THE MOSCOW TRIALS

A Legal View

By Max Radin

TWO trials that took place in Soviet Russia, one in August 1936, and the other in January 1937, engaged the attention of the world. The first resulted in the immediate execution of the sixteen defendants; the second, in the execution of thirteen out of seventeen defendants and the condemnation of the other four to long terms of imprisonment.

The defendants were members of a group called by many the "Old Bolsheviks," but designated by the government of the U.S.S.R. as members of a "Trotskyite-Zinovievite Center" or of a "Trotskyite Center." That is to say, they constituted a group of political opponents who professed that they and not the existing government were the true exponents of the doctrines of Marx and of Lenin, doctrines that both sides maintain to be the proper governing principles of the Union of Soviet Republics. With the truth or the falsity of this claim, we need not concern ourselves. The point is that the defendants were accused of crimes committed as part of a political scheme and were, therefore, to a certain extent charged with political crimes, although the specific acts cited would be criminal enough in all conscience whatever the motives.

The foreign comment on the trials has been in the main highly unfavorable to the prosecution. Two factors made it so. First, there is prejudice against the existing Russian government almost everywhere. Second, even among persons not prejudiced the spectacle of wholesale executions is profoundly shocking. Subsequent executions on similar charges, particularly in Siberia, have intensified this feeling in the United States.

A real basis for judgment regarding the merits of the case and the nature of the trials has now been furnished us by the official publication in an English translation of a verbatim report of the second of the two trials, that which took place January 23–30, 1937, in Moscow before the "Military Collegium of the Supreme Court of the U.S.S.R."[1] The defendants were seventeen persons

[1] "Report of Court Proceedings in the Case of the Anti-Soviet Trotskyite Center." Moscow: People's Commissariat of Justice of the U.S.S.R., 1937, 580 p. (New York: Bookniga Corporation, $1.00.)

of whom the best known outside of Russia were Pyatakov and Radek, although many of the others were notable persons in Russia and familiar names to those acquainted with recent Russian history. All seventeen were accused of "treason against the country, espionage, acts of diversion, wrecking activities and the preparation of terrorist acts, *i.e.* of crimes covered by Articles 58^{1a}, 58^{8}, 58^{9}, and 58^{11} of the criminal code of the R.S.F.S.R."

In the further specification of these charges, given in pp. 5–19 of the report, they are accused specifically:

1. of having entered into communication with two foreign countries, Germany and Japan, and having promised the surrender of the Ukraine to Germany and of the Maritime Provinces and the Amur region to Japan; and of having further promised both countries valuable economic concessions and especially a high degree of economic control over Russia;

2. of having furnished to these same foreign governments important information regarding particular munition resources of the country (p. 15);

3. of having organized the wreck of several trains in 1935 and 1936, in one of which twenty-nine soldiers were killed and twenty-nine injured and in all of which great property damage was caused; this under direct instructions from members of the Japanese and German intelligence service (pp. 12–15);

4. of having attempted to murder the Commissar V. M. Molotov and of having planned the murder of other leaders of the Government.

These four charges obviously are all extremely serious. They are not merely what lawyers call *mala prohibita*, morally indifferent acts declared to be unlawful by statute, but *mala in se*, acts of so obviously immoral a quality that any reasonable person would know them to be so even without knowing the statute. Nor is there any suggestion of *ex post facto* punishment or of any violation of the principle of *nulla poena sine lege* with which the humanitarians of the eighteenth century successfully combated "reasons of state" as the basis of punishment. These acts are not merely among those generally recognized as crimes in most modern civilized communities, but were definitely described in available sections of the Russian Penal Code, duly specified in the indictments.

From examination of the nature of the charges we must now turn to the procedure. Was the procedure such that any rights of

defendants in such cases in western civilized countries were violated?

Formally, no such violation took place. The defendants had been arrested and examined in a preliminary hearing, the character of which I shall discuss later. They knew in advance the charges against them. The charges were repeated to them on arraignment. They were allowed counsel, a permission of which only three availed themselves. The opportunity to be represented by counsel was renewed for the others at the opening of the trial (p. 3).

They were then asked to plead, after an elaborate and somewhat denunciatory recital of the charges (pp. 4–19). Each one was addressed personally and each one of the seventeen pleaded guilty (p. 20) when his name was called.

In England and in most parts of the United States this would have ended the trial, in its proper sense. At the Common Law the only thing that can follow a plea of guilty is the sentence of the court announcing the punishment. Until recent statutes, the court had little discretion in the matter. Usually the penalty, within limits, was determined in advance by law. The power to suspend sentence is a recent one bestowed by statute. It is no part of the judge's office as such. In New York, however, and in a few other states of the Union, a plea of "not guilty" is automatically entered in a capital charge.

We must understand the term "trial" in the case under examination as a public demonstration that these persons who had pleaded guilty were in fact really guilty of the acts which they have admitted. The demonstration is addressed not to the court, but to the public, Russian and foreign, and evinces a desire for general approval of their course and a sensitiveness to criticism that revolutionary governments in the past have not always shown.

There are instances even at Common Law when, the accused having pleaded guilty, something like a trial may be necessary to determine the character and degree of the punishment or even whether punishment is to be inflicted. We have had a notable example not long ago in the Loeb-Leopold case in Chicago, in which after a plea of guilty an elaborate trial took place, quite as complete as if a plea of "not guilty" had been entered. The only purpose this trial could have had was to determine whether the death penalty or imprisonment should be inflicted, although

actually much of the evidence submitted was irrelevant for this question.

While the four parts of the indictment consist of completely separate acts, they are none the less obviously connected. The gravamen of the charge against these seventeen defendants is that all of the crimes committed were part of a general plan of counter-revolutionary activities formed by a "parallel" or "underground" Trotskyite center at Moscow, and that these activities were directed by a single head animated by a single purpose. The defendants are charged with conspiracy. Only in the case of some of them is it assumed that they actually in their own persons did or attempted to do the acts recited.

It is, however, important to remember that in the case of conspiracy the individual participation of all the defendants in all the acts need not be proved. We may quote from an American case (U. S. v. Lancaster, 44 Fed. 896) the following general formulation of our law on the subject:

> It is not necessary that the conspirators should meet together in order to constitute the unlawful combination. If they have a mutual understanding, and act through one or more individuals, as a consequence of such mutual understanding, the conspiracy may be complete. . . . It is, indeed, not necessary that all the conspirators should be acquainted even with each other. If they conspire to accomplish the illegal purpose through one common acquaintance or go-between, the conspiracy may be complete. — U. S. v. Lancaster (C. C. Ga. 1891) 44 F. 896.

Who the head of this conspiracy was is not left in doubt. At the end of the court's sentence in the August trial of Kamenev, Zinoviev and their associates, and at the end of the official sentence in the trial of Pyatakov and Radek and the rest, there is a special reference to Trotsky and his son Sedov. In both cases it is stated that they have been "convicted by the evidence and by the materials" and that "in the event of their being discovered on the territory of the U.S.S.R., they are subject to immediate arrest and trial by the Military Collegium of the Supreme Court of the U.S.S.R."

In our terminology, "conviction" cannot very well be *followed* by "trial." We must assume that the word *predanie sudu*, which is here translated by "trial," means rather what it literally says, *i.e.* "to be delivered up for judgment" or else that in this case the term *izoblichennie*, which literally means "revealed," is the equivalent, not of "convicted" in our sense, but "accused" or

"indicted," although the indictment is more like the *gravis praesumptio* of English medieval law. Trotsky and Sedov are officially described in the January trial as "enemies of the people," *vragi naroda* (p. 580). If this is a declaration of outlawry, equivalent to the *mise hors la loi* decreed by the French Convention against Robespierre and his associates in Thermidor, 1794, the only legal proceeding left would be the identification of the outlaws, and in that case the sentence is practically one of death.

The figure of Trotsky, indeed, is the dominating one — in the official title of the case, throughout the testimony, in the summing up of the prosecutor, in the speeches of the accused, and in the formal sentence of the court. If there were no such person as Trotsky or if he did not do the things there ascribed to him, make the plans, issue the directions, send the communications referred to in these reports, the case against nearly all of the defendants — not quite all — would be considerably weakened, since the confession of each one is in many instances merely an admission of participating in a plot organized by Trotsky. It is quite true that they may have conspired for their own purposes and used the name of Trotsky either to gain adherents or, upon arrest, to mitigate their own guilt by pretending to have been his dupes. That, however, is a pure conjecture.

Trotsky was, of course, not present at the Moscow trial. Before the so-called Dewey Commission, however, which sat at Coyoacan April 11–17, 1937, he had a full opportunity of testifying in regard to all the statements made by the defendants. Before this commission Trotsky stated specifically that since his expulsion from Soviet Russia, he had been in no communication, direct or indirect — except to a limited extent which is not material in this instance — with any of the defendants in either the August 1936 or the January 1937 trials. He denied inciting them to do the acts they confessed doing. His statements, therefore, amount to a denial that he was associated with them in the conspiracy to commit the crimes charged and, to speak technically, he enters an emphatic plea of not guilty to the charge of conspiracy.

A real issue is accordingly raised on the charge of conspiracy. This issue does not quite go to the root of the matter so far as concerns those of the defendants who do not claim to have had any communication with Trotsky himself. But we must decide whether we will believe Pyatakov, who says he spoke to Trotsky at Oslo in 1935, and Radek, who said he received letters from

Trotsky between 1933–1935, or Trotsky, who declares he neither wrote to Radek nor spoke to Pyatakov.

That decision cannot really be made on the basis of a printed record. Personal acquaintance with the men who thus contradict each other would be helpful. It would be still better if they could be confronted with each other in public. Since that cannot be done, we are reduced to estimates which must at best be unsatisfactory and which cannot help being colored by prepossessions.

The testimony of Pyatakov and Radek and of the others who claim to have received instructions from Trotsky and Sedov is partially what is known as self-serving. Most of these men were executed, but they may well have hoped for clemency and some of them in their final speeches make an unqualified plea to be spared. They may have supposed that their chances of receiving a lighter sentence were greater if they represented themselves as the dupes of the arch-conspirator, Trotsky. Trotsky's denials are also obviously self-serving.

On the specific question of Pyatakov's airplane visit to Trotsky at Oslo in December 1935 the balance of probability is in favor of Trotsky's denial. It is certainly true that there is no regular airplane service in winter between Berlin and Oslo. There is further an official report that no foreign airplane landed in Oslo between September 1935 and May 1936. If Pyatakov went by air from Berlin to Oslo, as he states, it must have been with the connivance of both the German and Norwegian officials. That is not excluded as a possibility in view of the accusations made of Nazi interest in these intrigues, but no statement is made to this effect by Pyatakov.

In the case of Radek and those others who professed to have been in communication with Trotsky and Sedov, it is a sheer case of assertion by one person and denial by another.

Sedov, Trotsky's son, is in Paris and, we may suppose, will appear before a French commission similar to the Dewey Commission which met at Coyoacan. No specific denials — except in regard to minor matters — are quoted from him, but we may assume that like his father he denies having transmitted the instructions which are declared in the January trial to form the basis of the conspiracy. It is, however, admitted that he did meet Smirnov and Holtzmann, defendants in the August trial, at the time he is declared by the defendants in both cases to have met them.

Can we disregard all the statements concerning Trotsky and Sedov? Whether they acted for themselves or as Trotsky's agents, the seventeen defendants accused in January confessed in detail and in open court that they conspired and took steps to commit treason, murder and sabotage. Is it conceivable that men would so fully confess such serious crimes unless they were guilty of them? Were they tortured, mentally or physically, during their imprisonment or their preliminary examination? Were they tricked into confession by promises of remission of sentence? Were they induced to confess by threats of suffering to be inflicted on their families? All these things are theoretically possible. There is no specific evidence that any one of them occurred here in the case of any one of these defendants.

We should be in a better position to determine the value of the confession if we knew at what stage of the proceedings the confessions were first obtained. As would be the procedure in other Continental countries, the public trial in this case was preceded by a preliminary examination, like the *instruction* of the French procedure. This may be protracted and secret. It resembles in some respects the Grand Jury hearing or the preliminary hearing before the magistrate in England and America. It differs, however, in many respects from both of these. There is no rule against self-incrimination and the accused at this stage is usually not entitled to counsel as a matter of right. Torture, however, is prohibited and, if it occurs, is as illicit as the "third degree" methods too often used in the United States.

The results of the preliminary examination were before the Russian court in a great many volumes — at least thirty-six volumes — although we do not quite know what a "volume" is in this case. But these results are not available to public inspection. For that there may be reasons which would be accepted in similar investigations in other countries. The volumes may contain matters involving personalities of foreign diplomats or of the police whose identity it was not advisable to disclose. But explained or not, we do not know what took place at these investigations nor when or under what circumstances each of the thirty men involved in both trials confessed. We can only guess, and our guesses will not further our search.

The confessions elicited in the preliminary examination were repeated during the trial. In fact the so-called examination of the defendants is little more than a detailed confession. The confes-

sions are repeated sometimes with rhetorical amplifications in the final pleas of all the defendants.

It must first be noted that in no comparable cases in the history of western Europe did the defendants confess. In English state trials confession is rare and when it occurs it is defiant, not submissive. In the trials before the French Revolutionary tribunal in 1793–1794, confessions were extremely rare and the opposition leaders, Hébert, Danton, Robespierre, who successively were condemned along with all their associates, denounced their accusers violently and publicly. The defendants in the Moscow trials acted quite differently.

There have, of course, been false confessions. In fact, a vigorous controversy has raged for nearly two centuries in Common Law jurisdictions as to the value of confessions. Dean Wigmore in his classic treatise on Evidence has given the history of the controversy and has shown how confused the discussion has been in part and how easily one can substantiate from our greatest legal authorities — Lord Stowell, to take one example — the doctrine first, that confession is the least reliable, and next, that it is the most reliable kind of evidence.

The point, of course, is to inquire who is confessing and where. In general it is undoubtedly true, as Mr. Justice Stephen said, "Most persons accused of crime were poor, stupid and helpless," and — to quote Blackstone — the confessions of such persons are undoubtedly "the weakest and most suspicious of all testimony." The confessions in medieval witchcraft trials are particular examples. They were made chiefly by wretchedly poor and half-demented women who, we may add, were usually firmly convinced of their own guilt.

But the defendants in this case were not poor or stupid. Nor were they, properly speaking, helpless. They knew from the nature of the proceedings how much the government desired the approval of the world. If a single one of these doomed men had turned on his accusers, he would have discredited the Stalin régime more completely than by a year of intrigue. That not a single one did so, makes the situation unique in the history of criminal trials, unless the confessions are substantially true.

It is the fact of confession that must be explained. Besides the suggestion of some form of torture, of false promises of pardon, of sufferings to be inflicted on their families, there is the possibility of what is called "mass suicide." Suicide is a motive sug-

gested by Trotsky. To many Americans, such a suggestion seems fantastic. And it may well be fantastic. Still, it is not to be brushed aside. We have more than once found Russian psychology, as it is portrayed in literature, difficult to understand. And we have often assumed that a morbid desire to confess is one of the elements of this psychology. It is not inconceivable that a group of men actively supporting a political doctrine may feel that they do not wish to survive the wrecking of their political aspirations. In that case, the value of the confession is impaired, even if we can understand why the confession is made. The ancient brocard, *volenti mori non creditur*, is something more than a phrase. Desperate men in the East and West have frequently gone defiantly to death. Perhaps the Russian temperament makes a spectacular resignation to death as plausible as defiance.

But it must be admitted that this suggestion, even if it may be entertained, is highly improbable. The formal confession and the final speeches might be so explained. But the detailed examination and the special form it takes here, are more difficult to understand on this hypothesis. And once more it is a gratuitous theory. What few inferences can be drawn from the actual words of the confession tend to disprove it.

Is there anything else — always on the assumption that the confessions were essentially false and that the defendants were not guilty? Could they have hoped against hope that if they confessed they might receive a lighter sentence than death? That is, after all, the usual reason for confessing.

And, as we know, such a hope was not without foundation. Four of the defendants for whom the prosecutor demanded the death penalty were in fact sentenced to imprisonment. No one could know in advance whether this would happen and who would be spared, if anyone would be. Some of the defendants, *e.g.* Sokolnikov (p. 556), Serebryakov (p. 556), Boguslavsky (559), Drobnis (p. 560), Norkin (p. 561), Stroilov (p. 565), make direct pleas for clemency, sometimes with words of abject self-loathing. Radek, however, makes no such plea. Shestov asks to be shot (p. 563). On the other hand, the fact that there was a motive for confession does not mean that the confession was false. On the contrary, in most cases, public confessions made in open court, even if accompanied by a plea for mercy, are usually true and that fact must give them some degree of credibility here.

If the attempt had been made by confession to throw the chief

guilt on other members of a common conspiracy, the details of the confession would be under serious suspicion. Something of this sort is attempted in the adroit speech of the defense counsel for Knyazev, as far as Turok is concerned.

Corroboration is offered on some points. Strictly speaking, the requirement that an accomplice's testimony must be corroborated does not apply here, but one of the defendants, Stroilov, testifies to meeting a German representative, Wüster, in Berlin in relation to the plans of sabotage and treason which form one of the bases of the charge against the conspirators (p. 250). Stroilov's notebook, which is offered in evidence, contains Wüster's address, which is corroborated by the German official directory also offered in evidence (p. 276). Again, the photographs of several of the German emissaries in Russia are shown to Stroilov who identifies them by name (p. 277) and these names correspond to those on the passport photograph. It may be stated that this type of corroboration is adequate as to the fact that Stroilov had been in communication with Wüster and other Germans and would be accepted in American courts as corroboration of the testimony of Stroilov in general.

There is frequent reference in the trials to "materials," and in an article written by the procurator Vyshinsky in *Socialist Justice*, July 1936, importance is attached to "objective" evidence instead of the "subjective" determination of guilt which at one time had been accepted as a *ratio decidendi* in Soviet courts and which recalls the *éclaircissement de conscience* of the French Revolutionary Tribunal. By "materials" we are inclined to understand documents. The prosecutor, however, in this case (pp. 512–513) sneers at the suggestion that the documentary evidence is incomplete. "You cannot demand . . . minutes, decisions, membership cards" or a "written program." Obviously not. But as Mr. Duranty — not a hostile observer — is reported to have said, we should have liked *some* document.

Much is said about letters in the course of the trial. They were an important part of the means of communication between the alleged conspirators. They would have furnished strongly corroborative evidence by the mere fact that they are said often to have been in code. Oral testimony as to their contents is not enough, if the letters themselves can be obtained. That is a matter of common sense and not merely the application of a technical rule of the "best evidence." One such letter is actually offered in evidence.

It is a letter sent by an unnamed Japanese emissary to one of the defendants, Knyazev (p. 383). The letter is not presented in full; but we may assume that it did not unmistakably prove a treasonable compact, nor did it apparently mention anyone but the addressee. Its confirmatory value against Knyazev and its corroboration of the defendant Turok's evidence against Knyazev and himself is undoubted.

We may, therefore, say that the prosecution is aware of the importance of letters in substantiating their charge. What of the other letters? In our practice, if a letter is referred to and not produced, its contents are not admissible in evidence until some testimony is given as to its disposition. We may well suppose that if the defendants received such letters, they promptly destroyed them. But if they did, why is this not stated? And among so many letters, it is inherently likely that more than one would have escaped by the same sort of careless accident as that which concededly allowed the Knyazev letter to survive.

For there were so many conspirators. Not only the defendants here but the seventeen of the August trial and those of the Leningrad group sentenced in December 1934 for the murder of Kirov were involved. Besides, a large number of other persons who are not found in any lists of defendants are referred to throughout the proceedings as agents and assistants of the conspiracy. Did no other written communication between them escape? It seems somewhat improbable.

The most important letter would, of course, have been the particular letter which Radek declared he received from Trotsky in 1932 (pp. 86–87) with detailed statements of Trotsky's plans and designs. No statement is made in the testimony as to the disposition of the letter, but in his final speech (p. 543) Radek declares that he had "unfortunately burned" all the letters he had received from Trotsky. This is the nearest we get to a justification for the absence of all letters; and to many that absence will remain as a permanent cause of dissatisfaction.

A question arises, however, which does not present itself in most trials. The truth of these confessions is doubted, not on the basis of technical or quasi-technical rules of evidence, but on the inherent improbability of their substance. However much the prosecutor may deny the right of these defendants to be called a political group, there can be no question that they did constitute one. This appears from the prosecutor's own historical summing

up. Most of them — except perhaps Arnold and Hrasche — were or believed themselves to be Marxists, Socialists, Bolsheviks and Russians.

The charges of terrorism and sabotage can scarcely be called inherently improbable, either in Russia or any other country. The difficulty lies in the other charges.

Is it credible that Russian Socialists would have deliberately conspired not merely to become the government of Russia, but to displace the Socialist government by an avowedly capitalist government? Or that they would have deliberately sought to secure the military victory of Germany and Japan over Russia, while Germany and Japan were dominated by violently anti-Socialist groups who were ruthlessly exterminating every vestige of Marxism that they found?

To give such charges any plausibility at all, we must assume that men can take as a deliberate policy the doctrine that things must get worse before they can get better. We can perhaps imagine a dogmatic fanaticism that would actively assist in the defeat of one's own country by the aid of a ferociously anti-Socialist nation, in the hope or in the assured conviction that the victory of Germany and of Japan would lead to the collapse of these countries and would prepare the way for a socialist world-commonwealth. It is true that statements as extreme as these have been made. But that they should seriously be put into execution is hard to believe. Yet, the experience of almost everyone has brought him into contact with a type of fanatic who might well be capable of it. In the last analysis, it is a question of personal psychology.

The defendants, even Radek, a journalist by profession, have published little that is known to persons who do not command Russian.[2] In the case of Trotsky, however, we have not merely his writings in books[3] and articles but we have the detailed examination before the Dewey Commission.[4] He asserts that he has always opposed terrorism as incompatible with Marxist methods, but that his opposition to it was based on its believed ineffectiveness not on the fact that it violates moral principles. He asserts that he has consistently advised a common front against Fascism.

[2] *Editor's Note.* See, however, two articles written by Karl Radek for FOREIGN AFFAIRS — "The War in the Far East: A Soviet View" (July 1932) and "The Bases of Soviet Foreign Policy" (January 1934).

[3] See especially "The Revolution Betrayed" (Garden City: Doubleday, 1937, 308 p.).

[4] The report of the Dewey Commission based on the hearings in Mexico is being published under the title "The Case of Leon Trotsky" (New York: Harper, 1937, 602 p.).

All such more or less general statements of policy advocated are material but they are conclusive only if we can be sure that Trotsky is not the kind of man who would or could change his tactics under the stress of circumstances, or that he would be incapable of denouncing the Hitler régime in public while secretly joining it in order to overthrow Stalin.

One gets a vivid impression of Trotsky from the report of the Dewey Commission. He seems to be a man of extraordinary keenness of mind, of sweeping personality, of mordant wit and torrential eloquence. But he also shows an intensity of purpose that his opponents might well call fanaticism and a confidence in his own intellectual superiority that they might call arrogance. Such men in time past have not hesitated to change methods or to use extreme measures to achieve ends that seem to them of supreme importance. The testimony of Trotsky is directed to proving that he is not the kind of person who could have conspired to destroy the Stalin régime by terrorism and sabotage or that he could have made terms with the national enemy to destroy the Stalin régime. I am afraid many of those who read the report of the Dewey Commission of inquiry will remain unconvinced of that, even if they are equally unconvinced that he did in fact conspire in this instance.

Only a real and direct acquaintance with the personalities of all these defendants can give those who have been brought up in our intellectual and social climate an insight into their character, and only with such an insight can we judge what they could or could not have done.

It is likely enough on the basis of general probability that a good portion of the evidence used in the preliminary investigation was the testimony of spies. If that is the case, the failure to produce it in public is intelligible. Were the witnesses Romm and Bukhartseff spies in the employ of the G. P. U.? Were any of the many persons who are mentioned as actual participants, and who were not accused either in this trial or in the former ones, spies? The saturation of an opposition movement with governmental spies, like the saturation of the governmental service with secret revolutionaries, is traditional in Russia. If such evidence was presented in the preliminary investigation, we can attach a definite meaning to the recurring statement that the accused were forced to confess by the accumulation of the evidence against them. Confronted with men whom they had regarded as associates and

whom they discover to be spies in the service of the government, they may well have broken down without the aid of torture or bribery. But the gap is none the less present for those to whom the fact of the confessions in itself offers insuperable difficulties.

There are incidental matters that are hard to understand, supposing that the prosecution had convincing evidence of the guilt of the defendants over and above their confessions.

In the first place, it is difficult to see an adequate basis for the discrimination in the sentences. Four men were sentenced to imprisonment and not to death. Of these four, two, Arnold and Stroilov, might well claim exemption from the extreme penalty. They were clearly the rougher instruments of the crimes. In mind and in character they were men who obeyed the direction of others. Popular feeling, on the whole, is inclined to be as severe toward the actual perpetrator of a crime as toward those who hired and directed him, but a case can be made out for preferential treatment.

It is more difficult to justify the relative leniency of the punishment of Sokolnikov and Radek. Their confessions were full, and in spite of the statement of the court on page 579 there is nothing to indicate that they had a smaller share in the acts charged than most of those who were executed. Nor is there any indication that their confession or testimony was essential to convict the others. As a matter of fact, there is no reason for refusing to take literally the moral responsibility that Radek accepts (p. 95). It is highly likely that the adhesion of a man of Radek's distinction to the group was the determining factor that made some of the others join it.

It is true, however, that grounds of discriminating punishment are ordinarily matters of policy which do not lend themselves to the judgment of outsiders. In any case, they are only slightly relevant to any judgment of the justice of the sentences imposed.

Finally, the attitude of the prosecution does not assist our judgment of the trial. Mr. Vyshinsky has followed the worst traditions of his office. His opening speech and his questions are violent in phraseology and hectoring in tone. Above all, his summing up is highly objectionable. It is full of torrential abuse. On the very first page the following epithets are accumulated: "repulsive," "despicable," "disgusting," "stupid obstinacy," "reptile cold-bloodedness," "professional criminals," "bandits," "nightmare," "horror and revulsion."

Further, his historical account is disingenuous. He begins (p. 467) with the doctrinal opposition of Trotsky and Lenin in 1904 and runs through the entire history of Trotsky's career from that year to the present. But he does not mention in an address directed specifically to the historical enlightenment of "millions and millions of young workers and peasants" (p. 468) the fact that Trotsky enjoyed the complete confidence of Lenin from the beginning of the Revolution till Lenin's death. This omission wholly distorts the historical sketch he gives at such length and on which he dwells so insistently.

Of course, in speaking in this fashion, the procurator is following accepted models. But by this time it ought to have been long apparent that they are extremely bad models. One of the models is Edward Coke ranting and bellowing in the face of the unfortunate and already condemned Raleigh in order to show his zeal for the new king. Another model is Fouquier-Tinville pouring out cold venom on the men proscribed by the French Revolutionary Convention. Other models could be found in hundreds of politician-prosecutors, in countless American jurisdictions, inveighing against almost any wretched or casual criminal in cases which are likely to receive public attention.

The justification in some of these cases is that these speeches are addressed to a popularly selected and untrained jury and that speeches as violent and bitter are made by the counsel for the defense. That justification is wholly absent here. The court is in this case the "Military Collegium of the Supreme Court," consisting of three judges, two of whom sat on the previous trial in August. It would scarcely need fifty-four pages of passionate rhetoric to convince these judges of the guilt of men who have confessed their guilt, and of the need of imposing a severe punishment.

Extreme violence by the prosecution is often regarded in our courts as misconduct justifying a reversal by a higher court, and in any case it is an element to consider in determining guilt because it often has a direct bearing on the motives for a confession. This is especially true of Continental criminal procedure in which the prosecutor plays a much more influential part than the American district attorney.

From what has been said, it is clear that no judgment that will command assent can be reached on the basis of the available evidence. The report on the Radek-Pyatakov trial is only a frag-

ment of the case. It depends in part on materials that may well exist in the voluminous reports of the preliminary examination; but these are not before us. As for the examination of Trotsky, it is declared by the Dewey Committee to constitute merely a provisional and partial step in a fuller investigation.

The weakness of the case for the prosecution is the absence of letters written either by the accused or to them, from which inferences could be drawn as to their participation in a revolutionary conspiracy. It is further likely that the accounts given in the trials of August 1936 and January 1937 about meetings and conversations with Trotsky and Sedov in Copenhagen and Oslo are inaccurate in detail if not wholly invented.

On the other hand, the public confessions of all the defendants are extremely difficult to explain on any plausible ground unless they were actually guilty. It is unprecedented that men of this type — some of them of high intelligence, some of them soldiers of proved courage — should have acted as they did without any reasonable ground to believe that they would escape the death penalty and without any specific evidence of torture. We should further have to assume that the prosecution forced them to enter into a conspiracy to incriminate Trotsky and his son without advantage to themselves and without thereby making the seizure and punishment of Trotsky easier for the government. This is possible, just as it is possible that there are adequate if undisclosed reasons for the absence of documentary evidence.

If we must make some estimate of the weight of probability, I think it is still in favor of the prosecution as far as the Moscow defendants were concerned. In the case of Trotsky and Sedov themselves nothing except a suspension of judgment is possible. The extent of the punishment is a matter of policy. As long as capital punishment is part of a criminal system, the justification for its application must depend on considerations that cannot be easily estimated at a distance and by foreigners. But English and American observers will not readily overcome their repugnance to capital punishment inflicted wholesale on groups of thirteen and sixteen persons.