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BASIC PRINCIPLES OF SOVIET CRIMINAL LAW

GEORGE V. STAROSOLSKY*

I

CLASS CHARACTER OF THE SOVIET CRIMINAL LAW

The Communist revolution of 1917 in Russia threw down both the old Tsarist political regime, and, what was of principal importance, the old traditional social order. It, therefore, automatically put aside the formal expression of that old order—the law, the Penal Code of 1903 included.¹

We know that all the other successors of Tsarist Russia (Esthonia, Lithuania, Latvia, Poland), like the successors of the Austrian Hapsburgian Monarchy, were able to use the old laws for many years, giving their codification commissions time enough to prepare new statutes. We further know that the United States of America, though they revolted against Great Britain, have been able to take over and to keep the old English monarchic Common Law for over one and one-half centuries. But the old Russian Law could be of no use to the Bolsheviks. It was the law they had fought against. To break the shackles of the past, the new social order was to receive an entirely new legal basis. But, though this requirement was of principal importance, it could not be carried out instantly. So, during the first period after the revolution, "The armed people themselves, without any regulations or codes, settled matters with their enemies."² For years this lasted and, of course, it was a time of bloody terror. The historians of the Soviet Criminal Law used to boast that during that lawless time the basic principles of the new criminal law were born.³ On November 30, 1918, the first "Leading Principles of the Criminal Law" was issued, which, however, gave only general rules of the Soviet criminal justice without provisions concerning particular crimes. Then in 1922, the first complete Criminal Code was created; but four years later a new Code appeared, effective

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¹ Though its use was not forbidden officially until November 1918.

² Official introduction to the statute, "Leading Principles of the Criminal Law," in S. S. S. R., 1918.

³ E.g., Volkov, *Criminal Law* 9 (2d ed. Charkiv, 1928) (In Ukrainian).

from January 1, 1927, which is still in effect.⁴ So, in the course of the first nine years of the new Soviet state, three enactments of the criminal statutes appeared. In 1930 another draft (the so-called Krylenko draft) was completed but failed to become law because its author fell into disgrace, and shortly before World War II a new code was about to be proclaimed.

This was a revolutionary tempo of law-making. The real ambition of the Soviet law makers, however, was to create a criminal law that would be revolutionary in its substance. They succeeded in many respects and experimented throughout nearly twenty years. But, the preparatory works for a new code, completed by 1939, show that in the minds of the Soviet jurists an evolution had taken place back towards the old pre-revolutionary principles. We shall mention them below.

Nowadays, most of us agree that criminal law has to protect society against attacks of wrongdoers (criminals). Moreover, it is the *only* legal means of protection against crime in modern cultural societies. Considering the criminal law of the Soviet Union, however, we must keep in mind that it is not the only, and certainly not the most important, means of protection. Taking over the traditional Tsarist practice of "administrative justice," the Soviets made it the most powerful and the most used weapon in the fight against the enemies of their regime. According to the regulation of the Central Executive Committee of July 10, 1934, and the Regulation of the Central Executive Committee and the Council of People's Commissars U. S. S. R. of November 5, 1934, special organs of the Ministry of Interior Affairs (M. V. D. formerly N. K. V. D.) have the right, in an administrative way, to sentence persons "suspected of counter-revolutionary activity," whose guilt cannot be proved and who are socially dangerous, to deportation to distant places of the Union, to expulsion from certain places, to placement in corrective camps (concentration or labor camps). There are no rules of procedure; no inquiry of the suspect is required; no appeal or pardon admitted. It is easily seen that this practice practically allows the executive authorities to deprive any person of liberty or property without *any* process of law. It has been pointed out many times that this procedure is contrary to the Soviet Constitution (Article 127) which guarantees the citizens of the U. S. S. R. unimpeachment of person and a kind of "habeas corpus," as well as inconsistent with the traditional democratic phrase of Article 6, Code of Criminal Procedure, that "nobody can be deprived of liberty and taken into custody save in cases provided by law and in the way provided by law."⁵ This sort of "jus-

⁴ In separate republics of the Soviet Union separate codes were established, based on the Russian Code.

⁵ See Bmirkine-Guetzevich, *La Théorie Général de l'Etat Soviétique* 95 et seq. (Paris, 1928).

tice" is beyond criminal law and, therefore, will not be further considered.⁶

On the other hand, the Soviet Criminal Law must serve as a means of protection. The introductory articles state that clearly. And it is not so much the function of the Code as its *object* of protection that appears to us worth while considering. This object is not society at large, not people, not individuals, but is the proletarian, ruling *class*, represented by "the Soviet regime and legal order established by the government of workers and peasants for the period of transition to a Communist order," as stated in Article 6 of the Code. This class character of criminal law and its being a mere weapon of the proletarian dictatorship in the fight against its enemies have been stressed by all official and semi-official commentators as well as by Soviet jurisprudence.⁷ The Soviet Professor Gunter states in his commentary to the general Section of the Soviet Criminal Code: "In contrast to the Codes of the bourgeois states, the object of protection of the Soviet Criminal Code is not the person but the state and the legal order established by it. The person is protected only as far as it is in the interest of the working class and of the existing revolutionary order." Professor Piontkovsky⁸ and others have spoken to the same effect. This might be one of the revolutionary features of the Soviet Criminal Law which broke with tradition.

We know that modern criminal codes are generally based on the classic French Code Pénal of 1810 and the ideas and achievements of the great French Revolution. And we remember that those ideas, born of the philosophy of the Age of Enlightenment in Europe, of the theory of the Law of Nature and the Social Compact (John Locke and Jean Jacques Rousseau), also made of the individual and individual liberty a goal of revolutionary effort. It was the individual with those "inalienable rights"—life, liberty, and pursuit of happiness—who was at stake when first the American people, then the French at the head of awakening Europe, started their revolutionary struggles. The old English Common Law, taken over and kept by the Americans, is highly individualistic. And like it in this respect became the French Code Pénal of 1810 and the other European and non-European Codes. The individual, with his rights, was the main object of legal protection. Governments were only "to protect those rights," as the American

⁶ On this subject see, e.g., Evtichiev and Vlasov, *Administrative Law of the U. S. S. R.* 235 *et seq.* (Moscow, 1946) (In Russian); Studenikin, *The Soviet Administrative Law* 145 *et seq.* (1945) (In Russian).

⁷ See Volkov, *Class Nature of Crime and the Soviet Criminal Law* (1935) (In Russian); Oshervyitch, *Criminal Law* 3 (Moscow, 1939) (In Russian); Trajnyn, *General Theory of Crime* 153 (Moscow, 1939) (In Russian).

⁸ PIONTKOVSKY, 1 SOVIET CRIMINAL LAW 233, 234 (3d ed., Moscow-Leningrad, 1929) (In Russian).

Declaration of Independence pointed out. Seagle⁹ was right in saying that by the end of the nineteenth century the American law in particular was credited with a rampant individualism. All important criminal codes of the nineteenth century bear this characteristic, and, for example, the newest Swiss Penal Code of 1942 keeps clearly to this individualistic position. Only the Italian Fascist Criminal Code (1930) and the German amendments during the German National-Socialist period followed the pathway of collectivism, making the state (Italy) or the people as a social organism (Germany) rule over the individual. "Das Volk ist alles, der Einzelne nichts" was the German slogan.¹⁰ But many years earlier the Soviet law makers entered the pathway of collectivism. "The proletariat is all—the individual is nothing" was practically their slogan. They consequently carried out the idea in their Criminal Code.

The presence of this idea is first to be seen in the broad Soviet conception of treason. We can even say that "crime in the Soviet Union consists mainly of those acts directed against the state by the so-called class enemies; or those desiring to hamper socialist construction."¹¹ The Code defines these so-called "counter-revolutionary Crimes" as every action directed toward overthrowing, damaging, or weakening the government of the Soviets, of workers and peasants and their authorities; damaging or weakening the external security of the Union, or the principal economical, political or national achievements of the proletariat's revolution. It further says that "according to the international solidarity of interests of all the workers, the above mentioned actions are also counter-revolutionary if directed against any other state of workers, even if the latter did not belong to the Soviet Union." The articles defining particular instance of those crimes mention not only "levying war against the nation or adhering to its enemies giving them aid and support" and others which we usually find in modern codes. They further include, for example, "supporting in whatever way a hostile action against the Soviet Union, led by that part of the international bourgeoisie which does not recognize the equal status of the Communist system coming to succeed the capitalistic one, and (the Soviet Union's) attempts to overthrow the latter"; or "supporting such action undertaken by social groups or organizations which are under influence of such bourgeoisie"; *viz.*, also "damaging of national industry, transport, commerce, currency or credit system, co-operations"; "abusing of national institutions or undertakings in favor of their former owners or other interested capitalistic organizations," etc. In addition, many particular laws issued in the course of years consider as treason practically every action taken with "counter-revolutionary" purpose. Naturally,

⁹ Seagle, *History of Law* 179 (1946).

¹⁰ "The people is all—the individual nothing."

¹¹ Calcott, *Russian Justice* 18 (1935).

these cases of treason, given here as examples, cannot be discussed in their particulars; but it is easily seen how broad is the meaning of those crimes and how large the scope for the state's prosecutor to charge them. This is especially striking if we compare the Soviet definition of treason with that given by Article III, Section 3 of the Constitution of the United States, limiting treason to "levying War against them [United States], or in adhering to their Enemies, giving them Aid and Comfort." Here we see the tendency to limit the state's judicial power of prosecuting citizens for actions against the state; there (in U. S. S. R.) to limit the citizen's liberty to entertain any critical attitude toward the "achievements of the Revolution."

The collective principle of the Soviet law is more clearly seen in the disproportion between the extent and quality of protection of public, state or party goods on the one hand, and the goods of individuals on the other. Most striking here is the degree of punishment¹² provided, as it shows the grade of importance attached to separate crimes by the law maker. It underlines the Soviet point of view that "severer oppression is needed against the enemy of the political and social regime than against the citizen who infringes his fellow's interest from personal motives. And this is the general trend of all Soviet Justice."¹³

In the first two groups of crimes—the "Counter-Revolutionary Crimes" and "Crimes Against Administration" we find the thread of the "special" measure of social defense—punishment consisting of shooting to death is prescribed about 25 times,¹⁴ and about as often for "Military Crimes" which are included in the Criminal Code. As an example, shooting to death was provided for non-payment of taxes in war time, or, to take a drastic example, for "castration of breeding rams by private persons, if this crime was performed with counter-revolutionary purpose." (Regulation of the Council of People's Commissars U. S. S. R. and the Central Committee of the Communist Party of March 7, 1936.) But for murder committed with intent to kill, the highest punishment provided is eight years in prison; for rape, not more than five years in prison (eight years if the rape caused suicide, death or serious illness of the female, or was committed by more than one person).

Another outstanding example is the protection of property rights. Although private property is protected by the Soviet Criminal Law only as a temporary necessity admitted by practical life, and therefore toler-

¹² We use here the term "punishment" according to its real nature, although the Soviet Criminal Code originally does not thus use it, as will be later shown.

¹³ Schlesinger, *Soviet Legal Theory* 76 (1945).

¹⁴ After World War II the death punishment was formally abolished in the U. S. S. R. by the Law of May 26, 1947. Instead, confinement in camps of corrective labor for 25 years was introduced. But still the old regulation reflects the real attitude of the Soviet law makers to the problem, and may be, therefore, shown as an illustration.

ated by law, still it must be considered as one of the principal personal rights.¹⁵ Let us see: For a simple larceny (secret taking of other person's property) the highest punishment provided is three months in prison or six months of forced labor (up to six months in prison if repeated and up to two years if performed in a band, during a fire or other disaster, or while committing burglary). But, for larceny committed by a private person's taking from the state's or community's stocks, the same Article of the Code provides a punishment of up to eight years in prison. A special Act of the Central Executive Committee and of the Council of People's Commissars of August 7, 1932, expresses the idea as clearly as possible: ". . . that the national property is the basis of the Soviet order, it is therefore, sacred and inviolable, and persons attacking national property should be regarded as the people's enemies." That principle was subsequently adopted by Article 131 of the new Soviet Constitution of 1936. Two new statutes of June 7, 1947, were intended "to show the Soviet citizens that their personal property attained increased protection from theft,"¹⁶ but they strictly retain the privileged position of the government and public property. On the other hand, the statutes increased the punishment for larceny and robbery of private property (for larceny up to 5 to 6 years in corrective labor camps, and if repeated or in a band up to 6 to 10 years; for robbery 10 to 15 years, and if committed with violence dangerous to life—up to 15 to 20 years). On the other hand, they increase still more the punishment for larceny of government property (simple larceny, misappropriation, embezzlement of any kind of theft—minimum 7 to 10 years; if repeated or committed in a band or on a large scale—not under 10 to 25 years).

We have purposely taken treason, murder and larceny as examples because history proves that democratic and individualistic societies have always made murder and larceny principal crimes, most severely punished, while absolute societies have regarded the regime itself, the state, the ruling system, as the highest good to be protected, and, consequently have made treason the principal crime. The Soviet Criminal Law is another evidence of this.

II

PRINCIPLES OF CRIMINAL RESPONSIBILITY

We may also say that, as far as the principles of criminal responsibility are concerned, the Criminal Code of the U. S. S. R. is a revolutionary one among the codes of other nations. This is because criminal

¹⁵ The temporary necessity to protect and to tolerate private property because its abolition has not yet been completed justifies the Soviet Civil Code too. Still, William Seagle is probably right in saying that the very existence of a Civil Code in Soviet Russia is something of an anomaly. See Seagle, *op. cit. supra* note 9, at 295.

¹⁶ 1 GSOVSKI, SOVIET CIVIL LAW 577 (1948).

responsibility under the Soviet law has been based upon the so-called "social danger" of the act and the wrongdoer. As a matter of fact, this idea itself was not a new one. It was to be found in the teachings of the Anthropologist School of Criminal Law (Lombroso), the school of the Italian Positivists, and of the Sociological School, founded by von List. There was already a draft of a criminal law (the so-called Ferri Draft) in Italy in 1921 which was based on the idea of social danger rather than that of guilt, and on measures of social defense rather than those of punishment. The Soviet law makers, however, were the first to apply that idea in practice.¹⁷ This principle expresses, in short, the thought that crime is every act which is dangerous to the society. Consequently, every person who commits a socially dangerous act or otherwise proves that he is socially dangerous is a criminal. There is no disputing the fact that the Soviet Criminal Law is based on that principle. But, as far as the most important consequence of this principle—abolition of guilt as prerequisite to criminal responsibility—is concerned, the problem is far from being clearly and logically settled in Soviet jurisprudence.

The original idea was that the principle of social danger necessarily put aside the requirement of guilt as the basis of criminal responsibility. And there is no doubt that the law makers of 1922 and 1926 followed that pathway, expressing it by the words of law. "Guilt is but a metaphysical reminder as far as the fight against criminality is concerned; it has been replaced by social danger," said the Soviet Professor Volkov in 1930. "It was the task of the Marxist School of Criminal Law to solve the problem: to base criminal responsibility on social danger instead of guilt."¹⁸ In fact, the problem was solved in the Code. Furthermore, the conception of the Criminal Code of 1926 shows an evolution from the Code of 1922 clearly in the direction of the ruling principle of social danger with all of its consequences.¹⁹ This evolution lasted for some ten years after 1926 in Soviet jurisprudence and found its climax in the so-called "Krylenko Draft" of a new Criminal Code in 1930. Its main purpose was to protect the dictatorship of the proletariat against the attacks of its enemies. Krylenko²⁰ rejects every "guaranty of revolutionary legality" by the Code, because this would be a guaranty against the organs of the proletarian dictatorship, limiting its fight against its enemies.

But Krylenko's draft had not become law. Krylenko, then Secretary

¹⁷ To my knowledge, besides the Soviet Code, only the Mexican Penal Code of 1931 has carried out the idea of social danger (*estado peligroso*).

¹⁸ Volkov, *Textbook of Criminal Law* 109, 112 (Charkiv, 1930) (In Ukrainian).

¹⁹ So, e.g., Maurach, *Failure of the Bolsheviki Doctrine of Criminal Law*, 5 *DEUTSCHES STRAFRECHT* 359 (1938) (In German).

²⁰ Krylenko, *Three Drafts of the Criminal Code* 7, 33 (Moscow-Leningrad, 1931) (In Russian).

of Justice, happened to have a competitor for the job—Vishinsky. The latter first defeated one of the most extreme Soviet jurists, Pashukanis,²¹ as the people's enemy who introduced "nihilistic and antinational elements into the law." Then Krylenko, as Pashukanis' follower, had to confess his "mistakes." Thereafter, he disappeared and with him his draft. Vishinsky's era brought a retreat in the Bolshevik's jurisprudence as far as the question of both guilt and punishment were concerned. Both of them are now to be found in new commentaries, textbooks, or articles. New amendments of separate articles of the Code, official regulations, orders, etc., use the terms "guilt" and "punishment" again.

Thus the present official Soviet conception, now ruling in their jurisprudence, is that "social danger" is but the objective and material characteristic of crime, whereas guilt is its subjective element. Guilt is, therefore, an inevitable basis of criminal responsibility.²² Accordingly, guilt, understood rather narrowly as "capability to take decision understanding the matter" (Engels) is supposed to be the condition precedent to application of the Soviet Criminal Law.

The official explanation changed, but the old regulations remained in force. It seems to the writer that the regulations are contrary to the explanation, both from the historical and logical points of view. We have shown the arguments for the historical explanation. We shall try now to give, in short, a logical explanation of the regulations.

The Code states in Article 1 that its aim is to protect the Socialist state of workers and peasants and the established order therein against socially dangerous acts (which are crimes) by applying to persons committing such acts provided measures of social defense. Article 6 explains further that "every act or omission is considered socially dangerous which is directed against the Soviet regime or which violates the order established by the government of workers and peasants for the period of transition to a Communist system." Article 7 provides that as to persons who commit socially dangerous acts or are dangerous . . . the following three kinds of measures of social defense are applied: judicial-corrective, medical, or medical-educational.

We see first that *all* socially dangerous acts are considered crimes; second, that *all* persons committing socially dangerous acts are considered criminals and subject to provided measures of social defense. There are three kinds of measures. All of them are *criminal* measures and thus only persons criminally responsible may be subject to them. From this standpoint not only persons who commit crimes willingly and knowingly (and so are guilty as we used to understand it), but also

²¹ See Pashukanis, *General Theory of Law and Marxism* (3d ed. 1927).

²² See, e.g., Piontkowsky, *Criminal Law* 169, 187 (Moscow, 1939) (In Russian); Holiakov, *Criminal Law* 81 (2d ed., Moscow, 1947) (In Russian).

persons who are insane, as well as those who commit criminal acts because of curable mental disorder (*e.g.* curable aversion to labor), may be dangerous to the society and as such are criminals and have to be made harmless by the provided measures. Now, according to the Soviet Code, all of them may be tried and sentenced as criminally responsible. The question of guilt arises only with the first of those three categories of socially dangerous persons, that is, those who act willingly and knowingly. The Code accordingly provides that the judicial-corrective measures of social defense can be imposed only upon persons who acted with direct intent or incautiously. (Article 10). They cannot be imposed upon persons who committed a socially dangerous act in a state of chronic mental disease or while in a state of temporary mental disorder, so that they were neither able to recognize the importance of the action nor to govern their action. To those persons only medical measures of defense can be applied. (Article 11). So, if we strictly follow the Code, guilt is not meant to be a basis of criminal responsibility at large, but is merely intended as a requirement for applying the special type of measures of social defense (those of a judicial-corrective nature).²³

The difficulty of this problem increases because, according to the principal of social danger, persons otherwise irresponsible, such as the insane, can commit crimes (socially dangerous acts) and be sentenced by a criminal court under Soviet Criminal Law. Of course, only medical measures can be applied to such persons. But, these measures are criminal measures applied to the criminally responsible though not "guilty" persons. Up to this day, the Code of 1926, with its regulation of criminal responsibility and of measures of social defense, remains in force. The project of a new Code including guilt and punishment is still being discussed.

In another situation the statute directly provides for the application of measures of social protection to persons without guilt.²⁴ Amendments of 1930 provide that several measures of protection, such as deportation to remote places, compulsory settlement in certain places, etc., may be inflicted upon persons against whom accusations cannot be proved but who appear to be dangerous because of their past criminal activity or contact with criminal circles.²⁵ The court is also authorized, in case it acquits a person from accusation, to declare him socially

²³ Volkov, *Three Problems of the Criminal Code*, 6 JOURNAL OF SOVIET JUSTICE (1929) (In Russian).

²⁴ Even writers who assume the existence of a requirement of guilt as a basis of criminal responsibility in the U. S. S. R. admit that "there are instances in which, under the Soviet Criminal Law, an innocent person may be penalized in court." See Gsovski, *op. cit. supra* note 16, at 499.

²⁵ Compare the old English practice, so solemnly kept, that the jurors must not even know about the criminal past of the defendant and other circumstances not having direct relation to the given accusation.

dangerous. If this is done, the prosecutor may demand that provided measures of social defense be imposed upon such person.

There is a further regulation to be found among the "Counter-Revolutionary Crimes" that if a soldier escapes from the country, all his family members who lived with him or were dependent upon his support, though they had no idea of the intended flight and were not accomplices before or after the deed, shall be deported to remote parts of Siberia for five years. This regulation may be a measure of terror taken against the guilty person (the escaping soldier), but it nevertheless completely eliminates guilt as the basis for criminal responsibility of those family members who are made thus responsible. Here again it is the social danger of the deed and of those persons having family members abroad which replaces guilt.

To support our position we mention here another principle of the Soviet Criminal Law which, logically and reasonably, can be derived from that of social danger. The regulation of Article 4 of the Code of Criminal Procedure (accepted as a note to Article 6 of the Criminal Code) provides that an act is not a crime if, although formally declared as such by the statute, it proves to be not dangerous to society because of its insignificance and the absence of harmful consequences. No doubt there is logic in that regulation considered from the standpoint of social danger as a basis of criminal responsibility.

The modern sentiment of legality and justice does not allow any law to act *ex post facto* ("*lex retro non agit*"). This principle has been approved by both customary and statutory law and it is the practice in the United States, being expressly provided by the Constitution. Not so in Soviet Criminal Law. The Soviet law makers reasonably considered that those who had opposed the Communist struggle before the revolution began and before the new order was established might be dangerous to the new regime even after its victory. The Criminal Code, therefore, provides (Article 58(13)) that the measures of protection shall be applied "for activity and active fight against the class of workers and the revolutionary movement, [activity] in responsible or secret positions of the Tsarist regime or in service of counter-revolutionary governments during the Civil War." Schlesinger²⁰ is right in pointing out that this regulation is the most extreme example of *ex post facto* legislation. Here again, it was the principle of social danger that dictated and justified the regulation. We have already seen it in the "Leading Principles" of 1918, in the Code of 1922, as well as in Krylenko's draft of 1930, and there was no movement in the preparatory works for a new Code after 1936 to abolish it.

In the principle of social danger is also rooted another significant

²⁰ Schlesinger, *op. cit. supra* note 13 at 108, 109.

principle of the Soviet Criminal Law, the *analogy*. As stated in Article 16, Criminal Code: ". . . in case a certain socially dangerous act is not directly foreseen by the Criminal Law, the basis and limits of responsibility for such act, and of measures of social defense shall be found by the court under analogy with those articles of the statute which provide [for] a crime most similar as to its importance and character." Volkov²⁷ says that the principle of analogy is the natural consequence of the materialistic conception of crime in the Soviet law and he emphasizes that the said conception is clearly expressed by putting aside the principle of "*nullum crimen sine lege*" and by imposing criminal responsibility without any crime really being committed.

The importance of introducing analogy might not be so clear to Anglo-American jurists trained in the unwritten Common Law. But, for the European juridical thinking, its introduction means breaking down the basis of legal certainty. The fight carried out for a new law during the great period at the close of the eighteenth century, and which made a victorious march throughout Europe in the nineteenth century, was aimed at making law the only source of regulation of relations between the State and the citizens, and at, in this way, putting a barrier to arbitrariness and despotism of the ruler (be he king or president). The source of that idea may be found in the British Magna Charta of 1215. It was clearly expressed in Article 8 of the French Declaration of the Rights of Man and the Citizen and was included in the same sentence with the principle forbidding laws *ex post facto*. The celebrated maxim "*nullum crimen, nulla poena sine lege*" was, and has been since, considered as the stronghold of civil liberties and democratic administration of criminal justice. Putting it aside, by introducing analogy, would necessarily mean despotism and authoritarianism, and such was the ruling opinion of jurisprudence.²⁸ Indeed, Hitler's regime in National-Socialist Germany brought the so-called analogy amendment into Article 2 of the Criminal Code of June 28, 1935. One of the first steps of the Allied authorities in Germany, in the legal field, after World War II, was to cancel the analogy amendment and to restore to effect the maxim "*nullum crimen sine lege*" (Law No. 11, January 30, 1946).

Nowadays, only the Soviet Criminal Code allows persons to be sentenced who committed deeds which, not being foreseen by the statute as crimes, are socially dangerous in the opinion of the judges. Of course,

²⁷ Volkov, *The Class Character of Criminal Law* 177, 188 (Moscow, 1935) (In Russian).

²⁸ When, following Hitler's amendment to the Criminal Code, the Free Town of Danzig, in 1935, introduced analogy into its Code, the opposition sued the Town before the League of Nations. On request of the latter the International Tribunal at the Hague, on December 4, 1935, gave its opinion, that the principle of analogy expresses a collectivistic system, and since the Constitution of Danzig was individualistic, introducing analogy was against the Constitution.

the opinion of the judges is not unlimited. It has to be directed by the "socialistic sense of justice." (Article 6). Due to the broad meaning of social danger and the quite undefined "socialistic sense of justice,"²⁹ the practice of analogy introduced great uncertainty into law and justice. The following case which was cited by the President of the Soviet Supreme Court, N. T. Holiakov,³⁰ during the debates on a new draft, will show us the working of the principle of analogy. In one of the provincial courts a man, charged with executing a few circumcisions after Moslem custom, was sentenced by analogy for procuring an abortion. Of course, the socialistic sense of justice told the judges that circumcision was socially dangerous, but since there was no statute forbidding it, they applied analogy!

The principle of analogy has been valid until now in the Soviet Law but the aforementioned Vishinsky era started a crusade against it. In the great campaign for a new Code that started a few years before World War II, two leading groups of jurists turned partly or completely against the old regulation. One, from the group about the Institute of Law at the Academy of Science, with Vishinsky, Mankovsky, and Sharhorodsky at the head, strived to keep the principle of analogy but with a considerably limited extent of application. Vishinsky regards analogy as a necessary evil.³¹ He calls those jurists who made analogy one of the basic and primary principles of the Soviet Law "wrongdoers," "liars," and "falsifiers."³² The other group, around the All-Union Institute of Jurisprudence (WYJUN), including Holiakov, Herzenson, and Piontkovsky, demanded cancellation of the analogy regulation altogether. They pointed out that analogy was necessary in the first period of the new Soviet state but that, at present, it is not in accordance with the Stalin Constitution.³³ And, they cited in their support one of Stalin's new phrases that "now we need stability of law more than ever."

Both groups asserted the practical failure of the principle of analogy. But in vain would we look among their statements for arguments favoring guaranty against oppression of the individual by the State, or the right of the individual to know what he may expect as a consequence of his behavior. After all, the principle of analogy has been in operation until now in the Soviet Criminal Law, and some of the Soviet jurists

²⁹ The socialistic sense of justice is recognized as another source of law. See Volkov, *Textbook of Criminal Law* 17 (Charkiv, 1930) (In Ukrainian).

³⁰ Holiakov, *Basic Problem of the Soviet Socialistic Jurisprudence* (Moscow, 1939) (In Russian).

³¹ Vishinsky, *On the Situation on the Battleground of Legal Theory* (Moscow, 1935) (In Russian).

³² Vishinsky, *Basic Task of the Soviet Socialist Jurisprudence* (Moscow, 1935) (In Russian).

³³ Tanhazov, *Unconformity of Analogy with the Constitution of the U. S. S. R.*, 28-29 *SOVIET JUSTICE* (1938) (In Russian).

even keep to the position that this principle is a basic one in the Soviet Law.³⁴ According to the statute and the idea of its creators, it really is.

III

SANCTIONS OF CRIMINAL LAW

We have had reason, during the previous sections, to refer to the Soviet conception of criminal sanction. It now becomes advisable to give a more extensive picture of the matter.

As far as the idea of criminal sanction is concerned, the Soviet law makers followed the path they entered following their idea of crime. Crime was to them a phenomenon of class struggle, and so was the reaction to it. It is the ruling class, that of workers and peasants, which applies sanctions to its enemies. In this the Soviet jurists of today agree with the law makers of 1922 and 1926, as well as with the existing Code.³⁵ And still more, they all agree that their criminal law and its sanctions have both a defensive and an offensive, active character.³⁶ The Soviet Law is a militant law, one of the weapons of militant Communism in destroying the latter's opponents. The aforementioned draft of Krylenko presented the climax of that position, providing as sanctions for crimes "measures of direct destruction of class enemies and of openly declassed elements, and measures of forcibly corrective treatment of workers." Krylenko's draft was defeated but certainly not because of that point. Says Utevsky: "Dictatorship of the working class admits applying of merciless suppression of every resistance of the defeated classes."³⁷ He quotes Lenin (Works, Volume XIX, p. 315): "Dictatorship is the state's power based directly upon force [violence]." The legal means of that force is the Criminal Code with its sanctions. This is a basic principle which rules in theory and practice. We might say that the well known practice of Soviet criminal justice alone best proves the principle.

The Code itself explains in its General Section that: (1) criminal sanctions consist of measures of social defense; (2) these measures shall be judicial-corrective, medical, and medical-educational; (3) the measures of social defense are to be applied with the purposes of general prevention of crimes, of prevention of persons who committed crimes (*i.e.*, socially dangerous acts) from committing new crimes, and of adapting persons who committed socially dangerous acts to the way of free social intercourse of workers. Then a significant paragraph is added: "The measures of social defense do not pursue the object of in-

³⁴ See, *e.g.*, Mankovsky, *Principles of the System of Criminal Law*, 6 SOVIET STATE (1938) (In Russian).

³⁵ See, *e.g.*, Utevsky, *General Theory of Punishment*, CRIMINAL LAW 255 (Moscow, 1939) (In Russian).

³⁶ *Id.* at 261.

³⁷ *Id.* at 257.

flicting physical sufferings or degradation of human dignity; they do not pursue the object of retribution or punishment."

No matter how we understand the nature of crime and its legal consequences, it appears clear that guilt requires punishment, but danger, protection. Now even the Soviet jurists have to admit it. So Utevsky, in an officially published textbook, states: "Measures of social defense follow not guilt but so-called 'dangerous state' of the Sociological School."³⁸

Guilt looks back to what happened in the past, and the guilty person is being punished *because* he committed a crime. But social danger looks ahead towards the possible wrong that threatens to occur in the future. Thus, society protects itself against this threat. Justice requires punishment of those who are guilty; social security requires protection against those who are dangerous. Consequently, most of the modern systems see both punishment and protection as reasons for criminal sanctions. They look for measures that will serve both purposes. As a matter of fact, the modern criminologists stress the purpose of protection. New penitentiary systems, experiments in jail organization and jail life, etc., reasonably turn respectively toward correcting, educating, and separating the criminals. Still, the element of pure punishment with its moral judgment of the deed and just requital for the wrong, remains in the nature of a criminal sanction.³⁹ In this the criminal law is conservative, and rightly so.

The Soviet law makers were, however, progressive in this respect, when they put aside punishment and introduced measures of social defense as the only criminal sanction. Since crime was but a socially dangerous act and not morally or ethically wrong, its consequence had to be, not punishment for what had been done, but a mere defense against possible future violations. Accordingly, the present statute refuses punishment. The new Soviet jurisprudence under Vishinsky, as well as all newer official declarations and regulations, appear contrary, therefore, to the original idea and the general provisions of the Code. Even some amendments to the special section of the Code use again the old term "punishment." It has been (officially) explained that the term "measures of defense" was strange and did not express the real idea of the sanction.⁴⁰

So, the Code itself first reads that the only criminal sanctions admitted are measures of social defense which have nothing in common with punishment, and then, in several Articles (amended after 1936)

³⁸ *Id.* at 261.

³⁹ During the War Criminal Trials in Nuremberg, after World War II, all the prosecutors, with America's Mr. Justice Jackson at the head, demanded punishment as just requital for the crime committed.

⁴⁰ Utevsky, *op. cit. supra* note 34, at 260.

provides punishment for several crimes. Further, one must admit that even those measures of social defense (particularly those which were judicial-corrective) were, in practice, nothing other than punishment, according to what we understand that term to mean. On the other hand, the Soviet practice was far from the humane sounding regulation that the sanction would not inflict physical pain nor humiliate human dignity. Besides, that phrase is even in formal and theoretical collision with the nature of measures of defense as measures of general prevention and destruction. Preventing the criminal from committing new crimes, or forcibly adapting him to new modes of behavior can hardly be imagined to be without physical pain. *A fortiori*, the general prevention which means deterring would-be criminals by exemplary punishment of those sentenced, has physical pain and humiliation directly in its nature. The wish of the Soviet law makers to create a quite new, revolutionary penal law of a class character, which at the same time would present an example of progressive and humane ideas, caused these contradictions and prevented the Code from being one logical whole, applicable in real life.

It would lead us too far beyond our topic to discuss the particular measures of social defense and punishment individually, but we find it advisable to make a brief summary of them, taking only the judicial-corrective measures which are pure criminal sanctions.

The death penalty, in form of shooting, was provided by the Code as an extraordinary measure for defeating the most dangerous acts and wrongdoers. We showed in the first section how often it could be applied, and we pointed out that it was abolished in 1947, being replaced by confinement in camps of corrective labor for 25 years. The highest official measure is "declaring as worker's enemy, with [attendant] deprivation of citizenship of the U. S. S. R. [and the separate republics] and expulsion from the Union forever." Next come deprivation of liberty in corrective labor camps in remote places of the Union; imprisonment in general prison camps; forced labor without imprisonment; limitation of civil rights; expulsion from the U. S. S. R. temporarily; deportation beyond the borders of a certain Republic of the Union or to a place with or without compulsory settlement; the same with or without orders to stay in fixed places; prohibition against engaging in a certain occupation or trade; public blame; confiscation of property; fine; admonition. In addition, the Law of December, 1929, introduced another punishment: declaring as outlaws persons who, being Soviet citizens and officially employed abroad, refuse to return to the Union, thereby joining the enemies of the worker's class. The property of the outlaw is to be confiscated and he, if caught within the borders of the Union, shall be executed (shot) within 24 hours.

As we mentioned above, it is not our intention to analyze these particular sanctions. But there is one peculiarity about them: the highest measure of social defense (declaration as workers' enemy and expulsion from the U. S. S. R.) is never applied. Not only most of the condemned but a great part of the "innocent" citizens of the U. S. S. R. would certainly be happy to get that punishment. If people could expect it, the amount of crime would increase immensely in the Soviet Union. Of course, this sounds like irony, but life in the U. S. S. R. is filled with such phenomena as these that sound like irony, though they are serious reality.