**PRINCIPLE NULLUM CRIMEN SINE LEGE**

**IN THE HISTORY OF RUSSIAN CRIMINAL LAW**

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**E. Yu. Tikhonravov**

Siberian Federal University
79, Sveobudy prospekt, Krasnoyarsk, 660041, Russia
ORCID: 0000-0003-2132-842X
ResearcherID: S-6967-2016
e-mail: etikhonravov@sfu-kras.ru

**Introduction:** the principle nullum crimen sine lege was applied by the courts of the Russian Empire and of the USSR in the light of the competition of two interests. The first one, which this principle aims to safeguard, is ensuring of personal freedom – an opportunity to do everything which is not prohibited by the law. The second one is the need to prevent harmful acts which the legislature failed to foresee and criminalize in advance. **Purpose:** to conduct historical and theoretical research into the application of the principle nullum crimen sine lege in Russian criminal law; based on the research, to draw conclusions which would be beneficial and important for the contemporary legal practice. **Methods:** the methodological framework of the research is based on general scientific methods (analysis, synthesis, deduction, induction, comparison, system approach, historical and statistical methods) and specific scientific methods (legal dogmatic, legal comparative, legal historical). **Results:** both interests – ensuring of personal freedom and the need to prevent harmful acts which the legislature failed to foresee and criminalize in advance – should find their implementation in judicial practice. It is argued that exactly this approach secures the survival and progress of the body politic. The article provides a method to determine lawful but nevertheless harmful acts which should be prevented by judges by means of reaching guilty verdicts, notwithstanding the legally binding principle nullum crimen sine lege. **Conclusions:** the findings of the paper suggest that due to the need to prevent harmful acts which the legislature failed to foresee and criminalize in advance, the principle nullum crimen sine lege would not be followed by judges on all occasions.

**Keywords:** nullum crimen sine lege; personal freedom; gaps in the law; analogia legis
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**Information in Russian**

**ПРИНЦИП NULLUM CRIMEN SINE LEGE В ИСТОРИИ ОТЕЧЕСТВЕННОГО УГОЛОВНОГО ПРАВА**

Статья выполнена в рамках проведения научного исследования по гранту Президента РФ для государственной поддержки молодых российских ученых – молодых ученых № МК-6869-2016.6

Е. Ю. Тихонравов
Кандидат юридических наук, доцент кафедры теории и истории государства и права
Юридический институт Сибирского федерального университета
660041, г. Красноярск, просп. Свободный, 79
ORCID: 0000-0003-2132-842X
ResearcherID: S-6967-2016
e-mail: etikhonravov@sfu-kras.ru

Введение: реализация принципа nullum crimen sine lege – непреступление без указания о нем в законе – осуществлялась судами Российской империи и СССР в условиях конфликта двух противоречащих друг другу общеуголовных интересов. Первый из них заключается в обеспечении неприкосновенности гражданской свободы – возможности делать все, что не запрещено законом. Второй состоит в пресечении вредных для государства деяний, которые законодатель не предвидел и не осознал последствием уголовно-правовых норм заранее. Цель: выполнить историко-теоретический анализ реализации принципа nullum crimen sine lege в отечественном уголовном праве; сформулировать выводы, имеющие значение для современной юридической практики.

Методы: методологическую основу исследования составили общенаучные средства познания: анализ, синтез, сравнение, системный подход, историко-статистический и инструментально-правовой методы. Результаты: анализ исследований позволил выявить общеуголовные интересы, которые установлены законами Российской империи и СССР, и пресечения вредных деяний, которые должны быть своевременно выявлены и наказаны; формулировать постановления о пресечении вредных деяний судами; сформулировать выводы, имеющие значение для современной юридической практики.

Ключевые слова: nullum crimen sine lege; гражданская свобода; преступление; аналогия закона

**Introduction**

As multiple studies indicate, judicial practice of various countries is characterized by the conflict of two competing interests – personal freedom (the law “forbids everything if the law does not permit” [17, p. 70]). The second one is the prevention of harmful acts which the legislature failed to foresee and criminalize in advance. This conflict is also characteristic of Russia. The present paper demonstrates its existence in the judicial practice of the Russian Empire and then of the USSR. Next, the article provides a theoretical analysis of nullum crimen sine lege. The essay ends by presenting results and conclusions of the study.

The principle of nullum crimen sine lege was first incorporated in Russian criminal law in the 19th century. Article 1 of the 15th Volume of the 1832 Digest of Laws of the Russian Empire states, “Each act prohibited by the law under the threat of punishment is a crime” [18, p. 56]. Analogous provision was embodied in the 1845 Code of Criminal and Penitentiary Punishments. Its Article 4 defines crime as “an unlawful act itself or omission of what is prescribed under the threat of punishment by criminal or penitentiary law” [15, p. 174].

The principle of nullum crimen sine lege was also enshrined in Article 771 of the 1864 Code of Criminal Procedure. It specifies that “a court acquits the defendant if an act he was charged with is not prohibited under the threat of punishment by the law” [16, p. 446]. Having analyzed these articles, P. P. Pustoroslev came to the following conclusion: “In our
nullum crimen sine lege, and 3) close similarity to an action prohibited by criminal law"
[11, p. 205].
One of the examples of application of criminal law by analogy was provided by P. P. Pustoroslev. 19th-century Russian criminal law made no mention of blackmail. Despite this fact, “courts under the leadership of the Cassessional Department [of the Governing Senate], finding some similarities between blackmail and fraud, extended provisions of criminal law regarding the latter to the former, and thereby by means of unlawful analogy transformed blackmail into a criminal act, imposing a punishment reserved for the fraud” [14, p. 18].
It is important to note that judges of the Russian Empire tried to maintain the illusion that the practice of filling gaps in criminal law was lawful. To this end, in their gap-filling rulings they often worked on the assumption of the laic judge and lawmaker N. S. Tagantsev [1, p. 33; 2, pp. 30–31; 5, pp. 20–21; 18, p. 191].

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Therefore, Article 12 of the 1864 Code of Criminal Procedure and Article 155 of the 1845 Code of Criminal and Penitentiary Punishments [2, p. 26; 11, pp. 204–205; 18, p. 188].
For instance, N. S. Tagantsev pointed out that “the cassessional department of the [Governing] Senate [the Supreme Court of the Russian Empire] almost from the very beginning of its functioning developed a doctrine of its unrestricted power to fill any gap in the law” [18, p. 188]. Indeed, in 1868, the Governing Senate ruled that “an act, though not declared criminal by the present law” [27, p. 208]. As to the Latin formulation nullum crimen sine lege, it was proposed by P. J. A. Feuerbach at the beginning of the 19th century [22, p. 41].
The courts of the Russian Empire regularly ignored nullum crimen sine lege. In particular, individuals who committed lawful, yet harmful acts were often held criminally liable.
For instance, N. S. Tagantsev pointed out that “in the Cassessional Department of the Russian Empire, the courts generally accepted that only those acts are criminal which have been declared to be such by the present law” [14, p. 413]. This opinion was also subscribed to by many other Russian lawyers of that time: N. A. Butskovskij, A. D. Gra-dovskij, F. P. Dubrovin and N. S. Tagantsev [1, p. 33; 2, pp. 30–31; 5, pp. 20–21; 18, p. 191].

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nullum crimen sine lege, the sound general principle is adopted that those acts are criminal which have been declared criminal by the law” [14, p. 413]. This opinion was also subscribed to by many other Russian lawyers of that time: N. A. Butskovskij, A. D. Gradovskij, F. P. Dubrovin and N. S. Tagantsev [1, p. 33; 2, pp. 30–31; 5, pp. 20–21; 18, p. 191].

In order to fill gaps in the law, the courts of the Russian Empire frequently resorted to analogy. In 1906, the Governing Senate noted that “in order to apply criminal law by analogy, the following prerequisites are required: 1) unquestionable criminal nature of the act, 2) absence of penal law directly applicable to it, and 3) close similarity between this act and an action prohibited by criminal law” [11, p. 205].

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Punishment, but does not authorize the court to criminalize an action omitted in legislation” [2, p. 28].

A. D. Gradovskij’s analysis of Article 104 of the 1832 Digest of Laws of the Russian Empire was almost identical. He asserted that “one cannot interpret it (as the current judicial practice nevertheless does) as the authorization to use analogy … one resorts to analogy when the law makes no provision for a certain act; in this case, however, the law provides for a certain act but does not determine a corresponding punishment” [2, p. 15]. This opinion was also held by many revolutionary legal scholars [5, pp. 16–18; 14, p. 18; 18, pp. 189–190].

Principle Nullum Crimen Sine Lege in the History of Russian Criminal Law

The necessity of the said article is easy to explain. The 15th Volume of the 1832 Digest of Laws of the Russian Empire was an incorporation of penal laws of previous centuries. One of its features was that sanctions were often phrased in the most general terms.

Due to this fact, the 15th Volume of the 1832 Digest of Laws of the Russian Empire contained Article 104. It clarifies, “If the law determines the punishment in general terms, e.g. ‘to punish the offender as one [i.e. the judge] pleases’ [2, p. 14].

The cited article does not enumerate all general terms used in the wording of penal sanctions. For example, some penal laws required “to punish the offender as one [i.e. the judge] pleases” [2, p. 14].

The 1845 Code of Criminal and Penitentiary Punishments did not enable conviction for acts which no statute forbade. As A. D. Gradovskij argued, this article “refers only to the case when the law failed to identify the precise punishment for a criminal act at issue. Consequently, this article leaves to the court’s discretion determination of punishment, but does not authorize the court to criminalize an action omitted in legislation” [2, p. 28].

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Nullum Crimen Sine Lege in Soviet Criminal Law

From the very creation of the Soviet State, its courts enjoyed a wide discretion to fill gaps in the law. For instance, Article 22 of the 1918 Directive on People’s Court of the RSFSR declares, “In deciding all disputes, the People’s Court shall apply decrees enacted by the workers’ and peasants’ government; in the absence of insufficiency of a corresponding decree, the People’s Court shall follow the socialist sense of justice.” Analogous rules were expressed in Article 22 of the 1920 Directive on People’s Court of the RSFSR.

The issue of filling gaps in the law was discussed when drafting the 1922 Criminal Code of the RSFSR. At the third session of the ninth convocation of the All-Russian Central Executive Committee held in May 1922, People’s Commissar of Justice D. I. Kurskii stated, “No criminal code is able to cover all criminal facts which do exist in society; if we are really willing to have a code which would fight dangers for the regime, we should have articles enabling the court to employ analogy … The court would be empowered to intervene [in a certain case] and would not wait for the enactment of new legal rules” [10, p. 40].

As a consequence, analogy found its way into the 1922 Criminal Code of the RSFSR. Pursuant to its Article 10, “When there is no direct reference to particular forms of crime in the Criminal Code, etc., punishment, but does not authorize the court to criminalize an action omitted in legislation” [2, p. 28].
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ловом Кодексе прямых указаний на отдельные виды покушений, нападений или меры социальной защиты применяются согласно статей Уголовного Кодекса, предусуммивающих наиболее сходные по важности и роду преступления, с соблюдением правил общей части Кодекса. Отдельные правовые полномочия, что действия аналогии закона в советском уголовном праве долго не проделалась. Так, П. И. Люблинский в ст. 10 Уголовного кодекса РСФСР 1922 г., «одно из постановлений переходного периода советского законодательства» [10, с. 49–50]. Близкую к смыслу позицию занял С. В. Познанов. Он считал, что это привело к временному и вызываемому особыми условиями переворачиванию ментов» [12, с. 38]. Приведенные предположения П. И. Люблинского и С. В. Познанова оказались неверными. Аналогия закона была закреплена в ч. 3 ст. 3 Основных начал уголовного законодательства Совета Союза Союзных республик 1924 г., а также в уголовных кодексах всех Союзных республик, включая Уголовный кодекс РСФСР 1926 г. В соответствии с его ст. 16, «если то или иное общественно-опасное действие прямо не предусмотрено настоящим Кодексом, то основные и признаки преступлений, вменяемыесяся при санкциях этих статей законодательного порядка, а не решением суда применяются к тем статьям Кодекса, которые предусматривают наиболее сходные по роду преступлений».

Кроме того, впоследствии аналогия закона получила широкое распространение в советской судебной практике. Например, в 1939 г. отечественные исследователи констатировали, что за 20 месяцев работы «суда Московской области применяли аналогии по 53 статьям Уголовного кодекса, из которых в 32 статьи особой части Уголовного кодекса РСФСР» [12, с. 12]. То же было характерно для деятельности Московского городского суда [12, с. 12]. Схожее утверждение приводится и в зарубежной литературе [37, с. 620]. По утверждению уважаемых отечественных экспертов, «этот подход говорит о чрезмерном широком применении аналогии по множеству статей, что составляет одну из причин и вызывает в действительности к извращению института аналогии... Беспредельность использования аналогий вызывает определенную политическую вредность широкого применения аналогий в практике судов...» [12, с. 12]. К тем же выводом в 1938 г. пришли сотрудники редакции журнала «Советская юстиция». Они заявили, что использование аналогии «ориентировано сорока с лишним годами Статьи 16 и 79 УК» [19, с. 60]. М. Д. Шаргородский подверг это судебное решение критике. По его убеждению, наличие в Уголовном кодексе «специальных статей об убийстве, умышленном причинении вреда... лицах, применяется практика применения аналогии только в случаях таких преступлений, когда законом предусмотрено т. В. 1934 г. Верховный суд РСФСР постановил, что «несторонное обрашение с огнем повлекшее за собой уничтожение жилища нет в санкциях статей Уголовного кодекса РСФСР» [12, с. 12]. По этому поводу М. Д. Шаргородский отмечал: «...необходимо только умышленное истребление или повреждение имущества и на несостоятельные поступки никак распространяться не может». Причем данное заключение соответствовало прежней позиции Верховного суда РСФСР. В 1926 г. он постановил: статья Уголовного кодекса, «предусматривающая ли умышленное совершение какого-либо деяния, не может быть применена через 19(6) УК в случаях несостоятельного совершения этого же деяния» [19, с. 60]. Не удивительно, что в 1930-х годах между отечественными специалистами возник спор об аналогии закона в советском уголовном праве [13]. Так, А. А. Герцензон, И. И. Голиков, Е. В. Тиконов

cases of inappropriate application of analogy in the Soviet jurisprudence. For instance, in 1934, the Supreme Court of the RSFSR ruled that “the reckless use of fire which led to the destruction of the property belonging to a collective farm is a socially dangerous action and shall be punished in conformity with Articles 16 and 79 of the Criminal Code of the RSFSR” [19, p. 60]. M. D. Shargorodsky commented on this decision in the following manner: “Article 79 deals only with deliberate destruction of property and in no way can be extended [by analogy] to reckless acts” [19, p. 60]. This view corresponded to the former position of the Supreme Court of the RSFSR. In 1926, it ruled that article of the penal code “which provides for only deliberate commission of a certain act cannot be applied through Article 10 (16) of the Criminal Code to cases where the same act was committed recklessly" [19, p. 60]. It is not surprising that in the 1930s the dispute amongst Soviet scholars over the use of analogy in criminal law began. A. A. Gertsenzon, I. I. Golikov, penalties or means of social protection shall be applied in accordance with Articles of the Criminal Code which deal with crimes most similar in their gravity and kind, and in conformity with the rules of the general part of the Code”.

It was suggested that the use of analogy in Soviet criminal law would last for a short time. For instance, P. I. Liubinskii considered Article 10 of the Criminal Code of the RSFSR “as one of the provisions characteristic of the transitional period of Soviet legislation” [10, pp. 49–50]. S. V. Poznansky was of a similar opinion. He believed that this article, “triggered by the specific conditions of the present time, should be perceived as a temporary one” [12, с. 38]. Aggravation of penalties, for instance, articles of the penal code were often applied by analogy to acts already denounced in the code [8, p. 18]. For instance, articles of the penal code were often applied by analogy to acts already denounced in the code [8, p. 18]. For instance, articles of the penal code were often applied by analogy to acts already denounced in the code [8, p. 18].
Принцип nullum crimen sine lege в истории отечественного уголовного права

М. М. Исаев, И. Ромашкин, А. А. Пионтковский

В. А. Васильев, И. В. Бекетов

Принцип nullum crimen sine lege в отечественном уголовном праве

Неслучайно М. А. Кауфман сделал следующий вывод: "Аналогия — это орудие борьбы" [19, с. 60].

Однако отмеченные тенденции не вызвали серьезных изменений в практике применения аналогии в советском уголовном праве. Суды обращались к этому техническому приему с особой осторожностью и в послевоенное время [6, с. 225], что не случайно [7, п. 84; 8, п. 19]. Другие правоведы придерживались противоположной точки зрения. Например, М. Д. Нагородский, занимавшийся вопросами аналогии, в своем исследовании "Методологические основы отечественного уголовного права" [19, с. 60], выразил мнение о целесообразности использования аналогии в уголовном праве.

Однако в Основах уголовного законодательства Союза ССР и союзных республик 1958 г. аналогия закона была исключена. Тем не менее, в 1958 г. принцип nullum crimen sine lege был вновь введен в качестве основного принципа уголовного права в соответствии с указанными в Основах уголовного законодательства Союза ССР и союзных республик 1958 г. положениями.

Более того, И. Лапенна изучив Уголовный кодекс РСФСР 1960 г., заявил: "Отмена аналогии, хотя и благотворная в целом, не могла ей не принести последствий" [28, с. 427]. Но несмотря на это, аналогия продолжала использоваться в судебной практике, а в 1959 г. была впервые введена в качестве основного принципа уголовного законодательства Союза ССР и союзных республик 1958 г.

В 2002 г. М. Д. Нагородский, занимавшийся вопросами аналогии, в своем исследовании "Методологические основы отечественного уголовного права" [19, с. 60], выразил мнение о целесообразности использования аналогии в уголовном праве.

1 Основы уголовного законодательства Союза ССР и союзных республик 1958 г. // Ведомости ВС СССР. 1959. № 1. ст. 6.

M. M. Isaev, I. Romashkin, A. A. Piontkovskii demanded its abolition [7, p. 84; 8, p. 19]. Others held the opposite view. For instance, A. J. Vishinsky, restating on the cited arguments of D. I. Kurski, stressed the need to further apply criminal law by analogy. This opinion was also held by M. D. Shar-gorodsky, who viewed analogy as "a useful instru-
mence of fight" [19, p. 60].

The dispute, however, failed to bring considerable changes in the use of analogy in Soviet criminal law. Courts continued to employ the analogy article after World War II [6, p. 225], and this practice received approval of prominent legal scholars [6, pp. 220–226].

Nevertheless, in 1958, nullum crimen sine lege was reintroduced in Soviet criminal law. Article 7 of the 1958 Basic Principles of Criminal Legislation of the Union of the USSR and Union Republics defines crime as "a socially dangerous act or omission which is specified by criminal law and infring-es the Soviet social and state order, social economic system, social property, the individual, political, labor, property and other rights of citizens as well as other socially dangerous acts against social legal order and specified by criminal law."

The said article, identifying the illegal nature of an act (in the phrase "specified by criminal law") as one of the attributes of criminal offense, was enacted in order to strengthen personal freedom [3, p. 82]. However, despite legislative adoption of nullum crimen sine lege, individuals were occa-
sionally held to be criminally liable for lawful, yet socially harmful acts. It is worth emphasizing that in their decisions, judges made no mention of gaps in the law and methods which they used to fill lacunae. Instead, courts declared that these acts fall under the articles of the penal code.

For example, P. S. Dagel reported that Soviet courts considered "joyriding as hooliganism and sale of stolen goods by a third person who did not promise the sale before the commission of the theft as complicity in the theft" [3, p. 86]. He maintained that these cases demonstrate convictions for acts not forbidden by criminal law and therefore constitute "incorrect and illegal application of analogy [...] made under the guise of legal interpretation" [3, p. 86].

It is hardly surprising that M. A. Kaufman ar-

Principle Nullum Crimen Sine Lege in the History of Russian Criminal Law

Historical facts concerning the principle null-
mum crimen sine lege in Russian criminal law re-

Theoretical Analysis of the Application of Nullum Crimen Sine Lge
Harm. \[...] This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative” [29, pp. 327–328].

The above cited arguments of J. Locke and R. Jhering raise a question: in which cases should a judge violate the legally binding principle of *nullum crimen sine lege* and impose a penalty for an act not expressly declared criminal? The answer implies the comparison of the community benefit due to this act’s prompt prevention with the harm inflicted by the breach of *nullum crimen sine lege*.

Ignoring the legally binding principle *nullum crimen sine lege* end, creative legal fiction can be employed. It is an assumption that conceals, or at least attempts to conceal, the fact of the existence of the act by applying a legal ruling under the guise of applying a statutory rule [4, p. 23].

An important effect. Formulation and application of judicial rulings which cannot be derived from the existing law is perceived by citizens of the state as the lawful course of action. Obviously, this has a positive influence on the efficiency of legal regulation: Citizens of the state would not follow the example set by its officials.

Results

The above cited arguments of J. Locke and R. Jhering raise a question: in which cases should a judge violate the legally binding principle of *nullum crimen sine lege* and impose a penalty for an act not expressly declared criminal? The answer implies the comparison of the community benefit due to this act’s prompt prevention with the harm inflicted by the breach of *nullum crimen sine lege*. If the former outweighs the latter, punishment should be deemed permissible. In the opposite case, a judge should acquit the defendant.

It seems that R. Zippelius used a similar line of reasoning. He argued that “judicial supplementation and correction of legislation” is permissible when “reasons” justifying this alteration “have more weight than the opposing principles of separation of powers and legal security” [39, p. 64]. The latter principle, in particular, means that “the judicial decisions are foreseeable to a certain extent, and therefore calculable enough that the individuals subject to the law can adapt their behavior to the foreseeable judicial decisions” [26, pp. 251–252].

Prevention of non-criminal, yet harmful acts ignoring the legally binding principle *nullum crimen sine lege* has to be legally justified. To this end, creative legal fiction can be employed. It is an assumption that conceals, or at least attempts to conceal, the fact that judges formulate and apply a legal ruling under the guise of applying a statutory rule to factual situations that cannot be logically subsumed under that rule [4, p. 23].

Creative legal fiction allows courts to achieve an important effect. Formulation and application of judicial rulings which cannot be derived from the existing law is perceived by citizens of the state as the lawful course of action.

Obviously, this has a positive influence on the efficiency of legal regulation: Citizens of the state would not follow the example set by its officials.
2. Градовский А. Д. О судебном толковании за- конов по русскому праву // Журнал гра жданского и уголовного права. 1874. № 1. С. 1–62.

3. Дагель П. С. Об аналогии в советском уголов- ном кодексе // Российский криминологи- ческий вестник. 2009. № 4. С. 82–86.

4. Дубровин Ф. П. О размерах допустимости аналогии при применении уголовного зако- на (окончание) // Журнал Министерства юс- тиции. 1899. № 6. С. 1–35.


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15. Спасович В. Д. Учебник уголовного права. СПб.: Тип. Исаакова Огрико, 1863. Т. 1. 428 с.


17. Техника толкование и казуистика Уголовного кодекса // Советская юстиция. 1939. № 3. С. 8–13.


22. Conclusions

Historical and theoretical analysis of nullum criminesine legese in Russian criminal law makes it possible to predict the future of this principle. It is suggested that nullum criminesine legese would not always be strictly observed by the courts due to the need to prevent promptly the commission of non-criminal, yet harmful acts.

There are the main findings of the study on nullum criminesine legese in the history of Russian criminal law. Some of them contrast sharply with viewpoints expressed in numerous legal publications. For instance, it has been stated that “in jurisprudence and legislation,” the principle of nullum criminesine legese “probably enjoys the highest recognition possible” [34, p. 155]. It is hoped that this paper may provoke a further discussion on nullum criminesine legese in Russian criminal law.
ods of Gap-Filling: Synopsis of Dr. jurisd. sci. diss. [In Russ.]. Moscow, 2000. 51 p. (In Russ.).
34. Locke J. Two Treatises of Government. Lon- don, 1821. 405 p. (In Eng.).