THE RE-BIRTH OF SOVIET CRIMINAL LAW IN POST-SOVIET RUSSIA

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Unlike some other Soviet Codes, first acts of the Bolshevist Criminal law were not modeled after the pre-revolutionary imperial codes. In the early Soviet criminal legislation, key juridical categories were replaced by sociological categories. The Marxist-Leninist principle of supremacy of interests of the state over the interests of an individual was envisaged on the legislative level and became a fundamental principle of the Soviet criminal law: crimes against the state were made the gravest ones, and the punishment for these crimes was much heavier than for all other crimes. The principle of analogy allowed criminal prosecution even in the cases, where the offence was not stipulated in the Criminal Code. In 1930s, the trend towards criminal repression intensified. Big changes, including the restoration of the traditional vocabulary of criminal law, the limitation of the doctrine of analogy, the careful analysis of crime in terms of subject and object, took place in the Soviet criminal legislation in 1960, when the new Criminal Code of the RSFSR was adopted. 1990s saw the long-awaited humanization and modernization of Russian criminal law, but situation started to change after the turn of the millennium. Certain cases as well as recently passed pieces of the Russian legislation show the sings of old Soviet attitudes in contemporary Russian criminal law and law enforcement.

Keywords: Soviet criminal law; social danger; measures of social defense; principle of analogy; Bolshevist law; judicial mentality; courts; law-enforcement.

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1. "Measures of Social Defense": Soviet Theories of Criminal Law

When Bolsheviks came to power in 1917, one of their main goals was to repeal the legislation of the Russian Empire and to replace it with new Soviet legislation. At the same time, they understood that it was impossible to create a new legal system from scratch. One of the first acts of the Bolsheviks authorized courts to use "the laws of the overthrown governments" (that is, pieces of the pre-revolutionary legislation) that "were not repealed by the Revolution and did not contradict the revolutionary conscience and the revolutionary legal consciousness."[1]

Marxist-Leninist doctrine viewed law as a tool intended to maintain the domination of the working classes over the non-working classes. According to Marx and Lenin, law was essential for a bourgeois society, where it was a tool of capitalist domination and a reflection of the bourgeois values. In a classless communist society law would not be needed and would inevitably wither away together with state, family and other "anachronisms of bourgeois society." However, at the time of transition from dictatorship of proletariat to socialism and then to communism, law was certainly needed as a temporary phenomenon. Thus, despite a temporary acceptance of law as a tool of the revolution, it is not surprising that this Marxist attitude towards law later on translated into disrespect for law and legal nihilism.

When the new Soviet Codes were developed during the early 1920s, in most cases the drafters drew on the imperial codes. Criminal law was an exception. In the early Soviet criminal legislation the juridical categories of *crime, punishment*, and *guilt* were replaced by sociological categories. The phrases "socially dangerous act" and "measure of social defense" were substituted for the words "crime" and "punishment": "the criminal legislation of the RSFSR has as its aim the protection of the Socialist State of Workers and Peasants, and the legal order established therein, from socially dangerous acts (crimes) by means of application to persons who committed them of the measures of social defense indicated in the present Code."[2] Fault was declared to

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[1] Декрет о суде № 1 от 22 ноября (5 декабря) 1917 г. [Decree on Courts No. 1 of November 22, 1917] (Feb. 20, 2017), available at http://www.hist.msu.ru/ER/Etext/DEKRET/o_sude1.htm.

[2] Уголовный кодекс РСФСР 1926 г. [Criminal Code of the RSFSR of 1926], Art. 1 (Feb. 20, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3274#0.

be a bourgeois criterion: "measures of social defense" should be applied in accordance with the best interests of the "Workers'-and-Peasants' State," as determined by the "revolutionary legal consciousness" of the judges.[3] Art. 23 of the 1922 Criminal Code of the RSFSR introduced the principle of retroactivity of the Soviet criminal law. The same principle was envisaged in Art. 6 of the 1929 Decree of the Presidium of the USSR Central Executive Committee of November 21, 1929, "On Criminalization of Soviet Officials Who Joined the Enemies of the Working Class and the Peasantry Abroad and Refused to Return to the USSR." Such refusal of a Soviet official to return to the Soviet Union was qualified as high treason and was punishable by confiscation of all the offender's property and execution by shooting within 24 hours from the moment of establishment of identity. By virtue of the aforementioned Art. 6, provisions of this Decree applied also to those Soviet officials who refused to return to the USSR before the day of enactment of the Decree. The doctrine of *nullum crimen, nulla poena sine lege* (which now is stipulated at the international level in Art. 7 of the European Convention for Human Rights) became the object of sharp criticism, and instead the *principle of analogy* was introduced: if an *act or omission* was considered socially dangerous – even though no specific statute prohibited it – the judge could apply a statute prohibiting an analogous act or omission.[4] That is how the supremacy of law was replaced by "revolutionary legal conscience."

The 1922 Criminal Code envisaged two main types of crimes: "Crimes directed against the fundamentals of the new legal order established by the power of workers and peasants or recognized as the most dangerous by the Soviet regime" and "all other crimes."[5] Through this conceptual division of criminality, the key Marxist-Leninist principle of supremacy of interests of the state over the interests of an individual was envisaged on the legislative level and became a fundamental principle of the Soviet criminal law. Traditionally, various crimes are specified in the Special part of a Criminal Code according to the degree of social danger: the gravest crimes always go first. In the 1922 Criminal Code, crimes against life, freedom and dignity of individuals were put into Chapter V – after the crimes against the state, official malfeasance, breach of rules of separation of church from the state and economic crimes. The legislative intent was to show that crimes against individuals were less dangerous that the other four types of wrongdoings above. From the viewpoint of the Soviet lawmakers, murder and rape were less dangerous than wasteful usage of labor force provided in the form of exercise of compulsory labor duty (Art. 127) or moonlighting (Art. 140). It is also remarkable that libel and criminal insult were criminalized as early as in 1922.

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[3] Harold J. Berman, *Principles of Soviet Criminal Law*, 56 Yale Law Journal 803 (1947).

[4] Уголовный кодекс РСФСР 1922 г. [Criminal Code of the RSFSR of 1922], Art. 10 (Feb. 20, 2017), available at http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=ESU;n=3006;frame=83#0.

[5] *Id.* Art. 27.

The 1926 Criminal Code of the RSFSR made social danger itself, and not violation of a specific provision of the Special part of the Code, the key to judicial sanctioning.[6] The new Code incorporated the basic provisions of the 1922 Criminal Code and brought them to a more advanced level. Under the 1922 Code, a person could be recognized as socially dangerous (1) as a result of his/her criminal activity, "due to systematic abuses in his/her professional activity," or due to his/her connections with the criminal environment.[7] The 1926 Code added one more ground – previous activities of the person in question.[8] In some cases, punishment was based on the perceived social danger of the person rather than on the act that this person committed. Art. 7 of the 1926 Code stated: "With regard to persons who have committed socially dangerous acts or who represent a danger because of their connection with a criminal environment or because of their past activity, measures of social defense of a judicial-correctional, medical or medico-educational character shall be applied." Thus a person who committed no act whatsoever but merely had a "connection with criminal environment," or who had engaged in "past activity which caused him to pose a danger," could be sentenced by a court.[9] The term "punishment" that was used together with the term "measures of social defense" in the 1922 Code was not included in the 1926 Code: "Measures of social defense of a judicial-correctional nature" was the new Code's euphemism for criminal sanctions imposed by a court.[10] The new Code held that the principle of analogy remained one of the key principles of the Soviet criminal law: "If any socially dangerous act is not directly provided by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature."[11] Consequently, any person could be determined socially dangerous for practically any reason. This created a convenient design for a totalitarian state: at any time, any person could be imprisoned or shot, in full accordance with the law.

The priority to protect the new regime was made even more clear in comparison to the previous Code. "Any act or omission directed against the Soviet system or that violates the legal order established by the worker-peasant power during the period of transition to the communist system" constituted a socially dangerous act (Art. 6). The gravest crimes were those directed against the Socialist State. This led to a very

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6 Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes* 21 (Cambridge, Mass.: Harvard University Press, 1972).

7 Criminal Code of the RSFSR of 1922, *supra* note 4, Arts. 48, 49.

8 Criminal Code of the RSFSR of 1926, *supra* note 2, Art. 7.

9 Berman 1972, at 21.

10 *Id.*

11 Criminal Code of the RSFSR of 1926, *supra* note 2, Art. 16.

sharp division between political and non-political crimes. Art. 46 of the 1926 Code provided that crimes contained in this Code are classified as follows:

- Those directed against the foundations of the Soviet system established in the USSR by the power of workers and peasants, and therefore considered to be the most dangerous;
- All other crimes.[12]

Punishments for crimes directed against the foundations of the Soviet system were much heavier than punishments for other crimes. The death penalty was applicable only to crimes against the state.[13]

In an insightful commentary on these issues, Professor Harold J. Berman wrote that some of the philosophy of the early Soviet criminal law "seems to have stemmed from the sociological school of jurisprudence of the 19th and early 20th century", and that "Soviet jurists were greatly influenced by Enrico Ferri, the leader of the sociological school"[14]. Soviet legal scholars,[15] however, angrily rejected the assumption that Enrico Ferri's theories had a significant impact on the formation of early Soviet criminal law. They considered it shameful to acknowledge that the conceptual and categorical apparatus of Soviet criminal law was formed under a pronounced influence of an odious bourgeois scholar and a Mussolini apologist who actively collaborated with the Nazi regime. Nevertheless, the resemblance was too close to go unnoticed. It is telling that Ferri's *Criminal Sociology* was not reprinted in Russia for nearly a hundred years.

According to Ferri's concept of social protection, the function of justice is to protect society from socially dangerous elements. Ferri denied such basic elements of criminal law as crime, punishment, guilt, responsibility, and the objective examination of a crime, and he strongly advocated for the personification of punishment, or the determination of punishment based on the personality of the offender, not on the offense. A key role in determining punishment was played by the judges. "Since punishments, instead of being the simple panacea of crime which popular opinion, encouraged by the opinions of classical writers on crime and of legislators, imagine them, are very limited in their deterrent influence, it is natural that the criminal sociologist should look for other means of social defense in the actual study of crimes

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12 Berman 1972, at 22.

13 *Id.*

14 Berman 1947, at 804.

15 *See* Пионтковский А. Марксизм и уголовное право. О некоторых спорных вопросах теории уголовного права [Andrey Piontkovsky, *Marxism and the Criminal Law. On Certain Disputable Issues of Criminal Law Theory*] (Moscow: Juridical Publishing House of the People's Commissariat of Justice of the USSR, 1927).

and of their natural origin. We are taught by the everyday experience of the family, the school, associations of men and women, and the history of social life, that in order to lessen the danger of outbreaks of passion it is more useful to take them in their origin, and in flank, than to meet them when they have gathered force… If the counteraction of punishment must inevitably be opposed to criminal activity, still it is more conducive to social order to prevent or diminish this activity by means of an indirect and more effective force."[16] Ferri's theory contributed greatly to shaping the defensive nature of the Soviet criminal law.

The first Soviet Criminal codes (1922 and 1926) influenced the initial competence and specific mentality of the Soviet judges. Certain explicit instructions on the mode of judicial behavior also came from the part of the head of the Bolshevik state: "the courts should not do away with terror – to promise that would be to deceive ourselves and others – but should give it foundation and legality, clearly, honestly, without embellishments."[17] Specific features of the early Soviet criminal law provided unlimited possibilities for judicial discretion, arbitrary interpretation and selective application of law as follows:

- Ambiguity of norms describing grave crimes (counterrevolutionary crimes and crimes directed against the foundations of the Soviet state) and the presence of the principle of analogy allowed discretion to qualify most of acts as socially dangerous ones;
- The provision that a socially dangerous person includes not only a person who committed a socially dangerous act, but also those who allowed systematic abuses in the course of fulfilling their professional duties, as well as those who had connections with the criminal environment (Arts. 48, 49 of the 1922 Criminal Code). The new Criminal Code of 1926 added one more qualifying characteristic: a person with a suspicious or otherwise problematic past was also considered socially dangerous (Art. 7).
- According to the requirements of the early Soviet legislation, judges had to handle cases in accordance with the available legislation and revolutionary legal consciousness.
- It was up to a judge to decide which type of punishment (measure of social defense) should be applied in a particular case and how severe such punishment should be.
- The most severe types of punishment (including the death penalty) were envisaged for counter-revolutionary crimes (Art. 58) and other crimes directed

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[16] Ферри Э. Уголовная социология [Enrico Ferri, *Criminal Sociology*], 100–111 (Moscow: Infra-M, 2009).

[17] Ленин В.И. Дополнения к проекту вводного закона к Уголовному кодексу РСФСР и письмо Д.И. Курскому 17 мая 1922 года [Vladimir I. Lenin, *Additions to the Draft Introductory Act to the Criminal Code of the RSFSR and Letter to D.I. Kursky of May 17, 1922*] 296 (Moscow: Collected works, vol. 27, 1932).

against the foundations of the Soviet state. According to the provisions of the 1926 Criminal Code, such crimes did not have to necessarily involve criminal intent.

By the 1930s, it became clear that early revolutionary ideas about the inevitable demise of law, state, family and other basic were unrealistic. The Soviet criminal law, however, proved to be a surprisingly useful tool: the state appreciated it, began to enjoy it, and ultimately decided not to reject it any more. The trend towards criminal repression intensified with as Stalin's personal grip on power strengthened.[18] One of the immediate results was the passing of three notorious acts. The Joint Decree of the USSR Central Executive Committee and Sovnarkom of August 7, 1932 "On Protection of Property of State-Run Enterprises, Collective Farms and Cooperatives, and Strengthening of Public Socialist Property," or "the Law of Three Spikelets," explicitly emphasized the persistent defensive nature of the Soviet criminal law. The preamble of the act stated that the Decree was the state's response to the repeated complaints of workers and peasants regarding theft of cargos, kolkhoz and cooperative property committed by "antisocial elements." All types of public property (state, kolkhoz and cooperative property) were declared as fundamental to the socialist public order. Persons attempting theft of public property were labeled "enemies of the people," and the fight against "enemies of the people" was proclaimed the top priority of the Soviet state. The Law of Three Spikelets envisaged execution by shooting and confiscation of property as a measure of punishment for (1) a theft of kolkhoz or cooperative property and (2) pilferage committed on a railway or water transport. If there were mitigating circumstances, the capital punishment could be replaced by 10 years' imprisonment with confiscation of property. Persons sentenced under this law were not subject to amnesty.

The Joint Decree of the USSR Central Executive Committee and Sovnarkom of August 22, 1932 "On Fighting Blackmarketeering" served as a logical continuation of the Law of Three Spikelets. This act envisaged disproportionally severe punishments for activities that could be qualified as black marketeering (given that the principle of analogy was still in force): a person could be sentenced to 10 years of imprisonment for selling cookies on the black market, for example. This Decree provided additional legal grounds for the battle of the Soviet state against its own people as they were sliding into poverty. Early 1930s saw horrific consequences of collectivization, which caused mass starvation and poverty. Another hidden goal of this Decree was to eliminate memories about the New Economic Policy, which was discontinued in 1927. By proclaiming the NEP in March 1921, the Soviet government formally recognized for the first time that its previous economic policies had failed. This same proclamation showed – also for the first time – how pliable the communist

[18] Мишина Е. Длинные тени советского прошлого [Ekaterina Mishina, *Long Shadows of the Soviet Past*] 37 (Moscow: "Liberalnaya Missiya," 2014).

ideology could be: in the face of impending economic disaster, the "die-hard" fighters against "capitalist exploiters" and private property decided to turn back to certain elements of in order to prevent the country from plunging into economic chaos. In a short time, the NEP saved the economy and started to appear politically dangerous. The early 1930s marked a new phase in the life of the Soviet Union, with no place for the NEP. This new phase brought a new concept of responsibility for the activities in breach of the Soviet legislation in force – a collective responsibility. An offender's family members also had to be convicted and made liable for the offender's wrongdoings.

The Resolution of the USSR Central Executive Committee of June 8, 1934 "On Amending of Provisions on Crimes against the State (Counterrevolutionary Crimes and Crimes against Administrative Order) with Articles on Betrayal of the Motherland" introduced a particularly broad definition of "betrayal of the Motherland." Persons convicted under this Resolution were punished by execution and confiscation of property; if there were mitigating circumstances, the punishment was 10 years of imprisonment with confiscation of property. Betrayal of the Motherland committed by a military serviceman was punishable with death penalty and confiscation of property. If a military serviceman knew that a betrayal of Motherland was committed or imminent and failed to report it, he was subject to 10 years of imprisonment. If family members of a military serviceman who undertook an unauthorized travel outside of the Soviet Union contributed to the act of betrayal of the Motherland or knew about it and did not notify the authorities, they were subject to 5–10 years of imprisonment with confiscation of property. The Law "On Family Members of Traitors of Motherland" followed in March of 1935. In the same year, the age of criminal responsibility was reduced from 14 to 12 years old. The Decree of the USSR Central Executive Committee of October 2, 1937, extended the maximum term of imprisonment for the most dangerous crimes (sabotage, espionage, etc.) from 10 to 25 years.

The assassination of Sergey Kirov on December 1, 1934, became a trigger for the escalation of political repression. Another Decree of the USSR Central Executive Committee followed on the very same day. This act introduced amendments to the criminal procedural legislation envisaging a special order of adjudication for the cases of terrorist organizations and terrorist acts that targeted Soviet officials.[19] Investigation of such cases were required to be conducted within 10 days. Criminal defendants had to be served with indictments one day before the trial (and in most cases, they were not served at all). Hearings were conducted in absentia, and

[19] Постановление ЦИК СССР от 1 декабря 1934 г. «О внесении изменений в действующие уголовно-процессуальные кодексы союзных республик» [Decree of the USSR Central Executive Committee of December 1, 1934. On Amending Codes of Criminal Procedure of the Union Republics] (Feb. 20, 2017), available at http://www.alppp.ru/law/ugolovnoe-pravo--ispolnenie-nakazanij/16/postanovlenie-cik-sssr-ot-01-12-1934.html.

convictions were not subject to appeal. Guilty verdicts resulting in a death penalty were enforced immediately.[20]

The special NKVD Order of July 30, 1937 No. 00447 "On Repression of Former Kulaks, Criminals and Other Anti-Soviet Elements" illustrates how the Soviet criminal justice worked in the late 1930s. This startling document was designed specifically for the purposes of the Great Purge and envisaged "Contingents (Quotas) Subject to Repression" according to the following categories:

1. Former kulaks, returning after serving out their punishment and continuing to conduct active anti-Soviet subversive activity.

2. Former kulaks escaping from camps or labor colonies carrying out anti-Soviet activity.

3. Former kulaks and socially dangerous elements, belonging to rebellious, fascist, terrorist, and bandit formations, serving out their terms, hiding from repression or escaping from places of confinement and resuming their anti-Soviet criminal activity.

4. Members of anti-Soviet parties (listed), former Whites, gendarmes, officials, members of punitive organizations, bandits, and gang members, accomplices, those assisting escapes, re-emigrants, those hiding from repression, fleeing from places of confinement and continuing to conduct anti-Soviet activity.

5. Those exposed as a result of investigations as the most hostile and active participants in currently-being-liquidated Cossack-White Guard insurgent organizations, fascist, terrorist, espionage-diversionist counter-revolutionary formations.

6. The most active anti-Soviet elements among former kulaks, members of punitive bodies, bandits, sectarian activists, church officials and others currently being held in prisons, camps, work colonies and continuing to carry out active anti-Soviet insurgency work. Criminals (bandits, thieves, recidivist thieves, professional contrabandists, swindler-recidivists, livestock thieves) carrying out criminal activity and circulating in criminal milieu.

7. Criminal elements located in camps and work colonies and conducting criminal activity.

8. All the above elements currently located in villages – in collective farms, state farms, agricultural enterprises and in cities – in industrial and trade enterprises, transport, in Soviet institutions and in construction are subject to repression.[21]

The Decree stipulated the following measures of punishment: "The most dangerous individuals shall be immediately arrested. After adjudication of their cases by special troikas, such individuals are subject to a death penalty. Less dangerous individuals shall be arrested and sent to labor camps for 8–10 years. The most socially dangerous individuals shall be imprisoned for the same period."[22]

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[20] Decree of the USSR Central Executive Committee of December 1, 1934, *supra* note 19.

[21] Paul R. Gregory, *Lenin's Brain and Other Tales from the Secret Soviet Archives* 50 (Stanford, CA: Hoover Institution Press Publication, 2007).

[22] *Id.*

Between August of 1937 and October of 1938 *767,397* people were convicted under the special NKVD Order of July 30, 1937 No. 00447. Of those, *386,798* people were executed; others were imprisoned or sent to Siberian labor camps.

Beyond violating bedrock principles of criminal responsibility under the law, these standards became a terrible weapon and a basis of a catastrophe waiting to happen. The elasticity and vagueness of early Soviet criminal law provided a pseudo-legalization for the massacre of hundreds of thousands of innocent people.

The implications of the early Soviet approach to criminal law remain relevant and dangerous to this day. The early Soviet criminal law, including the Criminal Codes of 1922 and 1926, formed the basis for a legal tradition of arbitrary interpretation and selective application of the law. These acts contributed significantly to the formation of a specific mentality of Soviet judges and transformed judicial discretion into judicial arbitrariness. And here, too, Ferri's theories played a sinister role in establishing that the main function of justice is to protect society from socially dangerous elements. In the Soviet version of this concept, the basic function of justice has transformed into the prioritization of defense of the state over defense of its citizens. This approach became customary in the Soviet Union.

Big changes took place in the Soviet criminal legislation in 1960, when the new Criminal Code of the RSFSR was adopted. As Professor Harold J. Berman puts it, "the restoration of the traditional vocabulary of criminal law, the limitation of the doctrine of analogy, the careful analysis of crime in terms of subject and object, and the emphasis throughout on strict legality all bear witness to what may be called a Struggle for Law."[23] Donald D. Barry, George Ginsburgs and Peter B. Maggs state that many of the most important developments in Soviet law that took place in the 1960s and 1970s "could be classified under the heading of legal reform, and this would apply in particular to the impressive codification activity that has taken place in many branches of law."[24] However, that legal reform retained its Soviet underpinnings. Similar to the 1926 Criminal Code, the interests of the Soviet state were the top priority: crimes against the state (treason, espionage, sabotage, wrecking, anti-Soviet agitation and propaganda, etc.) were still considered the most dangerous crimes. The 1960 Criminal Code envisaged a number of wrongdoings typical of the Soviet regime: violation of rules for currency transactions, failure to report crime against the state, theft of state or social property, pederasty, defamation, insult, private entrepreneurial activity and activity as commercial middleman, profiteering, etc. Even vagrancy was criminalized in May of 1961 by the Decree of the Presidium of the USSR Supreme Soviet "On Tightening of Control over Individuals Avoiding Socially Useful Labor and Engaging in Antisocial Parasitic Lifestyle."

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[23] Berman 1947, at 836.

[24] *See Soviet Law after Stalin* (D.D. Barry et al., eds., The Netherlands: Sijthoff and Noordhoff Publishers, 1978).

Along with other major political changes, the 1990s saw a long-awaited humanization and modernization of Russian criminal law. The 1996 Russian Criminal Code brought a fundamental change of the top priorities of Russian criminal law, which emphasized on the protection of the individual. Legality, equality before the law, liability solely based on guilt, justice and humanism became the basic underlying principles of the new Code.[25] The fact that these principles are stated signals an intent to depart from the principles and practices of the old Soviet Code, which emphasized "protection of the social structure of the USSR, its political and economic system… and socialist law and order."[26]

2. Incomplete Reforms: Business, Criminal Law and "Artificial Criminalization"

Significant achievements were made in modernization and humanization of the Russian penal law in 1990s in a clear attempt to break with the Soviet past; even so, the initial version of the Criminal Code of the Russian Federation outlined economic crimes in a way that continued to reflect socialist attitudes. As a result, entrepreneurs and their property were inadequately protected under Russian law. Because of the government's weak commitment to protecting private property, doing business in Russia continued to involve unnecessarily large risks even after the change to a market economic system. Unfortunately, the situation has only deteriorated since the 1990s. The principles of justice and individual equality under the law no longer apply in Russia today. In addition to abnormal economic conditions in the marketplace, businesspeople in Russia face additional risks stemming from abuses of power by law enforcement agencies and the impossibility of compliance with legislation currently in force. As a result, Russian businesspeople are not protected by the law and do not feel safe. As a result, more and more Russian businesspeople are opting for relocation to countries where they may benefit from legal systems that provide real protections to law-abiding entrepreneurs in the form of dependable individual and property rights.

The situation in Russia today may be described as an almost total lack of property protections that should be guaranteed in criminal law and constant wrangling between entrepreneurs and government officials. This model is based on the old-fashioned idea that it is possible to make economic decisions at the state level, using the law as a tool to benefit both the legal and the non-legal interests of government officials. The authors of the Conceptual Framework for the Modernization of the

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[25] Уголовный кодекс Российской Федерации 1996 г. [Criminal Code of the Russian Federation of 1996], Arts. 3–7 (Feb. 20, 2017), available at http://www.consultant.ru/document/cons_doc_LAW_10699/.

[26] Peter B. Maggs et al., *Law and Legal System of the Russian Federation* 765 (6th ed., Huntington, New York: Juris Publishing Inc., 2015).

Criminal Code of the Russian Federation in the Economic Sphere[27] treat this model as a modified socialist idea using a body of criminal law as a tool of economic management. The concept emphasizes that having the ability to affect the economy is predicated on administrative discretion. This perspective, in turn, evokes the phenomenon of a "mixed nature" of business. Under this construct, a business can be characterized as having some legal aspects and some non-legal aspects at the same time. In other words, a business can be considered legal from the standpoint of non-criminal law, but illegal from the standpoint of criminal law. Accordingly, artificial criminalization of business activity may be secured either through the adoption of repressive, Soviet-like criminal legislation, or by means of undue, arbitrary legal interpretations that disfigure the nature of the legal norms in question.

As a result of non-legal interpretation, a legal norm can be replaced by a quasi-norm that qualifies, or reclassifies, as illegal all business activities that are considered to be completely legal in other areas of law. Where the concept of artificial criminalization has the potential to be invoked, any legal contract or transaction falls under a real threat that it might be qualified as illegal. An illustrative example may be found in the text of the Resolution of the Supreme Court of the Russian Federation of December 27, 2007. The act states that a transaction, a contract, or an otherwise legitimate activity can be proclaimed criminal if a court finds a motivation for committing a crime. Such an approach inevitably results in an escalating cascade of criminal repressions that target entrepreneurial activities.

When the new Criminal Code of 1996 was drafted and adopted, humanization of legal norms was declared to be one of the main goals. Indeed, the revised Code eliminated certain notorious articles dating back to the Soviet Criminal Code that stipulated criminal penalties for homosexuality, vagrancy, currency-exchange operations, and so on. At the same time, the humanizing trend of 1990s had almost no effect on those provisions of the Code that pertain to economic crimes. Moreover, it turned out to be impossible to extract the bad heredity of the Soviet Criminal Code of 1960. That Criminal Code was infamous for the severity of the sanctions that it imposed on people who were convicted of economic crimes. The repressive nature of the Soviet Criminal Code is still present in a number of provisions of the Criminal Code of 1996, especially those related to punishments and law-enforcement procedures in the sphere of business. When an excessively repressive criminal legislation is combined with a broad interpretation of what is permissible when it comes to the targeting of business activities, the end result is the establishment of penalties against businesspeople that may be more severe than the penalties established for convicted felons. Furthermore, the escalating severity of punishments for economic crimes – a salient feature of Russian criminal policy both in Soviet times and in the period of

[27] *See* Концепция модернизации уголовного законодательства в экономической сфере [*Concept of Modernization of Criminal Legislation in the Economic Domain*] (Moscow: "Liberalnaya Missiya," 2010).

transition to the market economy – brings serious social and economic damage. This is despite the fact that world history shows that increasing the severity of criminal penalties has never stabilized or reduced the level of crime, and never will.

The reality is that Russian legislative norms regulating the issues of property rights and economic activity provide scant protections for individuals or their property. What is more, such norms constitute a serious threat to individual rights and freedoms: their formulations are ambiguous and uncertain, and there is a serious risk of "ditto-ology" and arbitrary interpretation. In its present form, Russian criminal legislation is not only an impediment against, but quite obviously a threat to, Russia's further social and economic development. Originally instituted values, such as protection of property rights and fair competition (in the initial sense of these definitions) are at the point of disappearing. Moreover, the possibility that criminal punitive measures can be applied under ambiguous legislative acts sets the stage for abuses of power by law-enforcement agencies. In the criminal procedure area as well, Russian law-enforcement agencies practice arbitrary interpretations of the norms of the Russian Code of Criminal Procedure – especially norms relating to economic crime. This environment of arbitrary interpretation contributes to the repressive nature of criminal procedure in Russia. It also blocks the application of legal norms regulating special procedures for persons charged with economic crimes. A very recent example of dangerously vague interpretation of the rules of criminal procedure can be seen in the application of one of the new norms of the Russian Code of Criminal Procedure: Provision 1.1 of Art. 108 of the Code establishes that detention shall not be applied to those charged with the types of crimes indicated in this provision if such a crime was committed in the context of entrepreneurial activity.

The main sources of existing problems are arbitrary interpretation of the norms of the Russian Criminal Code and the Russian Code of Criminal Procedure, improper law enforcement and deformation of the legal consciousness of the Russian people. This phenomenon has been captured in numerous sociological surveys. Most respondents think that Russians are not protected while doing business, and that their property is not protected either. In order to do business in Russia, one must obtain numerous official permissions, known colloquially as "no-objections." Even while purporting to conduct legitimate economic activity, a law-abiding Russian entrepreneur must solicit these permissions from numerous governmental agencies to avoid arbitrary enforcement of vague statutes.

3. The Continuing Influence of the "Best Traditions" of Soviet Criminal Law – Contemporary Case Studies

Certain cases as well as recently passed pieces of the Russian legislation show the sings of old Soviet attitudes in contemporary Russian criminal law and law enforcement.

The Pussy Riot Case. For organizing a so-called "punk prayer" in Moscow's Christ the Savior Cathedral in February 2012, Pussy Riot members were arrested and later sentenced to two years in prison. Their case reveals a number of disturbingly familiar features in Russia's public and legal environment. Most people might dislike the idea of holding a punk prayer in a place where believers come to worship. However, despite individual tastes and attitudes toward the band's performance, under the law, Pussy Riot members should not have been subjected to such harsh legal penalties or such heavy-handed treatment by law enforcement. The applicable Russian legislation in effect at the time of the violation established the sanction of a fine in the amount of 1,000 rubles in the a case of presenting "offense to the religious feelings of believers and/or desecration of items, signs and emblems of religious reverence" (Part 2 of Art. 5.26 of the Russian Code of Administrative Offenses). This exactly fits the violation committed by Pussy Riot in Moscow's Christ the Savior Cathedral, and it has little overlap with "hooliganism," the violation for which the participants were sentenced. In other words, the "punk prayer" was an administrative offense, that is, an unlawful, guilty act that is characterized by a considerably lower degree of public danger than a crime. If their actions had been assessed objectively rather than according to the "best traditions" of the Soviet law, Pussy Riot members would have been fined and that would have been the end of the case.

In this particular case, nevertheless, *who* did it and *how* it was done was more important than *what* was done, and the Russian judicial machine reacted in strict accordance to Art. 24 of the infamous 1922 Soviet Criminal Code, which stipulates that "when determining the punitive measure, the degree and the character of the threat the offender poses as well as the degree and the danger of the crime he committed are examined. In pursuing these aims the circumstances of the crime are examined, the identity of the criminal is established because it manifested itself in the crime the offender committed and in his motives, and because it can be established based on his way of living and his past. Also, the extent to which the crime itself violates the principles of public safety at a given time and under the given circumstances is determined." This accurately describes the illegal, one-sided and biased approach to evidence by Judge Marina Syrova, who stated that the behavior of the accused in the courtroom should be considered as yet another proof of their guilt – an interpretation that ensured the required result: the members of Pussy Riot were not found guilty of what they actually did, but, according to the best traditions of early Soviet criminal justice, were sentenced on the basis of their categorization as socially dangerous individuals. It is notable that acts insulting religious feelings were criminalized in June of 2013.[28]

The "Rubber Homes" Legislation. December of 2013 saw changes to Russia's law "On the Rights of Citizens of the Russian Federation to Freedom of Movement,

[28] Criminal Code of the Russian Federation of 1996, *supra* note 25, Art. 148.

Choice of Place of Sojourn and Residence within the Russian Federation." At the same time, the Criminal Code introduced criminal liability for fictitious registration of Russian and foreign citizens or stateless people (Art. 322-2), as well as for fictitious registration of foreign citizens or stateless people at a location in the Russian Federation (Art. 322-3). The legislative intent for this law was stated with appealing frankness in the explanatory note to the bill: "Hundreds of thousands of people register each year in thousands of so-called 'rubber homes' in Russia with no intention of living at the locations. At the same time, their real place of residence is not known. In 2011 alone, nearly 300,000 people were registered at only 6,400 addresses. By exercising their right to choose the place of residence, many citizens are shirking their *constitutional duties to other citizens, the state and society*." The note adds: "this situation became possible due to massive abuse by homeowners of their property rights, often for material motives."

This law is dangerous not only on its own terms but because it is aimed at abolishing the supremacy of a person's rights and freedoms – and accentuating his or her responsibilities. Here, the bill's authors trample the Constitution, in particular, its Art. 2, which states that: "The person, his rights and freedoms shall be the supreme value. The recognition, observance and protection of human and civil rights and freedoms shall be an obligation of the State." In part, the Constitution focuses on a person's rights and freedoms, and not his duties, because rights and freedoms must be considered foremost in a properly functioning legal system, both based on legal history and due to the significance of rights and freedoms in society. Constitutional obligations for individuals are younger than constitutional rights by almost two centuries, and only began acquiring a legal expression after the Second World War. The textbook list of traditional obligations implicitly or openly placed by the state on its citizens usually consists of *compliance with laws and other statutory acts, the obligation to pay taxes and the duty to serve in the military*. In modern constitutions, one can see not only the term "citizens' obligations" itself, but even whole chapters and sections dedicated to this subject (for example, Part I of the Italian Constitution on "Rights and Duties of Citizens;" Title III of the Venezuelan Constitution on "Duties, Human Rights and Guarantees;" Title III of the Constitution of Panama on "Individual and Social Rights and Duties;" Part I, Chapter 2, Division 2 of the Spanish Constitution on "Rights and Duties of Citizens."). The Russian Constitution, by contrast, contains no such developed theory of duties, which means the reference to any such principles in justifying legislation is deeply disconcerting.

Second Citizenship Legislation. In June of 2014, changes to the Russian legislation introduced the obligation of Russian citizens who have a second nationality or a residence permit in a different country to notify in writing the federal Migration Service. These changes included amendments to Russia's law on Citizenship, the Criminal Procedure Code and the Criminal Code, which was amended with Art. 330.2: "Failure to Comply with the Obligation to Notify of the Citizenship (Nationality) of

a Foreign State or a Residence Permit or Other Document Confirming the Right to Live Permanently in a Foreign State." Such a violation was made punishable by a fine of up to 200,000 rubles or up to an amount equal to the offender's annual income, or by compulsory labor for a term of up to 400 hours. Apparently, the drafters of these amendments neglected to acquaint themselves with the criminal law. If they had, they would have known that the criminalization of acts is based on a number of qualifying characteristics, such as *culpability, punishability*, and *public danger* (Art. 14 of the Criminal Code). Part 2 of this Article expressively provides that "an action [inaction] is not considered a crime, although it can formally contain any characteristics of an offense under this Code, but because [such an action] does not represent any public danger due to its insignificance." Public danger is one criterion used in defining a crime that constitutes a socially dangerous act that harms or threatens to harm the individual, society, or the state. The social danger that results from a Russian citizen's failure to inform the relevant authorities about his or her possession of another state's citizenship or residence permit was never made clear in the legislation or otherwise.

The problem of dual citizenship and the desire to criminalize it has preoccupied domestic legislators for some time. Back in 2000, Alexei Mitrofanov, a member of the Parliament of the Russian Federation, prepared and submitted draft law to the State Duma, in which he proposed criminalizing the acquisition of another state's citizenship by a Russian Federation citizen. Shortly thereafter, he proposed adding the following language to Art. 136 of the Criminal Code: "Acquisition by a person of the nationality of another state while temporarily staying or residing outside the Russian Federation, while retaining the citizenship of the Russian Federation, shall be illegal." Upon closer examination, this language is not much different from some of the provisions of the notorious Art. 64 of the 1960 Criminal Code of the Russian Soviet Federative Socialist Republic (upheld by the Constitutional Court of the Russian Federation on December 20, 1995), which labeled the refusal to return from abroad or the act of fleeing abroad as treason. It is noteworthy that the Third State Duma considered this bill in the first reading in October of 2002 and responded sensibly. The Law Committee said that the bill contradicted the provisions of Art. 6 of the Constitution, noting that it is difficult to define the acquisition of another country's citizenship as a socially dangerous act. The Legal Department of the State Duma decided that "the proposed project establishing criminal liability for actions aimed at a Russian citizen's acquisition of the citizenship of another state raises serious objections" and was unacceptable.

Currently para. 3.1 of Art. 4 of the Federal law "On Basic Guarantees of Electoral Rights and the Russian Federation Citizens' Right to Participate in Referenda" (No. 67-FZ of June 12, 2002) reads: "Citizens of the Russian Federation with foreign nationality or a residence permit or other document confirming the right of residence of a citizen of the Russian Federation on the territory of a foreign state do not have the

right to be elected. These citizens have the right to be elected into local government, if it is stipulated by an international treaty of the Russian Federation." This Article's provision, which denies individuals holding another country's passport one of the most important political rights held by Russian citizens, is not in accord with Parts 2 and 3 of Art. 55 of the Russian Constitution, which reads:

> • Laws that abrogate or derogate the rights and freedoms of men and citizens shall not be passed in the Russian Federation.
>
> • The rights and freedoms of persons and citizens may be limited by federal law only to the extent that it is necessary for the protection of the constitutional order, morality, health, and the rights and lawful interests of other persons, national defense, and state security.

Provisions of the aforementioned law also disagree with Part 4 of Art. 15 of the Constitution of the Russian Federation, which states that the "generally recognized principles and norms of international law and international treaties of the Russian Federation form a constitutive part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those provided by law, the rules of the international treaty are to be applied." In addition, these provisions contradict Art. 3 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 4 of the Convention itself.

The Case of Svetlana Davydova. In November 2012, substantial amendments were made to Art. 275 of the Criminal Code relating to espionage and state secrets. In order to understand the significance of this disastrous change, it is sufficient to compare the text of the previous version of this article with its current version. Legal sanctions for the crime have remained unchanged, but the scope of the Article has changed dramatically. Prior to November 2012, Art. 275 defined high treason as "*espionage, transfer of a state secret or any provision of assistance to a foreign government, foreign organization or their representatives in their conduct of hostile actions to the detriment of the external security of the Russian Federation, committed by a citizen of the Russian Federation*." As amended, however, Art. 275 defines high treason as an act "*that is committed by a citizen of the Russian Federation, acts of espionage, disclosure to a foreign state, an international or foreign organization, or their representatives of information constituting a state secret that has been entrusted or has become known to that person through service, work, study or in other cases determined by the legislation of the Russian Federation, or any financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation*."

The following are the most dangerous pitfalls of the new provision:

1. The phrase "hostile actions to the detriment of the external security of the Russian Federation" is replaced by the ambiguous phrase "activities against the

security of the Russian Federation." The omission of the word "hostile" makes this concept indecipherably ambiguous.

2. The new definition covers not only external but also internal security. A clear and detailed definition of either concept is absent from the Criminal Code.

3. The ambiguity of the wording "financial, material and technical, consultative or other assistance to a foreign state, an international or foreign organization, or their representatives in activities against the security of the Russian Federation" makes the article applicable to virtually any activity.

4. International organizations are identified as potential recipients of information constituting state secrets, as well as of the abovementioned types of assistance. Any list of such recipients must necessarily be open-ended and can include any international organization by default.

5. The vagueness of this statutory provision makes it impossible for citizens to properly abide by it, a violation of one of the fundamental conditions of the rule of law.

6. The provision's extensive ambiguity creates unlimited possibilities for arbitrary interpretation and selective application. Pursuant to the provisions of Art. 275, a criminal case for high treason can be initiated against any citizen of the Russian Federation who provides someone almost any information or commits almost any action.

In January 2015, Svetlana Davydova encountered these pitfalls personally. She was subjected to the most radical measure prescribed by the law: being remanded in custody. According to Art. 108 of the Code of Criminal Procedure, a person is taken into custody "when it is impossible to apply a different, less stringent preventive measure. When a person is remanded in custody, a judge's ruling must detail the specific factual circumstances based on which the judge made such a decision." What were the factual circumstances based on which the judge decided that the use of less stringent preventive measures against the mother of seven children was not possible? According to the text of the ruling of February 3, 2015, the decision by Investigator Mikhail Svinolup to take Davydova into custody was based on Art. 110 of the Code of Criminal Procedure. According to this Article, "a preventive measure is changed to a less stringent one once the basis for imposing such a measure has changed."

It is abundantly clear that what really changed was not the basis for the preventive measure, but the team of lawyers: on February 2, 2015, Davydova dismissed her attorney, Andrei Stebenev, and since that day she has been represented by attorneys Sergei Badamshin and Igor Pavlov. The results of this shift became evident the day after the dismissal, when, at the request of Badamshin and Pavlov, Davydova was released from custody on bail. The Moscow Bar Association thereafter initiated disciplinary proceedings for inadequate provision of legal assistance against Stebenev, who was eventually disbarred.

Davydova's case confirms that the defensive nature of the Soviet criminal law, enshrined in the very first Soviet Criminal Codes of 1922 and 1926, has returned. Under this Code, the state actively defends itself against its citizens and sometimes exceeds the limits of self-defense to commit acts of oppression against them.

The Case of Ildar Dadin. Further proof to that Russian criminal law is on a dangerous track of restoration of certain attitudes of Bolshevist law can be found in the case of Ildar Dadin, an opposition and civic activist. In the summer of 2014, a new article, Art. 212.1 on "Repeated Violations of the Established Rules of Organizing or Holding Public Gatherings, Meetings, Rallies, Marches, and Pickets," was added to the Russian Criminal Code. In December 2015, Ildar Dadin became the first person prosecuted and convicted under this Article, which has been strongly criticized both by members of the Russian Presidential Human Rights Council and by most prominent Russian lawyers as contradictory to the country's fundamental law and the European Convention on Human Rights. Noted Russian lawyer Henri Reznik has pointed out the anti-constitutional nature of this Article and emphasized that *multiple and repetitive administrative offenses do not constitute a crime*, as criminal acts are associated with a higher level of danger to the public.[29] Reznik also noted another blatant violation: when a criminal case against Ildar Danin was initiated, some court decisions on Dadin's administrative offenses had not yet come into legal force and therefore charges under Art. 212.1 of the Russian Criminal Code were filed against him illegally.

There are several shocking features in Ildar Dadin's case.

First, Art. 212.1 itself and Dadin's criminal case initiated under this article will eventually become textbook examples of the restoration of Bolshevik-style criminal law in post-Soviet Russia. Those who suggested introducing criminal liability for repeated violations of the rules of organizing and holding meetings, rallies, and other forms of public gatherings cannot draw justification from the danger such assemblies pose to the public, because there is simply no such danger. Once again following the "best traditions" of Art. 5 of the 1922 Criminal Code of the RSFSR, the authors of this legislative innovation nonetheless found that such gatherings posed a threat to the current political system. Art. 212.1 stipulates a maximum penalty of five years, which qualifies such offenses as medium-gravity crimes.[30] For comparison, the same maximum penalty is provided for the murder of two or more people committed under the influence of extreme emotional disturbance (Part 2 of Art. 107 of the Criminal Code) and for incitement to suicide (Art. 110 of the Criminal Code). For further comparison, Part 1 of Art. 117 stipulates a maximum penalty of three years for torture without aggravation, thus making it a minor crime. In other words,

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[29] Букварева А. Генри Резник – о приговоре Ильдару Дадину: "Это оскорбление права," Новая газета, 1 апреля 2016 г. [Aleksandra Bukvareva, *Henri Reznik on Ildar Dadin's Conviction: It's an Insult of Law*, Novaya gazeta, April 1, 2016) (Feb. 20, 2017), available at https://www.novayagazeta.ru/articles/2016/04/01/68036-genri-reznik-8212-o-prigovore-ildaru-dadinu-171-eto-oskorblenie-prava-187.

[30] Criminal Code of the Russian Federation of 1996, *supra* note 25, Art. 15.

from the point of view of 21st-century Russian legislators, torture is less dangerous for society than repeated violations of the rules of holding meetings, marches, and rallies, including individual pickets. This represents yet another similarity between this article and early statutes of Soviet criminal legislation, according to which crimes against the state – which, in this case, has been equated with the current political order – posed a bigger public threat than crimes against persons.

Second, as in the Pussy Riot case, law-enforcement bodies were more interested in Ildar Dadin himself as a "socially dangerous element" than they were in his actions. The situation evolved along the lines of the first Soviet Criminal Code, which instructed judges, when deciding on a sentence, to take into account the level and nature of the threat posed by both the criminal and his act and to "establish the personality of the criminal, since it revealed itself in the crime he committed as well as in his motives, and since it can be established based on his way of life and past."[31] Judicial authorities determined the punishment according to their "socialist legal conscience": although the prosecutor was asking for only two years of imprisonment, the judge decided such a punishment would be insufficient. As a result, Dadin was sentenced to three years in a penal colony.

Third, although Art. 51 of the Russian Constitution guarantees the right not to give incriminating evidence against one's relatives, Ildar Dadin's father testified against his own son. Even Art. 205.6, which joined the Russian Criminal Code in July of 2015, contains an annotation stipulating that a person cannot be held criminally liable for failure to report a crime prepared or committed by his or her spouse or close relative, and in 2015 this Article did not even exist. It seems that some sort of social genetic memory dating back to Stalin's 1930s, when legislative innovations encouraged whistleblowing and denunciations, must have kicked in.

Fourth, the punishment stipulated by Art. 212.1 openly violates the principle of proportionality, which is one of the fundamental principles of criminal law. According to Art. 43, punishment is used to restore social justice as well as to correct convicted criminals and to prevent crimes in the future. Actions criminalized by Art. 212.1 of the Criminal Code do not infringe upon social justice. From the point of view of criminal law, being an accumulation of administrative offenses, such actions do not represent any social danger, and thus, they do not entail the task of correcting the convicted individual. The introduction of this Article to the Criminal Code was motivated solely by political expediency and the urge to fight dissent. As for punishment, just like in feudal times, it serves as intimidation to teach others not to dissent.

On February 10, 2017, the Constitutional Court of the Russian Federation delivered its decision on constitutionality of Art. 212.1. The Court ruled that the Article was constitutional in the interpretation given by the Constitutional Court. By the virtue of the 2016 amendments to the 1994 Federal Constitutional law "On the

[31] Criminal Code of the RSFSR of 1922, *supra* note 4, Art. 24.

Constitutional Court of the Russian Federation,""The constitutional legal meaning of provisions of Article 212.1 of the Criminal Code of the Russian Federation discovered in this Decision shall be binding for all representative, executive and judicial bodies of state power, bodies of local self-government, enterprises, institutions, organizations, officials, citizens and their associations."[32] The Court ruled that the federal legislature is eligible (but not obliged) to change Art. 212.1 "following the requirements of the Constitution of the Russian Federation and in accordance with the legal stances of the Constitutional Court outlined in this Decision."[33] On February 22, 2017, the Presidium of the Supreme Court of the Russian Federation repealed the Dadin's conviction on narrow grounds, and on February 26, Dadin was released from the penal colony. While Dadin's release is a certainly a very good development, Art. 212.1 remains in the Criminal Code of the Russian Federation and will be further applied by law-enforcers.

As with Art. 275 on espionage, the ambiguity of Art. 212.1 makes vitally important the issue of who will apply the law. The mentalities of judges, prosecutors, investigators and other actors in the process play critical roles in the real-world context of the courtrooms where life intersects with the law on a daily basis. Today, Russian legal system is operated by conventional law-enforcement bureaucrats whose minds bear the deformities of Soviet-style legal consciousness.

Beyond immediate questions of justice and constitutionality, these laws raise an even more worrisome question: why is the assumption of the infallibility of the state, most recently evident during Soviet times, so firmly entrenched in the minds of Russian legislators and government officials? The Soviet instincts of these individuals are still sharp, but their historical memory is short. It seems clear that they either do not remember or do not want to remember what an authoritarian regime often does to its most loyal vassals. Here is just one of the glorious pages of Russian history which might provide an appropriately bracing warning. In June 1937, a special military judicial panel of the USSR Supreme Court returned a guilty verdict in a case of an "anti-Soviet Trotskyite military organization" and sentenced to death several elite commanders of the Soviet Army, including Mikhail Tukhachevsky, Ieronim Uborevich, and Iona Yakir. The special military judicial panel consisted of nine members, of whom four were subsequently executed in 1938, one was tortured to death, and another one, according to some reports, shot himself in anticipation of his arrest. Solely on the basis of individual survival, these statistics should be harrowing for government officials: a criminal justice system unaware of its because history tends to repeat itself.

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[32] Постановление Конституционного Суда РФ от 10 февраля 2017 г. № 2-П [Decision of the Constitutional Court of the Russian Federation No. 2-P of February 10, 2017] (Feb. 20, 2017), available at https://rg.ru/2017/02/28/sud-dok.html.

[33] *Id.*

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