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Praxe v oblasti rozhodování o nařízení ústavní výchovy a uložení ochranné výchovy

Practice in Ordering an Institutional Education and Imposing a Protective Young Offender Education

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Summary

The Czech Government in its decree No. 1151 of 15. 10. 2007 on the document “Assessing the system of care for children at risk” ordered the Ministry of Justice, among other things, to guarantee the fulfilment of the task “through the ICSP to prepare an analysis of decision-making practice of the courts in imposing a protective young offender education and an analysis of the reasons that give rise to subsequent measures”. The task was developed from certain conclusions of the cited document, which, among other things, indicate that the courts when making decisions to impose a protective young offender education proceed rather formally and unsystematically, and that the institute of a protective young offender education is not adequately employed. With reference to these facts the Medium-term Plan for Research Activity of the Institute for Criminology and Social Prevention (ICSP) for 2008 – 2011 set the research task “Practice in Ordering an Institutional Education and Imposing a Protective Young Offender Education”.

The subject of the research was thus the application of judicial practice in imposing a protective young offender education and ordering an institutional education in the Czech Republic. The research aim was to gain a detailed overview of the sources of information (evidence) that courts employ when deciding on the stated measures, the quality of these sources, whether it is possible to consider them suitable for the court to be able to decide responsibly on the fulfilment of statutory conditions for ordering an institutional education or imposing a protective young offender education, and how the courts work with these sources in reality.

The following methods were used to fulfil the research task:

- description and analysis of legislation;
- analysis of the available data from judicial statistics of the Czech Ministry of Justice and the Supreme Prosecutor’s Office;

- analysis of court files in matters where a protective young offender education has been imposed or an institutional education ordered.

Ordering an institutional education

The legislation for the institute of an institutional education is not concentrated in a single law. However, the core law regulating an institutional education is a Family Act No. 94/1963 Coll. From a procedural point of view decisions on ordering an institutional education are regulated chiefly in Section 176 et seq. of Act No. 99/1963 Coll., the Civil Procedure Code, as amended, in the provision on a court's care for minors. The performance of an institutional education is also regulated by several legal norms of a statutory and subordinate character.

Based on an analysis of the **statistical data** published by the Czech Ministry of Justice it is possible to say that the total number of cases where an institutional education has been ordered registered a slight increase in the monitored period. An exception to this can be seen in the data for 2005, when a year-on-year fall of almost 3 % was recorded. As regards the territorial distribution the leading examples of ordering an institutional education in 2004 to 2007 were the regions of North Moravia and North Bohemia, which regularly alternate with each other in the first two places.

In the pivotal part of the research, dedicated to the decision-making practice of courts when ordering an institutional education, an **analysis of court files** concerning 94 minors was performed. The sample contained 36 cases of an institutional education being ordered for a child aged 13-15 for improper conduct, 28 cases of treatment being ordered for a child over the age of 15 for improper conduct, and 30 cases of treatment being ordered for other cases (i.e. when the reason was the family's unsatisfactory social situation, shortcomings in the educational environment, the fact that the child found itself entirely without any care etc.). When analysing these records we focused especially on the type, number and content of the sources of information that courts consider when deciding to order an institutional education, and on the method by which the courts proceed in these matters.

In the first place we researched the personal relations of the minors. The number of boys and girls in the sample was relatively equal, with just a slight preponderance of boys. With regard to age at the time a decision was issued to order an institutional education, children older than 12 were significantly more numerous, representing almost 80 % of the research sample. Apart from two cases all the children held Czech citizenship. Almost 70 % of the sample comprised children attending (even if often only sporadically) elementary and a special elementary school. A large number of children from our research sample had one or more siblings. The records of 30 children gave information on the educational problems of their siblings. Of the total number of 61 children who had siblings and whose records allowed us to obtain such information this represented practically one half. When a court launched action in a case, which ultimately led to treatment in a special institution being ordered the majority of children from our research lived only with the mother in the home. Almost one fifth of children however lived in a whole family and only a somewhat smaller number of children lived with the mother and her partner or husband, who wasn't the child's father.

Also covered by our research was the educational environment in which the child was brought up, the conditions in which it lived and the material needs that were met. These facts could be found primarily from reports made by employees of the bodies involved in the socio-legal protection of children (OSPOD), or from the statements of the child's parents, or other persons with whom the child lived. The courts also considered them in the large majority of cases, albeit with a differing degree of punctuality and thoroughness.

Documents used by a court to assess a personality of a child were in the great majority (approx. 75%) reports by OSPOD employees, or the child's guardian. Courts very often also had access to an assessment of the child from the school that it attended. The child's statutory representatives also generally commented on its character in their statements or written submissions. A written expert opinion concerning the child's character formed the basis for a court's decision to order an institutional education only in exceptional cases. In our sample this only happened in two cases. Further sources of information were obtained in more than half of cases from the reports or comments of doctors, health or social institutions which dealt with the children in the past, the reports of children's diagnostic institutions, educational care centres or other facilities in which the children were placed on the basis of a emergency ruling etc. An extremely useful source of information on children has proven to be the comprehensive reports from the diagnostic institutions for children (DDU), which as a rule

provided the most thorough information for an assessment of a child's current development and prospects.

The files unfortunately only contained basic information on the child's statutory representatives. There were various sources of this information – statements from the statutory representatives or witnesses, an employer's report on earnings, OSPOD reports, reports from employment offices or other similar institutions, but also the content of past records on care for the relevant minor.

The first signals of educational problems in the relevant child could be found, with some exceptions, in the reports or comments of the OSPOD, or other documentary evidence or the statements of parties to the proceedings. In just under half of cases (43; 46%) proceedings on ordering an institutional education were preceded by educational measures under Section 43 of the Family Act. This generally meant providing for supervision of a minor. To a lesser extent it also meant imposing an admonition.

If the court obtains possession of facts justifying the launch of proceedings to order an institutional education it usually also considers the possibility of ordering a preliminary measure so that the due care of the child, as well as protection of his/her life and favourable development is ensured until the final decision in the case. In our sample of files the court issued a preliminary measure relating to proceedings in which an institutional education was eventually ordered in approximately 70% of cases.

In more than half of cases the reason for launching proceedings to order an institutional education was the improper behaviour of the minor. Other reasons for launching proceedings happened more rarely. In almost 60% of cases proceedings were launched by a court without a motion and generally on the basis of a prior proposal from OSPOD, or after a preliminary measure had been ordered. Almost three quarters of monitored cases were completed by a final and conclusive decision within six months of proceedings being launched. Proceedings at court were public in every case for the entire period (i.e. the public was not excluded even for part of the proceedings) and the proceedings were decided in accordance with the Civil Procedure Code by a single judge.

In only about 10 % of cases the child for whom a possible educational measure had been proposed attended judicial proceedings. In these cases the child was always duly and appropriately heard according to his or her age and circumstances. The court failed to duly gain the child's opinions and information in more than 60 % of cases.

Documentary evidence predominated among other forms of evidence. These related to the relevant submissions in the case, OSPOD reports, the guardian's comments, reports from the school that the child attended, reports from diagnostic institution for children where the child was placed by virtue of a preliminary measure, relevant doctor's reports or comments, documentary material maintained by the court concerning the care of a minor in the past, expert opinions etc. In more than 80 % of cases the court also heard at least one participant, or witness.

As far as a decision of a court of first instance is concerned, it's possible to say that the court overwhelmingly (in 93 cases) decided by judgement only to order an institutional education. In the statement to the judgement the courts ordered an institutional education and decided on compensation of the costs of proceedings. In the majority of cases they also changed earlier decisions on care of a minor, or also decided on child support and maintenance. In some cases, when following the announcement of a judgement the parties waived an appeal against it, the courts, in accordance with Section 157 (4) of the Civil Procedure Code, prepared a judgement in an abridged form, whose written reasons contained the subject of the proceedings, the conclusion on the facts of the case and a brief legal assessment of the case. Judgements also contained due instruction on the time limit and place to submit an appeal, usually also stating the required number of copies of the appeal. In some cases the instruction also contained a notice on the possibility of the decision's execution, or on the fact that the right to an appeal does not apply to someone who has expressly waived it. With regard to form and content it is therefore not possible to have any more serious objections against the analysed judgements.

An appeal against a judgement of first instance was only lodged in four cases. The low number of lodged appeals evidently testifies to the fact that in some cases, where parents had disagreed with the order of an institutional education during proceedings, they had become resigned to this fact after the decision was issued. Their attempt to have the child

returned to the family environment in many cases was apparent subsequently, when after some time they suggested that the institutional education be cancelled.

Based on information that we obtained when analysing the decision-making practice of the courts in ordering an institutional education, it is possible also to formulate several suggestions on how to possibly improve the current situation, namely:

- when deciding to order a preliminary measure courts should always consistently distinguish between preliminary measures under Section 76 (1) b) of the Civil Procedure Code and preliminary measures under Section 76a of the Civil Procedure Code, which should reflect the due specifications of the type of preliminary measure in the execution of a resolution by stating the relevant provision of the Civil Procedure Code and its conformity with the statement and justification of the decision;
- during proceedings on ordering an institutional education courts could dedicate more time to obtaining the opinions and information of the children affected (taking into account their age and intellectual maturity, particularly by examining them during the proceedings, which conforms to the provision of Section 47 (2) of the Family Act and article 12 of the Convention on the Rights of the Child;
- reports from bodies involved in the socio – legal protection of children which are used as bases for the court deciding whether to order an institutional education should, as an essential element, expressly contain data on the results of research into the possibility of ensuring the child’s education by substitute family care or family care in a facility for children requiring immediate help, which under Section 46 (2) of the Family Act have priority over institutional treatment; in the opposite case the courts should request that the report be supplemented so that they can research this possibility imposed by the cited provision and duly settle this in the decision’s justification;
- in the judgement ordering an institutional education courts should always take into account a prior decision on the upbringing and maintenance of a minor, if such decision was issued in the past;
- in cases ordering an institutional education courts should always pay due attention to a related decision on maintenance and support of a minor for parents or other persons responsible for the minor’s maintenance (Section 103 of the Family Act), therefore research their ability, possibility and property owned and proceed according to the criteria

for deciding on support and maintenance under the Family Act just as consistently as in deciding on the extent of the child support and maintenance in other circumstances than placing the child into the institution by virtue of an institutional education;

- in proceedings on ordering an institutional education (or in cases of care for minors generally) the courts should carefully research and assess the current approach and position of the parents and look at the question whether it is not appropriate to consider limiting or withdrawing parental responsibility, or suspending its performance.

Imposing a protective young offender education

A separate **criminal law for juveniles and a specialised justice system** were renewed in the Czech Republic after more than fifty years by Act No. 218/2003 Coll., on the responsibility of juveniles for unlawful acts and on the juvenile justice (Juvenile Justice Act), as amended, which came into effect as of 1. 1. 2004. Proceedings in cases of children under the age of fifteen are regulated separately in Chapter three of the Act, and changes to the former legislation are substantial. The question of juvenile criminal responsibility, including the conditions for imposing a protective young offender education, is dealt with chiefly in Chapter two of the Juvenile Justice Act.

From the available **statistical data** it emerges that in the monitored period from 2004 to 2007, when cases of juveniles under the new Act are dealt with by courts for juveniles, the number of orders for protective young offender education and the number of cases where proceedings ended with measures being dropped. The frequency of cases where the protective young offender education was imposed to a juvenile under Section 22 of the Juvenile Justice Act did not change during the monitored years, with numbers ranging from 26 to 41 cases annually.

The research task contained an analysis of 59 court files entered in the Rod register, which was lent to us by district courts, and where in 2007 it was decided by final judgement to **order a protective young offender education for 60 minors**. We thus researched almost all court files and from all judicial regions in the Czech Republic.

Separate proceedings under Chapter three of the Juvenile Justice Act belong among non-contentious civil proceedings and the court for juveniles proceeds in them according to the relevant provisions of the Juvenile Justice Act, unless this stipulates otherwise. These proceedings are preceded by pre-court proceedings conducted by specialised police bodies and the Public Prosecutor's Office under the relevant provisions of the Criminal Procedure Code. In the analysed cases during the proceedings evidence was produced which adequately clarified all material circumstances of the case, proved the commission of offences by minors under the age of criminal responsibility and verified the conditions for ordering the appropriate measure so that it was sufficient for the Public Prosecutor's Offices to submit a motion for proceedings to be launched and for the main part also for juvenile courts to make a decision.

In the analysed cases the proceedings under Chapter three of the Juvenile Justice Act were always launched at the suggestion of the Public Prosecutor's Office. In all, 117 written suggestions were submitted and if several suggestions were submitted concerning a single minor the courts for juveniles were brought together to hold joint proceedings. The written suggestions from the Public Prosecutor's Office met the statutory requirements with regard to content, including a concluding proposal for the measure to be ordered. As a source of doubt it is necessary to point out the failure to state all parties to the proceedings in the written suggestions, in particular the frequent omission of the facility where minors were being treated in a special institution, and in one case also omitting the OSPOD.

In its annual reports the Supreme Prosecutor's Office especially perceived a legislative shortcoming in the existing obligatory state of the suggested activity and the consequent inadmissibility of replacing the submission of a suggestion with their own decision. In their opinion this involves a formal construction which does not bring the expected reformatory effect, increases the costs for proceedings and influences the effectiveness of suggestions by the prosecuting attorney's office. From the records we found that this obligatory state led in some cases to the submission of suggestions by the Public Prosecutor's Office where it had been quite clear from the beginning that they were not fit for purpose and were also unrealisable, without any hope of success.

Proceedings before courts for juveniles were conducted in accordance with the relevant provisions of the Civil Procedure Code. Procedural faults detected consisted of the institutional facilities where minors were placed by virtue of the institutional education not being involved as parties to proceedings and not taking part in court proceedings, or these were held in the guardian's absence; this formed the grounds for cancelling decisions by appeal courts. These courts proceeded in the same way to the relatively frequent failure to fulfil the statutory obligation to ascertain the opinion of the minor and his attitude to delinquent actions, behaviour and the suggested measure in cases when this was not included in their examination.

Before the court for juveniles evidence was chiefly used, which had been examined and produced by a statutory method in the pre-trial stage of proceedings. At court proceedings this evidence was supplemented by witness examinations, expert opinions and professional comments, documentary evidence on the personal relations of minors and their parents, which in long-running proceedings changed quickly. Cases were also found where the appellate courts supplemented evidentiary proceedings.

Due to the evidence produced, the courts for juveniles of first instance or appellate courts passed orders always of an optional protective young offender education (Section 93 (3) of the Juvenile Justice Act) on a total of 60 minors who had been proven to have committed crimes. Unlawful actions against property represented more than half of all crimes, with theft predominating. The second most numerous group comprised crimes against freedom and human dignity, where the dominant position was held by robbery without serious health consequences and high material damage. Cases that we rank as crimes against morality (sexual abuse and above all rape) were relatively serious, as well as cases of the abuse of drugs and toxic substances.

There was a high success rate for lodged appeals and the decisions of appellate courts contributed not only to the correctness of decisions made in concrete cases concerning minors but also to directing judicial practice in appellate court districts. In the analysed cases the length of proceedings complied with the statistical records of the Czech Ministry of Justice, with the mass of cases being completed at courts within one year of proceedings being

launched. A third of cases were completed at courts of first instance in one hearing and another third in two hearings.

Minors mostly in age categories, which approached the limit of their criminal responsibility, committed antisocial behaviour; more than half of minors were aged between 14 and 15. Girls formed a quarter of the total number of minors to whom a protective young offender education was ordered. The family environment was often unstable; more than half of minors lived in a broken family, and more than a third lived only with their mother, who was not capable to look after their upbringing on her own. The physical presence of fathers in families generally did not have a positive influence on their upbringing; instead their behaviour gave a poor personal example. Parental neglect of their children's upbringing often led to their facing criminal sanctions. All minors had siblings, and many of them came from large families. Minors grew up in social work families, with the majority dependent on the social care of the state in unsatisfactory housing conditions.

All minors were found to have a disturbed relationship with school and a lax to negative relationship to education. A third of minors visited a special school or school with a special program in educational institutions. Minors had a very weak to inadequate welfare, undisciplined behaviour and a large problem with truancy. More than half of minors were placed by court decision in institutional care. According to the educational employees of these institutions the behaviour of minors was assessed negatively in practically all cases; its typical manifestations were escaping from the institution and having escaped committing a crime. Cases also occurred of the abuse of narcotic and psychotropic substances, smoking, violence committed on fellow pupils and educational employees, destruction of property etc.

Court decisions to order a protective young offender education were preceded by educational measures by authorities involved in the socio –legal protection of children, the ordering of an institutional education, and almost half of minors were dealt with according to Chapter three of the Juvenile Justice Act before the order for a protective young offender education. These measures did not lead to the rehabilitation of minors, at least in the sense that they would no longer commit criminal acts. In the monitored cases the courts for juveniles thus had no option but to impose the protective young offender education and chose

the ultimate solution when no other real possibilities were able to ensure the proper education of minors.

In 2007, **the protective young offender education** under Section 22 of the Act on the Juvenile Justice Act was lawfully imposed in all judicial regions, apart from the district of the Regional Court in Pilsen. For our research an analysis was conducted of a total of 24 records. In 2007 these contained final judgements on the imposition of protective young offender education for 26 juveniles.

A protective young offender education was most often imposed for the 16 – 17 age category, in which half of juveniles fell. The oldest offenders between 17 and 18 years of age received orders in approximately a third of decisions. As concerns the level of education, the sample contained a majority of apprentices, followed by students at special schools and the unemployed.

At the time decisions were made to impose a protective young offender education, the majority of juveniles were in educational facilities following a prior order for an institutional education, or very often had escaped from them. In our sample, the escapes recorded in the reports of educational facilities corresponded with the number of persons who had been in institutional reformatory care – i.e., every juvenile escaped at least once from a special institution. The rest lived in a broken family environment, or alone; one was in pre-trial custody.

The depressing state of the original family relations is evidenced by the fact that 22 juveniles out of a total of 26 were ordered to receive an institutional education. The social situation and cultural level of the family was often extremely low and the parents' relationship disharmonious. The classic model of the family only functioned in 18 % of cases (husband and wife), while 35 % of cases involved a common law husband or common law wife; in most cases the juvenile grew up in a broken family, or family that was supplemented/repeatedly added to. In ten cases we registered problems with the abuse of narcotic or psychotropic substances (from sniffing toluene to the intravenous application of pervitin) and/or alcohol abuse to a greater or lesser extent.

The juveniles' assessments by educational facilities provided for needs of criminal proceedings is generally unfavourable with regard to juveniles; among the negatives there is a particular emphasis on arrogance and vulgarity of the juvenile, problems in respecting the authorities, a lack of interest basically in anything, experimenting with addictive substances and committing crimes both in institutions and in escaping from them. Relatively positive prognoses occur to a lesser extent. Reports from schools or teaching disciplines particularly point out unjustified hours, a lack of respect for the authorities, (violence) conflicts with fellow students, average or inadequate welfare, laxity and truancy. There are larger problems with behaviour, even when a juvenile manages school satisfactorily.

Among the types of wrongdoings in the research sample property crime predominates absolutely (88 %), which reflects the predominance of this type of crime in overall crime committed by juveniles. A disturbing element is the significant occurrence (38 %) of robbery, when violence is directed chiefly towards children and old people; in some cases knives and knuckledusters are used in robbery (in the monitored example for the time being only as a threat of imminent violence). However, the most common factor is theft – for almost half of juveniles. The most serious wrongdoing was the intentional causing of aggravated bodily harm resulting in death.

In all monitored cases a protective young offender education was imposed for a juvenile alongside a criminal measure; in 85 % for the criminal measure of imprisonment with conditional suspension of sentence for a probation period, including once with supervision. A protective young offender education for a juvenile was imposed most frequently (almost for half of offenders) according to the provisions of Section 22 (1)b, i.e. due to neglect of the juvenile's treatment.

The justification for ordering a protective young offender education, which was a part of the written reasons of the judgement (if a simplified written judgement had not been prepared which contains a written reasons according to Section 314d (3) of the Criminal Procedure Code), could be considered universally as cautious and not arousing doubts. Nevertheless, in certain cases it is necessary to consider whether the purpose of this protective treatment measure (in the sense of Section 9 (1) of the Juvenile Justice Act) will be fulfilled. This particularly concerns cases where a protective young offender education is ordered to be performed after the execution of the criminal measure of imprisonment, or if the protective

young offender education is imposed in a period when only a short time remain before the juvenile reaches the age of eighteen and an extension of this measure is not considered until the age of nineteen. The point is that it is necessary to ensure continual reformatory treatment and the provision of an adequate space for a positive influence on the mental, moral and social development of the juvenile.

The repeated imposition of conditional criminal measures for imprisonment of various lengths of time, in whose probation periods instead of a proper life the juvenile continues to commit crimes, does not lead in many cases quite evidently to the offender's rehabilitation. The high number of other convictions, which happened in the research sample of 26 juveniles after the imposing a protective young offender education, unfortunately illustrates the low effectiveness of the measures imposed and the significant level of recidivism. This also was the case for 19 juveniles, which are three quarters, while in this matter we did not have information on everyone and the period from imposing a protective young offender education to the moment at which we researched the relevant records was quite short.

Based on the information ascertained it is possible to recommend that the following suggestions be considered for the jurisdiction of the competent bodies in deciding whether to impose a protective young offender education:

In the practical activity of the Public Prosecutor's Offices and courts for juveniles

- consistent examination of the legal force of the police decisions on suspension of cases on grounds of the inadmissibility of the criminal prosecution;
- in Public Prosecutor's Offices' proposals for the launch of proceedings according to Chapter three of the Juvenile Justice Act to consistently state all parties to the proceedings and in the proceedings before courts to permit the participation of all parties stated in the Juvenile Justice Act;
- in proceedings before courts for juveniles to respect the provisions of Section 92 (1), second sentence, of the Juvenile Justice Act, and in cases where a juvenile has been discharged from an interrogation not to be satisfied with his comments before a police body which is not sufficient to fulfil the statutory requirement;
- in the statistical records kept by the Czech Ministry of Justice to ensure that these correspond to the actual situation as concerns the number of final judicial judgements on

imposing a protective young offender education and the legal grounds for their ordering stated in the provisions of Section 93 (2) and (3) of the Juvenile Justice Act;

- to produce an opinion on the unification of judicial practice in cases where decisions are taken on several lodged proposals for the launch of proceedings for a single minor;
- in the verdict part of the judgement, by which a protective young offender education is imposed to the minor, to precisely specify the statutory provision under which this measure is imposed by stating the relevant written provision of (Section 22 (1) of the Juvenile Justice Act.

In the legislative area

- use statutory legislation to allow minors to receive the obligatory expert legal aid in pre-trial stage of proceedings before a police body and the Public Prosecutor's Office as for juveniles before the launch of a criminal prosecution;
- to strengthen the status of the public prosecutor in proceedings according to Chapter three of the Juvenile Justice Act by relinquishing the obligatory need for written proposals for the launch of proceedings according to Section 90 (1) of the Juvenile Justice Act, in particular for proposals according to Section 93 (3) of the stated Act, and to permit him to take his own decisions;
- to permit the public prosecutor in a written proposal for the launch of proceedings under Section 90 (1) of the Juvenile Justice Act to propose refraining from sentencing under Section 93 (7) of the said Act in cases where it will be apparent at the time a proposal is lodged that the measure does not need to be imposed and that all statutory conditions have been met for abandoning its imposition.

In the research we have had the possibility to research the vast majority of cases in which a protective young offender education was imposed in the Czech Republic in 2007, and an adequate sample of cases in which an institutional education was ordered. Based on an analysis of the submitted court files it is possible to state that overall we have, in the decision-making practice of the courts when ordering an institutional education, not found serious shortcomings which could be indicated as systematic. The sole exception in this sense could be said to be the fact that, when ordering an institutional education or imposing a protective young offender education for a minor, in the large majority of cases courts did not properly gain the child's opinion. In individual cases there was partial doubt or inaccuracies of a

formal or organisation nature, which however did not have important results for the relevant case or for the overall view of courts' application practice. In their activity the courts respected the provisions of legal regulations. In proceedings there were generally no unjustified delays. The volume and content of material, which the courts used to reach a decision in a case corresponded to the character of the fact that the courts are obliged in this activity to research and assess. For this purpose the courts also communicated adequately with bodies involved in the socio-legal protection of children and with interested reformatory, educational and health institutions. Although we understandably did not assess the material accuracy of court decisions to order an institutional education or impose a protective young offender education we can declare that these decisions did not arouse any major doubts.

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