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# Reception of social defense in the RSFSR* and the USSR**

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**Abstract**
The work covers issues of social defense theory in the RSFSR and the USSR. It describes the way the theory influenced criminal legislation and practice after 1917 until the end of 1920s and key discussions between scholars during that period of time. After a short overview of chaotic development of criminal law after the revolution the article concentrates on several problems connected with social defense.

**Keywords**
Positivist school, social defense, dangerousness, class theory, Soviet government



## Introduction

At the beginning of the 20th century Russian criminal law doctrine was very much influenced by the sociological criminal law school. The revolution of 1917 allowed even the most extreme positivist concepts to become part of the law, at least for a while. The most important period for research into this is 1917-1924 as the Basic Principles of Criminal Legislation of 1924 represents one of the last positivist-influenced acts. By the end of the 1920s, the Soviet authorities finally managed to remove all vestiges of pure revolutionary law, which had pretended to be based on Marxist philosophy and be influenced by the sociological school of law.

At that time there were basically a few main issues concerning criminal law that were discussed in terms of "shifting to the complete new system of law", namely, the need for a codified criminal law, in particular concerning the special part; the concept of crime and punishment; legal analogy; the notion of guilt in the absence of free will; the dangerousness of the person as a ground for criminal sanctions; and influence of class for conviction and punishment. It is worth noting that revolutionary lawyers fought against the idea of "modifying the criminal law" or "its new expression". They insisted on creating new law which was totally different in all aspects from the old one, opposing and excluding the latter. One of the features of this new law as it was pointed out in doctrine was that it not only avoided hiding the class nature but did exact opposite – declared it in

specific norms[1]. The strong desire to proclaim the creation of new law led to the need to exclude some important and basic principles of criminal law, replacing them with new ones. However, most of these were restored soon after.

There are still heated debates on the real source for the direction of future Soviet criminal law that was chosen. The desire of the revolutionary authority to get rid of any signs of imperial law and its approach was the reason for *changing the terms* even if they could have just as easily *changed the content* instead. In 1917 it was obvious that attempting the latter would be much slower and would not so explicitly show that completely new law was being created.

Professor M.M. Isaev wrote in 1948 that the authors of the Guidelines on Criminal Law of the RSFSR (1919) were under the influence of the sociological school of criminal law[2]. That is why they did not take into consideration classic Marxist rhetoric which does not reject the concept of guilt; instead the metaphysical content was excluded from it. Moreover, the Marxism accepted the idea that punishment is the reaction (with negative evaluation) to the commission of a crime. On the other hand, Isaev continues, the notions of "dangerous condition" and "social defense measures" are alien to classical Marxism.

One of the features of the criminal justice of that period is the absence of comprehensive legal provisions and the right (as well as obligation) of judges to use their revolutionary sense of justice. Hence, the speeches, reports and scientific articles of scholars explaining the essence of "new criminal law" were of great importance for judges. Among the names who really influenced the legal mode of thought were the following: G.M. Portugalov, P.I. Stuchka, M.Yu. Kozlovskyi, A.V. Lunacharskiy, A.A. Zhizhilenko, Ya.L. Berman, L.V. Savrasov, M. Reysner, A.Ya. Estrin and N.V. Krylenko. The latter took an extremely critical approach to the former "bourgeois law". He insisted on instituting the concept of dangerousness of the person. Even in the 1930s he still supported the position that for those from the enemy class social improvement as a measure was not applicable and the only way of dealing with them was retribution (usually the death penalty). By 1935 his ideas were outlined in the draft criminal code but by then they were out of date. The authorities had already realised the impossibility of rejecting all the impertial notions, and as such the legislation took a few steps back from the revolutionary socialist approach.

* The Russian Soviet Federative Socialist Republic. It became the part of the USSR in 1922.

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[1] Shirvindt, Ye.G., Utevskij B.S., *Sovetskoye penitentsiarnoye pravo,* M., 1927, p. 7.

[2] Isaev, M.M., "Osnovnyye problemy sovetskogo ugolovnogo prava", *Sovetskoye pravo v period Velikoj Otechestvennoj vojny,* M., 1948, pp. 46-47.

## 1. Positivism during the Russian Empire

Positivist philosophy in Russia was already developing before 1917, although it mainly only influenced theoretical discussions and not the legal system of the empire. Positivism influenced criminal law doctrine by changing the concepts of crime and punishment. However, the biggest impact Positivism had in the Soviet period was on the concepts of crime, punishment, legal reasoning and social defense. Due to this, the focus of this research lies within these notions.

In regard to the essence of crimes, Russian scholars had begun to discuss the problems of free will, predisposition and various factors that caused unlawful acts to be committed. By 1903, A.D. Kiselev had published a book devoted to the psychological grounds of criminal responsibility. He compared, in particular, the traditional school and the so-called personality theory. The last one puts an emphasis on the personality of criminals and their internal features and then considers the passive development of a person's psychic make-up (instead of "free will") to be the psychological ground for criminal measures[3]. The author does not explicitly state his position but sets out certain advantages of the personality theory, highlighting that it is not limited to studying physiology and is useful for rethinking current criminal law provisions[4].

At the end of the 19th and beginning of the 20th centuries punishment was regarded by some criminologists as an old concept. New interpretations of the established term appeared as well as detailed rejections of the old term and its meaning. Ideas similar to the positivists' appeared in the 19th century, especially from I.Ya. Foynitsky, whose work on punishment was based on the idea that punishment is *personal* in nature. The author saw legal sanctions as only the *boundaries* for law enforcement agencies[5].

In the 20th century, social defense measures were broadly discussed, and these discussions took into account foreign regulation and practice. They were defined as measures aimed at fighting against criminality and protecting society but were different from punishments because their key task was prevention, and any criminal then had to be studied in terms of their dangerousness. This approach is exemplified by A.A. Zhizhilenko's report for the Russian group of the International Criminal Law Association in 1911. It was titled "Social defense measures against dangerous criminals" and contained specific examples of such measures in the legislation of Great Britain and the draft laws of Austria, Germany and Switzerland. The author states that social defense measures and punishments are totally different although they can both be applied at the same time without breaking the principle of *non bis in idem*[6]. The key difference between the two notions, according to Zhizhilenko's position, lies in the reason for applying certain measures: the basis for social defense is dangerousness of a person, while punishment is closely connected with a criminal act committed and not the criminal[7].

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[3] Kiselev, A.D., *Psihologicheskoye osnovanie ugolovnoj otvetstvennosti,* Har'kov, 1903, pp. 218-232.

[4] *Ibid*., p. 237.

[5] Fojnitskij, I.Ya., *Ucheniye o nakazanii v svyazi s tur'movedeniem,* SPb., 1889.

[6] Zhizhilenko, A.A., *Mery sotsialnoj zaschity v otnoshenii opasnyh prestupnikov: Doklad, predstavlennyi VIII s'jezdu Russkoj gruppy Mezhdunarodnogo sojuza criminalistov*, SPb, 1911, pp. 14-19, 33.

[7] *Ibid*., pp. 26, 30.

Positivist ideas described and developed in the Russian empire had their origins in European discussions and works and before 1917 were mainly of interest to scholars and not legislators. One of the achievements of the Russian group of the International Criminal Law Association was promoting the possibility of releasing convicts before their sentence was complete: in 1909 grant of parole appeared in Russian legislation[8]. After the revolution Positivist philosophy turned out to be useful for the new government and many of its ideas were implemented in legislation and practice.

## 2. Class theory and the development of early Soviet criminal law

After the Soviet revolution in 1917 class theory became extremely important in Russia. The beginning of the Soviet period was seen as a struggle between the proletariat and its enemies who appeared to want the former order reestablished. Law was considered to be a temporary measure on the way to communism as the government itself and the law system were associated primarily with instruments of oppression. Criminal law as a part of the whole law system was not an exception and was seen as a tool used by one class to control another. This idea was the reason why later, in 1922, when a new criminal code was adopted, one of its key features, and one favoured by academics, was a clear declaration of its class nature[9].

M.M. Isaev provides an illustration of the class nature of criminal law, which has always existed but, according to his view, was neglected by bourgeois governments. He collected empirical data on the number of deaths due to accidents in factories and street murders[10]. His conclusion based on the statistics was that the chance of dying from an accident was more than 30 times higher than the chance of being murdered in the street, and ignorance of such a difference meant criminal law was aimed at protecting the bourgeoisie (who could just as easily be killed as labourers although they couldn't die in their factories).

After October 1917 but before the adoption of the Guidelines on Criminal Law of the RSFSR in 1919 and the Criminal Code of the RSFSR in 1922, criminal law was formed mainly in judicial practice. Acts of government contained only some general criminal provisions or descriptions of specific crimes. This part of the article focuses on this period, its key ideas and norms, and considers how important class theory was.

The Decree On Court of 22 November (5 December)[11], 1917 changed the system of courts (local courts appeared and in contrast to the former system judges had to be elected), and abolished institutions of prosecution, defense attorneys and investigators. The tasks of

[8] The Russian group began to discuss it earlier, e. g. prof. M. V. Duhovskoj rejected the idea that conditions in prison did not allow to release on parole (the idea was the ground of legislators' refusal to lay down provisions on parole). He said that if prison conditions were poor than it was dangerous to release both before and after the sentence was completed. In his view, it was better to avoid negative consequences of long staying at prison. Doklad prof. M.V. Duhovskogo, "Ob uslovnom dosrochnom osvobozhdenii iz zaklucheniya", *Zhurnal Ministerstva Justistii,* № 10 (dekabr'), SPb, 1898, p. 439.

[9] Isaev, M.M., *Obschaya chast' ugolovnogo prava RSFSR,* Leningrad, 1925, p. 13.

[10] Data referred to Great Britain and included number of people died from 1886 till 1904. *Ibid*., p. 23.

[11] Dates before February 1918 differ because of the change made by the Soviet government. The Julian Calendar was replaced with the Gregorian one.

prosecutors and defense attorneys were fulfilled by volunteers who enjoyed all civil rights. However, a different notion turned out to be the most important for the future of criminal law:

"5) Local courts judge cases in the name of the Russian Republic and are guided by the laws of overthrown governments only if they are not abolished by the revolution and are not in conflict with revolutionary conscience and revolutionary legal consciousness"[12].

The term revolutionary legal consciousness became a new source of law but it was not the only one as later decrees began to use the expression "socialist legal consciousness". Alongside "socialist legal consciousness" the Decree On Court No. 2 of 15 February (7 March), 1918 names the principle of justice as the ground on which courts may ignore formal requirements in order to make their decisions fair[13]. The Decree On People's Court of the RSFSR of 21 October, 1920 forbad using any acts of the overthrown governments in deciding cases. If there was no decree on the issue or an existing act was not precise, judges were guided only by their socialist legal consciousness[14]. In addition to people's courts, the judicial system also included extraordinary bodies, for instance, revolutionary tribunals. Their task, according to special law provisions, was to judge cases connected with antirevolutionary acts and all other offences that aimed at weakening Soviet power and authority. Art. 1 of the Decree On Revolutionary Tribunals states that their discretion in the choice of repression measures was not limited by anything. Art. 25 specifies that tribunals in making decisions are bound by the circumstances of the case and revolutionary conscience[15]. To summarise, people's courts based their decisions on socialist legal consciousness where there was a lack of decree provisions, whereas revolutionary tribunals were not bound by laws enacted by the Soviet government concerning their specific aim and for them revolutionary conscience was the only ground in making a decision other than the specifics of the case itself.

The essence of both revolutionary and socialist legal consciousness is often seen as similar, especially given that socialist legal consciousness translated into revolutionary which contrasted with the legal order of the Russian empire[16]. Due to this the terms are used interchangeably for the first years of the Soviet government. The scope of this consciousness remains difficult to describe and different interpretations have been given by both Soviet and contemporary authors. For instance, G.M. Portugalov published "Revolutionary conscience and socialist legal consciousness" in 1922, which was devoted specifically to the topic. The author analyses the part that conscience plays in the legal system as well as its tasks and essence in the RSFSR. He states that the key difference between French tribunals during the French revolution and Soviet courts lies in the features of revolutionary consciousness present in the two countries. In the RSFSR it was not limited to the idea of simply destroying all that may stop the revolution. Its nature was

[12] Decret "O sude" ot 22 noyabrya (5 dekabrya) 1917 g., prin. SNK RSFSR, "Gazeta Vremennogo Rabochego b Krest'yanskogo pravitel'stva", 24 noyabrya (7 dekabrya) 1917 g.

[13] Decret № 2 "O sude" ot 15 fevralya (7 marta) 1918 g., prin.. VTsIK RSFSR, "SU RSFSR", 1918, N 26, st. 420.

[14] Art. 2. Decret "Polozheniye o Narodnom Sude RSFSR" ot 21 oktyabrya 1920 g., prin. VTsIK RSFSR, "SU RSFSR", 1920, № 83, st. 407.

[15] Decret "O revolutsionnyh tribunalah" ot 12 aprelya 1919 g., prin. VTsIK RSFSR, "SU RSFSR", 1919, № 13, st. 132.

[16] Fioletov, N.N., "Ponyatiye sotsialisticheskogo pravosoznaniya v Sovetskom prave", *Pravo i sud,* № 1, Saratov, 1925, p. 8-10.

creative, it considered many social factors and took into account all the practical results of socialism[17].

The author then goes on to place emphasis on the idea that socialist legal consciousness is in fact the only source of law in the RSFSR and even states that decrees are just guidelines for how to apply it[18]. He declares it has three elements: scrutiny of case circumstances, abiding by decrees and applying the revolutionary conscience of a judge. The socialist legal consciousness is seen by the author as something common for the whole proletariat and the revolutionary conscience is, on the contrary, individual[19].

Nevertheless, the position of G.M. Portugalov remains unclear in regard to the question of how socialist legal consciousness is formed as he insists that judge's internal beliefs as a "bourgeois" concept are inapplicable to it. It seems that the whole system of justice was established based on the notion that all the judges who belonged to the proletariat or peasantry acquired socialist ideas at birth or – at the very least – immediately after the revolution. The reality was not as ideal as politicians and academics wanted it to be.

It seems also that socialist legal consciousness and internal beliefs should not be contradicted. The first may be understood as a set of socialist beliefs. Some authors who share this position prefer to explain legal consciousness through certain principles that underlie it. Instead of explaining how it is reflected in a person's mind and how it influences their decisions, they list some guidelines. Such an attitude is exemplified by M.A. Cheltsov-Bebutov. In his work "Socialist legal consciousness and revolutionary criminal law" (1924), legal consciousness is described as a set of principles and requirements that are important for legislators and judges as both make law – legislators through the establishment of protection measures against crimes and judges through their decisions[20].

Another important idea in the book by M.A. Cheltsov-Bebutov is directly connected with positivist ideas. The author explains how revolutionary legal consciousness should be applied to criminal law and claims that one must reject notions of guilt and retribution and instead follow the concept of social defense. According to him, criminals must be classified into several groups on the basis of their dangerousness to society. Punishments must be consistent with the criminal dangerousness of the *person*, and that is why there is no need to describe the features of a particular crime in a criminal code. Labour and rehabilitation are the key factors for reforming the penal system[21].

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[17] Portugalov G.M., *Revolutsionnaya sovest' i sotsialisticheskoye pravosoznaniye,* Peterburg, 1922, p. 11, 41.

[18] *Ibid*., p. 47.

[19] *Ibid*., p. 19, 26, 44.

[20] Cheltsov-Bebutov, M.A., *Sotsialisticheskoye pravosoznaniye i ugolovnoye pravo revolutsii*, Har'kov, 1924, p. 21.

[21] *Ibid.*, pp. 45-49. However, it should be taken into account that the book was written after the period of the broadest application of revolutionary legal consciousness as a source of law. Before 1924 two important criminal acts had been adopted and the role of judges had been limited comparing to the first years after the revolution. It means that ideas described above could not be guidelines in the most difficult period of judicial system establishment, but are nevertheless interesting as reflect attitude of scholars towards positivist ideas (legislators' attitude is equally interesting and is described hereinafter). They could also be considered by judges after 1924 as some elements of their discretion still existed in that period of time.

O.D. Maximova, who is a contemporary researcher, views revolutionary legal conscience as primarily "a legal ideology of the proletariat as a class who had forced the October revolution"[22]. The term "*legal* ideology" which is used by the scholar is not correct, as the original idea of communists was that law had to disappear along with government[23]. The notion "ideology" seems to be better for characterizing socialist legal consciousness.

To sum up, revolutionary (socialist) legal consciousness as a new source of law at the end of the 1910s can be understood as certain ideas based on socialism that ought to be applied by judges in hearing cases in accordance with their sense of revolutionary conscience. Moreover, some scholars offered an interpretation of legal consciousness for criminal law which actually reflected positivism.

This theoretical review should be complemented with judicial decisions of that period in order to understand how the source of law being analyzed worked in practice. There were two typical situations at that time where decisions were made based on revolutionary legal consciousness (exclusively or mainly):

1. Where there was no criminal provision at all but a judge came to a conclusion that an act that had been committed constituted a crime.

2. Where there was a criminal provision that a named act constituted a crime but there was no explanation of its key features and in many cases no sanction. One of the first decrees of the Soviet government was the Decree On Land and it did contain the norm of the type described. It stated that all landowners' property had to be confiscated and any damage to it was a grave criminal offence. No further explanations were given.

The first group of cases demanded from courts to conclude whether what had been done was a crime when the law was silent on most potentially criminal actions. The most obvious examples are murders that were not named in any acts in force but were punished as criminal offences by courts. Nevertheless, murders had been punished since the earliest times of law development and it is reasonable to say that judges could rely on common sense in that sphere. The nature of murders as crimes seems to be rather clear and unnecessary to discuss. The same refers to theft, although there was a difference in the way these two kinds of crimes were punished. Criminal charges were as a rule brought against thieves but probation instead of punishment was often used. G.M. Portugalov stated that the reason was the "inheritance" of customs from previous times (particularly property inequality) that the new government had to destroy[24]. This position may be understood as the idea that poor social classes needed time to compensate for their lack of property and

[22] Maximova, O.D., "Revolutsionnoye pravosoznaniye kak istochnik sovetskogo prava I zakonotvorchestva", *Gramota,* № 9 (47), Tambov, 2014, p. 90.

[23] Thus, N. N. Fioletov was against treating socialist legal consciousness as views on ideal law. Fioletov, N.N., "Ponyatiye sotsialisticheskogo pravosoznaniya v Sovetskom prave", *Pravo i sud,* № 1, Saratov, 1925, p. 12.

[24] Portugalov G.M., *Revolutsionnaya sovest' i sotsialisticheskoye pravosoznaniye,* Peterburg, 1922, p. 43. At the same time the author names the second tendency which appeared in judicial practice which is aggravation of punishments for recidivism. He explains that it was necessary to destroy crimes as a social phenomenon. *Ibid.* It can be added that second (third, fourth etc.) offence committed by the same person showed that the criminal had not used his or her chance to rehabilitate which, of course, meant danger for the society but this conclusion still could be based on common sense of judges.

get rid of their suffering from poverty. In other words, their representatives often committed theft because of starvation so they should be given a chance to get used to a new way of life, to study Marxist theory and participate in building communism.

D. Kursky provides another explanation saying that judges understand what crimes are "disorganising" in relation to revolution and theft does not belong to them. He compares theft and crimes against the government stating Moscow people's courts never used probation instead of punishments for the latter[25]. Kursky's interpretation, though based on judicial practice, is a little bit idealistic as he compares two types of crimes (against property rights and the functioning of the government) that had been known before 1917 and prioritising them was not so difficult[26].

Another category of actions punished by courts without any legal basis consisted of crimes that appeared particularly in those years in judicial practice. Judicial acts contained some unpredictable qualifications made and some examples of balanced and reasonable usage of repression measures (invented by judges themselves due to the lack of the exhaustive list of sanctions). A nice example of this was admitting an anti-semitic act was a crime and punishing it with the obligation to attend classes on social science at a school. The convict had to present a certificate to the court after classes[27]. Two features of the judgment appear to be very sensible – criminalisation of the act and the choice of sanction. A contemporary scholar P. Vasilyev gives some other examples from the archives – such as cocaine sniffing and "ruffianism" (in Russian "bujstvo")[28]. The first one had never been punished before whereas the second term in Russian is not legal and cannot be precisely described in relation to a criminal offence (it refers to some aggressive way of behaviour while drinking alcohol and is often used to describe that someone has destroyed things, been cursing and shouting threats etc.) In both cases the personal qualities of criminals were taken into account and punishments were not severe because their purpose was rehabilitation. Usually courts considered all the difficulties that criminals had endured in their lives and sought to improve them.

The second group of court decisions based on revolutionary legal consciousness relied on legal acts to some extent (in most cases those were decrees of the Soviet government). It seems correct to say "to some extent", because decrees often contained only general descriptions of some offences that had to be regarded as criminal ones. The Decree On Land has already been given as an example. Some other specific provisions are:

- up to one year of imprisonment for breaking provisions of the Decree On 8-hours Working Day of 29 October, 1917[29];

[25] Kurskij, D., "Novoye ugolovnoye pravo", *Proletarskaya revolutsia i pravo: izdaniye Narodnogo comissariata justitsii,* 1919, № 2/4 (12/14) (fevr.-apr.), p. 29.

[26] It is deemed necessary to add that the author used decisions only of *Moscow* people's courts on these cases and in Moscow as a rule there are less judicial mistakes that in other regions (this is true both for the Russian Empire, the Soviet period and today and the task to correct misinterpretations in regions has been on the agenda too many times all these years).

[27] The example is given *ibid.*, p. 30.

[28] Vasilyev P., "Revolutionary Conscience, Remorse and Resentment: Emotions and Early Soviet Criminal Law, 1917-22", *Historical Research*, 2017, Vol. 90. No. 247, p. 127.

[29] It is the last provision of the Decree and it does not directly say that breaking it constitutes a *criminal* offence (there is only a sanction). Breaking rules on labour still can be seen as a dangerous offence as policy of communists aimed at protection of working classes, so it is reasonable to view it as a criminal one.

- sabotage of the National Bank civil servants called "criminal"[30] (in the Resolution of the Russian Central Executive Committee On Countermeasures against Sabotage of the National Bank Civil Servants of 8 November, 1917);

- up to two years of imprisonment *and* a fine (its maximum was confiscation of all property) for luxuries contraband (listed in the Act of the Supreme Council of National Economy On Prohibition of Luxuries Import of 28 December, 1917);

- in the Decree "The Socialist Motherland in Danger" of 21 February, 1918 it is said that

"Enemy agents, speculators, bullies, ruffians, anti-revolutionary agitators, German spies are to executed by shooting at the crime scene";

- the Decree On Bribery of 8 May, 1918 lists two kinds of punishment for bribery – imprisonment *and* community service for *at least* five years. In case an accused belongs to the so-called "propertied classes" and offers a bribe with the purpose of preserving or acquiring privileges, the consequences are more severe than in other situations – i.e. the hardest and the most unpleasant community service and confiscation of all property;

- the Decree On Abroachment of 22 July, 1918 punishes cornering and selling goods. The criminal liability is differentiated in accordance with trade or non-trade purposes and kinds of goods (for instance, cornering and selling food products monopolised by the Republic for trade purposes was punished with *at least* ten years of imprisonment *and* hard community service *and* confiscation of all property);

- the Resolution of the People's Commissars Committee On Red Terror of 5 September, 1918 states it is necessary to protect the Republic from its class enemies by their isolation in concentration camps. All those connected with the White organisations, plots and rebellions had to be executed by shooting and their names were to be published, as well as the grounds for their execution.

Other acts also covered issues of revolution, counter-revolutionary movements, the Civil War and the intervention of foreign troops. In other words, actions to which the term "counter-revolution" could be applied were punished with criminal measures.

Obviously, offences *named* in decrees (resolutions etc.) were viewed in that period of time as more dangerous than those which were *not* mentioned in legal acts. They were always seen as a threat to the new society and the Soviet government. Judges' discretion in these cases appears to be closer to *revolutionary* and *socialist* legal consciousness and not simply based on common sense. The attitude towards punishments and the dangerousness of a criminal differed from the cases described before, as usually the aim of social defense, from the judge's point of view, could be reached not with rehabilitation and improvement but with the death penalty. Cases connected with counter-revolution were heard by

[30] Sabotage, according to the act, included refusals to give money to the People's Commissars Committee (the Soviet government) while money was extremely necessary for supplying army in the Civil War. No specific punishment was mentioned.

revolutionary tribunals, and as mentioned before, they were bound only by the circumstances of the case and revolutionary conscience.

The criminal justice approach can be illustrated by the Wipper case, which was heard by the Moscow Revolutionary Tribunal on 18 and 19 September, 1919. Oscar Wipper was a civil servant in the Russian Empire. In 1913 he was a prosecutor in the hotly-debated case of Bejlis who was suspected of the murder of a 12-year-old boy. Bejlis was a Jew and rumours that there had been a ritualistic killing became widespread in society (there was a belief Jews needed the blood of Christians for ritual purposes). Different social groups and the mass media held anti-semitic views and insisted on punishing Bejlis even though only a few pieces of evidence against him existed. Bejlis was acquitted by the jury and immediately set free.

After the October revolution Oscar Wipper was working on a regional supply committee when he was arrested by the Soviet government. He was convicted of participating in rigging the trial against Bejlis in 1913, handling the prosecution and for his anti-semitic speech which increased national hatred between different groups of the working classes. N.V. Krylenko as his prosecutor claimed the rigged trial was necessary to distract attention from the real enemies of the proletariat who were responsible for labourers' poverty and hamper development of the revolutionary movement[31].

Closer to the end of his speech Krylenko said that he convicted Wipper not for being a prosecutor but for using his talents and abilities to serve the Empire and try to achieve political results preferred by tsarists. Krylenko reminded the court that the Soviet system aimed at improvement of a criminal and not taking revenge for offences but in some cases taking a soft approach was dangerous for the revolution. After describing the Bejlis case the prosecutor told the court the following:

"…imagine Wipper serves not in Kaluga but in Har'kov. Denikin comes and Wipper becomes a prosecutor instead of a supply committee civil servant. Then again and again there would be heard his antihuman propaganda and many, many of our comrades would have to listen to it from the defendants' bench…"[32]

The punishment which the prosecutor asked for was the death penalty. Taking into account that Oscar Wipper had not behaved as "an active enemy of the Soviet regime", he was sentenced to imprisonment "until the final establishment of communism"[33]. This case is interesting for studying positivism and social defense in Russia as in fact it is difficult to say why exactly Wipper was punished in 1919 – because of his actions in 1913 or because he was potentially dangerous for Soviet society? It is clear that these are interconnected grounds of criminal measures as prosecution in 1913 *might* show that one was dangerous

[31] Krylenko, N.V., *Za pyat' let. 1918-1922 gg.: Obvinitelnyye rechi po naibolee krupnym protsessam, zaslushannym v Moskovskom i Verhovnom revolutsionnyh tribunalah,* Moskva, Petrograd, 1923, p. 351. In the book the author includes the prosecution speeches in high profile cases heard by the Moscow Revolutionary Tribunal and the Supreme Revolutionary Tribunal.

[32] *Ibid.,* pp. 366-367. Denikin (the former officer of the Russian Empire and one of the White armies' leaders) was mentioned because in summer of 1919 he conquered several towns, including Har'kov, Yekaterinoslav and Tsaritsyn. In September (when the Wipper case was heard) the Denikin's armies were on their way to Moscow, so the threat to the Soviet power was obvious.

[33] *Ibid.,* p. 368.

six years later. The threat of Denikin and the possibility that Wipper would change his role and join the enemy were arguments, based on suggestions.

The judicial decision in such a situation seemed to be based in effect on *revolutionary* legal consciousness as the punishment of Wipper can be explained only for the purpose of fighting against all potential enemies of the Soviet regime. There are reasons to say he had already "improved" before 1919 and the committee he worked on was even ready to bail him out. In that regard Krylenko noted:

> "Even though Wipper after the revolution was a nice civil servant… we must admit that from the perspective of revolution protection there is no place for him freeside and he must be isolated. If you ask me "How isolated?" – I will respond: "Killed"[34].

The other interesting part in Wipper's case is the conviction itself. It was with an indefinite period for imprisonment – until the final establishment of the communism. That type of sanction was not inherent in the former principles of criminal law but could be found in the further socialist legislation.

To sum up, after the October revolution there were several years without codified criminal acts. The Soviet legal system was based on decrees and revolutionary (socialist) legal consciousness. For criminal justice, there were two typical situations within which judges used wide discretion (it was supposed that their discretion was grounded in legal consciousness). The first group of offences was not criminalised and decisions frequently appeared to be based on common sense. The second group is connected with the belief in there being serious danger to the Soviet regime. There were general provisions and declarations on counter-revolution and some specific actions and sanctions for them. The example of the Wipper case shows that the category of dangerousness to the revolution was extremely important for that part of judicial practice.

This indicates that positivist ideas were present in the attitude towards both crimes and punishments. The dangerousness of an accused was as a rule more important than the act he or she had committed. Punishments were chosen according to this dangerousness and the courts relied mainly on rehabilitation and improvement except for those criminals who were treated as enemies of the revolution[35]. Positivist ideas were widely spread among scholars.

## 3. The development of criminal law after the first years of the Soviet government[36]

[34] *Ibid.*, p. 367.

[35] Nevertheless, not all those who were dangerous to the revolution were punished the same way. There were many death penalties and imprisonments, but probation and amnesty were used for less dangerous participants of counter-revolutionary movements and organizations. Terms of imprisonment were shortened immediately or soon after. For elderly convicts punishments were replaced with those that were consistent with their abilities. Among decisions of tribunals named by Krylenko there were some examples of that kind. See *ibid.*, pp. 27, 55, 87, 404, 491.

[36] This paragraph is mainly based on two legal acts of the RSFSR – The Guidelines on Criminal Law of the RSFSR (1919) and the Criminal Code of the RSFSR (1922), but also covers the act adopted when the USSR was formed – the Basic Principles of the Criminal Legislation of the USSR and Union Republics (1924).

The idea of adopting a criminal code appeared soon after the revolution. Therefore, in 1918 socialists-revolutionaries presented their draft criminal code but it was grounded in the laws of the Russian Empire so could not be accepted. The Civil War stopped the process of drafting for a while but by 1919 the question of codification was again on the agenda. In an article the academic Ya. Berman argued in favour of promulgating a criminal code as guidance for judges. His ideas followed the concept of social defense so he claimed that social danger had to be characterised according to the personal qualities and motives of a criminal and not *actus reus*. From his point of view, a key purpose of repression was to prevent further crimes and no sanctions for certain crimes were necessary[37].

In 1919 the Guidelines on Criminal Law of the RSFSR were put into practice. They contained general provisions without any specific crimes and criminal law continued to develop through the practice of courts. This act became an important source for the following code to be developed and is important for the analysed topic because lawmakers were then influenced by positivist philosophy and the way it saw crimes and criminals.

The Criminal Code that followed had much in common with the Guidelines. The preamble of the latter states that the People's Commissariat of Justice adopted this act in order to help Soviet bodies cope with their historical mission – their fight against class enemies of the proletariat. Criminal law, according to the first articles of the act, has the aim to protect social relations that comply with the interests of the working classes[38]. Art. 5 of the Criminal Code of 1922 describes the aim of the code as legal protection of labourers' government from crimes and dangerous elements to society through applying punishments and other social protection measures to revolutionary order-breakers[39].

The Guidelines on Criminal Law define a crime as a breach of social order that is protected by criminal law. The purpose of punishments is protection of social order from one who has committed a crime or attempted to commit it, as well as future possible crimes committed by a person or others. Art. 6 of the Criminal Code declares that a crime is any socially dangerous conduct that endangers the framework of the Soviet order and legal order that has been established by the proletariat and peasantry for the period of transition to communism.

As it is seen from the key aims of acts and their definitions of crimes, the criminal law of that period focused on the protection of the new social and legal order and the interests of leading classes (proletariat and peasantry). Declarations were detailed in other provisions. In the following subsections of this article the social defense idea implemented in these two acts will be analyzed in relation to several key notions and problems: dangerousness of a person, guilt, legal analogy and the system of social defense measures.

[37] Berman, Yak., "K voprosu ob Ugolovnom kodekse sotsialisticheskogo gosudarstva", *Proletarskaya revolutsia i pravo: izdanie Narodnogo comissariata justitsii,* 1919, № 2/4 (12/14) (fevr.-apr.), pp. 43-44, 47.

[38] Art. 1-3 of the Guidelines on Criminal Law of the RSFSR (1919), Postanovleniye Narkomyusta RSFSR ot 12.12.1919 "Rukovodyaschiye nachala po ugolovnomu pravu RSFSR", "SU RSFSR", 1919, N 66, st. 590.

[39] Postanovleniye VTsIK ot 01.06.1922 "O vvedenii v dejstviye Ugolovnogo Kodeksa RSFSR" (vmeste s Ugolovnym Kodeksom RSFSR"), "SU RSFSR", 1922, N 15, st. 153.

### 3.1. Dangerousness of a person

The concept of one's social dangerousness was widely discussed by scholars then and remains a controversial issue today. After a short overview of legal provisions, the most important aspects of the discussions will be covered.

The Guidelines on Criminal Law demanded from enforcement bodies to take into account the character and degree of social dangerousness of both criminals and crimes. The court ought to study not only the circumstances of the case but also the personal qualities of the criminal. Those personal qualities were inspected considering the act, the motives for committing it, and the criminal's way of life and past. In each case the court had to specify whether the criminal belonged to the "haves" or "have-nots"[40], committed a crime to reestablish the former order or for personal purposes, was aware of the harm caused by their actions or lacked education, was a professional criminal (a repeat criminal offender) or had committed a crime for the first time etc.[41] Among the conditions for being released on probation, the Guidelines stated the following:

"…3) if dangerousness of a convict for the society does not require immediate isolation – the court may release him/her on probation…"[42]

The Criminal Code of the RSFSR (1922) describes that one's dangerousness emerges when he/she commits acts harmful to society or is engaged in activities that seriously endanger the social order[43]. It repeats almost all the provisions on imposition of punishments although it excludes the phrases "haves" and "have-nots" (the obligation to study whether the crime has been committed for bourgeois interests or personal purposes was left in)[44].

Art. 49 of the Code specifies norms on exile. Exile up to three years could be applied to those who were considered to be dangerous to society because of their criminal activity or connections with the criminal environment, although it is necessary to highlight that the article does not mention the commission of a *crime*, only criminal activities, leaving space for interpretation.

The Circular note of the People's Commissariat of Justice № 118 of 6 June, 1923 provided courts with official interpretation of Art. 49 of the Criminal Code[45]. It stated:

[40] "Have-nots" were associated with two main classes – proletariat and peasantry, whereas all others belonged to "haves".

[41] Art. 11 and 12 of the Guidelines on Criminal Law of the RSFSR (1919), Postanovleniye Narkomyusta RSFSR ot 12.12.1919 "Rukovodyaschiye nachala po ugolovnomu pravu RSFSR", "SU RSFSR", 1919, N 66, st. 590.

[42] *Ibid.,* art. 26.

[43] Art. 7 of the Criminal Code of the RSFSR (1922), Postanovleniye VTsIK ot 01.06.1922 "O vvedenii v dejstviye Ugolovnogo Kodeksa RSFSR" (vmeste s Ugolovnym Kodeksom RSFSR"), "SU RSFSR", 1922, N 15, st. 153.

[44] Bulatov S. Ya. expresses an idea that exclusion of a direct provision on classes was too early in 1922 and the necessity to consider class affiliation of a criminal was still implied. Bulatov, S.Ya., "Klassovyi moment pri opredelenii mer sotsialnoi zaschity", *Sovetskoye pravo,* Moskva, 1926, № 2, p. 30.

[45] Tsirkulyar Narodnogo Commissariata Justitsii ot 6 iyunya 1923 g. № 118 "O primenenii statej 21, 39, 49 UK", *Yezhenedel'nik sovetskoj justitsii*, № 23, Moskva, 14 iyunya 1923 g., pp. 548-549.

"3. One may be considered to be dangerous for the society not only in case of conviction, but also when a charge has not been proved, but circumstances of the case have convinced the court that one has connections with criminal environment or, as a whole, in one's dangerousness because of one's previous conduct or criminal record".

In 1923 a remarkable modification was made; Art. 12 of the Criminal Code was changed. Before 1923 it stated that preparation for crimes could be punished only if the preparation itself constituted a crime. However, in 1923 it was added that it was for the court to decide whether to apply social defense measures to those who were considered to be dangerous to society. So, a decision on punishing preparation for crimes was done not on the basis of legal provisions but on the dangerousness or non-dangerousness of a person.

Discussions of scholars on the issue together with the provisions described above allow three key problems to be pinpointed: the difficulty of adopting the theory of "dangerous state of a person" as a whole, and the dependence of the dangerousness degree on class affiliation and on exile (its essence and application, taking into account Circular note № 118). The adoption of the theory as a whole was not embraced unanimously by all scholars. Thus, I.V. Slavin totally rejected the idea that criminal legislation could somehow be based on the theory of dangerousness of a person. He was confident that the Criminal Code focused on crimes and not criminals and the theory was not consistent with the interests of the proletariat and was dangerous and harmful to the idea of legality[46]. M.M. Isaev claimed that the theory was rejected by legislators but he had to admit that the new interpretation of exile was a "symptom" of the preference for the dangerousness of a person theory[47]. The authors of the book "History of soviet criminal law from 1917 to 1947", published in 1948, compared drafts of the criminal code and the final version of the act. They stated that in 1920 and 1921[48] the People's Commissariat of Justice put an emphasis on a criminal's dangerousness and overestimated personality, contrary to *actus reus* and even *mens rea*, while the Criminal Code of 1922 focused on the *crime*, which was a key term of the code[49].

However, attempts to deny the theory's influence on legislators seem to be unreasonable. The different versions of its implementation have been proposed. The Soviet

[46] Slavin, I.V., "Nakazuyema li ugolovnaya neblagonadezhnost' (K teorii opasnogo sostoyaniya)", *Yezhenedel'nik sovetskoj justitsii",* № 8, 1922, p. 2. The author states also that sociological school did a lot to prove that there were social factors of criminality and that was important in regard to penal policy of governments, but after that the school began to fight against criminals and not crimes. *Ibid.*
The idea of legality as a key one became more important later, than it was in 1922. In the end of 1920s the revolutionary legality became one of the key legal notions and on its basis many positivist ideas were rejected, but in 1922 such arguments were in advance of their time.

[47] Isaev, M.M., *Obschaya chast' ugolovnogo prava RSFSR,* Leningrad, 1925, p. 141.

[48] In 1920 the draft criminal code was prepared by the general consultation department of the People's Commissariat of Justice. The name of the department is always used to distinguish this version from the draft code of 1921, written by the People's Commissariat of Justice (as a whole). The latter became the basis for the draft of 1922 (modifications made in 1922 dealt with the conceptual framework of the code but somehow related to the draft of 1921). And the version of 1922 with some changes was adopted as a Criminal Code of 1922. These drafts, however, were not the only ones and another important draft code was prepared by the Law Institution.

[49] Gertsenzon, A.A., Gringauz Sh.S., Durmanov N.D., Isaev M.M., Utevskij B.S., *Istoriya sovetskogo ugolovnogo prava,* Moskva, 1948, pp. 249-251.

legislation did not accept the most radical one[50], but studying the person's dangerousness was clearly an obligation of the courts and an extremely important notion. Moreover, the statement in the Code of 1922 that dangerousness is only *found out* because of the crime committed reflects the idea that the crime is only a symptom of one's criminality, although no direct provision that dangerousness itself was a ground of criminal measures was set up. Issues connected with exile will be considered below separately.

The last thing to note on the theory is that some scholars separate the Soviet attitude from the "bourgeois" theory of dangerousness of a person, relying on the idea that the former considered classes to which criminals belonged and without such consideration it would become closer to the latter[51]. Nevertheless, such a focus on classes can be seen to be just a specific feature of the Soviet attitude highlighted by Soviet academics in order to draw a line between their law and "bourgeois" theory. Some contemporary authors strongly criticise the drawing of this line. They claim that making class differences meaningful for criminal law was in fact the worst version of the "bourgeois" theory. V.A. Luk'yanov considers the "dangerous state" concept as the same one as in the former bourgeois doctrine. He argues that the class approach, that formed the basis of socialist concept of dangerous state, is not enough to recognize it as completely different. This statement seems to be rather radical, as in fact it refers mainly to counter-revolutionary actions and punishments for them, but it is difficult to deny that differences between dangerousness of a person theory and the soviet approach were slight[52].

Continuing the topic of classes, it is necessary to move to the second point of discussion mentioned earlier, i.e., dependence of dangerousness on class affiliation. As mentioned above, the Criminal Code of 1922 excluded the obligation to study whether a criminal belonged to the "haves" or "have-nots", which the Guidelines on Criminal Law contained, making it necessary to study the purposes for which a crime had been committed (personal or bourgeois ones).

Such an exclusion was not a radical change to the criminal policy of the RSFSR. Two years later, in 1924, the Supreme Court of the RSFSR in its guidance stated that when hearing criminal cases courts should differentiate between those who are "alien to the proletariat state" because of their class affiliation and those who belong to "the working masses"[53]. Also, in 1924 the Basic Principles of the Criminal Legislation of the USSR and Union Republics were adopted. They named class affiliation among aggravating and mitigating circumstances. Any past or present connection with classes that "exploit others'

[50] For instance, the draft code of the general consultation department of the People's Commissariat of Justice stated that criminal measures had to be based *only* on the dangerousness of a person, which was rejected in 1921 when the Commissariat already included a crime as a notion along with one's dangerousness. *Ibid.*, pp. 249-250.

[51] Bulatov, S.Ya., "Klassovyi moment pri opredelenii mer sotsialnoi zaschity", *Sovetskoye pravo,* Moskva, 1926, № 2, pp. 27-28.

[52] Luk'yanov, V.A., *Otvetstvennost': philosophskiye i ugolovno-pravovyye aspekty,* dis. na soiskaniye uch. step. k.ju.n., Yekaterinburg, 1999, p. 46.

[53] Nakaz Plenuma Verhovnogo Suda RSFSR ugolovnoj kassatsionnoj kollegii, *Yezhenedel'nik sovetskoj yustitsii,* 1924, № 31, p. 741.

labour" was an aggravating circumstance, whereas being a labourer or a working peasant was a mitigating one[54].

However, these provisions did not exist for a long period of time as in 1927 they were excluded from the Basic Principles[55]. This short cycle of change in criminal legislation can be explained by their controversial nature. It was obvious in 1917 that many people who belonged to other classes than the proletariat and peasantry were potentially dangerous for the new social order. Moreover, the Soviet government was only just being established so there were more threats for it then than several years later when the victory of the Soviet government in the Civil War was obvious.

Thus, S.Ya. Bulatov claimed that exclusion of provisions on classes was too early in 1922. Nevertheless, it was he who insisted that in 1926 it was necessary to reject such provisions due to the fact that eight years had passed since the revolution[56]. It remains unclear whether, according to his interpretation, considering class affiliation was important in *all* cases before the need for these provisions disappeared. For instance, A.A. Gertsenzon in his book on Soviet criminal law history states that abolishment of "class" circumstances in the Basic Principles of 1924 was reasonable because the former expressions could convince courts that class affiliation *ultimately* influenced punishments, without taking into account character and degree of the dangerousness of both the crime and criminal[57]. Gertsenzon's statement shows that this *ultimate* influence in *all* cases was false but in fact this conclusion did not follow from the articles where aggravating and mitigating circumstances were listed.

Provisions of the Guidelines on Criminal Law of the RSFSR (1919) and the guidance of the Supreme Court were more accurate. Their analysis prevents simplification of the matter. In the Guidelines the obligation of the court to find out whether a criminal belonged to the "haves" or "have-nots" was detailed in a way that connected the "haves" with attempts to save or return certain privileges and the "have-nots" with poverty and starvation[58]. The Supreme Court of the RSFSR in its guidance of 1924 after the obligation to differentiate between classes specified that there could be no correctional labour for those who committed crimes because of their class hate, class psychology or previous class "skills"[59]. It meant that crimes committed by this category of criminals required isolation or the death penalty. In contrast, correctional labour was considered of value for the

[54] Art. 31 and 32 of the Basic Principles of 1924. Osnovnyye nachala ugolovnogo zakonodatel'stva Soyuza SSR i soyuznyh respublik, utv. Postanovleniyem Presidiuma TsIK SSSR ot 31 oktyabrya 1924 g., "SZ SSSR", 1924, № 24, st. 205.

[55] Art. 7 and 8 of the Resolution of the Central Executive Committee of the USSR of 25 February, 1927, that changed the Basic Principles of the Criminal Legislation of the USSR and Union Republics. Postanovleniye TsIK SSSR ot 25.02.1927 "Ob izmenenii osnovnyh nachal ugolovnogo zakonodatel'stva Soyuza SSR i soyuznyh respublic", "SZ SSSR", 1927, N 12, st. 122.

[56] Bulatov, S.Ya., "Klassovyi moment pri opredelenii mer sotsialnoi zaschity", *Sovetskoye pravo,* Moskva, 1926, № 2, pp. 30-33.

[57] Gertsenzon, A.A., Gringauz Sh.S., Durmanov N.D., Isaev M.M., Utevskij B.S., *Istoriya sovetskogo ugolovnogo prava,* Moskva, 1948, pp. 350-351.

[58] Art. 12 of the Guidelines on Criminal Law of the RSFSR (1919), Postanovleniye Narkomyusta RSFSR ot 12.12.1919 "Rukovodyaschiye nachala po ugolovnomu pravu RSFSR", "SU RSFSR", 1919, N 66, st. 590.

[59] In this regard the word "skills" (in Russian "navyki") seems to be closer to the "behaviour", "way of life" that representatives of certain classes had.

working classes if the crime had been committed for the first time because of poverty, lack of education etc.[60]

So, the influence of class affiliation did not simply mean that there were lesser sentences for the proletariat and peasantry and more severe ones for others. In some situations, there could be no differences between classes. Conditions for correctional labour instead of isolation were connected not only with class but also with other circumstances, so no repeat criminal offender, whether a peasant or a labourer, could be treated in a softer way than a former noble. The latter could hardly hope to be treated the same as a peasant if they both committed a crime because of poverty, but other motives that were not related to class were of equal importance. However, these peculiarities could be simplified by courts, so refusal to introduce any direct provisions on class affiliation can be regarded as the best solution.

Finally, the issue of exile as a social defense measure should be examined. The possibility of applying it without a conviction (as explained by the People's Commissariat of Justice) constitutes a strong argument for the position that dangerousness of a person theory *was* implicit in the Soviet legal system. Criminal charges which had been brought against the person but had not been proved became an obligatory condition for the exile.

In addition to Art. 49 of the Criminal Code which concentrated on this issue, there were acts dealing with *administrative* exile. It was imposed on people involved in counterrevolutionary crimes, along with deprivation of electoral rights[61]. Repeat criminal offenders who had been convicted twice of certain crimes listed in the Criminal Code were another category to whom this measure could be applied[62].

In 1926, B.S. Utevskij, while working at the State institution studying criminals and criminality, published an article presenting the results of research carried out on dangerousness and exile. He was against earlier forms of exile mainly because of the disadvantages of the Siberian region to which many criminals had to move, but he nevertheless stated that exile could help in the fight against professional criminals. By this he meant more precisely *administrative* exile and described the best way of applying it as distant colonies where people were involved in labour[63]. While this measure is expressly called "a social defense measure" by Utevskij, he does not give the same characteristic to the exile referred to in the Criminal Code and criticises the means of its practice stating that different governorates did nothing more than "exchange" dangerous criminals and there was no protection for society from their criminal activities[64].

However, although administrative exile was imposed by the People's Commissariat of Internal Affairs and was listed, not in the Criminal Code, but in decrees and other acts,

[60] Nakaz Plenuma Verhovnogo Suda RSFSR ugolovnoj kassatsionnoj kollegii, *Yezhenedel'nik sovetskoj yustitsii,* 1924, № 31, p. 741.

[61] This kind of exilement could be imposed up to three years. Postanovleniye VTsIK ob administrativnoj vysylke ot 10 avgusta 1922 g.,*Izvestiya VTsIK,* № 185.

[62] Decret VTsIK ot 15 oktyabrya 1922 g., "SU RSFSR", 1922, № 65, st. 841.

[63] Utevskij B.S., "Iz trudov penitentsiarnoj sektsii (Ssylka i vysylka)", *Problemy prestupnosti: sbornik pod red. chlenov instituta Ye. Shirvindta, F. Traskovicha I M. Gerneta,* Gosudarstvennyj institut po izucheniyu prestupnika i prestupnosti, Moskva, Leningrad, Gosudarstvennoye izdatel'stvo, 1926, vyp. 1., p. 291-292.

[64] *Ibid.,* pp. 292-293.

its nature in fact was extremely close to the nature of exile that could be applied to those acquitted according to the Criminal Code by a court. It is hard to find reasons why administrative measures, in being treated as social defense ones and connected with threats of crimes or crimes, can be so clearly distinguished from those referred to in the Code.

There were some key features of administrative measures that made them easier to apply compared to criminal ones, because no courts participated in the procedure, but it seems sensible to admit the same nature of notions, that is why both administrative and criminal exile are in fact an important illustration of the sociological school of criminal law as a whole and a theory of a person's dangerousness in particular. The term "administrative" can be explained only through bodies that made decisions and of course it would be fairer to delegate this power to courts than to any executive agency.

Having observed the dangerousness of a person theory and the part it played in the criminal law of the RSFSR, it is necessary to move forward to the issue of guilt in the early Soviet law.

### 3.2. Guilt

The Guidelines on Criminal Law of the RSFSR (1919) used the word "guilt" to explain that punishments were not retribution for being guilty as in class-divided societies crimes were caused by the social order[65]. This statement appears to put emphasis on society as the key reason for criminality and not the personal guilt of the criminal. The Criminal Code of 1922 did not use the word "guilt" in its general provisions but instead stated that only those who committed crimes intentionally or acted negligently were to be punished[66]. This provision that has replaced "guilt" with its forms was broadly discussed.

A number of examples can be given of the different positions that existed in relation to guilt in the criminal law of that period:

1. the strong criticism of the guilt concept as "bourgeois" in the Criminal Code of 1922, and the point of view as expressed, for example, by N.V. Krylenko, that guilt was alien to the Soviet legal system and inconsistent with its fundamental principles[67];

2. viewing the Code of 1922 as a compromise between guilt as a principle of criminal responsibility and the dangerousness of a person theory, exemplified by V.N. Shiryaev's argument[68];

[65] Art. 10 of the Guidelines on Criminal Law of the RSFSR (1919), Postanovleniye Narkomyusta RSFSR ot 12.12.1919 "Rukovodyaschiye nachala po ugolovnomu pravu RSFSR", "SU RSFSR", 1919, N 66, st. 590.
[66] Art. 11 of the Criminal Code of the RSFSR (1922), Postanovleniye VTsIK ot 01.06.1922 "O vvedenii v dejstviye Ugolovnogo Kodeksa RSFSR" (vmeste s Ugolovnym Kodeksom RSFSR"), "SU RSFSR", 1922, N 15, st. 153.
[67] Krylenko, N.V., "Ob'yasnitelnaya zapiska k proektu Ugolovnogo Kodeksa", *Yezhenedel'nik sovetskoj justitsii*, 1925, № 38-39, p. 1232.
[68] Shiryaev, V.N., "Evolutsiya sovetskogo ugolovnogo zakonodatel'stva", *Pravo i Zhizn',* M., 1926, Kniga 2 – 3, p. 72.

3. seeing similarities between guilt and one's dangerousness as the goal of both is the individualisation of punishment for the criminal, which was supported by A.Ya. Nemirovskij[69];

4. the norm of the Code on forms of guilt was a fundamental provision of great importance, a position presented by N.D. Durmanov in 1948[70];

5. the Code did not use the term "guilt" itself, and in fact completely rejected this concept and saw a criminal as a product of the social order, which was an opinion expressed by M.A. Cheltsov-Bebutov[71].

The Basic Principles of the Criminal Legislation of the USSR and Union Republics of 1924 followed the approach of the Criminal Code of 1922 and did not use "guilt" as an umbrella term, specifying only its forms as requirements for imposing judicial correctional measures[72].

Obviously, legislators themselves attempted to strike a balance between the guilt principle and the revolutionary attitude which earlier neglected notions of that kind. There were signs of a tendency to turn back to well-established terms in criminal law that were interpreted a little bit differently then but could be the foundation for the legal system in its development after the revolution and the Civil War. Society needed stability and some old principles could cope with long-term tasks better than radical concepts. Nevertheless, ideas inspired by positivist philosophy were closer to the Soviet view of social relations, classes and the new society which was going to be established.

Whatever the case, it would be false to state that after specifying forms of guilt it became the only ground of criminal liability. Although provisions were written this way, they cannot be analyzed separately from all social defense measures and particularly exile which was described earlier. The opportunity to exile those whose guilt has not been determined is a clear evidence of the "dangerousness" theory, so obviously the principle of guilt did not obtain the dominant position in the 1920s. Nevertheless, seeing that issue as a total rejection of guilt only because of the "intention" and "negligence" instead of "guilt" seems unreasonable as well.

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[69] The scholar stated that it was not necessary to reject old concepts and formulating their new essense and contents would be enough. The guilt, in his view, should be understood deeper than it used to be and the Criminal Code of 1922 chose that moderate way. Nemirovskij, A.Ya., "Opasnoye sostoyaniye lichnosti i repressiya", *Pravo i Zhizn', god izd.* 3, M., 1924, pp. 7-8, 13.

[70] Durmanov compares the Code with its early drafts and mentions that in 1921 the question on guilt was decided the same way as in the Guidelines on Criminal Law (so that guilt was not a condition of criminal responsibility). He also appreciated the way intention was formulated claiming expressions were more precise than in the Russian Empire legislation. Gertsenzon, A.A., Gringauz Sh.S., Durmanov N.D., Isaev M.M., Utevskij B.S., *Istoriya sovetskogo ugolovnogo prava*, Moskva, 1948, p. 257. In this case the year of publication is important because in that period (in 1930s, 1940s and later) most radical ideas of the sociological school of criminal law were rejected.

[71] Cheltsov-Bebutov, M.A., *Prestupleniye i nakazaniye v istorii i v sovetskom prave*, Har'kov, 1925, p. 89.

[72] Art. 6. The Basic Principles did not use the term "punishment", only "social defence measures". The latter were divided into three groups: judicial correctional, medical and medical-pedagogical ones (art. 5 of the Basic Principles). Osnovnyye nachala ugolovnogo zakonodatel'stva Soyuza SSR i soyuznyh respublik, utv. Postanovleniyem Presidiuma TsIK SSSR ot 31 oktyabrya 1924 g., "SZ SSSR", 1924, № 24, st. 205.

### 3.3. Legal analogy

Before and after the Guidelines on Criminal Law of the RSFSR of 1919 were adopted, Soviet criminal law did not contain specific crimes codified in any act. In para. 2 certain examples of crimes in decrees were listed, which existed alongside actions that were treated as crimes by courts in compliance with their revolutionary legal consciousness.

After 1919 certain drafts of the Criminal Code did not contain any specific crimes either. The draft code of the general consultation department of the People's Commissariat of Justice included so-called "generic" crimes which were supposed to be guidelines for courts and were formulated broadly without details and sanctions. Authors of the draft saw the special part of the future criminal code as an old concept, inconsistent with new scientific ideas. Their attitude may be exemplified with the description of theft in the draft code:

"Stealing a chose transitory for mercenary purpose that a criminal does not legally possess or use is punished"[73].

The idea of generic crimes was quickly rejected and in the draft code of 1921 that followed the version by the general consultation department of 1920 the special part was based on a different approach, that of tackling a more specific list of crimes.

Many authors in the 1920s agreed that attempts to set *numerus clausus* of crimes in 1922 were not likely to be entirely successful as it was the first time since the revolution that codification pretended to be inclusive and a wide range of written and unwritten crimes had to somehow be unified. Legal analogy was often seen as a temporary solution that helped to decide cases which were not foreseen by the authors of the Criminal Code. Thus, M.M. Isaev regarded the provision on legal analogy as strictly technical and necessary only because of the first code's disadvantages and legal deficiencies[74].

The provision that allowed legal analogy to be used was in Art. 10 of the Criminal Code of 1922 and stated the following:

"In case there is a lack of direct provisions in the Criminal Code on specific crimes, punishments and social defense measures are applied according to the articles of the Criminal Code that regulate analogous crimes, similar in their gravity and kind, in compliance with general provisions of the Code"[75].

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[73] Gertsenzon, A.A., Gringauz Sh.S., Durmanov N.D., Isaev M.M., Utevskij B.S., *Istoriya sovetskogo ugolovnogo prava,* Moskva, 1948, p. 258-259.

[74] Isaev, M.M., *Obschaya chast' ugolovnogo prava RSFSR,* Leningrad, 1925, p. 138. The same position was shared by P.I. Lublinskij who draw attention to the difficulties of legal analogy for judges who could easier decide cases without any provision at all than correct mistakes of the Code adopted by legislators. Thoughts of judges and legislators, as he said, then had to go the same way, but did *not,* and that is why most judges were careful in applying the norm which should be taken away from the Code after the transition period. Lublinskij, P.I., "Primenenie ugolovnogo zakona po analogii", *Pravo i Zhizn',* M., 1924, Книга 1, pp. 48-50.

[75] Art. 10 of the Criminal Code of the RSFSR of 1922, Postanovleniye VTsIK ot 01.06.1922 "O vvedenii v dejstviye Ugolovnogo Kodeksa RSFSR" (vmeste s Ugolovnym Kodeksom RSFSR"), "SU RSFSR", 1922, N 15, st. 153.

Art. 10 of the Criminal Code was interpreted by the People's Commissariat of Justice in its Circular Note restrictively. The Commissariat limited application of legal analogy by the criteria of clear high danger to the new social order and exclusiveness[76]. Other restrictions were in the Code itself – for instance, the conduct had to be similar to what had already been included in criminal law.

A. Estrin connects one more limit of the article with the history of the Criminal Code's adoption. He says that legal gaps must not be mixed with intentional exclusions of some articles by the legislator. Examples of such were the making of punishable threats, appearing in public in a state of intoxication and drinking alcohol on the streets. Criminal liability for these actions conflicted with the aims of the Central Executive Committee of the RSFSR which excluded them from the Code[77].

However, despite all the restrictions that existed in Soviet law, legal analogy in relation to criminal law is always a serious threat to the principle *nullum crimen sine lege*. Its temporary nature turned out to be a rather longer term one as it was used in 1930s and 1940s when other radical changes had already been abolished. At the same time it was this very provision, according to most Soviet authors and drafters of the Code, that was not a fundamental one (unlike dangerousness, system of social measures etc.) and ought to have disappeared quickly but did not.

Although there was clearly a need for legal analogy during the transition from uncodified criminal law to the first Soviet code, it is difficult to agree that there was a need for its continued application. It is clear that in the 1930s and 1940s it had no connection with any positivist ideas.

### 3.4. The system of social defense measures

The Soviet attitude to punishments had its foundations in positivist philosophy, but its implementation during that era raises some questions. Legal provisions will be primarily considered here to gain a greater understanding of this.

The Guidelines on Criminal Law of the RSFSR (1919) used the term "punishment". It defined its aims as protection of the existing social order from one who had committed a crime or attempted to commit a crime and all the possible crimes committed by the person and others in the future. The Guidelines did not name retribution among the aims of punishment and highlighted that it was a *defensive* measure. According to the act, protection from possible criminal conduct of one who had already committed a crime could be achieved through making them adapt to the new social order or, if this was not possible, through isolation or liquidation[78]. Alongside punishments, the Guidelines named

[76] Tsirkulyar Narkomyusta ot 8 iyunya 1922 g. № 48, *Yezhenedel'nik sovetskoj justitsii,* 1922, № 21-22.

[77] Estrin, A., "Analogiya (st. 10 Ugol. Kodeksa)", *Yezhenedel'nik sovetskoj justitsii,* 1922, № 28, p. 1.

[78] Art. 7-10 of the Guidelines. Postanovleniye Narkomyusta RSFSR of 12.12.1919 "Rukovodyaschiye nachala po ugolovnomu pravu RSFSR", "SU RSFSR", 1919, N 66, st. 590.

pedagogical measures and medical ones. The first were applied to those who were underage and the second to those who had mental illnesses[79].

The list of punishments was also given in the Guidelines (and called "approximate"). It contained 15 measures and empowered courts to combine them. 9 of them aimed at criminals' rehabilitation. Among these measures were some that reflected the influence of the sociological school, for instance, public warning, certain obligations (such as studying certain courses), boycott, declaring someone an enemy of the people or revolution, and making someone an outlaw. Probation was regulated separately and required three conditions – a first-time offender, with difficult life circumstances and the perceived lack of need to isolate that person because of their low degree of dangerousness[80].

This shows that the system of punishments in the Guidelines included both measures for those who were dangerous to the new society and those who lacked money, education and could be improved. Often these categories were associated with social classes but not always[81]. There were separate measures for those who were underage and those with mentally illnesses.

As it was mentioned concerning Wipper's case the undefined period for the imprisonment was legally allowed by the Guidelines. Art. 25 (litter "n") provided for the deprivation of liberty for the defined or undefined period before the special (defined by the court) event will take place. In the discussed example the final establishment of communism was chosen to be such an event, that supposed to bring the imprisonment to an end. Apparently, he was executed in 1920[82] and could not witness neither the absolute victory of communism nor his own freedom.

The following act – the Criminal Code of the RSFSR of 1922 – changed the system of punishments. It used not only the term "punishments" but also "social defense measures" and saw the latter as an umbrella term that included both punishments and other measures. Like the Guidelines, it highlighted that punishments were *defensive* in their nature. Neither was the list of punishments the same. It was shortened and probation was added to the types instead of standing as a separate provision. The list included those specific measures that existed in the Guidelines, such as public warning but there were more severe measures – deprivation of rights, confiscation of property and imprisonment. In contrast to the Guidelines, the Code regulated imposing punishments, their maximum and minimum terms, the serving of punishments and parole.

Other social defense measures could be imposed by courts instead of punishments or alongside them. Their list was a mix of different types of measures that were not divided in any way in the Code but actually related to three groups. The first one dealt with mentally ill persons and included such measures as placement in institutions for "the mentally or morally defective" and forced medical treatment. Bail was the measure available for those who were underage. The third group was not connected with any category of

[79] *Ibid.,* Art. 13-14.
[80] *Ibid.,* Art. 25-26.
[81] Class affiliation was described in more detail in para. 3.1.
[82] Schegolev, P.Ye., *Padeniye tsarskogo rezhima,* Moskva, Leningrad, 1927.

criminals and had two general measures – exile from certain places and prohibition to occupy oneself with certain activities or hold a certain office[83].

Earlier drafts of the 1922 code viewed issues of punishment differently. The draft code prepared by the general consultation department of the People's Commissariat of Justice refused to include any sanctions for specific offences. The reasoning behind this followed from the idea of generic crimes described earlier. The draft prepared by scholars at the Law Institution supported the concept of indeterminate sentences. However, these two ideas of the general consultation department and the Law Institution were not included in the final version of the Code.

The Basic Principles of the Criminal Legislation of the USSR and Union Republics of 1924 completely excluded the term "punishment". In this act social defense measures were divided into three groups – judicial correctional, medical and medical-pedagogical. Deprivation of citizenship appeared among the judicial correctional measures (which were earlier called "punishments"). Confiscation and prohibitions connected with activities and offices were also related to this type. Certain measures could be imposed not only as primary ones but also as additional. Medical measures included, as was the case in the Code of 1922, placement in medical institutions and forced medical treatment. For the underage, two medical-pedagogical measures existed – release on bail ("na popecheniye") and placement in a special institution[84].

The aims of the criminal measures that were to be applied to those who had committed crimes were seen in a similar way by the Soviet scholars of that time. They focused on the new social order and attempts to create a new society, which aimed to give a criminal a chance to improve or isolate them if that was impossible. However, some differences of opinion existed in discussions on the essence of social defense measures.

In particular, A.Ya. Nemirovskij stated that it was not necessary to replace "punishments" with "social defense measures". It was just as possible to understand the previous term in a deeper way and free it from the goals which were not consistent with Soviet criminal policy[85]. B.S. Utevskij strongly criticised any focus on trying to discern differences between these two notions, stating that the only difference was in the words used[86]. M.M. Isaev criticised legislators' attitude in two ways. Firstly, he stated that it was necessary to separate not punishments and other social defense measures but all measures applied to the mentally ill and mentally healthy. Secondly, he claimed that courts after adopting the code felt too bound by it and could not arrive at fair decisions in cases of

[83] Art. 8-9 and Parts III-V of the Criminal Code of the RSFSR of 1922, Postanovleniye VTsIK ot 01.06.1922 "O vvedenii v dejstviye Ugolovnogo Kodeksa RSFSR" (vmeste s Ugolovnym Kodeksom RSFSR"), "SU RSFSR", 1922, N 15, st. 153.

[84] Art. 4-5, 13-17 of the Basic Principles of 1924, Osnovnyye nachala ugolovnogo zakonodatel'stva Soyuza SSR i soyuznyh respublik, utv. Postanovleniyem Presidiuma TsIK SSSR ot 31 oktyabrya 1924 g., "SZ SSSR", 1924, № 24, st. 205.

[85] This idea corresponds to another one expressed by Nemirovskij (concerning the concept of guilt and individualization of punishments). See also footnote 70. Nemirovskij, A.Ya., "Opasnoye sostoyaniye lichnosti i repressiya", *Pravo i Zhizn', god izd.* 3, M., 1924, pp. 4-5, 7.

[86] Utevskij B.S., "Iz trudov penitentsiarnoj sektsii (Ssylka i vysylka)", *Problemy prestupnosti: sbornik pod red. chlenov instituta Ye. Shirvindta, F. Traskovicha I M. Gerneta,* Gosudarstvennyj institut po izucheniyu prestupnika i prestupnosti, Moskva, Leningrad, Gosudarstvennoye izdatel'stvo, 1926, vyp. 1, pp. 281-282.

criminals who were extremely poor and had no other opportunity to gain money, especially given that poverty was common in society[87]. Although M.M. Isaev agreed with the idea in the Code of 1922 that punishments were social defense measures[88], this position was not shared by all authors. Sometimes this was seen as a terminological change that did not change key differences between social defense measures and punishments[89].

A detailed description of the differences between punishments and social defense measures was given by A.A. Zhizhilenko in his work "Essays on the doctrine of punishment". Unlike most authors, he did not refuse to use the term "retribution" speaking on that topic and insisted that it should be understood neither as the aim of the punishment, nor to mean "revenge". In his view, retribution constituted *the essence* of punishments because it was imposed on a person due to a committed *crime*. At the same time social defense measures, being connected with crimes, were imposed only for the purposes of *prevention*, and the ground for doing so was the dangerousness of a person. Punishments were associated with the past and social defense measures with the future. As for the Code, Zhizhilenko noted that the term "social defense measures" had two meanings: its narrow meaning was actually what he described in the book as these measures, while the broad one included punishments[90].

Zhizhilenko succeeded in drawing a line between the two notions but his clear division was not reflected in the Code by which the drafters attempted to show the rejection of all old concepts of punishment, retribution etc[91]. The task as it was seen then was to manage crimes with measures that would show perpetrators their mistakes and protect the new society from other potential perpetrators so exclusion of the word "punishment" in the Basic Principles of 1924 was rather predictable.

Getting rid of old concepts was considered key at the time. It is difficult to deny that there was certainly an opportunity to change the meaning of old terms, as suggested by Nemirovskij, but the total rejection of old notions was more remarkable and comprehensible step for – legislators, courts, average citizens. It was easier to replace the word than define something old in a new way. However, as well as changing the term, different classifications were given, and these varied from act to act as illustrated earlier.

[87] Isaev, M.M., *Obschaya chast' ugolovnogo prava RSFSR*, Leningrad, 1925, pp. 145-146, 150-156. However, in regard to poor criminals it is strange that courts reacted this way, as the Code of 1922 empowered them to impose a punishment less severe than it was prescribed by the article of the special part after considering all circumstances of the case. The draft code contained also possibility of the court to impose a more severe punishment than listed for the specific crime but legislators did not accept this part of suggestions.

[88] Actually, he did not draw attention to the problem of differences between these two notions and followed the structure and provisions of the Code in that regard.

[89] See, for example, Gertsenzon, A.A., Gringauz Sh.S., Durmanov N.D., Isaev M.M., Utevskij B.S., *Istoriya sovetskogo ugolovnogo prava*, Moskva, 1948, p. 266.

[90] Zhizhilenko, A.A., *Ocherki po obschemu ucheniju o nakazanii*, Petrograd, 1923, pp. 21-24, 29-31.

[91] What is more, it seems difficult to understand how the aim of prevention which characterizes a crime and the "future" effect of social defence measures should be distinguished. Still, the author exemplifies his position with four groups of social defence measures, which makes it easier to combine dangerousness as a ground with the emphasis on the future. These groups are measures of isolation and treatment for mentally ill and alcoholics, pedagogical measures for under-ages, labour measures for beggars and defence measures from repeat criminal offenders. *Ibid.*, pp. 94-95.

Measures for mentally ill criminals and those underage were clear because of the category of persons against whom they could be used. These measures were definitely applied because of the dangerousness of the person who could serve the punishment and required a different attitude. Exile and prohibitions imposed by courts as form of social defense measures remain more controversial. Their essence seemed to be close to punishments and any personal features could become the ground for their application. The system was changed again in the Basic Principles which left the general classification but named such controversial measures as exile and prohibition of activities or holding offices among judicial correctional measures together with measures which had been earlier referred to as "punishments"[92].

To sum up, in the sphere of criminal measures the concept of social defense influenced almost everything – the essence and goals of punishments, classification of measures and special categories of those who committed crimes. Scholars relied on both new interpretations of old terms and completely new notions but criminal legislation focused on a new attitude.

## 4. Concluding remarks on social defense in the RSFSR and the USSR

The tendencies described earlier had different perspectives in the years that followed the early 1920s. Some of them have remained but the most radical ones – in particular, dangerousness of a person[93], refusal to use concepts of guilt – were removed from criminal legislation.

Some changes that indicated legislators had moved in that direction were already in the Basic Principles of 1924. They also appeared in the Code of the RSFSR in 1926[94]. The concept of revolutionary legality gained more and more attention and importance. Even class theory began to focus on other issues, primarily compulsory collectivization[95].

Criminal law doctrine was slower in turning away from positivist ideas than legislation. That is why in 1935 N.V. Krylenko even published a new draft of a criminal code based exclusively on ideas of the sociological school of criminal law. This draft was based on the principle of criminal liability for dangerousness to society. There were no specific crimes

[92] The term "punishment" was turned back to the legislation of the USSR in 1934. This was done in the act of the Central Executive Committee of the USSR which specified crimes against the State and added article on treason. Postanovleniye TsIK SSSR ot 08.06.1934 "O dopolnenii Polozheniya o prestupleniyah gosudarstvennyh (kontrrevolutsionnyh i osobo dlya Soyuza SSR opasnyh prestupleniyah protiv poryadka upravleniya) stat'yami ob izmene rodine", "SZ SSSR", 1934, N 33, st. 255.

[93] In its most radical meaning. In general, personality has had certain influence in deciding cases since then, but the concept of social dangerousness as the ground of measures applied without conviction was later rejected.

[94] The most important change was exclusion of norms similar to what had been written in the Code of 1922 on possibility to impose exilement on those whose charges had not been proved.

[95] For instance, a contemporary researcher M.O. Okuneva compares the development of class theory and positivism in parallel and notes than in 1930s class-based attitude was dealing with different classes of peasantry, mainly the richest ones, who used others' labour and had more property than others (they were called "kulaki" in Russian. "Kulak" is literally translated as "fist"). For more detail on class theory in 1930s see Okuneva, M.O., *Sub'yect prestupleniya v sovetskom ugolovnom prave. Stanovleniye i razvitiye instituta v 1917-1941 gg.,* dis. na soiskaniye uch. step. k.ju.n., M., 2019, pp. 172-182.

and no specific sanctions[96], something A.A. Gertsenzon described as "nihilism in criminal law" and a rejection of "guarantees of socialist legality"[97]. The contemporary scholar V.A. Luk'yanov views that draft code as "the worst variant of the practical realisation of dangerousness of a person theory"[98]. In fact, the draft code prepared by N.V. Krylenko then was not something new for the doctrine of criminal law as many similar ideas had been implemented in the draft by the general consultation department of the People's Commissariat of Justice and subsequently rejected. The author was undoubtedly out of date with that draft and soon after its publication did his best to adapt it to a new dominant category of legality, although this failed[99].

The new concept of social defense measures instead of punishments could be explained with the logical chain from the speeches and writing of the revolutionary scholars. The idea of new criminal law was based on few pillars:

1) Class nature of the state and law.
2) The absence of the free will of the person who commits a crime. So, the criminal is bearing the responsibility not for himself but for the errors of the system.
3) The idea that once the communism establishes crimes will disappear, as the "intuitive law" (the psychology theory of law) will provide for the common legal consciousness of all.
4) Despite of the revolution there are still a lot of representatives from the enemy class.
5) They are treated differently in terms of convictions, aggravating circumstances and punishment.
6) The punishment should not exist in socialist system of law at all, because retribution is against the principles of communism, especially considering the absence of free will.
7) The only aim of the reaction to crimes from the state of proletariat dictatorship is to secure the new formation and new system from the assaults.

These factors have led to the implementing of social defense measures instead of punishments at the beginning of the Soviet criminal law development. The main task was to defend the new socialist's system. If that could be reached without isolation, then the person was to be rehabilitated; if not – which was usually the case with the enemy class – they were to be isolated. The choice between two ways of isolation (deprivation of liberty or death penalty) had to be done upon the dangerousness of the person, that is, to what extent there is the threat to the new state.

To conclude, the first years after the revolution have developed the completely new form of criminal responsibility. However, it soon became clear that there were many gaps and the system could not work appropriately, so they turned back to the concepts of codified law, concrete sentences and the division between representatives from different classes was excluded. Despite of the inhumane character of the whole soviet legal

[96] Krylenko, N.V., Proekt Ugolovnogo kodeksa SSSR, *Sovetskoye gosudarstvo*, 1935, № 1-2.
[97] Gertsenzon, A.A., *Ugolovnoye pravo. Obschaya chast'*, M., 1948, p. 141.
[98] Luk'yanov, V.A., *Otvetstvennost': philosophskiye i ugolovno-pravovyye aspekty*, dis. na soiskaniye uch. step. k.ju.n., Yekaterinburg, 1999, p. 50.
[99] In 1938 N.V. Krylenko was convicted of the crime against the State and executed. He was rehabilitated posthumously in 1955.

experiment, it would be incorrect and unfair to deny the role of positivism in Soviet legislation and the current Russian Criminal Code as it has drawn attention to a criminal as a personality, the social factors of criminality, the different ways of punishments and mechanisms to consider all circumstances of committed crimes. Class theory had its impact, and there were serious threats and exaggerations that followed from the concepts of dangerousness and some social defense measures. Nevertheless, the connection between some current law concepts and law enforcement and the Soviet reception of social defense is obvious.

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