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Social Defence Measures and Insanity: Problems and Solutions

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Abstract
The influence of sociological law theory on the criminal law of the RSFSR[1] and the USSR resulted in introduction of the concept of social defence. Several legal acts and draft criminal codes reflected the idea of "dangerousness of a person" as a general category. Soon after, however, scholars began to draw more attention to particular categories of dangerous offenders, and different psychiatric issues were discussed. It was clear that social defence measures against sane and insane offenders could not be the same, but many questions were left unresolved. Lawmakers soon removed the most extreme concepts of sociological law thought, which were adopted in the early 1920s. Nevertheless, a connection between insane and juvenile offenders and the idea of social defence has persisted and some unresolved questions remain almost exactly the same. Insanity and related issues remain some of the most difficult theoretical obstacles in contemporary Russian criminal law.

Keywords
Insanity, social defence, intoxication, dangerousness, class theory, Soviet government

1. Introduction

Like many other traditional criminal law categories, the concept of insanity was influenced by radical views developed in the early Soviet period. In the late 1910s and 1920s sociological legal thought played a key role in making criminal law policy.[2] Its ideas were implemented in legal acts. After the October revolution criminal law was primarily developed by courts. Judges applied different sources of law while hearing

[1] The Russian Soviet Federative Socialist Republic. It became part of the USSR in 1922.

[2] In Russian legal and criminological tradition sociological school is usually named this way and not "positivism", which is interpreted in a broad way and is not always mentioned as a term. Thus, Enrico Ferri is called "the representative of the sociological stream in criminal law doctrine": Okuneva, M.O., *Sub'ekt prestupleniya v sovetskom ugolovnom prave. Stanovleniye i razvitiye instituta v 1917-1941 godah*, dissertatsiya na soiskaniye uchenoj stepeni kanditata juridicheskih nauk, Msokva, 2019, p. 116.

cases, including, in particular, laws of overthrown governments but only if they had not been abolished and if they complied with revolutionary conscience and revolutionary legal consciousness.[3] In 1920, the latter was called "the socialist legal consciousness" and was the only source of law that could be applied because of the absence of any legal provisions laid down (as all laws of overthrown governments were forbidden).[4] In 1919 the Guidelines on Criminal Law of the RSFSR were put into practice. They contained provisions based on class and sociological theory, but only general ones, that did not target any specific crimes. The first Criminal Code of the RSFSR was adopted in 1922. When the USSR was formed, the Basic Principles of the Criminal Legislation of the USSR and Union Republics became the key criminal law act for all republics of the Union (1924), while each republic had its own criminal code.

A comprehensive approach to insane offenders was not of key importance to lawmakers and judges as they concentrated on class theory and class enemies.[5] Nevertheless, all the criminal law acts mentioned above concerned insane offenders, even though the terms "sanity" and "insanity" were not mentioned in any of them. Rejection of all traditional terms was in line with the Soviet criminal law policy; not only "insanity", but also "guilt" and "punishment" were excluded. The latter two remained in the Guidelines (1919), but in 1922 guilt was replaced with "commit crimes intentionally or act negligently", and in 1924 punishments were replaced with "social defence measures". The Guidelines underlined that punishments were not retribution for guilt as the understanding at the time was that in class-divided societies crimes were caused by the social order.[6]

In order to specify the changes connected with insanity, it is necessary to set out the approach of imperial law to this concept. Ever since the 19th century, insanity has been explained on the basis of its "formula". During the early Soviet period, the formula was reduced but did not totally disappear. However, scholars sometimes treated it differently and developed their own theory of insanity based on rationality. These issues, as well as the idea of free will, are covered in more detail later. Apart from the legal nature of insanity, several other questions require attention, e.g., the role of experts in the establishment of insanity, diminished sanity (or the problem of half-mad people) and the state of intoxication. As such, the first two parts are followed by descriptions of these specific issues and some concluding remarks on insanity theories in regard to contemporary Russian law.

2. Insanity during the Russian Empire

For many years, mental illnesses have been taken into account in deciding criminal cases, but the well-grounded concept of insanity dates back to the end of the XIX

[3] 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.

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

[5] Thus, the preamble of the Guidelines on Criminal Law of the RSFSR declared that criminal law is aimed at fighting against those who try to resist new social relations, for instance, against the bourgeoisie.

[6] 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, № 66, st. 590.

century. Criminal law of the pre-revolutionary period reached its peak of development in Russia during that time. In regard to the doctrine of criminal law, these years are associated with the name of Nikolaj Stepanovich Tagantsev, who was a professor at Petersburg University and wrote at length on the key problems of criminal law. Among other scholars, he took part in drafting the new criminal code of 1903[7] and many provisions of the latter originated from the approach of Tagantsev.

The traditional formula of insanity was developed by Tagantsev and imperial psychiatrists. Both lawyers and psychiatrists were interested in solutions which could help to achieve a compromise between legal and medical terms in relation to mentally ill offenders. For instance, psychiatrists V.P. Serbsky and V.Kh. Kandinsky concentrated on this issue.

In the view of Professor Tagantsev insanity could be established on the basis of two criteria – the medical and the psychological. The latter is now called the legal one, but its essence remains the same. Under the medical criterium many different states were united, among which there were mental disorders, unconsciousness, and retarded mentality caused by illnesses or infirmities. Many different mental states could fall under these categories. For example, unconsciousness covered, according to Tagantsev, somnambulism and alcoholic intoxication.[8] Both somnambulism and intoxication[9] were not directly mentioned in the draft criminal code he worked on, but the criterium was flexible enough to be modified in accordance with the development of medicine.

As for the psychological criterium, Tagantsev included two alternative elements in it – a person's inability to realise what he or she is doing or to control his or her actions (cognitive and volitional elements, respectively).[10] One of the most active promoters of the psychological criteria was V.Kh. Kandinsky. In particular, he insisted on cooperation between psychiatrists and lawyers and the prevailing role of lawyers over psychiatrists.[11] Elements of the psychological criterium were described by Kandinsky as an absence of *libertatis judicii* and *libertatis consilii.* The first one meant the ability to understand the nature and significance of one's actions, as well as the fact that they are prohibited by criminal law, while the second, in Kandinsky's interpretation, meant the ability to refrain from doing something.[12]

[7] The draft law was not put in force in the Empire, except from some sections. It became law in whole only in some specific territories.

[8] Tagantsev N.S., *Russkoye ugolovnoye pravo, Chast' Obschaya*, Tom 1, Tula, 2001, pp. 341, 383-385. The original edition was: *Russkoye ugolovnoye pravo, Lektsii N.S. Tagantseva, doktora ugolovnogo prava, senatora, zasluzhennogo professora Imperatorskogo Uchilischa Pravovedeniya, pochetnogo chlena: Universtitetov S.-Petersburgskogo i Sv. Vladimira, Moskovskogo i S.-Petersburgskogo Juridicheskih Obschestv*, Izdaniye vtoroye, Tom 1, S.-Peterburg, 1902.

[9] For further details see part 3.2.

[10] Tagantsev, *Russkoye ugolovnoye pravo, Chast' Obschaya*, pp. 338-349.

[11] Kandinsky, V.Kh., *K voprosu o nevmenyayemosti*, Moskva, 1890, pp. 8-9.

[12] *Ibid.*, p. 37. It is important to mention that many psychiatrists of Kandinsky's time insisted on the insanity formula containing only the medical criterium, without the legal one. D.R. Lunts described the influence of the symptom-oriented psychiatric school on this tendency. The school was the leading one in the 1880s. However, he thought that the primary reason was the humanistic approach to people and lack of trust in imperial courts and investigators (though such an explanation complies with the general soviet line to criticise the imperial government). Lunts D.R., *Problema nevmenyayemosti v teorii i praktike sudebnoj psikhiatrii*, Moskva, 1966, pp. 34-37.

Finally, it is remarkable that Tagantsev regarded the fundamental question of free will as an irresolvable one and thus avoided constructing his formula on its basis.[13] Kandinsky fully agreed with him on this point.[14] The consequences of absolute free will, in their view, meant there was no reason to impose punishments on the offender. This is because, if the offender could be absolutely free, no punishments could have any influence over him or her. Therefore, revenge could be the only purpose of punishments. At the same time, an offender could not be guilty of any crime if absence of free will was taken as an alternative assumption. These considerations became the reason why both authors put the issue of free will aside.[15]

To conclude, the descriptions above show that the insanity formula was developed in parallel by lawyers and psychiatrists, who managed to create a number of elements necessary to reach a compromise between judges and experts, with lawyers taking the leading role in its creation. Insanity is strictly a legal term and not a medical one, and usage of the term "mental illness" as a synonym of "insanity" in Russia is not correct.

3. The early Soviet period and insanity

3.1. Legal provisions on insane offenders during the early Soviet period

As mentioned before, the legal acts of the early Soviet period included the Guidelines on Criminal Law of the RSFSR (1919), the Criminal Code of the RSFSR (1922) and the Basic Principles of the Criminal Legislation of the USSR and Union Republics (1924). Mentally ill persons were also mentioned by another act, even before 1919. It was issued in 1918 by the People's Commissariat of Justice and was called the Instruction "On Examination of Mentally Ill Persons". According to its provisions, at least three medical doctors had to participate in the examination, with their report being subject to judicial revision. The People's Court could either uphold it or order a new commission to be summoned for re-examination. There was no appeal procedure for decisions of People's Courts on issues of mental illness.

The Instruction referred to the Code on family law, custody over children and mentally ill persons and civil status registration acts.[16] It was mentioned in provisions regulating custody and was adopted as an appendix to the Code, as one could be considered mentally ill only in compliance with the results of the examination.[17] The Instruction contained no provisions on insanity and criminal offenders, but was

[13] Tagantsev, *Russkoye ugolovnoye pravo, Chast' Obschaya,* p. 320.

[14] Kandinsky, *K voprosu o nevmenyayemosti,* pp. 9-11.

[15] Assessment of this approach is not an easy task. In order to determine motives behind crimes, existence or absence of free will needs to be established. Still, their insanity formula, based on a strict legal approach, turned out to be both flexible and stable. Taking into account its contemporary implementation in criminal law, it is difficult to overestimate its significance.

[16] Since the Soviet period, this term has become deeply rooted in the Russian legal system. It includes registration of marriages, divorces, births, deaths, changes of names and surnames, etc. Before the Revolution the registration function was imposed on the Church, but after the October revolution special Civil Status Registration Bodies were founded.

[17] The Code of Laws on Civil Status Acts, Marriage, Family and Custody, adopted by the Central Executive Committee of the RSFSR (1918), Kodeks zakonov ob aktah grazhdanskogo sostoyaniya, brachnom, semejnom i opekunskom prave, prinyat VTsIK 16.09.2018, "SU RSFSR", 1918, № 76-77, st. 818.

nevertheless seen as relevant for the purposes of criminal law. It was admitted that neither the Instruction nor any other acts mentioned insanity as the prerequisite of criminal liability, but the Instruction itself was considered enough, as it turned the judges' attention to a defendant's mental state.[18] However, sanity of defendants was discussed in courts hearing criminal cases, which seems to be more convincing, than relying simply on the Instruction.[19]

As for the subsequent criminal acts, the term "insanity" was avoided in their wording, but all of them covered the specific mental states relevant for criminal law. In 1919 the Guidelines excluded trial and punishment for those who suffered from mental illnesses or any other state which did not allow them to be aware of their own actions.

In relation to the traditional formula of insanity, it can be concluded that both criteria – medical and legal ones – remained, but their previous elements were inaccurately replaced with incomplete ones. The medical criteria included only medical illnesses, leaving unclear whether mental disorders formed part of them. The second criterium seems to be similar to the intellectual element of the legal one (as the legal one is often explained through the wording "not able to recognize his own actions or…"), but it lacks its second part – control of actions. Moreover, medical and legal criteria in the interpretation of the Guidelines were named as alternative ones, unlike consequent establishment of mental state and subsequent check whether legal elements exist. On the one hand, it helps to treat all mental states, not just illnesses, as ones that prevent a person from being conscious of his or her actions. On the other, if it can be replaced with anything able to influence a person's mind, it makes the medical criterium useless.

The above indicates that the attempt to create a new insanity formula was not a success. O.F. Shishov believed this failure caused contradistinguishing of criteria, while the contents of the criterium was not clear and left space for states of various nature.[20] It is difficult not to agree with the statement that the desire of the early Soviet lawmakers to create all provisions *ab ovo* led to consequences of that kind.[21]

Almost the same tendency can be witnessed in the Criminal Code of 1922. The medical criterium was specified to cover "chronic mental illnesses" and "temporary mental disorders", but the other criterium was not modified. The Basic Principles of the Criminal Legislation of 1924 followed the same definition of those people on whom only medical measures can be imposed.

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[18] Gertsenzon, A.A., Gringauz Sh.S., Durmanov N.D., Isaev M.M., Utevskij B.S., *Istoriya sovetskogo ugolovnogo prava*, Moskva, 1948, pp. 148-149. M.O. Okuneva, the contemporary scholar, comes to the same conclusion, stating that the Instruction implicitly means that only sane persons could be treated as criminal offenders. Okuneva, M.O., "Sub'ekt prestupleniya v ugolovnom zakonodatel'stve pervyh let sovetskoj vlasti", *Vestnik Moskovskogo Universiteta, Seriya 11, Pravo,* 2017, № 2, p. 96.

[19] In particular, it was discussed in regard to Zelinsky and De-Bode, defendants in a criminal case concerning monarchists led by Purishkevich.

[20] Shishov, O.F., *Problemy ugolovnoj otvetstvennosti v istorii sovetskogo ugolovnogo prava,* Moskva, 1982, pp. 36-37.

[21] The description of criminal law creation *ab ovo* is provided by Trakhterov, who claimed that at least the "achievements" of civilization, such as the insanity formula, could have been used by the new government, but even they were rejected. Trakhterov, V.S., *Vmenyayemost' i nevmenyayemost' v ugolovnom prave (istoricheskij ocherk),* Har'kov, 1992, p. 34. The book dates back to 1992, but it includes comments and additions of Trakhterov's followers, who used his notes. Trakhterov died in 1975, and his part of the book was written in 1930s-1940s.

Obviously, there was a necessity to enlist measures that could be imposed on insane offenders, even though they were not called "insane". The Guidelines (1919) listed pedagogical measures and medical ones. The first were applied to those who were under age and the second to those who had mental illnesses. A subsequent act – the Criminal Code of the RSFSR of 1922 – enshrined that different social defence measures could be imposed by courts instead of punishments or alongside them. The list was a mix of different types of measures that were not classified 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 under age. The third group was not connected with any category of criminals and had two general measures – exile from certain places and prohibition against occupying oneself in certain activities or holding certain offices[22].

The Basic Principles of the Criminal Legislation of the USSR and Union Republics of 1924 completely excluded the term "punishment". In this act social defence 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[23].

To conclude, all modifications of the traditional insanity formula can be considered a step backwards in its development. They mixed different criteria and thus raised even more questions than existed before. However, the situation did not last long as in 1926 the Criminal Code was amended and the formula became similar to the one developed by lawyers and psychiatrists in the imperial period. Since 1926 requirements have included chronic mental illnesses and temporary mental disorders, along with the establishment of either a lack of conscience of one's own actions or the ability to control them (cognitive and volitional elements of the legal criteria). The connection between criteria was restored, and establishment of relevant mental states again coexisted with the establishment of legal criteria. Taken as a whole, this proves the fundamental character of the insanity formula developed in the XIX century.

3.2. Theory of rationality in the Soviet criminal law doctrine

The criminal law scholars did not often turn their attention to insanity during the first years of the Soviet government. In some sense, insane offenders were less of a threat to Soviet power than class enemies (the so-called "haves", in comparison with the "have-

[22] 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, № 15, st. 153.

[23] 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.

nots"). Nevertheless, in the 1920s several papers were published devoted to criminal law in general and insanity in particular[24]. Scholars of that period set out different insanity theories and their views of social defence measures. The key feature of social defence measures according to them was they focused primarily on the criminal and not the crime. However, the term "security measures" was not used and was associated with foreign bourgeois ideas, which were considered to be unacceptable. Thus, S.I. Tikhenko stated that the measure should be applied to the offender and not the offence, which meant a judge had no choice but to evaluate his personality. In regard to a criminal's behaviour before commission of the crime, he declared that "some evaluation of the offender's previous reactions is always necessary."[25]

The paper by Tikhenko published in 1927 is usually mentioned by scholars who study insanity. Scholars of the later Soviet period directly criticized it for being heavily influenced by sociological legal theory[26]. However, in the 1920s and early 1930s many scholars began to share his views; this theory of insanity became known as the theory of rationality. It is based on several key pillars, listed below.

To begin with, many early Soviet scholars rejected the idea that a person could have free will, viewing it as incompatible with Marxism. It was seen as the primary reason for getting rid of the principle of guilt.[27] However, this has no bearing on sanity and insanity. For example, in the view of S.I. Tikhenko, the issue of insanity has nothing to do with free will:

> "In the actions of a mentally ill person one can often find a greater 'resemblance' to his sick personality than in the actions of a healthy person to his healthy personality; then, if he is nevertheless considered to be insane, this is considered not because he is deprived of this moral freedom."[28]

Later, Marxism was treated a little bit differently by other scholars, but, in general, crimes were still declared to be caused by the imperial government, feudalism and the bourgeoisie. Thus, in 1946 Tsetsiliya Fejnberg, the psychiatrist and the director of the Serbsky Institute of Forensic Psychiatry, wrote that Marxism did not exclude freedom, but explained it from the scientific point of view.[29] However, around the same period of time, in 1948, the authors of a book on Soviet criminal law history, when describing the

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[24] For example, the paper which was devoted solely to sanity and insanity was published by Tikhenko: Tikhenko, S.I., *Nevmenyayemost' i vmenyayemost',* Kiev, 1927. Cheltsov-Bebutov, Estrin, Nemirovskij were some of the authors who wrote the general part of criminal law.

[25] Tikhenko, *Nevmenyayemost' i vmenyayemost',* p. 89. Another example of this view is the work by Zhizhilenko, who stated punishments were imposed because of the crime committed, while social defence measures were imposed because of the dangerousness of the criminal. The first were focused on the past, whereas the latter – on the future. Zhizhilenko, A.A., *Ocherki po obschemu ucheniuy o nakazanii*, Petrograd, 1923, p. 29-30.

[26] See, e.g., Mikheyev, R.I., *Osnovy ucheniya o vmenyayemosti i nevmenyayemosti v sovetskom ugolovnom prave,* Vladivostok, 1980, pp. 7, 97.

[27] Estrin, A.Ya, *Ugolovnoye pravo SSSR i RSFSR,* Moskva, 1927, p. 6. The idea is that a person cannot be guilty if his behaviour is determined by many different factors, primarily, social ones. Nevertheless, even the earliest legislative provisions of the Soviet government provided for *forms* of guilt, being a compromise between traditional grounds of criminal liability and ideas of the sociological school.

[28] Tikhenko, *Nevmenyayemost' i vmenyayemost',* p. 68.

[29] Fejnberg, Ts.M., *Ucheniye o vmenyayemosti v razlichnyh shkolah ugolovnogo prava i v sudebnoj psikhiatrii*, Moskva, 1946, p. 7.

high level of criminality during 1917-1918, concentrated on the criminal tendencies rooted in the Russian Empire. According to their explanation, many labourers were under the influence of the bourgeoisie and landowners and shared their "mentality of small proprietors", which led to theft, speculation and other acts of that kind. Among other features of imperialist thought and attitudes, they named a lack of respect for the rights of other people, indifference towards the suffering of others and a backward attitude towards women and family.[30] In other words, the reasons for the crimes committed by the proletariat were found not in the proletariat itself but in the circumstances that surrounded them before, during and immediately after the revolution. However, it is remarkable that all these descriptions were given in general words, while in regard to elements of the crime in early Soviet law doctrine it was stated that only sane people could be considered criminals, without drawing attention to freedom or free will.[31] Still, as it has been mentioned earlier, in Russian criminal law doctrine analysis of insanity without taking into account free will is acceptable.[32]

In brief, in the 1920s scholars began to assume the absence of free will, altought in later doctrine the stress was placed differently. What is more, this prerequisite was used to build up further arguments. If there was no free will, a person could be neither guilty nor innocent. If the person was not guilty of a crime, but the crime had been committed because of different factors, then the only fact that mattered was that this person was dangerous to society so the social order should be protected from him. That is how, in the view of the early Soviet regime, the personality of the offender became the ground of social defence measures, which were aimed at crime prevention and not revenge. In the 1920s the intention was to make these measures widespread. For example, Zhizhilenko was sure they would replace punishments as they had already done in regard to juvenile offenders.[33] However, there was an alternative opinion, presented by A.Ya. Nemirovskij, who saw the terminological change to be irrelevant as he considered it possible to understand the previous term in a deeper way and free it from the goals which were not consistent with Soviet criminal policy.[34] Nemirovskij described sociologists' views and opposed them. He stated, in particular, that consistent implementation of sociologists' ideas meant the distinction between sane and insane offenders had become blurred; they were all dangerous to society and social measures had to be applied to all of them:

"To conclude, actually, scholars, who belong to this school [the sociological one], declare that there are *two kinds of dangerousness* – sanity and insanity. … Even though an insane offender, from their point of view, can be a subject of the crime, in fact, they do not differ from other criminal law schools, because they either impose different kinds of defence measures on sane and insane persons and then criminals are classified on the ground of insanity, or impose

[30] Gertsenzon, Gringauz, Durmanov, Isaev, Utevskij, *Istoriya sovetskogo ugolovnogo prava*, pp. 51-52.

[31] *Ibid*., pp. 148-149.

[32] As it has been done by Tagantsev, who, being one the most influential scholars in the end of XIX century and the beginning of the XX century, directly refused to focus on free will. See part 1.

[33] There was a long period of time during which only punishments could be imposed on minors, but in the XX century specific pedagogical measures appeared. Zhizhilenko, *Ocherki po obschemu ucheniuy o nakazanii*, p. 29.

[34] This idea corresponds to another one expressed by Nemirovskij, concerning the concept of guilt and individualization of punishments. He stated that formulating the new essense and contents of old terms would be enough. Nemirovskij, A.Ya., "Opasnoye sostoyaniye lichnosti i repressiya", *Pravo i Zhizn*', *god izd.* 3, M., 1924, pp. 4-5, 7-8, 13.

punishments only on sane offenders. So, even from this point of view, insanity remains relevant."[35]

Nevertheless, this view described and criticized by Nemirovskij was also one of the grounds for the rationality theory of insanity, along with the absence of free will. Its basis is that everyone who commits an act against the social order is a danger to it.

In terms of the insanity formula, it is necessary to mention that two criteria remained the same as before. Although there were legal and medical criteria, the core of the theory was the legal one, whose contents were radically changed in comparison with those of imperial doctrine. At the same time, the medical one was usually left unspecified. Tikhenko described it as "psychiatric abnormality",[36] and Estrin wrote about mental illnesses and mental disorders.[37] Both authors did not provide any details. Such a brief description is rooted in their focus on the legal element. Medical questions were left to psychiatrists to decide, and Estrin simply referred to the results of expertise, according to which criminal liability could or could not be imposed.[38]

The lack of attention given to mental aspects of insanity is easily explained by the new contents of the legal criteria mentioned above. They termed it rationality theory because, instead of analysis of the offender's mental state during the commission of a crime, the judge had to choose what measures to apply on the basis of *rationality*. According to Tikhenko, this leading criterium was aimed at both general and special prevention measures; this approach could unite experts, judges and lawyers and those who did not have legal education.[39] N.N. Pashe-Ozerskij fully agreed with him.[40] However, there was no unanimous interpretation of rationality. Estrin, for example, took dangerousness of the crime and the criminal into account. He characterised "political class-based rationality" as a precise standard and criticised the Ferri's code because of the individualism it promoted. Dangerousness, according to him, was important but only from the perspective of class theory.[41] The other variant of rationality considered the scientific achievements of medicine and the mental capacity of an offender. M.A. Cheltsov-Bebutov described these features the following way:

"As the medicine provides judges with certain instructions, according to which some people cannot be influenced by correctional measures and adapted to social life, courts can impose only isolation measures on them (and, if possible, medical treatment). … So, mental states, listed in Article 17 of the Criminal Code ("Insanity"), do not make any person free from criminal liability, but they are the grounds to apply special protection measures, those that are rational to impose on a particular person."[42]

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[35] Nemirovskij, A.Ya., *Sovetskoye ugolovnoye pravo*, Odessa, 1924, pp. 42, 55-56.

[36] Tikhenko, *Nevmenyayemost' i vmenyayemost*', p. 101.

[37] Estrin A.Ya., *Nachala sovetskogo ugolovnogo prava (sravnitel'no c burzhuaznym),* Moskva, 1930, p. 76.

[38] *Ibid.*

[39] Tikhenko, *Nevmenyayemost' i vmenyayemost*', pp. 96-98.

[40] Pashe-Ozerskij, N.N., "Predisloviye k knige S.I. Tikhenko 'Nevmenyayemost' i vmenyayemost'" [The foreword to the book by Tikhenko], Tikhenko, *Nevmenyayemost' i vmenyayemost*', Kiev, 1927, pp. 6-7.

[41] Estrin, *Ugolovnoye pravo SSSR i RSFSR*, pp. 9-11.

[42] Cheltsov-Bebutov, M.A., *Prestupleniye i nakazaniye v istorii i v sovetskom prave,* Har'kov, 1925, p. 99.

Later, V.S. Trakhterov devoted a paper to the history of insanity in which he considered the offender's capacity to perceive measures applied to him[43] (a punishment is useless, if it cannot be perceived to be such by an insane offender). Two abilities – to adapt to social life and to perceive correctional measures – are a little bit different, but it seems that neither they nor their differences were analysed in a comprehensive way. Some insane offenders obviously can understand the nature of punishments and suffer from them, and resocialization in correctional facilities worsens the post-criminal behaviour of many sane offenders, who cannot be adapted as well.

Obviously, Estrin overestimated the precise character of rationality as a criterium. He made it synonymous with the class nature of Soviet criminal law, while Tikhenko and Pashe-Ozerskij put emphasis on crime prevention as its purpose. Rationality in its third meaning considered what was relevant to apply in regard to offenders' abilities to perceive measures imposed on them. Whatever the case, all interpretations listed above made it difficult for judges to establish what was rational and reasonable, broadening judicial discretion considerably. Broad discretion could easily have the opposite effect, as judges often tend to empower experts more than the latter originally had[44]. So, it is not surprising that rationality has never been mentioned, even in the earliest Soviet legal acts.

It can also be noted that in the 1920s not all scholars were drawn into the debate over rationality. For instance, V.A. Zhdanov preferred to avoid this question and criticised the idea of hearing criminal cases in courts with mentally ill offenders sitting on the defendants' bench from a narrow practical perspective.[45] G.I. Volkov, his opponent, claimed that Zhdanov concentrated on specific procedural details and managed to ignore the core question of measures against mentally ill persons. Volkov treated all mentally ill offenders as criminals and psychiatrists as just another type of expert whose conclusions could not bind the judge.[46] Undoubtedly, in relation to insanity, what constituted social defence measures was the key issue of the time, but the theory or rationality was imprecise, controversial and radical. From a long-term perspective the theory turned out to be useless and it is extremely rarely mentioned today by scholars. From a short-term perspective it was influential but not unanimously supported. The lack of clarity and broad powers of psychiatrists were the reasons to return to the well-established formula quite soon, even though sometimes there were attempts to combine their "classical" arguments with rationality.[47]

4. Specific issues of insanity theory

[43] Trakhterov, *Vmenyayemost' i nevmenyayemost' v ugolovnom prave* (*istoricheskij ocherk*), p. 37.

[44] Experts' role is discussed in part 3.1.

[45] In particular, the author stated that mentally ill persons could suffer during the hearing, violate rules of court procedure, distract the audience attention etc. Zhdanov, V.A., "Sud nad psikhicheski nevmenyayemym", *Vestnik Sovetskoj Iustitsii,* Har'kov, 1925, № 24, pp. 958-959.

[46] Volkov, G.I., "Imenno – sud (Otvet d-ru V.A. Zhdanovu)", *Vestnik Sovetskoj Iustitsii,* Har'kov, 1925, nº 24, pp. 960-964.

[47] For example, N.S. Lejkina and N.P. Grabovskaya in the collective book on criminal law named sanity as the requirement for establishment of guilt and holding someone liable, but stated that punishments on insane people would not be rational, as criminal liability is based on one's capacity to perceive influence of the world. *Kurs sovetskogo ugolovnogo prava, Chast' Obschaya,* volume 1, Leningrad, 1968, p. 371. This is, however, exceptional for doctrine in 1960s and may be connected with traditions of criminal law schools in particular cities or universities.

4.1. Cooperation between experts and lawyers

The study of the role of experts in the Russian Empire and the Soviet Union shows that their community has not been strictly separated from lawyers. Issues of insanity were studied by both lawyers and psychiatrists. Experts had to be involved in the criminal procedure in order to prove a particular mental state.[48] At the end of the XIX century the level of medicine development was considered to be low,[49] but approaches of courts were controversial. On the one hand, some judges undoubtedly relied on the results of expertise. Moreover, courts sometimes found for defendants in cases where the conclusions of experts were uncertain. This was especially the case for trial by jury. Thus, A.M. Bobrischev-Pushkin wrote that:

"…experts-psychiatrists, subpoenaed to court, extremely rarely provide for categorically formulated conclusions; reasons for that lie not only in the state of psychiatry as a science, but also in the termination of criminal cases before they go to court if abnormality of an offender has been definitely proved. … juries, in case of any, even the slightest, doubts, respond in accordance with the archaic way the question has been formulated for them: "yes, in a state of illness."[50]

Bobrischev-Pushkin highlighted that juries were not obliged to agree with experts, if the conclusions of the latter were not definite but could side with defendants according to the principle that all doubts had to be interpreted in their favour[51]. However, their wording sometimes changed arguments; for instance, instead of sanity and insanity they stated there was no guilt or purpose relevant for conviction. Exclusion of these elements led to acquittal but did not result in mandatory medical measures.

On the other hand, prosecutors were not always ready to order examination to be carried out and instead chose to argue with psychiatrists, and their views could be supported and enforced by judges. Sometimes the reasons for that were found in poor knowledge of psychiatry demonstrated by lawyers,[52] but in contrast V.F. Chizh focused on the lack of experts' skills to explain the features of mental illnesses to judges.[53] However, Chizh simplified the problem of insanity in general, fully denying the existence of any legal criteria. In his view, insanity was to be associated with mental illnesses, and nothing else, and all insane people were to be placed in psychiatric hospitals.[54]

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[48] In this regard Ya.A. Kantorovich relied on the decision of the Senate, which functioned as the supreme court in the Russian Empire. In 1869 the criminal cassation department of the Senate considered testimony of witnesses to be unsatisfactory for purposes of mental illnesses, as the opinion of experts had to be examined to prove it (Decision № 135). Kantorovich, Ya.A., *Zakony o bezumnyh i sumasshedschyh, s prilozheniyem svoda raz'yasnenij po kassatsionnym resheniyam Senata,* Sankt-Peterburg, 1899, p. 107.

[49] Tagantsev, *Russkoye ugolovnoye pravo, Chast' Obschaya*, pp. 317-319.

[50] Bobrischev-Pushkin, A.M., *Ampiricheskiye zakony deyatel'nosti russkogo suda prisyazhnyh,* Moskva, 1896, pp. 337-338.

[51] This principle was *not* reflected in any legal provisions, but defence attorneys always insisted on it. *Ibid.*

[52] For example, V.S. Trakhterov gave an overview of views spread in the Russian Empire, according to which prosecutors lacked knowledge in the sphere of psychiatry but tried to convince judges on the basis of a couple of popular books on psychiatry. Trakhterov, *Vmenyayemost' i nevmenyayemost' v ugolovnom prave (istoricheskij ocherk),* p. 28.

[53] In his paper of 1911, he considered the amount of "mistrust" cases to be very small. Chizh, V.F., *Uchebnik psikhiatrii,* Peterburg-Kiev, 1911, p. 174.

[54] *Ibid*., pp. 170-172.

So, in imperial judicial practice, at least at the end of the XIX century, there were different approaches. In some cases, courts were ready to use different conclusions that psychiatrists came to, even in cases of uncertainty, whereas in others either lawyers or psychiatrists demonstrated lack of knowledge or skills. In either case, a strong bond between lawyers and experts appeared because of the formula of insanity, developed and supported by *both* scholars and psychiatrists.

The Soviet government continued to rely on medical reports in their new criminal procedure. The Instruction "On Examination of Mentally Ill Persons" reflects this as it mentions psychiatrists' commissions. In general, the views of psychiatrists were less seriously affected by sociological thought than the views of criminal law scholars. This is why they continued to use the same methods they had used before and even previous terms (in particular, "insanity", which disappeared from legal acts devoted to criminal law). However, those psychiatrists who became experts for the purposes of criminal law and procedure, adopted lawyers' terms, categories and interpretations, in accordance with the peculiarities of their tasks. D.R. Lunts sharply criticised the basis of the rationality used by some experts and described an example of their reports, according to which an examined woman exhibited psychopathic personality of a schizo-epileptoid character. However, her long stay at psychiatric hospitals had not led to any positive results as her anti-social reactions worsened. These statements became the ground for experts to claim she should be treated as a sane person[55]. Both legal scholars and psychiatrists were later accused of worshipping sociological thought and the idea of treating insane offenders as criminals.[56]

There are some grounds to claim that psychiatrists were more influential during the 1920s and early 1930s compared with previous and later periods. Sometimes the term "medicalization" is used to describe this. The notion covers changes in medical and legal terms and powers of psychiatrists. One historian exemplifies this with psychopaths, who were regarded as people with boundary mental states and often received specific treatment from experts in the 1920s. One of the reasons for this he claims is the Bolshevik desire to integrate achievements of social and biomedical sciences into legislation[57]. It is, however, not certain that new formulae of insanity, reduced in their wording and broadened in their scope, illustrated any scientific achievements rather than simply a rejection of imperial terms. It seems that support for sciences in general, and psychiatry in particular, was not achieved through means of criminal law, though on an organizational level there were changes to the system of psychiatric facilities. It is worth mentioning that the 1920s was when the Serbsky Institute of Forensic Psychiatry was founded and attention was drawn to mental states of convicts who served their sentences in prison[58]. However, it was also a period of experimental psychiatry that focused on medical help outside specialized institutions ("out-of-hospital psychiatry", which, in fact,

[55] Lunts, *Problema nevmenyayemosti v teorii i praktike sudebnoj psikhiatrii*, pp. 41-43.

[56] Shishov, *Problemy ugolovnoj otvetstvennosti v istorii sovetskogo ugolovnogo prava*, p. 41.

[57] Pogorelov, M, "Medikalizatsiya prestupnosti v sovetskoj sudebnoj psykhiatrii", *Zhurnal issledovanij sotsial'noj politiki*, 16/2 (2018), pp. 208-210.

[58] However, it should be taken into account that many problems for psychiatric institutions were caused by the October Revolution and the Civil War that followed it. Diseases and starving led to governmental instructions to discharge some patients with chronic mental illnesses from psychiatric hospitals. Schukina, Ye.Ya., Rusakovskaya, O.A., "K istokam sudebno-psikhiatricheskoj expertisy. Obzor", *Rossijskij psikhiatricheskij* zhurnal 1 (2017), p. 62.

combined medical help and social control over individuals)[59]. So, psychiatry went far beyond its limits.

In relation to criminal law doctrine, dependence on psychiatrists was sometimes indirectly reflected in the legal papers of this period. For instance, Estrin described the criterium of rationality (which was *not*, obviously, the medical one) and at the same time stated that "if experts establish that one has committed a crime in a state of mental illness or mental disorder, one is not held criminally liable"[60]. Moving on to the question of diminished sanity, the author again mentioned asking an expert about the mental health of a person. He did not make a usual remark according to which experts deal with medical aspects, while judges are empowered to agree or disagree with their opinion and are to establish the legal criteria.[61] This means either that Estrin skipped the stage of judicial evaluation in his description, or that he was not consistent in drawing a line between rationality and medical criteria and, even in his view, they were actually almost the same. Of course, his attitude was not the result of scientific achievements, but rather came from the general attitude to sanity and insanity, the focus on the classes and the needs of the Soviet government as well as the introduction of new concepts whose meaning was unclear. Rationality was not a psychiatric term, but its controversial essence meant that it was easier to fully rely on medical criteria rather than establish what rationality was. So, rationality and modified versions of the insanity formula had similar consequences in regard to experts.

For some years rationality continued to be mentioned by experts, even though there was already a clear distinction between their tasks and judicial discretion. In 1936 Ts. M. Fejnberg wrote that psychiatrists' education should have been modified in order to allow them to decide issues on the basis of rationality and consider different types of correctional facilities.[62] Ten years later she stressed the different functions of experts and judges, but continued to claim that experts took into account the legal criteria of insanity (of course, she admitted that it was up to judicial discretion to agree with them or not).[63] According to her conclusions, judges may disagree with experts on reports of the latter and not take them as a basis for their decision. In these cases, they are expected to provide arguments and explain why they have opposed experts' reports, but disagreements between judges and experts do not occur often. Conversely, judicial mistakes are sometimes connected with the neglect of their duty to consider the facts of the case and a suspect's mental state. The role of judges was highlighted by V.A. Vladimirov and G.A. Levitskij, who described the Pushkin case. The court of first instance imposed involuntary medical treatment on Pushkin on the basis of the experts' decision. The circumstances of

[59] Dufaud, G., "Novyye podhody k sumasshestviuy: razvitiye vnebol'nichnoj psikhiatrii v Sovetskoj Rossii v 1920-ye – nachale 1930-yh godov", *Istoriya meditsiny* 2/3 (2015), p. 382.

[60] Estrin, *Nachala sovetskogo ugolovnogo prava (sravnitel'no c burzhuaznym),* p. 76.

[61] This remark was made by many commentators and is obviously based on the combination of medical and legal criteria in the insanity formula. Many scholars of the same period were more precise on this issue. Nemirovskij stated that expertise was *necessary* for establishment of insanity and not that experts themselves *established* it. Nemirovskij, *Sovetskoye ugolovnoye pravo*, p. 58.

[62] It meant that psychiatrists ought to have some knowledge of law. Feinberg, Ts.M., *Sudebno-psikhiatricheskaya ekspertisa v SSSR i v drugih kapitalisticheskih stranah,* OGIZ, 1936, p. 31. She also described that judges primarily relied on experts' conclusions, expect from some practical recommendations on types of medical measures and from some specific questions, such as differences between pathologic and ordinary intoxication. *Ibid*., p. 26-27.

[63] Fejnberg, *Ucheniye o vmenyayemosti v razlichnyh shkolah ugolovnogo prava i v sudebnoj psikhiatrii*, pp. 4, 12.

the case and the dangerousness of Pushkin were not examined by the court which is why the decision was reversed by the Supreme Court of the RSFSR.[64] Experts had to be involved in criminal procedure, in case the sanity of the offender was questioned and the judges not only could but were obliged to examine all the circumstances themselves. Their obligations are exactly the same today.

To sum up, the high level of influence held by experts in the 1920s was rooted in a number of factors, which were in line with tendencies in legal doctrine and provisions but were not caused by the latter only. Afterwards, the formula of insanity returned to its traditional variant, and the powers of experts were limited. Rationality continued to exist as an idea but in a narrower way. In general, the level of cooperation between experts and lawyers is high, and some mistrust is rarely found, but sometimes judges make other mistakes, e.g., do not examine the mental state and objective elements of an act themselves (that is, there is rather "overtrust" than "mistrust").

4.2. Intoxication

Russian scholars traditionally deal with intoxication when they cover the topic of insane offenders. G.V. Nazarenko, who is a contemporary author, includes intoxication in a list of psychiatric states that should be dealt with by criminal law.[65] Usually, intoxication is not covered by an umbrella term, but is described in its own category, right after the description of insanity or diminished sanity.[66] Some papers are devoted specifically to this issue.[67] Today, intoxication is treated as a circumstance which cannot fall under the medical criterium of insanity. The general provision, listed in Article 23 of the Criminal Code, is that intoxicated offenders must be held liable for their actions. At the same time, it is common knowledge that alcoholism can lead to certain mental disorders, such as *delirium tremens,* and these states *are* considered to be covered by the medical criterium and thus can be grounds for insanity (as long as the legal criteria is also established). Ordinary intoxication, in contrast, is significant only in relation to aggravating circumstances. It does not necessarily influence the sentence; it is up to a judge to decide whether this occurs. Possible reasons for such influence, which are taken into account by judges, include character and degree of a crime's dangerousness, circumstances of its commission and an offender's personality.[68]

As for the historical interpretation of intoxication, attitudes to it have changed many times. In legislation, the pre-revolutionary approach varied from lenient sentences to the strictest ones (under the ruling of Peter I, intoxication became an aggravating circumstance). However, in the XIX century N.S. Tagantsev included intoxication in the list of mental states significant for insanity. In his view, it fell under the notion of "unconsciousness" and had to be evaluated in accordance with two elements of the psychological criterium – cognitive and volitional. In his considerations Tagantsev went

[64] Vladimirov, V.A., Levitskij, G.A., *Subjekt prestupleniya po sovetskomu ugolovnomu pravu*, Moskva, 1964, p. 50.

[65] Nazarenko, G.V., *Nevmenyayemost',* Sankt-Peterburg, 2002, p. 151.

[66] Pavlov, V.G., *Sub'yekt prestupleniya,* Sankt-Peterburg, 2001, p. 176.

[67] Greben'kov, A.A., *Ugolovnaya otvetstvennost' lits, sovershivshih prestupleniye v sostoyanii op'yaneniya,* Moskva, 2009.

[68] The list is very broad, so that judicial discretion is almost unrestricted.

further and claimed that criteria remained the same even in cases when offenders had become intoxicated with the purpose of committing an offence[69] (e.g., they knew it would be easier for them or wished to use it as a defence). The core of his idea was that if one *really* could not consider the nature of his actions or control them, then there was no connection between his initial intention and the consequences of intoxication. A causal link could be established only if his cognitive and volitional capabilities remained the same, but then he was obviously sane.

Tagantsev's views on the issue of intoxication have not received support from later scholars. The Soviet approach initially did not focus on intoxication, as well as insanity in general, as there were many other ideas which lawmakers were trying to introduce. The first Soviet formulae of insanity, listed in the Guidelines (1919) and the Criminal Code (1922), had been diluted in comparison to Tagantsev's formula and obviously allowed intoxication to be considered in evaluating mental state. Mental illnesses were mentioned along with *any* other states which excluded the ability to realise one's own actions, so that it was easy to include intoxication in the latter. This feature was later subject to criticism.[70] Moreover, the Criminal Code of 1922 directly excluded a specific category of intoxicated perpetrators from provisions on insanity. These provisions, according to the Code, could not be applied to those who had become intoxicated in order to commit a crime. As mentioned before, these cases were not excluded from insanity provisions by Tagantsev. Whatever the case, it meant that *other* intoxicated offenders could fall under provisions devoted to insanity. This exclusion was later annulled, and in 1924 all of them were to be held liable. However, in the same year Nemirovskij wrote that total intoxication excluded liability even for negligent offences, as intoxicated offenders were not able to foresee the consequences of their acts. He was against punishment for self-intoxication and found it possible to apply social measures only to those who were habitual alcoholics.[71] Therefore, until the end of the 1920s positions on intoxication were not consistent; both lawmakers and scholars from time to time protected intoxicated offenders from being held criminally liable for offences.

Nevertheless, soon the formula of insanity was improved and this contained elements similar to the imperial one developed by Tagantsev and Kandinsky. Scholars started to analyse the state of intoxication from a moral point of view, with the emphasis on the personal desire to become intoxicated and knowledge of the various consequences of intoxication. In the 1960s such a position became widespread and firmly entrenched and was held by many scholars specialized both in psychiatry and criminal law. Thus, D.R. Lunts focused on different motives that led one to the volitional act of becoming intoxicated[72]. A.B. Sakharov admitted the defects in an intoxicated person's consciousness and will; in his view, one was held criminally liable for acts committed while being intoxicated because he ignored the possibility to suffer from such defects and not because of their absence. Intoxication made the causal link as an element of the crime more complicated than usual.[73] A similar position was expressed by V.A. Vladimirov and

[69] Tagantsev, *Russkoye ugolovnoye pravo, Chast' Obschaya*, pp. 378-380.

[70] Lunts, *Problema nevmenyayemosti v teorii i praktike sudebnoj psikhiatrii,* p. 39; Orlov, V.S., *Sub'ekt prestupleniya po sovetskomu ugolovnomu pravu,* Moskva, 1958, pp. 38-39.

[71] Nemirovskij, *Sovetskoye ugolovnoye pravo*, pp. 42, 55-56.

[72] Lunts, *Problema nevmenyayemosti v teorii i praktike sudebnoj psikhiatrii,* pp. 51-52.

[73] Sakharov, A.B., *O lichnosti prestupnika i prichinah prestupnosti v SSSR,* Moskva, 1961, pp. 219-223.

G.A. Levitskij who claimed that intoxication could not fall under the medical criterium of insanity and that a person realised the possibility of losing control of oneself after becoming intoxicated.[74] On the basis of the different threats to society caused by alcoholism and drug-addiction, they justified a strict sentence and involuntary treatment, which could be applied to alcoholics and drug-addicts.[75]

An overview of these positions shows that after the establishment of the Soviet government, the Civil War and World War II, scholars agreed on some basic features of intoxication. In the 1920s the crime rate was blamed on as being caused by the imperial government and previous social classes, but obviously crimes and alcohol consumption were not going to disappear due to the new soviet order. Scholars continued to blame the imperial government and society for alcoholism, but went from general words to details. They turned their attention to the statistics, which showed that a high percentage of some violent crimes was committed by intoxicated perpetrators, and many driving offences were committed under the influence of alcohol. So, in general, the attitude towards intoxication hardened, even though scholars admitted that drugs and alcohol led to a loss of control over one's actions or an awareness of them. However, this approach should have led them to another question: what constituted the essence of the guilt of intoxicated offenders. Unfortunately, it was rarely examined specifically.

In this regard it is necessary to mention the paper published by N.S. Lejkina on the personality of offenders. N.S. Lejkina described a case related to criminal damage. The perpetrator set a dwelling on fire under the influence of alcohol and sat on the stove[76] saying he was going to warm himself. Afterwards, he claimed he could not understand how that could have happened. Lejkina evaluated this case as an example of the controversial establishment of *dolus*. Criminal damage could be committed only intentionally but it was difficult to describe the conduct of the offender as intentional in that particular case. She shared the view of other scholars, who considered the act of becoming intoxicated to be the ground of criminal liability in such cases. However, she suggested creating an offence of negligence on the basis of intoxication and its dangerous consequences. The *actus reus* of an offence included only intoxication, which represented the dangerous conduct as an element of the offence. Its *mens rea* was characterized by negligent attitude to consequences of intoxication.[77] It does not seem to be an ideal decision as an intoxicated offender may lack not only an ability to act intentionally but also an ability to foresee the consequences of his actions, while the latter is required for negligent crimes. Her approach may be qualified as a modification of liability for intoxication itself.

However, Lejkina's suggestions are interesting from the perspective of criminal law doctrine and important because of her comments on guilt, even though they have never been implemented in the criminal legislation. Along with scholars of her time, who ignored the form of guilt and highlighted the voluntary character of self-intoxication, she set out an argument which is still relevant today. The idea of voluntary intoxication as the

[74] Vladimirov, Levitskij, *Subjekt prestupleniya po sovetskomu ugolovnomu pravu*, p. 53.

[75] It meant that treatment could be applied along with the punishment imposed on such an offender. *Ibid,* pp. 56-58.

[76] In Russia stoves were traditional parts of dwellings in the countryside. They were used for heating of the house and cooking. Their large size allowed people to lie on them, and this feature is reflected in Russian fairytales (e.g., in one of them Yemelya lay down on the stove all day long).

[77] Lejkina, N.S., *Lichnost' prestupnika i ugolovnaya otvetstvennost'*, Leningrad, 1968, pp. 55-58.

ground of criminal liability is strong enough to justify criminal liability for intoxicated offenders now. Concerns over intoxication have remained almost the same for hundreds of years, but today Russian criminal law is closer to that held by late Soviet scholars.

4.3. The concept of "diminished sanity"

The term "diminished sanity" is controversial from the international perspective because it is understood to have its origins in foreign concepts of diminished *responsibility*. In Russian doctrine a similar idea is traditionally formulated on the basis of "sanity" and different adjectives annexed to it ("diminished", "reduced", "relative", "boundary"). [78] Among them all "diminished sanity" seems to be the most established one, and that is why it is used in this paper. In other words, this part covers the problem of "half-mad people", but this term is used neither in Soviet nor contemporary papers.

Originally, the concept of diminished sanity was based on the huge amount of diverse mental states and their intermediary variations. From time to time, new features are discovered by psychiatrists.[79] This fact has been admitted by almost all scholars. However, opinions differ on whether these variations are relevant to criminal law or not. Many scholars claim that insanity requires either the existence or absence of insanity criteria, and there is no other option. Sane or not sane, this is the alternative. This point of view was shared by N.S. Tagantsev.[80] In the late 1950s V.S. Orlov strongly criticised the concept of diminished sanity and exemplified his criticism with psychopaths, although it can be noted that his opponents questioned whether psychopaths could be considered to be responsible for their actions. He stated that unless there were some extraordinary symptoms or temporary mental disorders, psychopaths were able to control their actions in accordance with their purposes, to perceive all measures applied to them, and the lack of penal measures in response to their behaviour worsened the latter.[81] Orlov's general conclusion represents the argument which is still relevant today. Opponents of diminished sanity express it in a similar way even today. In particular, he stated that:

"Posing a question that a person who has committed a socially dangerous act is a bit ill and a bit healthy and thus should be covered by provisions on diminished sanity is incompatible with science. Even if we admit that one has diminished sanity or is not totally sane in regard to an offence that he is charged with, this is not the reason to exclude one's criminal liability for this offence, because a psychiatric anomaly does not prevent him from being able to consider his actions and control them.[82]"

[78] The list of different variants is given by V.G. Pavlov. He uses all of them as synonyms. See Pavlov, V.G., *Sub'yekt prestupleniya,* p. 155. However, sometimes different meanings are given to different terms; for example, "umen'shennaya" ("diminished") sanity is associated with the diminished cognitive or volitional capability, and "chastichnaya" ("partial") sanity is explained through different crimes. Some of them follow from the mental state of the offender (e.g., his ideas), so that he cannot be held liable for them, while others have nothing to do with his mental state, making him criminally liable. These explanations were given by Orlov, who differentiated their meanings, but criticised all of them. Orlov, *Sub'ekt prestupleniya po sovetskomu ugolovnomu pravu*, pp. 67-68.

[79] Some contemporary scholars exemplify this statement with schizophrenia, which earlier almost automatically meant insanity, but later its different shades were discovered and specified. See *Ogranichennaya vmenyayemost'*, pod red. T.B. Dmitriyevoj, T.B. Shostakovicha, A.A. Tkachenko, Izd. 3, pererab. i dop., Moskva, 2008, pp. 26-27.

[80] Tagantsev, *Russkoye ugolovnoye pravo, Chast' Obschaya*, p. 340.

[81] Orlov, *Sub'ekt prestupleniya po sovetskomu ugolovnomu pravu*, pp. 61-63.

[82] *Ibid*., pp. 63-64.

In the 1920s, when the sociological theory was at the peak of its influence, diminished sanity was broadly discussed. Representatives of the sociological school who were active before the October revolution treated diminished sanity as the reason to require more severe sanctions than usual because, in their view, such psychiatric features led to recidivism.[83] Later, many scholars put emphasis on the sociologists' intention to increase criminal liability for those who experience diminished sanity.[84] At the same time, during the establishment of the Soviet government, scholars preferred to view diminished sanity as a mitigating circumstance. Thus, Tikhenko contrasted the Soviet attitude and the approach abroad; in his view, the latter insisted on both a lenient punishment and a security measure, whereas Soviet criminal law provided only for mitigation of sentence.[85] He saw the rationality criteria to be applicable to this concept, as well as the concept of sanity. The medical conditions could be, according to him, formulated on the basis of either "mental deficiency" or a list of characteristics ("alcoholism, psychopathy, drug addiction").[86] An alternative position was presented by Estrin, who stood for the opportunity to combine medical and judicial measures according to the principle of rationality.[87] Estrin's interpretation of rationality allowed to impose any measures and combination of measures that met the criteria of being "rational" in a particular case.

As mentioned above, the insanity formula in legislation was reduced in the Soviet period in comparison with earlier periods. It did not directly mention diminished sanity, but suggestions were made to directly include it in the provisions of a new criminal code. Thus, a draft code prepared by the Soviet Law Institution in 1921 contained the term "mental deficiency", which was interpreted as a synonym for "diminished sanity", "boundary mental state", "demi-fous" and "demi-responsables".[88] Mitigation of sentences on this ground were found by scholars despite the absence of this term in the Criminal Code adopted in 1922. In Trakhterov's opinion, the obligation of the court to consider an offender's ignorance, thoughtlessness or quick temper for the purposes of sentencing reflected the general attention placed on personal cognitive and volitional capacities.[89] Nevertheless, he was strongly against combining different measures, notwithstanding the model of this combination (punishments, which follow medical measures, or medical measures, which follow punishments) and insisted on a mitigated sentence. which at the same time would not allow half-sane offenders to treat their punishment as impunity. M.M. Isaev considered that only medical measures were to be applied to this category of perpetrators, but Trakhterov argued that that was not

[83] See, e.g., Lyublinskij, P.N., *Mezhdunarodnyye s'yezdy po voprosam ugolovnogo prava,* Sankt-Peterburg, 1915, p. 25. P.N. Luyblinskij participated in many international congresses on criminal law until 1917, but even after the revolution he continued to publish papers on criminal law and criminology and teach students.

[84] Spasennikov B.A., Spasennikov S.B., *Sostoyaniye i yego ugolovno-pravovoye znacheniye,* Moskva, 2011, pp. 83-84.

[85] Tikhenko, *Nevmenyayemost' i vmenyayemost'*, pp. 35-36.

[86] *Ibid*., p. 102.

[87] Estrin, *Nachala sovetskogo ugolovnogo prava (sravnitel'no c burzhuaznym)*, p. 77.

[88] Trakhterov, V.S., "Umen'shennaya vmenyayemost' v sovetskom ugolovnom prave", *Pravo i Zhizn*', kniga sed'maya-vos'maya, Moskva, 1925, p. 53.

[89] *Ibid.*

reasonable.[90] An opposite view is presented not only by Isaev,[91] but also Nemirovskij[92] and Zhizhilenko.[93]

The commentators mentioned above either thought that diminished sanity was covered by the earliest Soviet provisions on insanity or considered such an interpretation not to be rooted in law, but all of them agreed on the idea that diminished sanity was to be accepted by lawmakers and regulated in detail by them. It is also remarkable that many of them rejected the idea of combining different measures, co-appliance of medical measures and punishments. However, diminished sanity as a concept has always received criticism on the basis of its controversial and imprecise character, and after the 1920s there was a wave of criticism against it for being a radical idea. Psychiatrists in the 1920s began to include examinees with boundary mental states in the category of sane or diminished sane persons but stopped doing this in the late 1920s.[94] Discussions existed in their sphere, as well as between lawyers, but after the 1930s they stopped for a long period of time and diminished sanity was rejected. Psychiatrists' discretion was limited, and the process of "medicalization" mentioned earlier was stopped.

Taking into account the radical change towards diminished sanity, it may seem strange that in the Russian legislation there is a "mental disorder that does not exclude sanity" today. It can be considered by a judge while sentencing and become a reason to impose medical measures on such an offender. According to the Constitutional Court of Russia, mental disorders are neither mitigating nor aggravating circumstances, and legal provisions only oblige judges to *consider* them.[95] So, the Criminal Code, which is now in force, allows a combination of different measures applied to offenders who suffer from mental disorders but are not insane. The predecessor of the norm appeared in 1991, and its appearance can be explained by serious social changes that led to changes in both the mental health of people and the desire to individualise criminal liability.[96] It is also stated that the absence of the term "diminished sanity" is correct, as there are no degrees of

[90] *Ibid*., pp. 55-58, 60-62.

[91] He stated that a narrow interpretation of medical measures as those which could be applied only to insane offenders was not in line with the essence of criminal legislation and rationality of social defence measures. Isaev, M.M., *Osnovnyye nachala ugolovnogo zakonodatel'stva SSSR i soyuznyh respublic*, Moskva, Leningrad, 1927, p. 36

[92] Nemirovskij insisted on a broad interpretation of the article devoted to insane offenders and claimed that medical measures were aimed at prevention as well as punishments, because they were often applied for a longer period of time than the latter. He regarded punishments imposed on diminished sane offenders as cruel ones. Nemirovskij, *Sovetskoye ugolovnoye parvo*, pp. 63-64.

[93] Zhizhilenko drew the line between dangerous and non-dangerous diminished sane persons. In his view, for most of them punishment exercised in special circumstances would be enough, while dangerous offenders should be placed in medical institutions *instead* of punishments, as punishing them would be incompatible with the refusal from revenge in Soviet criminal law. Medical measures would be much more useful for them, than facilities of ordinary correctional system. Zhizhilenko, A.A., "Spornyye voprosy umen'shennoj vmenyayemosti i ugolovnyj kodeks RSFSR", *Pravo i Zhizn',* kniga sed'maya i vos'maya, Moskva, 1924, pp. 43-45.

[94] Data on experts' conclusions in the Serbsky Institute of Forensic Psychiatry show that in the early 1920s more than 70% percent of examined persons were found to be insane or diminished sane, and among them there were many psychopaths. This tendency changed in the middle of 1920s and less than a half were them admitted as insane. Feinberg, Ts.M., *Sudebno-psikhiatricheskaya ekspertisa i opyt instituta imeni Serbskogo*, Moskva, 1935, p. 12.

[95] Decision of the Constitutional Court No. 1969-O, 29 September 2015, part 2.2.

[96] Spasennikov B.A., Spasennikov S.B., *Psikhicheskiye rasstrojstva i ih ugolovno-pravovoye znacheniye*, Moskva, 2011, p. 72.

insanity and sanity, and the provisions described above can be applied only if a person is *sane.*[97] Nevertheless, it seems that the bases of the contemporary provisions and "diminished sanity" are exactly the same because they reflect the variety of boundary mental states which can be established by psychiatrists and allow medical treatment to be used to cope with them. To conclude, current Russian legislation makes the Soviet discussions over the nature of diminished sanity and a combination of measures especially relevant today.

5. Concluding remarks

To sum up, the problematic issues of sanity and insanity were treated in a specific manner during the period of the 1920s and early 1930s due to the primary role of the sociological school of criminal law. Still, many controversial aspects, such as intoxication and diminished sanity require an analysis over a longer period.

The formula of insanity, which is adopted even today, was established before the October revolution and cannot be called an achievement of the Soviet government. It is not limited by medical criteria only and presumes courts are empowered with evaluation of cognitive and volitional capacities of an offender while committing an offence. It is also closely connected with the relations of trust between lawyers and experts. They have not always been the same, but judges generally rely on reports of psychiatrists and are even criticized for failing to make a personal independent evaluation.

Some achievements of pre-revolutionary scholars, including the theory of insanity, were rejected by the new government. The criteria of insanity were modified in an incomplete way. The theory of rationality treated insane offenders the same way it treated criminals, and scholars suggested to decide what social measures to apply on the basis of "rationality". The latter was an extremely vague and controversial term, with several meanings proposed by different authors, and could not have any positive effect on criminal law. Nevertheless, much attention was given to diminished sanity, which was rejected before the revolution. It meant that conditions were created for the development of psychiatry and growth of experts' influence. The so-called "medicalization" blurred boundaries between the powers of experts and lawyers. That is why lawyers later took the opposite view, and all concepts of diminished sanity were totally rejected for decades.

As can be expected, the formula of insanity was soon changed again and became a modified version of the pre-revolutionary one, with small changes in wording. However, the Soviet doctrine is the basis of several criminal law provisions and views of criminal law scholars today. Thus, according to the interpretation of medical measures applied to insane offenders, they are imposed on a person because of his dangerousness. This differentiates these measures from punishments because punishments are imposed due to the dangerousness of the *offence* and not the *offender*. The provisions on boundary mental states, though not directly called "diminished sanity", are rooted in the latter and appeared when the social order changed again in the 1990s. The state of intoxication began to be interpreted similarly to the Soviet doctrine of the 1960s. Although the 1960s was the period of official rejection and widespread criticism of sociologists, the specific

[97] *Ibid.*, pp. 73-75.

approach to intoxicated offenders is relevant in regard to sociological views because it is difficult to draw the line between punishment for the offence listed in the Code and punishment for becoming intoxicated in case dangerous consequences occur. In fact, intoxicated offenders are one of the focuses of the contemporary criminal law policy in Russia, which makes historical analysis of it especially necessary.

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