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## SOVIET CRIMINAL LAW REFORM OF 1958

KAZIMIERZ GRZYBOWSKI†

The fourteen laws adopted by the Supreme Soviet on December 25, 1958, have laid the foundation for a reform of Soviet criminal law and administration of justice. However, these laws constitute only a first step in this direction. They must be followed by detailed statutes and codes enacted by the constituent republics forming the Union in order to complete the system of criminal law and judicial procedure for the entire country. This somewhat complicated procedure is necessitated by the constitutional distribution of legislative powers. Under the 1924 Constitution the Union was given the right to enact legislation outlining only the general principles of criminal law and judicial organization and procedure, while the republics were entrusted with introducing specific legislation. Although the Constitution of 1936 authorized the legislature of the Union to provide uniform criminal laws for the entire country, in 1957 a constitutional reform redistributed the legislative powers in this respect according to the pattern of 1924.<sup>1</sup>

In fact, however, the federal authorities made little use of the powers given them by the Constitution of 1936 to enact uniform laws, and the bulk of Soviet criminal legislation was passed under the rule of the Constitution of 1924. The general principles of criminal law, the judicial system, and judicial procedure in criminal matters adopted in 1924 remained in force until 1958. The act containing the general principles of criminal law also reserved to the federal government the exclusive right to enact legislation concerning crimes against the state and military crimes although the Constitution of 1924 was silent on the matter and the Union possessed only specific powers. In 1924 the Union enacted a law dealing with crimes against the state, and in 1927, one concerning military crimes. In 1926 a new code came into force for the Russian Socialist Federal Soviet Republic and served as a pattern for the other republican codes which followed.

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† Editor, European Law Division, Law Library, Library of Congress.

1. Pravda, Izvestia, Feb. 10, 1957.

A 1938 law concerning the judicial system of the Soviet Union and the constituent republics was the only law enacted under the rule of the Constitution of 1936. Consequently, when need arose makeshift arrangements were made. The new republics which were created in the meantime, having no right to make codes of their own, requested, and were permitted, to use the codes of other members of the Union. Kazakhstan and Kirgizia, as well as the three Baltic republics, Estonia, Latvia and Lithuania, adopted the codes in force in the RSFSR, while the Moldavian republic adopted the criminal laws of the Ukraine. Thus the fourteen laws enacted on December 25, 1958, continue a legal order very similar to that which was in force in the formative years of the Soviet Union.

There is practically no aspect of the administration of justice in criminal matters which has not been affected by the new laws. When the republican legislatures have done their part of the work, the Union will come under a new set of rules governing one of the most important aspects of Soviet law. The extent of the reform initiated by the legislation passed on December 25, 1958, may be gauged from the listing of these various fields of legislation. New foundations were laid for the general part of the criminal codes, codes of criminal procedure and statutes on the judiciary to be enacted in the individual republics. Two laws have been enacted dealing with crimes of special interest to the Union: crimes against the state and military crimes. Two laws have been passed in order to amend the Federal Constitution to conform with changes introduced in the general principles of criminal law and those on the organization of courts, and Articles 135 and 109 of the 1936 Constitution were properly amended. Finally a new law on military tribunals was enacted.

The new laws fall into three categories. First, there are three statutes which contain the basic principles of criminal law, the organization of courts and judicial procedure in criminal matters.<sup>2</sup> These statutes require additional legislative action by the constituent republics. The second group constitutes those statutes which—though not authorized by the Constitution but following the practice established by the 1924 General Principles—come into force directly and uniformly throughout the Union without any additional action by the individual republics. Two statutes belong here—one pertaining to crimes against the state<sup>3</sup> and another concerning military crimes.<sup>4</sup> The statute abolishing the punish-

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2. *Vedomosti* (1959) No. 1, items 6, 12 and 15.

3. *Id.*, item 8.

4. *Id.*, item 10.

ment of deprivation of electoral rights<sup>5</sup> and another on changes in the election of the people's courts<sup>6</sup>—which is connected with the new basic principles of the organization of courts—belongs to the same category. Another law which went into effect immediately is the Statute on Military Courts.<sup>7</sup> The balance is made up of six statutes containing formal and transitory provisions for the interim period before the new regime in the Soviet administration of criminal justice is fully established.<sup>8</sup>

Theoretically, with the exception of the general part, each criminal code of a constituent republic functions as an independent piece of legislation. The general part of each code consists of the General Principles of 1924, which outlined the scope of penal legislation and the basic rules of the criminological policies of the Union and its parts. In fact, however, a high degree of uniformity prevails also as regards the provisions of the special part of each individual code with the result that it is possible to consider the provisions of the 1926 Code of the RSFSR as representative of the criminal law in force in the entire Soviet Union. This uniformity is the result of two factors. In the first place, the Russian component of the Soviet Union covers an overwhelming part of it. In the second, the 1926 Code served as a model for other republics which were entitled to enact their own legislation, and was copied with practically no important changes or additions. Consequently it is possible to refer to the provisions of the 1926 Code of the RSFSR as representing the provisions of Soviet criminal law, although the Code as such is in force in only a part of its territory.<sup>9</sup>

The statutes of December 1958 came into being as a result of a keen sense of dissatisfaction with the state of criminal law in the Soviet Union. The Code of 1926, conceived as a daring experiment in legislative techniques and a novel approach to the problems of criminal repression, was not a success. It failed to provide a basis for the orderly administration of justice in the Soviet Union, although not solely because of its own defects. Constantly amended by inexpertly prepared insertions, it quickly became a shapeless mass of penal provisions lacking a central idea and even a formal order. It also failed as the expression of a theoretical formulation.

The Code of 1926 clearly bears the marks of an effort to clothe it in a terminology suggestive of the teachings of the Italian *Scuola Positiva*,

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5. *Id.*, item 7.

6. *Id.*, item 13.

7. *Id.*, item 15.

8. *Id.*, items 6, 9, 11, 12, 14 and 15.

9. Cf. I PIONTKOVSKII AND MENSHAGIN, *KURS SOVETSKOGO UGOLOVNOGO PRAVA* 67 ff. (1955).

and in particular of those of its founder, Enrico Ferri. Ferri, who became familiar with only the general part of the 1926 Code, was convinced that it truly reflected the basic principles of his teaching. His somewhat superficial impressions were confirmed by Rakowski, the Soviet representative at the Criminological Congress of Geneva (1926), who informed him that the drafters of the Code were influenced by Ferri's draft of 1921.<sup>10</sup>

The discussion concerning the reform of Soviet criminal law started on the morrow of the enactment of the Code of 1926.<sup>11</sup> In the beginning the tendency was to seek solutions peculiar to Soviet conditions, and to provide for maximum flexibility and minimum restrictions in the prosecution of crimes against the new order.<sup>12</sup> A more conservative trend set in later. The Constitution of 1936 encouraged Soviet lawyers to demand greater stability in Soviet laws and more respect for the rights of the individual. More attention was paid to the work of Soviet courts and the juristic aspects of the Soviet administration of justice. In 1939 a new draft of the criminal code was prepared.<sup>13</sup>

The deaths of Stalin and Vyshinski increased the chances of reform. In 1956, the academician Orlowski criticized the Soviet legal system in general for its "lack of order in legislation, absence of an orderly system, and contradictions in the legal provisions, which was one of the reasons

10. ENRICO FERRI, "Il principio di responsabilità legale nel nuovo C.P. Russo (1927) e nel progetto del Cuba (1926)" in 7 *LA SCUOLA POSITIVA, RIVISTA DI DIRITTO E PROCEDURA PENALE* 384-390 (1927). In this connection Ferri stated the basic principles of his school and the purpose of criminal repression to be expressed in the "principle of legal responsibility for all delinquents, regardless of their physical condition, thus making no distinction between punishment and security measures, maintaining that different physical-psychic conditions (mental infirmity, minority, inclination to crime, habitual delinquency, passion, imprudence, improvidence, etc.) affect the quality and quantity of repressive sanctions in order to adopt them to the degree of social danger and social readaptability of the delinquent, starting with imprisonment for an absolutely undetermined time, up to judicial pardon." However, only a short time after the enactment of the Code, Ferri and his school came under violent attack by Soviet scholars and any connection between the *Scuola Positiva* and socialist criminal law was disclaimed, due not so much to the incompatibility of socialist legal ideas and Ferri's school as to the fact that Ferri came out in support of the Fascist movement, and that he linked the future of his ideas with the new order in Italy. PIOTKOWSKI, *SOVETSKOE UGOLOVNOE PRAVO* 72-73 (1929). *Id.* Enrico Ferri in *SOV. GOS. I PRAVO* (1928), No. 1, and FERRI, *FASCISMO E SCUOLA POSITIVA NELLA DIFESA SOCIALE CONTRA LA CRIMINALITA*, 36 *SCUOLA POSITIVA* 696-736 (1926). See also REINHART MAURACH, *GRUNDLAGEN DES RATERUSSISCHEN STRAFRECHTS* (Berlin 1933).

11. The reaction against the influence of the Italian school expressed itself in one way in a return to the old terminology. For instance, the Decree of June 8, 1934, in defining treason, used the expression "penalty" instead of "measure of social defense" used in the Code. *USSR Laws*, No. 33, Section 255.

12. STAROSOLSKYJ JURIJ, *THE PRINCIPLE OF ANALOGY IN CRIMINAL LAW: AN ASPECT OF SOVIET LEGAL THINKING*, Research Program of the USSR, New York City 39 ff. (1954).

13. *Id.* at 48-49.

for the violations of legality.”<sup>14</sup> In his opinion a scientific codification of Soviet legislation was of paramount importance. Discussion turned to practical work and nearly two years later Soviet scholarly magazines carried the text of the drafts of two bills, one “On the basic principles of the criminal legislation of the Union and of the Soviet Republics,” and the other “On the principles of the criminal procedure of the Union and of the Soviet Republics.”<sup>15</sup>

Some of the enactments of December 1958 constitute basic reforms affecting the due process of law, while others are less fundamental in scope and significance, although of great practical importance. In the first category of reforms the issue of punishment by analogy is central to the whole range of questions involving the nature of the judicial process in the Soviet Union. Its significance clearly exceeds the somewhat narrow limits of criminal law and judicial procedure, involving the basic attitudes toward the function and role of the state in relation to the individual, although it must be stated that effects similar to those of punishment by analogy may be achieved by other means, *e.g.*, loose definitions of punishable acts.<sup>16</sup>

Article 16 of the RSFSR Code of 1926 and the corresponding articles of the republican codes permitted the imposition of criminal liability for a socially dangerous act not expressly proscribed by a criminal statute. Criminal liability was imposed under that article of the Criminal Code which most nearly approximated such act. This provision was in direct opposition to the principle of *nullum crimen sine lege, nulla poena sine lege* which, since the French Revolution, has been the fundamental rule of modern criminal law.<sup>17</sup> Article 3 of the 1958 Basic Principles of

14. ORLOVSKI, ZADATCHI PRAVOVOI NAUKI V SVIETLE RESHENII XX SIEZDA KPSS, 26 Vestnik Akademii Nauk No. 8, p. 5.

15. Sovetskoe Gosudarstvo i Pravo, June, 1958.

16. Solnar, *Maintien ou abandon de la regle nulla poena sine lege*, 17 *Revue de droit penal et de criminologie* 744-50 (1937).

17. DONNEDIEU DE VABRES, *LA CRISE MODERNE DU DROIT PENAL, LA POLITIQUE CRIMINELLE DES ÉTATS AUTORITAIRES* 156 ff. (Paris, 1938). Some of the features of the Soviet criminal codes have been credited to the influence of the Italian *Scuola Positiva*. In fact Ferri's appraisal of the Soviet Code was an error, based on certain verbal associations. Ferri's principle of the legal responsibility of every delinquent for socially dangerous acts did not mean absolute criminal responsibility for every act irrespective of the degree of guilt, nature of the offense, or the chance of the offender's rehabilitation. The very latitude of judicial means of social defense permits, according to Ferri, great individualization of treatment, including total pardon. Ferri's *Scuola Positiva* did not do away with the principle of legality, *i.e.*, strict definition of offenses, and the correct application of various rehabilitation measures, or total segregation of an offender giving no hope of correction. Although generally laudatory in his comments on the General Part of the Code of 1926, Ferri took issue with the analogy clause (*loc. cit.*). Some of the critics of the Soviet criminal theory credited the objective elements of criminal responsibility, the degree of social danger, and the extent of damage caused to Ferri's influence. Nothing is farther from the truth. The degree of social danger, according to

Criminal Legislation of the USSR and the Constituent Republics signified the victory of the traditionalist tendency. It stated that "only persons guilty of committing a crime, that is, those who intentionally or by negligence have committed a socially dangerous act specified by the criminal statute, shall be held responsible and shall incur punishment."

Modern criminal law is based on the proposition that the purpose of punishment is primarily to correct, and only in exceptional cases to eliminate. As a consequence liability to punishment and its type and severity are related to the form and nature of subjective guilt which modern criminologists consider the surest guide to the personality of the offender. Absolute liability (objective criteria of responsibility) is little known to European criminal law, and the commission of a punishable act requires either intent (*dolus* in its various forms, *directus*, *indirectus*, *eventualis*, preterintentional) or negligence (*culpa*). As a rule a punishable act must be committed intentionally. If the offender is guilty of negligence he is liable to punishment only if the law expressly provides for it.<sup>18</sup>

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Ferri's theories, is determined exclusively by the psychological characteristics of the offender.

The analogy clause, as it appeared in Soviet criminal law, represented a revival of the provision contained in the 1845 Russian Criminal Code (art. 151) which states: "If the law does not provide punishment for the criminal act submitted to the court's decision, the court shall impose upon the guilty person a penalty provided for crimes most similar to those in issue as to its importance or kind." It was introduced as a new idea reflecting the revolutionary character of the new legal order. Ever since the first efforts at the codification of the Soviet criminal system there has been opposition to the "bourgeois" legislative technique with its legalistic definitions of prohibited acts. Kurski and Krylenko, commissars of justice of the early years, shared the conviction that the revolutionary state could do away with the traditional forms of criminal law with its strict definitions of crimes. According to them, a Soviet criminal code should abandon the effort to cover the entire field of various offenses and give only typical definitions of crimes according to which similar crimes would be punished by analogy. This tendency was dominant in Russia until the great purge of Soviet legal leadership which removed Krylenko and Pashukanis, the standard bearers of legal nihilism. Their theories became discredited and this encouraged a number of important Soviet lawyers to initiate an attack against the state of Soviet criminal law and law enforcement in general. This attack was helped by the adoption of the analogy clause by Nazi Germany. Its presence in the Soviet legal system was consequently explained by necessity, and although its usefulness under the influence of Vishinski was affirmed, it was no longer hailed as an exemplary institution of socialist law and some, including Goliakov, the first president of the Supreme Court, insisted on its removal. For the full history of the analogy clause in Soviet law see STAROSOLSKYJ, *op. cit. supra* note 12.

18. Article 19 of the Danish Criminal Code stated: "As regards the offenses dealt with in this act, acts which have been committed through negligence on the part of the perpetrator shall not be punished except when expressly provided . . ." The Norwegian Criminal Code of 1902 stated the same principle in a somewhat different manner (art. 40): "Whoever acts without malicious forethought is not subject to punitive provisions of the present statute, unless it is expressly provided for or undoubtedly results that the omission alone is punishable." The Italian pre-Fascist Code also stated in a negative form (art. 45) that a person is not subject to punishment if he did not intend (*non abbia voluto*) the result which constitutes the criminal act unless the law provides otherwise.

As legislative technique developed, types of guilt were related to the classification of offenses. Crimes and misdemeanors as a rule require intent. In expressly provided cases a misdemeanor may be committed through negligence, while petty offenses (police transgressions) are liable to punishment without regard for the type of guilt (absolute responsibility), except when the law rules otherwise. A full statement of various forms of guilt seems to have been included for the first time in the Russian Code of 1903, and its classification has become almost a rule in modern codes.<sup>19</sup> The Yugoslav (1927) and Polish (1932) Codes have repeated it almost without change.<sup>20</sup>

Even these already fairly detailed provisions have not satisfied European scholars, and one may note efforts at a closer definition of the conditions under which the law should punish crimes committed by negligence. The Swiss Code of 1937 (Art. 18) rules that an offense committed by negligence is punishable only when "the perpetrator, out of carelessness contrary to his duties, has not foreseen or taken into account the consequences of his behavior. Carelessness is contrary to duty when the perpetrator has not exercised the caution to which he is obligated either by circumstances or his personal situation." The Greek Criminal Code of 1952, which included in its provisions a short theoretical treatise dealing with various aspects of guilt and forms of criminal acts, introduced another small addition to the generally accepted limitation of criminal responsibility for acts considered punishable but committed without direct intent. Article 15 of this Code states: "When the law requires that a specific consequence should occur as an element of a criminal act, the non-prevention of that consequence shall stand for the causation only when the offender was under special duty to prevent that consequence."<sup>21</sup>

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19. Article 48 of the 1903 Russian Code ruled that an offense should be considered intentional not only when the offender desired its commission, but also when he was aware of the possibility of the result, which constitutes the criminal nature of the act. An offense is committed by negligence not only when the offender failed to foresee it, although he could or should have foreseen it, but also when having foreseen the possibility of the result, lightmindedly supposed that he could prevent its occurrence.

20. The provisions of the Italian Criminal Code of 1930 (art. 42) represent another type of formulation of the same set of ideas: "No one may be punished for an act of commission or omission deemed by the law to be an offense unless he has committed it knowingly or wilfully. No one may be punished for an act deemed by the law to be a crime unless he has committed it with criminal intent, except in cases of crimes of transferred intent or crimes without criminal intent which are expressly contemplated by the law. The law determines the cases for which an agent is otherwise accountable as a consequence of his act of commission or omission. In regard to contraventions, each person is answerable for his knowing and wilful act or omission, whether it be with or without intent."

21. Ferri's draft of the Criminal Code, which was supposed to have inspired the Criminal Code of the RSFSR of 1926, also declared punishable (art. 12) offenses negligently committed only when expressly so provided in the law, and qualified this responsibility by a general provision that negligence is punishable when it results from the



The general meaning of the provisions of modern criminal codes concerning types of guilt in their relation to the classification of offenses and the type of punishment is that while guilt by negligence extends the scope of responsibility as regards the type of criminal act, at the same time it restricts the class of persons criminally responsible for a negligent act or omission (special duties, violations of orders, etc.) and reduces the severity of punishment.<sup>22</sup>

The reform of 1958 has failed to change Soviet criminal law as regards the determination of criminal responsibility according to the degree of guilt. The new law defines as a crime any socially dangerous act (of commission or omission) directed against the Soviet social and political order, the economic system, etc. if so specified by the statute.<sup>23</sup> It also defines criminal intent and negligence in much the same manner as the Russian Code of 1903, but fails to repeat its general reservation that unless otherwise expressly provided for by a criminal statute, a prohibited act is punishable only when committed with intent.<sup>24</sup> Contrary to modern practice, the Soviet statute lumps all punishable acts into a single category of socially dangerous acts, and although on occasion a distinction is made between more dangerous and less important crimes, a systematic grouping of offenses into classes according to their seriousness is avoided. In this manner it is left to the special part of the Code and its definitions of separate crimes to distinguish between intent and negligence, and unless expressly provided in each definition, the court has to give similar weight to intent and negligence.

The lack of differentiation between negligent and intentional offenses permits the measurement of punishment according to the objective criterion of the social danger involved and not according to the personal relationship of the offender to the prohibited act. That this is to remain a feature of the criminal legislation of the Soviet state in the future is already apparent from the two federal statutes on anti-state

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violation of official regulations or orders, or follows the violation of the dictates of common sense. As Ferri explains in the commentary to this article, commission or omission does not constitute an offense by itself, it must be the expression, even in cases involving negligence, of a personality which is socially dangerous. 31 *LA SCUOLA POSITIVA* 20-21, 135 (1921).

The real measure of concern of the Italian positive school with the psychological aspects of each individual act is demonstrated in the Cuban Code of Social Defense which endeavors to determine criminal responsibility in all cases in which intent differs from the actual consequence of a criminal act (Preterintentional crimes) (arts. 18-20).

22. *E.g.*, provisions of Chapter XXXIII of the Polish Code of 1932 on crimes causing public danger, where intentional crimes are punishable by imprisonment for from 6 months to 15 years, while the negligent commission of such crimes calls, as a rule, for simple detention for from one week to one year or a fine.

23. Principles of Criminal Legislation art. 7 (1958).

24. Principles of Criminal Legislation arts. 8, 9 (1958).

and military crimes. As regards the crimes which by their nature may be only committed intentionally the statutes contain statements making intent a constitutive element of the crime definition. Sometimes the definitions of intent are somewhat vague, and give little concrete instruction for the courts to go by ("weakening of the state," "undermining . . . a branch of the economy"), thus permitting an unusually wide latitude of interpretation of what the purpose of the crime defined in the statute really means. In other cases, however, the statute fails to make clear the nature of the guilt which makes an offender punishable.<sup>25</sup> But in addition to those two groups a considerable number of crime definitions are couched in terms which make it clear that a serious punishment is threatened for the commission of an act which may be the result of either intent or negligence.<sup>26</sup> Both the statute on anti-state crimes and that on military crimes list a large number of offenses of this type. After a list of crimes which either by their nature or by direct statement must be committed with intent, the statute on military crimes lists a large group of crimes which, although threatened with serious punishment, may also be committed by negligence. The mere loss of secret documents is punished by imprisonment for from two to five years. Article 24 of the same statute provides a stiff sentence of from six months to ten years for a careless attitude toward service duties, a vague and all-embracing statement which permits criminal prosecution for almost any dereliction of duty. The two statutes still leave many questions unanswered, but there is little hope that in the other parts of the criminal codes, which still await enactment by the republican legislatures, a new approach to the question of guilt may be expected.

The attitude of the Code of 1926 is quite orthodox in regard to crimes which are traditionally and specially connected with the protection of the state and society—crimes against the life, health, freedom and honor of a person, or against private property. A distinction between intentional and unintentional crimes is clearly made in the definitions and properly reflected in the penal sanction.<sup>27</sup> Type of guilt is not specified when only intentional crime is possible.<sup>28</sup> Furthermore, there is no reference to criminal liability for negligence when failure to take action is criminal owing to specific obligations and duties resulting from the

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25. *E.g.*, art. 8 of the Statute on Anti-State Crimes, Propaganda of War.

26. *E.g.*, art. 13, Loss of Documents; art. 21, Violation of Rules of International Flights; art. 22, Violation of Rules of Safety of Traffic and Exploitation of Transport of the Statute on Anti-State Crimes.

27. Arts. 138, 139, Murder and Negligent Homicide; arts. 142-47, Intentional and Negligent Bodily Harm.

28. Art. 162, Larceny.

offender's qualifications or position. In such a case a modern code would make it clear that negligence is punishable.<sup>29</sup>

In defining crimes which constitute an attack on the new order there is either no reference to the type of guilt, or it is described in different terms from those used in the general part. Article 58<sup>14</sup> on sabotage speaks of conscious non-execution, or intentionally careless execution of duties. Sometimes no clear distinction is made between an intentional and a negligent act,<sup>30</sup> which is also the case with respect to crimes especially dangerous to the governmental order.<sup>31</sup> Sometimes a reference to negligence signifies that all forms of prohibited activity or inactivity from which damage results are punishable irrespective of the type of guilt.<sup>32</sup> The obliteration of the dividing line between intent and negligence is particularly striking in the definitions of economic crimes, which in addition present singular technical difficulties which Soviet legislators had little interest in resolving in the past.

Additional light is thrown on the Soviet legislative solutions of the question of negligent and intentional crimes by the extent to which this technique was followed by satellite criminal legislation in Eastern Europe. Of the five criminal codes enacted there since 1945, two—the Hungarian Code of 1950 and the Albanian Code of 1952—have adopted, in one form or another, the Soviet formulation of intent and negligence. The Hungarian Code differs from its Soviet model in stating plainly in Article 11 that “crimes committed by negligence shall be punished except when the law declares that only an act intentionally committed shall be punished.” The statement of the Minister of Justice, submitted with the bill to the parliament, explained that “the law declares that as a general rule crimes committed by negligence are punishable except when the law states that only an act intentionally committed shall be punished. This represents a more satisfactory defense of society, because the social danger of negligence is frequently equal to that of intent, and sometimes even surpasses it.” Other satellite codes, however—the Bulgarian Code of 1951,<sup>33</sup> the Czechoslovak Code of 1950<sup>34</sup> and the Yugoslav Code of 1951<sup>35</sup>—state that crimes committed by negligence are punishable only

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29. Art. 176, A Captain's Failure to Give Assistance to a Ship Involved in a Collision with his own Vessel if such Assistance could be Rendered without Serious Danger to his own Ship, Crew or Passengers.

30. RSFSR CRIMINAL CODE art. 58<sup>1</sup> (1926).

31. RSFSR Criminal Code art. 59 (3d) (1926) on the Violation of Rules of International Aviation.

32. RSFSR CRIMINAL CODE art. 74<sup>4</sup> (1926).

33. BULGARIAN CRIMINAL CODE art. 4 (1951).

34. CZECHOSLOVAKIAN CRIMINAL CODE art. 4 (1950).

35. YUGOSLAVIAN CRIMINAL CODE art. 7 (1951).

when so provided by law.

The Soviet approach to the question of guilt falls far short of the general European standards which before the revolution provided a model for the reform of Russian law. It denotes a total lack of concern with the personality of the offender as a factor in determining the nature and severity of punishment, and turns the administration of justice in penal matters into blind retribution.

On the other hand, the reform bears eloquent witness to the effort to make Soviet criminal law more humane. Under the old rule, juveniles were equally responsible with adults after reaching the age of fourteen. In a number of limited, most serious crimes the age of responsibility was lowered to twelve years, with no restriction of the kinds and types of penalty applied, including the death penalty. Under the 1958 General Principles of Criminal Legislation minors under fourteen are not liable to criminal prosecution. Those over fourteen and not more than sixteen are criminally liable only for the most serious offenses such as murder, rape, serious bodily harm, etc. Between sixteen and eighteen they are criminally liable as adults, with the limitation that if the youthful offender can be reformed without the imposition of a penalty the court may refrain from imposing one. However, if the offense represents a great social danger the court must apply coercive educational measures. What these measures shall be is left to the legislation of the individual republics.<sup>36</sup>

The new regulations on the treatment of juveniles thus represent a considerable improvement, although they are far from a model of moderation. The general tendency of modern codes is to substitute educational measures for punishment as a matter of principle and not as a matter of exception, with the provision that even after the age of full responsibility is reached the court may apply judicial mercy or educational measures.<sup>37</sup>

The system of penalties provided in the 1926 Code was extremely complicated. In 1958 the number of penalties was reduced from eighteen to eight, retaining, however, the most important and traditional punishment in Russia, exile and expulsion. The maximum prison sentence has been reduced from fifteen to ten years, and in cases where previously, under the Code of 1926, a maximum sentence of twenty-five years imprisonment could be imposed, the maximum is now fifteen years. The death penalty is now imposed only for treason, espionage, subversion,

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36. Principles of Criminal Legislation art. 10 (1958).

37. In the Polish Code of 1932 and the Greek Code of 1952, the age of responsibility began at 17 years, and educational measures or judicial mercy could be applied until the offender was 20 or 21 years old.

terroristic activities, banditry and murder, and in time of war, for the most serious military crimes. In no case is the death penalty mandatory. It should be mentioned, however, that treason covers a number of activities, among which is refusal to return from abroad, for which the death penalty seems excessive.<sup>38</sup>

There are special provisions concerning the penalties for juveniles and pregnant women. The death penalty cannot be imposed on juveniles under eighteen or on women who are pregnant either at the time when the crime is committed or the sentence is rendered, and it cannot be carried out on a pregnant woman. The maximum prison sentence for a juvenile under eighteen is ten years. Juveniles serve their prison sentences in separate labor colonies. Exile and expulsion cannot be imposed on juveniles under eighteen or pregnant women.<sup>39</sup>

One of the disappointments of the reform is the preservation of the penalty of general confiscation of property, which in the principles of 1958 appears as an additional penalty for most serious crimes against the state or crimes committed for mercenary motives.<sup>40</sup> Dean Karev, of the Moscow University Faculty of Law, has confidently forecast its repeal in an article which appeared in this country.<sup>41</sup> Obviously this aspect of the reform was the result of a last-minute tug of war in the drafting committee. There is no record of the discussions of the committee, which makes it difficult to establish why this penalty was kept in the arsenal of repressive measures. The confiscation of an offender's entire property was introduced as a typical measure to combat counterrevolutionary activities and its presence suggests that however optimistic the official opinion of the ideological unity of Soviet society may be, it still needs bolstering up by exceptional measures. The principles of 1958 continue a practice which the French bourgeoisie hoped to consign to the unreturnable past in the *Declaration des droits de l'homme et du citoyen*. Together with expulsion, exile, and long-term imprisonment, general confiscation of property constitutes a measure which contains the elements of civil death.

In contrast, the abolition of the penalty of deprivation of the right to vote strikes a somewhat bizarre note. One would suppose that in a socialist society which, according to the official line, is the first in history to realize the complete equality of citizens, the exercise of political rights

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38. Principles of Criminal Legislation arts. 21-22 (1948); Law on Crimes Against the State art. 1 (1958).

39. Principles of Criminal Legislation arts. 22-23 (1958).

40. Principles of Criminal Legislation art. 30 (1958).

41. D. S. Karev, "The Forthcoming Reform of USSR Criminal Law", Harvard Law Record, May 1, 1958, p. 1.

would be one of the most cherished privileges, fully deserved by only the most loyal citizens. Obviously this is not so, if the deprivation of such a right has no deterrent value.<sup>42</sup>

At the foundation of the provisions guaranteeing a fair trial stands the conviction that, in the system of separation of powers or of checks and balances, the courts are the branch of government specially designed to protect the rights of the individual. Under the Soviet rule of unity of powers, citizens need no special protection against the agencies of the people's government, which have no policy but that determined by the well-understood interests of the people. However, this latter theoretical assumption has not worked with the perfection expected, and Soviet legislators have felt obliged to proclaim anew the principle of judicial monopoly in imposing serious penalties. Article 4 of the General Principles of Procedure in Criminal Matters formally states that no person shall be put in the position of a defendant otherwise than in virtue of, and in the manner prescribed by, the law. Article 7 of the same law states that the "administration of justice in criminal matters belongs exclusively to the court. Nobody may be declared guilty of committing a crime and be subjected to penalty except by court sentence." The same principle is restated in the General Principles of Criminal Legislation, which asserts in Article 3 that criminal punishment may be imposed only by a court sentence.

It is somewhat doubtful whether these provisions constitute in themselves an adequate guarantee of legality. It is always possible to leave the application of various measures, which are not called punishments but are punitive in character, to other government agencies. An example of this is the legislation adopted in several Soviet republics (Uzbekistan, Latvia, Kazakhstan, Turkmenistan, Tajikistan and Armenia) in 1957 and 1958, directed against persons "who carry on a parasitic mode of life . . . as well as those living on unearned income." A meeting of neighbors has the power to sentence such people to exile with forced labor for from two to five years. The decision of such a meeting is subject to confirmation by the executive of the district soviet and there is no appeal to a court.

The future of this method of criminal repression of enemies of the Soviet order was somewhat in doubt. Its adoption was discussed in other Soviet republics but was rejected in the RSFSR, among others, which somewhat checked its progress. However, it now seems that this or a similar method of criminal repression has a great future in the Soviet

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42. See Polianski, *Izvestia*, Dec. 27, 1958.

legal order. As the First Secretary of the Soviet Communist Party and the Prime Minister of the Union, Nikita Khrushchev, stated at the 21st Congress of the Communist Party: "Problems of security in our social order, and enforcement of the rules of socialist coexistence should, to an ever-increasing degree, become the business of social organizations. . . . Socialist society forms such voluntary agencies of enforcement of the social order as people's militia, comradesly courts, and similar institutions. They will discharge in a new manner . . . social functions . . . ." According to Khrushchev, this new approach to problems of law enforcement was dictated by the serious restriction of the powers of the security police.<sup>43</sup> This suggests that Soviet public life will continue to be characterized by the vast punitive powers exercised by administrative authorities in an informal manner without the usual judicial guarantees.

Another incursion of administrative authorities into judicial functions which survived the reform of 1958 is the continued control of the pre-trial stage of proceedings by the public prosecutor. The Principles of Judicial Procedure in Criminal Matters of 1958 have reestablished the traditional terminology indicating the difference between a police and a formal investigation, the latter being obligatory in trials of more important crimes (crimes against the state and military crimes). In modern European criminal procedure such investigations are controlled, after the French pattern, by the court and conducted by a judicial officer who enjoys all the privileges and has the status of an independent judge (*juge d'instruction*). The strict connection between a formal investigation and the disposal of a case is indicated by the fact that Soviet legislators have included it in the law on judicial procedure. But while judicial control of an investigation assured all the guarantees of a fair trial, this element of judicial guarantee is lacking in Soviet procedure, and the real difference between police investigations and formal investigative proceedings is that the latter are conducted by the more experienced agents of the security police or the public prosecutor.

The Principles of Criminal Procedure of 1958 make no mention of the venue of courts, either territorial or by subject matter. The Code of Criminal Procedure of 1923, now in force, rules on the matter in a manner similar to that of the codes of other European countries. However, while elsewhere a violation of the rules of venue constitutes a nullity which must be corrected ex officio in all stages of proceedings in order to enforce the right of the defendant to be tried by a competent judge, there is no such provision in Soviet law. Neither the Principles of 1958

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43. Pravda, Jan. 29, 1959.

nor the Code of 1923 contains detailed provisions on nullity. These are usually formulated in provisions dealing with the reasons for appeal. In the Principles of Criminal Procedure of 1958 the reasons for appeal are vaguely stated to be the illegality or groundlessness of a sentence, which terminology has not been interpreted in Soviet practice as strictly as are the causes of nullity in the practice of the courts of other countries.

There are areas where the Procedural Principles of 1958 constitute a definite improvement over those of the Code of 1923. Article 14 introduced an important innovation by incorporating into Soviet criminal procedure the Roman law maxim *ei incubat probatio qui ait non qui negat*, by stating that "neither the court, the prosecutor, nor the investigating agent has the right to impose the duty of furnishing proof on the defendant." In this connection, two other issues are important: the presumption of innocence and the status of the defendant.

Presumption of innocence is dealt with in Article 43, which states: "A conviction cannot be based on suppositions, and may be decreed only when in the course of trial the guilt of the accused in committing the crime has been proved." As regards the second issue, the Principles of 1958 are less clear. In one place they put the depositions of the defendant in the same category as those of a witness or of an expert, calling them testimony (*pokazania*).<sup>44</sup> In another<sup>45</sup> the procedural principles state that the defendant has the right, but not the duty, to give explanations in connection with the charges against him, which suggests that the defendant may either participate actively in the proceedings or remain passive, and that his position differs from that of a witness.<sup>46</sup> The restitution of the defendant to the position of a party in the trial is an important change in the concept of criminal proceedings.

The rights of the defendant circumscribe the powers of the court and the prosecution, and their exercise is subject to definite rules which, in the final analysis, constitute the essence of legality. Soviet criminal procedure still falls short of the generally accepted standards in this respect, although in the 1958 reform a definite attempt has been made to bring Soviet procedure in criminal matters closer to established practice. This is especially evident in appeal proceedings. Contrary to the Code of 1923, the Principles of 1958 limit the right to impose a stiffer sentence only when the appeal is lodged by the prosecution or by the injured party. At the same time the higher court always has the right to go be-

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44. General Principles of Criminal Procedure art. 15 (1958).

45. General Principles of Criminal Procedure art. 21 (1958).

46. Cf. SWISS FEDERAL PROCEDURE OF 1943, arts. 39-43.



yond the appeal if, in reviewing the case, it comes to the conclusion that a milder sentence would be more appropriate.<sup>47</sup>

Both the 1926 Code<sup>48</sup> and the General Principles of Criminal Legislation of 1958<sup>49</sup> create the impression that the criminal law of the Soviet Union has no extraterritorial effect as regards foreigners except in cases, according to the 1958 law, when international treaties provide for the punishment of foreign nationals for crimes committed abroad. Generally Soviet law and the jurisdiction of Soviet courts is applicable only to crimes committed by nationals, non-nationals, and stateless persons in the Soviet Union, and crimes of nationals and stateless persons residing in the Soviet Union committed abroad. There are, however, two exceptions to these somewhat narrow limits. In the first place, certain crimes are defined in a manner which clearly indicates that criminal acts committed abroad are punishable irrespective of the nationality of the offender. For example, under Article 59<sup>8</sup> of the 1926 Code the counterfeiting of Soviet currency abroad by an alien is punishable in the Soviet Union as are, according to the Soviet statutes, several other acts affecting in some manner the interests of the Soviet state and Soviet nationals. This is also apparent from the Statute of Crimes Against the State of 1958. Espionage against the Soviet state committed by a non-Soviet national is punishable wherever it takes place. In fact the silence of Soviet statutes permits the prosecution of any crime committed by foreigners abroad.

While this aspect of the extraterritorial effect of Soviet statutes has its origins in the European legal tradition, the Code of 1926<sup>50</sup> and the Statute on the Principles of Criminal Legislation of 1958<sup>51</sup> have established the rule that certain crimes having no connection with the Soviet state or its nationals may be prosecuted in Soviet courts if they affect the international interests of the working class. Article 58<sup>1</sup> makes punishable all crimes directed against any other state of workers, while Article 58<sup>4</sup> does the same for any political activity opposed to the struggle for power of the Communist Party. Article 10 of the Statute of 1958 keeps on the statute book only crimes against other states of workers. The departure from the traditions of European criminal law is also visible in the fact that these provisions make punishable crimes which are purely political in character. This new group of international crimes is an expression of the special interest of the Soviet state in the conversion of

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47. General Principles of Criminal Procedure arts. 44, 45 (1958).

48. RSFSR CRIMINAL CODE arts. 2-4 (1926).

49. Arts. 4, 5 (1958).

50. RSFSR CRIMINAL CODE arts. 58<sup>1</sup>, 58<sup>4</sup> (1926).

51. General Principles of Criminal Legislation art. 10 (1958).

other nations to its system and in its preservation outside the territorial limits.

Generally speaking, the reform has produced more cohesion between the various parts of the Soviet legal system and in the machinery of criminal justice, and has removed some of the inherent contradictions by reinstating some of the principles which are basic for any system of justice. It has also corrected some of the misconceptions and plain mistakes born of the endeavor to produce a socialist legal order equipped with institutions which differ totally from those of free societies. The humane aspects of the new provisions are not to be overlooked, although there is perhaps a greater distance between practice and legal rule in the Soviet Union than in any other public order.

However, some of the most important aspects of the Soviet criminological policy have not been affected by the reform. The General Principles of 1958 provide no machinery for permitting the individualization of criminal cases in order to make proper use of the large punitive powers with which the law has equipped the Soviet courts. The most important element in the determination of criminal responsibility, the element of guilt, has remained blurred and there is no direct connection between the degree of guilt and the penalty. Elsewhere modern legislators have employed great ingenuity in order to assure as full and purposeful a realization of criminological policies as possible. This example has not been followed in Soviet law which still contains little more than high-sounding slogans having no coverage in the detailed provisions of the law.

The same conservatism prevailed in regard to the principal features of the administration of justice. It is still dominated by the person of the government attorney, who combines in his office the role of prosecutor of crimes and guardian of legality, and the duty to enforce government policies with the duty to protect the law. The prosecutor appears in the dual role of the party before the court and the supervisor of its practice. Furthermore, the government attorney represents the only element in the complicated machinery of the Soviet administration of justice in which the principle of professional proficiency has received consistent recognition.

Two aspects of the reform are particularly disappointing. In the first place the conduct of pretrial investigations is left in the hands of the public prosecutor and police authorities.<sup>52</sup> This conservatism is the more surprising in that there is a definite tendency in other countries of the Soviet Bloc to return the conduct of pretrial investigations, which are

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52. Principles of Criminal Procedure arts. 28-35 (1958).

obligatory in all the more important crimes, to judicial officers. These officers act as judges and are subordinate exclusively to the court, before whom a government attorney has only the position of a party. The other disappointing feature is that little has been done to improve the professional qualifications and the performance of Soviet courts. The only measure adopted in this connection is the extension of the tour of office of judges elected to peoples' courts from three to five years, thus bringing the lower courts up to the standards of the higher courts in this respect. However, no requirement of legal education or practice, which would have extended the principle of professionalism into the administration of justice, has been established. The serious effect of the absence of trained personnel in the administration of justice is apparent from the perennial complaints which may be garnered from Soviet sources about the low level of judicial work in the Soviet Union, owing primarily to the shortage of trained lawyers on the bench.<sup>53</sup>

As early as 1927, Ferri, having come into immediate contact with the Soviet Criminal Code, complained about the verbosity and propagandistic passages in the Soviet statutes. Theoretical expositions are not needed in a well written law. The same is also characteristic of the 1958 judicial statutes. With untrained judges on the bench who have never been exposed to organized instruction in law, the Soviet legislator feels compelled to lecture the laymen called to fulfill judicial duties on the rudiments of the theory of criminal law. The low level of legal preparation prevailing in the Soviet Union makes it doubtful whether the use of modern legislative techniques is at all possible and practicable. The modern tendency toward simple phraseology and succinct definitions is based on the assumption that the bench, the prosecution and the defense consist of highly trained jurists, completely familiar with the theory of modern criminal law and fully conversant with the various penological theories. In countries with modern codes judges must first refer the definitions of individual crimes to the provisions of the General Part which determine in the most general manner the principles and purpose of the punishment of crimes, and secondly to legal theories learned from their professors which constitute the ultimate terms of reference in order to fill a gap or clarify a doubtful point.

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53. For a comprehensive treatment of the subject see I. GSOVSKI & GRZYBOWSKI, *GOVERNMENT, LAW AND COURTS* . . . , Chapter 15. See also "Illustrations on the Rule of Law," 6 *HIGHLIGHTS* . . . 193 ff. (1958).