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The Principle of Analogy in Sino-Soviet Criminal Laws

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I. Introduction

“Analogy” is a principle of substantive criminal law which permits the conviction of an accused despite the absence of any defined criminal behavior.¹ If the actions of the accused are perceived to be inimical to the socio-political order then he may be found guilty of a defined crime which prohibits analogous behavior. Analogy may also be employed in a more restrained fashion as a principle of sentencing law. If the accused has committed a defined crime which is now perceived to be more deleterious his punishment may exceed the maximum legislatively mandated sentence. Analogy is, therefore, one method of defining and punishing acts which are perceived to be iniquitous. In this application, analogy is qualitatively distinguished from liberal statutory interpretation,² and it frequently includes or accompanies the retroactive application of law.

The principle of analogy is neither the product of twentieth century jurisprudence,³ nor is its application confined to regimes which Westerners characterize as totalitarian.⁴ However, it was employed until 1958 in the Soviet Union and it is still in use in the People’s Republic of China. Our focus will be primarily on these modern applications.

The use of analogy is anathema to the Western tradition. The contrasting philosophy in Europe is expressed in the maxim *Nulla crimen sine lege, Nulla poena sine lege*,⁵ the essence of which is

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1. See generally, Note “The Use of Analogy in Criminal Law” (1947), 47 Col. L. Rev. 613-629; “The Principle of Analogy in Criminal Law: An Aspect of Soviet Legal Thinking”, Research Project on the USSR, Mimeographed Series No. 55, New York City (1954).

2. J. Hall, “Nulla Poena Sine Lege” (1937), 47 Yale L.J. 165-174; J. Hall, “General Principles of Criminal Law”, beginning at 35 (1960).

3. See *Analogy in History*, infra.

4. Note, supra note 1 at 628.

5. Hall, supra note 2 (1937) at 165 has written: “*Nulla poena sine lege* has several meanings. In a narrower connotation of that specific formula it concerns the treatment-consequence element of penal laws: no person shall be punished except in pursuance of a statute which fixes a penalty for criminal penalty. Employed as

that no person may be punished except under the authority of a statute which defines the act as criminal and prescribes the permissible punishment. This maxim is usually found to exist concomitantly with the requirement that penal statutes must be strictly construed and not applied retroactively. A similar tradition exists in Anglo-American law, where the principle *nulla poena sine lege* is included within the group of principles known as the rule of law. The dichotomy between analogy and *nulla poena sine lege* is our second and subsidiary enquiry.

The doctrinal justifications and actual applications of analogy have been protean. Analogy permits and encourages flexibility.⁶ It imbues the administration of criminal law with a chameleon character. Westerners view this chameleon character as corrosive to our concept of justice. The study of analogy may therefore provide one method of contrasting fundamental beliefs.

II. Analogy in History

1. Tsarist Russia

It is not surprising that Lenin, who characterized law as politics,⁷ sought an early renunciation of pre-revolutionary laws and on November 30, 1918, the application of these earlier laws was explicitly prohibited.⁸ However, analysis of the early developments in Soviet legality indicates that not all traces of the past were eradicated. In particular, the development and application of analogy in the new regime is not without an historical foundation.⁹

nullum poena sine lege, the prohibition is that no conduct shall be held criminal unless it is specifically described in the behaviour circumstances element of a penal statute. In addition, *nulla poena sine lege* has been understood to include the rule that penal statutes must be strictly construed. A final, important signification of the rule is that penal laws shall not be given retroactive effect." Also see, J. Hall, *supra* note 2 (1960); Claser, "Nullum Poena Sine Lege" (1942), 24 *Journal of Comparative Legislation and International Law* 29; R. Miller, "Comparison of the basic philosophies underlying Anglo-American Criminal Law and Russian Criminal Law" (1954), 23 *University of Kansas City L. Rev.* 62 at 72-80 (1954), G. Williams, "Criminal Law, the General Part" 2d (London: Stevens, (1961), chapter 12.

6. J. Hazard, *Communists and Their Law* (1969), 69-101 ("Flexibility versus Stability").

7. "A law is a political instrument; it is politics;" discussed by Hazard, *Id.* at 69.

8. (1917-1918), *Sob. Uzak. RSFSR*, No. 52, item 889. An annotation specifically stated, "reference in judgements and decisions to the statutes of the overthrown governments is prohibited." See Starosolskyj, *supra* note 1 at 9.

9. N.S. Timasheff, "The Impact of the Penal Law of Imperial Russia on Soviet Penal Law" (1950), 12 *American Slavic & East European Review* 441.

The Penal Code of 1845 contained in article 151 the statement that “if the law does not contain a definite provision about the crime which is being tried, the court sentences the offender to the punishment applicable to a crime most similar to the one committed, as to kind and gravity.”¹⁰ In practice, the reach of this provision was limited, at least during the last two decades of the nineteenth century,¹¹ to sentencing law when a defined crime was silent on the applicable punishment. Article 151 was eliminated by article 1 of the 1903 Penal Code in its provision that “an action is considered criminal if, at the time of its performance, it was prohibited by law under the threat of punishment.”¹² Thus, not only analogy, but also retroactive application of law was abolished. This continued to be the law until 1917.

2. *Imperial China to 1949*

In China, the criminal laws of the last Imperial dynasty (Ch’ing 1644-1912) provided for their analogous application.¹³ For example, s. CCCLXXXVI provided that “whoever is guilty of improper conduct, and such as is contrary to the spirit of the laws, shall be punished, at the least, with 40 blows and when the impropriety is on a serious nature, with 80 blows.”¹⁴ Further in Professor Cohen’s opinion, new criminal laws were applied retroactively, and “when in 1912 the Ch’ing was succeeded by the Republic of China, there was no developed concepts of ‘rights’ of the accused as limitations upon the state.”¹⁵ It is difficult to reconcile this with the opinion of Fu-Mei Chang Chen who has concluded that the principle *nulla poena sine lege* was a part of traditional Chinese law.¹⁶ She has written that “the Ch’ing judges

10. *Id.* at 449.

11. *Id.* at 449.

12. *Id.* at 448.

13. See generally, Chen, “On Analogy in Ch’ing Law” (1970), 30 *Harvard Journal of Asiatic Studies* 212.

14. Translated in Cohen, “The Criminal Process in the People’s Republic of China 1949-1963”, (1968) 339. Also note Section XLIV: “From the impracticability of providing for every possible contingency, there may be cases to which no laws or statutes are precisely applicable; such cases may then be determined, by an accurate comparison with others which are already provided for, and which approach most nearly to those under investigation, in order to ascertain afterwards to what extent an aggravation or mitigation of the punishment would be equitable . . .”:
translated in Cohen, 338-339.

15. *Id.* at 7.

16. Chen, *supra* note 13, at 214.

rarely employed the principle of analogy to create new crimes and . . . the code prohibits *ex post facto* penalization.”¹⁷ This assessment is supported by Meijer who, commenting on the state of Chinese law at the turn of the century, wrote that “the legal provisions were models, and analogical application was allowed . . . analogy, however, was only to a small extent subject to the discretion of the judge, rules existed in this respect, which are found in appendices in some editions of the code.”¹⁸

During the early 1900s serious attempts were made to modernize Chinese criminal law. A draft code in 1907 contained provisions abolishing analogy¹⁹ and in article 10 specifically set out the principle *nulla poena sine lege*.²⁰ However, this draft, and subsequent revisions, was never promulgated by the Emperor. The new code was promulgated soon after Sun Yet-Sen’s party came to power.²¹

Analogy was used by the communists during the transitional period 1924 to 1949. Article 38 of the Statute of the Chinese Soviet Republic Governing Punishment of Counterrevolutionaries, promulgated in 1934, provided that “any counterrevolutionary criminal behavior not included in this statute shall be punished according to the article in the Statute dealing with similar crimes.”²² The Communists therefore rejected the concept *nulla poena sine lege*.²³ Analogy was not the only instrument of expediency. There were few legal codes, and the statutes that existed were ambiguous. Meijer has written that “the most encompassing word describing the legal policies of the Chinese Communists during the 1924-1949 period is flexibility.”²⁴

17. *Id.* at 216.

18. M. Meijer, *The Introduction of Modern Criminal Law in China* (Bafavia: Koninklijke Drukkerij de Unie, 1967), p. 4.

19. *Id.* at 68.

20. *Id.* at 71.

21. *Id.* at 119.

22. Translated in P. Griffin, *The Chinese Communist Treatment of Counter-revolutionaries, 1924-1949*, (Princeton: Princeton University Press, 1976), p. 167.

23. *Id.* at 51; see also, Lin, “Communist China’s Emerging Fundamentals of Criminal Law” (1964), 13 *Amer. J. of Comp. Law* 80 at 23.

24. Meijer, *supra* note 18 at 143.

III. Analogy and War Communism

1. Soviet Union (1917-1922)

The period from the 1917 Revolution to the establishment of Federation on December 29, 1922 saw a dramatic shift in fundamental notions of Soviet legality and, in particular, in the sources of law.²⁵ There is no evidence that the Provisional Government intended to abandon the 1903 Penal Code and its principle *nulla poena sine lege*.²⁶ But following the establishment of Bolshevik power the former sources of law were quickly abandoned. Also the definition of crime as a violation of an established norm was quickly replaced by a "material" concept²⁷ according to which crime consisted in any socially dangerous activity. This developed logically from the Marxist belief that "law rests upon society, it must be the expression of the general interests that spring from the material production of a given society."²⁸ Similarly, the bourgeois "justice" had been rejected by Engels as "nothing more than an expression of the existing economic relations dressed up with idealistic, bombastic gilding."²⁹

The function of Soviet law before it "withers away" was not to be the enforcement of defined norms, but the protection of the new proletarian rule from socially dangerous activity.³⁰ The principal source of law became the elusive notion of the socialist consciousness of law,³¹ supplemented by a few Decrees. Judges were instructed to breathe life into revolutionary legality by the individual application of their socialist consciousness. This appeared theoretically to involve the intuitive³² identification of new concepts of right and wrong emerging from the destruction of bourgeois society and law and the creation of a society to be erected on the bedrock of Marxist beliefs. In its application such legal nihilism was an invitation to rampant judicial legislation on an *ad*

25. See generally, Starosolskyj, *supra* note 1; V. Gsouski, "The Soviet Concept of Law" (1938), 7 *Fordham L. Rev.* 1.

26. "In general the legal viewpoint of the Provisional Government was that of preserving the 'continuity of legal order'", Starosolskyj, *supra* note 1 at 6.

27. See generally Starosolskyj, *supra* note 1.

28. Translated and discussed in Gsouski, *supra* note 25 at 5.

29. Translated and discussed in Starosolskyj, *supra* note 1 at 21. In response, one may question whether there is Soviet "Justice": see H. Berman, "The Law of the Soviet State" (1955), 6 *Soviet Studies*.

30. Starosolskyj, *supra* note 1 at 24.

31. *Id.* at 18.

32. *Id.* at 28.

hoc, case by case basis; or, at least, judicial creativity subject only to the judges' perceptions of Party policy.

The R.S.F.S.R. had enacted General Principles of Criminal Law³³ in December, 1919, but this legislation did not enumerate any defined crimes. The first code³⁴ enacted in the continental style of a general and special part became effective on June 1, 1922. The principle of analogy was contained in article 10 which provided that "in case of absence of a direct provision for a particular kind of crime in the Criminal Code, the punishment or means of social defence shall be applied, with observance of the rules of the General Part, according to those articles of the Criminal Code which provide for crimes most similar as to importance and kind."³⁵

Following ratification of the first Federal Constitution on January 13, 1924, Basic Principles of the Criminal Law of the USSR were enacted and these contained an analogy provision.³⁶ The 1922 R.S.F.S.R. code was replaced in 1926,³⁷ and analogy was restated in article 16: "if a socially dangerous act is not directly foreseen by the present Code, the grounds and limits of responsibility for its commission shall be based on those articles of the present Code, providing for crimes most similar in kind." Thus, analogy became a characteristic of Soviet criminal law and it remained so until 1958.

2. *People's Republic of China (1949-1953)*

In China, the period 1949 to 1953 is "roughly comparable"³⁸ to the period of war communism in the Soviet Union. The laws of the Nationalist regime were abrogated by the Chinese Communists in 1948,³⁹ and this was formalized in 1949, following the establishment of the People's Republic of China, by article 17 of the Common Program of the Chinese People's Political Consultative Conference.⁴⁰ A codification commission was set up to prepare new

33. December 12, 1918 (1919) 1 Sob. Uzak. R.S.F.S.R., No. 66, item 590.

34. (1922) 1 Sob. Uzak. R.S.F.S.R., No. 15, item 153.

35. Translated and discussed by Starosolskyj, *supra* note 1 at 16.

36. Translated and discussed, *id.* at 35.

37. Decree of November 22, 1926, (1926) L. Sob. Uzak. R.S.F.S.R., No. 80, item 600.

38. Cohen, *supra* note 14 at 9.

39. D. Buxbaum, "Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law" (1962), 11 *Int'l and Comp. Law Quarterly* 1 at 5.

40. Tao, "The Criminal Law of Communist China" (1966), 52 *Cornell L. Rev.* 43 at 49.

draft codes, but none were forthcoming. Instead, the early years saw passage of some individual statutes, usually enacted at the end of great campaigns. For example, The Act for the Punishment of Counterrevolutionaries, promulgated on February 21, 1951, provided for analogy in article 16: "Those who, with a counterrevolutionary purpose, commit crimes not covered by the provisions of this Act may be given punishments prescribed for crimes [enumerated] in this Act which are comparable to the crimes committed."⁴¹ Also, the Security Administration Punishment Act, promulgated on October 22, 1957, provided for analogy to the "most similar" enumerated crime.⁴² The retroactive application of law was permitted. The new laws were "of the most general and flexible kind."⁴³ The evaluation of one writer is that "in Chinese Communist criminal legislation the definition of specific crimes is either very broad and imprecise or is not made at all." Principles such as non-retroactivity of law and *nulla poena sine lege* were specifically regarded as anathema to public interest.⁴⁴

The Chinese justifications for the use of analogy during war communism and for some time thereafter was the same as the early Soviet position, which will be examined in detail in the next section. The argument is stated in the 1957 Peking Lectures in this manner:

The fact that the criminal law of our country permits analogy is intimately related to the present political and economic situation in our country. Our country is now in the period of transition to a socialist society. Everything is in the midst of ceaseless development and transformation. The criminal acts committed by the enemy and other criminals are of all types. They are difficult to calculate at the time criminal laws are adopted. Therefore, the present criminal laws of our country cannot include all the types of criminal acts which may possibly appear or are appearing. Although such acts occur separately, in order to guarantee (the continuance of) the struggle against those acts which are in substance socially dangerous but for which there are no direct provisions of current criminal legislation, it is necessary that judges be allowed the use of analogy in the conduct of their work.⁴⁵

41. Translated in Cohen, *supra* note 14 at 302.

42. *Id.* at 220.

43. Buxbaum, *supra* note 39 at 4.

44. Leng, "Justice in Communist China" (1967) at 42.

45. Translated in Cohen, *supra* note 14 at 332.

IV. Analogy Under the New Regimes

1. Soviet Union (1922-1958)

(a) Before Stalin

In the years from the 1920s until the formal abolition of analogy in 1958 there was a lively debate among Soviet theorists concerning the proper application of this principle, a debate which reflected changing concepts concerning the role of criminal law during the development of socialism and beyond. In the early years, the class character of Soviet law and the sharp distinction between political and non-political crimes conditioned the application of analogy. A 1924 theorist stated that the objective of criminal law was "the defense of the toilers' state from crimes and from socially dangerous elements."⁴⁶ In 1927 Krylenko stated that "in all instances, the interests of the whole, the duty to safeguard the social order are to be the decisive criteria."⁴⁷ Obviously, under such theories the protection of the individual is of little importance.

There were only two criteria established for the application of analogy: first, "the act to which a particular article of the special part is to be applied by way of analogy should conform to the general definition of crime provided for by . . . the Criminal Code; and secondly, the application of analogy should be of exceptional character."⁴⁸ This so-called general definition of crime means "any act or omission that is directed against the Soviet system or that violates the legal order established by the workers peasant power during the period of transition to the communist system."⁴⁹ A criteria of this kind can provide little doctrinal restraint. The evidence is that analogy was applied in both of its capacities, i.e. to define crimes and to increase penalties, and with particular vigor for crimes of a political nature. The impetus for the perceived necessity of analogy was the belief that class enemies were everywhere in the new Soviet state.⁵⁰

46. Piontkouskii, "Criminal Law of the R.S.F.S.R., General Part" (Moscow, 1924) at 215, translated in Berman, "Materials for Comparison of Soviet and American Law" (Harvard Law School, 1958) at 147.

47. Translated and discussed in Gsowski, *supra* note 25 at 2-3.

48. Piontkouskii, *supra* note 46, translated in Berman, *supra* note 46 at 148.

49. R.S.F.S.R. Criminal Code, translated in Berman, *id.* at 147.

50. P. Solomon, *Soviet Criminologists and Criminal Policy* (New York: Columbia University Press, 1978, p. 23.

The Soviet theorists of principal importance before the Stalinist era, and particularly dominant in the post-NEP period, were Pashukanis supported by Krylenko.⁵¹ Pashukanis developed the so-called “commodity-exchange” theory. In general, his belief was that the capitalist system was based upon barter or exchange, and, consequently, this was the foundation of capitalist law. The criminal law *nulla poena sine lege* manifested a principle of “equivalence”, a means of defining permissible retribution, by which the potential criminal was advised in advance of the price to be paid for particular forms of criminal activity. The belief was that criminal law should not be barter, the exchange of a definite penalty for a defined crime. Rather, a socially dangerous person must be detained until he is no longer socially dangerous. In destroying class enemies the targets should not be limited to criminals in the strict sense. The targets become anyone, to quote Krylenko, “who has not committed any crime at all but because of their connections with criminal surroundings or because of their past activity, they give reason to expect that they could commit a crime.”⁵² Indeed, his proposal was more extreme than the application of analogy under the 1926 Code. The proposal urged the elimination of specifically defined crimes and, concomitantly, the creation of crimes *ad hoc* upon the most flexible of principles. Crimes were to be considered either as especially dangerous, if of a political character, or less dangerous. Examples of these should be given, but there should not be specific definitions restraining judicial discretion and flexibility. Dr. Starosoloskyj has observed that there was a belief in the courts that the theories of Pashukanis and Krylenko would soon be drafted to replace the 1926 Code and this had a serious impact. Professor Hazard has written that:

This encouragement of complete disregard of the precise provisions of the code led to a broad application of the section permitting application by analogy to punish an act for which there was no definite section. The court practice had led to the result that no citizen could foretell what was a possible criminal act.⁵³

51. See generally, P. Fuller, “Pashukanis and Vyshinski: A Study in the Development of Marxian Legal Theory” (1949), 47 Mich. L. Rev. 1157; J. Hazard, “Reforming Soviet Criminal Law” (1939), 29 Journal of American Institute of Criminal Law and Criminology 157; Gsowski, *supra* note 25, Starosolskyj, *supra* note 1.

52. Translated in Starosolskyj, *supra* note 1 at 40.

53. Hazard, *supra* note 51 at 167.

(b) After Stalin

During the late 1920s and early 1930s the prediction had been for an early withering away of, among other things, criminal behavior. This belief was of fundamental influence in determining the scope of application of analogy and, of course, the theoretical rationalizations that were required. But with the perhaps surprisingly early announcement in 1936 that socialism had been achieved and Stalin's call for "stability of laws"⁵⁴ it was clear that an immediate re-evaluation of the continued efficacy of analogy was required. Neither the old theories, nor the old theorists,⁵⁵ would survive. The old theories were replaced by a call for a more restrained use of analogy as part of a more stabilized socialist legality for non-political crimes. Of course, the hunt for counterrevolutionaries was not abated by stability in non-political matters. The result was a less-than-peaceful "coexistence of law and terror".⁵⁶ The new theorist was Vyshinsky.

Vyshinsky clearly favored the continued but restrained use of analogy. In 1937 he wrote that "analogy does not free one from the necessity of applying legislation, nor give the court or prosecutor the right to declare criminal a particular act at its caprice . . . without referring to the specific law in effect".⁵⁷ Thus, he clearly identifies the requirement that the application of analogy must be linked to the application of the written law, which by 1940 was stated by one theorist to exist in a determination that the socially dangerous act is not covered by the special part of the code.⁵⁸ This theory resulted in the courts in the late 1930s allowing only a restrictive application of analogy.⁵⁹

54. "And now more than ever before there is a need for stability of laws", Stalin's speech at the VIII Congress of Soviets (1936).

55. Pashukanis, who from 1930 to 1936 headed the Institute of Socialist Construction and Law of the USSR Academy of Sciences, renounced his theories in 1937. This self-rehabilitation did not save his life. Krylenko was the People's Commissar of Justice in 1936. He disappeared in 1938.

56. H. Berman, "The Dilemma of Soviet Law Reform" (1963), 76 Harv. L. Rev. 929 (1963) at 932.

57. Translated in Berman, *supra* note 46 at 149.

58. A. Trainin, "Practical Commentary to Arts. 10 and 16-19 of the Criminal Code of the R.S.F.S.R.", Soviet Justice, 1940, No. 7, p. 6, translated in Berman, *supra* note 46 at 149.

59. H. Berman, *Soviet Criminal Law and Procedure* (Cambridge: Harvard University Press, 1966), p. 43.

Vyshinsky's argument for the continued use of analogy was challenged.⁶⁰ A number of theorists argued pragmatically that analogy was no longer needed to fight class enemies, and, more theoretically, that the existence of analogy as an invitation to judicial legislation undermined the stability of laws. The influence of this position became predominant, as evidenced by four draft codes between 1938 and 1952, each of which would have excised analogy from the criminal law.

This influence was, however, attenuated by the intervention of World War II. The war years were perceived as a period during which there was an increase in new and unanticipated forms of socially dangerous behavior, and an increase in the degree to which existing crimes were socially dangerous. Hence, the flexibility of analogy was required in both the definition of crime and the determination of appropriate punishment.

Following the war further doctrinal restrictions on the use of analogy continued, and by 1948 many theorists openly advocated its abolition. In that year the All-Union Institute of Juridical Sciences of the Ministry of Justice set out five criteria⁶¹ for the application of analogy: 1) the act must be socially dangerous within the meaning of article 6 of the R.S.F.S.R. code; 2) the act must be absent from the list of crimes contained in the criminal legislation; 3) the act must be classified under the most similar article of the code; 4) an act cannot be characterized as criminal by analogy if the law limits responsibility under some article by special circumstances not present in the given act; and, 5) the court cannot exceed the maximum punishment provided by the article which the court applied by analogy.

The trend represented by these restrictions continued after Stalin's death in March, 1953, and in 1956 two theorists labeled Vychinsky's belief in the continued necessity of analogy as "erroneous".⁶² In their opinion the preservation of analogy "is not only not warranted by necessity but . . . is even capable of causing damage to the further struggle for strengthening of socialist legality".⁶³ These ideas represent part of the de-Stalinization desire to effect liberal reforms. Analogy was no longer necessary to satisfy

60. See Starosolskyj, *supra* note 1 at 47-50.

61. Translated in Berman, *supra* note 46 at 158-159.

62. *Id.* at 160.

63. *Id.* at 160.

“Stalin’s passion for security”.⁶⁴ Also, it was no longer necessary to fight class enemies. There was a perceived reduction in that population, a perception ideologically required to lay the foundation for the 1961 announcement that “a state of all the people exists”.⁶⁵ There is good evidence that these developing ideological shifts affected court practice, and from the end of the war until the late 1950s “analogy was hardly ever applied in practice”.⁶⁶

2. *People’s Republic of China (1953-1980)*

The changes that were occurring in the Soviet Union with the rise of stability of law were not adopted or paralleled in China. That this was to be the case was not at first apparent. During the period 1953-57 the Chinese were preparing “to develop further a Soviet-style legal system”⁶⁷ and they were acting in close consultation with the Soviets.⁶⁸ This was to include a new criminal code. During the movement “let a hundred flowers bloom, let a hundred schools contend” there was considerable criticism of Chinese legal nihilism. In fact the 1957 Peking Lectures predicted the possible abolition of analogy. The author suggested that “we believe . . . after several years, following the development of the socialist construction of the State and the daily enrichment of experience in struggling against crime, under circumstances in which the criminal code is even more thorough and complete, we may consider abolishing the system of analogy”.⁶⁹ The Lectures also called for conditions restricting the use of analogy and proposed consideration of an additional requirement that its use should be subject to approval by higher courts. Further, the Lectures made some attempt to articulate the essential elements of criminal conduct.⁷⁰

64. J. Hazard, *The Soviet Legal Pattern Spreads Abroad: Law in the Soviet Society* (1964), 293.

65. This announcement is most significant. See J. Hazard, *Communists & Their Law* (1969), 450.

66. B. Nikiforov, “Fundamentals of Soviet Criminal Law” 23 *The Modern L. Rev.* 31 at 34. See also F. H. Feldburgge, “Soviet Criminal Law — The Last Six Years” (1963), 54 *The Journal of Criminal Law, Criminology, and Police Science* 249 at 261-262.

67. Cohen, *supra* note 14 at 11.

68. Hazard, *supra* note 65 at 294.

69. Translated in Cohen, *supra* note 14 at 337.

70. Cohen, “Reflections on the Criminal Process in China” (1977), 68 *The Journal of Criminal Law & Criminology* 323 at 335.

In 1953 a Chinese scholar wrote an article entitled "The Question of Whether There Should or Should Not be Reasoning by Analogy in Our Nation's Criminal Law".⁷¹ He recommended that use of analogy should continue but subject to four criteria: 1) the criminal's act must harm the entire country; 2) there must be no written provision covering his action in the criminal law; 3) the law must deem the general activity a criminal offence; and 4) the analogy must be made to the closest existing principle in the criminal law.

These potential reforms were abruptly and effectively stopped by the anti-rightist movement beginning in 1957.⁷² The proposed Criminal Code was not promulgated. With regard to analogy, one Chinese commentator stated in 1958 that "to propose now the future abolition of analogy is not only unrealistic, it is also futile".⁷³ More generally, it has been said that 1957 marks the beginning of distinct Soviet and Chinese legal models.⁷⁴ The reasons for the distinct developments is not easily identified. It may be explained by the obvious fact that the Communist regime in China encountered more difficulty than the Russian Bolsheviks in effectively consolidating its power.⁷⁵ The reason may be ideological. The Chinese have not accepted the Soviet announcement in 1961 that a "state of the entire people" exists. To the Chinese, ideology demands the continued existence of class enemies until communism is achieved.⁷⁶ These are, in the socialist mind, more than mere slogans. Professor Hazard has observed that "the Soviet jurists in treating their criminals as wayward workmen rather than class enemies take the position that they must be given protection against conviction if they are innocent".⁷⁷ However, for the Chinese the continued existence of enemies of the people requires the use of analogy as one element of the flexibility needed to root out counterrevolutionaries. As recently as 1977, Professor

71. Ts'ao, in *Studies on Political Science and Law* (No. 3, 1953) at 11.

72. See generally, Leng, "The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence" (1977), 68 *The Journal of Criminal Law & Criminology* 356 at 358.

73. Ming, "Some Opinions about Lectures on the General Principles of Criminal Law of the PRC", *CFYC*, 4:73 (1958), translated in Cohen, *supra* note 14 at 339.

74. Hazard, *supra* note 65 at 293.

75. Lin, "Communist China's Emerging Fundamentals of Criminal Law" (1974), 13 *The American Journal of Comparative Law* 80 at 92.

76. Hazard, *supra* note 65 at 295.

77. *Id.* at 296.

Cohen indicated that "China has no belief that it is better to let many guilty go free than to convict a single innocent person".⁷⁸ Finally, the continued use of analogy in China after 1957 may simply have reflected cultural differences. Professor Hazard has written that "the traditional Chinese concepts of conciliation and lack of rigidity in law may have started to re-emerge in 1957".⁷⁹ Quite possibly then the answer lies in the difference in the blend of culture and Marxism in China and the Soviet Union.

Whatever the reason for the Chinese developments in the late 1950s, there can be no question that the model then introduced was to "enjoy" a long life. In 1977, Professor Edwards observed that the Chinese "reject the very concepts of stability and predictability that in the West have given rise to codification and published judicial decisions".⁸⁰ In this climate the principle of analogy cannot be abolished, but whether it has frequently been used is more difficult to determine. A commentator stated in 1962 that "the absence of any systematized criminal code has required the authorities to apply the analogy principle far more widely than has been the case in the USSR".⁸¹ However, in 1977 Professor Chiu observed that:

In judicial practice, even the discussion of whether analogy or retroactivity should be used is not relevant to an accused, because the PRC has only a few pieces of criminal legislation. It does not seem possible for legal personnel to make widespread use of the doctrine of analogy or retroactivity. Moreover, in rendering a sentence, a PRC court is not required to cite the legal basis of its decision, except to include the vague expression of "Sentence . . . according to law".⁸²

The few pieces of legislation referred to are essentially those already in existence in the 1950s as no significant criminal legislation was enacted in the 1960s or 1970s.

78. Cohen, *supra* note 71 at 339.

79. Hazard, *supra* note 65 at 295. See also, Lin, *supra* note 76 at 84.

80. R. Edwards, "Reflections on Crime and Punishment in China with Appended Sentencing Documents" (1977), 16 *The Columbia Journal of Trans-national Law* 45 at 52.

81. Lin, *supra* note 76 at 87.

82. H. Chiu, "Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents" (1977), 68 *The Journal of Criminal Law & Criminology* 384 at 189.

V. *Analogy and the Modern Era*

1. *Soviet Union — The 1958 Reforms*

In 1958 the Supreme Soviet passed the Basic Principles of Criminal Legislation. This represents a significant turning point in Soviet criminal law. The Basic Principles are, of course, faithfully reproduced in the Republic Codes, and the new R.S.F.S.R. Code was adopted in 1960. Article 3 abolishes the principle of analogy in providing that “only persons guilty of committing a crime, that is, those who intentionally or by negligence have committed a socially dangerous act specified by the criminal statute, shall be held responsible and incur punishment”.⁸³ Also, the retroactive application of law is now prohibited by article 6.

It should be noted that the abolition of analogy and retroactive application of law does not necessarily equate with the practice of the principle *nulla poena sine lege*. The flexibility achieved through analogy may be achieved in other ways, principal among these being the use of vaguely defined crimes. If a specific crime is defined so broadly as to encompass myriad forms of behavior, then the formal abolition of analogy is a facade. As each cell contains its own genetic code, each vaguely defined crime allows within its own meaning all that was permitted by analogy. My present purpose is simply to point out the possibility.⁸⁴

2. *People's Republic of China — The 1980 Criminal Law*

On July 1, 1979 China's first comprehensive Criminal Law since the Communist revolution was passed by the Second Session of the Fifth National People's Congress. This law became effective on January 1, 1980, together with a new law on Criminal Procedure. The form of these laws is modern. The Criminal Law contains both general and special provisions. The general provisions set out the “guiding ideology, task and scope of application” (chapter 1) of criminal law, the nature of “offences and responsibility for a crime” (chapter 2), and detailed general provisions on “punishments” (chapters 3 and 4) together with miscellaneous “other provisions” (chapter 5). The specific provisions contain the definition and range of punishment for numerous crimes to be found

83. Translated in Berman, *supra* note 60 at 145.

84. See B. Ramundo, “Analogy Reincarnated: A Note on the Form and Substance of Soviet Legal Reform” (1963), 19 *Military Law Review* 152.

in any modern criminal code, together with crimes of more "ideological" content such as the detailed provisions on "counter-revolution" (article 90 to 104).

The new Criminal Law retains the principle of analogy subject to one important restriction. Article 79 provides: "Those who commit offences not explicitly defined in the specifics of the criminal law may be convicted and sentenced according to the most appropriate article in the criminal law. However, approval must be obtained from the Higher People's Court". The definition of an "offence" is provided in Article 10:

Any action which endangers state sovereignty and territorial integrity, jeopardizes the dictatorship of the proletariat, sabotages socialist revolution and socialist construction, disrupts public order, encroaches upon the property of the whole people, the collective or legitimate private property, infringes upon the personal rights, democratic rights of citizens, or any other action which endangers society and is punishable according to law is an offence. However, if the offence is obviously a minor one and if its harm is negligible, it should not be considered a crime.

Thus, the field of application of analogy is very great indeed. For sentencing law, article 59 contains an "analogy-like" provision in that it allows imposition of a punishment less than the minimum where that minimum is "too heavy based on the concrete conditions of the case". Retroactive application of the Criminal Law is prohibited in article 9, except that the new law exonerates an act which is criminal under former law but is no longer considered an offence and the new law may mitigate punishment that would have formerly been imposed.

The retention of analogy together with the ban on retroactivity and numerous "safeguards" now to be enjoyed by the accused presents an unusual juxtaposition. It is as if the Chinese have made a great forward leap, but with slight hesitation on take-off. This raises two questions: why was analogy retained and will analogy be used?

The answers cannot, at this time, be entirely satisfactory. There is no available empirical data which would provide an answer to the second question, and there has been little doctrinal comment which directly answers the first question. However, some clues are provided by the recent comments of the Central People's Broadcasting station.⁸⁵ On July 13, 1979 this station began a series

85. "Lectures on the Criminal Law", translated in (1980), 13 Chinese Law and Government 1.

of thirteen lectures to the public to explain the new Criminal Law. Lecture III contains a clear indication that the conditions which are usually seen to justify the use of analogy, i.e. the constantly changing nature of crime, continue to exist. The speaker noted that “another factor to consider is that the answer to the question of which conduct belongs to the category of crime is not a fixed and unchanging one — there is some conduct that was not previously considered criminal that, as a result of change of circumstances, may under today’s laws be defined as criminal”.⁸⁶ It should be noted that this statement was made in the context of an explanation of the etiology of crime, and not in direct reference to analogy. Indeed, the 112 page transcript of these lectures does not contain a single direct reference to analogy. In addition to the fact just quoted, one must recall the basic ideological and cultural distinctions between the Chinese and the Soviets. It may be that Chinese culture and their brand of Marxism require the contained possibility of using analogy, whether or not it is in fact used.

It is unlikely that analogy will receive frequent use in the People’s Republic of China. Analogy flourishes when there is a widespread perception that flexibility is required. The use of analogy is an offspring of a climate of legal nihilism. The 1979 Lectures indicate that this is exactly what the Chinese wish to avoid. In Lecture IV the author states that “we must resolutely oppose the handling of cases without regard for existing law and without adherence to existing rules, the substituting of feeling for policy, the reliance on words instead of on law, and other such conduct which violates law and discipline”.⁸⁷ This theme, which is found throughout the lectures, is repeated with particular vigor in the final lecture:

Only through the strict implementation of the laws can the national will and the people’s will be correctly embodied. Otherwise, the laws lose their sanctity and authority and become so many pieces of paper, and the national will and the people’s will cannot be realized. This is something the country and the people will not permit. Up to now the Criminal Law has not been implemented, China’s criminal laws are not complete and crimes are often ascertained and penalties meted out on the basis of a leader’s words . . . Once the Criminal Law has gone into effect, when a criminal case comes up, it will absolutely not do to ignore the clear provisions of the law which stare one in the face and

86. *Id.* at 27.

87. *Id.* at 37.

persist in handling the mater according to the 'memorandum' of this or that leader. This is illegal conduct.⁸⁸

Thus, it appears reasonable to conclude that analogy will not often be used. Of course, only future history will tell.

VI. Nulla Poena Sine Lege and Common Law Crimes

The principle *nulla poena sine lege* has been dominant in Western Europe at least since the French Declaration of the Rights of Man in 1789.⁸⁹ Article 8 provides: "The law may establish only such punishments as are strictly necessary. No one may be punished except according to a law enacted and promulgated before the commission of the offence and lawfully applied". In England, the rule of law has been established since the time of the promulgation of the Charter of Henry the First,⁹⁰ and Canada has, of course, received this tradition. And in the United States the "void-for-vagueness" doctrine and the constitutional prohibition against *ex post facto* laws have established a rule of law.

This is not to assert that the history of the principle of rule of law demonstrates an unbroken or pure application of its central concept, viz., the concept that behaviour should not be considered criminal unless precisely defined as criminal in a penal law of prospective effect only. This is certainly not the case.⁹¹ But the dominant Western theme has been the rule of law, the central achievement of which is the establishment of "a definite limitation on the power of the State".⁹²

There is, however, one challenge to the purity of the rule of law in the Anglo-American tradition which could be made and which is of particular interest in a comparative study of analogy. This is the creation of crime at common law, a matter of contemporary interest because it still may occur in the State law of the United States. This does not raise an issue of pragmatic importance. In England, Professor Glanville Williams wrote in 1961 that "the creative powers of the judges in the realm of criminal law have almost

88. *Id.* at 107.

89. Hall (1960), *supra* note 2 at 33.

90. *Id.* at 31. For Canada, see the *Canadian Charter of Rights and Freedoms*, 1982.

91. See generally note 5 *supra*.

92. Hall (1960), *supra* note 2 at 27.

withered away”⁹³ and common law crimes have been abolished in Canada.⁹⁴ In the United States “the trend in the twentieth century . . . is to enact comprehensive new criminal codes, abolishing common law crimes in the process”.⁹⁵ However, from the doctrinal point of view, is the creation of crime at common law distinct from analogy?

The answer to the question posed lies in the meaning of the term analogy. It is clear that in the socialist applications we have examined, analogy is an instrument of flexibility, a means of enforcing whatever ideology is currently valued. In the application it has received, socialist analogy has denied any role of certainty and predictability in law. In this sense it is definitely qualitatively distinguished from the process of creating crimes at common law. That process has been described by Professor Hall, thus:

The necessary use of analogy, especially by Anglo-American judges, is a process that is so minute in the changes effected as to be hardly perceptible. Excepting occasional leaps that undoubtedly occur, it reflects the day-by-day growth of criminal law which, for the most part keeps pace with change in the language institution itself. It has thus amounted largely to an all-but-unnoticed bringing up-to-date of old terms so that, filled with new content, they referred more adequately to the changed conditions. When American judges speak of expanding criminal law by ‘analogy’, they certainly do not mean the so-called ‘legal analogy’, the deliberate lawmaking, avowed and apparent to all, which was required in the Russian and German innovations . . ., they are speaking of necessary analogy, limited by the traditional judicial function to apply, not to make, law and restricted by the canon of strict construction illustrated in a vast number of decided cases.⁹⁶

VII. Conclusion

The study of analogy in the Soviet Union and the People’s Republic of China demonstrates that the theoretical foundations and actual applications of the principle follow a definite pattern. In the early

93. G. Williams, *supra* note 5 at 591.

94. Article 8 of the Criminal Code of Canada provides: “Notwithstanding anything in this Act or any other Act no person shall be convicted (a) of an offence at common law. . .”. See generally Mewett and Manning, “Criminal Law” (1978) at 3-10.

95. W. LaFave and A. Scott, “Handbook on Criminal Law” (St. Paul: West, 1972) at p. 60.

96. Hall (1960), *supra* note 2 at 48-49.

years the drive to consolidate power requires extreme flexibility, an unfettered discretion to deal with any real or perceived threats. This is the climate in which analogy, as a political instrument, may flourish. However, once the political viability of the new regime is assured, legal stability is required. Thus the application of analogy, as a crude instrument of political suppression, must atrophy. A stable socialist political system must have more refined means of advancing the State's interests.

There will be variations on this pattern. If written laws are established at an early stage, as in the Soviet Union, analogy will be frequently applied. But if the new regime does not establish a network of written laws, as in China, then there is no law to apply analogously. Rather, flexibility will be achieved through the very absence of defined prohibitions. Analogy in China became subsumed in a political and legal system of even greater fluidity than the early Soviet regime. But in either system the application of analogy is destined to diminish. Whether it is formally abolished, as in the Soviet Union, or whether it simply recedes in potential importance, as will probably be the case in China, is determined by political and cultural factors indigenous to each system.

The gradual withering away of socialist analogy does not indicate a movement to the adoption of those Western values which require certainty and predictability in the administration of criminal laws. There is not a scintilla of evidence that the increasing disuse of analogy in these socialist societies represents increasing belief in the value of protecting the individual from the State. Rather, the change is a change within the socialist system itself and not an indication of a rapprochement between Eastern and Western values. Whatever certainty and predictability is achieved by abolishing socialist analogy does not necessarily reflect the same values which militate against analogy in Western law.

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