

CONTEMPORARY SOVIET CRIMINAL LAW: AN ANALYSIS OF THE GENERAL PRINCIPLES AND MAJOR INSTITUTIONS OF POST-1958 SOVIET CRIMINAL LAW

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I. INTRODUCTION

Soviet criminal law, from the very inception of the Soviet state in 1917, has been charged with the major role in preparing Soviet society for the future communist society. By defining what conduct is criminal, as well as by establishing a deliberate hierarchy of crimes—depending on the gravity of the social danger posed by such conduct—Soviet criminal law generally seeks to reform Soviet citizens and to create that ideal man, the “new man,” whose presence is a condition *sine qua non* of the communist goal¹ set by the Soviet state.

The primary purpose of this study is to analyze the general principles and the major institutions of contemporary Soviet criminal law. To this end this study proposes to discuss the basic principles of contemporary Soviet criminal law and the major institutions of the Special Part of the Criminal Code of the Russian Soviet Federated Socialist Republic (RSFSR). In a brief conclusion, an attempt will be made to synthesize these discussions and to present a general picture of the trend in Soviet criminal law in the 1970's. Speculation on the future development of the law will be attempted. At the same time suggestions for change will be proposed.

Before settling down to the substantive discussion of Soviet criminal law it may be necessary to make the following observations

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¹ V. I. Lenin in his famous work entitled *The State and Revolution* argued that crime is destined to wither away in the process of the construction of communism. Arguing that the principal cause of crime is social exploitation, i.e., the exploitation of one segment of society by another, he asserted: “[W]ith the elimination of this major cause of crime, crimes are bound to wither away. We do not know how fast or which order this is going to take place, but we do know that they will wither away. The withering away of crime will be followed by the withering away of the state.” V. I. LENIN, *STATE AND REVOLUTION*, cited in 2 KURS SOVETSKOGO UGOLOVNOGO PRAVA [TREATISE OF SOVIET CRIMINAL LAW] 77 (A. Piontkovskii, P. Romashkin & V. Chkhikvadze eds. 1970) [hereinafter cited as PIONTKOVSKII]. For a detailed discussion of Soviet attitudes toward the causes of crime, see *id.* at 55-85; F. FELDBRUGGE; *SOVIET CRIMINAL LAW* 85-88 (1964) (volume 9 of the *LAW IN EASTERN EUROPE* series) [hereinafter cited as FELDBRUGGE].

which might aid the Western reader who has not been initiated into the Soviet legal system. First, Soviet criminal law is essentially statutory law. Accordingly, emphasis will be placed only upon criminal statutes adopted at both the federal² and state³ levels. Since judicial precedents are generally relegated to the background in any discussion of the sources of Soviet law, any reference to case authority in this study will only be incidental. Second, most of the doctrinal materials are taken from the writings of leading Soviet criminal law authorities as well as from scholarly commentaries (annotations) to the various codes. These commentaries, to a great extent, reflect the legislative history and the intent of the code articles under discussion. Nevertheless, they are not an official interpretation of the code. To some extent Western writings on problems of Soviet criminal law are also used.

The evolution⁴ of Soviet criminal law can be divided into the following periods: 1917-1921; 1922-1923; 1924-1958; and 1958 until the present time. At this point we propose to look at the latter period in great detail.

II. THE BASIC PRINCIPLES OF CONTEMPORARY SOVIET CRIMINAL LAW

When one speaks of contemporary Soviet criminal law one means the criminal law of the post-1958 Soviet Union. A great portion of this new law can be found in the Fundamental Principles of Criminal Legislation of the USSR and the Union Republics (FPCL) of 1958,⁵ the 1958 Law on Criminal Responsibility for State Crimes,⁶ the 1958 Law on Criminal Responsibility for War Crimes, the respective criminal codes of the individual Union Republics, and the

² Pursuant to art. 14, para. (u) of the USSR Constitution, the Supreme Court of the USSR has recently adopted the following laws: Law of Dec. 25, 1958, *Osnovy Ugolovnogo Zakonodatel'stva Soiuza SSR i Soiuznykh Respublyk* [The Fundamental Principles of Criminal Legislation of the USSR and the Union Republics], art. 7, [1959] 1 Ved. Verkh. Sov. S.S.S.R. Item 6 (Supreme Soviet U.S.S.R.) [hereinafter cited as FPCL]; Law of Dec. 25, 1958, *Osnovy Zakonodatel'stva O Sudoustroistve Soiuza SSR, Soiuznykh i Avtonomnykh Respublik* [The Fundamental Principles of Court Organization of the USSR, the Union and Autonomous Republics], [1959] 1 Ved. Verkh. Sov. S.S.S.R. Item 12 (Supreme Soviet U.S.S.R. [hereinafter cited as FPCO]); Law of Dec. 25, 1958, *Osnovy Ugolovnogo Sudoproizvodstva Soiuza SSR i Soiuznykh Respublik* [The Fundamental Principles of Criminal Procedure of the USSR and the Union Republics], [1959] 1 Ved. Verkh. Sov. S.S.S.R. Item 15 (Supreme Soviet U.S.S.R.) [hereinafter cited as FPCP].

³ Examples of such state criminal laws are: R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code); R.S.F.S.R. 1960 KOD. UGOL. PRO. (Code of Criminal Procedure).

⁴ For a comprehensive and detailed study of the evolution of Soviet criminal law, see the excellent bibliography in PIONTKOVSKII, *supra* note 1, at 54-56.

⁵ See note 2 *supra*.

⁶ [1958] 2 S.2. S.S.S.R. 450 (Supreme Soviet U.S.S.R.).

USSR Law of July 11, 1969, "On the Expansion and Amendment of the FPCL."⁷

When Soviet writers speak of Soviet criminal law in general and of contemporary Soviet criminal law in particular, they often refer to it as "a new and higher type of law"⁸ in comparison to its Western (bourgeois) counterparts. In their opinion this new law is characterized by the following general principles. First is the principle of socialist humaneness. This means that

while decisively protecting socialist social relationships, the norms of socialist criminal law make it possible to pick out those persons who accidentally deviated from the law and committed crimes which do not pose any serious social danger. In such cases Soviet criminal law contemplates the exemption from criminal punishment of persons who committed a crime but whose crimes, because of the change in circumstances either at the time of preliminary investigation or at the time of trial, have lost their social danger or of persons who have as of this time ceased to be a social danger. Similarly, persons who committed crimes may be released from criminal punishment if it is shown that by their subsequent conduct, but prior to the time of the trial, they have ceased to pose any social danger.⁹

The principle of socialist humaneness is reflected also in the humane principles of Soviet criminal punishment. Article 20 of the FPCL states that Soviet criminal punishment serves three humane purposes: the chastisement of the convicted criminal himself, the reeducation and correction of the criminal, and a warning both to the convicted criminal and to all other persons not to commit similar crimes in the future.¹⁰ While the first purpose of criminal sanction is to punish the criminal, it is not the intent of the law to lower the honor and dignity of the convict. Thus, the principle of socialist humaneness would exclude any cruel and unusual punishment under Soviet criminal law.

The second general principle of contemporary Soviet criminal law is the principle of socialist democratism. This means that the general population is involved in the criminal justice system at all levels—pre-trial, trial, and post-conviction. Forms of popular participation in the criminal justice system include, for example, the

⁷ [1969] 29 Ved. Verkh. Sov. S.S.S.R. Item 249 (Supreme Soviet U.S.S.R.).

⁸ For the use of the term "law of a new and higher type" in Soviet literature, see I ПОНТКОВСКИЙ, *supra* note 1, at 9.

⁹ *Id.* See also FPCL, art. 43.

¹⁰ FPCL, art. 20.

participation of lay assessors in criminal trials, the parole system under which groups of individuals volunteer to take a parolee under their direct supervision or the system of conditional sentence under which groups of individuals volunteer to guarantee the good behavior of persons who are sentenced conditionally. Since one of the primary purposes of criminal punishment is to reform and reeducate the convicted person, the courts will willingly hand such persons over to members of the community if by so doing it will aid the speedy correction of such criminal. This method of community involvement is particularly used when either the crime committed is not of a grave nature or the personality of the criminal himself does not pose a serious social danger.

The third general principle of contemporary Soviet criminal law is the principle of socialist legality. Crime and punishment therefor are specifically provided for by law and no person shall be subject to criminal punishment unless the specific provisions of the substantive and procedural criminal laws are met.¹¹

The fourth principle is the principle of Soviet patriotism and proletarian internationalism. Elaborating on the meaning of this principle one Soviet commentary noted:

Soviet criminal law aids the nourishment in all citizens of love for the fatherland and a nursing of a feeling of contempt for traitors, it teaches the people to protect state secrets and to be prepared to rebut all devious moves by agents of foreign intelligence organizations. Soviet patriotism is inseparably linked with proletarian internationalism. Soviet criminal law manifests the idea of proletarian internationalism.¹²

The spirit of proletarian internationalism is given concrete meaning in arts. 73 and 101 of RSFSR Criminal Code. The spirit of these four principles is spelled out in greater detail in the specific provisions of the respective criminal laws which we shall be discussing momentarily.

The leading source of this new (post-1958) Soviet criminal law is unquestionably the FPCL of 1958. In order for us to fully appreciate some of the revolutionary changes that have taken place in post-

¹¹ *Id.* art. 3. For a detailed discussion of some of the general principles of Soviet criminal procedure, see H. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES 47-70*, 84-89 (1972) [hereinafter cited as BERMAN]; Osakwe, *Due Process of Law Under Contemporary Soviet Criminal Procedure*, 50 *TUL. L. REV.* 266 (1976) [hereinafter cited as Osakwe, *Due Process*]. An English translation of the RSFSR Code of Criminal Procedure may be found in BERMAN, *supra* at 247-424.

¹² 1 PIONTKOVSKII, *supra* note 1, at 11.

1958 Soviet criminal law it is necessary to begin with an analysis of the substantive provisions of this Act.¹³

A. *Substantive Provisions of the FPCL of 1958*

Two leading Western students of Soviet criminal law—Professors Harold Berman¹⁴ of the Harvard Law School and Ferrie Feldbrugge¹⁵ of the University of Leiden School of Law—have conducted extensive studies into the general principles of the General Part of the RSFSR Criminal Code and of the FPCL of 1958. None of those studies, however, provides a much needed individual commentary to each of the articles of the code or of the FPCL. There is no doubt that both laws need to be annotated if they are to mean anything to the ordinary Western reader. This portion of our study proposes, therefore, without reproducing the texts of the pertinent provisions of the 1958 FPCL which are already available in an English translation,¹⁶ to provide a brief annotation to some of the major articles of that statute.

Article 1—The Tasks of Soviet Criminal Law (article 1—RSFSR)

A leading Soviet commentary defines Soviet criminal law as follows:

Criminal law is a legislative act promulgated by the Supreme Soviet of the USSR or by the Supreme Soviets of the Union Republics, which contain legal norms establishing the principles and general provisions of Soviet criminal law by defining which socially dangerous acts constitute crimes and what punishment should be applied to persons convicted of committing such crimes.¹⁷

The only binding sources of Soviet criminal law are legislative acts promulgated either by the USSR Supreme Soviet or by the Supreme Soviets of the Union Republics.¹⁸ No other agency of the Soviet

¹³ The FPCL established only the general principles of Soviet criminal law. It neither discusses individual crimes nor does it stipulate which acts must be uniformly criminalized by the Union Republican criminal codes. Where necessary the federal government has promulgated individual laws dealing with separate crimes. But by and large the task of establishing the different categories of crimes is left to the respective Union Republics.

¹⁴ BERMAN, *supra* note 11.

¹⁵ Feldbrugge, *supra* note 1.

¹⁶ For a literal translation of the 1958 FPCL into English, see F. FELDBRUGGE, *THE FEDERAL CRIMINAL LAW OF THE SOVIET UNION 37-71* (1959) (volume 3 of the *LAW IN EASTERN EUROPE* series).

¹⁷ 1 PIONTKOVSKII, *supra* note 1, at 143.

¹⁸ *Id.* at 156.

Government, including the federal executive department,¹⁹ may enact criminal statutes. Decisions of the Supreme Courts are at best evidence of the law²⁰ and not a source of law *stricto sensu* and ipso

¹⁹ One Soviet commentator takes the position that agencies of the executive department also enact criminal laws in the sense instructions and regulations, the violation of which is criminalized under the criminal code. See M. SHARGORODSKII, *UGOLOVNYI ZAKON (CRIMINAL LAW)* 29-30 (1948). The same position is taken by Professor Harold Berman. See BERMAN, *supra* note 11, at 6. A close reading of Feldbrugge's comments in his 1964 study on the general principles of Soviet criminal law also leaves the reader with the impression that other agencies of the Soviet Government may enact criminal laws. See Feldbrugge, *supra* note 1, at 55-57.

This writer feels that both Shargorodskii, Berman and Feldbrugge are wrong on this question. The regulation promulgated by an agency of the executive department is per se not a source of Soviet criminal law. The violation of such executive rule or regulation entails criminal responsibility only because the criminal code so provides. In other words, the criminality for violating any executive rule arises not from the mere violation of the rule, but from the fact that the legislature criminalizes such violations. This view is shared by the authors of a recent Soviet treatise on criminal law. See 2 PIONTKOVSKII, *supra* note 1, at 157-58. For this writer's earlier opinions on this question, see Osakwe, *Soviet "Pactomania" and Critical Negativism in Contemporary International Law: An Inquiry into the Soviet Drive for a Comprehensive Codification of General International Law* in 19 *LAW IN E. EUR.* 291, 292-93 (1975) [hereinafter cited as Osakwe, *Soviet "Pactomania"*]; Osakwe, Book Review, 47 *TUL. L. REV.* 1225, 1228-29 (1973).

²⁰ Among Soviet jurists there is a continuing debate as to whether the "guiding explanations" (*Rukovodiashchie Raz'iasneniia*) issued by the USSR Supreme Court sitting en banc (generally referred to as the Plenum of the Court) or by the Supreme Courts of the Union Republics sitting en banc constitute a source of criminal law. The 1957 Statute on the Supreme Court of the USSR, art. 9, para. (c), [1957] 4 *Ved. Verkh. Sov. S.S.S.R.* Item 85 (Supreme Soviet U.S.S.R.), provides that the Plenum of the USSR Supreme Court shall "consider judicial statistics and materials summarizing judicial practice and give guiding explanations to courts, in connection with the consideration of judicial cases, concerning questions of application of legislation." These "guiding explanations" are not sources of law in any sense of the word. These "guiding explanations" are an explanation of the real meaning of the law or of an individual norm of law but does not in itself create a new legal norm. In these guiding explanations is contained such understanding of the operative norm which in actual practice ought to have been followed even without such explanation. Such explanations are generally given if and when a legal norm is differently understood and applied by the courts. It does not add anything to the norm, nor does it detract from it; it merely defines its true contents. "[T]hus interpretations of the law, as well as guiding explanations on the application of criminal law do not constitute a source of law, but nevertheless play a significant role in the correct understanding and application of criminal law." 1 PIONTKOVSKII *supra* note 1, at 158-59. See also A. GALKIN, V. KULIKOV, N. RADUTNAIA & I. PERLOV, *NASTOL'NAIA KNIGA SUD'I (RASSMOTRONIE UGOLOVNYKH DEL V SUDE PEROVI INSTANTSII)* [A Desk Diary For Judges (The Examination of Cases In A Court Of First Instance)] 53-76 (1972) [hereinafter cited as GALKIN, *DESK DIARY*].

Professor Feldbrugge takes the position that since "the [guiding] explanations are binding on the lower courts . . . they can safely be considered as a source of law." Feldbrugge, *supra* note 1, at 64. This writer disagrees with such position as taken by Professor Feldbrugge. The guiding explanations handed down by the Plenum of the USSR Supreme Court were never intended to be a source of law and were never so considered. As the name suggests they merely clarify the law where there is a clear misunderstanding of the pertinent laws by the lower courts. At best they can be regarded as convincing evidence of the law in the sense that they are handed down by the highest judicial body in a particular jurisdiction. It is true that they

facto such decisions are not considered binding upon the lower courts. Customs are not a source of Soviet criminal law either.²¹

Art. 1 merely enumerates those social relationships which Soviet criminal law is called upon to protect. In this regard the FPCL does not seem to depart, in any substantial way, from the corresponding provisions of the previous Soviet criminal laws.

Article 2—Criminal Legislation of the USSR and the Union Republics (article 2—RSFSR)

With the exception of state and war crimes which are uniformly established by the federal government, each Union Republic has the

are binding upon the lower courts. But they derive their *vis obligandi* not from the fact that they are a source of law, which they are not, but rather from the fact that they represent the most authoritative judicial interpretation of the legislative will contained in the pertinent law so construed by the Plenums of the respective supreme courts.

The statement by Professor Feldbrugge that "ad hoc decisions of the Supreme Courts of the USSR and the Union Republics can to a certain extent be regarded as a source of law," Feldbrugge, *supra* note 1, at 64, is predicated upon a misapprehension of what a "source of law" is under Soviet law. Judicial decisions are not a source of law under the Soviet legal system. Not only are Soviet judges not bound by judicial precedents, but, as a matter of fact, it is prohibited by Soviet law for the lawyer to cite precedents in his pleadings. In the words of some leading Soviet jurists, "Soviet legislation does not grant binding force to judicial precedents. It is not allowed either in a judicial opinion or in any other judicial decree to cite as a basis for the decision in concrete case, the decision of a previous court." GALKIN, *DESK DIARY*, *supra* at 54. See also Berman, *The Comparison of Soviet and American Law*, 34 *IND. L.J.* 359, 559-70 (1958-1959).

Professor D. Barry refrains from taking any position on the question, but rather looks upon these guiding explanations (and correctly so) as a technique for the systematization of law by the Plenum of the USSR Supreme Court. See Barry & Barry, *The USSR Supreme & C. Barry, The USSR Supreme Court and the Systematization of Soviet Criminal Law* in 19 *LAW IN EASTERN EUROPE* 1, 1-21 (1975).

In short, it may be said that the guiding explanations issued by the Plenums of the various Supreme Courts serve three distinct purposes: to draw attention to prejudicial errors in the application of the law by lower courts, to alert the lower courts to the need to be firm and consistent in their application of the law to cases before them, and to recommend measures for the unification of the application of law by all lower courts. None of these functions has the effect of constituting these guiding explanations into an independent source of law.

²¹ "Custom never was and is presently not a source of Soviet Criminal law. Socialist rule of law contemplates, as a prerequisite for criminal responsibility, the fact that an act in order to be declared to be a crime must meet the elements of crime specified in a criminal law." I PIONTKOVSKI, *supra* note 1, at 159. In the view of this writer the above statement by a group of Soviet commentators is only half the truth. It is true that under contemporary Soviet criminal law custom is not considered to be a source of law, but this cannot be said also for the pre-1958 period. When during the 1917-1922 period the Soviet judges were called upon to fill the gaps in the criminal law by resorting to their socialist consciousness, what they were doing in fact was to apply custom as a source of criminal law. See Osakwe, *Soviet "Pactomania," supra* note 19, at 291-93.

Finally, it could be pointed out that international treaties to which the Soviet Union is a party are considered sources of Soviet criminal law only after they have been incorporated

authority to criminalize that conduct which it feels violates the social relationships within that Union Republic. In doing so, however, the Union Republic must respect the federal principles of criminal law as established by the FPCL. Under the supremacy clause of the USSR Constitution,²² any conflict between a federal and a Union Republican statute shall be resolved in favor of the federal statute. This does not mean that such conflicting state statutes are ipso facto invalid. Until they are interpreted to be in conflict with a federal statute they shall be deemed to be valid. Thus, when a state statute in existence is in conflict with a federal statute, the former shall remain in force until it is specifically overruled by a court of competent jurisdiction.

This writer disagrees with the statement made by Professor Feldbrugge to the effect that in case of a conflict between a federal and state statute "the provision of the latest date must be applied, irrespective of the authority which issued this provision."²³ Such a conclusion is specifically precluded under art. 20 of the USSR Constitution.²⁴

Article 3—Basis of Criminal Responsibility²⁵ (article 3—RSFSR)

In a most radical departure from the past provisions dealing with the basis of criminal responsibility, this article provides that only persons adjudged to be guilty of committing an act specifically criminalized as of the time it was committed shall be subject to criminal responsibility and punishment. To prove guilt it must be shown that the individual acted with criminal intent or out of criminal negligence. The fact that only a court of law may adjudge a person

into Soviet domestic law. Such incorporation may take the form of statutory reference to the treaty and a provision in the criminal code that criminal responsibility shall attach to any violations of the terms of the treaties thereof. 1 PIONTKOVSKII, *supra* note 1, at 160-62.

²² KONSTITUTSIYA (Constitution) art. 20 (USSR, 1936).

²³ Feldbrugge, *supra* note 1, at 56.

²⁴ Soviet jurists unanimously assert the supremacy of federal law over Union Republican law. Neither in theory nor in practice is Union Republican law given effect over a conflicting valid federal statute. See 1 PIONTKOVSKII, *supra* note 1, at 165-86. If a Union Republican statute provides exactly the same thing as a federal statute, a Union Republican court routinely cites the Union Republican statute as the authority for its decision. Any gaps in Union Republican laws shall be filled by state courts by resorting directly to federal law in applicable instances.

²⁵ For a more detailed study of the Soviet doctrine on guilt, see 2 PIONTKOVSKII, *supra* note 1, at 257-341; B.S. VOLKOV, PROBLEMA VOLI I UGOLOVNAIA OTVETSTVENNOST' (The Problem of Will and Criminal Responsibility) (1965); M.S. STROGOVICH, MATERIAL'NAIA INSTINA I SUDEB-NYE DOKAZATEL'STVA V SOVETSKOM UGOLOVNOM PROTSESSE (Material Truth and Judicial Proof in Soviet Criminal Procedure) (1958).

guilty of a crime eliminates the prospects of mob justice that pervaded the early stages of the development of Soviet criminal law. The practical result of the provisions of art. 3 is a direct rejection of the concepts of crime by analogy and guilt by association that were found in the earlier Soviet criminal statutes. In the words of a leading Soviet commentary:

The task of [contemporary] Soviet criminal process is to establish the objective truth in a given case and without this it is impossible to accomplish the goals of socialist justice under law. The most important part of this process is the establishment of the guilt of a particular individual in the commission of a crime. To the materialist [which all Soviet jurists are—C.O.] truth is the correct reflection of the external reality in the consciousness of a person. The Soviet court in its verdict must establish the truth, *i.e.*, it must correctly reflect in its decision a precise phenomenon of the external reality—the guilt of the defendant as it really exists outside of the consciousness of the judge.²⁶

Thus, “the guilt of a particular individual in the commission of a crime exists independent of whether the person recognizes such guilt or whether the court recognizes such guilt.”²⁷ However, the only basis for criminal responsibility is such objective guilt which has been recognized by the court in the course of the criminal proceedings. Needless to say, the burden of proving guilt beyond a reasonable doubt rests with the prosecution.²⁸

Article 4—The Operation of the FPCL With Regard to Acts Committed Within the Territory of the USSR (article 4—RSFSR)

Under the principle of territoriality all persons who commit crimes within the territory of the USSR, unless they enjoy diplomatic immunity, shall be subject to criminal punishment according to the law in force in that territory.²⁹ It makes no difference whether the person is a Soviet citizen, an alien, or a stateless person. Criminal responsibility is based upon the laws of the place where the act took place and not upon the personal law of the person who committed the crime.

²⁶ 2 PIONTKOVSKII, *supra* note 1, at 257-58.

²⁷ *Id.*

²⁸ The principles of presumption of innocence and burden of proof in contemporary Soviet criminal procedure are discussed in greater detail in Osakwe, *Due Process*, *supra* note 11, at 66.

²⁹ For a general discussion of the concept of USSR territory in particular and of state territory in general, see 3 KURS MEZH DUNARODROGO PRAVA - v SHESTI TOMAKH (A Treatise of International Law - in Six Volumes) 115-69 (V. Chkhikvadze ed. 1967).

Article 5—Operation of the FPCL With Regard to Crimes Committed Outside the Territory of the USSR (article 5—RSFSR)

The Soviet Union retains criminal jurisdiction at all times over its citizens no matter where they may be situated. If a Soviet citizen commits a crime in a foreign country and returns to the Soviet Union (either voluntarily, by extradition, or by deportation order) he shall be subject to criminal responsibility and possible punishment for the same crime for which he may have been tried and convicted abroad. For him to be tried in the Soviet Union, however, the act which he committed abroad must also be a crime by Soviet law in accordance with the doctrine of double criminality. Since the second trial in the Soviet Union is conducted by the courts of a different sovereign state (the first trial having been conducted by the courts of a foreign state), the principle of double jeopardy is not violated.

In retrying him for the crime for which he may have served a criminal sentence abroad, the Soviet court reserves the discretion to take into consideration the sentence already served abroad. The fact that he was tried and acquitted in a foreign court does not preclude his retrial in a Soviet court for the same offense under the principles of art. 5 of the FPCL.

The same principle applies to a stateless person who commits a crime outside the territory of the USSR (assuming that the act so committed is also a crime under Soviet law) and enters the USSR after or before serving a criminal punishment abroad.

By contrast the Soviet Union may not prosecute a foreigner who committed a crime outside the limits of the USSR and subsequently entered the USSR, unless an international treaty to which the USSR is a party otherwise provides. It makes no difference whether the act engaged in by the foreigner while abroad is also a crime under Soviet law. As long as it was not committed on the USSR territory, a USSR court shall have no jurisdiction over such a person. Usually, however, the USSR enters into treaties governing the prosecution of certain international crimes including, but not limited to, traffic in dangerous drugs, circulation of pornographic materials, making of counterfeit money, destruction of marine cables, airplane high-jacking, terrorism on the high seas, acts of piracy, etc. Absent such an international convention to which the USSR is a party, a USSR court shall have no jurisdiction over a foreigner who commits a crime outside the limits of the USSR and eventually winds up in the territory of the Soviet Union.

In deciding, however, whether the crime was committed "abroad" by the foreigner, certain general principles of interpretation must be borne in mind: If conduct is engaged in abroad, but has a significant impact on the Soviet Union, the Soviet Union may properly assert criminal jurisdiction over such a person if he ever winds up in the Soviet Union even in the absence of the type of international treaty referred to above. For example, if a foreign citizen was engaged in the broadcast of anti-Soviet propaganda over a radio station whose programs are specially beamed into the USSR (*e.g.*, Radio "Free Europe" or Radio "Liberty"), even though the broadcasts originate from outside the territorial limits of the USSR (*e.g.*, from West Berlin or Munich), the significant impact of the broadcasts is felt in the Soviet Union (*i.e.*, in the private homes of the Soviet radio listeners). In this case the crime of anti-Soviet propaganda and agitation³⁰ may be considered to have been committed within the territorial limits of the USSR.

As long as such a person stays outside the USSR there is no way in which he may be properly brought before a Soviet court since most extradition treaties concluded between the USSR and Western countries do not include anti-Soviet propaganda and agitation as an extraditable crime. If, however, such a person enters the Soviet Union by any other means and is apprehended, the Soviet courts may assert proper jurisdiction over him.

Similarly, if a foreigner conspires with other persons outside the limits of the USSR to ship bibles, prayer books, or other forbidden religious materials into the Soviet Union, even though the person is a foreign citizen, and even though the crime is not considered extraditable, the Soviet Union may exercise proper jurisdiction over such a person if he ever enters the Soviet Union and is apprehended by Soviet agents. The basis for jurisdiction in this instance would be the significant impact theory, just as in the case of the radio broadcast above.

Absent such a "significant impact" element, a foreigner who commits a crime against the Soviet Union while abroad (*i.e.*, outside the territorial limits of the USSR) shall not be subject to the jurisdiction of Soviet courts unless an international treaty to which the USSR is a party otherwise provides. For example, an American citizen who kills a Soviet tourist on the street in New York City, an English subject who intentionally destroys the property of the Soviet Government in London, or a French citizen who engages in anti-Soviet

³⁰ R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) art. 70.

propaganda and agitation through his lectures to various groups in Paris, may not be subject to the criminal jurisdiction of Soviet courts even if he eventually winds up in the Soviet Union at some later date since none of the above crimes is covered under art. 5 of the FPCL.

Article 6—Operation of Criminal Law in Time (article 6—RSFSR)

The principle of nonretroactivity of criminal law is one of the major innovations of post-1958 Soviet criminal law. An act shall be deemed criminal only if it was so considered by the laws in force at the time the act was committed. By the same token an ex post facto law shall not be enacted if it has the effect of increasing the criminal punishment beyond that which was stipulated at the time the particular conduct was committed.

In the light of changing circumstances, however, the lawmaking body may retroactively decriminalize any conduct it feels no longer poses any social danger or, in the alternative, it may reduce the punishment for a particular crime ex post facto if it feels that the seriousness of the crime no longer warrants such severe punishment. A retroactive clarification of the meaning of a criminal statute is not precluded under art. 6 of the FPCL.

Pertinent to the question of nonretroactivity of criminal legislation is the issue of publication of new criminal statutes. As a general rule an unpublished criminal statute is not law for the purpose of art. 6 of the FPCL and no person may be held to criminal responsibility for violations of such unpublished laws.³¹ According to a 1958 law,³² all laws adopted by the USSR must be published in the *Vedomosti Verkhovnogo Soveta S.S.S.R.* (Bulletin of the USSR Supreme Soviet—Ved. Verkh. Sov. S.S.S.R.) in the languages of all the Union Republics no later than 7 days after their adoption. The more general laws (*i.e.*, such laws that must be brought to the atten-

³¹ Most Soviet commentators refrain from any categorical assertion that an unpublished criminal statute is not law. However, a close reading of the commentators on the subject indicates that such conclusion is intended by Soviet writers even though it remains unarticulated. See IURIDICHESKII SPRAVOCHNIK DLIIA NASELENIIA (Legal Handbook for the Citizens) 87-88 (1968); 1 PIONTKOVSKII, *supra* note 1, at 225-30; KOMMENTARI K UGOLOVNOMY KODEKSY RSFSR (Commentary to the RSFSR Criminal Code) 14-16 (G. Anashkin, I. Karpets, & B. Nikifirov eds. 1971) [hereinafter cited as ANASHKIN COMMENTARY].

³² *O Poriadke Opublikovaniia i Vstupleniia v Silu Zakonov SSSR, Postanovlenii Verkhovnogo Soveta SSSR, Ukazov i Postanovlenii Prizidiuma Verkhovnogo Soveta SSSR* (On the Procedure for the Publication and Entry into Force of Laws of the USSR, Decrees of the Supreme Soviet of the USSR, Orders and Decree of the Presidium of the USSR Supreme Soviet), [1958] 14 Verkh. Sov. S.S.S.R. Item 275 (Supreme Soviet U.S.S.R.).

tion of the public) may be published in the Soviet Government newspaper *Izvestiia* at the same time. Radio or television broadcasts may be used for this purpose also. Unless otherwise provided, the law shall go into force ten days after its publication in the *Ved. Verkh. Sov. S.S.S.R.* or in *Izvestiia*. In principle, the law may not provide for a shorter waiting period, *i.e.*, no law shall go into force in less than 10 days from the time that it was published. However, it may provide for a longer waiting period.³³ The principle of nonretroactivity in criminal legislation applies only to substantive criminal law.³⁴ If, however, the law was intended for application only by officials, then there is no requirement that such law be made public. The requirement of notice shall be met once such law is communicated to those officials who are expected to conform to its provisions. Usually there are secret instructions intended for internal use only and of which the public has no right to know. If the violation of these secret laws entails any criminal responsibility, the proper subject of such criminal responsibility shall be only those officials to whom they were addressed and to which the provisions were properly communicated.³⁵

Article 7—The Concept of Crime (article 7—RSFSR)

This provision takes an openly class approach to the definition of crime: a crime is seen in the context of the danger that the act poses to the socialist society's protected interests.³⁶ The social interests specifically protected by criminal law include: social and state system, socialist economic system, socialist property (which includes state and collective-cooperative farm property, as well as the property of socialist social organizations), the person, as well as the political, labor and property rights of citizens,³⁷ and the socialist legal order.

³³ Similar laws are in effect in all the Union Republics. See Law of Sept. 30, 1958, [1958] 10 *Ved. Verkh. Sov. R.S.F.S.R.* Item 510.

³⁴ M.S. STROGOVICH, *I KURS SOVETSKOGO UGOLOVNOGO PROTSSA* (Treatise on Soviet Criminal Procedure) 48 (1948).

³⁵ The legal problems raised by such secret laws are discussed in Loeber, *Legal Rules for Internal Use Only*, 19 *INT'L & COMP. L.Q.* 70, 70-98 (1970).

³⁶ For a more comprehensive discussion of the elements of crime in Soviet doctrine see 2 PIONTKOVSTII, *supra* note 1, at 86-205; IA. M. BRAININ, *UGOLOVNAIA OTVETSTVENNOST I EE OSNOVANIE V SOVETSKOM UGOLOVNOM PRAVE* (Criminal Responsibility and Its Basis in Soviet Criminal Law) (1963); M.A. GEL'FER, *SOSTAV PRESTUPLENIIA* (The Elements of a Crime) (1960); A.N. TRAININ, *OBSHCHEE UCHENIE O SOSTAVE PRESTUPLENIIA* (General Theory or the Elements of a Crime) (1957).

³⁷ The use of the term "citizen" in this article is not intended to preclude non-Soviet citizens. Rather it should be read to mean "persons," including aliens and stateless persons whose protected rights may be infringed upon within the territory of the USSR.

By design this provision does not seek to protect capitalist interest from criminal violations. A close reading of art. 7 of the FPCL would tend to suggest that the capitalist interests of foreign business interests are not protected under Soviet criminal law. But perusal of the special provisions of the criminal codes of the respective Union Republics indicates that these capitalist property interests are protected, though not to the same extent that the property interests of other socialist states in the Soviet Union are protected.³⁸

It is equally important to note that art. 7 preserves the concept of *nullum crimen nulla poena sine lege* and categorically rejects the notion of crime by analogy. A criminal statute must have an objectively measurable meaning under established principles of statutory construction. As long as it at least defines the outer perimeters of the crime it shall be held to have met the tests of art. 7 of the FPCL.

This does not mean however that a Soviet criminal statute shall be voided merely for its vagueness or overbreadth. Unfortunately, most provisions of the RSFSR Criminal Code are vague and impermissibly overbroad. The hooliganism³⁹ and anti-parasite⁴⁰ statutes belong to this latter category but no Soviet court has seen fit to declare them void for vagueness or overbreadth. What this means is that whereas contemporary Soviet criminal law rejects the concept of crime by analogy, it refuses to adopt the doctrine of overbreadth or void for vagueness. As a result of this, the RSFSR Criminal Code is replete with omnibus criminal statutes.

Article 8—Intentional Commission of a Crime (article 8—RSFSR)

This article contemplates two categories of criminal intent: direct intent and indirect intent. The elements of direct intent are as follows: the individual is aware of the socially dangerous character of his contemplated act, he wishes to precipitate such social danger, and he consciously goes ahead with the act. By contrast, indirect intent is characterized by the following three elements: the individual is aware of the socially dangerous character of his contemplated act; however, he hopes that the social danger could be avoided (*i.e.*, he does not wish to precipitate the social danger); and he consciously goes ahead with the act knowing fully well that there is a

³⁸ The property interests of other socialist countries within the Soviet Union is specifically protected under art. 101 of the RSFSR Criminal Code. The provision of art. 151 of the RSFSR Criminal Code may be construed to mean that the property interests of capitalist corporations operating inside the Soviet Union are protected from criminal infringements.

³⁹ R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) art. 206.

⁴⁰ *Id.* art. 209.

chance that the social danger which he does not wish to occur may in fact occur. The main difference between direct and indirect intent lies in the second factor—in the former, the individual wishes to precipitate the social danger, whereas in the latter, he does not consciously wish to precipitate such social danger.

Article 9—Commission of a Crime Through Negligence (article 9—RSFSR)

Article 9 contemplates criminal negligence as the second basis for guilt. Criminal negligence may be manifested in two distinct forms: *samonadeiannost'* (Negligent Presumption)—here the individual is aware of the possible dangerous consequences of his contemplated act, however, he strongly believes that such danger could be averted and it turns out that his calculations (as to the possible aversion of the danger) proved to be wrong; or *Nebrezhnost'* (Carelessness)—here the individual is not aware of the possible dangerous consequences of his contemplated act, but he ought to have or should have foreseen such danger. In determining whether an individual ought to have foreseen the social dangers in his contemplated act the court shall take into consideration, in appropriate cases, certain subjective factors such as the level of education of the individual.

*Article 11—Nonimputability*⁴¹ (article 11—RSFSR)

This provision operates on the assumption that a person, who because of any degree of mental illness, cannot fully appreciate the socially dangerous character of his act, cannot be held to criminal responsibility for such act. Criminal guilt presupposes the possession of a healthy criminal mind by the criminal. Any impairment of his mental faculties shall be a ground for release from criminal responsibility.

In deciding nonimputability the Court uses two criteria—medical and psychological—both of which must be established before a person may be declared to be nonimputable. "The medical criteria of nonimputability consist of the establishment of the existence in an individual of a chronic mental illness, a temporary loss of mental

⁴¹ For a detailed discussion of the concept of nonimputability in Soviet doctrine, see 2 PIONTKOVSTII, *supra* note 1, at 236-46; D.P. LUNTS, PROBLEMA NEVMEINIAEMOSTI V TEORII I PRAKTIKE SUDEBNOI PSIKHIATRII (The Problem of Nonimputability in the Theory and Practice of Forensic Medicine) (1966); A.A. GRAVIANI, UGOLOVNAIA OTVETSTVENNAST' ZA PRESTUPLENIIA SOVERSHENNYE V SOSTOIANII OPIAENENIIA (Criminal Responsibility for Crimes Committed in a State of Drunkenness) (1968).

activity, mental retardation or any other state of psychic illness. Among such chronic mental illnesses may be listed schizophrenia, progressive paralysis, epilepsy, etc. Temporary loss of mental activity includes all forms of unbalanced state of mind, like pathological insanity and pathological intoxication."⁴²

By contrast, "the psychological criteria of nonimputability consist of the mental inability of an individual to appreciate the full meaning of his actions . . . or to control his actions" ⁴³ The presence of any of the medical criteria listed above, if it results in any of the psychological results above, may lead to the declaration of the person to be nonimputable.

The implication is that not all stages of chronic mental illness may necessarily result in one of the above psychological results. Thus, the presence of some stage of schizophrenia or epilepsy may not be a sufficient ground for declaring an individual to be nonimputable if it does not result in the mental inability of the person to either appreciate the full meaning of his actions or to control such actions.

However, in order to successfully plead insanity under art. 11, the person must be certified to be mentally ill by state psychiatrists. Once the person is so certified, the court may order him to undergo compulsory medical treatment in a certified mental (psychiatric) institution. It should be pointed out here that once the court has established that an individual is nonimputable, such a person has no constitutionally protected right to refuse treatment for his mental illness. The condition of his release from criminal responsibility is that he must undergo a court ordered psychiatric treatment and whatever right he has to refuse treatment shall be superseded by the overriding interest of the state in his mental sanity.

Under art. 58 of the RSFSR Criminal Code there are two categories of psychiatric hospitals to which a person may be committed: general psychiatric hospitals or special psychiatric hospitals. The choice of psychiatric hospitals, under art. 59 of the RSFSR Criminal Code, shall depend upon the seriousness of the crime committed by the individual. Persons who commit the more serious crimes but are in need of hospitalization and compulsory treatment shall be sent to the special psychiatric hospital.

These psychiatric hospitals are not hospitals in the conventional

⁴² 2 PIONTKOVSKII, *supra* note 1, at 238.

⁴³ *Id.* at 239.

sense of the word. They are hospitals-*cum*-detention centers. Persons who are committed to these psychiatric hospitals by order of a court acting under art. 11 of the FPCL shall be subject to certain limitations on their freedom. Release from such psychiatric hospitals would need not only a certification by the attendant physicians that the person is fully recovered from his mental illness, but also an order of a court terminating the measure of compulsory treatment.⁴⁴ Once released from this compulsory medical treatment the person shall not be sentenced to any further criminal punishment.

For persons who committed a crime while in a state of imputability but who only became nonimputable at the time of the judgment the court reserves the discretion, upon the release of the person from the psychiatric hospital, to sentence him to further criminal punishment for his original crime if the statute of limitations has not run out or if the court feels that there are no grounds for releasing him from criminal responsibility. In such a case the time spent in the psychiatric hospital shall be deducted from the term of imprisonment to be served by him.⁴⁵

It is obvious from the provision of art. 11 of the FPCL that an insanity plea is not an easy way out of criminal responsibility—it not only requires certification by state psychiatrists as to the true state of mind of the defendant, but if successfully argued it may yet entail commitment to a psychiatric hospital where the conditions of detention may not be much better than they would have been had the person been sentenced to an ordinary prison. Because of this factor a defendant in a Soviet criminal trial would think twice before deciding to enter a plea of insanity.

Article 12—Responsibility for Crimes Committed in a State of Intoxication (Drunkenness) (article 12—RSFSR)

Not only is it not permitted to plead intoxication (drunkenness) as a ground for relief from criminal responsibility, but, in fact, art. 39, para. 10 of the RSFSR Criminal Code provides that the commission of a crime by a person who is in a state of intoxication may be considered as an aggravating circumstance in the assignment of punishment by the court. Article 12 refers to intoxication resulting either from the use of alcohol or from other intoxicants, *e.g.*, narcotic drugs. However, art. 12 contemplates only ordinary intoxication as opposed to pathological intoxication. The latter form of in-

⁴⁴ R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) art. 60, ¶ 2.

⁴⁵ *Id.* art. 61.

toxication would qualify as a ground for nonimputability under art. 11 above.

Article 13—Necessary Defense (article 13—RSFSR)

A most elaborate explanation of this institution of Soviet criminal law was given by a leading Soviet commentary, viz.,

The institution of necessary defense in Soviet law is a subjective right of each Soviet citizen. To respect the rules of socialist communal living is the duty of each citizen in our society. A citizen of a socialist society has the right to defend, through acts of necessary defense, Soviet power and socialist property, as well as other social interest from criminal violations. . . . The exercise of this granted right is a social duty and a moral obligation on all citizens in our society. . . . There is no [legal] duty on the part of a citizen to exercise a right of necessary defense.⁴⁶

Necessary defense is a justifiable basis for release from criminal responsibility only as long as the measures taken in necessary defense are proportionate to the social danger against which the defense measures are taken. Any person who exceeds the limits of necessary defense shall be subject to criminal responsibility, even though this may be considered to be a mitigating circumstance in the assignment of punishment by the court.⁴⁷ It is not necessary that the infringement against which the necessary defense measures are taken shall be criminal. As long as the infringement poses a clear and present danger to the protected interests of the Soviet state and society, as well as to the individual or his legitimate rights, a person may take legitimate measures of necessary defense to prevent it.

Article 14—Extreme Necessity (article 14—RSFSR)

In order to successfully plead extreme necessity as a ground for relief from criminal responsibility it must be shown that the danger which threatens the aforementioned protected interests is suffi-

⁴⁶ 2 PIONTKOVSKII, *supra* note 1, at 347, 349. The only time that there is a legal duty to defend the interests of the Soviet state or the interests of other socialist organizations is when it is a part of the official function of the person to do so. For example, a night watchman has a positive duty to defend the property over which he has charge in case of any criminal attempts directed at such property. Failure to do so may be deemed to be a crime under art. 172 of the RSFSR Criminal Code.

⁴⁷ R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) art. 39, ¶ 6.

ciently clear and present and not just remote or hypothetical; it must be shown that no other realistic measure of preventing such danger exists; and that the harm caused by resorting to the measures of extreme necessity is less than the harm so prevented. The source of such danger varies and may range from the forces of nature (*e.g.*, flood, lightning, hurricane, earthquake, etc.); faulty mechanical device (*e.g.*, faulty automobile brakes, collapse of a faulty construction, etc.); attacks from animals, to the actions of a human being. In all of these instances, except in the case of a man-caused danger directed at the person or the protected personal interests of the individual taking the measures of extreme necessity, the defender is acting as a good samaritan. Articles 13 and 14 of the FPCL are, therefore, designed to encourage selfless efforts on the part of all Soviet citizens in protecting the interests of society at large and of their fellow citizens as well.

Article 17—Complicity (article 17—RSFSR)

Conscious participation in the commission of a crime may take any of the following forms—perpetrator, organizer, instigator or accessory. Such participation must be intentional since there is no such thing as complicity through negligence. A prior agreement between all or some of the participants is a prerequisite for the kind of complicity contemplated under art. 17. Accordingly, the concept of accessory after the fact is not covered under art. 17 of the FPCL. Similarly,

[a] crime shall be deemed to have been committed through complicity only under the condition that there exists between the actions of the perpetrator and all other participants at the moment of the commission of the crime a causal and guilt connection. When a series of similar or different crimes are committed simultaneously by different persons even if those crimes are directed at the same protected interests, there is no complicity if there is no causal connection between their separate actions, and if their actions are not governed by a common intention.⁴⁸

Article 18—Concealment (article 18—RSFSR)

This provision contemplates the notion of accessory after the fact. However, it shall apply only to those few instances specifically provided for by law. Under art. 88-1 of the RSFSR Criminal Code, concealment of the following crimes shall be a basis for criminal

⁴⁸ ANASHKIN COMMENTARY, *supra* note 31, at 47.

responsibility: treason, espionage, terrorist act, sabotage, wrecking, organizational activity directed at the commission of specially dangerous crimes against the state or participation in an anti-Soviet organization, banditry, smuggling, making or passing of counterfeit money or securities, and violations of currency transactions.⁴⁹

Article 19—Failure to Report (article 19—RSFSR)

Article 19 seeks to constitute every Soviet citizen into a private attorney-general: any person who knows of a crime that has been committed or is in the stage of preparation or strongly believes that such is the case has a positive duty to report such knowledge or strong suspicion to the law enforcement authorities. This duty applies, however, only to the few crimes specifically enumerated in the criminal codes of the respective Union Republics. The RSFSR Criminal Code lists such crimes in art. 88-1 and it includes: treason, espionage, terrorist act, sabotage, wrecking, organizational activity directed at commission of specially dangerous crimes against the state or participation in an anti-Soviet organization, banditry, making or passing of counterfeit money or securities.⁵⁰

Failure to report shall be deemed to be a crime only if such failure was intentional. To be intentional the following elements must be present: the individual realizes that he is in possession of the knowledge of a crime that is either in the stage of preparation or that has already been completed; that the information he has is reliable and is not based on mere conjecture or on frivolous speculations or on baseless hearsay evidence; that the crime which is in the stage of preparation or that has already been completed belongs to the category of crimes for which the law requires him to report all knowledge of such crimes to a competent state or social agency.⁵¹ "The reliability of the knowledge of the crime in preparation or already completed is a prerequisite for criminal responsibility for failure to report."⁵² "The fact that the person who possesses such a reliable knowledge of a crime is a relative of the person who is committing or has already committed the crime is not an excuse for failure to report any such knowledge."⁵³

⁴⁹ Art. 189 of the RSFSR Criminal Code lists other crimes the concealment of which is actionable under art. 18 of the FPCL.

⁵⁰ Art. 190 of the RSFSR Criminal Code contains a second list of crimes which fall under this category.

⁵¹ ANASHKIN COMMENTARY, *supra* note 31, at 55.

⁵² *Id.*

⁵³ *Id.* at 56.

It is not clear, however, whether a defense counsel who is confidentially informed by his client of a crime committed by the client but for which he is presently not being prosecuted, or of a crime committed by another person hitherto unknown to the authorities, is required to report such knowledge to the law enforcement authorities in contravention of the confidentiality of communication between an attorney and his client.⁵⁴

Article 20—Purpose of Punishment (article 20—RSFSR)

Criminal punishment is a measure of governmental coercion applied only by an order of a court of law. Criminal punishment shall be imposed only upon conviction for the violation of a special provision of the criminal law and not just for anti-social or immoral conduct. No other organ within the Soviet state is authorized to impose criminal punishment, not even the omnipotent Communist Party of the Soviet Union (CPSU).

Without seeking to inflict unnecessary physical pain on the convicted criminal, Soviet criminal punishment serves three interrelated purposes—it is punitive, it is correctional, and it is prophylactic. The choice of one or a combination of the available measures of punishment shall be made by the court after due consideration of the gravity of the offense, the personality of the criminal, the potential for a speedy rehabilitation of the criminal, and any other relevant factors in any given case. In the words of a leading Soviet commentator:

[t]he ultimate purpose of criminal punishment is the correction and rehabilitation of the criminal. . . . Punishment under Soviet criminal law does not have the intention of inflicting physical suffering, or the lowering of human dignity. Because of this the Soviet legislation created an entirely new system of punishment from which are removed all implications of torture and the lowering of the human personality.⁵⁵

Article 21—Kinds of Punishment (article 21—RSFSR)

Article 21 provides for the following measures of punishment: (1) deprivation of freedom; (2) exile; (3) banishment; (4) correctional tasks without the deprivation of freedom; (5) deprivation of the

⁵⁴ For a more detailed discussion of this question and of the much broader issue of the attorney-client privilege under contemporary Soviet criminal law, see Osakwe, *Due Process*, *supra* note 11.

⁵⁵ ANASHKIN COMMENTARY, *supra* note 31, at 58.

right to occupy specified official positions or to engage in specified activities; (6) fine; (7) social censure; (8) punishment in the form of assignment to disciplinary battalion may also be applied to persons in military service for a regular term; and as supplemental measures, (9) confiscation of property; and (10) deprivation of military or special rank.

Article 21 stresses the principle of individualization of criminal punishment: only persons who have been tried and convicted of a specific crime may be sentenced to any of the measures of criminal punishment listed above. The listing of the measures of criminal punishment in this article is intended to be all inclusive. These measures may be complemented by the respective Union Republican criminal codes,⁵⁶ but the court is not at liberty to impose a measure of criminal punishment that is not listed either in art. 21 of the FPCL or in the pertinent criminal code provisions of the respective Union Republics.

Most of the earlier types of criminal sanctions have been abandoned completely. These include: a declaration of the criminal to be an enemy of the people; the declaration of the criminal as an outlaw; banishment from the USSR; the denial of a criminal of the right to return to the Soviet Union; deprivation of a criminal of his civil and political rights; and stripping of the criminal of his Soviet citizenship. The socio-economic and political conditions of 1958 no longer justified the retention of any of the above measures of criminal punishment and accordingly they were rejected in the 1958 FPCL.

Even though banishment from the USSR, denial of a right to return to the USSR, and the stripping of the convicted criminal of his Soviet citizenship are no longer listed among the measures of criminal punishment that may be imposed by a court of law on a convicted criminal, it should be stressed that in extreme circumstances any of these measures, or a combination of them, may be imposed by the Soviet political authorities—usually by the Presidium of the USSR Supreme Soviet. When this happens it should be considered as a political rather than as a legal sanction. The power of the Presidium of the USSR Supreme Soviet to confer, deny, or take away Soviet citizenship is unrestricted. Accordingly, its deci-

⁵⁶ Among some other measures of criminal punishment provided in the criminal codes of the Union Republics is the deprivation of parental rights which is contemplated in the criminal codes of Uzbekistan, Azerbaidjan, Armenia, Georgia, Kirgizia, Latvia, Moldavia, Tadjikistan, Turkemenia, Ukraine, and Estonia.

sion to strip any recalcitrant Soviet citizen of his or her citizenship may not be challenged on the basis of any principle of law since it is an extra-legal measure.⁵⁷

Article 22—Death Penalty as an Exceptional Measure of Punishment (article 23—RSFSR)

Soviet criminal law views the death penalty as an extreme measure of criminal punishment which shall be applied only in those rare instances specifically provided by law. Under the present law the death penalty may be imposed for the following types of peacetime crimes: (1) political crimes—treason,⁵⁸ espionage,⁵⁹ terrorist acts,⁶⁰ sabotage,⁶¹ organizational activity directed at the commission of specially dangerous crimes against the state and also participation in anti-Soviet organizations,⁶² especially dangerous crime against the state committed against another working peoples' state;⁶³ (2) crimes against the system of justice and public order—banditry,⁶⁴ actions disrupting the work of correctional labor institu-

⁵⁷ The present law governing the recognition, acquisition and loss of Soviet citizenship was adopted on August 19, 1938 by the USSR Supreme Soviet pursuant to the authority granted it under art. 14, para. (V) of the USSR Constitution of 1936. Under that law the admission into, the deprivation of, as well as the readmission to Soviet citizenship falls within the exclusive jurisdiction of the Presidium of the USSR Supreme Soviet. The power of the Presidium of the USSR Supreme Soviet to admit, readmit, release, or expel any person from Soviet citizenship is absolute and final. A Soviet citizen does not have an inalienable right to his/her citizenship status. By the same token a Soviet citizen who wishes to renounce his/her citizenship may not do so unilaterally—a request for such release from Soviet citizenship shall be addressed to the Presidium of the USSR Supreme Soviet and a release from Soviet citizenship is considered legal only after such a request has been granted by the Presidium of the USSR Supreme Soviet.

The law of 1938 does not establish the conditions under which a person may be stripped of Soviet citizenship. Such a determination may be made by the Presidium of the USSR Supreme Soviet on a case-by-case basis and generally such a decision is made if the Presidium of the USSR Supreme Soviet feels that a particular individual, by virtue of his act, is undeserving of the honor of being a Soviet citizen.

In recent years such a determination was made in the cases of Madam Svetlana Alekueva (Joseph Stalin's daughter who defected to the West) and Soviet dissident writer, Alexander Solzhenitsyn. For more details on the law governing Soviet citizenship, see G. GINSBURGS, *SOVIET CITIZENSHIP LAW* 7-270 (1968) (volume 15 of the *LAW IN EASTERN EUROPE* series).

Ginsburgs, *Citizenship*, in 1 *ENCYCLOPEDIA OF SOVIET LAW* 108, 108-11 (F. Feldbrugge ed. 1975); V. SHEVTSOV, *SOVETSKOE GRAZHDANTVO* (Soviet Citizenship) (1965); Osakwe, *Equal Protection Under Soviet Constitutional System*, in *CONSTITUTIONAL PROTECTION OF EQUALITY* 159, 177-78 (T. Koopmans ed. 1975) [hereinafter cited as Osakwe, *Equal Protection*].

⁵⁸ R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) art. 64.

⁵⁹ *Id.* art. 65.

⁶⁰ *Id.* arts. 66-67.

⁶¹ *Id.* art. 68.

⁶² *Id.* art. 72.

⁶³ *Id.* art. 73.

⁶⁴ *Id.* art. 77.

tions;⁶⁵ (3) economic crimes—making or passing of counterfeit money or securities as a form of business or on a large scale, stealing of state or social property on an especially large scale;⁶⁶ (4) crimes against the person—intentional homicide under aggravating circumstances,⁶⁷ aggravated rape;⁶⁸ (5) other crimes—taking of a bribe under aggravating circumstances,⁶⁹ infringing the life of a policeman or of a Peoples' Guard under aggravating circumstances.⁷⁰

The imposition of the death penalty in each of the above instances by the court is discretionary. Usually the death penalty is applied if the court feels that the gravity of the crime is such that, if coupled with the extremely dangerous nature of the criminal himself, other measures of punishment will not achieve the purpose of criminal punishment listed under art. 20 of the FPCL.

Soviet policy toward capital punishment has been most erratic: when the Bolsheviks seized power in 1917, the death penalty was permissible under the tsarist law. The Soviet government, within two days from the time it seized political power, abolished the death penalty in a Decree of October 26, 1917.⁷¹ In 1918 the death penalty was restored for certain categories of crimes.⁷² Once again in 1920 the death penalty was abolished.⁷³ In doing so, however, the Soviet government reserved to itself the right to reinstate capital punishment should the circumstances so demand. In that same year, 1920, the Soviet government quickly brought back capital punishment. Both the 1922 RSFSR Criminal Code, the 1924 FPCL, as well as the 1926 RSFSR Criminal Code contemplated the death penalty as an extreme but temporary measure of criminal punishment. In 1932 the category of crimes for which capital punishment was permitted was considerably enlarged.

⁶⁵ *Id.* arts. 78, 87, ¶ 2, 88, ¶ 2, respectively.

⁶⁶ *Id.* art. 93-1.

⁶⁷ *Id.* art. 102.

⁶⁸ *Id.* art. 117, ¶ 2.

⁶⁹ *Id.* art. 173, ¶ 2.

⁷⁰ *Id.* arts. 191-2.

⁷¹ See *Dekret Vtorogo Vserossiskogo S'ezda Sovetov* (Decree of the Second All-Russian Congress of the Soviets of Oct. 26, 1917) 1 S.U. 1917 Item 10.

⁷² See *Postanovlenie Soveta Narodnykh Kommissariatov "O Krasnom Teroze"* (Decree of the Council of Peoples' Commissariats "On the Red Terror" of Sept. 5, 1918) 65 S.U. R.S.F.S.R. 1918 Item 710.

⁷³ *Postanovlenie VTsIK and SNK "Ob Otmene Primeneniia Vyshchei Mery Nakazaniia—Rasstrela"* (Decree of the Supreme Central Executive Committee and the Council of Peoples' Commissariats "On the Abolition of the Application of the Extreme Measure of Punishment—Death by Shooting") 4-5 S.U. R.S.F.S.R. 1920 Item 22.

In 1947 capital punishment was abolished again for all crimes. But in 1950 it was reinstated by a decree of January 12 but was limited only to such crimes as treason, espionage, subversion, and wrecking. In 1954 a decree of April 30⁷⁴ extended the application of capital punishment to other categories of crimes, notably aggravated homicide. Thereafter the categories of crime for which capital punishment was permitted were expanded in 1960, 1961, and 1962. The current law on capital punishment is restated in both art. 22 of the 1958 FPCL and in art. 23 of the 1960 RSFSR Criminal Code. Apparently capital punishment is here to stay in the Soviet Union.

Article 23—Deprivation of Freedom (article 24—RSFSR)

The maximum period of deprivation of freedom is 10 years in most cases. For especially dangerous recidivists the maximum period of deprivation of freedom is 15 years. Persons who have not attained the age of 18 at the moment of judgment may not be sentenced to more than 10 years of deprivation of freedom under any circumstance.

Deprivation of freedom may be served in one of the following facilities: Educational Labor Colony, Correctional Labor Colony, and Prisons. Educational Labor Colonies (ELC) are of two categories: general regime and reinforced regime. Only persons who have not attained the age of 18 at the moment of judgment may be sent to the ELC. By contrast, there are five categories of correctional labor colonies (CCL)—general regime, reinforced regime, strict regime, special regime and the correctional labor settlement colony. No person may be sentenced by a court to a correctional labor resettlement colony. Instead, the authorities of the CCL may in their discretion transfer persons from the general, reinforced and strict regime to the correctional resettlement colonies if the individual is of good conduct. To qualify for such transfer (*i.e.*, to the correctional labor resettlement colony) the individual must have served at least half of his term in the CCL.

In sentencing a convicted criminal the court not only must indicate the time to be served, but also the kind of facility to which the person shall be sent and under what regime he is to be held. The prison is designed for the internment of recidivists and for persons convicted of serious crimes.

Even though the prisons are reserved for the hard-core criminals, the Soviet prison system operates on the "scientific" assumption

⁷⁴ See [1954] 11 Ved. Verkh. Sov. S.S.S.R. Item 221.

that prison inmates are not innately wicked and therefore are redeemable. Accordingly, the Soviet prison is designed to provide a morally antiseptic environment that would be conducive to solitary reflection and repentance. Inmates of Soviet prisons are forbidden to speak to each other even while working, or to have the slightest contact with the outside world. The regime in these prisons calls for almost absolute solitary confinement.

In all of the above facilities the inmates are segregated on the basis of sex, age, and severity of the crime committed. Thus, women are kept separate from men, children from adults, and recidivists from first-time offenders. Supervision over all of the above facilities is vested in the procurator whose duty it is to make sure that the rights of the inmates are fully respected.⁷⁵

Article 33—Circumstances Mitigating Responsibility (article 38—RSFSR)

Under the present law some of the factors that were considered to be grounds for mitigated criminal responsibility have disappeared. These included the following: the fact that the individual belonged to the working class, or the fact that the criminal acted out of an urgent need to satisfy his hunger. The changes in the socioeconomic and political conditions in the Soviet Union of 1958 rendered those factors no longer controlling in the assignment of criminal punishment.

Article 33, however, continues to operate on the assumption that any factor which renders a crime less socially dangerous ought to be treated as a mitigating circumstance in the assignment of punishment. It may be equally interesting to note that membership in the CPSU is not a mitigating circumstance under art. 33 and no case is known to this writer in which the court considered such factor to be a basis for mitigated criminal responsibility.

Article 34—Circumstances Aggravating Responsibility (article 39—RSFSR)

Unlike in the case of art. 33 where the court is granted the power to consider other circumstances as mitigating criminal responsibility even where the FPCL or the Union Republican criminal code

⁷⁵ Soviet law regulating the operation of the correctional facilities is contained in two major acts: The Fundamental Principle of Correctional Labor Legislation of the USSR and the Union Republics, and the Correctional Labor Code of RSFSR. For a general discussion of the Soviet Correction Labor Law, see Feldbrugge, *Soviet Penitentiary Law*, 1 REV. SOCIALIST L. 123-47 (1975).

does not specifically list such other circumstances, the list of aggravating circumstances in art. 34 or in a corresponding provision of a Union Republican criminal code is all-inclusive. A court in determining criminal punishment may not consider as aggravating the individual's responsibility factors not specifically listed in the FPCL or in the pertinent criminal code of a Union Republic. Aggravating factors listed include: (1) previous commission of any crime; (2) commission by an organized group; (3) mercenary or other base motives; (4) resultant grave consequences; (5) commission against a helpless or dependent person; (6) involvement of minors; (2) especially cruel manner of commission; (8) exploitation of public disaster; and (9) commission in a state of intoxication.

In reality however the court is not completely powerless in considering other aggravating factors other than those listed above. The use of the phrase "or other base motives" would seem to allow the court the freedom to interpret what constitutes "other base motives." One Soviet commentator tried to plug this loophole in art. 34 of the FPCL by explaining: "The reference to 'other base motives' [in the present article] should be understood to mean cowardice, money-grubbing, revenge, or other similar motives which are incompatible with communist morality."⁷⁶ Even this explanation still leaves the court with the authority to introduce other circumstances as basis for the aggravated responsibility of persons before them.

However, no longer is the fact that the individual belongs or once belonged to the class of exploiters considered to be an aggravating circumstance. Also not considered to be an aggravating circumstance is the fact that a person is a member of the CPSU. Membership of the CPSU certainly creates a higher expectation of moral behavior and respect for law, but such fact should not be held against a person who happens to commit a crime in violation of his CPSU membership obligation to obey the laws of the state and to help expose all persons who violate those laws.

Article 47—Expunging of Record of Conviction (article 57—RSFSR)

For certain categories of crimes the expunging of the criminal record is automatic—once the objective criteria such as relief from such punishment by art. 49 and art. 50 or prior service of punishment are met, no further action is needed on the part of the convict in order to have his criminal record expunged. In some other cases it will take a judicial action to expunge the criminal record, *e.g.*,

⁷⁶ ANASHKIN COMMENTARY, *supra* note 31, at 102.

when the convict wishes to expunge his criminal record prematurely. In addition to that, a criminal record may be expunged by an act of amnesty issued by the competent political authority, usually the Presidium of the USSR Supreme Soviet.

Among some of the most serious legal consequences of an unexpunged criminal record are the following: upon the commission of a new crime a previous unexpunged criminal record may be considered as an aggravated circumstance; the person with an unexpunged criminal record may be limited not only in his choice of place of residence, but also he may not hold certain offices or engage in certain professions.⁷⁷ However, no one may be denied the right to vote or to hold office in any Soviet election on the ground that he has a criminal record.

III. MAJOR INSTITUTIONS OF THE SPECIAL PART OF THE RSFSR CRIMINAL CODE

Whereas the FPCL in its 47 articles provides the general principles of contemporary Soviet criminal law which all the respective Union Republics have internalized in the provisions of the General Part of their criminal codes, the specific task of establishing the different types of crimes is left to the Union Republics. The Special Part of the RSFSR Criminal Code contains 12 chapters with a total of 235 articles⁷⁸ and an Appendix. Each chapter deals with a special category of crimes and the order of the listing does not necessarily reflect the severity of the crimes.⁷⁹

Of the 235 separate articles contained in the Special Part of the Criminal Code, only 54 articles protect the rights of the individual, *i.e.*, life, liberty, property rights and other civil and political rights.⁸⁰ The remaining 181 articles specifically protect the social, economic, political system, the system of justice in the USSR, as well as the

⁷⁷ For a general discussion of the rights of ex-convicts to vote and hold office under Soviet electoral law, see Osakwe, *Equal Protection*, *supra* note 57, at 179-81.

⁷⁸ When the RSFSR Criminal Code was originally adopted the Special Part of the Code had 206 articles. Between 1960 and 1973 the Special Part was amended so many times that 29 additional articles were added.

⁷⁹ For example, the fact that the category of Crimes Against Life, Liberty, Freedom and Dignity of the Person (chapter 3) comes before Economic Crimes (chapter 6) is certainly not intended to demonstrate the order in which the Soviet Union regards both categories of crimes. If a true order of priority were to be maintained both economic and military crimes would not occupy the same positions which they now occupy—chapters 6 and 12 respectively.

⁸⁰ The articles which directly protect the rights of the individual include 102-41, 142-51, 176-79, and 183.

special relationship between the Soviet Union and the other socialist states.

Since the English language translation of the RSFSR Criminal Code is readily available,⁸¹ this portion of the study shall deal only with the noteworthy provisions of that code. The noteworthiness of a code provision for the purpose of inclusion in this study shall be determined by a combination of the following factors: the peculiarity of the crime to the socialist system; the pervasive vagueness in the drafting of the code article in question, thus giving rise to the question of constitutional overbreadth and voidness; the frequency with which the article in question is applied by Soviet courts; a general feeling of misunderstanding of the provisions of the article in question by many Western students of Soviet law as well as Western laymen; a striking contrast in the Soviet application of a particular institution as compared with its general Western understanding.

By these criteria the noteworthy articles of the RSFSR Criminal Code Special Part are:

Article 70—Anti-Soviet Agitation and Propaganda

Article 70 makes it a crime to engage in any of the following activities: (a) agitation and propaganda aimed at subverting or weakening the Soviet state; (b) agitation or propaganda aimed at committing any of the crimes listed in arts. 64-73 of the RSFSR Criminal Code; (c) circulation of anti-Soviet false rumors with the aim of either subverting the Soviet state, weakening the Soviet authority or committing any of the crimes in arts. 64-73; (d) circulation of defamatory statements designed to degrade the Soviet state or social system; (e) preparation of materials (literature of any kind) aimed at achieving any of the above purposes; (f) keeping of materials of the above nature for the purpose of achieving any of the above purposes.

An essential element of this crime is the underlying purpose of the act—the subversion or the weakening of the Soviet regime. Accordingly,

there is no crime of anti-Soviet agitation and propaganda when the circulation of slanderous fabrications which defame the Soviet state or social system is not coupled with the intention to subvert or weaken the Soviet power. A systematic circulation in an oral

⁸¹ BERMAN, *supra* note 11, at 125-202.

form of false statements which defame the Soviet state or social system, as well as the preparation or circulation into a written form, through the press or in any other forms, or similar materials without the special intention to subvert or weaken the Soviet authority may be classified only as a crime against the Soviet system of administration and this may be criminalized under art. 190-1 of the [RSFSR] Criminal Code.⁸²

By the same token, any person who stores anti-Soviet material without the intention of using it to subvert the Soviet system shall not be guilty of the crime contemplated in art. 70. "Anyone who maintains and preserves a daily diary which is not intended for circulation but which contains anti-Soviet observations and entries may not per se be guilty of the crime of anti-Soviet agitation and propaganda, but such activity may constitute an evidence of the author's anti-Soviet sentiments."⁸³

Anti-Soviet agitation is defined as the circulation of anti-Soviet statements, thoughts or rumors within a large group, whereas anti-Soviet propaganda, by contrast, entails the same acts directed at a small group or even to just one individual.⁸⁴

It follows that in order to apply art. 70 two elements must be present—first, the agitation and propaganda must be anti-Soviet in substance. Any statement which incites anti-Soviet reaction or incites hatred for or ill feelings toward the Soviet system is by definition anti-Soviet; second, the purpose of the agitation or propaganda must be to weaken, subvert, defame, or degrade the Soviet state, social system or Soviet authority. As one Soviet commentary put it:

In order to make a correct political evaluation of the intention of the individual or of the purpose of his action . . . it is important to study the personality of the defendant, to know his political convictions, to have an insight into his moral outlook, his attitude towards work, his participation in social activities, etc.⁸⁵

The crime defined in art. 70 may be committed either by word of mouth (direct speech, radio or television broadcasts), printed word (books, articles, letters, reviews, commentaries, etc.), or artistic impression (paintings, cartoons, caricatures, etc.). Finally, it should be pointed out that the crime described here requires direct intent as defined in art. 8 of the RSFSR Criminal Code.

⁸² 4 ПОНТОВСКИЙ, *supra* note 1, at 117-18.

⁸³ *Id.* at 119.

⁸⁴ *Id.* at 116.

⁸⁵ *Id.* at 120-21.

On its face art. 70 of the RSFSR Criminal Code appears to conflict with the freedom of speech guaranteed under art. 125 of the USSR Constitution. To the Soviet legal mind, however, both articles are perfectly reconcilable—the freedom of speech that is guaranteed under art. 125 of the USSR Constitution is not intended for use for an anti-Soviet purpose. The right to engage in anti-Soviet agitation and propaganda is not a constitutionally protected freedom of speech. The freedom of speech under art. 125 of the USSR Constitution is not an absolute right and art. 70 of the RSFSR Criminal Code is seen as a permissible limitation on the use of the right of free speech under the USSR Constitution. Other limitations on the constitutional right of free speech are provided in arts. 130 (defamation) and 131 (insult) of the RSFSR Criminal Code.

To the Western lawyer, however, it is difficult to reconcile art. 70 of the RSFSR Criminal Code with the freedom of speech provisions of the USSR Constitution. The real problem posed by art. 70 of the RSFSR Criminal Code is the question of its vagueness and overbreadth—under the present formulation it is difficult to tell when the expression of a view that is unfavorable to the Soviet government is constitutionally protected free speech. Since the Soviet courts are required to conduct a thorough investigation into the personality and the legal as well as the moral philosophy of the defendant charged under art. 70 in order to determine the purpose of his actions, there is no way in which the Soviet jurist can convince the Western lawyer that such a procedure does not leave the door open to a return to the infamous concept of guilt by association. For these reasons art. 70 of the RSFSR Criminal Code may be properly referred to as the dissidents' clause—the purpose, no doubt, is to suppress dissent in the Soviet Union.

Article 88—Violation of Rules For Currency Transactions

In the Soviet Union the state has a monopoly of all transactions involving foreign currency or securities. Under existing Soviet law,⁸⁶ all transactions (including buying, selling, exchange of goods for

⁸⁶ Professor Berman translates art. 88 of the RSFSR Criminal Code to mean Violation of Rules for Currency Transactions, a translation which would suggest that it is also a crime to violate rules regarding transactions in Soviet currency—the ruble. This writer doubts if that was the intended purpose of art. 88. The use of the word "Valiuta" would suggest "currency" in general, but the legislative history of the article suggests that it was intended to cover foreign currency specifically. All the laws regarding currency transactions in the Soviet Union relate to foreign currency and not to Soviet domestic currency. In the view of this writer art. 88 should therefore be read to cover foreign currency and securities.

foreign currency, transfer of foreign currency or securities to and from foreign countries, etc.) involving foreign currency and securities shall be conducted only through the authorized state institutions—the State Bank of the USSR or other specialized department stores operated by the state.

There are two separate types of crimes contemplated in art. 88—first, violation of laws establishing state monopoly on foreign currency transactions; second, speculation⁸⁷ in foreign currency and securities.

Speculation in foreign currency or securities in para. (2) of the above article is deemed completed at the moment of resale of the currency or securities. It makes no difference whether or not the speculator actually made any profit or if in fact he suffered a loss. The implication of art. 88 is that all private transactions involving foreign currency or securities in the Soviet Union are categorically prohibited. Whereas art. 88, para. (2) speaks of speculation in foreign currency or securities as a form of business or on a large scale, the small scale speculation in foreign currency and securities is criminalized under art. 154-2 of the RSFSR Criminal Code.

Article 88-1—Failure to Report Crimes Against the State

Failure to report crimes against the state under art. 88-1 shall of itself be deemed to be a crime only if the crime of which the person had knowledge but failed to report is among those crimes specifically listed under this article. The list of crimes under art. 88-1 is complemented by a second list of crimes in art. 190 of the RSFSR Criminal Code. The list in art. 190 includes intentional homicide, aggravated rape, aggravated theft, open stealing under aggravated circumstances, assault with intent to rob, etc.

Failure to report knowledge of any of the crimes not listed in arts. 88-1 or 190 may constitute a violation of rules of socialist morality, but it shall not be sanctioned under criminal law. The duty to report knowledge of such crimes arises only if the person has no doubts whatsoever as to the completed crime or crime in preparation. If he has any serious doubt as to the veracity of the information received on such a crime he is not under any obligation to report such knowledge to the state authorities. Even if the person knows for sure of a crime that has been committed or is in the stage of preparation, the failure to report such knowledge shall be punishable under criminal

⁸⁷ The crime of speculation under Soviet law is discussed in greater detail in art. 154.

law only if the person knew also that the crime so committed or in the stage of preparation belongs to the list of crimes contained in art. 88-1 or 190. Ignorance of this law shall be an excuse.

When a person who commits any of the crimes listed in art. 88-1 and 190 fails to report such crime on his own, he shall be charged not under art. 88-1 or 190, but rather under the specific article dealing with the crime which he committed. Any person who makes a knowingly false report of the commission of a crime shall be punished under art. 180 of the RSFSR Criminal Code. In contrast to art. 88-2 of the Criminal Code, art. 88-1 criminalizes non-action: failure to report knowledge of a crime against the state. The practical effect of art. 88-1 is the constitution of all persons into private attorneys-general—all citizens have a positive duty to report their knowledge of such serious crimes which threaten the very existence of the Soviet state.

Article 88-2—Concealment of Crimes Against the State

Both art. 88-2 and 189 of the RSFSR Criminal Code list those crimes the concealment of which, when not promised in advance, shall entail criminal responsibility and punishment. These crimes include treason, espionage, terrorist act, sabotage, wrecking, organizational activity directed at commission of especially dangerous crimes against the state or participation in an anti-Soviet organization, banditry, smuggling, making or passing of counterfeit money or securities, and violation of rules for currency transactions. The listing in these two articles is all-inclusive of those crimes the concealment of which is considered to be a crime. Both arts. 88-2 and 189 contemplate only intentional crimes. No person shall be held to criminal responsibility for unintentional, *i.e.*, through negligence, concealment of any of these crimes.

Articles 89-97—Stealing of Socialist Property

In the Soviet Union there are two types of property—socialist property and individual (personal) property. Art. 4 of the USSR Constitution defines socialist property as existing in two forms—state property (*i.e.*, belonging to the whole people), and cooperative and collective farm property (*i.e.*, belonging to the cooperative societies and collective farms). Art. 4 of the USSR Constitution is further clarified by art. 21 of the Fundamental Principles of Civil Legislation of the USSR and the Union Republics⁸⁸

⁸⁸ See [1961] 50 Ved. Verkh. Sov. S.S.S.R. Item 525.

(F.P.Civ.L.). According to the F.P.Civ.L., socialist property exists in three forms—state property, collective farm and cooperative property, and the property of socialist (social) organizations, *e.g.*, the CPSU, the Young Komsomol League, the Trade Unions, etc.

Among items falling within the category of state property under art. 21 of the F.P.Civ. L. are the following: land and its mineral wealth, water (including all bodies of water), forests, factories, manufacturing plants, coal mines and other mines, electric stations, railroads, all means of public transportation (including air, water, and land transportation), banks, means of telecommunications, state farms, state trading organizations, state organized communal and other enterprises, a great portion of the dwelling houses in the cities and in the countryside.

Article 23 of the F.P.Civ.L. lists the following items as falling under the category of cooperative-collective farm property: production enterprises, cultural-communal institutions, tractors, combine harvesters, other agricultural machinery, means of transportation, cattle, agricultural produce and "any other property items which are compatible with the activities of these organizations." Under art. 24 of the F.P.Civ.L. trade unions and other social organizations may own buildings, enterprises, sanatoria, rest homes, club houses, stadiums, pioneer camps and equipments needed to run them, funds for educational and cultural activities, and "any other property items which are compatible with the activities of these organizations."

Articles 89-97 of the RSFSR Criminal Code criminalize the stealing of socialist property in one form or another.⁸⁹ In practice the major problem arises with regard to a correct application of each of these articles, *i.e.*, the need not to confuse stealing by theft (art. 89) with stealing by open stealing (art. 90); or the need to differentiate stealing by finding (art. 97) with stealing through swindling (art. 93). This question of correct application of the code provisions regarding the stealing of socialist property has occupied the attention of Soviet courts over a long period of time. Concerned over the uneven enforcement by the lower courts of the provisions of the RSFSR Criminal Code on the stealing of socialist property, the RSFSR Supreme Court handed down a *Postanovlenie* (Decree) in

⁸⁹ The following forms of stealing of socialist property are recognized in the RSFSR criminal Code: theft (art. 89); open stealing (art. 90); robbery (art. 91); appropriation, embezzlement or abuse of official position (art. 92); swindle (art. 93); deception or abuse of trust (art. 94); extortion (art. 95); stealing by finding (art. 97).

1961⁹⁰ providing guidelines to be followed by such courts in all future cases dealing with arts. 89-97 of the RSFSR Criminal Code.

Article 107—Incitement to Suicide

Under Soviet law neither suicide nor unsuccessful attempt at suicide is a crime. Even though the state has an interest in the preservation of human life, the right of a particular individual to take his own life is tacitly recognized by law as long as such suicide was not directly prompted by the actions of a third person. When one person (A) takes undue advantage of the fact that another person (B) is dependent upon him either professionally or economically, and intentionally propels or induces such a dependent person (B), through a systematic mode of behavior, into taking his or her own life, criminal action could be brought against such person (A) if all the elements of art. 107 are present.

The crime in art. 107 requires three elements: successful or attempted suicide by the victim; a causal connection between the suicide or attempted suicide and the incitement to suicide or attempted suicide through the cruel treatment received by the victim or through the systematic lowering of the honor and personal dignity of the victim by the defendant; and the establishment of material or other state of dependence between the victim and the defendant.⁹¹ The systematic lowering of the honor and personal dignity of a person may take any of the following forms: insult, ridicule, wild jokes about the person, hooliganistic acts directed at the victim, character defamation, anonymous accusations without foundation, etc. The relationship between the victim and the defendant may be

⁹⁰ Postanovlenie No. 5, *O Sudebnoi Praktike Po Delam O Khishcheniiakh Sotsialisticheskoi Sobstvennosti* (On the Judicial Practice in Matters Relating to the Stealing of Socialist Property), issued by the Plenum of the RSFSR Supreme Court on Sept. 7, 1961 and amended by the Postanovlenie No. 12 of Sept. 11, 1962, the Postanovlenie No. 29 of July 6, 1965, and by the Postanovlenie No. 53 of Jan. 28, 1970. See SBORNIK POSTANOVLENIÍ PLENUMA VERKHOVNOGO SUDA RSFSR 1961-1971 1 (A Collection of the Decrees of the Plenum of the Supreme Court of the RSFSR 1961-1971) (L. SMIROV ED. 1972) [HEREINAFTER CITED AS SMIROV, SBORNIK].

The concern of the USSR Supreme Court on this matter was also expressed in a Postanovlenie No. 5, *O Sudebnoi Praktike Po Delam O Khishcheniakh Gosudarstvennogo i Obshchestvennogo Imushchestva* (On the Judicial Practice in Matters Relating to the Stealing of State and Socialist Property), adopted by the Plenum of the USSR Supreme Court on March 31, 1962 and amended by Postanovlenie No. 7 of June 24, 1968. See SMIROV, SBORNIK, *supra* at 14.

⁹¹ The criminal codes of Belorussia, Uzbekistan, Armenia, Ukraine, Moldavia, Latvia, Azerbaidjan, and Turmenia do not require the third element, i.e., the establishment of the dependence (material, professional, or otherwise) of the victim on the defendant. If, however, such a dependence exists then it will be treated as an aggravating circumstance in the case.

family relationship, work relationship, contractual relationship, or other types of relationships.

The continuing debate in RSFSR jurisprudence is over the type of relationship which may fall within "other state of dependence" (or "otherwise dependent") as that phrase is used in art. 107 of the RSFSR Criminal Code. The RSFSR Supreme Court has on occasions addressed itself to this issue. In one reported case, *State v. Bodrov*,⁹² the Presidium of the RSFSR Supreme Court held that marital relationship falls within the "economic and other state of dependence" contemplated under art. 107 of the RSFSR Criminal Code.

Article 115—Infecting With Venereal Disease

Art. 115 is designed to demonstrate the concern of the Soviet state for the health of its citizens. Any person who knows that he or she has venereal disease is under a positive duty to seek immediate medical treatment for the disease. Until such disease is fully treated the person shall be subject to criminal responsibility if he or she engages in sexual intercourse with another person.

Since art. 115 does not define the method by which the infection of other persons with venereal disease could occur, it follows that even infection by methods other than by sexual intercourse shall be punished. One such possible method of infecting other persons with venereal disease is through failure to observe proper sanitary rules, e.g., a mother who infects her infant child with venereal disease by using her infected towel to wipe the child's genital organ shall be criminally liable under art. 115. Article 115 contemplates all types of venereal diseases, including, but not limited to, syphilis, gonorrhea, etc.

Article 116—Illegal Performance of Abortion

Abortion is defined as the artificial termination of pregnancy. Prior to 1955 it was illegal to perform non-therapeutic abortions in the Soviet Union. But by a decree of the Presidium of the USSR Supreme Soviet "*Ob Otmene Zapresheniia Abortov*" (On The Lifting On The Ban Of Abortions)⁹³ which was issued on November

⁹² See SBORNIK POSTANOVLENIÍ PRESIDIUMA I OPREDELENIÍ SUDEBNOI KOLLEGII PO UGOLOVNYM DELAM VERKHOVNOGO SUDA RSFSR 1964-1972 (A Collection of the Decrees of the Presidium and Decisions of the Criminal Division of the Supreme Court of the RSFSR) 280-81 (A. Orlov ed. 1974) [hereinafter cited as ORLOV, SBORNIK].

⁹³ See Ukaz of the Presidium of the USSR Supreme Soviet, [1955] Ved. Verkh. Sov. S.S.S.R. Item 425.

23, 1955, non-therapeutic abortions were once again permitted and the woman was given the right to decide all relevant questions of maternity by herself. By restoring to the woman the right to make the decisions regarding abortion, the law, however, made sure that incompetent persons were not allowed to perform such operations. Under the present law, only a trained medical doctor⁹⁴ is permitted to perform abortions and even then, the operation, in order to be legal, must be performed in a hospital or at any other approved medical facility. If, however, the doctor performed the abortion outside of a hospital or outside of an approved medical facility, he may be released from criminal responsibility if it can be shown that he acted out of extreme necessity.⁹⁵

Soviet policy towards non-therapeutic abortions has been a most inconsistent one. Under tsarist law (*i.e.*, pre-1917) abortion was considered to be a felony and was punishable upon conviction by up to 6 years imprisonment with hard labor. On November 18, 1920, the Peoples' Commissariat of Health promulgated a new law which permitted clinically performed non-therapeutic abortions on demand and free of charge. On June 27, 1936 another law was passed which prohibited abortions on demand and instead legalized only those therapeutic abortions that were performed by trained doctors in hospitals or other approved medical facilities. In the words of a Soviet commentator "the practical implementation of the law of June 27, 1936 led to serious repercussions—many pregnant women were forced to seek the services of underground abortionists and thus exposed their lives to a serious danger."⁹⁶ On August 5, 1954, the Presidium of the USSR Supreme Soviet issued a new law⁹⁷ which decriminalized all non-therapeutic abortions. This was followed by a law of November 23, 1955 which finally restored abortion on demand as long as it was performed by a trained doctor in a hospital or in any other approved medical facility.⁹⁸ Article 116 of

⁹⁴ For the purpose of this law a trained medical doctor is any such person who has higher medical education. It makes no difference whether the doctor is a specialist in gynecology, surgery or therapy.

⁹⁵ See R.S.F.S.R. 1960 UGOL. KOD (Criminal Code) art. 14 for the concept of extreme necessity.

⁹⁶ 5 PIONTKOVSKII, *supra* note 1, at 129.

⁹⁷ Ukaz Prezidiuma Verkhovnogo Soveta SSSR "Ob Otmene Ugolovnoi Otvetstvennosti Beremennykh Zhenshchin Za Proizvodstvo Aborta" (Decree of the Presidium of the USSR Supreme Soviet "On the Lifting of Criminal Responsibility of Pregnant Women for the Performance of Abortion), adopted Aug. 5, 1954, cited in *id.* at 129.

⁹⁸ For a brief history of the erratic Soviet policy on abortion, see Beermann, *Abortion*, in 1 ENCYCLOPEDIA OF SOVIET LAW 1, 1-3 (F. Feldbrugge ed. 1975).

the RSFSR Criminal Code merely codifies the law of 1955 on abortion.

Under the new law, a legal abortion is defined as such abortion which is performed in accordance with the *Instructions* of the USSR Ministry of Health. Those *Instructions* provide inter alia, that: (1) the request for abortion by any pregnant woman shall be carried out unless such abortion is ill-advised on medical grounds only; (2) all abortions must be performed by persons with higher medical education and only in hospitals or in any other approved medical facilities. Generally, neither the consent of a husband (in the case of a married woman) nor of parents (in the case of an unmarried woman below the age of 18) is required before such operation is performed. Under the *Instructions* of the Ministry of Health, abortion on demand may be granted up to the twelfth week of pregnancy, as long as there are no medical grounds for denying such abortion. If it is necessary to perform an abortion on a pregnant woman in order to save her life, a trained doctor can perform such emergency abortion even outside of a hospital or approved medical facility. Such emergency operation would not entail any criminal responsibility for the doctor under the doctrine of extreme necessity in art. 14 of the RSFSR Criminal Code.

In both instances of illegal abortion under art. 116, the woman herself is not subject to criminal responsibility as the recipient of illegal abortion. This contrasts with the situation in most Western legal systems where both the woman who received the abortion and the person who performed the illegal abortion on her shall be subject to criminal responsibility under the anti-abortion statutes. It is also interesting to note that under the Soviet system if a pregnant woman performs an abortion on herself (*i.e.*, without the aid of another person) she shall not be charged with illegal abortion under art. 116 of the RSFSR Criminal Code.

In short, the decision whether to have an abortion is entirely left to the pregnant woman herself, subject only to the right of a team of doctors to rule against such abortion on purely medical grounds. In fact, under art. 110 of the Criminal Code of Ukraine, it is a crime for anyone to compel a pregnant woman, through the exertion of any form of real pressure on her, to undergo an abortion. Under this law any person (including the husband, parents of a minor, guardians, etc.) who exerts pressure on a pregnant woman to undergo abortion contrary to her wishes shall be guilty of the crime of "compelling a woman to undergo an abortion." However, the inducement of a

pregnant woman to undergo an abortion, *e.g.*, through the promise of some reward, is not a crime under the Ukrainian statute.⁹⁹

Article 117—Rape

Rape is defined as “the nonconsensual, *i.e.*, over the objection or without the consent of the victim, sexual intercourse with a person procured either through the application of physical force, threat of force or by taking advantage of the helpless condition of the victim.”¹⁰⁰

Article 117 contemplates only the raping of a woman by a man. When a man engages in nonconsensual sexual intercourse with another man, action may be brought against such person under art. 121, para. 2 of the RSFSR Criminal Code and not under art. 117. Article 117, however, does not exclude the possibility that a woman could be an accomplice in the rape of another woman.

One Soviet commentary noted that “[a] man could be found guilty of the rape of a woman with whom he is in a marital relationship.”¹⁰¹ It is not immediately clear from the above statement whether a man could in fact be charged with the rape of his wife or whether it only means that a man could be an accomplice in the rape of his wife.

This writer believes that a husband, under art. 117 of the RSFSR Criminal Code, could be guilty of raping his own wife. The intention of art. 117 was to give the woman full right to regulate access to her body. This individual right is not presumed to have been given up at the time of her marriage to her husband. Soviet family law is replete with references to the absolute equality of the spouses in all aspects of family life and there is no reason to believe that the law intended to make the woman a non-equal in marital sexual matters.

The following passage, taken from an authoritative Soviet treatise on Soviet criminal law, clarifies the question of whether a husband can be guilty of raping his wife with whom he currently resides:

In bourgeois criminal law doctrine as well as in bourgeois judicial decisions it is generally accepted that a husband cannot rape his wife. [It is stated that] ‘the object of a rape cannot be the personal

⁹⁹ One Soviet commentator, however, thinks that anyone who induces a pregnant woman, through promise of a real reward, to undergo an abortion, contrary to her wishes, may be guilty of the crime of “compelling a woman to undergo an abortion.” See M. SHARGORODSKII, OTVETSTVENNOST’ ZA PRESTUPLENIE PROTIV LICHNOSTI (Responsibility For Crime Against the Person) 85 (1953).

¹⁰⁰ ANASHKIN COMMENTARY, *supra* note 31, at 279.

¹⁰¹ *Id.* at 280.

wife of the defendant or even a woman with whom he has engaged in continuing sexual relationship; if, however, he was an accessory to the forcible rape of such a woman, he may be subject to criminal responsibility only as accessory. . . .¹⁰² Socialist criminal law resolves the question differently. Marriage under Soviet law is founded upon the marital consent of husband and wife, properly registered in the organ of civil registration and does not entail a right of the husband to engage in sexual intercourse with his wife without the latter's consent. Accordingly, there can be no doubt that a husband can be guilty of raping his wife. . . . Soviet criminal law protects the sexual inviolability of all women. . . .¹⁰²

The conclusion from this is clear: Soviet marriage is not a license for the husband to procure sex on demand from his wife.¹⁰³ Because the husband has no legally enforceable conjugal rights against his spouse he may be properly charged with rape of his wife if his actions meet any of the objective tests in art. 117 of the RSFSR Criminal Code.¹⁰⁴

The continuing debate in the Soviet Union today centers around the question of what constitutes nonconsent on the part of the victim. In a 1964 *Postanovlenie*¹⁰⁵ the USSR Supreme Court expressed concern over the uneven enforcement of the rape statute by the lower courts and proceeded to establish certain interpretative guidelines to be followed by the courts in all future rape cases.

One lingering question in the Soviet interpretation of the rape statute is the issue of when the withholding of consent by the victim may be properly construed as the basis for rape charges against a man who proceeds to engage in sexual intercourse under such circumstances. In a most illuminating case, *State v. Muchkaev*,¹⁰⁶ the Criminal Division of the RSFSR Supreme Court held that a rape

¹⁰² 4 PIONTKOVSKII, *supra* note 1, at 149-50.

¹⁰³ For a detailed discussion of the equal rights of spouses within a Soviet marriage, see R. DZYBA, RAVNOPRAVIE SUPRYGOV—OSNOVNOI PRINTSIP SOVETSKOGO SEMEINOGO PRAVA (Equality of the Spouses—A Fundamental Principle of Soviet Family Law) (1972).

¹⁰⁴ A similar view is held by R. Beermann. See Beermann, *Sexual Crimes*, in 2 ENCYCLOPEDIA OF SOVIET LAW 611-13 (F. Feldbrugge ed. 1975). In that article Beermann also gives some interesting statistics on rape crimes in the Soviet Union.

¹⁰⁵ *Postanovlenie* No. 2, *O Sudebnoi Praktike Po Delam Ob Iznasilovanii* (On the Judicial Practice in Matters Relating to Rape), issued by the Plenum of the USSR Supreme Court on Mar. 25, 1964. See SBORNIK POSTANOVLENIÍ PLENUMA VERKHOVNOGO SUDA SSSR 1924-1970 (A Collection of the Decrees of the Plenum of the USSR Supreme Court 1924-1970) 452-59 (V. Terebilov ed. 1970) [hereinafter cited as TEREBILOV, SBORNIK]. The *Postanovlenie* makes reference to an earlier Decree of the Presidium of the USSR Supreme Soviet, *Ob Usilenii Ugolovnoi Otvetstvennosti Za Iznasilovanie* (On the Strengthening of Criminal Responsibility for Rape), which was adopted on Feb. 15, 1962. See TEREBILOV, SBORNIK, *supra* at 452.

¹⁰⁶ See ORLOV, SBORNIK, *supra* note 92, at 799-800.

charge cannot be brought against a person who has had consensual intercourse with a woman in the past. In the words of the court, where a woman had willingly consented to sexual intercourse with a man many times in the past, the man may not be charged with rape, if in one incident he forced the woman to engage in sexual acts with him over the woman's strong objection. However, since testimony shows that Mushkaev engaged in sex acts with "L" when the latter was a minor, Muchkaev is guilty under art. 119, para. (1) of the RSFSR Criminal Code.¹⁰⁷

The final question to be considered with regard to art. 117 of the RSFSR Criminal Code is the meaning of "sexual intercourse" for the purposes of the rape statute. If a man compels a woman to engage in oral sex with him, would such act be actionable under the RSFSR rape law? In other words, does the notion of sexual intercourse include oral sex? Neither the reading of art. 117 of the RSFSR Criminal Code nor an examination of jurisprudence of RSFSR courts would supply an answer to this question. It would appear to this writer that oral sex is not sexual intercourse and therefore would not be actionable under art. 117 of the RSFSR Criminal Code.

Article 118—Compelling a Woman to Enter into Sexual Intercourse

Article 118 criminalizes the act of sexual intercourse which was procured through psychological coercion of a woman where the man takes undue advantage of the fact that a woman is dependent upon him economically or occupationally, threatens her with certain reprisals if she fails to engage in sexual intercourse with him and thereby procures her "willy-nilly" consent thereto. Here, physical force or the threat of physical force is not used by the man. He merely uses such threats that exploit the economic or occupational dependence of the victim. For example, the man, who is usually the boss, may threaten to fire the victim from her job if she refuses to engage in sexual relationship with him, or he may threaten to withhold her next pay raise or to put off her next promotion or to transfer her to a less paying or less desirable job if such consent is not given.

In order to bring action under art. 119 it must be demonstrated

¹⁰⁷ Art. 119 of the RSFSR Criminal Code provides:

Sexual relations with a person who has not attained puberty shall be punished by deprivation of freedom for a term not exceeding three years. The same actions in conjunction with satisfaction of sexual desire in perverted forms shall be punished by deprivation of freedom for a term not exceeding six years.

that the victim is economically or occupationally dependent upon the man. The crime is completed once the man applies the psychological coercion on the woman, even if she has not actually given in to sexual intercourse with him. One interesting question in this regard is: if a female boss, through psychological coercion, compels a man who is economically or occupationally dependent on her to engage in sexual relations with her, is such conduct actionable under art. 118? The obvious answer to this question is no. Rape, under Soviet law, contemplates a situation where a man rapes a woman and not the reverse. When a woman compels a man to engage in sexual intercourse with her, there is no rape under art. 117. Similarly, when a female boss, through psychological coercion, compels a man who is economically or occupationally dependent on her to engage in sexual relations with her, it is not actionable under art. 118 of the RSFSR Criminal Code.

Article 121—Pederasty

Article 121 contemplates two categories of pederasty—simple and aggravated. Simple pederasty is present when two adult men (both must be above the age of 16) engage in consensual sexual intercourse. Whereas art. 121 criminalizes male homosexuality even between consenting adults in the privacy of their own homes, female homosexuality (lesbianism) is not criminalized per se. Aggravated pederasty is present if any of the elements of para. 2 of art. 121 is present. The probable reason for not criminalizing female homosexuality is that such acts are not as rampant as male homosexuality. Arguably, when female homosexuality reaches the same disturbing proportions as male homosexuality, the law will be amended to equally criminalize lesbianism.

Article 127—Leaving in Danger

Under art. 127 it is a crime to fail to render aid to a person in danger of death or to fail to report to the appropriate authorities the necessity of rendering aid to such a person. Before actions may be brought under art. 127, however, it must be shown that, first, there was a real and present danger to the life of the victim and not just a threat to the health of the victim; second, necessary and immediate aid was not rendered; third, the person could have rendered such aid to the victim without a serious danger to himself or to other persons. If any of the above criteria is missing the person may not be held to criminal responsibility for failure to render aid. On the other hand if these three factors are present, even if it turned out

that no harm was done to the threatened victim, the person who failed to render the necessary and immediate aid will still be subject to criminal responsibility.

The real and immediate danger to the life of the victim could be caused by various factors: forces of nature (e.g., fire, flood, collapse of a wall, snowstorm, etc.), accident at a production plant, or by the dangerous actions of other persons. If any of these factors puts the person in a danger of losing his life, all other persons who are present at the scene of the danger and are able to render aid without danger to themselves or to other persons have a positive duty to render such aid.

Even if the onlooker cannot render aid in person he has a duty to immediately inform the authorities who may be able to save the life in question. For example, a person who cannot swim will not be under a positive duty to render aid to a drowning person. Failure to render aid under art. 127 is an intentional crime. If in rendering such aid to a person in danger of death the person rendering aid causes injury to other persons or to property, he shall be immune from criminal responsibility on the grounds that his actions were taken in necessary defense.¹⁰⁸

Paragraph (2) of art. 127 contemplates circumstances that may aggravate criminal responsibility for failure to render help to persons in immediate danger of death.

Article 128—Failure to Render Aid to a Sick Person

Under art. 33 of the *Osnovy Zakonodatel'stva Soiuza SSR i Soiuznykh Republik O Zdravookhranении* (The Fundamental Principles of Legislation of the USSR and the Union Republics on Health—FPLH)¹⁰⁹ “medical and pharmaceutical workers are obligated to render first aid to persons at all times—on the road, in the streets, in all other public places and at home.” Under art. 128 of the RSFSR Criminal Code, it is a crime for a person, who is required by law to render first aid, to fail to render such medical help to persons in need if there is no compelling reason for failing to do so.

Such persons required by law to render first aid to all persons in need include: medical doctors, midwives (*akusherka*), doctor's assistants (*fel'dsher*), hospital attendants (*sanitar*), ambulance workers, etc. The Criminal Division of the RSFSR Supreme Court in a

¹⁰⁸ See art. 13 of the RSFSR Criminal Code for the institution of necessary defense.

¹⁰⁹ Adopted by the Supreme Soviet of the USSR on Dec. 19, 1969. See [1969] 52 Ved. Verkh. Sov. S.S.S.R. Item 466.

1961 *Opredelenie* (Decree) stated that the group of persons who may be charged under art. 128 includes not only persons with higher medical education, *i.e.*, doctors, but also all other such medical workers who are required by law to render first aid to persons in need.¹¹⁰

Article 153—Private Entrepreneurial Activity and Activity as Commercial Middleman

By private entrepreneurial activity one means such activity that is linked with the exploitation of hired labor, as well as all such other activity directed at deriving unearned income, *i.e.*, at deriving compensation for which there has been no expenditure of socially useful labor or compensation which is sharply incommensurate with the quantity and quality of expended labor.¹¹¹

Article 153 is specifically aimed at persons who set up and operate private, nonsocialist enterprises. Because such enterprises, as a rule, cannot legally exist in the Soviet Union, the operators generally camouflage their illegal activities by openly operating in the form of either a state, cooperative or other socialist form of enterprise. The use of state, cooperative or other socialist form of enterprise as a camouflage for what is really a private entrepreneurial activity is a prerequisite for the crime described in art. 153. Thus, private entrepreneurial activity exists generally in the form of a dummy state enterprise (*Lzhepredpriatie*), a dummy cooperative enterprise (*Lzekooperativ*), or a dummy subsidiary of an existent parent socialist enterprise (*Lzhetskikh* or *Lzhefilial*), or sometimes the person secretly uses the facilities of a state or cooperative enterprise for carrying out his illegal activities. "The use of the term 'activity' [in art. 153] contemplates not just an isolated incident, but rather a system of actions aimed at a particular goal."¹¹²

If a private entrepreneurial activity entails one of the activities which, by law, individuals are prohibited from engaging in, the person may be charged both under art. 153 and art. 162 of the RSFSR Criminal Code. If, however, an individual engages in the type of activity that is specifically prohibited by law, he may be held to criminal responsibility under art. 162 of the RSFSR Criminal Code.

¹¹⁰ See *Opredelenie* of the Criminal Division of the RSFSR Supreme Court, 4 BULL. RSFSR SUP. CT. 10 (1961).

¹¹¹ ANASHKIN COMMENTARY, *supra* note 31, at 325.

¹¹² *Id.*

The following activities may not be regarded as private entrepreneurial activity for the purpose of art. 153, para. (1) of the RSFSR Criminal Code: when a collective farm hires seasonal laborers (from outside of the collective farm) for the purpose of helping it with its harvest or for any other purpose for which it needs extra helping hands; when a person hired to work for a state enterprise (e.g., a barber, photographer, shoemaker, etc.) systematically embezzles a portion of the proceeds of his work.¹¹³ Article 153 para. (1) contemplates only an intentional crime. The motivation for the crime is generally pecuniary—a premeditated desire to derive unearned income (e.g., capitalist-type profits) through the intentional use of a dummy state or cooperative enterprise.

By contrast, “activity as a commercial middleman means any type of activity as a middleman in a commercial transaction (*i.e.*, sale, purchase, exchange of goods, etc.) performed for a remuneration.”¹¹⁴ The parties to such activity may be two private individuals, two socialist enterprises using a private individual as its middleman, or a socialist enterprise and a private individual. Activity as a commercial middleman may take one of many forms: by soliciting potential buyers for a seller; by soliciting a potential seller for a buyer; by helping a person (including a socialist enterprise) to sell or buy goods; by rendering any other type of aid to a party in a commercial transaction, *e.g.*, holding a spot for somebody else in a long line of persons waiting to buy a deficit commodity. One of the most popular forms of activity as a commercial middleman is when a private individual helps a collective farm or a collective farmer to sell its or his produce on the market or to deliver such produce to a buyer. Such commercial assistance is not permitted under art. 153, part 2 of the RSFSR Criminal Code.

The activity as a commercial middleman is criminalized only if it contains the following two factors: it is engaged in as a form of business, *i.e.*, for the individual this is considered to be a regular source of income; it is engaged in, even though not as a form of business, but with the intention of reaping unconscionable profit, *i.e.*, such profit that is in no way commensurate with the quality and quantity of the labor put into the service. It follows, therefore, that engaging in the capacity as a commercial middleman under art. 153, para. (2) as para. (1) of the same article, contemplates direct intent

¹¹³ Such a person may be charged either under art. 170 (abuse of authority or official position), or art. 94 (causing of property damage through deception or abuse of trust).

¹¹⁴ ANASHKIN COMMENTARY, *supra* note 31, at 329.

as the only basis for establishing the guilt of the individual charged with the activity as a commercial middleman.

Article 154—Speculation

Speculation contemplates the buying up and the reselling of goods or other articles of value with the intention of making profits therefrom. It follows that if the good or article of value was acquired by a method other than by buying (*e.g.*, by donation, inheritance, or as a price in a lottery) even if the person sells it at a considerable profit there is no basis for a speculation charge under art. 154. It makes no difference whether the goods or articles were originally purchased by the speculator in the Soviet Union or from a foreign country, in a department store or in an open market, from the lawful owner, or from a person who stole such goods.¹¹⁵ When a person sells the product of his own labor, *e.g.*, a person may purchase raw or unfinished products and use them for the production of a thing of value, he may not be charged with speculation.¹¹⁶

The reselling of a purchased good is a required element in the crime of speculation. Usually the resold good must be the same good as originally purchased. If the speculator made some minor improvements on the good and resells it, he will still be liable for speculation. Any changes in or improvements upon the original good that do not alter the original quality of the purchased good will not release the speculator from criminal responsibility for speculation. For speculation it is not necessary for the purchased good to be resold in the original package or form. It is necessary, however, that the resold good be substantially of the same quality as the purchased good.

By "goods" art. 154 contemplates all "products of human labor designed for the satisfaction of a human need and which may be the object of a contract of sale or exchange."¹¹⁷ By "other articles" art. 154 contemplates "all types of documents which grant all sorts of rights to the bearer,"¹¹⁸ *e.g.*, tickets to a rest home, tickets to an entertainment show, tickets for the claim of goods already paid for, Soviet or foreign postage stamps. These, however, do not include such valuable articles as foreign currencies, securities, etc. Specula-

¹¹⁵ If, however, it is established that the speculator entered into an advance agreement to buy stolen goods he may be charged also under art. 208 of the RSFSR Criminal Code, *i.e.*, for the acquisition or marketing of property known to have been criminally acquired.

¹¹⁶ Such a person may be charged, however, with engaging in private entrepreneurial activity under art. 153 of the RSFSR Criminal Code or with engaging in prohibited trade under art. 162.

¹¹⁷ ANASHKIN COMMENTARY, *supra* note 31, at 329.

¹¹⁸ *Id.*

tion in these types of articles is separately criminalized under arts. 88 and 154-2 of the RSFSR Criminal Code.

Speculation is an intentional crime. This means that the intent to derive speculative profits from a resale of a purchased good must have been present at the time of the original purchase of the goods. It makes no difference if the speculator did not derive profits from the resale or if, in fact, he suffered actual loss from the resale of the goods. All that is needed is the intent to reap speculative profit at the time of the purchase of the good. In this regard, profit is a state of the mind.

By the same token, if the goods were purchased originally for personal use and not for resale and for some reason the owner decides at a later date to resell the goods, he shall not be guilty of speculation even if he reaped a windfall profit from such resale.

Paragraphs (2) and (3) of art. 154 contemplate two other categories of speculation—aggravated speculation and petty speculation. Petty speculation, if committed for the first time, does not entail criminal responsibility. Under the RSFSR Law of 1957,¹¹⁹ persons found guilty of first-time petty speculation may either be subjected to administrative sanctions or penalized through measures of social censure.

Noting that speculation poses a great threat to the economic welfare of the state as well as the economic interests of individual citizens, and in the light of the fact that speculators tend to take undue advantage of seasonal shortages of consumer commodities, the RSFSR Supreme Court in a 1963 *Postanovlenie*¹²⁰ called upon all lower courts to wage a relentless fight against all speculators in the society.

¹¹⁹ *Ukaz Prezidiuma Verkhovnogo Soveta SSSR "Ob Otvetstvennosti Za Melkuiu Spekulatsiiu"* (Decree of the Presidium of the USSR Supreme Soviet "On Responsibility for Petty Speculation"), adopted on Sept. 12, 1957. See [1957] 1 Ved. Verkh. Sov. S.S.S.R. Item 5.

¹²⁰ See *Postanovlenie* No. 20, *O Sudebnoi Praktike Po Delam O Spekulatsii* (On the Judicial Practice in Matters Relating to Speculation), issued by the Plenum of the RSFSR Supreme Court on Oct. 29, 1963. See SMIROV, *SBORNIK*, *supra* note 90, at 52-56. Similar concern for lack of uniformity in the enforcement of the law on speculation was expressed by the USSR in *Postanovlenie, O Sudebnoi Praktike Po Delam O Spekulatsii* (Decree on the Judicial Practice in Matters Relating to Speculation), issued by the Plenum of the USSR Supreme Court on Sept. 20, 1946, and amended by the *Postanovlenie* of Jan. 18, 1957, and the *Postlanovlenie* of Mar. 14, 1963. The *Postlanovlenie*, as amended, is contained in TEREBILOV, *SBORNIK*, *supra* note 105, at 459-61.

Article 162—Engaging in Prohibited Trade

The Constitution of the USSR permits individual peasants to engage in private production activities on a small scale as long as such peasants do not hire outside labor. For such purposes they may engage members of their immediate family (wives, husbands, children) but may not hire outside labor. The laws also permit individuals to engage in such activities as carpentry, window-cleaning, photography, floor shining, woodcutting, shoeshining, etc. so long as the individuals who engage in such activities do not hire a helper. Outside of these permitted activities the laws regulate all other types of trade.

The following laws regulate individual handicraft activities in the USSR: *Pravila Registratsii Nekooperirovannykh Kustarei i Remeslennikov* (Rules for the Registration of Non-Cooperative Handicraftsmen and Artisans);¹²¹ *Postanovlenie Soveta Ministrov SSSR "Ob Otdelnykh Vidakh Promislov Kustarei i Remeslennikov* (Decree of the USSR Council of Ministers On Individual Types of Activities By Handicraftsmen and Artisans).¹²² It should be pointed out that these laws specifically regulate only the trade of handicraftsmen and artisans.

For example, when criminal charges under art. 162 were brought against an individual who engaged in the private practice of dentistry in his home, the USSR Supreme Court overturned the conviction by the lower court on the ground that the private practice of dentistry does not fall within the trade of handicraftsmen and artisans as prohibited by the laws in question.¹²³ A person who engages in the private practice of dentistry may be charged either under art. 221 for illegal practice of medicine (*i.e.*, only if such a person does not have higher medical education) or under art. 153 for private entrepreneurial activity (*i.e.*, only if the person utilized a dummy state or social enterprise to carry out his illegal activities). Such a dentist, however, may be subject to administrative sanctions for engaging in the private practice of dentistry without a proper permit.

Before actions could be brought under art. 162, it must be shown

¹²¹ Adopted by the Council of Ministers of the USSR on June 30, 1949, with amendments of April 22, 1958, (*see* [1958] 7 S.P.-S.S.S.R. Item 24), and of June 3, 1963 (*see* [1963] 12 S.P.-S.S.S.R. Item 121).

¹²² Adopted on Aug. 4, 1965 (*see* [1965] 18 S.P.-R.S.F.S.R. Item 110) and amended on Dec. 24, 1969 (*see* [1970] 2-3 S.P.-S.S.S.R. Item 11).

¹²³ *See* *Postanovlenie* of the Plenum of the USSR Sup. Ct. of Feb. 27, 1967 in 3 BULL. VERKH. SUD. S.S.S.R. 17 (1967).

that the individual engaged in such prohibited trade as a form of business. Among the trades specifically prohibited by the *Pravila* of 1963¹²¹ are the brewing of all types of alcoholic beverages, the manufacture of all types of firearms, explosives or poisonous materials, retail trade, activity as a commercial middleman, operation of all types of games for which the winner receives a prize, and all gambling activities. All of these crimes contemplate direct intent on the part of the individuals who engage in them.

Article 196—Forging, Making, Marketing of Forged Documents, Stamps, Seals and Forms

Article 196 criminalizes the making, forging, or marketing only of those documents, stamps, seals, and forms which meet the following criteria: it must be a document issued by a state institution, enterprise, or social organization; the document must confer certain rights or privileges on the bearer. The forgery of documents issued by private individuals, *e.g.*, signature, letters of recommendation, contracts, etc., does not fall under this provision of the criminal code.

In one reported case, *State v. Ionin*,¹²⁵ the Criminal Division of the RSFSR Supreme Court held that the term "certificate or other document" as used in art. 196 of the RSFSR Criminal Code refers only to documents issued by a state institution or enterprise or social organization, which grants a right or privilege or releases the bearer from a legal duty. As to a letter of recommendation, the court held that it does not constitute a "document" in the context of art. 196, because it neither confers a right or privilege nor does it relieve the bearer from a legal duty.

In another reported case the Criminal Division of the RSFSR Supreme Court held that the forgery of a character testimonial issued by a previous employer is not actionable under art. 196.¹²⁶ Such documents, even though emanating from a state enterprise, merely testify to a fact with no legal consequences for his prospective employer.

Article 206—Hooliganism

In order to treat a hooliganistic act as actionable under criminal law it must constitute a rude violation of public order and it must

¹²¹ See note 121 *supra* for the *Pravila* of 1963 (amended).

¹²⁵ The case is reported in ORLOV, SBORNIK, *supra* note 92, at 27-28.

¹²⁶ See 10 BULL. VERKH. SUD. R.S.F.S.R. 9-10 (1965).

also manifest clear disrespect toward society. By "rude violation of public order" one means such violation that is substantial and significant by its character and intensity. By "clear disrespect toward society" one means an openly manifested, clear defiance of the rules of behavior, decorum and propriety.¹²⁷

Hooliganism is an intentional crime and as a rule it is carried out with direct intent; the manner of the conduct is coarse, and the intention of the person is hooliganistic.

Article 206 speaks of three categories of hooliganism: ordinary, petty, and malicious hooliganism. Petty hooliganism per se is not actionable under art. 206. It takes a repeated act of petty hooliganism in order to subject the person to criminal responsibility under art. 206, part (1).

Such position was taken by the RSFSR Supreme Court in the case of *State v. Balakin*.¹²⁸ In an *Opredelenie* (Decision) issued by the Criminal Division of the RSFSR Supreme Court, the court held that incidents of petty hooliganism should be left to the administrative agencies to handle and, as such, persons who are found guilty of petty hooliganism should not be subject to criminal responsibility under art. 206.

The RSFSR Supreme Court seems to have taken a very strong position on the question of hooliganism and has constantly expressed concern over the enforcement of the hooliganism provision of the RSFSR Criminal Code by the lower courts. In a 1962 *Postanovlenie*¹²⁹ the Plenum of the RSFSR Supreme Court¹³⁰ observed that the lower courts were misapplying the hooliganism statute in cases brought before them. This general observation was followed by certain specific guidelines which the Plenum called upon the lower courts to adopt in all future cases dealing with hooliganism. The Presidium of the USSR Supreme Soviet has also expressed grave concern over the increase in the incidents of hooliganism throughout the Soviet Union.¹³¹

¹²⁷ ANASHKIN COMMENTARY, *supra* note 31, at 437.

¹²⁸ The case is reported in ORLOV, SBORNIK, *supra* note 92, at 31.

¹²⁹ Postanovlenie No. 11, *O Sudebnoi Praktike Po Delam O Khuliganstve* (On the Judicial Practice in Matters Relating to Hooliganism), issued on Sept. 11, 1962, and subsequently amended by Postanovlenie No. 33 of Oct. 27, 1966, and Postanovlenie No. 53 of Jan. 28, 1970. See SMIROV, SBORNIK *supra*, note 90 at 35-40.

¹³⁰ Similar concern has been expressed by the Supreme Court of the USSR in Postanovlenie No. 17 of the Plenum of the Court which was issued on Dec. 22, 1964. This was subsequently amended by the Postanovlenie No. 7 of Aug. 26, 1966, Postanovlenie No. 8 of Dec. 3, 1966, and Postanovlenie No. 7 of Jan. 24, 1968. See SMIROV, SBORNIK, *supra* note 90, at 35.

¹³¹ In a decree of July 26, 1966, *Ob Usilenii Otvetstvennosti Za Khuliganstvo* (On the

IV. CONCLUSION

If compared with the past years there is no doubt that Soviet criminal law has made considerable improvements both in terms of narrowing down the reach of criminal laws and in the choice of criminal sanctions that may be applied to convicted criminals. Soviet legal draftsmanship has also improved considerably. Most of the crimes in the post-1958 criminal codes are defined with relative specificity and particularity. This is essential if the Soviet rejection of the concept of crime by analogy is to mean anything.

To attribute these progressive changes¹³² in the post-1958 Soviet criminal law to just one factor—the death of Stalin and the de-Stalinization of Soviet criminal law—would be incorrect. The rejection of Stalinism in contemporary Soviet criminal law was made possible by a combination of subjective and objective factors. The death of Stalin and his replacement with leaders who were willing to experiment with liberal reforms constitute the subjective aspect of the post-1958 phenomenon in Soviet law. The other factors derive from the major changes which had taken place within the Soviet Union itself—socialism had irreversibly triumphed in the Soviet Union; the antagonistic economic classes of the past years, *i.e.*, the bourgeoisie, the petty bourgeoisie, and the kulaks, had been physically liquidated; the resistance of the peasants to collectivized agriculture had been tamed though not completely eliminated; Soviet military might had given it a sense of relative security in case of an outside attack and thus the need for internal repressive measures against collaborators of foreign intelligence agencies had subsided.

All of these factors convinced the Soviet Union that it was time to restore the rule of law, to enhance the role of the courts of law, to rid the courts of political hacks and replace them with trained professionals, to call upon the legal scholars to study new ways of

Intensification of Responsibility for Hooliganism), adopted by the Presidium of the USSR Supreme Soviet, the USSR Supreme Soviet addressed itself to the perennial question of increased acts of hooliganism in the USSR. On October 27, 1966, the Plenum of the RSFSR Supreme Court issued *Postanovlenie* No. 33 on the Implementation of the Supreme Soviet Decree. See SMIROV, *SBORNIK*, *supra* note 90, at 86-90.

¹³² A Dutch commentator does not feel, however, that contemporary Soviet criminal law has made any progress whatsoever. He states:

Reviewing the basic principles of the law as they are now enacted [in the 1958 FPCL] one gets the impression that Soviet criminal law is not very progressive. One might say that what has recently been enacted is a rather incomplete compilation of the criminal law of different Western countries at the beginning of this century. Only with regard to children is the system brought up to date.

J. M. Van Bemmelen, *Introduction*, in 3 *LAW IN E. EUR.* 5, 25 (1959).

continued improvements in Soviet criminal law even if this involves looking to other legal systems to know what they are doing and to determine the extent to which the Soviet Union may borrow from such foreign experience, including Western experience.

The overall development of Soviet criminal law has been marked by trials and errors. Revolutionary ideology rather than practical reality dominated much of the pre-1958 Soviet criminal legislative activities. The result, of course, was general instability in the law. But the post-1958 phase in this continuing development of Soviet criminal law seems to have shown, so far, an element of uncharacteristic stability and it is only hoped that this good record will be maintained into the immediate future.

Most of the general concepts of Western criminal law are today increasingly being recognized in Soviet criminal law. These include: the principle of *nullum crimen nulla poena sine lege*, nonretroactivity of substantive criminal legislation, rejection of the concept of crime by analogy, rejection of the doctrine of guilt by association, etc. These similarities in Western criminal jurisprudence and contemporary Soviet criminal law, however, should not create the illusion of possible convergence between these two systems of criminal law.

Among some of the irreversible differences between Soviet socialist criminal law and its Western counterparts are the following: first, Soviet criminal law continues to criminalize acts in terms of their social danger. Secondly, Soviet criminal laws continue to combine criminal with noncriminal sanctions in the rehabilitation of convicted criminals. Thirdly, Soviet criminal law continues to treat crimes against the person, as well as crimes against personal rights and protected personal interests differently from crimes against the state, social and other socialist property.

The above-mentioned improvements in Soviet Criminal law notwithstanding, there are to the Western student of Soviet criminal law (particularly the American) still areas of Soviet criminal law which raise serious problems of substantive due process.

First, many RSFSR Criminal Code provisions are, in their literal scope, so indefinite that the courts are free to react to nothing other than to their socialist legal consciousness. Under the Soviet constitutional system, however, there is neither a recognition of the concept of voidness for vagueness nor of the power of judicial review of acts of the legislature. Under such a system the Soviet criminal lawmaker should at least, *sua sponte*, strive to avoid statutory

vagueness. If the Soviet lawmaker wants its rejection of the concept of crime by analogy or guilt by association to be taken seriously, it must make an effort to tighten up the loose ends in most of the criminal statutes and to define crimes in such a manner that it will not leave the reasonable mind guessing as to the outer perimeters of the conduct so criminalized.

A close reading of the provisions of the special part of the RSFSR Criminal Code indicates, at least to this writer, that over half of the 235 articles are void for vagueness and overbreadth. The greatest number of vague articles is concentrated in the sections dealing with state crimes, other state crimes, and economic crimes. Contemporary Soviet criminal law cannot really lay claims to maturity until it gets rid of those omnibus provisions of the criminal code and considerably improves the drafting of its general criminal laws. Because of the nature of criminal punishment, laws which define criminal conduct must be specific and it will be a good thing if the Soviet criminal lawmakers make this the goal of the next wave of law reform in the Soviet Union.

A second problem of constitutional due process that still exists in contemporary Soviet criminal laws is the fact that Soviet courts often do not follow the prescriptions of the law in deciding cases brought them. For example, even though art. 6 of the FPCL disallows the application of *ex post facto* substantive criminal laws to pending cases, Soviet courts have been known to disregard this provision of the law. Pending cases have been adversely affected by laws that were adopted after the facts in the case had occurred. Similarly, even though the enumeration of aggravating circumstances in art. 34 of the FPCL is intended to be all inclusive, Soviet courts have been known to take into consideration aggravating factors that are not listed by the lawmaker. Such judicial arbitrariness leads to unpredictability of what the law is and how the courts are going to interpret them.

A special colloquium was recently held at the Center of European Law at King's College of the University of London (December 13, 1974) on the question of the contemporary crisis of legality in the Soviet Union. Two of the participants examined Soviet criminal law and came to the conclusion that despite the improvements made in the 1958 FPCL, most of the provisions of that law are not followed by Soviet courts. For example, Professor Ivo Lapenna pointed out cases in which the nonretroactivity provisions of art. 6 of the FPCL

were disregarded by the USSR Supreme Court.¹³³ In a most illuminating discussion, another participant in the colloquium, R. Beermann, revealed the considerable extent to which Soviet judges are subject to off-the-record pressure in deciding cases, usually from the press, the workers' collectives, and other social organizations. His conclusion is that in the Soviet Union because of the "anti-legalistic bias of the Russians . . . lifestyle prevails over the rule of law and letter of the law."¹³⁴

The third problem arises in the area of equal protection of law under contemporary Soviet criminal law. For example, the homosexuality provision of the RSFSR Criminal Code¹³⁵ specifically criminalizes homosexual acts between males but not between females. The rape statute¹³⁶ contemplates the raping of woman by a man but explicitly excludes the raping of a man by a woman. Whatever the reasons for maintaining such distinctions, the fact is that these statutes are *prima facie* discriminatory against the male offenders.

Fourth, the invasion of the privacy of individuals under some of the criminal laws poses a serious problem of due process. For example, the homosexuality provision of the RSFSR Criminal Code criminalized homosexual acts between consenting adults even in the privacy of their homes.¹³⁷ Without necessarily questioning the power of the RSFSR Supreme Soviet to criminalize homosexuality, it is doubtful whether this particular law can be enforced without an invasion of the individual privacy of the persons involved. Admittedly, the Soviet lawmaker sees the homosexuality law as a legitimate exercise of the police powers to protect public health, safety, welfare, and morals. It is also true, however, that the exercise of a legitimate police power by the state must yield to an overriding right of the privacy of individual citizens.

Fifth, the proliferation of criminal statutes in the Soviet Union poses a serious problem of overreach. There is no good reason why most of the acts in the Special Part of the RSFSR Criminal Code cannot be decriminalized and perhaps sanctioned in some other way other than by criminal punishment. The following "crimes," for example, could be handled through civil sanctions: malicious eva-

¹³³ See I. Lapenna, *The Contemporary Crisis of Legality in the Soviet Union Substantive Criminal Law*, 1 REV. SOCIALIST L. 73, 78-79 (1975).

¹³⁴ R. Beermann, *The Rule of Law and Legality in the Soviet Union*, 1 REV. SOCIALIST L. 97, 109 (1975).

¹³⁵ R.S.F.S.R. 1960 UGOL. KOD. (Criminal Code) art. 121.

¹³⁶ *Id.* art. 117.

¹³⁷ *Id.* art. 121.

sion of payment of support or maintenance of children (art. 122); malicious evasion of rendering aid to parents (art. 123); defamation (art. 130); insult (art. 131); violation of authors' and inventors' rights (art. 141); illegally engaging in fishing and other water-extractive trades (art. 163); illegally engaging in hunting of seals and beavers (art. 164); floating of timber or blasting in violation of rules for the protection of fish reserves (art. 165); illegal hunting (art. 166); etc. All of these could be dealt with adequately through administrative or civil sanctions.

It is true, of course, that not all criminal convictions under the RSFSR Criminal Code actually result in the imposition of a criminal punishment. Article 50-52 of the RSFSR Criminal Code contemplate possible relief from criminal punishment of persons who commit crimes. But it is a waste of the resources of the criminal process to try and convict a person of a crime under the code only to release him thereafter from criminal punishment. The use of criminal law should be restricted to the protection of society and individual rights from serious violations. To resort to criminal law when civil or administrative law will perform the task will only result in an undesirable trivialization of the criminal process. Contemporary Soviet criminal law still regards criminal law as a panacea to all social ills. The result of this is a proliferation of "crimes" in the short run and a degradation of the criminal process in the long run. Such results could be avoided by the Soviet Union without detracting from the effectiveness of Soviet criminal law as the principal instrument of social engineering.

Finally, the proliferating criminalization of violations of unpublished administrative rules and regulations would seem, on its face, to violate the due process requirement of notice. We do not question the authority of the Soviet lawmaker to make it a crime for anyone to violate a rule promulgated by an agency of the executive branch. It is only fair, however, to require that these rules and regulations, the violation of which would entail criminal responsibility, should at least be given the same publicity that criminal laws receive. As it now stands most of the rules and regulations contemplated under arts. 88 (violation of rules of foreign currency transactions), 142 (violation of laws on separation of church and state and of church and school), 160 (violation of veterinary rules), 161 (violation of rules established for combating plant diseases and pests), 162 (engaging in prohibited trade), 167 (violation of rules for mining and surrender of gold to the state), 197 (violation of rules of entry into

or living in border region or border), and 197-1 (violation by foreigners and persons without citizenship of rules for movement on territory of USSR), of the RSFSR Criminal Code are given little or no publicity at all in the Soviet Union. To make it a crime for anyone to violate a rule that he is not aware of violates a fundamental principle of due process—the requirement of notice.

These are only some of the disquieting features of contemporary Soviet substantive criminal law. It is hoped that the same forces that made it possible for the Soviet Union to reject the nihilistic and apocalyptic attitude that characterized Soviet criminal law during its formative years, (1917-1922), as well as during its infancy, (1922-1958), will also guide its future growth into full maturity and adulthood.