Many Jews are charged with various crimes as a result of seeking to emigrate. The American attorney petitioning on behalf of these

\textsuperscript{229} \textit{Fundamentals of Crim. Proc.} art. 22, \textit{reprinted in The Criminal Justice System of the USSR, supra} note 144, at 229-30; \textit{see also Savitsky, supra} note 147, at 70-71.


\textsuperscript{231} \textit{Id.} at art. 23.

\textsuperscript{232} \textit{Id.; see also Savitsky, supra} note 147, at 72.

\textsuperscript{233} \textit{Fundamentals of Crim. Proc.} art. 21, \textit{reprinted in The Criminal Justice System of the USSR, supra} note 144, at 229; \textit{see also Savitsky, supra} note 147, at 72.

\textsuperscript{234} \textit{Fundamentals of Crim. Proc.} art. 22, \textit{reprinted in The Criminal Justice System of the USSR, supra} note 144, at 229; \textit{see also Savitsky, supra} note 147, at 72.

\textsuperscript{235} \textit{Fundamentals of Crim. Proc.} art. 23, \textit{reprinted in The Criminal Justice System of the USSR, supra} note 144, at 229; \textit{see also Savitsky, supra} note 147, at 72.

\textsuperscript{236} \textit{Fundamentals of Crim. Proc.} art. 23, \textit{reprinted in The Criminal Justice System of the USSR, supra} note 144, at 229; \textit{see also Savitsky, supra} note 147, at 72.
persons must understand these crimes in order to argue that no crime has been committed. A general overview of the criminal law and several specific crimes is thus set forth below.

1. Overview

The major source of Soviet Criminal law is the Fundamentals of Criminal Legislation in the U.S.S.R. and Union Republics (FCL).\textsuperscript{237} The FCL constitutes the law on a federal level.\textsuperscript{238} The aim of the FCL is to preserve the integrity of criminal law regulations throughout the Soviet Union, but they do not set forth responsibilities for particular crimes.\textsuperscript{239} The FCL are incorporated into the texts of the penal codes of all the union republics, each of which has its own penal code.\textsuperscript{240} These individual penal codes are used by practitioners in defining specific crimes and punishment.\textsuperscript{241} The union republic criminal codes are divided into two parts: (1) The General Part, which incorporates the FCL and (2) The Special Part, which contains definitions and punishments for each specific offense.\textsuperscript{242}

a. general part

In Soviet criminal law the statement of purpose is central to criminal policy.\textsuperscript{243} Article 1 provides that "criminal legislation of the U.S.S.R. and union republics shall have as its task the protection against criminal infringements of the Soviet social and state system, socialist property, the person and rights of citizens and the whole of the socialist order."\textsuperscript{244}

Jurisdictional boundaries are also established in the General Part. All persons who commit crimes in the territory of a union republic are subjected to responsibility under the union republic code unless they enjoy diplomatic privileges and immunities or are otherwise excepted.\textsuperscript{245} If a defendant commits crimes in several territories of union republics, he is responsible under the penal codes of each

\textsuperscript{237} Kelina, supra note 144, at 131.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} W. Butler, supra note 13, at 259-60.
\textsuperscript{241} Kelina, supra note 144, at 131.
\textsuperscript{242} W. Butler, supra note 13, at 259-60.
\textsuperscript{243} Id. at 260.
\textsuperscript{244} Fundamentals of Crim. Legis. art. 1, reprinted in The Criminal Justice System of the USSR, supra note 144, at 247.
\textsuperscript{245} Id. at art. 5.
republic wherein the criminal actions took place.\textsuperscript{246}

In addition, the General Part defines in general terms what constitutes a crime.\textsuperscript{247} The FCL provides that a person shall be subject to criminal responsibility when he either intentionally or negligently commits a socially dangerous act provided for by criminal law.\textsuperscript{248} Thus, an act cannot be a crime unless the law so provides.\textsuperscript{249} Even if an act is defined as a crime, if it is harmless, its criminality will be ignored, since it does not represent a social danger to society.\textsuperscript{250} Finally, an act must be committed intentionally or carelessly. Soviet judges strictly adhere to this definition.\textsuperscript{251}

Moreover, the FCL and union republic criminal codes provide the purposes of punishment for crime. They are (1) chastisement for the crime, (2) reforming and re-educating the criminal, and (3) the prevention of crimes.\textsuperscript{252} Under law, punishment may not cause physical suffering or debase human dignity.\textsuperscript{253} Further, Soviet law distinguishes "basic" and "supplementary" measures of punishment.\textsuperscript{254} Basic measures of punishment are deprivation of freedom, correctional tasks, social censure, and assignments to disciplinary battalion.\textsuperscript{255} Supplementary measures include confiscation of property and the deprivation of orders, medals or honorary titles.\textsuperscript{256}

Assignment of punishment is another concern of the General Part. The FCL requires that only a court may determine that someone is guilty of committing a crime and assign criminal punishment.\textsuperscript{257} The courts' judgments cannot refer to Soviet Supreme Court decisions but only to the underlying criminal law.\textsuperscript{258}

Finally, when assigning punishment, the courts are required to follow types and limits imposed for each crime in the Special Part.\textsuperscript{259}

\begin{itemize}
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id. at arts. 7-10.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} W. Butler, supra note 13, at 268.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Fundamentals of Crim. Legis. art. 20, reprinted in The Criminal Justice System of the USSR, supra note 144, at 247.
\item \textsuperscript{253} Id. at art. 21.
\item \textsuperscript{254} W. Butler, supra note 13, at 268.
\item \textsuperscript{255} Id.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Fundamentals of Crim. Legis. art. 32, reprinted in The Criminal Justice System of the USSR, supra note 144, at 247.
\item \textsuperscript{258} Id.
\item \textsuperscript{259} W. Butler, supra note 13, at 268.
\end{itemize}
The penal codes do not contain automatic or inflexible punishments. When imposing a sanction, the legislature aims to make the punishment correspond to the gravity of the crime. The court is given a chance to thoroughly consider all of the peculiarities of the specific crime. A court may, in exceptional situations, assign a milder punishment than that set forth in the codes. However, they may not exceed the limits set forth in the law.

b. special part

The Special Part of the code deals with elements of specific crimes and measures of punishment for particular crimes. The structure is based on the interest protected, and each chapter contains descriptions of crimes directed against the same object. The order reflects the societal importance of the areas of social relations being regulated. The structure of the Special Part, however, is not identical in all the union republic penal codes. Most republics follow the penal code of the RSFSR, the largest union republic of the U.S.S.R., which places crimes against the state and crimes against socialist property as the first two enumerated crimes.

i. "Hooliganism"

One of the most popular penal code articles is "hooliganism" — a crime similar to vandalism in the United States. Article 206 of the penal code of the U.S.S.R. defines "hooliganism" as "[a]ctions rudely violating social order and expressing obvious disrespect towards society." Hooliganistic acts are often performed in a state of drunkenness and in public places. They account for twenty to thirty percent of all crimes committed in the Soviet Union. Many Soviet Jews, after applying for emigration visas, are charged with this crime.

261. Id. at 134, 164. Petty hooliganism is punished by administrative measure. Id. at 162.
262. Id. at 167.
263. W. BUTLER, supra note 13, at 271.
264. Kelina, supra note 144, at 133.
265. Id.
266. Id.
268. Id.; see also Kelina, supra note 144, at 133.
269. Kelina, supra note 144, at 135.
270. Id.
271. Id.
ii. anti-Soviet agitation and propaganda

Criticism of the government or state is the essence of democratic society. However, the Soviet Union considers such activity an especially dangerous crime.\(^\text{272}\) Article 70 of the RSFSR criminal code:

punishes by deprivation of freedom for a term of from six months to seven years, with or without additional exile for a term of from two to five years, or by exile for two to five years, agitation or propaganda carried on for the purpose of subverting or weakening Soviet power or of committing particular especially dangerous crimes against the State, or the circulation for the same purpose of slanderous fabrications which defame the Soviet state and social system, or the circulation or preparation, or keeping, for the same purposes, of literature of such content.\(^\text{273}\)

“Circulation” may occur by means of conversation, speeches, reports, cinema, or the displaying of flags or emblems.\(^\text{274}\) The information circulated must be defamatory; it must portray the Soviet system in an unfavorable light. \(^\text{275}\) “Keeping” is a more difficult matter, however.\(^\text{276}\) Mere possession of anti-Soviet literature for scholarly purposes or keeping diaries containing anti-Soviet ideas is not a crime if the diaries and memoranda are not intended for circulation.\(^\text{277}\) Yet, many Jews are charged with the crime of anti-Soviet agitation by merely possessing books dealing with Jewish history, Hebrew or Zionism, since belief in Zionism has traditionally been viewed as subversive to the communist system.\(^\text{278}\)

iii. parasitic way of life

The Constitution mandates that avoidance of socially useful labor is incompatible with the principles of a socialist society.\(^\text{279}\) Similarly article 209 of the RSFSR Criminal Code provides that “systematically engaging in vagrancy or in begging, or leading any other parasitic way of life over a protracted period of time, may be punished by deprivation of freedom or correctional tasks for up to one

---

\(^{272}\) UK RFSSRF art. 70, cited in W. BUTLER, supra note 13, at 271-72.

\(^{273}\) W. BUTLER, supra note 13, at 271-72.

\(^{274}\) Id. at 272.

\(^{275}\) Id.

\(^{276}\) Id.

\(^{277}\) Id.

\(^{278}\) See supra notes 27-75 and accompanying text.

\(^{279}\) KONST. SSSR (Constitution) art. 60 (USSR).
Commentators say that "other forms of parasitism" include a person capable of being employed, living on non-labor income and avoiding socially useful labor despite warning.281

A common scenario for a prospective emigr is that upon applying for an exit visa, he or she is dismissed from his state job and is threatened with being charged with parasitism. Hence, many professionals resort to menial work in order to avoid the charge.

IV. Emigration Procedure

Soviet spokesmen maintain that no obstacles block the paths of those who, for valid motives, seek to emigrate from the U.S.S.R.282 They maintain that to leave for family reasons does not contradict Soviet law.283 Although there are emigration procedures in the Soviet Union, their inaccessibility to the public hinders the process by compounding an air of uncertainty, arbitrariness and abuse in the decision-making process.284 In August 1986, however, Nikolai Ryzhkov, Chairman of the Council of Ministers, signed Order 1064 which effectively codified formerly unavailable procedures.285 Their effect on the emigration process remains to be seen.

A. Family Reunion Principle

Order 1064, which basically amends the pre-existing law, regulates applications for entry into or exit from the U.S.S.R. by Soviet citizens and foreigners.286 The new law outlines personal reasons which the Soviet government recognizes as a valid basis for such travel. These include family reunification and visits, marriage, visits to the graves of close relatives, and the resolution of certain legal matters.287

The first step in the emigration process is the procurement of a written certified invitation (vyzov) from a close relative abroad.288 In the past, Soviets have attempted to block the emigration process by

280. UK RFSFR art. 209, cited in W. BUTLER, supra note 13, at 274-75.
282. G. GINSBURGS, supra note 9, at 326.
283. Id.
284. Id. at 327.
287. Id. § 21.
288. G. GINSBURGS, supra note 9, at 332.
claiming that the relative who sent the invitation was not close enough. Yet, when the Soviet authorities decided that expatriation of the particular person was desirable, the process has been known to move rather swiftly. The Soviets seemed to have taken the arbitrariness out of the procedure in this area. The new law now explicitly provides that this invitation must be from a husband, wife, father, mother, son, daughter, brother or sister. Unfortunately, this narrow list excludes many potential emigrs.

Prospective emigrs are also required to submit notarized statements from family members in the Soviet Union stating that the person departing has fulfilled his or her legal obligations. In the past, family reference presented little problem since securing the requisite papers was a mere formality. Since one can find no compelling reason for these references, one may assume they were set forth as roadblocks to the emigration process.

Lastly, the new order sets forth a disturbingly ambiguous addition to the application procedure. The Soviet authorities now have the power to deny applications "if the person who has sent the invitation is in violation of the regulations for departure from the U.S.S.R. or residence abroad." This provision suggests the power to continue to deny the refusenik’s family reunification requests, or to invalidate invitations from former Soviet citizens who emigrated to Israel but are not living there.

B. Grounds for Denial

In the past, Soviets have admitted that there are restrictions which affect individuals with advanced military training. In addition, those who had not met their military obligation were unable to

---

289. Id. at 333.
290. Id.
292. CSCE DIGEST, supra note 285, at 3.
293. Order No. 1064, § 24, Jan. 1, 1987 (issued Aug. 28, 1986); see also G. GINSBURGS, supra note 9, at 326.
295. Id.
296. Id. § 25(f).
297. CSCE DIGEST, supra note 285, at 3.
298. G. GINSBURGS, supra note 9, at 327. In the case of Lev Elbert, a construction engineer from Kiev, he first applied for an exit visa in February, 1976. He was denied the right to emigrate on the grounds of possession of “classified information” received during his army service. In fact, he was a private in a construction battalion engaged in the construction of a swimming pool. This military exception has also been applied to persons who might bolster
apply for emigration.\textsuperscript{299} Hence, Soviets have been known to induct
young men who wish to emigrate.\textsuperscript{300}

Another restriction affects individuals who, by nature of their
profession, are employed in jobs with a national security risk or fulfill
an important social need so that the community cannot afford to lose
their services.\textsuperscript{301} Departures are often delayed until such information
has lost its value to foreigners.\textsuperscript{302} The net result of the restriction on
those who supposedly have state secrets is that would-be emigrs,
aware of these technicalities, have switched from high priority jobs to
menial occupations.\textsuperscript{303} They have abandoned employment which
might put them into contact with state secrets.\textsuperscript{304} As one writer
points out, "[I]f the Soviet leadership's concern for these matters was
genuine, its approach to the problem has accomplished little and still
meant the professional loss of the very personnel whose particular
services it was interested in preserving."\textsuperscript{305} However, what constit-
tutes "secrets" has never been defined, thus leaving the door open for
arbitrary interpretation by the Soviet authorities.\textsuperscript{306}

The new amendment expressly sets forth these restrictions on
persons with state secrets. It provides that personal travel from the
U.S.S.R. is not allowed if:

\begin{quote}
[the person] "has knowledge of state secrets or there are other rea-
sons which affect the security of the state — until expiration of the
circumstances preventing departure," if such travel will infringe
upon "basic Soviet rights and legal interests," if the traveler has
not fulfilled state or property obligations, or if he or she is facing
or has stood trial.\textsuperscript{307}
\end{quote}

But what constitutes state secrets still remains undefined.

\textsuperscript{299} G. Ginsburgs, \textit{supra} note 9, at 326.
\textsuperscript{300} \textit{See infra} note 323 and subsequent text.
\textsuperscript{301} G. Ginsburgs, \textit{supra} note 9, at 326. In the case of Grigory Rozenshtein, a doctor of
computer science from Moscow, he first applied for an exit visa in November 1973. He re-
ceived a refusal in February 1974 based on his supposed access to "state secrets" in 1965.
Officials claimed that he "saw" a classified document on a subject which the officials refused to
disclose. Twenty years later, the Soviets continue to cite access to state secrets as grounds for
refusal. \textit{National Conference on Soviet Jewry, Refusnik Profile.}

\textsuperscript{302} G. Ginsburgs, \textit{supra} note 9, at 327.
\textsuperscript{303} \textit{Id.}
\textsuperscript{304} \textit{Id.}
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} \textit{Id.}
\textsuperscript{307} Order No. 1064, § 25(a)-(f), Jan. 1, 1987 (issued Aug. 28, 1986).
C. Appeal of Denial

Appealing a denial by the OVIR (Office of VISA and Immigration) to a higher administrative body is rarely successful since the efforts of the lower administrative bodies to block emigration mirror the attitudes of the central leadership. In addition, the courts offer no relief as the Constitution does not provide for the judicial review of legislative enactments. Since the probability of a judicial or an administrative reversal is low, the refusenik is resigned to reapplying to the OVIR for an exit visa. The rule in the past has been that the administrative agencies required the refusenik to observe a one year waiting period following the rejection of an application for exit papers before filing a new petition. The new rule, however, changes the deadline for consideration of visa applications. Applications for permanent exit visas are to be considered within one month. Additional review of such requests may be needed, but for no more than six months. Finally, visa requests may be resubmitted no sooner than six months after denial.

D. Reimbursement for Higher Education

In 1972, the Presidium of the U.S.S.R. Supreme Soviet resolved that citizens of the U.S.S.R. departing for permanent residence abroad were obliged to reimburse state expenses for higher education and advanced academic degrees. The Soviets justified this on two grounds: First, the rules governing conditions of emigration from a country lie exclusively within the sphere of domestic jurisdiction. Thus, every state possesses the sovereign right to adopt in this realm whatever definitions suit its purposes. Secondly, where a country spends a great deal of money to provide its citizens a free education, it has the inherent right to protect itself by appropriate means from the consequences of a prospective major "brain drain." While this second point is not specifically set forth in the new order, one may expect the same policy to remain in force.

308. G. Ginsburgs, supra note 9, at 326.
309. Id.
310. Id.
311. Id.
313. Id. § 29.
314. G. Ginsburgs, supra note 9, at 335.
315. Id. at 336.
316. CSCE Digest, supra note 285, at 3.
E. Renunciation of Citizenship

Soviet law does not specify that an individual seeking to emigrate from the U.S.S.R. must formally surrender his Soviet citizenship. Yet, there was heated debate on this issue among Soviets, and the harder-lined faction won. Thus, renunciation is required along with a heavy fine. This penalty was designed to make the applicant aware of the gravity of emigration. Again, although not specifically set forth in the new order, one may expect this policy to continue.

V. Actual Cases and the Application of Law

The following cases demonstrate the problems that occur for Soviet Jews after they apply for exit visas. These cases demonstrate the reality of how the law set forth above is actually applied as opposed to the theory of what is written in the code books and the Constitution.

The aftermath of applying for an exit permit, of course, varies from case to case. The two cases set forth below are rather famous, and there is thus relatively more information available. The American attorney, however, should be mindful of the cases of less famous refuseniks and direct his or her attention to the aid of them as well. For purposes of this analysis, the cases of Iosif Begun and the Yakir family will be set forth below followed by an approach American attorneys might take to formulate these petitions on behalf of refuseniks who have encountered trouble with the law.

A. Iosif Begun

In 1983, a Soviet court indicted Iosif Begun for criminal activity directed at undermining the state and social system of the U.S.S.R. Within two days the court reached the verdict that Begun was guilty of having systematically compiled and propagated anti-state materials which incited hatred for the Soviet country, with the purpose of subverting the existing system. Since his crime posed a danger to society, he was given a maximum sentence of seven years in prison and five years in internal exile.

317. G. Ginsburgs, supra note 9, at 337.
318. Id. at 338.
319. Id.
320. Id.
322. The following account was taken from Kagedan, The Trials of Iosif Begun, Jewish Frontier, Mar. 1984, at 8.
Begun allegedly threatened the Soviet state by teaching Hebrew and by planning to circulate a journal on Jewish culture called *Our Heritage*. At Begun's trial, the prosecution sought to establish that Begun possessed Hebrew books, and had spoken favorably of Israel and Jewish culture. The prosecution produced a copy of *Our Heritage* which they obtained in a raid on Begun's apartment. Further, the trial was closed to relatives and foreign journalists. The logical political interpretation of the trial is that Moscow wanted to intimidate the Jewish community and demonstrate that it would combat renewed interest in Hebrew.

Born in Moscow in 1932, Begun earned a Candidate’s Degree, the equivalent of an American Ph.D., in mathematical engineering from Moscow State University. In 1971, Begun applied for emigration to Israel, but was denied an exit visa. Thereafter he was relieved of his position as a lecturer in mathematics and banned from future employment in his field. Unemployed, he began to teach Hebrew.

Begun attempted to have his new occupation officially recognized by registering with the income tax authorities. While one of his aims was to have Hebrew recognized as a valid subject of study, he also wanted to avoid being charged with parasitism.

Through lengthy correspondence with the tax authorities, Begun learned he would not gain permission to teach Hebrew. Officials informed him that he needed a certificate to teach. Yet, when he inquired into how he might earn one, he was rebuffed.

In March 1977, Begun was arrested and charged with parasitism. Convicted in June 1977, Begun was sentenced to two years in Siberian exile. He was released, however, in February 1978. By May 1978 he was charged with “malicious violation of the passport rules,” for having lived in Moscow with his family without having acquired the necessary residence permit. Yet, as a felon, he could not get the pertinent passport. Again condemned to Siberia, he finally won release in 1980.

In November 1982, Begun was again arrested. By 1983, it was learned that he would stand trial under article 70 of the Criminal Code of the Russian Republic. Article 70 deals with anti-Soviet agitation.

### B. The Yakir Family

In 1973, Yevgeny and Rima Yakir applied for permission to emi-
grate to Israel. They were refused on the grounds that Rima had had access to state secrets since she was a computer engineer. As permitted by law, the couple reapplied for a visa every six months for the past eleven years. Like thousands of other Jewish families, they received the same negative answer, but never one that specified when the secrecy restriction would expire.

Shortly after his first application, Yevgeny was fired from his job as a mechanical engineer. In order to live and avoid being charged with parasitism, he worked for the past ten years as a free-lance English translator. He moved from one government agency to another as the KGB security policy periodically purged Jews from lists of translators. Rima worked as a cleaning woman.

Yevgeny and Rima's son Alexander (Sasha) also applied to emigrate to Israel. He was branded as disloyal to the state as were countless other students who applied to emigrate. Alexander was allowed to finish his university studies as an electrical engineer, but was barred from the usually obligatory military courses that would have qualified him as a reserve officer, exempt from the draft.

In June 1984, Alexander was arrested and accused of evading the draft. He was sentenced in July to two years in jail for an offense which he now allegedly committed in 1977. The offense was avoiding conscription. A Soviet public prosecutor, however, admitted that the charge had no legal validity, since Alexander was never presented with a proper summons as required by law.

The offense had previously been brought in 1981 but rejected by the prosecutor for the above reasons. In June 1984, however, Yakir was invited to meet the local militia to "sort out minor technicalities," but was arrested on the spot and charged again with avoiding conscription.

The Moscow court which sentenced him had rejected a request by the Yakir family for a postponement of the trial to give defense counsel a chance to return to Moscow from holiday.

The summons was not served on Yakir in person since he was on an archeological dig at the time. Yet, between 1981-1984, the Soviet military authorities made no other attempts to call him up. Evidence to this effect was submitted by Yakir's lawyer, but rejected on the technical grounds that the case had already been filed by the court authorities. The Jewish Chronical reports: A good indication of the arbitrary nature of his trial is the fact that Yakir's age, twenty-eight, is the maximum age for conscription in the Soviet Union.
C. An Approach for the American Attorney

As foreign attorneys, it is difficult to get a completely accurate account of the details of every case. Thus, it is a difficult task to ensure that every right has not been infringed upon. A general approach must be employed.

An approach for forming a petition is to break the petition down into four distinct categories: (1) the pertinent Constitutional provisions, (2) the pertinent rule requiring proper administration of justice, (3) the procedural safeguards that have been denied the accused, and (4) the applicable criminal law allegedly violated. The following example demonstrates this approach.

1. Constitutional provisions

In all cases it is extremely important to state that the Jewish client is guaranteed equal protection of the law. Then the advocate should focus on the specific constitutional right his client has been denied.

Example:

**BEGUN IS GUARANTEED RIGHTS UNDER THE SOVIET CONSTITUTION**

Under article 34 of the Constitution of the U.S.S.R., Begun is guaranteed to be treated equally with other Soviet citizens, notwithstanding the fact that he is Jewish.

Similarly, under article 52 of the Constitution of the U.S.S.R., Begun is guaranteed freedom of conscience. Begun's interest in Hebrew and his heritage was not an attempt to overthrow the government, but rather an attempt to understand his ancestry and preserve his culture.

Under article 40 of the Constitution of the U.S.S.R., Begun has a right to work. The Government violated this right when he was banned from employment in his field shortly after he petitioned to emigrate. Begun attempted to fulfill his corresponding duty to society by establishing a new career, but was thwarted by the authorities. Hence Begun did not breach his duty owed to society, since he made a good faith effort to work.

Finally, under article 53 of the Constitution of the U.S.S.R., the family is protected by the state. Begun's protection under this provision was violated when he could not get the pertinent passport to be with his family.
2. Proper administration of justice

Facts concerning the administration of justice with regard to a particular individual are often difficult to ascertain. It is thus difficult to point to specific improprieties. If specific improprieties cannot be argued, the advocate should nevertheless address the role of the procurator with regard to that of the court.

Example:

ALEXANDER YAKIR IS GUARANTEED PROPER ADMINISTRATION OF JUSTICE.

Under article 155 of the Constitution of the U.S.S.R., the participants in the administration of justice are to act independently from extra-judicial factors. In Alexander Yakir's case, the procurator admitted that the charge of avoiding conscription had no legal validity since Alexander was never presented with a proper summons. Yet, three years later this issue was disregarded when Alexander was again improperly served and evidence to that effect rejected. The procurator has not acted consistently with regard to this particular issue. There is a suggestion that extra-judicial factors played a role in this inconsistency. The procurator has a duty to oversee this.

3. Criminal procedural rights

Under this section, the advocate should address the specific procedural right that the client was denied. Facts from different cases lend themselves to different arguments. Areas where the advocate should almost always focus include: the right to a defense, the requirement of a search and arrest warrant, and the right to a public trial.

Example:

BEGUN IS GUARANTEED CRIMINAL PROCEDURAL RIGHTS UNDER THE CONSTITUTION OF THE U.S.S.R. AND FUNDAMENTALS OF CRIMINAL PROCEDURE.

Under article 158 of the Constitution of the U.S.S.R. and article 22 of the Fundamentals of Criminal Procedure, Begun has an immediate right to counsel after the investigation is complete. He has a right to request an attorney or be assigned one.

Under article 157 of the Constitution of the U.S.S.R. and article 12 of the Fundamentals of Criminal Procedure, Begun has a right to an open trial unless he possesses state secrets. As a former lecturer in mathematics, Begun did not possess state secrets. He therefore was denied his rights when his trial was closed to the public.
Under article 55 of the Constitution of the U.S.S.R., Begun is guaranteed inviolability of his home. Yet, the prosecution produced a copy of Our Heritage which they obtained on a raid of Begun's house. The police should have had a proper warrant to conduct such a raid. Example:

**ALEXANDER YAKIR IS GUARANTEED CRIMINAL PROCEDURAL RIGHTS UNDER THE CONSTITUTION OF THE U.S.S.R. AND THE FUNDAMENTALS OF CRIMINAL PROCEDURE. THESE RIGHTS INCLUDE THE RIGHT TO DEFENSE COUNSEL.**

Under article 158 of the Constitution of the U.S.S.R. and article 22 of the Fundamentals of Criminal Procedure, Alexander Yakir has a right to defense counsel. He has a right to chose or request one. Yet, the Moscow court which had sentenced him rejected a request by the Yakir family for a postponement of trial to give defense counsel a chance to return from holiday. A case considered without defense counsel is grounds for reversal. Since the trial was not postponed and Yakir's lawyer not present, this decision should be reversed on appeal.

Finally, article 50 of the Fundamentals of Criminal Procedure permits the re-opening of cases for reason of newly discovered evidence. Yakir was denied this right when his attorney's request to introduce evidence regarding improper service of summons was denied for the reason that the case was already filed by authorities.

4. Soviet criminal law

Under this section the advocate must address the particular crime the client has been charged with and point to evidence which would reveal that the charge is unfounded. Example:

**BEGUN DID NOT VIOLATE SOVIET CRIMINAL LAWS**

Begun was accused of having systematically compiled and propagated anti-state materials inciting hatred for the Soviet country, with the purpose of subverting the existing system — a violation of article 70 of the criminal code. However, Begun's interest in Hebrew and Israel was not conspiratorial in nature, but rather, a basic human interest and curiosity in one's ethnic heritage.

In addition, article 32 of the Fundamentals of Criminal Legislation requires that the punishment fit the crime. Clearly, Begun did not pose a danger to society so as to warrant a maximum sentence of seven years in prison and five years in internal exile. Similarly, article
20 of the Fundamentals of Criminal Legislation provides that punishment may not cause physical suffering or debase human dignity. Yet, Begun's inability to be with his family because of internal exile has clearly debased human dignity.

Finally, the charge of parasitism under article 60 of the Constitution was unfounded. Begun indeed made an attempt to work but was thwarted by the authorities.

The above merely represents an example of an approach the American attorney can take to argue the defense of the refusenik or prisoner of conscience under Soviet law. The Soviet authorities' encroachments of these rights seem unabounded, and there are thousands of different cases ranging from mere refusal to permit emigration to imprisonment. It is best for the attorney to focus in on his particular client's situation and set forth the rights that have been most obviously violated.

VI. CONCLUSION

The U.S.S.R. represents its system as having basic humanitarian protections and rights. Therefore, it is the job of the advocate representing the Soviet client to focus on these protections and rights which have been set forth in this guide.

To reiterate, the advocate first must see that the client is afforded his constitutional rights as set forth in the Constitution of the U.S.S.R. These include equal protection of the law under article 34. Importantly, these also include freedom of conscience and religion. The advocate must bear in mind, however, the qualifying language in the Constitution that puts the goals of the State before the individual need. Hence, it is the job of the advocate to argue why the client is not exercising his rights to the detriment of the State.

Second, in each individual case, the advocate must see that justice was administered properly as required by law. For instance, the advocate should gather facts regarding the trial to see whether the judge and people's assessors acted independently from extra-judicial factors. Further, the important role of the procurator should be kept in mind; petitions should be addressed to him.

Third, the advocate must see that the client was afforded his criminal procedural rights. The inquiry and preliminary investigation should be carried out properly under the supervision of the procurator. The client's rights at trial should be protected. He is equal to all citizens before the court. In most cases, he is guaranteed defense
counsel. He has the right to a public trial, and the right to appeal. Finally, the client does not carry the burden of proving his innocence.

Fourth, with regard to the various crimes many Jews in the Soviet Union are charged with, it is the advocate’s job to argue why the charge is unfounded. For instance, belief in one’s culture is not subversive. In addition, a refusenik fired from his state job should not be charged with parasitism if he makes an effort to work.

Finally, the advocate should see that the emigration procedures are adhered to and not applied arbitrarily. Although the new order potentially eliminates this problem with its explicit narrow provisions, to some extent there is still room for arbitrary application. This is true at least in the area of state secrets which still remains undefined. In addition, the new statute does not disclose when a person no longer possesses state secrets. Thus it is the duty of the advocate to see that the Soviet authorities have not used the state secrets restriction on the ability to emigrate in an arbitrary manner.

In short, one cannot lose sight of the fact that the Soviet Union bases its legal system on a very different ideological structure than that of the United States. Hence, when embarking on the representation of the Soviet client, the American advocate must conform to the Soviet system. This would entail acknowledgement of the limitation on individual rights to the extent that they are inconsistent with the state’s interests. It is absolutely essential to acknowledge this limitation. But it is equally essential to argue that it does not — and should not — apply.

Alyssa Katz