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Research into the effect of transformation of criminal legislation and application of alternative sentences¹

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Extended summary

A vast number of legal norms have been adopted in the Czech Republic since 1989, in the criminal legislation field too. Ascertaining how successful these norms have been in practice and how they actually function provides vitally necessary feedback for future procedure. In accordance with this, the Institute for Criminology and Social Prevention was authorised by the Ministry of Justice to carry out the "Effects of transformation of criminal legislation on the state of criminality and increase in the effectiveness of justice in relation to the security of Czech citizens in 2000" project.

The subject of the research was principally to ascertain how legal provisions instituted after 1989 in criminal legislation are applied in practice, in what direction they are effective and whether they have proved successful. The aim was to formulate an opinion on whether it is necessary to repeal some of the new provisions, to amend them and perhaps to propose new measures and to use the results of the research and its conclusions as background material for formulating sentencing policy.

This was a long-term and comprehensive research task, in which individual research sub-projects conducted in the years 1996-2000 were considered to be fundamental from the point of view of transforming criminal legislation. The legal aspect was the major predominant feature in performing research tasks.

The focal point of the research consisted in **surveys of new provisions** which had been incorporated in sentencing codes since 1989. This involved the issue of alternative sentences, the probation provision in criminal law and the provision of what is termed diversion in criminal proceedings. These provisions form an important component of the new concept of our criminal law.

The following surveys were performed:

- survey of the community service provision
- survey of probation elements newly introduced in Czech criminal law
- survey of the provision for conditional stay of criminal prosecution
- survey of the mediation provision

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- survey of fines
- study on the security of citizens
- survey of the effectiveness of criminal law systems
- survey of short-term prison sentences

Following completion of the research task in 2000, an overall synthesis of the findings ascertained was made. The result is a final summary report on the project **entitled "Effects of transformation of criminal legislation on the state of criminality and increase in the effectiveness of justice in relation to the security of Czech citizens in 2000"**. In addition to this final summary report, the researchers published 17 separate papers during the research in the ICSP edition and 26 articles in the specialist press.

Findings were gleaned in surveys of individual procedures from the following sources:

- police statistics and statistics of the Ministry of Justice
- court files of criminal cases and in cases where there were good reasons also investigation, probation or other files
- surveys of professional opinions, predominantly of judges and state prosecutors, or sometimes other professionals (in the form of questionnaires)
- studies of professional literature.

We present the following brief conclusions on the findings obtained by the surveys on the above-mentioned new criminal law procedures:

a) Alternative sentences

Police statistics and statistics of the Ministry of Justice bear witness to the fact that there has unquestionably been an overall increase in criminality in the Czech Republic since 1990. High criminality called for a need to change sentencing policy and to deal with the question of the effectiveness of sentences, especially prison sentences. The growth in short-term prison sentences logically resulted in overloading of the prison system too and was manifested in a chronic inadequacy of prison capacity. On the basis of negative findings on the influence of imprisonment on the offender and the findings on the prison system in general, a search began for new solutions. Reform of the penal sanction system became one of the main tasks of overall reform of criminal legislation.

In most modern states what are called alternative sentences and measures that can be suitable replacements for short-term prison sentences in particular have progressively started to be applied and developed. On the basis of these findings the range of alternative sentences was also extended here. In addition to the traditional alternative sentences, such as fines in particular, a new type of sentence – **sentence to community service** - was introduced in the amendment to Act No. 152/1995 Coll., the Criminal Code, effective from 1.1.1996, and other alternative sentences and measures were also considered.

According to the report giving the reasons for the amendment to Act No. 152/1995 Coll., the conditions for imposing a sentence of community service are defined in such a way that they apply to offenders committing less serious criminal offences on whom there is no need to impose a prison sentence and for whom also for some reason mere imposition of a fine is insufficient or unsuitable. The report assumes that imposition of this sentence will come into the picture in particular for manifestations of vandalism, hooliganism or less serious property crimes where it is desirable that public opinion be brought to bear on the offender.

A list of types of community service is given for illustrative purposes in the criminal code. The essence of this sentence is the obligation of the convicted person to perform work to the stipulated extent for the benefit of the community in maintaining public areas, cleaning and maintenance of public buildings and highways or also other similar work beneficial to the community. The convicted person is obliged to perform this work personally, free of charge and in his/her free time. A court may impose a sentence of between 50 and 400 hours and may also impose restrictions on the offender for the period the sentence is served aimed at ensuring that he/she leads an orderly life. As a rule it also charges him/her to compensate in accordance with his/her means for the damage caused by the criminal offence. The Act also provides for this sentence to be converted into a prison sentence if the offender does not lead an orderly life in the period from conviction to completion of serving the sentence, comply with the conditions laid down or fails through his/her own fault to complete the imposed sentence within the stipulated time.

Statistical data show that sentences of community service are beginning to be applied more in court practice, which is an indubitably favourable indicator. In 2000 this sentence was imposed on 7,084 persons, 11.2 % of all sentences imposed. This is more than twice as many as in 1999, when this percentage was only 5.1 %.

The research conducted demonstrated that a community service sentence can to a significant degree fulfil the task of an alternative to a prison sentence. **Proposals** were also formulated for utilising the results of the research conducted which may increase the degree of application and effectiveness of this sentence, for example to make imposition of a community service sentence conditional upon the agreement of the accused, to reduce the upper limit of the sentence from five to three years for criminal offences for which a community service sentence can be imposed and to reduce the upper limit of community service sentences for juveniles, to define clearly the legal terms “for the benefit of the community” and “other similar work beneficial to the community”, to broaden the possibility of performing community service to the benefit of a number of entities and others. Some of these recommendations have already been incorporated after completion of our research in the amendment to the Criminal Code No. 265/2001 Coll., which will come into effect on 1.1.2002.

As regards **the sentence of a fine** already mentioned, the amendment to the Criminal Code No. 175/1990 Coll. has basically broadened the possibility of its imposition and has thus created the legal preconditions for it to become an important alternative to a sentence of imprisonment. However, the numbers of cases here where merely a fine is imposed are few and have been showing a tendency to decline since 1990 (from 16.7 % in 1990 to 5.6 % in 2000). There is a clear difference between our country and certain European countries, where fines are becoming the most common sentence imposed. It can be seen from the results of the questionnaire survey conducted that the majority of the respondents who are judges and state

prosecutors see the causes of low application of fines in the low economic level of most offenders as a result of which it is evident that fines could not be collected from them. De lege ferenda it is suitable to consider utilising the experience of a number of European countries with what is called the daily fine procedure, which would bring the amount of the penalty more into line with the financial means of the accused and what he/she can actually pay.

b) Probation in criminal law

Another way of resolving the fight against crime is introducing supervision of the behaviour of a person committing a criminal offence, what is termed **probation**. This combines the penological aspect (sentence, threat of sentence, limitation) and the social aspect (supervision, assistance). Probation was introduced in the criminal code by the amendment No. 253/1997 Coll. effective from 1 January 1998. It has been implemented in two procedures of the criminal code – conditional discharge with supervision (§ 26) and suspended prison sentence with supervision (§ 60a, § 60b).

Conditional discharge with supervision is closely related to discharge under § 24 of the Criminal Code and both these procedures can be applied under the same conditions. Conditional discharge with supervision is, however, a more severe alternative, because it is not a definitive verdict but conditional on fulfilment of certain facts; it is linked to stipulation of a trial period and may be made stricter by imposition of appropriate restrictions and obligations.

A suspended prison sentence with supervision is the typical form of probation through which the aim of the criminal code is achieved less repressively. It differs from a suspended prison sentence (without supervision) in the length of the sentence, serving of which can be conditionally deferred (it amounts to a maximum of 3 years as against 2 years) and in the fact that with conditional deferral of a prison sentence the court is also obliged to order supervision of the offender. Supervision is legally performed by a court and probation officers are authorised with its performance in practice.

It can be seen from the conclusions of the research conducted that only a negligible number of supervision procedures were imposed in the first year they became applicable (1998). Though there was a rise in the number of cases in 1999, to 82 for conditional discharge with supervision and to 659 cases for a suspended sentence with supervision, both these procedures continued to be used very sparingly.

On the basis of all the material obtained again **proposals** were formulated for utilising the results of the research which may contribute to greater application of both procedures. There was, for instance, a recommendation to define the concept, aim and content of supervision in the Criminal Code, to incorporate procedural processes in the Criminal Procedure Code for the performance of supervision under both procedures and other proposals. Most of these have already been legally implemented since the research project was completed, as for a community service sentence, in Act No. 257/2000 Coll. on Probation and Mediation Service and in the amendment to the Criminal Code and the Criminal Procedure Code No. 265/2001 Coll. (effective from 1.1.2002). Act No. 257/2000 Coll. contains inter alia a definition of the term “probation” and defines the position, rights and obligations of probation officers. The amendment No. 265/2001 Coll. defines the concept, aim and content of supervision in the

Criminal Code. It can be anticipated that these legislative provisions will lead to greater use of both supervision procedures in court practice.

c) Diversion in criminal proceedings

The growth in criminality after 1989 led to a significant increase in the workload of authorities responsible for criminal proceedings, which has had a negative impact in particular on the length of criminal proceedings. Democratic countries have reacted to the rise in criminality in recent years inter alia by reinforcing out of court and alternative procedures. This also takes into account the need for rapid satisfaction of the claims of those harmed by criminal acts and limitation of the rising cost to society for the criminal justice and prison systems.

In conformity with Council of Europe Recommendation No. 2/87/18 new alternative methods of procedure have been introduced in our criminal law by the amendments to the Criminal Procedure Code, first conditional stay of criminal prosecution and then mediation. We class both procedures among what are termed **diversions in criminal proceedings** – alternatives to punishment.

The procedure for conditional stay of criminal prosecution introduced in the amendment to the Criminal Procedure Code No. 292/1993 Coll. is laid down in the provisions of § 307 and § 308 of the Criminal Procedure Code. This is one of the options for achieving what is termed diversion from the standard procedure when criminal proceedings come to an end in a manner other than by a court verdict of guilty or not guilty.

According to the report giving reasons for the amendment, it comes under consideration in cases when in view of the circumstances of the case and the person of the accused it is evident that in the case of a conviction a conditional prison sentence would be imposed and the accused would in all probability respond well in the trial period. It is for this reason not necessary to pursue full criminal proceedings when the aim of these can be achieved in a much simpler way. This procedure has the nature of an interlocutory decision and cannot be interpreted as a verdict of guilty. It serves as a means for mediation between the person committing the criminal offence and the victim. If the accused does not comply with the conditions laid down in the trial period, the result is that criminal proceedings are continued.

The findings from our research showed that this new procedure was taken on board very quickly by judges and state prosecutors and also used appropriately by them. Criminal proceedings were accelerated by its application and the decision had the expected and required effect. There was also a strengthening of the position of the victim and satisfaction of his/her justified claims to compensation for damage caused by the criminal offence. It is necessary for all authorities responsible for criminal proceedings to create the preconditions for this, so that the accused persons do not have to be convicted if they fulfill all the legal conditions and where possible do not even have to appear before a court. It is thus possible to achieve a situation where criminal proceedings are freed from unnecessary formalities and can proceed far more rapidly.

The mediation procedure is another of the diversions in criminal proceedings providing alternatives to due trial in connection with hearing a case at a trial and passing a verdict of guilty and sentencing after full evidence has been established. This was incorporated in the Criminal Procedure Code in the amendment No. 152/1995 Coll., effective from 1. 9. 1995. It is regulated by the provisions of §§ 309 - 314 of the Criminal Procedure Code. In the last major amendment of the Criminal Procedure Code No. 265/2001 Coll. (effective from 1.1.2002) the provisions on mediation were fundamentally supplemented and newly formulated.

Mediation is conceived here in such a way that it can be applied in particular in cases where in addition to the public interest the private sphere is relatively seriously affected by a criminal offence. The state does not in these cases have a significant interest in criminal prosecution of the offender, because the criminal offence has the nature of a conflict between the offender and the victim(s). Mediation can clearly also be used in cases where the criminal offence affected only the public interest.

In contrast to conditional stay of criminal prosecution, mediation is a definitive end to criminal proceedings, it is decided by a court (from 1.1.2002, in accordance with the amendment to the Criminal Procedure Code cited, decisions on mediation will also be made by state prosecutors in preliminary proceedings), it requires a declaration by the accused that he/she committed the offence for which he/she is being prosecuted, and only conclusion of an agreement to compensate for damage in the future is not sufficient. Mediation also requires the agreement of the victim to this procedure and he/she can lodge an objection against the decision. The accused must deposit a sum of money in the account of the court designated for a specific addressee for generally beneficial purposes. Here, in contrast to conditional stay of criminal prosecution, no trial period or appropriate restriction is stipulated. A difference can also be seen in the aim of the two procedures. The very name mediation necessarily implies that its basic purpose is voluntary reconciliation of conflict between the accused and the victim, which cannot be reduced to mere compensation for damage.

The results of our extensive research showed that the mediation procedure here has not as yet fulfilled expectations and mediation has not yet become a standard form of resolving criminal cases. According to the statistical data for the years 1996 - 1999 mediation was decided in only 699 cases, which represents a minimal share of the total number of cases resolved.

In the replies of respondents to the questionnaire provided in 2000 who were judges, state prosecutors and probation officers a clearly negative assessment prevails. Mediation is perceived by them as a procedure that can seldom be used, which is not here to stay, does not have anything to offer in practice and does not lead to the desired acceleration of criminal proceedings. It is of no interest in court practice and of no interest to those accused, who prefer conditional stay of criminal proceedings or conditional convictions, nor is there any interest on the part of defence counsel. There is a lack of cooperation between the parties involved and victims often make it impossible to reach agreement because of their excessive demands. The general public is very inadequately informed about mediation.

Respondents unanimously see the main causes of this unsatisfactory position as being primarily in the over complicated state of legal regulations, consisting in an accumulation of sets of conditions for fulfilment of which a whole range of acts is needed. The absence of the probation service was strongly felt at state prosecutors' offices and judges too refer to its inadequate capacity. A number of respondents also refer to the unethical nature of this

procedure, which favours the more solvent offenders. The vast majority of offenders do not have enough money to fulfil all the financial conditions for mediation, and they see this as another very significant obstacle to application of this procedure.

Despite all the ascertained inadequacies and reservations, those carrying out the research project came to the **conclusion** that mediation has a legitimate part to play in our legal procedure. It is a procedure which is beneficial for the accused and the victim and when it is applied at the right time with the help of the mediation service it can be of assistance to all authorities responsible for criminal proceedings for reducing their workload and for more rapid resolution of criminal cases and thereby also in saving costs of criminal proceedings. It can be anticipated that, as with the previous procedures, the legislative regulations provided recently will increase the interest of authorities responsible for criminal proceedings in applying the mediation procedure.

The final report, "Effects of transformation of criminal legislation on the state of criminality and increase in the effectiveness of justice in relation to the security of Czech citizens in 2000," summarises the results of the research carried out as follows:

"The expansion of criminality and the lack of organisation in the state coercive power apparatus as typical symptoms of social anomaly connected with each far-reaching and revolutionary change in society posed threats to the proper functioning of the justice and prison systems here too in the post-November period and thereby also hampered control of criminality and posed threats to the citizens' right to security. The most marked signs of this situation were overloading of authorities responsible for criminal proceedings and overcrowding in prisons.

These problems had to be resolved as a matter of priority, if they were not to lead to the collapse of these systems with far-reaching critical results for the whole of society. The relatively most rapid and simplest measure in the criminal law field was adoption in this respect of alternative sentences in the criminal substantive law, which would put the brakes on overcrowding of prisons, and bring alternative measures in criminal law procedure, which would at least partially reduce the burden on authorities responsible for criminal proceedings.

The relevant legal regulations were of key significance in this period in eliminating the danger that threatened and for this reason their effectiveness also became of paramount importance as a subject of research interest".