

*Karabec, Zdeněk :*

**Trestní politika a její realizace v oblasti trestní justice.**

**Penal Policy and its Implementation in Criminal Justice.**

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***Summary***

1. The Institute for Criminology and Social Prevention, as a theoretical, analytical and research centre, performed the research “penal policy and its implementation in criminal justice”, the results of which form the content of this study.

The research was conducted by means of partial research tasks (probes, analyses and studies) on selected topics representing a broad spectrum of the penal policy question.

The research was performed using the appropriate methods, namely the analysis of documents, a questionnaire survey, a public opinion polling sub-survey, the analysis of statistical data and interviews with experts. A study of the relevant specialist literature helped in completing the individual tasks.

The research goal was to determine the relevant main characteristics of penal policy in the Czech Republic from 1990 to 2005 regarding the creation and implementation of the fundamental penal policy measures in the selected areas and the understanding of factors influencing the creation and implementation of penal policy in the relevant period.

The research schedule meant that some documents published in 2006 were also analysed; documents from a later period could only be considered in isolated cases.

In its penal policy every state declares primarily the level of protection for basic human and civil rights and freedoms that it is willing and able to safeguard in reality. A state’s penal policy is chiefly specified in its procedural and substantive criminal legislation, and in the system and organisation of the authorities and institutions that guarantee the application of penal law in the practical activity of these subjects.

2. The research proceeded from the definition that “penal policy, as part of a general policy, formulates the aims and means of the societal control of crime through penal law”. The following principal elements defining penal policy were identified:

- the connection with general policy,
- the focus on crime and other socio-pathological phenomena,
- the connection with criminal legislation and the criminal justice system,

using the instruments of penal law.

In the Czech Republic, as a democratic state, legislative bodies are periodically elected, thereby establishing their legitimacy and general responsibility for formulating penal policy. The legitimacy of executive bodies is provided (as well as by their acting under the law and with powers defined by the law) by the fact that their activity is subject to scrutiny and is transparent.

In a democratic state the role of other entities in formulating penal policy is also considered to be legitimate as long as their activity is substantiated by expert (or moral, religious etc.) authority. These can include a variety of non-government organisations and individuals. In the conditions that currently apply in the Czech Republic, the influence of NGOs (non-government organisations) on penal policy is by no means negligible. This is evidently because NGOs have focused on various aspects of the protection of human rights and freedoms and have been able to support their operations also by obtaining funds from

abroad, which is where they drew a degree of inspiration for their activity. They thus gradually succeeded in overcoming the scepticism of state authorities concerning their activities and the operations of NGOs began to be perceived as an organic part of civil society. Their contribution in formulating penal policy can generally be seen in the fact that they often provide an unconventional perspective on phenomena harmful to society, their causes and the possibility of prevention; they also frequently possess information and data on the occurrence of these phenomena which are difficult for executive bodies to access (e.g. data on domestic violence, human trafficking etc.).

A separate category comprises the press, television, the radio and other media affecting a broad range of people and often decisively influencing public opinion in the state. And the pressure of public opinion, e.g. the increase in repressive moods in society due to the fear of crime may significantly affect legislators in approving legislative principles and concepts in the penal law area. It obviously is not possible to rule out the fact that intense media coverage of criminal cases might directly or indirectly influence the decision-making of the court. Even if judges are bound by the law in their decision-making, their assessment of the evidence submitted, the person of the offender and related circumstances reflects, one way or another, their moral outlook, their world-view, their character and other personality traits, which also creates potential space for the media to influence their decision-making.

As a mass-scale social phenomenon, crime undoubtedly has major political potential in the way that political parties incorporate the following in their programs: the question of its restriction and control, police activity and the effectiveness of the judicial system in tackling crime and dealing with offenders, and ideas on the suitability of resolving conceptual and current problems in this area. Formulating a penal policy thus becomes a subject of political rivalry.

An important component of penal policy is the evaluation of its effectiveness. The criteria for effectiveness, however, are not unequivocal as a wide variety of factors are relevant in the etiology of crime. Apart from the common indicators of effectiveness, such as the rise and fall of crime (determining the dynamics and structure of crime), one should also consider the incidence of recidivism (effectiveness in treatment of offenders), costs incurred in fighting crime (budgetary costs for the police and judiciary, for the prison system, for compensating victims etc.), and take into account the degree of acceptance by the public of specific penal policy measures. According to the recent public opinion polls in the Czech Republic, of the 1004 respondents who were asked if they thought that they were informed of measures implemented in the CR to restrict crime, only 6.2% answered that they definitely were, 22.9% answered that they were partly informed, 39.1% said that they didn't have enough information, and 25.6% said they definitely lacked information on measures to restrict crime (6.3% said they didn't know or were unable to form an opinion on the question). The results indicate that citizens of the CR are not sufficiently aware of the measures implemented to counter crime in our society, which may have a considerable influence on whether they accept the state's penal policy, on their relations with the police, and with criminal justice generally. What people know about penal policy, and how they assess what they know, is also determined by the level of their legal awareness.

3. The empirical examination of penal policy focused especially on the following areas:

- the identification of the chief sources of penal policy and their content,
- the mechanism for formulating penal policy,
- the identification of a constant in penal policy,
- the content, form and effectiveness of current penal policy measures.

Each of these areas has its specific features to which the choice and application of research methods had to be adapted. The core methodological approach lay in an analysis of

the contents of selected documents from the field of penal law, and legislative activity relating to the control and prevention of crime.

The following brief comments can be made on the individual areas:

Identifying the main sources of penal policy did not present any problems for the research. At the most general level, the policy is clearly based on the Constitution, the Charter of Fundamental Rights and Freedoms, applicable laws and other normative acts and the measures of executive bodies that relate to them. These measures usually take the form of various conceptual, planning and organisational documents, which are often approved by a Government resolution requiring individual members of government and heads of central administrative authorities to perform specific tasks to implement penal policy plans (e.g. Czech Government Resolution No. 125 of 17 February 1999 approved the Government program for the fight against corruption, Government Resolution No. 1044 of 23 October 2000 updated the Concept of the fight against organised crime, which was adopted by the Government based on a program declaration in 1996 etc.). These fundamental measures take various forms, such as the National Plans for the fight against the commercial sexual abuse of children, the Security Strategy of the Czech Republic, the Plan for the development of the prison system in the CR, the Plan for the fight against crime perpetrated in the environment, Principles for the reform of the judiciary, Plan for the stabilisation of the judiciary etc.

These documents also include analytical materials of law enforcement bodies, such as Reports on the situation pertaining to public order and internal security (annually prepared by the Ministry of the Interior from documents provided by other central bodies), analytical materials of the Supreme State Prosecutor's Office, the Supreme Court etc.

Important sources for penal policy are obviously contained in the decisions of general courts of all levels and the judgements of the Constitutional Court; their significance derives not only from their practical application but also in how they influence public attitudes to the law and the rule of law.

An analysis of the content of the said sources produced information on specific topics of penal policy, on the level of understanding of the etiology and phenomenology of the phenomena which individual penal policy measures are designed to suppress. The analysis of their contents also provided information on the effectiveness of these measures.

The research also contained an analysis of the key penal policy documents from the following areas:

- Prison system
- Reform of the justice system
- The security situation
- Organised crime
- Drug-related crime
- Corruption
- Extremism
- Illegal migration
- Integration of foreigners
- Human trafficking and the commercial sexual abuse of children
- Environmental protection
- Prevention of crime

The analysis of the above subjects generally adhered to the following procedure: the characteristics of the topic (its history in the context of penal policy), the characteristics of the analysed documents, a description of the main penal policy problems for the relevant topic (description of strategies and objectives), a partial summary (influence of the analysed

documents on practical penal policy, potential consequences of this policy in the relevant topic area etc.).

A major constituent of penal policy in the Czech Republic comprises attempts at the reform of the justice system. Problems involving the organisation and execution of the judiciary are unquestionably rooted in the totalitarian era, although some shortcomings were compounded (or reappeared) after 1990. The transition to a market economy, the democratisation of political and public life, the guaranteeing of civil rights and freedoms, admission into the Council of Europe, preparations for accession to the EU, accession to important international conventions and treaties and many other factors created the need for the often hasty adoption of new legal norms, which the judicial system has had trouble in enforcing in judicial decisions. To this was added the complex and protracted dealing with various restitution claims and the elimination and remedy of wrongs in rehabilitation proceedings. In terms of personnel, organisation and material provisioning, the justice system was unprepared for this situation. A quantitative solution (a big increase in judicial posts, a large rise in the budget funds set aside for the justice system) was not sufficiently effective. The reform of the justice system was therefore generally considered to be essential.

Every state's penal policy is also clearly enforced in criminal procedure. This concerns an act that was perpetrated in the past beyond the direct knowledge of the bodies that conduct criminal procedure. These bodies thus have to reconstruct the relevant act through the process of evidence substantiation. An important aspect of this process is the constant conflict between two opposing requirements – for the effective approach of law enforcement bodies and for the protection of the rights and freedoms of the person. The unreasonable limitation of rights and freedoms of individuals in favour of law enforcement bodies can very easily lead to a grave distortion of the results of evidence, weaken the public control of such bodies and paradoxically may be detrimental to society's sense of security and freedom.

Penal policy is, among other things, the search for a compromise between both aforementioned requirements. The actual relation between these two requirements, also manifested in the relevant judicial practice, is therefore an important indicator of the state's penal policy. Historical developments may reveal a certain dynamics in how the relation between these partly conflicting values is resolved. Their true balance is a highly complex problem of penal policy and legislation, but also of police and judicial practice.

Under Article 41 of the Constitution of the Czech Republic (Act No. 1/1993 Coll.) the official legislative initiatives, or draft bills, are submitted to the Chamber of Deputies. These official legislative initiatives appertain to Members of Parliament, groups of MPs, the Senate, the Government or the Council of a territorial self-governing unit. A lot depends on the substance of such legislative initiatives, their principles, content, but also on the professional and formal quality. Legislative proposals and initiatives should above all adequately and flexibly respond to the needs of society with regard to crime control but also be carefully drafted, based on expert knowledge and practical experience. Their proponents should also consider the stability of the legal order and respect the system and basic principles on which penal law is based. A clearly defined and conceived penal policy should create and provide such a background to legislation.

The conducted research demonstrated that in the monitored period a total of 53 separate legislative proposals were submitted which were intended directly to amend the Criminal Code. Of these, 15 were Government proposals, 35 came from MPs and 3 from the Senate. There were 24 proposals for an amendment to the Criminal Procedure Code, of which 15 were Government proposals and 9 from MPs. There were no Senate proposals.

The following figures describe the success of legislative proposals according to their proponents: of the 15 Government proposals to amend the Criminal Code, 10 were adopted,

of the 35 proposals from MPs, 13 were adopted and one Senate proposal. Altogether, therefore, 24 draft bills were approved which directly amended the Criminal Code. The Criminal Procedure Code was amended by 16 direct amendments, of which 13 concerned a Government proposal and 3 a proposal by MPs (it should be pointed out that the figures for draft bills are approximate as full overviews are not available).

As is evident from the above comparison, the success rate of proposals by MPs is below 50%, or is only around one third. From this it is possible to infer that the power to influence penal policy through legislative initiatives lies mostly in the hands of the Government of the CR. Government proposals are generally more comprehensive and put forward more wide-ranging changes. The applicable penal codices in the Czech Republic, i.e. the Criminal Code and Criminal Procedure Code, were amended many times from November 1989 to 2006 and underwent extensive changes. These consisted not only of partial changes responding mostly to current needs and requirements, but primarily of profoundly conceptual changes. These concerned provisions of substantive and procedural penal law such as alternative sentencing, probation, diversion, criminal conspiracy, European arrest warrant and others. Many new bodies of crimes were created, and a host of major changes in the Criminal Procedure Code were effected. All these changes are indicative of the state's penal policy during this complex historical period.

Together with amendments to the existing Criminal Code and Criminal Procedure Code, work also proceeded on preparing new criminal codices, in the first place the Criminal Code. However, this has proved to be a task of immense complexity. The new codification should summarise and set the seal on the hitherto attempts to reform fundamentally substantive criminal law and criminal procedure and create in the Czech Republic a functioning, and ultimately stable Criminal Code and Criminal Procedure Code which respect all the basic principles of a democratic society.

In their programs political parties obviously try to respond to topical questions of interest to the public. As the question of crime is in various ways always at the centre of people's attention, crime (and especially measures for its control and restriction) also becomes a political matter *sui generis*.

Penal policy always forms part of pre-election campaigns and the programs of political parties; sometimes even a whole strategy for winning voters is built on radical slogans and views on the fight against crime. The question of people's security, the reduction and consistent prosecution of crime, the transparency and speeding-up of judicial practice and possible solutions are some of the main arguments that persuade voters. Some proposals are to a greater or lesser degree controversial or populist and regularly appear in various party materials. Examples include the prevention of crime, lowering the age for criminal liability, the idea of "three times and you're out", the definitions of new crimes (euthanasia, human cloning), sentencing for violent crime, repression of drug-related crime (zero tolerance for dealers and middlemen, not distinguishing between "soft" and "hard" drugs etc.), the reintroduction of the death penalty, the fight against corruption and economic crime and so on. Politicians also place emphasis on integrating the views of the public, or at least their reactions, in the development of penal policy. These views, however, may be not only quoted but also manipulated.

4. The research into penal policy and its implementation in the criminal justice system was conceived as a probe in a subject that, following the fall of the totalitarian regime in the Czech Republic, has been dynamically structured and developed alongside the building of a democratic state respecting the rule of law, changes to the legal order and the creation of its bodies and institutions.

This raises a number of essential questions on the character of our penal policy in the past period, its consistency, comprehensiveness, effectiveness, on the mechanism by which it is created, on the entities that conceive and implement penal policy etc.

We based the investigation into penal policy chiefly on a study (analysis) of documents in which our society's penal policy is expressed, as these written materials represent important *sources of penal policy*. The sources were selected to portray penal policy in the most important sections of societal reality, which also affect the criminal justice system.

It was obviously essential to define the actual *concept of penal policy* in order that thegnoseological basis of our approach be clear. We inclined towards a theoretical definition that accentuates the connection (and contingency) of measures adopted to control and restrict crime with the general policy. This approach made it possible to analyse (and better understand) the *mechanism for the creation of penal policy* and the role of certain entities that are involved in it.

Where individual analysed sources permitted, we also tried to record the development of penal policy and its transformations over time, or changes in the direction of individual penal policy measures.

The particular areas of penal policy that the research focused on are dealt with in separate parts of the concluding report from the research and always end with a sub-summary characterising the sources of penal policy in the given area and the focus of the main penal policy measures. Alternatively, they provide summaries of findings on the relevant subject.

From this broad picture it is possible, using our research, to emphasis the following in particular:

- The penal policy of our state following the fall of the totalitarian regime has, since the beginning of the 1990s, started to focus on removing the ideological barriers and systemic and personal impediments that hindered the creation of a democratic state based on the rule of law and the protection of the individual rights and freedoms of citizens.
- Penal policy was thus first characterised by a drive to reform all areas in which legislative and executive bodies are active. It soon became clear, however, that these attempts at reform in the area of penal policy cannot be achieved quickly and easily and for a number of reasons it was only possible to proceed step by step with regard to the activity of police and judicial bodies and in the area of criminal legislation. Certain fundamental penal policy measures, in particular the new codification of substantive and procedural criminal law and the essential reform of the judiciary, have not yet been implemented in the required extent.
- On the other hand, the fact obviously can not be ignored that the passing of time has made it possible to review some initial ideas and that individual penal policy measures have become gradually more profound and perhaps also more effective, e.g. as concerns crime control (i.e. repression and prevention), the protection of people's rights and freedoms (including the protection of their life, health and property), the activity of police, state prosecutor's offices, the courts and the prison system.
- There has also been a gradual refinement of the formal aspects and the content of materials in which penal policy measures were conceived. An analysis of the selected documents (sources of penal policy) that we looked at as part of our research shows that the proposed penal policy measures are mostly professionally well-grounded (they frequently derive from criminological research, or call for or propose such research), systemically consistent, feasible and their enforcement is verifiable. The principle penal policy documents are approved at Government level and discussed in the relevant Parliamentary or other representative bodies.
- The Czech Republic's penal policy is characterised by the high level of participation by NGOs in its creation and control. Czech NGOs, often following on from the activity of international organisations operating on the basis of a variety of foundation resources, have

gradually obtained the necessary professional authority. They are able to provide valuable information on the phenomenology and occurrence of various phenomena and submit meaningful proposals for penal policy measures. They also represent a welcome corrective in respect of the activity of state bodies, e.g. as concerns the protection of human rights.

- Even though it is undoubtedly a common phenomenon that penal policy in all countries is subordinate to general political interests and objectives (the axiom applies that “crime is a political issue”), in the Czech Republic this subordination is particularly marked. The causes are apparent in the very nature of our political life where, in the interest of individual political parties and groupings, problems are put forward and solutions promoted chiefly in order to bring about the electoral success of the relevant political entity. To a large degree, this also applies for the solution of penal policy problems. Penal policy in our society is a major field of political rivalry; this obviously brings with it no little risk of populism.

- A serious problem is posed by a certain discontinuity in some fundamental penal policy measures caused by personnel changes in key positions of state bodies as a result of the success or failure of political parties in elections to Parliament. This often brings not only changes in material priorities but also delays due to the need to progressively familiarise oneself with a new area of issues.

- The initiative of members of legislative bodies plays an important part in forming penal policy. The results of individual legislative activities on the part of MPs are not unequivocal, however. Their motivation sometimes arises solely from individual experience with crime or criminal justice, or from populist attempts to react quickly to specific cases upsetting the public, and the proposals are therefore often rejected by the Government as unsystematic. Legislators thus have far more influence in forming penal policy when debating the Government’s bills in individual committees or on the floor of the Chamber of Deputies. The opinions of MPs on Government proposals are often based not only on material (expert) arguments but also derive from political support or otherwise from opposition standpoints to the proponents of legislative proposals. It would be welcome if legislative bodies showed greater propriety and solidarity in considering and approving fundamental penal policy measures, for example in the interest of the effective restriction of crime, improvements to the work of the police and judicial bodies etc.

- It should be stated that the degree to which citizens are informed about penal policy in our society is at a low level and that for a long time there has been a discrepancy between penal policy practice and the expectations of citizens.

- The media’s influence in shaping public opinion on penal policy measures is significant. The public’s perception of the issue of crime and the activities of the police and the criminal justice system is fundamentally influenced by information for the public presented through the media. The press, radio and especially television through the presentation of news sometimes engender pressure on the part of public opinion which can affect the course and result of criminal procedure.

- The Czech Republic cannot be censured for failing in its penal policy to respect the undertakings and requirements that stem from the international treaties and conventions by which it is bound as a signatory state (another matter is obviously the fact that the Czech Republic, following the ceremonial signing of some treaties procrastinated in their ratification). The fact that these international acts are respected is apparent in the dealing with specific legislative problems connected, for example, with guarantees of human rights and freedoms in the procedural regulation of evidence in criminal procedure, or in the amendment to concrete provisions of the Criminal Code.

- A comparison of the development of criminal law in the Czech Republic and the Slovak Republic confirms the thesis on the connection between penal policy in a broad sense and general policy. Although the same legal system has existed in both states for decades, it has

only taken a few years for fundamental differences to appear in this area. For a deeper understanding of the penal policy of each society it is therefore advisable to also look at the sociological characteristics of the relevant community.

- The respect for and guaranteeing of basic human rights and freedoms should be considered a constant of the penal policy of the Czech Republic as a democratic state respecting the rule of law.

*In summing up it is possible to add as a concluding note that penal policy in the Czech Republic sometimes does not concur with the findings of criminology on the phenomenology, etiology and prevention of crime.*

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