AN INTRODUCTORY APPROACH TO A COMPARATIVE AND THEORETICAL STUDY OF SOME BASIC LEGAL CONCEPTS IN RUSSIAN (RUSSIAN SOVIET FEDERATIVE SOCIALIST REPUBLIC) CRIMINAL LAW.

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This comparative essay is also an objective criticism of a Soviet school of law and its western counterpart, both believing that substantially, Soviet law is no law at all: the former manifests this belief through its supposition that Soviet law is radically and principally a new 'substantia', a completely new 'essence'. Thus, this school rejects any possibility of evolution, of transformation, of mutual influence between different cultures.

This attitude was greatly enhanced after the 1917 revolution by the dogmatic classist character of this school which in fact successfully changed old terminology to a new one; thus the RSFSR Criminal Code of 1922 excludes the concept of 'mens rea' and the concept of punishment but only by means of new terminology i.e. measures of social protection having a judicial-corrective character took the place of the term 'punishment'. But as correctly asserted by Pashukanis E.B. this did not change the essence of facts. [1]

While this Soviet school based its theoretical foundations on the political and legal necessity of destroying the 'old' and building the 'new', its western partner, ironically enough, upheld the same thesis, but basing itself on an incorrect analysis of the situation evolving in revolutionary Russia concluded that a sine lege society was in formation-a society without law.

According to the author of this essay, Soviet law, although creating the basis of essentially novel legal provisions and a new legal culture (in the same manner as the Napoleonic legal system did for the XIXc) it also integrally forms part, a very active part of Continental legal culture and as such is neither a 'sine lege' system nor is it an immune system, nor a system without roots in the 'old' continental sense. On the contrary, Soviet law is an integral, evolutionary part of this same culture.

The Continental character of the Soviet Russian Criminal Code is formally explicit in the traditional, 'old', structural differentiation of the Code itself. Thus, it is divided in a general and special part, the former giving the basic structure of positive criminal law, while the latter provides for the special character involving the crime composition of specific acts, qualified as being positive criminal acts. Thus the former includes:- the objectives and principles of the Criminal Code, criminal liability, general rules about the application of punishments, the will and age of the offender, attempted offence, impunity, necessary and self-defence, preparatory acts, voluntary desistince, complicity,

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The author is using the word Russian for several reasons one being the fact that this essay is based on the Russian Federation (RSFSR) 1961 Criminal Code enacted by the Supreme Soviet of the Russian Soviet Federal Socialist Republic on the basis of the Fundamental Criminal Legislations of 1959-61.

exemption from punishment etc. An important consideration is the fact that the Russian Criminal Code defines each concept. It defines "Crime". One also finds definitions of intention, of negligence, defence, extreme necessity, complicity and others.

As stated above, the special part, as in all Continental codes, is dedicated to the specific crime composition of acts qualified as criminal acts - state crimes, crimes against socialist property, crimes against the life, health, freedom and honour of the person, crimes against the political and labour rights of citizens, crimes against the personal property of citizens, economic crimes, crimes against public trust, crimes against the administration of justice, crimes against public peace, crimes against security, social order and against the health of the population, military crimes, and others.

It is not our intention here to delve deeper into each provision. Suffice it to say that such a formal structure is already a very noted characteristic of the Continental legal culture inherited by the Soviet Russian system.

Limiting ourselves to the general part, one immediately notices that Soviet Russian criminal law is fundamentally based on a defined qualification of the crime composition of each act, which thus is determined as being a criminal act if so defined by the state.

Thus, we find here a very interesting position: whereas in Malta doctrine is radically differentiated from positive law, this doctrine is in the Russian system positivised i.e. made as an integral part of positive law. In other words, one finds a codification of what in our system we are habituated to interpret as being pure doctrine. What is doctrine in our system becomes positive law in the Soviet Russian system.

Hence, differing from the Maltese Code, sec. I. of the Russian Code instead of providing for the penal laws as in the Maltese Code, defines in a positive manner the tasks of the RSFSR Criminal Code i.e. *to protect the social order, the political and economic system, socialist property individual rights and freedoms and the whole socialist legal order, from criminal encroachments.* [2]

Thus, what for the normative school of legal science seem to be extra-legal concepts are themselves normitivised and made positive through their enactment in a Criminal Code.

What for the Maltese system is part of doctrine, becomes in the Russian system a part of positive law. The above definition is in fact an expansion of Carrara's definition - 'promulgata per proteggere la sicurezza dei cittadini' - and in which definition the word 'subjects' is used precisely to convey that crime is punished by the state because it injures also the community at large..." [3]

Sec. I of the RSFSR Code also underlines that in order to implement this above mentioned enactment, the Code must determine which acts are to be so qualified and their corresponding punishments. Thus sec. I gives a positive character to doctrine *and* formalises its normative character. In order thus to afford such "protection" it is the Criminal Code that determines which dangerous social acts are criminal.

Protection as a positive legal concept, is defined as the "tutela" of the objects enlisted in the article concerned is implemented by means of applying the norms found in the Criminal Code.

Social order includes the system of social relations obtaining in the economic field, in social-class and in political spheres. This latter unit is concretely interpreted as including the Communist Party of the USSR, the Soviet Government, social organizations, collectives and independent social organizations.

The USSR economic system reflects the character and form of property and the corresponding system of distribution of wealth.

Besides these objects to be defended and protected sec. I singles out 'socialist property' i.e. the fundamental constitutional basis of the USSR society. This property is reflected in the legal entities of state and "kolhkoz" property, together with union property and co-operative property.

The individualisation of this specific item being afforded special protection is conditioned by s.10 of the USSR Constitution.

The next object to be protected is the person, defined as an active subject in the construction and establishment of society; the concept of person includes also a subject incapable of participating in same. Citizens are so qualified by birth, by acceptance, and by other means regulated by the "Law on USSR Citizenship" (1978). Their protected rights are those provided for by the Constitution - equality in the economic, political, social and cultural life, sex equality and race equality. The rights afforded protection are the right to work, to rest, to health, to education, to use cultural benefits, and to social benefits, and others.

Citizens' freedoms include the traditional freedoms of conscience, of meetings, demonstrations, of expression, of scientific, technological and artistic creativity.

The last element provided for by sec. I. is "the whole socialist legal order" meaning all the positive norms regulating socialist social relations.

Thus, according to sec. I. all the above units are afforded protection against criminal encroachments, the latter expression interpreted as meaning the action (commission and omission) having all the necessary elements composing the crime-structure, which is thereby qualified as such by the Code.

Thus, as one can see the Soviet Russian Code in fact includes concepts which are qualified by the normative school, especially by Beling, Binding and Yescheck, as concepts "having nothing to do with law". [4]

One may recall here that the normative school excludes concepts such as 'social danger', since these have a subjective-assessive character and hence do not belong to law.

Such concepts' normativisation in a Code should naturally create theoretical problems to the German normative school.

The Maltese-Italian school, although based on and implies such objectivity as that found in the Soviet Code, does not expressly 'de jure condito' provide such a character in its system of law. The Maltese legislator on the other hand opted for an adjective formal definition of criminal action as one prosecuted before the courts of criminal jurisdiction, by the Government of Malta, without

positively providing for the requisite of social danger, of socially, harmful consequences (v.sec.3.2.,4.I.) although such concepts are integral, basic and fundamental in the legal system's doctrine.

After defining the objectives of the RSFSR Criminal Code, the Code defines the parametres of criminal liability (sec.3), or rather the basis of criminal liability, which is also left out from being 'codified' in the Maltese system: yet the codified Russian definition is directly based on the same doctrinal concepts accepted by the Maltese school.

Thus, criminal liability arises only if a person is guilty of committing a criminal act and the Russian Code qualifies this as being possible either "intentionally or through negligence". That is, only a person who is guilty of committing a crime' is defined by the Code itself as one committing either intentionally or by negligence a socially, dangerous act provided for by criminal law.

Doctrinally this aspect tallies with the Maltese school, but the latter leaves this aspect in the doctrinal field, while the Soviet system again as above mentioned, 'codifies' the same.

Such a dichotomy exists in all these relative aspects of both schools. Again, in the Maltese system, the Code refrains from giving any definition of 'negligence' and 'intention', and of course as already stated does not touch the definition of criminal liability, being content with subjecting the concept to defect of will, this being ground to exemption from criminal responsibility. The doctrinal 'res ipsa in se dolum habet' is only implied through case-law.

On the contrary, sec.8 of the RSFSR Code defines the complex limitations of 'intention', defining an intentional criminal act as that *situation when the person committing the crime comprehends, is conscious of the socially dangerous character of his act (commission or omission) and foresees the dangerous social consequences and either desired them or consciously allowed their coming into being.* Such definition, as one can note, unites direct and lateral intentions and is directly derived from the Italian classical school and accepted by the Maltese legal system; [5]

The intellectual moment is the consciousness of the dangerous and harmful character of the acts and the foreseeing of the results, the 'volere' is the striving towards the desired end or consciously permitting such results. The correlation between this 'conoscere and volere' may produce direct intention i.e. being conscious of the socially dangerous character of the act, foreseeing the inevitability or possibility of the results and desiring same. Or this correlation may also produce lateral intention i.e. conscious of the socially dangerous character of the act, forseeing the possibility of its consequences, he may not desire (although at the same time he may be consciously permitting) their coming into being. The latter is close to Carrara's positive indirect intention.

Sec.9 further qualifies 'negligence' as an *act committed by a person who foresaw the possibility of socially dangerous results, but carelessly calculated on their being prevented.* This gives rise to criminal presumption. Negligence also includes the situation in which a person does not foresee the possibility of his act's consequences but should have and could have foreseen them. This is termed criminal negligence.

The first part of the above Russian section deals with the situation in which negligence is understood as a particular state of mind manifested by a failure to be alert: the true nature, circumstances, and consequences of a man's acts are prevented from being present in his conciousness. [6] On the other hand, the second part of the Russian section deals with negligence as "un atto di volonta", "a voluntary failure to take care" and as a voluntary failure to foresee." 'Should have' and 'Could have' imply that the Code is not only talking on the 'possibility' of foreseeing but also includes the breach of the duty of taking care. That is, it includes the failure to foresee that which is foreseeable (could) and also the failure to foresee that which ought ot have been foreseen (should).

Sec.3 (criminal liability), sec. 8 (intention) and Sec.9 (negligence) together formulate the important postulates of the crime-composition of an act. Criminal liability is effected from the moment of the completion of the crime. At this point of time one may speak of criminal legal relations "the subjects of which are the official organs representing the state and the criminal (v. Commentaries). This relationship is also reflected in sec.4 of the Maltese Code"... the criminal action is essentially a public action and is vested in the Government by whom it is prosecuted in the name of the Republic of Malta, through the Executive Police or the Attorney General as the case may be according to law".

According to Russian law intention or negligence in the act concerned is present only if this same act has all the required ingredients i.e. has a *complete crime-composition.*

A crime-composition is defined as *the totality objective and subjective ingredients established by criminal law, characterising the specific socially dangerous act as a criminal act.* The objective ingredients include (i) the socialist social relations protected by law and against which the particular, specific act is directed, i.e. the object of the criminal encroachment. ii. the criminal act and the external 'iter' i.e. omission and commission, criminal effects, the legal nexus between the act and the results or effects: sometimes time, place and means are also included as forming part of the objective side of the crime-composition.

The subjective side of crime-composition articulates the psychic relation the person has to the socially dangerous act and its subsequent effects. As stated above, this psychological relationship is by Russian law defined a having the form of either intention or negligence. In fact 'guilt' is defined by Russian law as the psychic, the mental relation of the person to his committing of a socially dangerous act defined as such by criminal law. Due to such definition some conclude that Russian law does not recognise the Continental concept of objective liability, (did not foresee, could not and should not have).

Motive, objective, personality together with guilt form part of the subjective side of the crime-composition.

It is of outmost importance to repeat that according to Russian law, only the totality of all the above mentioned ingredients may give rise to criminal liability.

One, or a couple of the above elements *do not* constitute the complex definition of liability. There has to be the total sum of each ingredient present in the act.

Sec.8 goes on to develop sec. 3 by giving a definition of intention (supra).

As already stated, sec.8 defines two forms of intention: direct and indirect intention.

Direct intention includes the consciousness of the socially dangerous character of the act, the foreseeability of the dangerous effects of the act or omission and the desire of their coming into being. Direct intention as in the Italian-Maltese school is formed of an intellectual and the volition side. The former assists in the knowing of the dangerous character and in the foreseeing of subsequent effects while the latter is necessary to define the 'desire' of such results coming into being. As one can see even here the Soviet Russian school of criminal law is very much dependant on the classical Italian source.

The indirect or lateral intention implies that the offender is conscious of the socially dangerous character of his act or omission, he foresees the corresponding consequences and effects and consciously permits their coming into being. Like the Italian school, the Russian school admits the intellectual and volitional elements in this indirect form of intention.

According to Russian law, indirect intention is possible only in cases of material crime-compositions. In formal crime-compositions indirect intention is not accepted due to the fact that in the completion of such crime-compositions the psychological relationship between the offender and the criminal result is impossible to establish.

The fundamental, basic difference between direct and lateral intention is found in the element of volition. In direct intention, this element in material crime-compositions is expressed by the explicit desire of the coming into being of particular results, foreseen either as the sole aim or objective of the actor or as a means towards an end. In the case of lateral intention foreseen results are not the end, are not the objectives of the offender's acts, are not desired nor required as the completion of his objective.

Russian positive law, although defining Intention as above, does not proceed to define specific and generic intent, nor does it define preconceived or spontaneous intent although these are accepted by Soviet case-law.

Sec.9 qualifies negligence. A crime is committed through negligence *if the offender foresaw the possibility of the resulting socially dangerous effects due to omission or commission, but frivolously (thoughtlessly) relied on their prevention or did not foresee the possibility of their coming into being although he ought to have (should have) and could have foreseen them.*

Thus Russian law defines two forms of negligence: criminal presumption and criminal carelessness.

The former is carefully worded so as to underline that the psychological relationship here is not directed towards the act, but is determined within the parameters of the relationship to the socially dangerous results. This obviously means that acts in this section do not have the same criminal liability burden and as such cannot eg. establish preparation or attempt in crime.

The offender is not conscious of the real and concrete development of the nexus between his behaviour and subsequent results: although he could have been conscious if he had used greater mental care. This is very similar to the traditional theory propounded by Carmignani and Carrara. According to this

school negligence is a subjective fact i.e. a particular state of mind. It essentially consists in a failure to be alert, circumspect, or vigilant. The negligent wrongdoer is-he does not know it, but would have known it were it not for his mental indolence [7]. In fact the Russian Code seems to use Carrara's terminology in defining negligence (the former type) as a voluntary failure to take care in *estimating* the probable and foreseeable consequences of one's acts.

The second form of negligence defined by sec.9 is criminal carelessness, whereby the offender did not foresee the possibility of resulting effects although he ought to/should have and could have foreseen them. Here the central element is the unforeseeability. The element of volition here consists in the fact that although the offender had a real possibility to foresee such results, he did not act upon his mental capabilities to will the necessary acts necessary to prevent such results.

Thus, in contrast to criminal presumption one notes here the objective criteria of "ought to/should have" but this is integrated with the subjective element of "could have".

Following Impallomeni and Maino, the Russian school distinguishes between the various degrees of foreseeability opting for an average criteria to determine the possibility existing in foreseeing, taking into account such elements as the profession, speciality, activity of the offender, the normal standard of care expected from a normal person.

This again is very close to Carrara and to the Maltese school. "When we say that the event was unforeseeable, we do not mean that it was unforeseeable absolutely. We mean only that it was unforeseeable by the standard of care which the law requires every man to use in his actions, ...the amount of prudence or care which the law actually demands is that which is reasonable in the circumstances of the particular case...". [8]

'Nullum crimen, nulla poena sine lege' is effectually enacted in the second part of Sec.3. [9] This provision underlines that only a court sentence can define and determine guilt. As in many continental systems this section is a reflection of constitutional norms. Thus the same principle is provided for in sec. 160 of the USSR Constitution:- "No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by the sentence of a court and in conformity with the law". (v. also sec. 151) "... in conformity with the law" is understood by Soviet jurists as meaning the pronouncing of the sentence in observance with all material and procedural criminal law requirements. This interprtation is detatable.

Thus the guilt of every accused person has to be proved in court and according to law. Russian law underlines that the system established by law for the determination of guilt can only be a court system -- excluding any other organ. Such a situation can be compared with Malta's Constitutional provision stating that" Whenever any person is charged with a criminal offence he shall... be afforded a fair hearing...by an independent and impartial court established by law..." (Sec.39.I.).

Unfortunately the qualifications of "fairness", "independence" and "impartiality" do not figure in the Soviet Russian version.

An interesting digression here can help us understand better this situation. "When in 1921 the Organizational Bureau of the Party Central Committee drafted a circular, which stipulated the right of the Party Committees to impose pre-determining instructions on the Courts, Lenin thought the respective instructions harmful and insisted on a revision of the circular. And in a well known letter to the Political Bureau of the Central Committee of the Russian Communist Party (Bolsheviks), dated March 18, 1922 he wrote this reminder: "That it be confirmed to all Gubernia Party Committees that for the slightest attempt to influence the courts...the CC will expel such persons from the Party...". L. Sobolev, from whose works the above was quoted also states that 'no heed was paid to Lenin's warning'.

In fact today the Party's Resolution "On Legal Reform" stresses that it is necessary...to secure unconditional independence of judges and their subordination to law alone, and to define concrete sanctions for interference in their activity and contempt of court. [10]

The concept that anything the law does not prohibit is allowed, was recently declared as a principle that the XIXth Conference put at the basis of the reform of the legal system.

The Soviet Russian Code, maintaining its positivist character, 'provokes' a definition, a positive definition of 'Crime'.

Primarily it indicates that crime is a violation of the law of the State. "..(act).. encroaching on socialist legal order..as provided for by criminal law...".

Then it goes on to qualify that such law is promulgated for the protection of the safety of the subjects and community; "... (act)... encroaching on the social structure, its political and economic system, on the socialist property, personal and political, labour, property and other rights and freedoms of the citizens...".

This act of encroaching is defined by criminal law as a socially dangerous act (omission or commission). Here one cannot help recalling and not using the extension of Carrara's Classical doctrinal definition which finds its positive enactment in the RSFSR Code. (The second part of Carrara's definition can be found in sec.3).

But the Soviet Russian Code goes further -- it concretises the concept of 'safety of the subjects' and besides the objective danger and harm qualified by the definition, it also, interestingly enough, includes the normative concept of the whole legal order as an element needing the 'tutela'. This implies the fundamental normative theoretical elements of 'material unlawfulness' in the theory of Yescheck H. and the concept of 'legal good' in Dona A. [11]

Thus, sec. 7 defines Crime as that *socially dangerous act (omission or commission) qualified by criminal law, encroaching on the USSR social structure, its political and economic system, on socialist property, on the person, on political, labour, property and other rights and freedoms of citizens and*

also as that socially dangerous act (provided for by the criminal law) which encroaches on the socialist legal order.

Here the author considers a formally very interesting development from sec. 1 concerning the objectives of the Criminal Code, which therein groups the objectivity of all protected objects under one title; whereas sec. 7, in defining Crime, divides these protected objects into two distinct parts with the very strict and strong conjunction (translated poorly) as "as well as". The first part concerns acts involving certain material objectivity broken down into separate distinct departments, while the second part mentions any acts (socially dangerous) that encroach against 'legal order' -- a very normative *doctrine*. Thus, in a certain manner one here notes an interesting 'Carrara-Yescheck' theoretical combination having a very explicit positive manifestation. Such a situation is absent in many Continental Codes such as those of Austria and Malta which opt for only a procedural concept defining crime or the criminal act as eg. that act prosecuted by the courts of criminal jurisdiction (s.3.2.); a public action vested in the Government by whom it is prosecuted (4.1.); and whereby a certain punishment of the offender is demanded. (7.1;3.2)

Thus, although objectivity and harm are essential for the definition of crime in the Maltese legal system, these are left undefined and confined only within a structural concept of crime. [12] The objective material element of social danger is the more underlined, on the other hand, by the Russian Code which besides the explicit sec. 1 and sec. 7, again underlines that an act, even if formally it answers to a crime-composition as provided by the special part of the Code, is nevertheless not included in the definition of a criminal act if due to its small significance it does not present any social danger. [13] Thus the formal elements are not enough to qualify an act as a criminal act. The significance 'level' is decided on the basis of all actual and factual events and circumstances composing the case--character of the act, conditions and means of completion and committion, the absence of harmful results, insignificant damage, together with the important qualification that the actor did not intend otherwise.

The crime and its elements, presuppose that the act is one capable of or has in fact caused a social danger. The legislator sometimes directly links given elements of offences with the causing of definite particular harmful consequences. In fact the unlawfulness of the act, its socially harmful consequences and a causal connection between these constitute the objective side of the offence. [14]

The Soviet school differentiates between the concept of social danger and of social harm. Social harm appertians more specifically to civil, administrative, disciplinary "and similar ..." offences and unlike 'crime' does not always manifest the required level of danger to society in general. [15]

Thus, to conclude this part one may recapitulate by stating that the Soviet school recognises four constituent elements of criminality--social danger, unlaw fulness, guilt, and penal sanctions. These elements of criminality are not to be confused with the structural units of the crime-composition i.e. a) object of the crime; b) subject of the crime; c) objective side of the crime (act, omission, results); d) subjective side of the crime (mens rea, motive and objective).

The positivization of certain classical concepts (supra) has caused a very important critique from the Italian school although as we have already seen those concepts in fact stem from the very same school. Thus, Pagliaro A. and Tranchina G., say that "... le definizioni sostanziali del reato dettate da orientamenti politici sono gravement pericolose per la liberta individuale, quando tendano a sostituirsi alla legge o ad estenderne le incriminazioni. Esse comportono infatti, una decisa rottura del principio di certezza del diritto, in quanto concetti estremamenti vaghi, come quello di "tradimento rispetto agli ideali della comunita" o l'altro di "fatto pericoloso per il sistema socialista" possono essere determinati di volta in volta in modo diverso ...". [16]

Although agreeing with the emminent jurist, the author of this essay has to underline and note that these substantial definitions derive directly from the classical school of legal thought amongst which Carrara and Manzini's theories were fundamental and whose theories inform modern Italian and Maltese legal thought. The difference being that the Soviet legislator opted for these concepts' positive enactment.

The Soviet Russian Code defines its enforcement framework within space and time. The Code bases its provisions on the territorial principle for all crimes committed within RSFSR territory (s.4) and in the opinion of the author on an extreme interpretation of the personal theory for crimes committed by USSR citizens outside USSR territory.

One may recollect that Maltese law provides for the territorial principle in s.5 and even gives a differential definition of such territorial jurisdiction i.e. territory, sea, space, ship, vessel. The same Maltese Code narrows the personal theory for *certain* crimes and integrates this to the 'nationality' principle (citizenship and residence). Thus, a criminal action may be prosecuted in Malta against any citizen of Malta or permanent resident in Malta who becomes guilty of specified offences including those against the person of a citizen or permanent resident of Malta. Russian law does not differentiate territorial aspects of territorial jurisdiction. It gives a general dictum for all crimes committed within USSR territory without feeling the necessity of defining the various aspects of territory presumably because it is recognised that territorial jurisdiction explicitly means and includes territory, sea, air-space, vessels, aircraft etc.

S.4 deals also with the criminal liability of diplomatic representatives and other citizens enjoying immunity. The Code provides that such questions are to be based on the ex territorial principle and is to be solved through diplomatic channels. [17]

Due to its federal system, one can understand the difference of the territory defined in s.4 and s.5.S.4. speaks of crimes within the RSFSR territory (which is the territory of one republic in the fifteen republic federation) and is not applicable to other republics. S.5 concerns the liability of all USSR citizens committing a crime in foreign states who are triable in the RSFSR if brought to trial within RSFSR territory. On the other hand, s.4 applies to all citizens (RSFSR and all other citizens of other USSR republics, foreign citizens and state-less persons, if their criminal act is committed within RSFSR territory).

One should not forget that all republic citizens are USSR citizens.

The territorial parameters are clearly defined in the 'Law on State Frontiers USSR, 1982'. This includes land territory, internal waters, internal sea waters, territorial waters (12 miles), frontier rivers and lakes up to the differentiating line, air-space, military ships, civil ships on the high seas, air ships.

Foreign military ships situated in territorial waters of the USSR are recognised as not appertaining to USSR territory.

The crime committed within RSFSR territory is defined as being either that activity the criminal quality of which commenced and was consumated in RSFSR territory; or when the result of criminal acts committed outside RSFSR or USSR territory happens within RSFSR territory, or in cases where although the criminal acts commenced within RSFSR territory the results ensue outside such territory. The latter case can be found in the Maltese Code with respect to the result of death outside Maltese jurisdiction of a person striken within such jurisdiction (s.211.3); and also s.220.3 concerning grievous bodily harm from which death ensues.

As to s.5, it is Soviet law that is to determine and define acts committed outside Soviet jurisdiction by USSR citizens as criminal acts. The third para. of sec.5 explicitly negates the 'ne bis in infidem' principle previously admitted by the Maltese Code sec. 5.

An application of the 'ne bis in idem' by Soviet law may be possible only by an express court decision. This gives very wide powers to the court in each specific case. But in principle, criminal liability and proceedings against USSR citizens continue their effectivity independently if whether the offender has already been convicted, or has already served his sentence. A very interesting provision of this same sec.5 is the last para., providing for the application of international legal norms stemming from international treaties in case of criminal liability under Soviet law for crimes committed by foreign citizens *outside* USSR territory. Examples of such treaties include the 1973 International Convention on Apartheid. This provides for the cosmopolitan doctrinal attitude for defined criminal acts. This provision is a domestic legal crystallisation of the cosmopolitan school of law and is applicable to crimes against peace and humanity, military crimes, terrorism etc.

It is important to clarify that this provision is applicable only where the international convention provides for the competence of the courts of *any* state-signatory/member of the particular agreement. Foreign citizens are liable only for those crimes committed outside USSR territory which are so provided for by Soviet criminal law.

Differing from some other European Codes, the RSFSR Code provides for the transitory principle of law. The RSFSR Code sec. 6 expressly states that criminality and punishability are determined by the law in force at the time of committing the criminal act.

Extenuation and exclusion of punishability have in determined circumstances a retroactive character. This is in line with Roman and Continental law. Ulpian, one may recall, wrote that wrongs should not be subjected to the punishment imposed by law in force at the time of trial but

to the punishment prescribed by the law in force at the time of the commission of the wrong. [18] But furthermore 'lex non habet oculos retro' and other Roman law provisions declare similar provisions; this applies to laws establishing punishment or aggravating punishment as in most systems of law. The Soviet school of law believes that it is not correct to punish a person for acts which previously were defined as criminal but which at the time of trial have either partly or completely lost their dangerous character, thus having a new penal status.

Sec. 6 is integrally linked to the constitutional provision in art. 160 stating that "No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by the sentence of a court and in conformity with the law." This provision is enhanced by sec.6 of the Code underlining that an act may be qualified as criminal only in conformity to positive law and if so defined during the moment of commission of the wrong. Thus, the Russian provision manifests the generally accepted norm that wrongs should not be subjected to the punishment imposed by law at the time of trial but to the punishment prescribed by law at the time of the commission of the wrong.

Thus the first part of sec.6 finds a reflection in the Maltese Constitution sec.39.8"... No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence...". This is in fact a manifestation of the principle nullum crimen, nulla poena sine lege. *Soviet law knows cases in which the principle of retroactive application of entenuating circumstances was limited in its operation. Thus the newly enacted law providing for the maximum period of fifteen years deprivation of liberty was not to apply for special grave crimes and for special dangerous recidivists convicted* before the passing the passing of the Fundamental Criminal Legislation. The retroactivity of extenuation or exclusion provisions found in the second part of the RSFSR Code Sec. 6 is essentially found also in sec. 27 of the Maltese Code "... if the punishment provided by the law in force at the time of trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment shall be awarded.".

Soviet law established the moment of the consumation of the particular crime as the essential point of reference in order to determine whether the new or old law is to be applicable. Thus the moment of the coming into force of the new law is regarded in reference to the moment of the final act of the crime. Of course this holds good except for those situations that are afforded retroactivity according to sec.6.

The application of retroactivity is a mandatory one for the courts. Investigating personel and inquiry organs may stop the proceedings subject to agreement with the public prosecutor.

Soviet law as above stated recognizes cases in which the principle of retroactivity was not applied i.e. in which the extenuating provision was limited in its operation. Thus, the RSFSR Criminal Code provided a maximum period for deprivation of liberty for special grave crimes and for specially dangerous recidivists-fifteen years substituted the previous twenty five. But sec. 2 of the Law concerning the confirmation of the RSFSR Criminal Code, 27th October

1960 states that this particular section, i.e. sec. 24 does not apply or rather is not applicable to persons convicted before the enactment of the Fundamental Criminal Legislation if the conviction included special, dangerous state crimes, banditry, intentional homicide with aggravating circumstances and other grave crimes. This limitation was qualified by the provision that this only concerns sentences and court decisions that came into force before the coming into effect of the RSFSR 1960 Code.

It thus, *seems* that Soviet law, like Italian law, maintains that repeal should have the effect of cancelling the effects of conviction and of remitting any unexpired or outstanding portion of the sentence or penalty *after* the offender has already been tried and sentenced. [19]

'Minor' is defined by the RSFSR Code as a person under 16 years of age. As a protection to the minor, Soviet law defines a criminal act against such a person as involving an aggravating circumstance including in some cases a specially grave' punishability.

The 16 year limit is the general age limit defining a minor in sec. 10. Yet, the same section establishes a 14 year limit for liability involving certain specified crimes. There are certain grave criminal acts whose character the Criminal Code believes the minor is capable of understanding and comprehending-wilful homicide, intentional and grave bodily harm, rape, theft, extreme hooliganism, grave crimes against the state and against social and personal property are some examples.

When the minor is the active agent of a criminal act, the RSFSR Code establishes a special procedure of certain qualified norms in determining punishment and the circumstances necessary for exemption.

Like Italian law, Russian law, possibly under the influence of sociological legal concepts, believes that "nei confronti dei minori, dunque la pena ha perduto quasi del tutto il carattere di castigo o di espiazione, per assumere una funzione di prevenzione sociale e di rieducazione ...". [20] This is based on the well accepted attitude that there is the "prezunzione assoluta di assenza di capacita di intendere e di volere" within the age limit as qualified and differentiated by law.

This age differentiation, is regarded as a privilege granted for the reasons above mentioned and it is further complemented by the fact that Russian law holds that in such cases the minor had acted in such a manner by reason of his intellectually retarded capabilities (not in any way connected to insanity). In case of such a court determination which also takes into account the gravity of the act, the court may apply the norms related to disciplinary educative measures. This is also applied when, in relation to a person who is under eighteen years of age, the Court is satisfied that the criminal act is not one of grave social danger and that such a minor can be corrected without applying any penal procedure.

The Court has a positive obligation determined by sec. 32 of the Fundamentals which states that it has to subject punishment to the objectives and principles of correction and positive up-bringing.

Until the eighteen year limit a person is deemed to be under a special type of protection and 'status'. The eighteen year limit, for example, implies

that such a person, although fully responsible as from his 16th year, cannot be subjected to capital punishment; nor can his loss of personal liberty exceed ten years. Such persons have the 'privilege' to be granted a special form of conditional liberty and/or a possible subsequent change in punishment.

All this, one may repeat, depends on the court's estimation of the social danger manifested by the minor's act and of the minor's character. This is similar to the other Italian doctrine which underlines that "se il soggetto e socialmente pericoloso, gli saranno inflitte le misure di sicurezza del riformatorio guidiziario o della liberta vigilita". [21] Similar but not identical, it may be useful to recall that Italian law while defining the 14 year limit as one composed of absolute 'doli incapax' like the Russian Code, it defines the 14 - 18 year period as one involving the principle of diminished responsibility. Maltese law defines the 'doli incapax' as an element applicable to a 9 year limit. It conditionally grants the same regime to the 14 year limit if the act is "done without mischievous discretion". The 14 - 18 year old period is deemed to be 'doli capax' but involves an extenuation of punishment (1 - 2) due to the privileged treatment afforded.

Sec. 2 speaks of exemption from criminal responsibility; and as in other sections, the Soviet legislator deems it important to define same, unlike his Maltese collegue. This is defined as *a situation in which a person at the time of the perpetration of a socially dangerous act could not give an account of his actions or control them, either due to a chronic mental disease, or to a temporary disarray of mental activity, imbecility or other unhealthy condition.* This definition is important since like the Italian variant, and unlike the undefined Maltese version the fact that "il vizio di mente deve essere la conseguenza di una malattia" is explicitly enacted. [22] The author must here underline that the Russian section is not implying "ogni deviazione nel funzionamente normali" as Pannain interprets the Italian version.

Russian law differentiates between two closely interacting conditions i.e. medical and juridical criteria both of which are necessary in establishing the exemption from responsibility.

The medical criteria includes the objective presence of mental disease within the limits imposed by sec.2 i.e. chronic mental disease, temporary disarray of mental activity, imbecility and other unhealthy condition.

The first one (eg. schizophrenia, epilepsy) has to be of a grave and of a relatively uncurable character, of a protracted type and to have a deteriorating tendency.

Temporary disarray (eg. pathological intoxication, alcoholic psychosis, mental shock) has to be qualified as a psychological disease which is of a short duration and has the possibility of cure or betterment. Imbecility is a complete intellectual lesion, a psychic defect. It hinders a correct evaluation of one's actions and disturbs an objective appreciation of events. This disease is classified either as being from birth or as having progressively developed during childhood. Examples are, idiotism, imbecility, and debility. Here exemption is not of an automatic nature.

The last aspect i.e. 'other unhealthy conditions' is meant to include only

those grave defects or diseases which may violate the person's psychological activity and does not necessarily and solely imply completeness of the sickness concerned. Thus, one may here include psychological changes caused by deaf-muteness, psychopathy, and mental disorders caused by infectous diseases. The medical criteria is not enough to determine the exemption status of the offender. Besides this, the RSFSR Code, like Italian law, differentiates between the juridical criteria's elements i.e. the accounting capability and the controlling capability, "... could not give account ... or control them ...". Both these elements are separated by an 'OR' due to the now well accepted fact that there are mental diseases which exclude the capacity of 'intendere' and 'volere' as in insanity but there is a majority of mental situations which exclude either the 'intendere' or the 'volere'. Thus, imbecillita, cretinismo, demenza are defined, at least by Italian law, as appertaining to the former, while peromania cleptomania and related diseases, to the latter.

This juridical side thus constitutes an intellectual side i.e. the inability to account for one's acts, and a volitional side i.e. the inability to control same. The juridical aspect requires one of these aspects. The inability to account for, is interpreted by Russian law as an inability either to know, to realise the nexus between behaviour and the corresponding results or the inability to realise the socially dangerous character of behaviour.

The inability to control one's acts is understood as an inability due to disease to act otherwise, even if the person knows of the dangerous character of his acts.

Differing from the Italian school, neither Russian law nor Maltese law explicitly provide for 'visio parziale' and for a corresponding level of diminished responsibility.

Hence, Russian law, as most systems of Continental law, recognises "insanity as an excuse not only when it deprives the victim of his power of distinguishing the physical and moral nature and quality of his act charged as an offence, but also when it deprives him of his faculty of choice so as to exclude a free determination of his will in relation to those acts...". [24]

This may make us conclude that Russian law does not like Italian and Maltese law, admit of the doctrine of Feuerbach and Metzger who qualify these violations of law as rea independently of their punishabilty or otherwise.

According to Russian law, this forms the theoretical basis for the application of compulsory measures of a medical character which conceptually are differentiated from the concept of 'punishment' (sec.58-61). These measures are applicable only to persons suffering from defective psychological elements. Thus, these measures cannot be applied to persons qualified as suffering from sec.2 qualification re: "...other unhealthy conditions".

This attitude seems to be different from the concept of "custodia aggiuntiva" in Italian law or that of "strict custody" in Maltese law, which debatably seems to consider strict custody as a substitute to punishment. [25]

Para. 2 of this section makes interesting reading since it positively enacts that a person committing a criminal act while in a state of liability will not be subject to punishment (note the difference--to punishment and not to criminal liability as in the first paragraph) if he becomes mentally sick or suffers from

such a disease before the pronouncement of sentence. In such situations Russian law here recognises the possibility of suspended proceedings.

Such a person will be 'afforded' the same compulsory measures of a medical character. The difference here consists in the fact that if such a person is cured he may be liable to punishment.

A direct minute provision in sec. 12, states that a person committing a crime while in a state of alcoholic intoxicaiton (drunkenness) is not exempt from criminal liability. This specific type of intoxication is not included in sec. 38 which qualifies circumstances having extenuating or diminishing responsibility. On the contrary, as in the old English law this situation is included as a possible, facultative aggravating estimation. According to the 'Commentary' the Soviet legislator is providing for the physiological or simple alcoholic intoxication which is differentiated from the pathological. The former is deemed to have that required psychological link with the surrounding circumstances and events. Aggression and extreme, acute reactions caused by this normal, simple intoxication is, according to Soviet law, still within the sphere of consciousness and volition. In fact Soviet law, like Italian law, believes that one should not admit any exemptive effect especially when intoxication is voluntary and thus the cause has its origins in a voluntary misconduct. The Russian section does not positively distinguish between accidental and voluntary, habitual or pre-determined situations as does Italian law. It only gives one generic provision.

The Soviet school of law defines alcoholic intoxication as a *psychological situation created by the intake of alcohol, and is manifested by a depression of the person's capacity to account for his actions or to control them.* Note the word 'depression'. Russian law does not express a clear provision for cases defined by Italian law as accidental i.e. "... Ricorre quando al soggetto che si e ubria cato non si puo rivolgere rimprovero, neppure di semplice leggerezza per tale suo stato ... [26]. Neither does it, at least explicitly, provide for situations caused by the "malicious or negligent act of another person..." as the Maltese Code does.

Russian positive law seems to find common ground with Italian law only in ubriachezza volontaria when "... essa si verifica non solo quando l'agente ha voluto ubriacarsi ma anche quando lo ha fatto per imprudenza o negligenza". [27]

Drunkenness is also included as an aggravating circumstance when it is 'present' in the performance of an official or professional duty, or when the person concerned is performing a function qualified as connected with a source of extreme danger. Unlike Maltese or Italian law the latter of which differentiates between accidentale parziale, volontaria, preordinata abituale, cronica. The Soviet court in certain circumstances has a wide latitude and power to consider intoxication as aggravating or not.

As in many countries, Soviet law applies these provisions related to alcohol intoxication also to conditions caused by the intakes of narcotics or exciting drugs.

The Code section itself does not mention narcotic intoxication; but persons under the influence of narcotics (stupefacenti and narcotici) are not exempted from criminal liability. Although in certain cases the above mentioned medical measures are applied as in other cases touching on the 'insanity' border, the court has the power to declare such persons as persons possessing limited capability and thus subjects them to a special guardianship regime and procedures. [28]

The Soviet legal doctrine of 'defence' as a basis exempting liability (infra) is, as in Italian law, applicable to all acts. Thus, the provision concerning 'defence' is included in the general part of the Code under the title of 'necessary defence'. One may recall that the Maltese Code provides for 'legitimate defence' only in connection to homicide and bodily harm, implying a rather restrictive attitude permitting the notion of defence only within a framework of personal injuries: although one must underline that case-law seems to extend such effects to other offences. [29]

The RSFSR section 13 starts by underlining the absence of a criminal act in such cases. In other words an act falling under the elements as envisaged by the Special Part of the Code but committed in 'necessary defence' *is not a criminal act,* i.e. it is not a question of exemption from liability as in other cases, but a negation of the criminality of the act. One finds the same position in the Maltese Code, "... No offence is committed...".

Thus, although there exists a difference of opinion, the author believes that 'necessary defence' in RSFSR law is not a situation exempting from criminal liability or from punishability, with the violation remaining a 'rea' as in the Metzger theory, but on the contrary, an act which cannot be defined as a criminal act. This is essentially different from being non-punishable as for example in Sec. 52 of the Italian Code.

Soviet criminal legislature has many times qualified *necessary defence as being socially beneficial and qualifies such an act as a subjective right directed towards one's defence and towards the defence of social interests.* Besides being a subjective right, Soviet law sees necessary defence as a moral duty and obligation of each citizen and for certain specified officials responsible for the protection of public order, property etc., necessary defence is a juridicial obligation, the non-fulfilment of which gives rise to criminal liability.

Sec. 13 defines necessary defence as being defence in protecting the interests of the Soviet State, social interests, interests of the person. This section also includes defence of the rights of persons defending, as well as defence from socially dangerous encroachments.

This wide qualification, of course manifests the Soviet doctrine's attitude in believing that 'necessary defence' is not only a factor of personality, but is itself a social-legal institute creating a 'sui generis' legal call for activity in the fight against criminality. [30] One must here underline that although necessary defence is not only a right but a moral obligation calling each citizen to act against anti-social violations and to assist in the defence and protection of the public and social order (v.USSR Constitution s.65) the Code does not establish any legal liability if a person refuses to act accordingly.

Thus, RSFSR law provides that within the notional parameters of this section, the offence requiring 'lawful defence' action includes not only acts which are directed against 'rights' but also includes offences committed by acts directed against the State's interests, social interests and against the interest of the person.

Although this may sound too ideologically burdened, one should compare and recall that the Italian school of law provides that "oggetto dell'offesa deve essere un 'diritto' ..." including thereto a 'diritto proprio' and 'diritto altrui'. Interesting enough, according to Italian doctrine 'diritto altrui' implies *also* a right that may not at the moment of the act be recognised as such. [31] This expansive interpretation of right approaches the concept of 'interest' in Soviet law although this has, in the opinion of the author a rather more expansive nature, enabling the court (to have the possibility) to qualify and disqualify any criteria it deems fit or unfit for the definition of 'necessary defence'.

Both Maltese and Italian law qualify that the offence has to be of an unjust and unlawful character, "... cioe contraria ai precetti dell'ordinamento giuridico...". [32] This unlawfulness is only implied by the RSFSR Code definition by means of the words 'socially dangerous encroachments' as inserted in the structure defining the situations in which 'necessary defence', *is* lawful. The absence and the qualification of the word 'unlawful' may on the one hand cause a certain confusion with the concept of 'jus necessitatis' (infra) and on the other hand implies that this section may not cater for cases in which an offence may be tolerated although not positively provided for. In fact, court case-law and criminal law doctrine have established certain criteria in defining 'lawfulness' of the defence. Soviet law has differentiated between those conditions constituting lawfulness, as those that are related to the offence itself, and those conditions related to the defence proper: the former included the notions of 'social-political essence', 'time' and 'reality-actuality' of the offence. Thus an offence has to be of a socially dangerous character causing harm to the interests enlisted in sec.13. This element implies that such an offence may not necessarily be of an illegal (unlawful), character or burdened by the 'mens rea' in order to bring into effect section 13. This means that 'necessary defence' is permitted against offences committed by non responsible persons, by minors for example. Further, this attitude implies that sec.13 is effective even against 'encroachments' which have the necessary elements qualifying the act as criminal missing. One must here mention the fact that this above mentioned interpretation has strict qualifications.

The offence has to be of an immediate character, i.e. the objects provided for are subject to harm or a real, direct, immediate threat is created. 'Necessary defence' is not admitted in cases other than those having the 'sudden' and 'immediate' character. Neither is it admitted if it is called to before any such offence had been committed, nor if the act is an act of lawful correction or of a performance of duty.

The offence or encroachment has to be real. This means that there must exist circumstances which together form an objective reality of the offence and not just or simply existing in the imagination of the person defending. Although this *seems* to be contradicting the subjective theory (proclaiming, as in Maltese law that in deciding whether there was actual necessity of self-defence, the test

should be subjective. The danger against which the accused reacted should be viewed not necessarily as it was in truth and in fact, but rather as he saw it at the time), Soviet law recognizes the notion of 'apparent defence', which may lead to negligence or to exemption from liability--depending on the circumstances of the particular case.

The latter differentiation i.e. conditions of lawfulness realted to the defence is concerned with the volume of the protected interests, the relationship between the defence and the offence and the protection of persons who may become victims of the caused harm.

Thus all citizens have the right to protect and defend the qualified interests as in sec. 13 independently of whether such offences are directed against the defending person, or against the state interests or against other persons. This is subject to the condition that the act of defence must be directed solely at the offender and any harm caused must be caused to the same.

The third condition in this paragraph concerns the principle of proportionality which is explicitly stated in the last sub-para. of sec.13. This section recognises only an explicit, clear disproportionality between the character of the defence applied and the character of the offence's danger as qualifying for the definition of 'excess of the limits of necessary defence'. It is interesting to note that an excess of such limits may be recognised as a circumstance diminishing the responsibility. [33]

Before concluding our discussion concerning sec. 13 it is important to note that whereas the Maltese and Italian Codes speak of "imposed by actual necessity" and "per esservi stato costretto dalla necessita", respectively the RSFSR provision does not positively speak of such necessity. This may in fact create a debatable ground concerning questions bordering between 'necessity' and 'provocation'. This problem is enhanced by the fact that the first part of sec. 13 (re: protected interests) *seems* to cater for cases which are caused or created by the agent's own initiative, this being directed towards the protection or defence of the section's qualified interests (state, social, person). In fact Saharov A.B. states that necessary defence is permissable in any cases of socially dangerous character which are threatening the above mentioned interests and rights, *and can also be of a preventive nature* against socially dangerous acts *which have not yet formed* the corresponding necessary crime composition i.e. have not yet become crimes. This is a dangerously expansive interpretation and the element of 'actuality' is underminded (supra). 'Actuality', although difficult to define in the first part of the section is recognised by Soviet law as being the actuality of danger as in Italian law--il *pericolo* deve essere attuale, presente o imminente-- but in Maltese law it is the *necessity* that must be actual. This may of course be implied by the title of the section itself--necessary defence, but a defence may be necessary without being actual, contrary it seems, to the provision of 'jus necessitates' (infra).

The RSFSR Code, like the Italian Code, provides for 'jus necessitates', in sec. 14 and sec. 54 respectively. Under Maltese law the situation is debatable since "... it is essential in order that there may be exemptions from punishment, that the agent should have been constrained to the deed by an external force which he could not resist; the coercion must proceed from without ...", although

as Mamo A., continues "... the court would take the extremity of the offender's situation into account by reducing the sentence". [34] Thus other impulsions may serve only to mitigate punishment but not to exclude liability altogether. Contrary to this, the RSFSR Code removes 'jus necessitatis' from the notion of crime. Thus, as in the case of 'necessary defence' the Code states that an act, even if it corresponds to the crime-composition as envisaged in the Special Part of the Code *is not a criminal act* if it is committed in a state of extreme necessity.

An act is qualified as being committed under 'extreme necessity' when *it is committed in order to eliminate a danger threatening the interests of the Soviet State, the interests of society and those of the person or threatening the rights of the person concerned or those of other citizens.* The elimination of the danger is subject to the fact that the danger within such circumstances could not have been eliminated by other means and if the harm caused by the defence is of a lesser significance or degree than the prevented harm.

As in the 'necessary defence' provision we again note in sec. 14 the dichotomy of 'community interests' and 'personal interests'. This is a radically expansive development of the classical doctrine of 'jus necessitates' which is restricted to when *a person* is "... costretto dalla necessita di salvare se o altri dal pericolo attuale..." (Sec. 54 of the Italian Code). One must qualify the Italian definition since "... danno grave alla persona non e da intendere in maniera ristretta, e cioe con riferimento ai soli danni alla vita ed alla incolumita individuale, ma in senso piu ampio, e cioe con riferimento a tutti quei danni che possono incombere sulla persona ...". [39] This expansive interpretation of harm to the person was even further expanded by the Russian provision to include the interests of the State and the community. According to Soviet legal doctrine this institute affords citizens the necessary possibility to participate in the protection of the legal order in the cases where a conflict of legal protective interests arises and in which the causing of harm to one side of these interests is the sole and only way to defend and protect the other more important and significant interests.

The act, according to Soviet and Italian law, has to be caused by the absolute necessity and if "il pericolo non sia altrimenti evitabile ...". Thus, the danger has to be actual. Here, actually permits probability and to make this clear, the Codice Zanardelli excluded the notion of 'pericolo imminente'. It is here that Soviet law differs from the Italian. Soviet legal doctrine provides that the danger must be *already threatening.* It must have already originated and has not ended. It must be actual and real.

Soviet law provides for several sources of danger which may create a situation of extreme necessity-natural calamities; physiological and pathological processes; animal attack; sources of extreme danger in different mechanisms; the human causing, or threatening to cause, harm to legally protected interests; and others.

Danger has to be real and not imaginary nor apparent. In the latter case criminal liability is excluded only when the person concerned errored in good faith and neither should nor could have foreseen that the danger was not real.

In Italian law the 'stato di necessita' operates if the harm caused by the

defence is less *or at least equal* to the harm eliminated. The RSFSR Code provides only and exclusively for the former situation i.e. when the harm is of a lesser degree. Thus, according to Russian law, the harm caused has to be of a less grave character than the original harm to be eliminated. Contrary to the Antolisei's theory that the state is not interested in what 'particular' harm was caused, if at least an equal one is eliminated, the Russian provision shows that the state *is* interested, so much so that it provides only for those cases in which the harm caused is of a lesser degree and it does not provide for harm equality as does Italian law. The question of the relationship between the harm caused and the harm eliminated is a question of fact. Again, here the Soviet law has to take the social-political factor into account i.e. the social-political content of the interest harmed and the interest which was threatened by the danger. Soviet doctrine states that in balancing interests involving life and property, life has to be given legal privilege. Since Soviet law does not admit of harm equality, it is an accepted and recognised fact that saving one's life by causing the death of another person is not accepted as a case of extreme necessity and is in fact a criminal act.

Thus, one may conclude here that the causing of greater harm to eliminate a lesser harm or danger is qualified as an act having a dangerous social character. Furthermore, if the original harm is not eliminated, criminal liability subsists for the harm caused in trying to eliminate the former. The motive to eliminate harm is however accepted by Russian law as an element affording diminishing responsibility.

The court has discretion in applying a latitude of possibilities when the harm caused to eliminate danger causes harm to third party's rights. Soviet doctrine underlines that sec. 14 is applicable to all citizens but it cannot be applicable to a certain category of people in the performance of their duties as for example, military-service persons, police-executive, and others.

The RSFSR Code does not speak of 'costringimento psichico' as does sec. 54 of the Italian Code and in a certain sense section 33 of the Maltese Code as well and it is debatable (supra) whether the first part of sec. 14 may infer the possibility of application in a situation of need "lo stato di bisogno" as in Italian law.

Sec. 15 of the RSFSR Code explicitly provides for criminal laibility for the preparation of a crime and for an attempt of the crime. The section positively separates both situations. It defines 'preparation' as the *finding of the means or measures to be taken or the devicing of the means or instruments or the intentional creating of conditions for the criminal act.* Punishment is provided in the Special Part of the Code. Thus, here the Soviet legislator's intention is radically different from that of the Continental. In fact 'preparation' in Soviet law is slightly similar to the provision given in Maltese section related to 'conspiracy' (sec.57.2). Preparation, in fact according to Soviet law includes for example, the working out, the devising of a common design (in complicity), the determination, the qualification of the persons, participants, members chosen and the participant's instigation and incitement. Although Maltese law does not recognize preparation as a criminal act, Maltese positive law seems linguistically to be accepting this attitude in relation to complicity: thus by

Maltese positive law a person shall be deemed to be an accomplice in a crime if he "... knowingly aids or abets the perpetrator or perpetrators of the crime in the acts by means of which the crime is *prepared* or completed ...".

This apparent contradiction was mitigated by Mamo A.'s assumption that in this case by the word 'preparation' is meant preparation which is followed at least by a commencement of the execution. This is a necessary attitude since according to Maltese law "there cannot be complicity unless there has been at least an attempted offence ...". [36]

Now, to continue our discussion concerning attempt and preparatory acts. Russian law differentiates three main stages of the criminal 'iter' i.e. the preparatory stage, the attempt and the completion of the crime. These stages are recognised as such in crimes having an objective, and having present the notion of direct intention.

Preparatory acts are defined by Russian law as *those objective and subjective elements listed in the first part of the section which form per se an intentional behaviour of a socially dangerous character, which in itself creates the necessary conditions towards the subsequent committing of the crime.*

The RSFSR Code, like the Maltese Code is a certain respect, recognises that for particular acts, the above mentioned actions constitute in themselves independent compositions of other qualified crimes, as for example certain crime against the safety of the state, banditry, and others. According to Soviet law, in these latter crimes there is no possibility of attempt, since the preparatory stage overlaps with the crime completion.

Similarly, Maltese law provides that the mere agreement on a mode of action whatsoever directed against the safety of government (sec.55,56) is a crime in itself, which is aggravated by any preparatory measures taken for the carrying of the crime into effect.

One must state that Soviet doctrine is conscious of the fact that the working out of a common design, the elimination of obstacles and all other acts directed to the creation of necessary conditions permitting the completion of the crime *do not always create an immediate danger,* neither may they be assumed to be establishing the actual presence of danger and furthermore do not as yet at such a stage form the substantial part of the crime-composition. But Soviet doctrine underlines that it is the existence of such acts that secures the necessary conditions for the consummation of the crime in question. Due to this fact and within such parameters determining the level of 'necessary conditions', the court is given powers to determine liability and punishment in cases that involve preparation. The court has to take account of the character and level of social danger created by such acts; the degree of consummation of the criminal intent and the causes preventing the completion of the crime. Thus, here within the notion of 'preparatory acts' the determining role in establishing liability is not only the degree of danger but the criminal intention present.

Many authors believe that due to this relative exclusion of the difference between preparatory and executive acts Soviet law comes closer to the Italian provision regulating 'attempt'.

Attempt is by the RSFSR Code defined as an *intentional act immediately*

directed towards the committing of the crime, if such a crime is not completed due to causes independent of the will of the offender. Thus attempt is that stage of activity of a criminal character having intentional encroachment as its basic element directed against an object which is protected by law, subsequently putting such an object in immediate danger of being harmed but stopping short of causing harm due to causes which do not depend on the will of the person concerned. According to Soviet doctrine the difference between preparatory acts and attempt is the fact that during the latter there is the development of an actual encroachment on a concrete object. This doctrinal explanation is close to the Maltese 'commencement of the execution of the act' but per se is left unprovided for by the provisions of the RSFSR Code. Furthermore Soviet law recognises the notion of completed and uncompleted attempt.

The act within the concept of attempt is interpreted as being that act 'immediately' directed towards the committing of the crime, which is provided for in the Special Part of the Code and part of the integral objective side of the criminal act. Another element of attempt is that such act must have put the object protected in immediate danger.

As one can note, the RSFSR provision does not, positively provide for the 'idoneita' of the act as in Italian law (and not idoneita of the means as Mamo states). It seems that the former provides for teleological iter of the act, while the Italian provides for the ''non equivocita'' character of the acts. In fact the Italian Code speaks of the univocita and of the idoneita of the acts, the unequivoal and sufficient/suitability character of the acts. The author is inclined to believe that the Russian version of the words 'direct' and 'immediate' are in fact manifesting the element of 'univocita' but not necessarily 'idoneita' although this may be implied.

In fact Italian positive law has counterbalanced its elimination of the difference between the preparatory act and the executive act by providing instead for the univocita of the acts determining the criminal intention.

The author believes that the same situation can be inferred from the RSFSR provision. [37]

The RSFSR Code, unlike the Maltese provision but similarly to the 1889 Italian Code speaks only of ''independent of the will' leaving out 'fortuita' for much the same reasons as those explained by Mamo A. Further, Italian positive law instead of providing for 'volonta' gives the positive qualification of ''quando l'azione non si compie o l'evento no si verifica ...'', i.e. ''qualunque causa tranne lo stesso recedere della volontà del soggetto dall' azione ...''. [38]

Theoretically for Russian law, the punishment for a preparatory act and for attempt is the same as that of the completed crime. But case-law has shown that for the former a ''less severe punishment'' is inflicted.

This equalization of liability seems to be unfair although the provision goes on to qualify that in inflicting the punishment the court is bound to take into consideration the character and degree of social danger of the acts committed, the degree or rather the level of the achieved criminal intent and the causes that hindered and prevented the completion of the crime.

This aspect if analysed on a theoretical level conflicts with sec. 49 of the Italian Code which provides for an exemption of punishment *ex conditio jure*

and with the implied position of exemption of punishment in cases of the use of impossible means in attempt. In practice the expression 'socially dangerous act' may help to extenuate the punishment in Soviet law, but also having a dangerous nuance.

Voluntary desistence (sec. 16) is provided for by a separated section. It is substantially similar to the Maltese and Italian provisions: *a person who voluntarily desists from the completion of the crime is criminally liable only if the factually committed acts form a crime composition of a different crime.* The formulation here has created an anomaly in the sense that it gives the impression that a person voluntarily desisting may be liable for *this* attempted crime if the acts committed by him do form *another different crime.*

Of course this may be only a linguistic anamoly since in reality the offender is liable only *for* the acts already committed and if these form the necessary crime-composition. Thus, if the factually committed acts do not form part of a positively defined crime, then, the offender is exempt from liability. As in Italian law, "... nei casi di desistenza volontaria ... il colpevole soggiace soltanto alla pena per gli atti compiuti, qualora questi constituiscono per se un reato diverso". [39] which seems to be the source of the Russian provision.

By 'voluntarily', Soviet law understands a final discretion in the desistance from any acts directed towards the completion of the crime; an important element is the fact that the offender is conscious of the possibility of a successful result of his criminal act. If desistance is caused by the apparent impossibility to complete the crime, then the offender is still liable. This latter case is regarded by Soviet law as being of a forced desistance and not of a voluntarily character.

As in Maltese law, motive plays no part in determining the existence of desistance.

Although the objective side of this desistance is qualified as 'forbearance' or 'inaction' (i.e. a complete and final discontinuance of the already initiated acts directed towards a criminal activity), such forbearance is not always enough to bring about the exemption of liability. In case social dangerous consequences resulted from such acts, than a mere inaction will bring about liability. The desistance here has to take a very active form of action in order to prevent the birth of such results. This position is clear especially when one analyses 'complicity': and 'inaction' by the instigator will not be enough to exempt him from liability subsequent to the crime committed by the principal--a direct active intervention to prevent the commission of the crime is necessary.

Other crimes positively require a denouncement act in addition to the act of desistance.

Soviet law accepts the juridical reason for impunity in these cases, basing its acceptance as does Maltese law, on the fact that the will "to commit the crime...is negatived by a contrary determination of the same will of the agent ...". And as in the above paragraph, one can see that the Soviet provision is very similar to the Maltese one in that the latter also includes forebearance from doing any further acts, as well.as the counter action directed to prevent any effects ensuing.

Like Italian and Maltese law, Soviet law recognises, though not positively the concept of 'recesso attivo' i.e. when "il colpevole ha condotto a termine l'attivita esecutiva e desiderando, per riflessioni o fatto sopraggiunto, evitare il verificarsi dell'evento, agisce per impedirlo ...". [40]

The difference from the Maltese position is that while the latter includes the counter action of the agent directed *to undo the acts already done* A. exempting from liability, the Italian and Soviet provisions "non importa l'impunita, ma solo una diminuzione della pena ...".

Complicity is defined in sec. 17 as the intentional joint participation of two or more persons in committing a crime. This is very similar to the Favata definition that "... concorso di persone nel reato si ha quando piu persone concorrono nel medesimo reato...". [41]

The Russian school of legal thought underlines that complicity includes (a) plurality of agents, (b) realisation of the objective element of crime as envisaged in the special part of the Code, (c) a casual link and 'contribution' to the event, (d) the 'volonta' in participating, (e) the consciousness of participating in a common design and (f) the awareness of availing of the common realisation.

Since, Soviet law like English law believes that a collaboration between persons or groups increases the danger of their actions, a crime committed in complicity is an aggravating circumstance (v.RSFSR Criminal Code s. 39). Subject to the totality of circumstances envisaged in the above six characteristics Soviet doctrine divides complicity into simple and complex.

Simple complicity implies the activity of co-principals while complex complicity includes the different roles played by different agents i.e. principal, organiser, instigator, accomplice. All participants are linked to the principal by having a causal relationship to the crime. Thus, the accomplice assists the principal in the consummation of the crime, or the instigator strenghtens the principal's intention and desire while the organiser commands and organises the crime. Thus, sec. 17 establishes the liability of the principal together with the liability of those persons who, although do not commit directly the criminal act, create the necessary conditions for the principal's action.

The persons involved are regarded as accomplices only if their action and the action of each is considered as being of social danger i.e. it plays an essential role in the criminal act or in the conclusion of the criminal result. Russian legal doctrine recognises that complicity may be composed of omission and commission.

Joint participation is defined by Russian doctrine as a material side of the act and includes--(a) the acts of each accomplice are necessary conditions for the actions committed by the others; (b) the criminal result is common and integral to all the accomplices; (c) the acts of each is integrally linked in a causal relationship to the common criminal result.

The subjective side consists in the intention. As in Maltese law, legal responsibility is based on the 'mens rea' participation in committing a socially dangerous act having the crime-composition of a provision defined by law.

Punishment is effected according to the level and characteristics peculiar

to the particular participation of the person per se. The court has to take account of the factual role and participation of each, the activity manifested by each and the persistence involved in the consummation of the act. Soviet law of complicity-punishment is based on an individualistic approach and hence sec. 17 does not equalise, at least in a positive sense, the principal and the accomplices' liability as Maltese law does. On the contrary sec. 17 obliges the court to take into account the concrete and individual role of each participant.

Soviet case-law accepts the principle that personal circumstances are not communicable. It also accepts as Maltese positive law does that any aggravation of crime can be imputable only to the person who commits the act.

Sec. 17 recognises the following as co-participants to the crime: the principal, who is the person directly committing the crime; the organiser who is the person organising the committing of the crime or who leads/heads its commitment; and the instigator who is, the person who persuades; the accomplice, who is differentiated from co-participant is the person who promotes the crime by means of advices, instructions, allotment of means or by the elimination of impediments. The accomplice is also that person who prior to the act promises to harbour the criminal, the means used and the instruments used for the completion of the criminal act or to hide any tracks of the crime or the objects received or acquired by the criminal act.

This section is also applicable to the corresponding sections related to (a) criminal group, (b) criminal organization, (c) criminal gang. (v. sec. 72-77). Soviet law, like Maltese law separates complicity from other acts which though being somewhat and even closely linked to the crime are not conditional for its commission and/or consummation, eg: concealment-harbouring, misprision, connivance. The latter two notions are provided for separately in sec. 18 and sec. 19.

These provisions create liability only for cases specially provided for in the Special Part of the RSFSR Code.

Sec. 18 (Harbouring-concealment) underlines that this section is applicable only for that concealment-habouring which was not promised prior to the crime, implying complicity-liability for such promise. This is similar to the Maltese and Italian position stating that "if before the fact a promise is made of some help to be given after the fact then that promise becomes a form of complicity because it encourages the author to perpetrate the offence ...".

For certain particular types of acts of complicity, RSFSR law like Italian law punishes the act of complicity not only when factual acts are implemented or a result ensues but also for the mere fact of appertaining to such an 'organization'. This is also present in Maltese law especially in sec. 63-83 where the Code speaks of crimes against the public peace, in sec. 58 re:conspiracy and in sec. 83 concerning the promotion of political object by use or display of physical force.

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