

Opatření nahrazující vazbu v trestním řízení
Alternatives to Custody in Criminal Proceedings
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Summary

The Government of the Czech Republic, in its resolution no. 1151 of 15 October 2007, appointed the Minister of Justice with ensuring the carrying out of tasks, resulting from the “Assessment of the Care of Children at Risk System”. Among the tasks listed in the referenced text for the Ministry of Justice is to “*Analyse the possibilities of increased use of alternative measures to custody than under the current legislation, in particular with respect to the possibility of using the electronic monitoring as an alternative to remand juveniles in custody.*” This task was included in the medium-term plan of research activities of the Institute of Criminology and Social Prevention for the period of 2008-2010, with a deadline for finalising the first part of research by the 31 December 2010.

On this basis, in 2009 and 2010, a research project has been realised entitled “*Alternatives to custody in criminal proceedings*”. The object of the research was the legal provisions on alternative measures to custody in criminal proceedings and their practical applications in the Czech criminal procedure. The aim of the research was attaining detailed knowledge about making use of alternative measures to custody in criminal proceedings and exploring their potential use in larger extent. A secondary goal was primary assessment of the potential to employ electronic monitoring within the framework of these measures, and likewise with a view to replace the custody in the cases involving accused juveniles.

In solving the research task the following methods were employed:

- *analysis of the Czech legislation, including the relevant decisions of courts*
- *analysis of the statistical data of the Ministry of Justice, Probation and Mediation Service of the Czech Republic and Prison Service of the Czech Republic*
- *study of specialist literature and official documents*
- *an expert questionnaire survey among judges, prosecutors, and probation officers*
- *analysis of selected court files concerning cases in which alternative measures were taken instead of remand in custody.*

Custody can be defined as an institution of criminal proceedings, by the use of which the accused is temporarily rid of his/her personal freedom, on the basis of a decision reached by an appropriate body, in order to prevent him/her to avoid prosecution or punishment by fleeing or hiding, to obstruct or impede the clarification of the case through unacceptable influence upon the sources of evidence, or to continue in criminal activity. The purpose of custody is therefore securing the accused for the purposes of criminal proceedings and the execution of sentence, preventing the accused from obstructing or impeding the finding of evidence or from avoiding the criminal proceedings or punishment, and potentially preventing him/her from completing his/her offence or committing a new offence.

Legal conditions of remand in custody and relevant proceedings in the Czech Republic are primarily outlined in the first section of the fourth title of part one of the Act no. 141/1961 Coll., on the criminal proceedings (Code of Criminal Procedure), in articles 67- 74a. These provisions closely follows the provisions on fundamental rights and freedoms, anchored in article 8 of the Charter of Fundamental Rights and Freedoms. Czech legal conditions of remand in custody also significantly reflect important international documents, including the Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

Custody is an optional, subsidiary measure, and it is for this reason that modern criminal justice systems include various less intrusive measures, which can replace remand in custody. These measures ensure the presence of the accused persons at court, and prevent them from undertaking actions, which would threaten the criminal proceeding. The chosen alternative measure must give the required effect with minimal intervention in the personal freedom of the suspect or the accused, which must be considered innocent during this phase. Calls for the widest possible range of use for alternative measures instead of taking individuals into custody are the focus of a whole range of international documents (eg. United Nations Standard Minimum Rules for Non-custodial Measures, Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, Adopted by the Committee of Ministers on 27 September 2006, etc.).

The Czech criminal code contains provisions on alternative measures to custody in arts. 73 and 73a. They include:

1. a guarantee either of a civil society organization or trustworthy person capable of positively influencing the behaviour of the accused
2. a written oath from the accused
3. supervision of the accused by a probation officer

4. monetary security (bail)

In the case of a juvenile offender, the Juvenile Justice Act recognizes in addition to the above mentioned measures also the alternative consisting in the placement of the juvenile offender into the care of a trustworthy person (art. 50).

In conjunction with the introduction of house arrest, the new criminal code also introduces the institution of electronic monitoring into the law, the use of which within the criminal justice system has a relatively long history throughout the world. In European countries, electronic monitoring is used in the framework of criminal justice in varied ways, which differ across individual countries. In some countries electronically monitored house arrest represents an independent form of punishment, and elsewhere it is a component of conditions of conditional sentence or some community sanctions. Electronic monitoring is used in carrying out sentences involving imprisonment, as well as in cases of conditional release from prison. Finally, in some countries this measure serves as an alternative to remand in custody, either as the independent alternative or as a control element in the framework of some alternative to custody, which the given law permits. It is possible then, with a certain measure of simplification, to claim that electronic monitoring has become a component of sanction systems of criminal justice within European countries, and is used even when custody has been replaced by other measures.

To the end of gaining an overview for the state and trends of the use of alternative measures to custody in criminal proceedings, analysis was conducted upon the available statistical data pertaining to the agenda under research. Attention was also given to the state and trends in the use of remand in custody and to the statistical information about the use of custody in cases involving juveniles. The fact that official statistical evidence does not contain complex quantitative information about the use of alternative measures to custody proved to be a fundamental problem. This poses a problem for using statistical analysis to investigate the state and trends in the reviewed issue. Therefore at least a summary was made of the available information about alternative measures to custody in criminal proceedings from various sources.

Quarterly court reports concerning custody show, among other things, that the numbers of accused persons released from custody on probation or on bail are low in the long term, both in the total figures and in comparison to the total number of releases from custody. The number of cases of the accused being release from custody on probation was, in the observed period, between 80 (2005) and 37 (2008), and the number of cases of the accused being released from custody on bail between 25 (2005) and 15 (2007). The percentage of both types of case combined within all cases of release from custody within singular years was

around 1%. As for juveniles, the release from custody on probation has occurred very rarely, and the release on bail has in this period never occurred, according to the registered data.

Attention can also be drawn to the fact that making use of the possibility for release on probation is evidently favoured in some judicial regions in the long term, whilst in other regions the opposite holds; courts are reluctant to employ this institution. It is however important to bear in mind the low overall figures of these cases, which allow for the resulting interpretation to be easily biased.

Court reports about custody contain information only about cases of release from custody on probation or on bail. Cases in which the court decided about the potential remand the accused in custody in a way that let him/her free and placed him/her under the supervision by a probation officer or on bail, remain unlisted. In order to gain more complex data, at least for the institution of replacing custody with supervision by a probation officer, it is possible to make use of the statistics from the Probation and Mediation Service (PMS). These reveal the number of new cases of custody replaced by supervision of a probation officer, both in the event of release from custody, as well as if the accused had remained free.

The overall figures of cases of replacing custody with supervision by a probation officer have fluctuated between approx. 400-300 new cases per year, in past few years, during which in 2008 there was a decrease to 316. The proportion of these cases to the total agenda of the PMS in the observed period fluctuated between approx. 1.5 % - 1 %. In juvenile cases the figures were once again relatively low, no more than three dozen, and the proportion of these cases to the total agenda of the PMS relating to juvenile clients was even lower, namely the one percent. Cases, in which supervision was ruled during release of the accused from custody, made up approximately 20 % - 10 % of all cases of custody replaced by supervision in the last four years.

The research involved an expert questionnaire survey among judges, prosecutors and probation officers. The aim was to attain the opinions of these experts on the legislation relating to alternatives to custody, to become familiar with their experience from the practical implementation of this legislation and to ascertain their stance on the potential usage of electronic monitoring within the framework of replacing custody with other options. The responses from 80 judges, 78 prosecutors and 43 probation officers were obtained.

The questionnaire survey was met with a significant response from judges, prosecutors and probation officers, expressed through a high response rate of questionnaires and through extensive additional answers, comments, and suggestions. We can deduce from this that this is a topic of great relevance to representatives of these professions. The responses expressed common satisfaction with the range of alternatives to custody, which the Code of Criminal

Procedure provides. Despite different occupational groups, they agreed upon adding to this range with the electronic monitoring system (following its expected implementation in the Czech Republic), and for it to be used for the purposes of supervising the fulfilling of conditions given for the existing alternatives, and also as an independent alternative measure to custody.

As for the existing alternatives to custody, the fulfilling of purpose was evaluated highest in the case of bail and supervision by a probation officer. Apparently due to the simplicity of implementation, the written oath from the accused was also positively evaluated, although there was considerable scepticism among the responses as to the honesty of the accused. When it comes to a guarantee either of a civil society organization or trustworthy person, the view is that this is a purely formal institution, and is untrustworthy and hardly useful for this particular purpose. The same holds true for the placement of juvenile offender in the care of trustworthy person, in the area of juvenile justice. In these latter mentioned alternatives the responses often mentioned a lack of a person in the offender's surroundings, which could be identified as trustworthy and capable of having a positive influence on the accused.

This is indeed a stumbling block, however if we accept the claim that trustworthy persons in the surroundings of the accused are an exception, the more important it becomes for the body deciding upon custody, in cooperation with other subjects, to conduct an investigation into this issue, and so avoid the possibility that such an exceptional person will not be found.

Almost a quarter of responses from judges did not consider the benefit of alternatives to custody, consisting in reducing numbers of people in custody, as significant. Instead, they considered the greatest benefit to be in maintaining the social ties of the accused. Prosecutors, on the other hand, identified the reduced costs of criminal proceedings in particular as a benefit. The most beneficial measure in replacing custody, according to judges and prosecutors, was undoubtedly the bail. In the second place for what appeals as beneficial, according to judges, was the supervision of a probation officer, whilst the prosecutors leaned more towards the written oath of the accused. Even despite relatively positive assessment of the written oath, both the prosecutors and judges expressed concerns about this measure. In the additional comments they indicated as a main weakness of the written oath that it is often considered as a mere formality by offenders, and that they are willing to make whatever promises, but the actual impact on their further behaviour tends to be negligible.

As to the possibility of using electronic monitoring when replacing custody in criminal proceedings, the responses from the judge group expressed agreement. Their positive

standpoint mainly lay in the fact that there would be some guaranteed constant level of control over the behaviour of the accused, whereas the written oath or any of the other measures alone do not allow for this level of constant supervision. The judges similarly spoke for the responsibility of the accused, were they to be found guilty, to reimburse the costs resulting from the usage of the electronic monitoring system during the replacement of their custody. Before deciding upon this method of replacing custody, some responses suggested the accused persons ought to be informed of their liability to pay these expenses.

A vast majority of responses from prosecutors also expressed agreement with the use of the electronic monitoring when replacing custody. They saw benefits in the increased control over replaced custody and the broadening of possibilities in imposing obligations and restrictions, and supervising their compliance. The total of 94% of polled prosecutors, similarly to responses from judges, agreed with the reimbursement of costs arising from the use of electronic monitoring.

The questionnaire given to probation officers referred to the replacement of custody with supervision by a probation officer and the possibility of deploying electronic monitoring during the replacement of custody. A vast majority of responses stated that the supervision by a probation officer as an alternative to custody fulfils practically its role, which is the achievement of goals for custody without the need to detain the accused in custody.

In the responses given comments were made as to the low possibility of supervising the accused, and also the fact that the court often does not react immediately in cases of non-fulfilment of conditions of probation. The accused has a broad field of options in which to manipulate information, which it is not possible for the PMS to monitor. There is then a greater room for them to behave in a way, which can be considered reason for custody, for example influencing witnesses, or completing the offence. Probation alone cannot prevent the continued criminal activities of the client. The cooperation between the PMS and bodies involved in criminal proceedings tends to be effective above all in those cases where the PMS operates with the approval of these bodies even in the phase of preparing an official opinion toward the potential replacement of custody by probation, assesses with the accused his or her needs and risks, and proposes appropriate measures within the framework of replacing custody with probation.

A vast majority of polled probation officers agreed with the possibility of using electronic monitoring in replacing custody. The main reasons supporting the implementation of electronic monitoring as an alternative to custody included a greater supervision and monitoring of the clients. Awareness of electronic monitoring ought to significantly help lower the risk of re-offending on the part of the accused. Using electronic monitoring may

also contribute to giving the necessary respect to the institution of alternatives to custody. A clear stance was taken by probation officers towards the responsibility of the accused persons, should they be found guilty, to reimburse the costs arising as a result of the use of electronic monitoring when replacing custody; aside from one exception all participants were in favour. It is however important to consider the effectiveness of recovery, so that the expenses do not exceed an acquired reimbursement, i. e. not to charge those who are unable to pay.

For the purpose of gaining complimentary information about the practical usage of alternatives to custody in criminal proceedings, the research included analysis of selected court files relating cases where custody was replaced by some other measure. Analysis ought to have been aimed at the reasoning of decisions, the issue of whether the alternative to custody in the given case ensured the fulfilment of the purpose of custody, whether the accused complied with conditions of the alternative measure, etc. Owing to the fact that detailed and comprehensive information about making use of alternatives to custody is lacking in official statistics, it was only possible to acquire the appropriate sample of files pertaining to cases in which custody was replaced by bail (and this only in cases where the bail was posted in connection with the release of the accused from custody), or for supervision by a probation officer. A total of 21 files were studied, out of which 17 cases involved the replacement of custody by supervision of a probation officer, and in 4 cases custody was replaced for bail. Analysis proceeded according to data sheets, which were divided into several themed blocks: decisions decreeing supervision, and respectively setting bail; the criminal activity according to the indictment; the final decision on merits; the personality of the accused.

A total of 17 court files were examined on cases from 2007 and 2008 where custody was replaced by the supervision of a probation officer. The relevant cases related to offences of a wide variety; violent crime, property crime, drug-related crime, sexual and other offences were recorded. In all analysed cases the accused was found guilty. The most common sentence (10x) was a conditional sentence. A sentence of imprisonment was imposed in five cases, three of which were for a term of 12 to 24 months, one for 6 months, and one for term exceeding 24months. In two cases the imposed sentence was a community service. In 14 cases the accused were male, and in 3 female. These persons typically fell between the ages of 20-29 (7 cases).

The average duration of the criminal proceedings in the analysed cases was 431 days. The average duration of custody in cases where the accused was remanded in custody during the proceedings (in total there were 10 such cases) was 126 days, out of which the shortest term of custody was 25 days and the longest 364 days. In preliminary proceedings, during

which 7 of the accused were held in custody, the custody lasted for an average of 66 days in the analysed cases, out of which the shortest was 25 days and the longest 120 days. In the trial, during which 8 of the accused were held in custody, the custody lasted for an average of 100 days, out of which the shortest was 16 days and the longest 243 days. The average time in which the accused was placed under the supervision of a probation officer instead of custody lasted 217 days, where the shortest time for replacing custody with supervision by a probation officer was 35 days and the longest 574 days.

Out of seventeen examined criminal cases, those where the order was given that custody was to be replaced with supervision by a probation officer, this decision was in 9 cases made by the judge in preliminary proceedings, in 7 cases by the court during trial, and only in one case by the prosecutor. The accused was placed under supervision after release from custody (in 9 cases), after release from arrest (in 6 cases), and in one case the accused was left at liberty without any prior custody. In eleven cases the decision was taken by the appropriate body to replace custody with supervision by a probation officer without it having been suggested. In five cases this decision was taken upon the request of the accused or their defence lawyer. In the remaining case the impulse for the decision could not be found in the file.

In five cases the body deciding about the replacement of custody with supervision by a probation officer decreed that the accused be obliged to undergo further conditions, aside from the legal obligation to visit the probation officer at given times, and changing their address only with the officer's agreement. The extent of these extra conditions varies in individual cases, where in some cases there was a particular attempt on the part of the body responsible for custody to respond to the circumstances, which contributed to the offence committed, and in others these conditions were formulated in a more general manner. The reasoning of decision on replacing custody with the supervision by a probation officer differed both in content and in extent. In some cases the responsible body just quoted the relevant provisions of the Code of Criminal Procedure, and stated the conditions that had been found to allow such a procedure, whilst in other cases the concrete circumstances of the cases were specifically explained.

The files also revealed the manner in which the supervision of the accused was conducted. This information could be found namely in the reports on the course of supervision, which the probation officer must send to the court. Probation officers gave a clear overview of the course of the supervision in their reports, including the current situation of the accused, and focused on the question whether the accused is behaving in accordance to the conditions placed upon them as a part of the supervision.

In two cases the court, after having replaced custody with supervision by a probation officer, took the accused back into custody as a result of a failure to fulfil conditions.

A further four criminal files were studied pertaining to cases where, in 2007 and 2008, custody was replaced by bail. Two of the investigated cases involved drug-related offence, one was a case of burglary, and one was a case of embezzlement. In one case the accused was acquitted, and in the remaining three cases the offenders were found guilty. Out of these one was given a prison sentence of 3.5 years, and two were given conditional sentences. One of the offenders was also referred into obligatory in-patient drug treatment. All four were male, and two fell under the age category of 20-29, one 30-39, and one 40-49 years of age.

The length of the proceedings in the examined cases took place between 233 days and 1715 days. In all cases the accused were in custody during the criminal proceedings and the average time of custody was 227 days. During the preliminary proceedings, where 3 of the accused were in custody, the custody lasted for an average of 149 days. In the trial, where 2 of the accused were in custody, the custody lasted for an average of 230 days. The average time for which the custody in examined cases was replaced by bail lasted 292 days.

In two cases the judge made a decision to replace custody with bail in the preliminary proceedings, and in the remaining two cases the court did so in the trial. In all cases the situation was such that the accused was released from custody on bail, and this was done based on a request by the accused or their defence lawyer. In one case supervision by a probation officer was also mandated to the accused, and in another case the court accepted not only the bail posted but also a guaranty from the accused person's partner and parents for his future behaviour, and a written oath by the accused. The amount of bail in individual cases was 20,000 CZK, 120,000 CZK, 200,000 CZK and 250,000 CZK. In one of the examined cases the bail was posted by the accused themselves. In two other cases bail was posted by the mother of the accused, and in one case by the partner. The reasoning of decision on replacing custody with bail was given to a different level of detail in different cases where dealing with reasons that lead the court to accept this possibility or setting the specific sum for the bail. Not one case involved a decision to forfeit the bail for the benefit of the state, to revoke a bail, or to change the amount of the bail, and the accused were in none of the cases remanded back into custody after the posting of bail.

Remand into custody is a very serious interference with the rights and freedoms of the accused. The law, therefore, allows for the use this measure only if permitting the accused to remain at liberty would threaten the process and outcome of the criminal proceedings. Even in such cases it is possible, however, to achieve the goals of custody through use of alternative measures not related to the restriction of liberty of the accused.

For these alternative measures to be a real alternative to custody, several conditions must be fulfilled. Firstly the body deciding upon custody must have access to a sufficient number of alternatives, adequately set in law. There exist many such measures with different characteristics in different countries. Furthermore it is necessary to create practical conditions for the application of alternative measures. Some of them can simply be set into the law and it is possible to apply them without any further requirements (e.g. the written oath of the accused), others require a supporting infrastructure (supervision of the accused, bail, electronic monitoring). If this infrastructure is not in place, or in a sufficient quality and range, it is not possible to use these alternatives to custody in an effective way.

Finally, there is a need for qualified and active stakeholders. First and foremost bodies deciding on custody (judges, prosecutors) must consider the possibility of replacing custody any time custody is being decided on. At the same time however, considerations of using alternative measures must come only after the relevant body comes to the conclusion that custody is needed, and this is in order to prevent the negative effect known as “net widening”. Apart from this the bodies deciding upon custody must carefully evaluate the circumstances of the case, and the personality and situation of the accused, to be able to select a measure appropriate to the given case. Opinions of other persons involved also have great significance, such as probation officers, persons working in social care system for children and youth, members of the police or defence lawyers, who can contribute to the effective use of alternatives to custody in suitable cases.

The primary source of information about the current situation in the area of the analysed measures is statistical data. In our research we found that the official judicial statistics don't collect data about using alternatives to custody in a comprehensive and detailed way, and rather contain only partial data about some of these. If the issue of remand in custody is to continue to be one of the priorities in the area of criminal justice, it is time to consider whether it would be appropriate to add the statistical system with the aforementioned data, at the very least where it comes to the extent of use of custody alternatives.

Alternatives to custody in criminal proceedings must fulfil the primary function of custody, that is to secure the accused persons for the purposes of the criminal proceedings and prevent them from further criminal activities or hampering the criminal proceeding. An indicator of the success of using alternatives to custody can not be, for example, the number of cases in which the alternatives were used, but rather the fact whether or not those people who are in custody are indeed such that there is no other way to reach the goals of custody in their cases.

The results of the research revealed a series of problematic areas, foremost in the area of practical application of alternatives to custody and conditions for them. It cannot be said with certainty that removing these problems would result in more frequent use of alternatives. However if one of the aims of the institution of replacing custody in criminal proceedings is to achieve a situation when taking suspects into custody occurs truly only in absolutely necessary cases and for a necessary length of time, then it is necessary for the conditions of using alternatives to be the best they can, and for them not to involve practical stumbling blocks in their application.

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