

CRIMINAL LAW BETWEEN THE CAPITALIST AND SOCIALIST PARADIGM?

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Socialist legal theorists claimed they introduced a new paradigm of (criminal) law. To verify or falsify this claim, the article is searching for specificities of socialist criminal law. Out of numerous East-European countries, Czechoslovakia was taken as an example here. There, the new regime in 1948 had already simplified the entire criminal justice system. Other major changes, still influencing the legal system in Slovakia (a descendant of Czechoslovakia) nowadays, include the introduction of: lay judges, protective measures as new forms of sanctions, material understanding (dangerousness) of the criminal offense, and the increased role of public prosecution. On the other hand, since the 1960s, the formalistic approach to (criminal) law was adopted in Czechoslovakia, becoming a characteristic feature of criminal law in the whole Eastern Bloc, just like in Western Europe. Therefore, it seems that despite some minor differences between socialist and capitalist criminal law, these do not actually represent contradictory paradigms of criminal law. Should any paradigm shift in its proper (Kuhnian/Foucaultian) meaning be seen in the socialist countries, rather a more general paradigm shift might be proposed: the socialist society could namely be seen as a potential precursor to a post-modern "control society" (replacing the previous "disciplinary society"), due to the omnipresent control by Communist Party structures.

Keywords: capitalist law; socialist law; criminal law; paradigm; Czechoslovakia.

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Introduction

The term “paradigm” in the sense of dominant historical insights and “optics” was introduced into the philosophy and history of science by Thomas S. Kuhn in 1962.¹ A similar concept was at the same time proposed by Michel Foucault, who, however, rather spoke of “episteme” and of changing “discourses.”² Still, both shared the idea that each period in history uses its own dominant optics, principles and approaches to social and scientific problems, which can get completely rejected and replaced in a new historical epoch (paradigm). Thereby, although the “paradigms” in the theory of T.S. Kuhn as well as “epistemes” in the theory of M. Foucault are considered to be mutually exclusive and therefore two paradigms (epistemes) cannot co-exist at the same time, still, it is claimed that the dominant paradigm often latently contains elements of a new, subsequent paradigm, whereby it is the accumulation of inconsistencies in the ruling paradigm that ultimately leads to the abandonment of the dominant optics and to the acquisition of new optics – i.e. the acceptance of a new paradigm (episteme, discourse). This general observation should thereby apply to all aspects of human life and knowledge, including law and legal thinking.

Thus, one might claim that currently it is the “absolutist” and “statist” paradigm, episteme, discourse, or approach to law and legal science that prevails nowadays, perceiving law as a normative system created and enforced by the State. Similarly, already in 1983 at a conference in Lund, Sweden, Jan M. Broekman³ considered

¹ Thomas S. Kuhn, *Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

² Michel Foucault, *The Archaeology of Knowledge* (London: Routledge, 2002).

³ Jan M. Broekman, *Changes of Paradigm in the Law in Theory of Legal Science* 135 (A. Peczenik et al. (eds.), Dordrecht: D. Reidel Publishing Company, 1984).

jurisprudence today to have only one ruling paradigm – the paradigm of the judicial application of law. On the other hand, Marxist philosophy and theory of law claimed that a completely different paradigm of law applies in capitalist, and vice versa, in socialist society. Western European legal theory was in turn partially willing to speak of two paradigms instead of one, but only in the sense of legal science being based either on formalist platforms (being the case of legal positivism, including socialist formalism) or anti-formalist platforms (being the case of legal realism, or generally of sociological approaches to law). At the same time, however, it was still pointed out that the only paradigm that is truly appropriate and practical (at least in the European continental legal system), is the exclusively formalistic paradigm, covering both the capitalist and socialist legal system.

In the following part/section, we shall therefore examine whether and to what extent legal paradigms truly shifted in the transition from bourgeois, capitalist (criminal) law to socialist (criminal) law. In order to do so, we shall use the example of the legal history of Czechoslovakia in order to identify any specificities of “socialist” criminal law, to assess its “paradigmatic” nature.

1. Criminal Law in the Territory of Russia before and after 1917

Before testing the theory of a new “socialist” legal paradigm in criminal law, it is necessary to start with introducing the historical legal roots of Russian (later Soviet) criminal law, from which the “new paradigm” was supposed to grow. Thereby, the basis of Russian criminal law until the victory of Bolshevism in 1917 was a very casuistic Criminal Code revised in 1846, being based on a purely formal, positivist concept of crime. This approach was then revolutionarily replaced after 1917 by a completely contrasting situation of a sociological approach to law, at the same time leaning on the ideas of Marxist philosophy.⁴

While the sociological approach had already been abandoned by the 1930s, the Soviet theory of criminal law was throughout the period of its existence consistently based on Marxist thought, albeit with certain modifications as introduced by leading political figures of the regime. Hence, until 1956 the theory was called “Marxist-Leninist-Stalinist philosophy” and after 1956 “Marxist-Leninist philosophy.” The official philosophy was in general based on two principles: of dialectical materialism and historical materialism. In addition, it was also based on the idea of a class struggle. These three features deserve some clarification, since they were the reasons why socialist criminal law was supposed to represent a different, new paradigm of law, notwithstanding the return from sociological to a more formalistic approach since the 1930s:

⁴ Ekaterina Mishina, *The Re-birth of Soviet Criminal Law in Post-Soviet Russia*, 5(1) Russian Law Journal 57 (2017).

According to historical materialism, law is a part of the ideological superstructure, built (and dependent) on its economic base. Changes in the economic base bring about changes in the ideological superstructure. This influence, however, is mutual – meaning that the superstructure can also change the base; that is the essence of dialectical materialism, in turn. Finally, according to the third mentioned element, the class struggle, it was claimed that each State represents a rule of one class (oppressors) over another class (the oppressed). Law was, therefore, primarily seen as an instrument of class power.

While the Soviet (and more generally, socialist) legal science claimed to have “unmasked” the class character of criminal law in capitalist countries, at the same time it frankly admitted the reverse class character of Soviet (socialist) law – in favour of the working class. The class character of Soviet (not only criminal) law was thereby determined foremost by the nature of the entities of criminal law (e.g. socialist organizations, workers, class enemies), the choice of sanctions (e.g. the new institute of protective measures) and the interests protected by criminal law (being mostly the construction and protection of socialism). Criminal law theoreticians in the USSR have therefore declared themselves to represent a special, Marxist-Leninist criminal school, which was claimed to have differed from classical and positivistic schools of criminal law. Thereby, until 1930s it was indeed different – namely closer to the sociological school of criminal law; however, since the times of Vyshinsky, formal elements, characteristic also of Western European legal schools, began to prevail from the 1930s.

To offer an example of sociological influences in early Soviet criminal law, it can be briefly summarized here that according to Sec. 7 of the Soviet Criminal Code of 1927, anyone was considered socially dangerous who, due to their characteristics, way of life or contacts with the world of criminals, or by its overall moral and intellectual status, could represent a danger to society. Socially dangerous was thus, under Soviet criminal law, in a somewhat circular definition, any person who either by their actions or by their status (moral, intellectual, etc.) represented a danger to society. The doctrine of Soviet criminal law of the 1920s namely emphasized that a criminal act is foremost a social phenomenon.⁵ Legal practice thereby even took the view that it was not necessary to wait until the offender commits an offense dangerous to society, rather society had the right to take action against the individual as soon as the dangerous character of the person became clear.⁶ Still, in assessing the social danger of individual and the degree of that danger, Soviet courts had only very general criteria available; they were to draw both from the nature of the person of offender and from their actions. Legal practice was not able to use these incomplete guidelines, especially when it was necessary to criminalize the so-called anti-Communist Party activities, the content and nature of which permanently changed according to immediate political interests.

⁵ Vladimír Solnař et al., *Základy trestní odpovědnosti, podstatně přepracované a doplnené vydání* [Fundamentals of Criminal Liability, Substantially Revised and Extended Edition] 43 (Praha: Orac, 2003).

⁶ *Id.* at 39.

Criminal repression based on the dangerous nature of the perpetrator (the material nature of crime) was not, however, a purely Soviet “invention.” It was in fact proposed as early as in 1903 at a conference of international forensic society (*Internationale Kriminalistische Vereinigung*) in Hamburg. Still, it was in the USSR that this approach became a legal norm, insisting on the preference of material elements (dangerousness) of the offense, respectively on assessing the perpetrator’s personality in the spirit of the sociological school of criminal law, at the expense of formal features of the offense.

From the 1930s onwards, however, based on numerous unpleasant experiences, a requirement was voiced in the Soviet legal scholarship for every criminal offense to have its binding formal features laid down in the wording of the Criminal Code. Thus, the radical “material nature of crime” was abandoned, together with gradual abandonment of analogy in criminal law.⁷ Soviet criminal law therefore began to resemble standard formalist systems of criminal law, even though the institute of social danger represented in the person of an offender remained preserved in the Criminal Code as a sign of the dialectic synthesis of formalist and former anti-formalist tendencies. It was this new form of (limited) material understanding of criminal offense that was then taken over at the turn of the 1940s and 1950s by the criminal legislation of the states of Eastern Europe, the material understanding of crime being thereby officially proclaimed and recognized as a qualitatively and historically (paradigmatically) new definition of a criminal offense, characteristic of a socialist society – being both more just and more scientific.

The new “socialist” understanding of criminal law was reflected also in the Czechoslovak Criminal Code of 1950. Criminal offenses were only actions that were dangerous to society, making it possible that while an action on the one hand complied with the formal features listed in the Criminal Code, but on the other hand, its degree of danger was not so high as to be considered a criminal offense. Still, unlike in Soviet criminal law, it was excluded to consider as a criminal offense an action that did not meet the formal characteristics listed in the Criminal Code, notwithstanding the fact that the social danger of the action was high. The Czechoslovak criminal law of the 1950s similarly did not allow for the analogy to the detriment of perpetrator.

It was thereby claimed that in Czechoslovakia, previous Soviet experience with the creation and application of criminal law was used. Indeed, before the new

⁷ An analogy to the detriment of the offender had already been introduced into the Soviet law in the first Criminal Code of 1922. The aim under Art. 5 was to provide for any possible “protection of working people’s government from crime and from the elements dangerous to human society.” *Analogia legis* has therefore been explicitly enshrined in Art. 10. In the period shortly before World War II it was accepted in criminal law science in the USSR that analogy was no longer necessary. This view was reflected in the draft of the Criminal Code of the USSR of 1938, where an analogy was no longer provided for. The discussions finally ended with the adoption of the Basic Principles in 1958 where the analogy was definitely abandoned.

Criminal Code was adopted in 1950, a period of anti-formalism and judicial activism (just like in the USSR in the years following 1917) was necessary in applying the previous capitalist criminal law rules. Since the 1950s, however, despite the anti-formalist rhetoric, the formalistic approach started to prevail, clearly culminating in the 1970s and 1980s.⁸ Czechoslovakia thus closely followed the historic experience of the USSR, its criminal law finally accepting the formalist shape and form.

2. Soviet Models of Criminal Law in Czechoslovakia (1948–1989)

In the territory of today's Slovakia (until 1918 being a part of Austrian-Hungarian Empire, and in 1918–1992 being a part of Czechoslovakia), the former Hungarian Criminal Code on Crimes and Contraventions No. V/1878 was effective until 1950. This Code expressed in its Sec. 1 the traditional formalist understanding of criminal offenses by stating that "crime or contravention is only an act that the law has declared as such."⁹ It was only the new (Soviet-inspired) Criminal Code No. 86/1950 Coll. that introduced the material understanding of crime for the first time in modern history of (Czecho)Slovakia.¹⁰

However, even before the 1950 Code, some Acts of Parliament that signalled the future concept of criminal law were adopted very soon after February 1948, when after a governmental crisis the Communist Party of Czechoslovakia gained the exclusive monopoly of power for over 40 years. The principles laid down in these early laws thereby remained as basic postulates of the people's democratic and socialist criminal justice way until 1989.

Throughout the whole period of communist rule in Czechoslovakia, two basic motivations were hidden behind the reform of the criminal justice system: on the one hand, the effort for overall control of justice as a component of state power, and on the other, effort to introduce regulations following the Soviet pattern.¹¹ With these aims in mind, changes in criminal law had already been prefigured by Act No. 231/1948 Coll. for the protection of the People's Democratic Republic. It is possible

⁸ Zdeněk Kühn, *Ideologie aplikace práva v době reálného socialismu* [The Ideology of Application of the Law at the Time of Real Socialism] in *Komunistické právo v Československu, Kapitoly z dějin bezpráví* [Communist Law in Czechoslovakia, Chapters on the History of Injustice] 60 (Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009). See also Jan Kuklík, *Vývoj česko-slovenského práva 1945–1989* [Development of the Czech-Slovak Law 1945–1989] (Praha: Linde, 2009).

⁹ Anton Ráliš, *Slovenské trestné zákony* [Slovak Criminal Laws] 18 (Bratislava: Nakladateľstvo Justitia, 1948).

¹⁰ Darina Mašľanyová, *Nebezpečnosť činu pre spoločnosť ako materiálny znak trestného činu* [Danger of Offense for Society as a Material Element of an Offense] 6 (Bratislava: Akadémia policajného zboru v Bratislave, 1999).

¹¹ Zdeněk Kühn, *Socialistická justice* [Socialist Justice] in *Communist Law in Czechoslovakia*, *supra* note 8, at 825.

to infer already from the title of the Act that it replaced the former Czechoslovak Act No. 50/1923 Coll. on the protection of the Republic.

The 1948 Act regulated anew, more strictly but also more vaguely, criminal responsibility for crimes against the external and internal safety of the Republic and against the safety of international relations.¹² Compared with Act No. 50/1923 Coll. there has been a significant increase in the penalties for most of the criminal offenses; while Act No. 50/1923 Coll. imposed the death penalty only for military betrayal, a death sentence was from now to be imposed for treason, spying, allegiance against an ally, war destruction, war treason, and assault on the life and body of state officials. In most of the cases, the death penalty was exclusive. Finally, some new types of punishment were also introduced: the loss of civil rights and the loss of citizenship.

On top of the crimes already found in the 1923 Act on the protection of the Republic, new offenses were introduced in the 1948 Act: offenses of support and propagation of fascism and similar movements, the misuse of the office of the clergy, provisions protecting the economic system of the people's democratic regime, central planning, and protecting against sabotage and endangering the success of economic planning. Act No. 231/1948 Coll. for the protection of the People's Democratic Republic has thus become one of the legal backbones of the new regime, and was also widely applied in subsequent political show-trials at the turn of the 1940s and 1950s, aimed mainly against the opponents of the new regime. (All in all, based on the data from post-1989 rehabilitations (under Act No. 119/1990 Coll.), since 1948, 1288 persons were convicted in Slovakia under the 1948 Act.¹³)

2.1. Changes in the System of the Judiciary

Another Act of Parliament having an impact on the criminal justice system, following immediately after February 1948, was Act No. 319/1948 Coll. on the popularization of the judiciary. According to the legislator, it brought about a true equality of the parties, the principle of searching for material truth, the elimination of formalism, simplification, speeding up and lowering the costs of judicial proceedings. The courts were thereby called upon to protect the socialist state and its social system in the first place, as well as the peaceful international relations within the world socialist bloc. Finally, the legislation explicitly declared the ideological and instrumental nature of the judiciary.

Besides introducing a two-tier court system of district courts and regional courts (still operating in the Slovak Republic to the present day) instead of the previous three-tier system, this Act also introduced – under the headline of “popularization

¹² Antonín Růžek, *Rok 1948 v trestním právu* [The Year 1948 in Criminal Law], 88 *Právník* 224 (1949).

¹³ František Gebauer, *Soudní prezekuce politické povahy v Československu 1948–1989. Štatistický přehled* [Judicial Persecution of Political Nature in Czechoslovakia 1948–1989. Statistical Overview] 91 (Praha: Ústav pro soudobé dějiny AV ČR, 1993).

of the judiciary” – a new institution of lay judges at all ordinary courts, whereby the law put them “on a par with professional judges and assured their majority.”¹⁴ The lay judges were to be Czechoslovakian citizens aged 30–60 years old, who were registered in the permanent voter list, were of full integrity, were reliable and devoted to the people’s democracy.

In addition, the popularization of the judiciary was manifested also by the nomination of new professional judges of blue collar origin, educated for the role of a judge in two-year law courses. In these courses, both blue-collar judges and prosecutors were prepared for their new roles, often without any secondary education. These lawyers were thus characterized by insufficient formal education, but on the other hand by much appreciated distrust to the traditional legal culture, and in contrast by their trust in the Communist Party, system and ideology. Soon, in 1951, out of a total of 280 graduates of the short-term law courses, 55 were presiding in district courts, one was a judge of the Supreme Court and 115 were employed in the District Prosecutor’s Offices.¹⁵

Finally, many of the older judges have shown even greater zeal for the regime than their younger colleagues, hoping to maintain their positions. Often they even gained prestigious seats in the senates deciding in show-trials, precisely because their political past was not very solid and unambiguous, and this was supposed to be a test to show their loyalty to the new regime.¹⁶

Either way, many of the judges became members of the Communist Party, being thus directly subjected to Party discipline and Party training. At the same time, however, one must also not forget that the actual decision-making by judges was additionally controlled by prosecutors, the “elite of communist justice” who could challenge both the criminal and civil decisions of any court, including the Supreme Court.¹⁷

2.2. 1950 Recasts – Substantial Changes in the Criminal Justice System

By the government decree of July 1948, the Ministry of Justice was required, as far as possible, to draw up and submit, before 1 September 1950, drafts of new Codes which fall within the competence of the Ministry – i.e. civil and criminal codes of both substantive and procedural law. The process was thus to be completed within the set deadline of two years, giving the process the name of “legal bi-annual.”

To meet this goal, the Ministry of Justice set up a codification unit, a codification commission, and two major expert commissions for civil and criminal law. The Criminal

¹⁴ Ladislav Vojáček & Karel Schelle, *Právní dějiny na území Slovenska* [Legal History in the Territory of Slovakia] 36 (Ostrava: KEY Publishing, 2007). Interestingly, in criminal proceedings, the function of lay members of the senate was preserved in Slovakia until these days, albeit with limited competences.

¹⁵ Kühn, *Socialist Justice*, at 826.

¹⁶ *Id.* at 826 ff.

¹⁷ *Id.* at 826.

Law Commission was further divided into two subcommittees on criminal code and criminal procedural law, and these were further divided into 13 subcommittees for the individual parts of substantive criminal law, procedural criminal law and military criminal law.¹⁸ In addition, the Ministry of Justice established an administrative and organizational department to monitor the literature and legislation of the USSR,¹⁹ and an information and publicity department, which aimed to popularize the works of the legal bi-annual.²⁰

To continue with the simplification of the criminal justice system, the members of the commissions and subcommittees included – besides law professors, representatives from courts, public prosecutors and notaries – also representatives from trade unions, youth workers and employees of the largest factories and other organizations. The involvement of non-professionals in this process was to be a guarantee of a popular element ensuring the working class interests.

On 28 October 1949 the draft codes were submitted to the Minister of Justice A. Čepička.²¹ Upon their approval, the result was the adoption of a Criminal Code (Act. No. 86/1950 Coll.), Criminal Procedure Code (Act No. 87/1950 Coll.), Criminal Administrative Code (Act No. 88/1950 Coll.) and the Code of Administrative Criminal Procedure (Act No. 89/1950 Coll.). Out of these, we shall only pay attention to the former two.

The new Criminal Code of 1950 was based on the premise that

socialism eliminates the economic base of capitalism,

and that

the bourgeoisie, in order to regain lost power by all means fights the people's democracy and hates socialism and is therefore trying to prevent the building of socialism.²²

Criminal Law has therefore gained a somewhat new function – that of creating and also protecting the new social relations, including building a new socialist society.

¹⁸ Karel Petrželka, *K současným kodifikačním úkonům* [On the Current Codification Activities], 89 *Právník* 137 (1950).

¹⁹ Jaroslav Vorel et al., *Československá justice v letech 1948–1953 v dokumentech, II. díl* [The Czechoslovak Justice in the Years 1948–1953 in the Documents. Vol. 2] 247–248 (Praha: Úřad dokumentace a vyšetřování zločinů komunismu, 2004).

²⁰ Karel Petrželka, *O kodifikaci* [On Codification] in *O právu a jeho tvorbě* [On the Law and Its Creation] 99 (Praha: Knižnica ústavu ministerstva spravedlnosti, 1950).

²¹ Vorel et al. 2004, at 247–248.

²² Vojáček & Schelle 2007, at 411. Václav Lachout, *K pojmu a metodě trestní politiky* [On the Concepts and Methods of Criminal Policy], 9 *Právnícké štúdie* 38 (1961).

The purpose of the Criminal Code was to protect the People's Democratic Republic, the construction of socialism, the interests of the working people, and to educate everyone to observe the rules of socialist coexistence. Thus, criminal law introduced certain educational moments following the Soviet model of criminal law, considering as one of its main tasks to educate and change the personality of the perpetrator and to ensure their inclusion into society.²³ The emphasis on the educational nature of criminal law was manifested particularly by the newly introduced "protective measures", as new forms of sanctions (this still applies in the Slovak criminal law system today).²⁴ The regulative function, protective and repressive functions have thereby stepped somewhat into the background, highlighting the educational function instead. This has been linked to the aim of the legislator to emphasize and point out that the people's-democratic society is better than the previous capitalist one, providing greater care of the people.

Still, the main objective of criminal law was undoubtedly the protection of the new regime from any political opponents and enemies. It was for this reason that the greatest protection was given to the people's democracy, the construction of socialism, and the economic interests of the state, while the protection of individuals was in the background. Strikingly, the explicit "destruction" of all enemies of the new regime was the main goal of criminal sanctions under the Criminal Code of 1950.²⁵

A fundamental change in comparison with traditional criminal law has also been the introduction of the Soviet model of the material concept of offense, together with a change in the overall categorization of offenses. Starting here with the latter, the tripartite division of criminal delicts into crimes, contraventions and violations was replaced by one category solely, namely that of a criminal offense. The new 1950 Code abolished the category of contraventions and excluded violations from the jurisdiction of courts, transferring them into the competence of the administrative authorities. A still, more radical change was that the Criminal Code introduced the material understanding of a criminal offense as one of the fundamental principles of criminal law. The principle was laid down in Sec. 2 of the Criminal Code as follows:

²³ See Milan Čič, *Vplyv sovietskeho trestného práva na československé socialistické trestné zákonodarstvo* [The Influence of Soviet Criminal Law on the Czechoslovak Socialist Criminal Legislation], 58 *Právny obzor* 544 (1975).

²⁴ Anna Miškárová, *Výchovný účel trestného práva* [The Educational Purpose of Criminal Law], 34(9) *Právny obzor* 818 (1951); Vladimír Solnař, *Represe a výchova ve vývoji čs. trest. práva* [Repression and Education in the Development of Czechoslovak Criminal Law], 99 *Právník* 446 (1960).

²⁵ Solnař 1960, at 446. Under Sec. 17, the purpose of punishment was to destroy the enemies of the working people, to prevent the offender from committing another offense, and to educate the offender to comply with the rules of socialist coexistence. At the same time, the imposed penalty had to act educationally on other members of society. Theoretically, it was a combination of punishing the perpetrator and preventing other criminal activities, while taking a class approach – since the working people were the main focus of the legislator.

an offense is any activity dangerous to society, where the outcome referred to in the law was caused by the offender.

This legal definition outlined three basic elements of the new concept of an offense – the principle that the action must be dangerous to society, the principle of no offense without guilt, and a requirement that the offense meets the formal features listed in the Criminal Code.²⁶ Hence, to consider an action a criminal offense, it was not enough to meet the formal features of the offense, but the action also had to be a culpable conduct, dangerous to society. An action dangerous to society was, quite understandably, foremost any conduct directed against the state or an action which otherwise violated the legal order created by society in the process of the transition to communism,²⁷ which corresponds to the purpose of criminal law enshrined in Sec. 1 of the 1950 Code, being the protection of the People's Democratic Republic.

The material concept of offenses was based on the social danger of the action, but criminal law – just like in the USSR – did not define the concept of “conduct dangerous to society.” Still, if the judge assessed that the offense showed no signs of danger to society, it was not a criminal offense, even though the formal elements of an offense were met. Additionally, if the danger of the offense was only minor, criminal prosecution could have been stopped by the prosecutor. There was thus a combination of two principles introduced, namely that of the material perception of the offense and that of the discretionary power of the prosecutor, which both constituted an exception to the principle of legality on which the criminal law was traditionally based. The system in question was therefore criticized as somewhat contradictory.²⁸

Still, this contradictory effect of the material concept of an offense was later on efficiently used in the light of democratic development after 1989. Under the new circumstances, many of the actions previously considered dangerous ceased to be regarded as such, and in the context of the rehabilitation Acts, the material concept of an offense was used in reverse mode – to abolish any sentences and judicial awards issued on the basis of the first three chapters of the special part of the Criminal Code of 1950, which were providing protection to the people's democracy and its economic system. Those offenses were namely not considered dangerous by the democratic society after 1989. This was confirmed by Act No. 119/1990 Coll. –

²⁶ Jan Filipovský et al., *O obecné části trestného zákona* [On the General Part of Criminal Code] 65–66 (Praha: Orbis, 1951).

²⁷ Jozef Madliak & Andrej Madliak, *Trestné právo hmotné – všeobecná časť. I. Základy trestnoprávnej zodpovednosti* [Substantive Criminal Law – General Part. I. Principles of Criminal Liability] 100 (Košice: ATOM computers, 2000).

²⁸ See Vladimír Solnař, *Nová kodifikace trestního práva a úkoly vědy* [The New Codification of Criminal Law and the Tasks of the Science], 3 Stát a právo 107 (1957). See also Ladislav Schubert, *Rozbor všeobecnej časti trestného zákona z hľadiska niektorých sporných otázok* [Analysis of the General Part of the Criminal Code in Terms of Some Contentious Issues], VI(1) Právnické štúdie 73 (1958).

a total of 37.590 rulings (out of which 8.160 judgments were issued in the territory of today's Slovak Republic) concerning offenses pursuant to the first chapter (against the Republic) of the special part of the 1950 Code was abolished,²⁹ together with 66.003 rulings (including 19.042 judgments from the territory of Slovakia) relating to offenses pursuant to the second chapter (economic offenses) of the special part of the 1950 Code³⁰ (mostly concerning the crime of endangering the economic planning – equalling to 59.388 judgments, out of which 17.031 were issued in Slovakia³¹), and finally the total number of 2.456 rulings (including 602 judgments from the territory of Slovakia) relating to offenses under the third chapter (against the order in public matters) of the special part of the 1950 Code (paras. 163, 164, 165, 166, 167–168, 169, 173–174) was abolished in 1990.³²

However, this was still not the end of the material concept of an offense in (Czech and) Slovak criminal law. It was only with the Slovak recast of criminal law in 2005 (by Criminal Code No. 300/2005 Coll.) that the element of the danger of an action for society was removed, except for certain minor cases. In those few remaining exceptions, the term “material corrective” became a new criterion for defining the boundary between a criminal contravention (newly re-introduced category of criminal offenses) and administrative violations – under Sec. 10 para. 2 of the Criminal Code:

It is not a contravention, if given the way of the act and its consequences, the circumstances under which it was committed, the degree of fault and the motive of the perpetrator, the severity of the action is negligible.

The material corrective also still applies when determining the type and term of punishment under Sec. 34 para. 4 of the 2005 Criminal Code. Hence, it can be concluded that the material understanding of criminal offenses remains a fundamental concept of criminal law in Slovakia, despite the fact that it was imported into Czechoslovak law, respectively Slovak criminal law under the influence of Soviet law.

2.3. Criminal Procedure and the Office of Prosecution in the 1950s

Czechoslovak (and Slovak) criminal procedural law has similarly gone through many changes since 1948. The works on the new criminal procedure code culminated

²⁹ Gebauer 1993, at 117, 169–181.

³⁰ *Id.*

³¹ *Id.* at 117, 158. For this offense, particularly private farmers were penalized, because the failure to supply set amounts of agricultural products was claimed to disturb the operation of the whole economic system. Criminal sanctions for self-employed farmers have become one way of putting pressure on them to join united agricultural cooperatives. To a large extent, this offense was also used against persons (especially miners) who, by skipping work or abandoning workplaces threatened the running of the economy.

³² *Id.* at 117, 169–181.

in 1950 in the adoption of the Criminal Procedure Code – Act No. 87/1950 Coll. However, procedural criminal law was already influenced by the above mentioned Act No. 319/1948 Coll. on the popularization of the judiciary.

The class character of criminal procedure as a specific feature of criminal justice in this period was highlighted already in Sec. 1 para. 2 of the Criminal Procedure Code, which provided that

the procedure should take a shape so as to educate citizens to remain vigilant against the enemies of the working people and other violators of building efforts and to meet their civic obligations.

The class character and the call for the fight against the enemies of the working people was then unfortunately manifested in a line of so-called “monster-trials” as an

effective tool of persuasion and education, and of increasing the alertness and vigilance in detecting, isolating and... suppressing enemies of the state and people’s democracy.³³

From the instructional material of the Ministry of Justice on Public Trials and their Organization (August 1951) it namely clearly follows that the cases tried before the general public intentionally concerned mainly the class enemies, namely rich villagers (*kulaks*), former entrepreneurs, tradesmen, factory owners or members of the bourgeoisie, and in the case of workers, these were mostly leading employees of national enterprises or cooperative farms, and the officials of local administration. These trials all had pre-processed scenarios and casts, including what sections of the Criminal Code were to be used, the tasks of individual actors were predetermined, and the overall political line of the trials was always determined in advance.³⁴ In these trials, a very non-formalistic approach to criminal law and procedure (including safeguards of fair trial) was taken.

Ex post, the main fault for the procedural failures connected to show-trials was already attributed in the 1950s to prosecutors, an office rebuilt in the same era under Soviet models³⁵ by extending the scope of prosecution competences way beyond the traditional area of criminal justice.³⁶ (Even today, in the Slovak Republic public

³³ Vorel et al. 2004, at 224.

³⁴ Karel Kaplan & Pavel Paleček, *Komunistický režim a politické procesy v Československu* [Communist Regime and Political Trials in Czechoslovakia] (Brno: Barrister a Principal, 2001).

³⁵ Act No. 319/1948 Coll. on the popularization of the judiciary changed the status of former state representatives; these authorities were for the first time called prosecutors/prosecutions.

³⁶ Jozef Čentéš et al., *Dejiny prokuratúry na Slovensku* [History of the Prosecutor’s Office in Slovakia] 81 (Bratislava: Atticum, 2014). Being guardians of socialist legality, the prosecutors could have entered any court proceeding at any stage, in the interests of the state or the workers. The Public Prosecutor’s

prosecution still plays a significant role in the system of protection of legality, albeit its role in civil court proceedings has been limited recently, in the context of recast civil procedural codes.) This led to the adoption of the new Criminal Procedure Code of 1956.

2.4. Strengthening Legal Guarantees at the End of 1950s

In 1953, after the death of the chairman of the Czechoslovak Communist Party, Klement Gottwald, a few weeks after the death of J.V. Stalin, and upon the subsequent revelation of J.V. Stalin's personality cult (1956), Czechoslovakia gave up the previous repressive approach to criminal justice and started rethinking the future direction of society anew. Changes were thereby initiated also in the criminal justice system.³⁷

The Criminal Code of 1950 was amended twice in this period – a major amendment was adopted in 1956 (Act No. 63/1956 Coll.) and a minor in 1957 (Act No. 68/1957 Coll.).³⁸ The amendment of 1956 has removed the most serious legal shortcomings. It focused mostly on sanctions, where it set out the direction of the individualisation of the sentence and the removal of its severity. The capital penalty was mostly replaced by a custodial sentence of 25 years. Where the Criminal Code previously only allowed for death penalty, the amendment introduced a 25-year imprisonment penalty as alternative. The amendment further deleted the provisions on the mandatory imposition of a financial penalty and of the penalty of property forfeiture.

The amendment also introduced changes in the special part of the 1950 Criminal Code – those provisions of the special part were deleted which excluded the possibility of imposing a conditional sentence and the possibility of reducing the sentence. The conditional deferral of imprisonment was newly possible in case of a custodial sentence of no more than two years (compared to the previous limit of one year). The penalty of loss of citizenship was erased completely. Following the amendment, it was also not possible to impose a ban on a profession and a ban on residence permanently, but only for a period from one year (or three years in case of the ban on residence) to ten years. There was also one reason for the cessation of the criminal nature of an act added newly, namely that of the extinction of the danger of an action for society.

Furthermore, some offenses (e.g. treason) were specified in greater detail, while others were abolished (e.g. Sec. 129 on hostilities against the Republic) and some new offenses were introduced, such as intrusion into the territory of the Republic,

Office also supervised the execution of the sentence and kept criminal records. The General Prosecutor was also entitled to express his views on all death sentences. Finally, the Prosecutor's Office gradually began to replace the role of the administrative judiciary, supervising the legality in administrative proceedings. The new role of prosecution was subsequently confirmed by the Act No. 64/1952 Coll. on courts and prosecution, 65/1952 Coll. on the Prosecutor's Office, and Act No. 65/1956 Coll. on the Prosecutor's Office. Cf. Čentéš 2014, at 82–84.

³⁷ Vojáček & Schelle 2007, at 416.

³⁸ Juraj Vieska, *O novelisaci trestního zákona [On Amendments to the Criminal Code]*, 4 *Socialistická zákonnost* 391 (1956).

terrorism, speculation, parasitism, hooliganism and pimping. New criminal offenses were based, in particular, on data derived from the practice of the judicial and law enforcement authorities.³⁹

The second amendment, Act No. 68/1957 Coll. on artificial interruption of pregnancy, amended the Criminal Code of 1950 in that the offense of killing a human foetus (Sec. 218) was abolished. Recently, impunity has been introduced for a woman who discontinues her own pregnancy or asks or wants someone to do so. The Act also laid down the conditions for discontinuation of pregnancy in a health facility with the consent of the woman, based on a decision of a special medical commission.⁴⁰ (The same principles have been retained up till today in Slovakia.)

The Czechoslovak Communist Party nationwide conference of 1956 additionally set out some new main principles for the work of the security authorities, prosecution offices and courts in this period: the strengthening of prosecutorial supervision, ensuring the consistent application of the presumption of innocence in criminal proceedings, improving the educational role of all law enforcement bodies, ensuring mutual control of their work, and the consistent application of socialist legality have been enumerated as the main tasks.⁴¹

This was reflected in the new Criminal Procedure Code of 1956 (Act No. 65/1956 Coll.), which even strengthened the principle of legality (the prosecutor has a duty to prosecute all offenses brought to their attention), the principle of officiality (the criminal justice authorities were to act *ex officio*) and the principle of indictment (the judge could start the criminal hearing only on the basis of an indictment filed by a prosecutor). All the authorities were obliged to collect not only evidence on the circumstances that were against the accused, but also in favour of the accused.

The new Criminal Procedure Code of 1956 specifically touched upon the preparatory procedure, since it was at this stage mostly that the failures occurred in the 1950s. As part of the preparatory proceedings, investigation was newly entrusted to the prosecutor's office and to the investigators of the Ministry of the Interior. Additional safeguards included the setting of time limits on the termination of the investigation (Sec. 185), as well as introducing the institute of acquainting with the results of investigation, to which the attorney of the accused must have been admitted. In order to ensure a higher degree of control over the work of the law enforcement authorities, a pre-trial hearing was also introduced as an optional stage of criminal proceedings.⁴² Obligatory pre-trial hearings were introduced in four cases

³⁹ Eduard Vlček, *Z dějin trestního práva v Českých zemích a v Československu* [From the History of Criminal Law in Bohemia and Czechoslovakia] 50 (Brno: Masarykova univerzita, 2004).

⁴⁰ See also the Decree of the Ministry of Health No. 249/1958.

⁴¹ Petra Gřivnová & Tomáš Gřivna, *Trestní právo procesné* [Criminal Procedural Law] in *Communist Law in Czechoslovakia*, *supra* note 8, at 587.

⁴² See also Explanatory memorandum to Act. No. 63/1956 Coll.

(in death penalty cases, cases of imprisonment, which exceeds the upper limit of two years, cases where the accused was in custody, and in proceedings against a juvenile and refugee). Changes have also been brought about with respect to some innovative procedural safeguards that should have been self-evident, but have been violated in the past (prohibition of forcing the accused to confess, the banning suggestive questions, etc.).

Furthermore, unlike in the previous Criminal Procedure Code of 1950, in all cases a two-level procedure was introduced. The Supreme Court could therefore no longer rule as the first and only instance.⁴³ Finally, the new Criminal Procedure Code, in comparison with the former, included also a chapter on indemnity for torture and punishment and a chapter on mutual assistance with foreign countries. The new legislation certainly meant progress, but in practice, the rigidity in thinking and procedural steps often prevailed even in the years that followed.

2.5. Socialist Criminal Law – Optimism in the 1960s

After the enactment of the 1960 Constitution which declared the victory of socialism in Czechoslovakia, the political leaders made efforts to change the most important Codes of Czechoslovak law as well, in order to better reflect the new ideological standpoints adopted by the Constitution. Foremost, it was deemed necessary to recast the whole criminal law sector and to adopt a new criminal code and a new criminal procedure code.

The 1960s were thereby somewhat exceptional in the Czechoslovak legal history, with strong idealism about reaching a number of the regime's goals, i.e. achieving socialism and reaching the awareness of citizens to the extent that criminal law may give priority to social self-regulation. These ideas were reflected in the wording of the Criminal Code of 1961, its conceptual basis and its implementation.

In line with the idea of criminality dying out in socialism and therefore a lower need for the state repressive apparatus, the Czechoslovak Communist Party conference of 1956 voiced a requirement for the increased participation of workers in the protection of public order and in the protection of property in socialist ownership. This was to be manifested in a separate body of workers to be established to deal with certain types of charges and with prosecuting certain types of offenses. Thus, Act No. 24/1957 Coll., which regulated the establishment of disciplinary commissions in companies, was enacted. These commissions had the task of dealing with and sanctioning offenses against property in socialist ownership, if being of lesser social danger. According to the cited Act, the head of the relevant socialist organization or an employee of that organization or, in accordance with this Act, or another authority created within the trade unions could decide in the given cases. A survey showed

⁴³ Eugen Husár, *Kotázke riadneho opravného prostriedku proti rozsudku v československom trestnom konaní* [On the Issue of Ordinary Appeals Against the Judgment of the Czechoslovak Criminal Proceedings], 40 *Právny obzor* 25 (1957).

that by the end of 1959, 827 disciplinary commissions of that kind were established in Slovakia. Altogether, there were only 49 individual decision-makers in Slovakia, with collegiate authorities prevailing.

In addition to the disciplinary commissions mentioned above, under the influence of the hopes of approaching socialism, unofficial “courts of comrades” had already started to be established in 1959. In contrast to disciplinary commissions, these tribunals were not formed under any law; rather, they were being created within the trade unions and were to deal with minor offenses that violated the principles of socialist co-existence. This trend was thereby officially supported and accepted as an expression of citizens’ awareness. This tendency was then transformed into the official establishment of the people’s local courts under Act No. 38/1961 Coll.⁴⁴

The new Criminal Code No. 140/1961 Coll. entered into force on 1 January 1962. The new Code leaned to a certain extent on the wording of the Criminal Code of 1950, but on the other hand, certain provisions linked to the suppressive function of the state and the “dictatorship of the proletariat” had vanished or had been replaced with new terminology, building on the “socialist” constitution. The new Code also witnessed a reduction in “sharp formulations,” which was made possible due to the success of the previous criminal repression of the 1950s, having fulfilled its purpose: to liquidate, punish and intimidate a large portion of potential opponents of the new regime. This was evidenced by an overall reduction in the crime rate, which reached in 1960 its statistically lowest numbers – e.g. the number of inmates had fallen to 54% in comparison with the year 1951.⁴⁵

The new nature and character of criminal law was already clearly stated in Sec. 1 of the general part of the 1961 Code, which defined the purpose of the Criminal Code as follows: to

protect the social and state establishment of the Czechoslovak Socialist Republic, socialist property, rights and legitimate interests of citizens and to educate towards the proper fulfilment of civic duties and towards the observation of the rules of socialist coexistence.

A class interest was seen here in the line of priorities in which the Code enumerated objects that were provided protection (the social and state establishment of Czechoslovakia, socialist property and finally the rights of individuals). The class struggle was claimed to be also reflected in the requirement of a certain level of danger to society under Sec. 3 para. 4 of the Criminal Code of 1961.

⁴⁴ Michal Benčík & Milan Čič, *Trestné právo a trestná politika v socialistickej spoločnosti: Účel, tvorba a aplikácia trestnej politiky socialistického štátu* [Criminal Law and Criminal Policy in Socialist Society: Purpose, Creation and Application of the Criminal Policy of the Socialist State] 13–14 (Bratislava: Obzor, 1973).

⁴⁵ *Id.* at 405.

Still, unlike in the 1950 Code, the purpose of punishment was no longer the explicit destruction of working people's enemies; on the contrary, emphasis was put on protecting society against criminals and on the educational aspect, i.e. to prevent the offender from continuing the criminal activity and to educate the convict to lead a proper life of a working person, serving thereby as a model to other members of society.

The effective protection of society and its individual members, and an increase in the educational role of the punishment were reflected in the system of penalties, the level of penalties and the new arrangements of conditional release from custody. In general, the severe sanctions of the 1950s, which contributed to the effective fight against "class enemies" were mitigated. The penalties of property forfeiture, ban on exerting a profession, expulsion, and financial penalties have been reworded. The Criminal Code was giving priority to pecuniary fines in the range of 500 to 50,000 crowns instead of custodial sentences. Finally, with reference to the Constitution of 1960 and to the special care that "socialist society dedicated to the youth," the seventh chapter of the special part of the Criminal Code was devoted to the punishment of juveniles. Criminal Code No. 140/1961 Coll. also reduced the custodial sentences to the maximum permitted period of 15 years while retaining the death penalty only as an exceptional punishment.⁴⁶ The death penalty should have been used only in cases of the most serious crimes and only in the event that a different penalty would not meet the purpose of the punishment. All these adjustments should have made it possible for the courts to take into account in each individual case all the particularities of the case and to choose a punishment best fitting the perpetrator, with regard to personality and the characteristics of the offender. Therefore, in addition to the custodial sentence and corrective measures, the courts had the possibility to impose numerous additional penalties as separate punishments.

Individual criminal offenses were divided into twelve chapters of the special part of the Criminal Code, in a systematic resembling that of the 1950 Code. The ordering of individual chapters thereby expressed the priority given to the protection of the state and of socialist society, only then providing protection to the rights of individuals. The systematics were only slightly modified in comparison with the previous adjustment of 1950: a new fifth chapter on offenses grossly disrupting civic coexistence was introduced, combining offenses that had been scattered in various chapters of the special part in the Criminal Code of 1950. The provisions of this chapter should have mainly protected groups of people or individuals against less intense conduct such as threats, use of violence or defamation based on conviction, nationality, or race. The fight against alcoholism, hooliganism and other so-called "parasitic"⁴⁷ social phenomena was also included in this chapter, being reflected

⁴⁶ Benčík & Čič 1973, at 44.

⁴⁷ Kuklík 2009, at 413.

in offenses such as drunkenness, hooliganism, parasitism, pimping, threatening morality, but also, for example, defamation or failure to provide assistance.

The tenth chapter was also a new one, comprising military offenses and crimes against humanity including the acts of supporting and promoting fascism and similar movements or expressing sympathy for these, acts of warfare, war cruelty, misappropriation of the Red Cross sign, etc.

However, maintaining the old systematics did not mean keeping the inner system of individual chapters intact. The visible changes occurred mainly in chapter one on "the crimes against the Republic," which omitted two sections, and in chapter two on "economic crimes," which newly included crimes against property in socialist ownership, which were previously classified as general property crimes. The new Code has also introduced a large criminalization by including broadly defined acts of "preparation for offense." A similar change touched upon the newly introduced concept of "attempt." Finally, in connection with the conspiracy to commit an offense, another new concept was introduced – namely that of an "organizer," denoting a new form of participation in a criminal act. A very serious change was seen in the introduction of so-called "*Rauschdelikt*," i.e. committing an offense under the influence of alcohol or other narcotic substances, which was modelled after a Soviet pattern in the new provision of Sec. 12 para. 2 of the 1961 Criminal Code – meaning that in a case of limited capacity self-inflicted with the use of alcohol, respectively narcotics, criminal responsibility was not excluded and the perpetrator was fully responsible for the offense committed.

Changes have also been introduced with respect to previously existing offenses, in particular those relating to the economy. It was mostly the provisions on the protection of socialist property and provisions governing economic offenses that were redefined. Some offenses that disturbed the socialist economy and state discipline, as well as some military offenses that seriously undermined discipline and order in the armed forces, have been clarified. The relations between states of the world socialist system have newly become protected in particular by the fact that the Code allowed to prosecute the most serious forms of "counter-revolutionary" acts aimed against the states of the world socialist system. Finally, as new offenses, those against fundamental human rights were inserted into the Criminal Code of 1961, based on numerous international treaties and conventions.⁴⁸

In general, a new view of criminal law and its role in society – essentially as an "*ultima ratio*" – and its subsidiary function, rather than being a daily instrument of state power, was reflected in the text of the 1961 Code. In line with this approach to criminal law, a specific feature of Czechoslovak criminal law was claimed to be the principle of socialist democratism, which meant that criminal law expressed the will

⁴⁸ Karol Matys et al., *Trestný zákon: Komentár 1* [Criminal Code: Commentary. 1] 19–20 (Bratislava: Obzor, 1978).

of all working people. Czechoslovak criminal law was finally claimed to be democratic also in that its individual legal provisions were formulated in a clear manner comprehensible for the widest masses of people.⁴⁹ Some further manifestations of democracy were also seen in cooperation with social organizations, in the election of judges and the like.

In addition, the principle of legality (in contrast to analogy) was also still in force – reflecting the historical model of *nullum crimen, nulla poena sine lege*. Czechoslovak criminal law was thus built on the so-called “socialist legality principle.” Furthermore, the principle of liability for guilt and the principle that only the offender can be punished by the punishment, and only the court may impose a penalty or a protective measure on the offender was still respected, just like in the 1950 Criminal Code.

Another feature of the Czechoslovak criminal law of the 1960s was claimed to be the principle of so-called socialist humanism, which was manifested in the fact that the role of criminal law was foremost humanistic – to ensure the protection of socialist society, peace and peaceful work, the undisturbed life of working people, peaceful coexistence of the nations, the inviolability of life, health, freedom, dignity and of property interests of citizens. Criminal repression was considered as a rational repression that should not cause unnecessary suffering to the perpetrator. This was emphasized, for example, in the provision stating that punishment must not be humiliating (Sec. 23 of the 1961 Criminal Code), or in the provision that the death penalty is a measure that is exceptional and instead of it there is a wide range of less stringent measures available. Cruel punishments, which contradicted the view of socialist society, excessive imprisonment and the death penalty coupled with special hardships, were precluded. Where possible, a more moderate measure was to be given priority before more stringent punishments.⁵⁰

The punitive element was to be applied only to the extent necessary, while it was to be gradually weakened in the future, emphasizing rather the educational aspect of criminal law. Czechoslovak criminal law was thus said to be based on the principle of the unity of repression and education. The purpose of punishment should have namely been to educate and lead the offender to live a proper life of a working person. The penalty was hence to act educationally upon the sentenced, and to intimidate other “morally unstable” members of society.

Finally, some additional principles of criminal law in Czechoslovakia, proclaimed by the then legislator and by the follow-up commentaries and treatises on Czechoslovak socialist criminal law, should have been the principle of proletarian internationalism and socialist patriotism, while on the contrary, manifestations of bourgeois nationalism and racism (e.g. supporting and promoting fascism and similar movements, the defamation of nation and race, etc.) were to be sanctioned.

⁴⁹ Milan Čič et al., *Trestní právo hmotné* [Substantive Criminal Law] 19–20 (Praha: Panorama, 1984).

⁵⁰ *Id.* at 14–16.

Finally, a few words on criminal procedure. Just like the Criminal Code, also the new Criminal Procedure Code of 1961 proclaimed the need to re-adjust criminal proceedings to the fact of reaching socialism and to gathering forces for the transition to communism.⁵¹ The new Act No. 141/1961 Coll. (Criminal Procedure Code) thereby followed the model of the Criminal Procedure Code of 1956, its purpose being to regulate the “procedure within criminal justice so that offenses are properly investigated and the perpetrator punished.” The proceedings were to observe the principle of socialist legality, prevent criminality, and educate citizens to honour their duties towards the state and society. It is thereby also important to mention that many provisions of the Criminal Procedure Code of 1961 followed the earlier adopted Act No. 38/1961 Coll. on peoples’ local courts, entitled to try minor offenses, including violations and property disputes, if they were referred to the local court by a prosecutor or a court.⁵²

The above specificities of the socialist criminal law were claimed to capture the difference in nature of socialist and capitalist criminal law: while the criminal law of capitalist states protected only social relations based on private property and served the interests of a minority of society (or individual), socialist criminal law was claimed to protect the interests of all workers and socialist property. The Socialist 1961 Codes were, as a result, claimed to be qualitatively different from the codes of capitalist states. Their provisions protected the socialist state in particular against any forms of resistance against the then political system (treason, destruction, spying), and further protected economic discipline, socialist property, socialist order in public affairs, etc. They also punished the abuse of property, parasitism, etc., as offenses which were not at all known to capitalist criminal law. Clearly, activities that were the basis of “successful business activity” in the capitalist social system, were considered offenses in the socialist state (speculation, abuse of property, parasitism, etc.).⁵³

After 1989 this system of criminal law was marked by many changes. Foremost, capital punishment was definitely abolished, and some types of offenses have been deleted from the Criminal Code (mainly those used to persecute political opposition). Most of the principles and rules, however, were preserved even in conditions of the renewed “capitalism,” allowing for our research question on whether the socialist and capitalist criminal laws were indeed that different as claimed.

2.6. Getting Sober in the 1970s

The period of social and legislative optimism of the 1960s did not last for long. Between 1963 and 1964 there was an increase in the rate of violent crimes,

⁵¹ Kuklík 2009, at 413.

⁵² Gřivnová & Gřivna 2009, at 588.

⁵³ Vladimír Solnař et al., *Československé trestné právo. Zvázok I: Všeobecná časť* [The Czechoslovak Criminal Law. Vol. I: General Part] 83 (Bratislava: Osveta, 1964).

crimes against life and limb, etc. In June 1964, the Czechoslovak Communist Party leadership even stated that the criminal laws were interpreted in a benevolent, liberal manner, with pseudo-humanist views, which ultimately had an impact in the rise of criminality, especially of the repeated criminality and on the weakening of state authority and trust in law. This was manifested in particular by the failure of the people's local courts to meet the respective expectations. These courts should have been a proof that the state and law is dying out and the role of protecting the public order is shifting from the state authorities to the autonomous bodies. The failure of local courts proved this premise wrong and the courts were abolished by Act No. 150/1969 Coll. The amendments to the Criminal Code also followed soon, abandoning the unrealistic idea of extinguishing criminality for good.

In the 1960s, moreover, the neighbouring countries of Czechoslovakia – especially Poland and the Democratic Republic of Germany – began to worry that Czechoslovak experiments will spread to their countries and endanger the unity of the Soviet bloc in general. It was therefore accepted that “the defense of socialism is a shared international duty of all states of the socialist system” and this thesis was interpreted as an international legal reason for the military intervention of the Warsaw Pact armies into Czechoslovakia in August 1968. Later, this concept was called the “Brezhnev’s doctrine.”

After the intervention, at the national level, the situation was called in Czechoslovakia as “the defeat of counter-revolution in the Czechoslovak Socialist Republic,” leading to some consequences also in the sphere of criminal law – mainly to a new attempt at strengthening the protection of socialism, the fight against imperialism, and against anti-socialist forces. It was not a return to the Stalinism of the 1950s, to terror, but still it was also not a democratic pluralism either. This new situation was called “normalization.”

In 1969, the first changes in criminal law were brought about in this context by a Statutory Act of the Bureau of Federal Assembly No. 99/1969 Coll. on certain transitional measures necessary for the consolidation and protection of public order. This was to have a temporary effect on the prosecution of offenses and violations. The matter was to be decided by a District Court’s single judge on the basis of a criminal notification by the police. The detention period was extended to three weeks and the attorney of the accused person could take part only in the main court proceedings. On the basis of this Act, an amendment to the Criminal Procedure Code was adopted (Act No. 149/1969 Coll.). The amendment extended competences of the courts to prosecute criminal contraventions (the new type of criminal offenses) – specific provisions were introduced regarding the investigation and trial of contraventions, which were dealt with differently from the general criminal offenses. The amendment further upgraded the jurisdiction of regional courts and district courts (including military district courts) and strengthened the institute of a single judge (deciding instead of a senate).

Another amendment to Criminal Code No. 148/1969 Coll. expanded both the general and the special part of the Criminal Code.⁵⁴ Signs of discontent, respectively of forming a political opposition to the regime could be punished by a “ban on residence,” introduced after the demonstrations on the first anniversary of the occupation of Czechoslovakia by the Warsaw Pact countries. The amendment allowed the offenders to be moved outside big cities. The purpose of this sanction has thus shifted in comparison with its previous purpose, which was to provide the more effective protection of society against “anti-social elements, especially repeat offenders, troublemakers, parasites and thieves.”⁵⁵

Furthermore, the maximum length of the custodial sentence was raised from 15 years to 25 years by Act No. 45/1973 Coll. The conditions for the imposition of the death penalty were amended as well, but still as a truly exceptional punishment, which could have only been imposed for offenses specified in the Code, and only if the sentence of imprisonment was not sufficient to meet the purpose of the sentence.

Finally, as a measure of post-penitentiary care, a “probationary supervision” was introduced by Act No. 44/1973 Coll., with so-called curators assisting the convict in the process of resocialization.

However, the above enumerated changes having to do with the change in the regime and in international relations were not of such a nature to completely replace the basic principles of “socialist criminal law” that were identified in the previous subchapter.

Conclusion – Shifting the Sociological or Legal Paradigm?

Although the criminal law of the Eastern Bloc countries witnessed a number of specificities, especially in its anti-formalist phase (in the USSR until the 1930s and in the rest of Eastern Europe at the turn of the 1940s and 1950s), later on, following the pattern of Soviet law, formalism found its way back into the criminal law of socialist countries, showing since then only minor specificities in contrast to the “capitalist” criminal law.

Therefore, it seems that the claims by socialist legal theorists that they have introduced the next stage in the development of criminal law, and a new paradigm of (criminal) law, this argument can be considered questionable – in the light of the above account of the Czechoslovak experience with socialist criminal law, it namely seems that albeit socialist theorists accepted a different approach to “protected interests” in criminal law, being the protection of socialist society, its economy and international relations, this may not be enough in fact to recognize socialist law as

⁵⁴ Benčík & Čič 1973, at 46.

⁵⁵ Vojtech Hatala, *K súčasnej novelizácii trestného práva hmotného* [On the Current Amendment to Substantive Criminal Law], 53(5) *Právny obzor* 404 (1970).

representing a truly different paradigm of criminal law. It may even be claimed that in the 1960s, when the political objective of destroying a class enemy was achieved, the criminal law in the Eastern bloc actually even more approached the Western European standards and the continental paradigm of criminal law. Similarly, Western European criminal law was throughout the 20th century closely observing the evolution in Eastern Europe, leading the Western European legislators to omit certain traditional crimes against morality (homosexuality, prostitution⁵⁶) from their Criminal Codes.

Hence, the differences between socialist and capitalist criminal law do not seem to confirm the existence of two contradictory paradigms of criminal law, at least not in the Kuhnian or Foucaultian meaning. Both political (and socio-economic) formations and blocs namely successfully applied the same paradigmatic model of statist criminal law, where public interests prevails – notwithstanding whether the public interests give priority to protection of state and regime or to other values such as human freedom, dignity, life, health, property, and so on. The statist paradigm of criminal law is therefore generally accepted in Europe at least since the end of the 19th century, being characteristic in that the state actually took the position of the victim of a crime,⁵⁷ or – more realistically assessed – took the position of guarantor of values specified and protected by criminal law. This happened to the extent that even in “capitalist” criminal law the injured person, the victim and their relatives or members of their family were moved to a second row.

In the last decades of the 20th century, this “statist” approach (paradigm) was criticized by criminal lawyers, especially in the USA and subsequently also in Western Europe, seeking the ways to reform the criminal justice system so as to take into account also the interests of the victims, and at the same time to qualitatively change the relationship between the state and the perpetrator. A solution to these issues is thereby offered by the representatives of the so-called “restorative justice” school, the origins of which are mainly associated with the work of Howard Zehr from 1990,⁵⁸ and the essence of which is the resolution of a dispute to the satisfaction of the injured party/victim, but also to the satisfaction of the community, without undue (and in fact often ineffective) disciplinarization of the offender. The very idea of restorative justice, thereby does not mean abandoning the concept of punishment; penalties are to be applied further on, but not as an end, but only as a tool to reach the goal of restoring the relationship between the criminal law entities.⁵⁹

⁵⁶ John Quigley, *Soviet Legal Innovation and the Law of the Western Law* 126–127 (Cambridge: Cambridge University Press, 2007).

⁵⁷ Declan Roche, *Accountability in Restorative Justice* 8 (Oxford: Oxford University Press, 2003).

⁵⁸ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale: Herald Press, 1990).

⁵⁹ Lode Walgrave, *Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime in Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* 61, 64 (A. von Hirsch et. al. (eds.), Oxford and Portland, Oregon: Hart Publishing, 2003).

However, this concept has numerous opponents pointing to the fact that the restorative justice theory has many goals, but at the same time unspecified instruments, missing criteria and uncertain evaluation standards.⁶⁰ Moreover, supposedly it is hard to imagine restoring physical damage.⁶¹ In any case, however, the concept of restorative justice undoubtedly represents a sort of a step towards the next stage in history of criminal law, respectively, according to some opinions, a return to the origins of continental European criminal law from before the 18th century (a “pre-statist” period of criminal law). It is this evolution that might potentially lead to a “new” paradigm of criminal law, replacing the paradigm of “statist criminal law” that prevailed in continental Europe in the 20th century, including the criminal law of both Capitalist and Socialist blocs.

Finally, also the philosophers of criminal law and punishment, who follow-up upon Foucault, for example Gilles Deleuze (1925–1995), repeatedly refer to the emerging next stage in the development of criminal law at the turn of 20th and 21st centuries. In particular, Deleuze notes that Foucault’s elaborate characteristics of the so-called disciplinary societies were indicative of the 18th and 19th century statist period, which peaked at the beginning of the 20th century. A distinctive feature of such a disciplinary society thereby was the use of environments of “closure” (schools, barracks, factories, hospitals, and, last but not least, prisons or labour camps). However, according to Deleuze, at the end of the 20th century, Europe moves from disciplinary societies to qualitatively different, “controlling” societies, which instead of disciplining use information technology and computers to control the citizens. The world has, according to Deleuze, arrived at a new level of capitalist life, where man is no longer “closed” in the factory, but rather is “only” controlled – for example, by being indebted (mortgaged). According to Deleuze, this change from disciplinary to a control society is also reflected in the prison regime and in criminal law in general – specifically in use of alternative punishments, such as electronic bracelets.⁶² The new type of control society attempts to control the risks, and does not attempt to discipline the body or soul of the offenders.⁶³

Hence, in this context, one might also raise a different question instead of the question of a paradigmatic shift from capitalist to socialist law – namely the question of to what extent the socialist society was a precursor of a shifting to a post-modern control society,⁶⁴ using the omnipresent control by the Communist Party? Again,

⁶⁰ Andrew von Hirsch et al., *Specifying Aims and Limits for Restorative Justice: A “Making Amends” Model?* in *Restorative Justice and Criminal Justice*, *supra* note 59, at 21, 22–23.

⁶¹ Anthony Duff, *Restoration and Retribution* in *Restorative Justice and Criminal Justice*, *supra* note 59, at 43, 45.

⁶² Gilles Deleuze, *Rokovania 1972–1990 [Proceedings 1972–1990]* 196–201 (Bratislava: Archa, 1998).

⁶³ Martin Vávra, *Kdo je vinen? Sociologie trestního práva a trestání [Who is Guilty? Sociology of Criminal Law and Punishment]* 28 (Plzeň: Aleš Čeněk, 2012).

⁶⁴ Marxists believed that the cause and solution to criminality lies in the society itself, not in the law. See Quigley 2007, at 34–36.

however, no major difference in comparison to Western Europe using modern technologies of control might be identified in the end...

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