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# Marxist and Soviet Law

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Stephen C. Thaman

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**CRIMINAL LAW**  
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## CHAPTER 14

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# MARXIST AND SOVIET LAW

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STEPHEN C. THAMAN

### I. THE MARXIST CRITIQUE OF LAW BEFORE THE RUSSIAN REVOLUTION

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#### 1. What is “Marxism”?

“MARXISM” as a political, sociological, economic, and philosophical school of thought and action originally developed from the works of Karl Marx (1818–1883) and Friedrich Engels (1820–1895), two German thinkers who, in their individual and co-authored writings, provided a foundation for the nineteenth-century socialist movement. Broadly speaking, they propagated a theory of political economy based on the writings of Adam Smith (1723–1790), David Ricardo (1772–1823), and others which claimed that capitalism, while a necessary stage of world economic development, would eventually falter due to contradictions between the forces of economic production and the social relation engendered thereby. This crisis in production would lead to the working class or proletariat spearheading a revolutionary movement to overthrow the capitalist mode of production and set up a transitional “dictatorship of the proletariat” which would eventually give way to a

utopian communist society where no state would be necessary and people would work according to their abilities and consume according to their needs.

## 2. The place of law in general, and criminal law in particular in the writings of Marx and Engels

Although Marx studied law (Engels was himself a capitalist who ran his family's factories in England), the writings of Marx and Engels contain few insights into what the nature of law will be either in the transitional period of the "dictatorship of the proletariat" or in the future stateless communist society. Marx's monumental work *Das Kapital*, however, describes in great detail the "laws" of capitalist commodity production based on the "exchange value" of commodities and their circulation and the accumulation of capital produced from the "surplus value" earned by the owners of the means of production as a result of their exploitation of the labor power of the proletariat. With respect to the criminal law, one finds very few passages from Marx and Engels referring to criminal law, or what role it would play in a socialist or communist society.

### a) *The base–superstructure paradigm*

Many Marxist commentators refer to comments by Marx and Engels which tend to show that the forces and relations of production of society constitutes its "base" or infrastructure, and that it is this base which ultimately determines the "superstructure" of society, that is, the particular state or social institutions that arise, as well as political theories, ideologies, art and culture, etc. While mainstream Marxists saw the state itself as being part of the superstructure, and a mere reflection of the forces and relations of production of the given socioeconomic system, if not an institution designed to defend and perpetrate them, more critical voices insisted that the writings of Marx and Engels were not clear, and that some of their texts tended to show that the state was itself part of the "relations of production," and thus the "base."

### b) *The doctrine of the "withering away" of the state under communism*

In key writings, Marx and Engels do talk about the fact that the nation-state, which had become the protector of the foundations of the capitalist system of production, would gradually "wither away" in the transition from the dictatorship of the proletariat to a fully developed communist society, though they also talk, in various writings, about the fact that "bourgeois law," that is, the law which mirrored the development of private property and capitalism, would still be necessary during the transitional dictatorship of the proletariat, because the state economy would still circulate commodities and labor based on "exchange value."

### 3. Law in the writings of Vladimir I. Lenin before the Russian Revolution

Vladimir Ilyich Lenin (1870–1924) was the founder and leader of the majority (in Russian, *Bolshevik*) faction of the Russian Democratic Labor Party and eventually led the coup d'état which, in November 1917, overthrew the interim government which had ruled Russia following the abdication of Tsar Nicholas II in February 1917. Although Lenin was trained as a lawyer, he early became a professional revolutionary and political theorist whose many writings drew on those of Marx and Engels.

His main treatise touching on law was *State and Revolution* which basically adopted the theory of the “withering away of the state” promoted by Marx and Engels as well as the notion that the transitional “dictatorship of the proletariat” would need to maintain “bourgeois” law until the final triumph of communism, when “law,” as such, would disappear with the state, and cede to mere “accounting and control.”

His main addition to Marxist thought would probably be his theory of the need for a revolutionary party to “guide” the workers and peasants, due to their inherent incapacity to do so themselves. The problem Russian Marxists had, in the late nineteenth and early twentieth centuries, was to square Marx’s theory, that socialism and communism would only be possible in a country with fully developed capitalism, with the idea of a socialist revolution in the predominantly peasant society of Russia which only had a fledgling proletariat in Moscow and St. Petersburg. One could say, thus, that Lenin propounded a theory of petty bourgeois revolution, where the non-productive but educated classes (lawyers, like Lenin, intellectuals, etc.) would take over the means of production from the incipient bourgeois class and land-owners with the help of the laboring classes.

### 4. Marxist approaches to criminal law before the Russian Revolution

Before the Russian Revolution in 1917, and the creation of the Union of Soviet Socialist Republics (USSR), which sought originally to base its rule in Marxism, there was little Marxist writing dedicated to law in general, or criminal law in particular.

An exception are the writings of Willem Bongers (1876–1940), a Dutch sociologist, whose 1905 dissertation “Criminality and Economic Conditions” was translated into English and published in 1916. Bongers argued that crime had two economically rooted sources: (a) need and deprivation suffered by the disadvantaged members of society; and (b) greed and selfishness, which were the motivating factors of

capitalist society. He argued that moral relations and moral restraint are only possible in communities characterized by mutual interdependence and sympathetic identification, and that capitalism's stress on competition and greed destroyed these values. They could only be restored in a future post-capitalist social system, where those who violate the law will do so only due to mental incapacity, and would be best treated by physicians, rather than punished.<sup>1</sup>

## II. THE DEVELOPMENT OF SOVIET CRIMINAL LAW THEORY: THREE MAIN STRAINS

### 1. Introduction

In the early years of Soviet rule, policy vacillated between minimalist, sometimes called “nihilist” criminal law echoing the utopian Marxist idea that the state and law would wither away, and the instrumental use of criminal law, first as a weapon against the class enemy to consolidate the “revolution,” the takeover by the Communist Party of the Soviet Union (CPSU) and, secondly, through the forced industrialization of the country.

Since Marx and Engels did not think socialism or communism could be established in peasant countries like Russia or China, it is perhaps inevitable that Marxism would remain an ideology and would not have practical importance in creating post-revolutionary legal systems in those countries. Marxist-infused utopian notions of criminal law were trumpeted in the early periods of both regimes when the Communist parties were primarily interested in eliminating the remnants of the small incipient bourgeoisies or the rich peasants, that is, the classes that, according to Marx and Engels, were needed to create the economic basis for a transition to communism.

Because of this, the policies of the CPSU were in many respects objectively reactionary and not revolutionary. For instance, Decree No. 1 on the Courts, issued in 1917, eliminated the progressive reforms achieved by Tsar Alexander II, who had created a liberal legal system with an independent judiciary, independent prosecutor, and adversary trial by jury in 1864, and eventually replaced them with a system of courts dependent on the CPSU in which party and government officials could call in the judgments they wanted the courts to return (“telephone law”).

<sup>1</sup> Jeffrie G. Murphy, “Marxism and Retribution,” (1973) 2 *Philosophy and Public Affairs* 217, 234–243.

And especially under the rule of Joseph V. Stalin (1878–1953), the CPSU reintroduced an economy based on forced labor which effectively reversed Alexander II's abolition of serfdom in 1861. Stalin was a communist revolutionary from Georgia who won out in party struggles for control of the CPSU in the late 1920s and then ruled the USSR with an iron hand through World War II until his death in 1953.

“Marxist” utopianism, based on the “dictatorship of the proletariat,” quickly ceded to the instrumentalist use of criminal law by the CPSU in its dictatorship *over* the proletariat and peasantry which was aimed at forced industrialization and the collectivization of agriculture, which we can refer to as “Soviet” criminal law. However, “Soviet” law, to distinguish it from other totalitarian or authoritarian legal systems, did conserve some residue from its early “Marxist” roots.

I will now briefly discuss the three main trends in Soviet criminal law before elucidating how these three trends affected the General Part and the Special Part of Soviet criminal codes and overall Soviet criminal policy. These three main trends are: (a) “Marxist” radical utopian minimalism; (b) “enemy criminal law” aimed at consolidating the rule of the Communist Party; and (c) the mature “socialist rule of law” aimed at industrializing the Soviet state and educating the populace to be obedient to its policies.

## 2. “Marxist” radical utopian minimalism: the gradual withering away of criminal law

### a) *Introduction*

After the end of the Russian Civil War, Lenin pushed what he called the “New Economic Policy” (NEP) which was, in a sense, a step backward from the radical expropriation of the capitalist classes begun in 1917, and was an implicit recognition of the fact that to rebuild the economy after the war, private enterprise was necessary. This “liberal” period of Soviet history began in 1922, continued beyond the death of Lenin in 1924, and constituted a period of great cultural productivity in painting, cinema, literature, and architecture, as well as in legal theory, with the writings of Pashukanis and others. It ended in the late 1920s as Stalin began to take over absolute control of the CPSU apparatus.

### b) *The general theory of law and Marxism by Yevgeniy Pashukanis*

Yevgeniy B. Pashukanis (1891–1937), was the premier Soviet legal theoretician of the early USSR and his book *The General Theory of Law and Marxism*<sup>2</sup> attempted

<sup>2</sup> Evgeny Pashukanis, “The General Theory of Law and Marxism,” in Piers Beirne and Robert Sharlett (eds.), *Pashukanis: Selected Writings on Marxism and Law* (1980), 40–131.

to lay a Marxist philosophical and legal foundation for socialist law, and for its “withering away” along with the capitalist and post-capitalist state. He thus follows directly in the line of Marx, Engels, and Lenin. Just as Marx began *Das Kapital* with a treatise on the commodity, Pashukanis derives his theory of law from commodity exchange.

Commodity exchange and the replacement of use-value by exchange-value—that is, the quantification of things according to an abstract measure, money—enables humans to interact as “equals” and “individuals,” separated from their earlier collective life-world. Indeed, law in general, as we know it, arose to protect the relationships between commodity owners and its language of rights and duties, both in the civil and criminal areas, and reflects these roots. “Only bourgeois-capitalist society creates all the conditions necessary for the legal element in social relationships to achieve its full realization.”<sup>3</sup> Each human being became an abstract legal subject with rights and duties.

According to Pashukanis, the first appearance of criminal law comes with the stamp of commodity exchange, in the form of blood money, the tradition of paying the victim or the victim’s family a certain price to atone for the crime and prevent blood revenge or feud. “A crime may be considered as a particular aspect of exchange, in which the exchange (contractual relationship) is established *post factum*, that is, after the intentional act of one of the parties. The ratio between the crime and the punishment is reduced to an exchange ratio.” The feud is transformed from a purely biological phenomenon into a legal institution to the extent that it is linked with the form of exchange-value.<sup>4</sup>

This state of affairs changed with the development of classes, when the ruling class sought to use the criminal law to prevail in its struggle with the lower and oppressed classes, where criminal law became a “method of merciless and harsh reprisal against ‘evil people,’” that is, against “peasants who had fled from unbearable exploitation by landlords and the landlords” state, and against the pauperized population, vagrants, mendicants, etc. Punishment became a method of physical elimination or of instilling terror.<sup>5</sup>

Thus, when the institution of commodity exchange (and labor power is just another commodity) disappears, as a result of the communist revolution, so will bourgeois law and morality as we know it. They will be replaced in mature communism by a collective ethos epitomized by the phrase from Marx’s early works: “From each according to his capacities, to each according to his needs.” Criminal law, which had developed its basic characteristics of retribution and compensation from commodity exchange, would yield to administrative disposition of those few delinquents who challenged the harmony of a classless society.

<sup>3</sup> Pashukanis (n. 2) 44.

<sup>4</sup> Pashukanis (n. 2) 111–113.

<sup>5</sup> Pashukanis (n. 2) 115.

c) *The chief tenets of “Marxist” utopian minimalism*

The utopian Marxists thought that the future communist state could do without “law” or the “state” and were therefore very close to espousing an anarchist view. This “anti-criminal law” school held that there would be no crime under mature communism, because there would be no “need” among the masses and no avaristic ruling classes, thus eliminating the motivation for crime under capitalist relations of production.

But before that stage was reached, there could be no talk of “guilt” or “unlawful intent” in relation to violations committed by the laboring classes because they were not responsible for the system which created the need to commit the unlawful act. Therefore there could be no “punishment” but only the administration of protective “measures.” No criminal code would be needed, nor would the administrators of the system need a legal education. Judges, guided in their broad discretion only by “revolutionary consciousness,” would merely have to determine whether a “socially dangerous act” was committed and then decide what measures would be applied.

Mild administrative measures of re-education and social protection would be applied to errant proletarians and peasants, with the “punitive” repressive measures being reserved for those with evil intent—the capitalist, bourgeois class, and the surviving monarchists. Utopian Marxists rejected retribution as a goal of sanctions, as it rejected the notion of punishment in its entirety. Special deterrence and rehabilitation of the individual wrongdoer were their goals and measures which did not involve deprivation of liberty were therefore preferred.

In both China and Cuba the victorious revolutionaries also cancelled all the laws of the *ancien régime* and flirted with the utopian approach to criminal law in the revolution’s aftermath. The Cuban leader, Fidel Castro (b. 1926), for instance, maintained that the country needed no lawyers, and that all disputes would be handled informally claiming that “revolutionary justice is not based on legal precepts, but on moral convictions.”

### 3. Enemy criminal law: criminal law as a weapon against the class enemy

a) *The notion of “enemy criminal law”*

The expression “enemy criminal law” was coined by German professor Günther Jakobs,<sup>6</sup> and refers to a type of criminal law that has existed since time immemorial. The notion is that there are two tracks of procedure and punishments: one for those

<sup>6</sup> Günther Jakobs, “Zur Theorie des Feindstrafrechts,” in Henning Rosenau and Sangyun Kim (eds.), *Straftheorie und Strafgerechtigkeit* (2010), 167–182.

belonging to the dominant lineage, tribe, ethnicity, “citizens,” the “good guys” and another for the “other,” the outsiders, the “enemies” whether they were brigands, highwaymen, vagrants, or freed slaves, not to speak of the eternal American problem of having one system for the rich and another for the poor, one for the white and one for the black.

b) *The chief tenets of “enemy criminal law” in the USSR*

Soviet law, especially in the early years, reserved its harshest measures for use against the “class enemy,” the bourgeoisie or remaining monarchists, and later against whomever it determined was “anti-Soviet.” Already in *State and Revolution*, Lenin set the groundwork for the dual system characteristic of “enemy criminal law”: “The dictatorship of the proletariat produces a series of restrictions of liberty in the case of the oppressors, the exploiters, the capitalists. We must crush them in order to free humanity from wage slavery; their resistance must be broken by force; it is clear that where there is suppression there is also violence, there is not liberty, no democracy.” He asserted that the “State must be democratic for the proletariat and poor and dictatorial against the bourgeoisie.” According to Lenin: “the courts should not do away with terror—to promise that would be to deceive ourselves and others—but should give it foundation and legality, clearly, honestly, without embellishments.” In § 27 of the 1922 Criminal Code a distinction was made between “crimes against the establishment of the worker and peasant’s power” and “all other crimes,” which led to sentencing aggravation for the commission of the former.

Shortly before the Chinese Communist Party under the leadership of Mao Zedong (1893–1976) took control of the Chinese mainland, Mao described the “people’s dictatorship” as “democracy for the people and dictatorship over the reactionaries.” The state was clearly seen as the “instrument by which one class oppresses another.”

In 1957, in his talk “On Correctly Handling Contradictions Among the People” Mao stated that: “all classes, strata and social groups that approved of, supported and participated in the endeavor to construct socialism fell under the rubric of the people, while all social forces and social groups that resisted the socialist revolution and were hostile to or undermined the construction of socialism, were the people’s enemies.” A member of the “people,” however, could become an “enemy” by committing a serious crime, such as murder, rape, or prostitution and become a “bad element.” Eventually, the class enemy was divided into the “five elements”: landlords, rich peasants, counterrevolutionaries, bad elements, and “rightists.”

Soviet-style enemy criminal law is characterized by the use of a regular system of criminal courts for workers, peasants, and the “good guys” and either “revolutionary tribunals” or administrative organs of repression for the “enemy of the people.”

Decree No. 1 on the Courts in 1917 established elected revolutionary tribunals with panels of six lay judges or assessors to deal with counterrevolutionary activity, thus marking the beginning of a separate system for the regime's enemies. The revolutionary tribunals initially asked the public to help it decide cases. There was no prosecutor or defense counsel per se involved, other than citizens who could assume these roles. The courts had no laws, only their "revolutionary conscience" to guide them. No court personnel were professional jurists.

On November 21, 1917, the "Commission for the Fight Against the Counterrevolution" (CHEKA), was created to investigate cases for the revolutionary tribunals, but it was later authorized summarily to execute "enemy agents, speculators, thugs, hooligans, counterrevolutionary agitators, and German spies" and to "destroy the bourgeoisie as a class." Its only criteria was the class to which the suspect belonged, "his origins, education, training or profession." It acted as investigative organ, court, and executioner until abolished in December 1921.

Under Stalin, the Unified State Legal Directorate (OGPU) and the People's Commissariat of Internal Affairs (NKVD) set up tribunals that were instrumental in the Great Terror of the 1930s. The OGPU's Special Board, established in 1924, was originally set up to facilitate campaigns against anti-Soviet elements and to silence potential opponents. They were later given the power to imprison or exile for a term of up to five years anyone considered to be "socially dangerous." In the late 1930s, and again in the 1940s, the maximum sentence was extended to ten and then 25 years. Proceedings of the boards were not public, the accused had no right to counsel, and there was no appeal of verdicts. Most of the nearly 800,000 political prosecutions in 1937 were handled not by courts but directly by Special Boards or the notorious three-person panels (*troiki*).

Procedures for "enemies" were also carried out in a super-expedited fashion in the normal courts. For instance, Nikolay Krylenko (1885–1938), People's Commissar for Justice from 1931 until shortly before his death, and a prominent utopian Marxist legal reformer, was tried and convicted in a 20-minute trial before the Military Panel of the Soviet Supreme Court and executed immediately after the trial.

China also set up its "People's Tribunals" after 1950 which were to function as ad hoc courts to punish "local despots, bandits, special agents, counterrevolutionaries, and criminals who violate the laws and orders pertaining to agrarian Reform." These tribunals could make arrests, detain subjects, impose the death penalty, and other penalties. Mass trials, accusation meetings, and "big meetings to announce the sentence" were used to dispense justice. Each forum could involve up to tens of thousands of people.

In the early years, North Vietnam also used "special people's courts" empowered to try counterrevolutionary elements, or anyone acting against agrarian reform and impose death penalties.

After the 1959 revolution, Cuba introduced “revolutionary tribunals” to try members of the previous regime for murder, torture, and other atrocities, but their jurisdiction was eventually extended to the crimes of alleged insurgents. Marked by summary procedures and the power to impose capital punishment, these courts were staffed by a mixed bench of professional and lay judges, with the latter composed of soldiers, civilian militia members, and representatives from the Ministry of Interior.

Cuba also continues to use special “summary proceedings” in the trials of dissidents and those charged with crimes threatening state security. These trials are closed to the public, take place days after arrest and pursuant to exceedingly lax evidentiary rules with a limited right to counsel. They always result in conviction.

The overwhelming penal theory behind “enemy criminal law” is a combination of special deterrence (the commitment to a concentration camp or immediate execution) with general deterrence: the reign of terror and Stalin’s show trials were definitely designed to induce obedience in the general population.

#### 4. Establishment of the “socialist rule of law” under the reign of Joseph V. Stalin

By the time Stalin had consolidated his power and proclaimed that socialism could be created in one country, without waiting for the victory of socialist revolutions in the more developed countries of Western Europe, the utopian theory of the “withering away” of the state propounded by Marx, Engels, Lenin, and Pashukanis was rejected in favor of the idea of a “socialist rule of law.”

The main proponent of this new legal ideology was Andrey Vyshinskiy (1883–1954). He held the positions of Minister of Justice, Prosecutor General of the USSR, and, in the end, was a diplomat involved in the negotiations surrounding the founding of the United Nations. He was also the chief prosecutor in many of the most prominent “show trials,” including that of Pashukanis.

Vyshinskiy wrote: “Over the course of years an almost monopolistic position in legal science has been enjoyed by a group of persons who have turned out to be provocateurs and traitors—people who actually knew how to contrive the work of betraying our science, our state and our fatherland under the mask of defending Marxism-Leninism.” He denounced the “Trotsky–Bukharin band headed by Pashukanis, Krylenko, and a number of other traitors.”

The “socialist state” was now semi-permanent and its ruling clique, the Communist Party, needed its own “rule of law” for its state, much as the capitalist classes supposedly used the “bourgeois” state to maintain its economic and political hegemony.

This new “socialist law” required socialist legal education and legally trained judges, prosecutors, and criminal investigators, instead of amateurs inspired by

“revolutionary consciousness.” It required criminal codes and criminal punishment. Special prevention gradually took a backseat to retribution and general deterrence. Parole was eliminated in 1938.

Once Stalin and his successors accepted that their socialist rule of law was not transitory, and had to be administered by professionals, the unsuccessful prosecutions which ended in dismissals or acquittals due to the incompetence of the amateur officials became unacceptable. Acquittals were considered to be a blemish on the system and virtually disappeared.<sup>7</sup>

Indeed, the emphasis on general deterrence required that criminal trials be less exercises in ascertainment of the “material truth” of the charges, than vehicles to educate the populace in how properly to behave in the socialist community and be a productive member thereof. Thus, we have the great “show trials” conducted against the Old Bolsheviks or other “enemies of the people” of dangerous stature, and smaller “demonstration” trials conducted in factories, worker’s collectives, collective farms, etc. To ensure the trial’s educational value, however, the state had to fix the result of the trial at the outset.

As was stated in § 3 of the Principles of Court Organization (1938):

In applying criminal measures, the court punishes not only the criminals, but aims also at their correction and reeducation. Through its total activity the court educates the citizens of the USSR in the spirit of dedication to the homeland and to socialism, in the spirit of an exact and strict fulfillment of Soviet laws, a careful attitude toward socialist property, to labor discipline, an honest approach to state and social duty, and to heeding the rules of socialist community.

Since the purpose of trials was predominantly education of the public and repression of “socially dangerous” people, rather than the ascertainment of truth, Soviet law rejected “bourgeois” concepts such as the presumption of innocence, the privilege against self-incrimination, the right to counsel, and, in practice, even the possibility of acquittal.

This Soviet criminal justice system was adopted in most part by Poland, Hungary, Czechoslovakia, East Germany, Bulgaria, and Romania after World War II. Although all these countries quickly “de-Sovietized” after the “velvet” revolutions of 1989. Soviet criminal law (and procedure) begin to “wither away” however, to be replaced by more conventional democratic rule of law forms with the ascendancy of Mikhail Gorbachev (b. 1931) to the post of General Secretary of the CPUSSR in 1985 and his “restructuring” or *perestroika* of Soviet society, until the Soviet state itself withered away in December 1991.

After the Cultural Revolution and the death of Mao Zedong, a turn to “socialist legality” finally began in China under the leadership of Deng Xiaoping (1904–1997) as the country, while maintaining the Communist Party dictatorship in the political

<sup>7</sup> Peter H. Solomon, Jr., *Soviet Criminal Justice Under Stalin* (1996), 371.

realms, gradually began moving to a market economy. The first Penal Code and Code of Criminal Procedure were finally enacted in 1979.

### III. GENERAL PRINCIPLES OF SOVIET CRIMINAL LAW (THE GENERAL PART)

#### 1. Introduction

In this section I will discuss the general principles of Soviet criminal law which distinguish it from Western criminal law systems, whether of civil law or common law heritage. Tsarist Russia was clearly in the civil law realm and today's Russian Federation, though firmly back in civil law tradition, has, like many other countries reforming their criminal justice systems, moved closer to the common law in adopting adversarial procedure, plea bargaining, and, in Russia's case, a reintroduction of jury trial. I will, however, note where Soviet principles continue to play a role in Russian criminal law today.

As I discuss Soviet criminal law legislation and practice from 1917 through 1991 I will trace the rise and fall of principles that derive from utopian Marxist thought, the crude strains of enemy criminal law, or the instrumentalist Stalinist "socialist rule of law." In the last analysis, it is the amalgam of these three ideological approaches that constitutes "Soviet criminal law."

The death penalty, not only for murder (as in the United States) but for a wide swath of crimes against the socialist state and way of life, was also a part of socialist criminal law. Although most Western European countries had abolished the death penalty by the early 1980s, every socialist country maintained it until the German Democratic Republic abolished it in 1987, with the rest of the Southern and Eastern European members of the socialist bloc following suit after 1989, and most of the post-Soviet republics falling into line in the last 20 years. The remaining socialist countries—North Korea, China, Vietnam, and Cuba—all still use the death penalty.

Throughout this section, and the following section dealing with the Special Part, I will refer, primarily, to the following important pieces of legislation: (a) the Guiding Principles of the Criminal Law of the Russian Soviet Federated Soviet Republic (RSFSR) of 1919 (Principles (1919));<sup>8</sup> (b) the Criminal Code of the RSFSR

<sup>8</sup> Decree of the People's Commissariat of Justice, Dec. 12, 1919, SU (1919), No. 66, item 590.

of 1922 (CC (1922));<sup>9</sup> (c) the Principles for Criminal Law Legislation of the USSR and Union Republics of 1924 (Principles (1924));<sup>10</sup> (d) the Criminal Code of the RSFSR of 1926 (CC (1926));<sup>11</sup> (e) the Principles of Criminal Law Legislation of the USSR of 1958 (Principles (1958));<sup>12</sup> and (f) the Criminal Code of the RSFSR of 1960 (CC (1960)).<sup>13</sup>

However, the aforementioned codes, were supplemented, especially during Stalin's rule, by ad hoc laws, resolutions of the Supreme Court and other government bodies, and even secret regulations issued by government or party organs. For Stalin, the codes were the "conduct rules" for educating the people and deterring crime, the secret directives were the "decision rules" for administering them.

## 2. Goals of the criminal law

The Principles (1919), consisting of only 27 paragraphs, constituted the first attempt to lay out a General Part of criminal law after two years without codes, with judges relying on "revolutionary consciousness" to suppress anti-regime forces.

§ 3 Principles (1919) pronounced that the task of Soviet criminal law was "to protect, through repression, the system of social relations which corresponds to the interests of the workers as the dominant class in the transition from capitalism to communism, the dictatorship of the proletariat." Until the promulgation of the CC (1922), this task had to be accomplished without a Special Part of the CC, that is, without statutory offenses with clearly delineated elements. This goal is clearly instrumental or utilitarian and reflects the Marxist notion that "law" will still be necessary during the transitional dictatorship of the proletariat. Criminal law will be needed for class purposes, thus also encompassing its use as enemy criminal law.

In later formulations, the mention of the "dictatorship of the proletariat" disappears, with the goal of the criminal law being the protection of: the "government of the workers" from "crimes and socially dangerous elements" (§ 5 CC (1922)); or of the "socialist state of workers and peasants" against "socially dangerous acts (crimes)" (§ 1 CC (1926)). Finally, in post-Stalinist legislation, the goal becomes the protection of the "Soviet social and state structure, socialist property, the individual and rights of the citizen, and the entire socialist legal order" against "criminal acts" (§ 1 Principles (1958); § 1 CC (1960)). The USSR has become a state of all the people,

<sup>9</sup> SU (1922), No. 15, item 153.

<sup>10</sup> SZ (1924), No. 24, items 205 and 206.

<sup>11</sup> SZ (1926), No. 80, item 600.

<sup>12</sup> Vedomosti Verkhovnogo Soveta SSSR (1959), No. 1, item 6.

<sup>13</sup> Vedomosti Verkhovnogo Soveta RSFSR (1960), No. 40, item 591. Criminal codes were within the competence of the Soviet republics and the criminal codes of the RSFSR, by far the largest and most influential Soviet republic, will be my reference point. The "Principles," on the contrary, were Union-wide in their application.

not just workers and peasants, and with no hint of transitoriness. Enemy criminal law and Marxist utopianism have faded.

### 3. Judicial discretion in the Soviet definition of crime

Even with the promulgation of the first criminal code (CC (1922)), the imprint of the utopian “anti-law” period was still apparent. It set forth two principles which rendered the definition of crime incredibly malleable: judicial discretion (in the form of “revolutionary conscience” or “socialist legal consciousness”), and the use of analogy.

#### a) *Judging according to “revolutionary conscience” or “socialist legal consciousness”*

Even before the Principles (1919), Decree No. 1 on the Courts, provided that “local courts will only be guided in their decisions and judgments by the laws of the old government to the extent that they have not been eliminated by the revolution and do not contradict revolutionary conscience and revolutionary legal consciousness.” Decree No. 2 on the Courts of March 7, 1918, bound local courts to apply “socialist” legal consciousness and informal justice principles. § 9 CC (1922) instructed judges to sentence according to their “socialist legal consciousness” while “observing the guiding principles and articles” of the Code.

#### b) *Analogy*

The ability to condemn someone after they have committed a dangerous act not rendered punishable by the Code is a version of convicting based solely on “revolutionary conscience.” It violates the principles of legality and *nulla crimen sine lege*.

Punishment by analogy was allowed by § 10 CC (1922) and § 16 CC (1926), though it was seldom used. Crimes were vaguely defined in order to give state organs maximum flexibility in apprehending and convicting “enemies of the people.” The effect of the doctrine of analogy was to widen the already wide definition of political crimes listed in § 58 CC (1926) (see Section IV.2.b).

The legitimacy of the use of analogy and “revolutionary conscience” was eventually called into question by Soviet legal theorists, the most prominent of whom was Mikhail S. Strogovich (1894–1984). Writing in the 1940s and 1950s, he demanded that courts should punish only criminal acts included in the Code, and not status or class affiliation, and should seek to ascertain the truth of such charges and given written reasons based on evidence presented in court. His ideological opponent was Vyshinsky, who thought material truth could not be reached and that socialist legal consciousness was needed to correct the law to achieve political aims.

Poland, East Germany, Czechoslovakia, and Hungary never introduced analogy though they did, by and large, adopt the Soviet system of criminal law after World War II. *Nulla crimen sine lege* was finally recognized, and analogy eliminated, in the CC (1960).

Analogy and “revolutionary conscience” also played an important role in the early decades of the People’s Republic of China and unified Vietnam. Analogy was only eliminated in 1985 in Vietnam and 1997 in China.

#### 4. *Actus reus* and social dangerousness

§ 6 Principles (1919) described a crime not as the violation of a formal normative prohibition, but as an “act or omission dangerous for the given system of social relations,” implying that the definition of crime may fluctuate with changes in the country’s social relations. This sociological, rather than psychological, approach paved the way for the instrumental use of criminal law not only to crush the regime’s perceived enemies, but also to facilitate the industrialization of Soviet society.

This material approach to criminal law was followed in all the Soviet codes and has even been maintained in the post-Soviet Criminal Code of the Russian Republic. § 6 CC (1926) also allowed for dismissal of *de minimis* crimes even though the elements of an offense were provable, if the act committed lacked the requisite social dangerousness and this provision remained part of Soviet and later Russian law. § 8 CC (1926) also provided for dismissal if the actor or the crime was no longer considered to be socially dangerous at the time of trial. The same applied in § 43(1) Principles (1958) and § 50 CC (1960).

The Principles (1919) require an “act or omission,” but this restriction became foggy over the years as enemy criminal law required the punishment of people due to their status. The goal of the criminal law to protect against “socially dangerous elements” (§ 5 CC (1922)) intimates that a voluntary act or omission may not have been a prerequisite for imposing sanctions. Persons considered dangerous due to their past criminal conduct or association with a criminal milieu could be subject to punitive measures (§ 7 CC (1926)), including banishment or restrictions on where they could live (§ 49 CC (1922); § 22 Principles (1924)). Acquitted persons could also be subject to the sanction of a “warning” (43 CC (1926)).

However, the Supreme Court of the RSFSR in 1927 decided that one could not be banished or exiled based on status alone, without having committed a criminal act and the post-Stalinist § 3 Principles (1958), clearly require that: “Criminal responsibility and punishment may be imposed only on a person, who is guilty of the commission of a criminal act, that is, intentionally or negligently commits a socially dangerous act that is provided in the criminal law.”

The emphasis on social dangerousness, rather than the morally laden and individualistic notion of personal guilt, is one of the most typical and lasting characteristics of Soviet criminal law.

## 5. *Mens rea*

### a) *Intent and negligence (carelessness)*

The early Soviet codes reflect the Marxist attempt to break from the concept of psychological guilt and retributive punishment or “just deserts” and to move to a sociological analysis of social dangerousness in objective terms. In many ways, this came close to a denial of the inner or mental element of crime, or *mens rea*. Soviet courts vacillated from imposing strict liability for harm caused to insisting on guilty intent.

Whether a crime was committed intentionally, knowingly, or negligently, was, according to § 12(v) Principles (1919), seen more as a factor in imposing punishment, than an element of the offense committed. Thus, pursuant to § 11 CC (1922), to be “punished” one must have acted (a) intentionally, that is, foresaw the results of his acts and desired, or consciously allowed, them to take place or (b) acted carelessly, that is, foolishly thought he could prevent the results of his acts or negligently failed to foresee the deleterious results. In the CC (1926), however, renowned as the Code “without guilt or punishment”, § 10 requires one of the same mental states to “apply a measure of self-defense of a judicial-corrective character,” the Code’s paraphrase for “punishment.” Even in the many Special Part offenses where causing serious injury or death aggravates punishment, the actor must at least be “careless” with respect to the aggravating result to merit the enhanced punishment. The Soviet definitions of mental states—intentional, knowingly, or carelessly (*neostorozhno*) are borrowed directly from the terms used in most civil law countries and have not been affected by Marxist thought.<sup>14</sup>

### b) *Mental illness and diminished capacity*

Those suffering from a chronic mental illness or a temporary psychic disturbance at the time of their act, or who suffered from mental disease at the time of judgment, could neither be punished under § 17 CC (1922) nor be subject to measures of social defense of a judicial-corrective character under § 11 CC (1926). They could, however, be subject to other “measures of social defense of a medical character.”

Nevertheless, alcoholic intoxication was never treated as a factor which could eliminate or mitigate guilt, or lead to a reduced punishment. Abuse of alcohol has long been endemic in Russian culture and been the cause of poor work habits,

<sup>14</sup> The same approach is still used in post-communist Russia. Stephen C. Thaman, “Russia,” in Kevin John Heller and Markus D. Dubber (eds.), *The Handbook of Comparative Criminal Law* (2011), 420–422.

violence, and low life expectancy. Yet the taxes on alcohol, especially vodka, were a major source of revenue for the tsarist and Soviet regimes, and still are in today's Russian Federation. Until 1969, drunkenness could aggravate punishment only if it enhanced the social dangerousness of an act yet, thereafter, drunkenness became a general aggravating factor in sentencing (§ 10 CC (1960)).

### c) *Treatment of children, juveniles*

Pursuant to § 18 CC (1922), minors younger than 14 years when they committed the act cannot be punished, and those aged 14 or 15 can normally only be subject to medical or pedagogical measures and not punishment. The same limits were originally included in the CC (1926). If children had to be punished, the punishment was discounted by one-half for 14- and 15-year-olds and by one-third for 16- and 17-year-olds.

However, an edict of April 7, 1935, "On the Struggle against Juvenile Crime," lowered the minimum age of criminal responsibility to 12 years for a short list of common crimes and made children face trial in the normal courts and made them subject to the same penalties as adults. Age-based discounts were abolished by edict on November 25, 1935. The juvenile commissions which handled juvenile cases were also abolished.

## 6. Inchoate crimes and accomplice liability

While the Soviet definition of what constitutes an "attempt" or "preparation" of a crime does not diverge from definitions found in the civil law world, all of the Soviet codes, due to the focus on social dangerousness, applied the same punishments as for a completed crime. However, if the actor renounced his or her criminal intentions before the crime was committed, he or she could not be punished for preparation or attempt, but only where the acts already committed constituted a distinct criminal offense (§ 19 CC (1926); § 16 CC (1960)).

In relation to accomplice liability, Soviet law, which differentiated between executors (principals), instigators, and aiders and abettors, also did not allocate different sentences based solely on the level or quality of the aid provided toward commission of the offense, but solely on the social dangerousness of the defendant, no matter which role he or she played in a crime's commission (§§ 21–24 Principles (1919); § 18 CC (1926)).

## 7. The Soviet theory of punishment

### a) *The broad use of discretion in general*

The first Bolshevik decrees in relation to punishment were vague and allowed great discretion. Examples are where the guilty person will "receive a severe punishment,"

will “get a punishment that corresponds to the gravity of the deed,” or “will be punished with the full toughness of the revolutionary law.”

According to § 7 Principles (1919), punishment was described as “measures of coercion through which the state power protects the given social relations against criminals.”

This “repression” was not seen as retribution in the name of justice, but mere “coercion.” § 10 Principles (1919) stated that “in selecting punishment, one must take into consideration, that criminality is caused in class society by the circumstances of social relations in which the perpetrator lives,” and that “punishment is not retribution for guilt, not penitence for guilt” but “as a protective measure, punishment should be goal-oriented and at the same time without pain, and should not impose on the perpetrator any unnecessary or superfluous suffering.”

Even with the CC (1922), the most important sentencing principle was judicial discretion. Most articles gave judges a broad choice of sanctions, a spectrum of terms of custody, and noncustodial options, as well as “compulsory work” to be chosen according to their “socialist legal consciousness.” Throughout Soviet history, judges could also sentence below the statutory minimum in exceptional cases and this discretion continues to exist in post-communist Russia.

Another use of judicial discretion was the power to dismiss a case with conditions, similar to what is called “diversion” in the United States. In cases of minor crimes, the court could “liberate” the accused from criminal responsibility and refer the case either to a “comrades’ court,” a lay court often within a collective farm or workers’ collective, or to the custody of a person for the purpose of supervising the conduct of the accused and ensuring the fulfillment of non-criminal measures (§§ 51, 52 CC (1960)). These courts were used in the early years of the USSR and then reinstated in 1959.

#### b) *Class as an aggravating or mitigating circumstance*

Crucial, for the two-lane class-based approach to sentencing was § 12(a,b) Principles (1919) which asks the judge to determine “if the act was committed by a person who belonged to the propertied class and was committed with the goal of restoring, maintaining or obtaining privileges bound with the private property owning class, or whether by a propertyless person motivated by hunger or necessity” or “in the interest of restoring to power the vanquished class.” § 31 (a,b,v) Principles (1924) contained similar language. § 32(b) Principles (1924) also made it a mitigating factor if the actor was a worker or working peasant. In the following section on the Special Part we will see how rich peasants (*kulaks*) were subjected to aggravated punishments for theft, solely due to their class adherence.

The aggravating and mitigating circumstances based on class did not make it into either the CC (1922) or the CC (1926), however, and were criticized as being “vulgar Marxist” principles. Article 4 of the Soviet Constitution of 1936, dubbed the

“Stalin Constitution,” proclaimed that the “exploitation of man by man” had been abolished, that is, that classes no longer existed. As we shall see in the discussion of the Special Part, workers were actually subject to some of the most draconian punishments during Stalin’s forced industrialization of the country.

c) *Other aggravating circumstances and mitigating circumstances*

Other than the specific Soviet or “Marxist” aggravating circumstances related to class mentioned previously, Soviet law provided for aggravating circumstances that were very similar to those found in Western democratic penal codes. Soviet mitigating circumstances, other than those based on class, are also not dissimilar to those found in Western codes.

The mitigating circumstances of hunger and need, however, disappeared in the Principles (1958) and the CC (1960), supposedly due to the fact that need had been eliminated by that time!<sup>15</sup>

## 8. Soviet punishments and measures of social protection

a) *Non-custodial punishments and measures of judicial–corrective character*

Other than deprivation of liberty and the death penalty, § 33 CC (1922) provided for expulsion from the country (exile) for a term or forever, forced labor without imprisonment, probation (conditional punishment), confiscation of property, fines, loss of rights, professional prohibitions, public reproach, and restitution. Among the “measures of judicial–corrective character” in the CC (1926) were also “declaration as an enemy of the workers,” loss of citizenship, and expulsion from the country (§ 20(a) CC (1926)), a larger gamut of internal exile and banishment provisions and “warnings” (§ 20(o) CC (1926)).

From the early 1920s to the beginning of World War II, it was likely that a person convicted of a crime would receive a lenient, usually noncustodial, sanction. 80% of those convicted in court in the early 1920s received a sentence of compulsory labor without deprivation of liberty which, per § 35 CC (1922), could last from a week to a year.

b) *Deprivation of liberty*

In the early Soviet years, deprivation of liberty was considered to be an exceptional punishment for workers, peasants, or other common people and only to be imposed as the *ultima ratio*. For the class enemy or enemy of the people, however, the typical

<sup>15</sup> Ulrike Schittenhelm, *Strafe und Stanktionensystem im sowjetischen Recht* (1994), 215.

punishment was deprivation of liberty, or death penalty by shooting. Since jail sentences were considered to go against the preventive goal of rehabilitation, a minimum sentence of six months was first set in the CC (1922), but was reduced to one month in 1923, seven days in 1924, and one day in the CC (1926), only to be raised to three months again in § 24 CC (1960). The reason for these short prison sentences was that neither fines, forced labor without confinement, nor suspended sentences were realistic alternatives in the early Soviet era.<sup>16</sup>

The percentage of sentences to deprivation of liberty gradually rose because there were insufficient work opportunities for a sentence to compulsory labor without confinement. By 1926, 40% received terms in prison, usually only for a number of months, up from around 20% in previous years, though the rate fell to around 9.6% in 1928 and 1929. However, with the Law of August 7, 1932 (see Section IV.3), rates of imprisonment jumped to 29% in 1933 and up to 67% in 1941, with the average terms being considerably longer.<sup>17</sup>

The USSR never had a punishment of life imprisonment because prisoners were always considered to be subject to rehabilitation. The longest prison sentence was originally ten years (§ 18 Principles (1919); § 34 CC (1922); § 28 CC (1926)), though the maximum was raised to 25 years in 1937 for some political crimes, but in § 23 Principles (1958) the maximum was again lowered to ten years for normal crimes, and 15 years for especially dangerous recidivists and those convicted of especially grave crimes, such as aggravated murder. Vietnam, unlike the USSR and most other socialist regimes, did provide in general for longer prison sentences and life imprisonment for murder and other serious crimes.

In the mature Soviet system there were three basic types of deprivation of liberty: (a) settlement colonies, more like half-way houses, where low-level prisoners could work, live with their families, and leave for schooling; (b) corrective labor colonies, for higher security prisoners; and (c) prison (*tiur'ma*), since 1936 for dangerous recidivists sentenced to more than five years for grave crimes.

Solzhenitsyn maintained that the system of Soviet concentration camps was first conceived by Lenin in the decree, "Temporary Instructions on Deprivation of Freedom," of July 23, 1918. In a letter of August 1918, Lenin expressed his position: "Lock up all the doubtful ones in a concentration camp outside the city" and "carry out merciless mass terror." Solzhenitsyn claimed that this was the first time the term "concentration camp" was used in relation to one's own citizens.<sup>18</sup>

Soviet law always allowed early release from prison after having served a set percentage of the sentence. In the last variant (§§ 44, 44-1 Principles (1958); §§ 53, 53-1 CC (1960)), the condition for release was that "the actor has shown his correction through exemplary conduct and an honest approach to work." Here one again sees the Soviet emphasis on rehabilitating prisoners to play a role in the country's

<sup>16</sup> Schittenhelm (n. 15) 63, 90, 113.

<sup>17</sup> Solomon (n. 7) 52, 223–224, 229.

<sup>18</sup> Aleksandr Solzhenitsyn, *Gulag Archipelago*, Vol. 2 (1979), 14–21.

economy, although those sentenced to corrective labor colonies—the GULAG—actually were the primary workforce in the industrialization of the USSR.

*Laogai*, or “reform through labor” which was aimed at transforming criminals into productive citizens, was the main sanction imposed in the People’s Republic of China for convicted criminals, or those just administratively detained. Although re-education was the main goal of criminal justice in China, in 1956 Mao stated that some counterrevolutionaries had to be killed: “because they were deeply hated by the masses and owed the masses heavy blood-debts.” From 1952 to 1962, around ten million prisoners died in Chinese re-education and prison camps from malnutrition, being worked to death, or from execution.

Even after the 1997 reforms in China, minor offenders could still be administratively committed to terms of “re-education through labor” of up to four years without even invoking the protections of the criminal justice system.

Socialist North Vietnam also had a broad system of “re-education” camps. Decrees in 1961 permitted unlimited detention in three-year renewable periods for the re-education of “counterrevolutionary elements” who threatened public security, among them “professional scoundrels,” defined as persons who earned a living by criminal means, such as thieves, pimps, and recalcitrant hooligans who had “refused to mend their ways” after being subjected to re-education measures not involving incarceration. Similar measures were applied to South Vietnamese collaborators with the U.S.-supported regime after the North’s victory in 1975.

### c) *Banishment, exile, restrictions on residence*

Expulsion from the country or republic (*vysylka*) or internal banishment or exile (*ssylka*) in places like Siberia has a long tradition in Russia. § 36(a) CC (1922) and § 20(e) CC (1926) provided for a punishment or sanction of “expulsion from the USSR for a term or forever.” § 20(zh) CC (1926) included a measure for internal exile (i.e. in Siberia).

The maximum length of banishment was originally 15 years but was eventually reduced to ten. Banishment and exclusion from a place could be imposed as the main, or as a supplementary, punishment. These punishments remained on the books until *perestroika*.

### d) *The death penalty*

Russia has always had an ambivalent attitude toward the death penalty. Empress Elizabeth, for instance, abolished it in 1753 but it kept coming back until it was abolished by the interim government of Alexander Kerensky after the overthrow of the tsar in February 1917. Although the Bolsheviks suspended the death penalty shortly after their seizure of power, it was reintroduced on June 16, 1918, to be used by the revolutionary tribunals and the CHEKA during the “red terror” of the years of “war communism.” Lenin claimed that “no one can be revolutionary and repudiate the

death penalty.” § 9 Principles (1919) provided: “The protection of society against future criminal acts of someone who is subject to punishment can be achieved either through his adjustment to the given social order or, when the perpetrator does not adjust, through isolation and in exceptional cases through physical extermination.” Although the death penalty was again abolished by decree after the end of the Civil War in January 1920, it was reauthorized five months later.

§ 33 CC (1922) and § 21 CC (1926) foresaw death by shooting, “until its repeal,” as the punishment for the most serious crimes which threatened the foundations of the Soviet state. The CC (1960), at its most repressive, provided for the death penalty, “until its repeal” for 17 different offenses, including some economic offenses. Executions reached a high of 2,000 a year in the 1960s then dropped to 1,000 per year from the early 1970s to the mid-1980s. The death penalty is still on the books in the Russian Federation but there has been a moratorium on executions since 1996 due to Russia’s ratification of the European Convention on Human Rights.

One official estimate was that 9,641 persons were executed following court trial from December 1917 through February 1922, the period of “war communism,” but others put the figure at from 25,000 to 150,000. Of course, the numbers executed by the CHEKA and other administrative organs was much greater. The number of executions following court verdicts during Stalin’s reign is estimated at somewhere between 700,000 and 800,000. It has also been estimated that from 1960 to 1981 2,000 to 3,000 persons were executed each year, with the number falling to around 750 a year from 1982 through 1989.

In the early 1950s in China, 95% of all crimes carried the death penalty, life imprisonment, or imprisonment for a term. An estimated four million arrests were made by popular tribunals and around one-quarter of those arrested were executed. The death penalty was carried out immediately, usually in public, with a bullet in the nape of the neck. The Criminal Code of China of 1997 still has 68 crimes which are punishable by death, 20 of which are economic offenses, such as bribery or embezzlement, which can end in the death penalty if the loss amounts to more than 100,000 RMB (\$14,500).

## IV. THE SPECIAL PART OF SOVIET CRIMINAL LAW

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### 1. Introduction

The really distinctive aspect of the Special Part of Soviet law is to be seen in three areas: counterrevolutionary crimes (always the first to be mentioned in the Special

Part), or crimes against the Soviet way of life, economic crimes (including theft of state property), and crimes by officialdom. Otherwise, crimes against the person such as murder, assault, sexual assault, etc., will only be mentioned in passing where pertinent.<sup>19</sup>

## 2. Counterrevolutionary crimes and crimes against the Soviet state and way of life

### a) *Introduction*

Since all states punish high treason and other crimes against state power or the constitution, it is important to distinguish those provisions of Soviet law which go beyond the norm and are framed in vague terms which permit “flexible” application to dissidents or non-conformists of diverse stripes. Typically Soviet, in this context, is the threatened punishment of all adult members of the family of someone who is guilty of treason with loss of civil rights or being exiled to Siberia or other outlying regions for up to five years (§ 58(1v) CC (1926)).

### b) *Counterrevolutionary crimes and anti-Soviet agitation*

§ 57 CC (1922) described “counterrevolutionary acts” as not only those aimed at overthrowing Soviet power and the Soviet state, but also acts which are “aimed at helping that part of the international bourgeoisie which does not recognize the equal rights of the communist system of property which has arrived to replace capitalism, and strives to overthrow it through interventions or blockades, espionage, financing of the press or other similar means.” §§ 60, 61 CC (1922) provide for a possible death penalty for anyone participating in such acts, or aiding organizations which “help the international bourgeoisie.” § 58(1,4) CC (1926) contains similar language.

§§ 69, 70 CC (1922) punished “propaganda and agitation” whether to “overthrow the Soviet power” or for “helping the international bourgeoisie.” § 72 CC (1922) punished the “preparation, possession with intent to distribute, and distribution of agitational literature of a counterrevolutionary character” and § 73 punished “conceiving and distribution of untrue rumors or unproven information with counterrevolutionary goals, which could give rise to social panic, or lack of trust in the government.”

The infamous § 58(10) CC (1926), which was in force throughout Stalin’s reign, contained similar language, and provided for the “highest form of social defense,” that is, the death penalty, if the propaganda, agitation, or literature contained religious or nationalistic content or the acts were committed during times of war or

<sup>19</sup> On the modern Russian approach to crimes against the person and sexual assault, which is similar to the approach in Soviet times, see Thaman (n. 14) 435–440.

emergency. Solzhenitsyn gave examples of conduct that led to punishment under § 58(10) CC (1926): putting a noose around a bust of Stalin better to carry it (ten years), a shepherd calling a cow a “collective-farm whore,” a deaf and dumb carpenter hanging his coat on a bust of Lenin (ten years), drinking heavily because of hatred of the Soviet government (eight years); praying in church for the death of Stalin (25 years), or saying Pushkin was a better poet than the Soviet icon Mayakovsky (15 years).<sup>20</sup>

Anti-Soviet agitation continued to be punished by § 70 CC-RSFSR (1960), although no longer with the death penalty.

The crime of “undermining state industry, transport, commerce, or the monetary or credit system, or using state enterprises with counterrevolutionary intent,” sometimes called “wrecking” was also punishable by death (§ 58(7) CC (1926)), though a similar offense in post-Stalinist times was no longer punishable by death (§ 69 CC (1960)).

Up until the late 1970s, the 21 Articles of China’s “Statute on Punishment for Counterrevolutionary Activity” of February 20, 1951 was the closest thing to a criminal code. “Counterrevolutionary” was defined as “any activity that aims at overthrowing or undermining the democratic dictatorship of the people and the socialist system and therefore puts the People’s Republic of China in harm’s way.”

Like other socialist penal codes, the CC-Vietnam (1985) penalized a wide range of conduct as crimes against the state, which included “propaganda against the socialist regime,” or “production, possession, or distribution of documents or cultural articles whose content is directed against the socialist system.”

In 1999, Cuba passed a law in response to a drastic tightening of the U.S. trade embargo, which punishes by up to 20 years any “actions designed to support, facilitate, or collaborate with the objectives” of the embargo and the “economic war” against Cuba, which can include possessing, distributing, or reproducing “material with a subversive character” from a foreign government or collaborating with foreign media that “destabilizes the country and destroys the socialist state.”

### c) *Crimes against the socialist way of life*

#### *Parasitism*

Adults could be punished as “parasites” if they lived off income not based on their own work and actually refused to do socially necessary labor per § 209 CC-RSFSR (1960). These specific laws were first introduced in 1957. A first violation could lead to a warning, but further violations could trigger banishment from one’s place of residence with a duty to work from two to five years. This punishment was administrative and issued by local committees or village Soviets and could not be appealed to the courts.<sup>21</sup>

In 1970, along with § 209 CC (1960) which punished begging and vagrancy, § 209-1 CC (1960) was introduced which criminalized stubborn refusal to engage in socially useful labor. It was punished by deprivation of liberty of up to one year, and

<sup>20</sup> Solzhenitsyn (n. 18) 279–281.

<sup>21</sup> Schittenhelm (n. 15) 222–223.

up to two years for repeat offenders. In 1975, § 209-1 CC (1960) was repealed, and parasitism was incorporated into § 209 CC (1960) as the crime of living a “long-term parasitic lifestyle,” defined as gaining one’s livelihood from illegal sources, such as prostitution, speculation, gambling, fortune-telling, begging, profits from renting one’s house or car, etc. Dissidents, such as the poet Joseph Brodsky (1940–1996) were sentenced under these provisions.<sup>22</sup>

Cuba has criminalized the failure to work, which can result in a sentence of up to two years of forced labor. Gays and lesbians were also punished with up to four years’ forced labor for “dangerousness” (*peligrosidad*), defined as “having a special proclivity to commit crimes, demonstrated by behavior that clearly contradicts socialist norms.” Homosexuality was considered to be deviant, against socialist morality, and even “counterrevolutionary.”

### *Hooliganism*

The crime of “hooliganism” takes its name from the drunken exploits of Irish seamen and became a peculiarly Soviet-Russian crime. *Khuliganstvo* originally began as an offense aimed at drunk or disorderly conduct which disturbed the peace. It normally involved rowdy conduct that escalated into personal injury or property destruction and nearly all those prosecuted were intoxicated at the time of the offense.

In the CC (1922) hooliganism was characterized as a crime against “life, health and dignity.” Hooliganism was originally tried in the village or comrades’ courts and most sentences were to forced labor without confinement or very short jail sentences.<sup>23</sup>

Traditionally, “hooliganism” was described as “gross mischief and drunken boldness, and striving in an acute way to show one’s power and strength, a desire to show disdain to those around one, to draw attention to oneself with one’s cynical behavior.” In the last Soviet code, “hooliganism” was described as “intentional acts which grossly violate social order and express a clear disrespect for society.” An aggravated form, “malicious hooliganism,” applied to those with prior hooliganism convictions, those who acted against representatives of the state or social organizations, or whose conduct “distinguishes itself by its unmistakable cynicism or audacity” (§ 206 CC (1960)).

An edict of August 10, 1940, aimed at hooliganism and theft in factories, led to the amendment of § 74 CC (1926) and the setting of a five-year maximum for aggravated hooliganism in the workplace. During the campaign triggered by the edict, nearly all those convicted of hooliganism received a term of imprisonment.<sup>24</sup>

When the death penalty was introduced for aggravated murder, “hooliganistic motivation” became one of the aggravating factors (§ 102(b) CC (1960)).<sup>25</sup>

<sup>22</sup> Schittenhelm (n. 15) 255–256.

<sup>23</sup> Solomon (n. 7) 58, 132–133.

<sup>24</sup> Solomon (n. 7) 331–332.

<sup>25</sup> On “hooliganism” in modern Russian law, Thaman (n. 14) 448–449.

### 3. Crimes against property: the priority of socialist property over private property

The definition of theft in Soviet law followed tsarist law and distinguished between “secret” (*krazha*) and “open” takings (*grabezh*).<sup>26</sup> Characteristic of Soviet law, however, is the distinction made between crimes against private and socialist property.

In the USSR, due to replacement of private ownership of the means of production by state ownership, crimes against state property were punished more severely than crimes against private property. Crimes against state property were really “economic” crimes, and indirect crimes against the state.

Thus, § 79 CC (1926) punished non-aggravated destroying or damaging of property of government agencies or enterprises by deprivation of liberty of up to one year, whereas the same act against private property was punishable by only up to six months’ deprivation of liberty (§ 175 CC (1926)). Theft of private property was punishable by up to three months’ deprivation of liberty but theft of state property could be punished by up to five years’ deprivation of liberty (§ 162(a,d,e) CC (1926)). The original version of the CC-RSFSR (1960) continued this differentiation between crimes against socialist property and private property.

Criminal law was used as an instrument by Stalin in his drive to collectivize agriculture and force rapid industrialization. In 1930, it became a crime to kill your own cattle, pregnant livestock, or stock of breeding age. In March 1931, “spoiling a tractor” became a criminal offense (§§ 79-1, 79-4 CC (1926), as amended). Most notorious, however, was the law of August 7, 1932, written by Stalin himself, which preempted the provisions in the CC (1926) and referred to socialist property as “holy and untouchable” and provided for the death penalty, or, in mitigated situations, for ten years’ deprivation of liberty, for anyone who stole from state enterprises, collective farms, or cooperatives, including theft of harvest or livestock. The bulk of the prosecutions were against peasants for stealing grain during the catastrophic famine unleashed by the forced collectivization.<sup>27</sup>

Although the law of August 7 fell into disuse after collectivization, after World War II Stalin returned to draconian punishments for theft in a decree of June 4, 1947, which raised the minimum punishment for simple theft of personal property from five to six years, and that for aggravated theft from seven to ten years. For simple theft of state property, the minimum was raised from six to seven years with a maximum for repeat offenses of 25 years. Under pressure from Stalin, the Supreme Court of the USSR issued a directive in 1952 which prevented judges from sentencing below the minimum.<sup>28</sup>

After Stalin’s death, first-time petty theft was decriminalized, but the draconian sentences for theft otherwise survived until enactment of the CC (1960). Stalin’s

<sup>26</sup> On crimes against property in modern Russia, Thaman (n. 14) 440–443.

<sup>27</sup> Schittenhelm (n. 15) 160.      <sup>28</sup> Solomon (n. 7) 440.

“strike-hard” campaign against theft by workers in industrial and agricultural enterprises is perhaps the best example of the move from Marxist to instrumental criminal law. During the early Marxist period, the worker was the carrier of the revolution and the bourgeois elements were the class enemy. Under Stalin, the worker and peasant became the new serfs of an economy based on slave labor and, in a sense, became the class enemy of the owners of the means of production, the Communist Party.<sup>29</sup>

#### 4. Economic crimes

##### a) *Criminalization of entrepreneurial activity*

After the Russian Revolution, the act of “buying and selling to make a profit” was immediately criminalized, though this provision was eliminated during NEP in favor of anti-monopoly or price-fixing laws. §§ 99, 99-1 CC (1926) punished by up to two years the acquisition of products or fish with the intent of selling them for profit. § 107 CC (1926) punished sale of agricultural products for profit. After NEP, however, Soviet codes provided for criminal punishment for entrepreneurial activity up until *perestroika*. See § 153 CC-RSFSR (1960).

##### b) *Criminalization of common labor infractions*

During the Civil War the Bolsheviks used military conscription to recruit labor for their enterprises and missing or leaving work subjected conscripted workers to a criminal charge of “labor desertion” under the CC (1922). This was dropped in the CC (1926).<sup>30</sup>

In preparation for war, Stalin issued an edict on June 26, 1940, which criminalized common labor infractions, such as quitting and shirking, and raised to new levels punishments for hooliganism, petty theft at factories, and production of defective goods. Such offenses were responsible for more than two-thirds of all criminal convictions in 1940, more than one-half in 1945, and over 40% even in 1949. Any employee of a state firm who quit a regular job without permission was subject to a term of imprisonment of two to four months. The edict also prohibited the firing of workers who shirked. Any shirker who missed all or part of a day at work faced a punishment of one to six months’ corrective work with a deduction from earnings of up to 25%. To prevent workers from stealing something small from their factory in order to get fired so that they could find better work, a decree was issued on August 10, 1940, imposing a mandatory one-year prison sentence for petty theft at factories.

<sup>29</sup> e.g. the majority of workers who built the mammoth Moscow–Volga canal between Sept. 14, 1932 and Jan. 31, 1938, were prisoners sentenced to corrective labor camps for property and economic crimes, among other things. 22,842 of them died during its construction. Karl Schlögel, *Terror und Traum. Moskau 1937* (2nd ed., 2011), 374.

<sup>30</sup> Solomon (n. 7) 305.

Even though judges were reluctant to convict for these offenses, convictions for violations of the edict, mainly for shirking, amounted to 51.1% of all convictions from 1943 through 1945.<sup>31</sup>

The law punishing violation of a labor contract or arriving late at work was eliminated in 1956.

## 5. Crimes against public administration

Crimes against public administration, like “anti-soviet” activity, were sufficiently vague to be used in an instrumental way to punish those whose conduct impeded Soviet industrialization. The most common offense was § 61 CC (1926), “refusal to fulfill a duty, universal governmental task, or industrial labor having universal governmental importance” which was punishable by a fine, or on a second violation by deprivation of liberty or forced labor for up to one year, or if committed by a “kulak” element or in an aggravated manner, by up to two years’ deprivation of liberty. During collectivization of agriculture, § 61 was used to punish peasants who hoarded grain, thus forcing them to dissolve their farms and flee the countryside.<sup>32</sup>

The poor functioning of the Soviet economy, and the mistakes and accidents caused by break-neck industrialization, led Stalin and other high government officials to find scapegoats for these shortcomings. This use of the criminal law against scapegoats was a distinctive aspect of Stalin’s use of the criminal law. Individuals could be held criminally responsible not only for actions performed, but for omissions, accidents, or failures that were not intentional and not even the fault of the accused.<sup>33</sup>

Government officials prosecuted as “scapegoats” were originally charged with “abuse of power or official position” (§ 109 CC (1926)) in the case of intentional violations and under § 111 CC (1926), in the case of negligent failure to fulfill official duties. Violations of § 109 were punishable by a minimum of six months’ deprivation of liberty, and of §111 by a maximum of three years’ deprivation of liberty. But Vyshinskiy urged legal officials to charge wrecking (§ 58(7) CC (1926)) and counterrevolutionary sabotage (§ 58(14) CC (1926)) in all industrial failings. In 1937, when some products were found to be infected with ticks, Vyshinskiy declared this the work of wreckers and insisted on the death penalty for all convicted. In 1937 and 1938, many, if not most, cases involving accidents, defective goods, broken machines, or other problems of the economy were escalated from their usual status of “criminal negligence” to the potentially capital crime of “wrecking.”<sup>34</sup>

<sup>31</sup> Solomon (n. 7) 299–301, 311, 324. <sup>32</sup> Solomon (n. 7) 93.

<sup>33</sup> Solomon (n. 7) 138–139. <sup>34</sup> Solomon (n. 7) 241–242.

## 6. Crimes against the person

### a) *Homicide and sexual offenses*

The formulations of homicide and sexual offenses in the CC (1922) and subsequent penal codes were taken over directly from the 1903 tsarist draft criminal code and reveal nothing peculiarly “Marxist” or “Soviet.”

If anything, there seems to be a peculiar lack of concern with homicide, when compared with other seemingly less serious “counterrevolutionary” or “anti-Soviet” offenses. No crime of homicide even existed until the CC (1922), as the decrees passed by the commissars were dedicated solely to counterrevolutionary activities. The maximum punishment for aggravated murder remained at ten years, until § 102 CC (1960) for the first time provided for a possible death penalty. Due to the number of murders perpetrated by the Soviet authorities themselves, it is not surprising that homicide was not of particular concern to them.

### b) *Abortion*

In 1920, Russia became the first country to legalize abortion, permitting free abortions on request when performed by doctors in hospitals. Underground abortions remained criminal after 1920. The CC (1922) did, however, punish abortions performed by anyone other than a doctor or in unsanitary conditions by up to one year’s imprisonment, and provided for mandatory imprisonment of up to five years for persons who performed abortions as a trade or caused the death of the woman.<sup>35</sup>

But on June 27, 1936 Stalin issued a decree banning all abortions other than to protect the health of the pregnant woman or prevent the birth of a child with an inherited disease. Doctors faced up to two years’ deprivation of liberty if they performed abortions without a pressing medical need and self-aborting women were punished by censure and a small fine.<sup>36</sup>

The re-establishment of abortion as a crime is an example of Stalin’s use of criminal law to implement social policy. Stalin sought to raise the birth rate and remedy one of the negative consequences of his rule—the steady drop in births since 1927 caused by collectivization, deportation of family members, and the need for women to enter the workforce. Their low wages meant it was difficult to support large families.<sup>37</sup>

The criminalization of abortion by Stalin was ineffective as women refused to turn in the illegal abortionists and the courts were also reluctant to impose the required prison sentences.<sup>38</sup> In 1955, abortion became available in hospital and clinics during the first 12 weeks of pregnancy.<sup>39</sup>

<sup>35</sup> Solomon (n. 7) 214.

<sup>36</sup> Solomon (n. 7) 211, 216.

<sup>37</sup> Solomon (n. 7) 212.

<sup>38</sup> Solomon (n. 7) 221.

<sup>39</sup> Schittenhelm (n. 15) 198.

## V. CONCLUSION: THE DISAPPEARANCE OF SOVIET SOCIALIST LAW?

In December 1991, the USSR ceased to exist and was replaced by 15 independent republics. All 15 republics embarked on courses of reform, including the promulgation of new constitutions and new criminal codes. Already in 1989, the former socialist countries of Eastern and Southern Europe had renounced socialism and many also passed new constitutions and codes. They quickly shed nearly all traces of Soviet socialist law, as did the ex-Soviet Baltic countries of Estonia, Latvia, and Lithuania. Since most of these countries had essentially been colonized by the USSR and its law, it was easy for them to rid themselves of its worst aspects.

Although tendencies toward authoritarian rule are blemishing the democratic advances in some of the former Soviet republics, and democracy has completely failed to take root in most of the dynastic authoritarian former Soviet republics of Central Asia, all former Soviet republics, with the exception perhaps of Belarus, have “de-Sovietized” their criminal law. The different treatment of state and private property has by and large disappeared, and the death penalty has virtually disappeared from the post-Soviet landscape.

Russia, and many of the post-Soviet countries have, however, maintained the material definition of crime based on social dangerousness.

I stated earlier that “Marxist” notions of law could only with difficulty become the foundation of a country like the USSR or China, which had forced a socialist revolution in a country that had not benefited from capitalist development of the means of production. Thus these countries had to revert to what Marx called the “Asiatic mode of production,” that is, an economy based on slave labor. Soviet criminal law produced these slaves with its sentences to corrective labor colonies, and disciplined them when they were obliged to work in state enterprises or collective farms.

Today’s former Soviet republics are now going through a belated “bourgeois” revolution against the Soviet empire based on forced labor, which should eventually lead to the rejection of enemy criminal law and the instrumental use of criminal law for development purposes. China and Vietnam are carefully taking steps in this direction and Cuba may not be far behind. But North Korea? The only thing that might survive are some of the utopian, “liberal” aspects of early “Marxist” law.

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