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**Teoretické a trestněpolitické aspekty reformy trestního práva v oblasti trestních sankcí I.**

**Theoretical and Criminal Policy Aspects of the Penal Law Reform in the Area of Criminal Sanctions I**

ISBN 978-80-7338-135-6

**Abstract**

The new Criminal Code (Act No. 40/2009 Coll.), which came into effect on January 1<sup>st</sup>, 2010, introduced several significant changes in the area of criminal law sanctions. They are especially characterized by the principle of depenalization, leading not only to necessary modifications of the existing sentences and protective measures but also to outlining new and more effective sanctions, which, in the spirit of restorative justice, take also into account the needs of the victims of crime. Great emphasis is put on an individual approach to solutions of criminal cases where a wide range of possible alternative sentences will provide a sufficient motivation for the offender for rehabilitation. These changes represent a significant challenge for the entire criminal justice system – only their application in real situations will show if the expectations of the legislators can be met.

Criminological research shall play a considerable role when analyzing and assessing our experience with applying the new Criminal Code. One of the first studies, which has focused on this topic, is the research project “Theoretical and Criminal Policy Aspects of the Penal Law Reform in the Area of Criminal Sanctions”, approved by the Grant Agency of the Czech Republic for the period of 2012 to 2015. Its solvers are employees of the Institute of Criminology and Social Prevention (ICSP) and the Faculty of Philosophy and Arts at Charles University, who have prepared it in a close cooperation with experts from the area of criminal law and criminal policies, working in the criminal justice system.

**The subject of the research** is an analysis and assessment of the legislative frame of criminal sanctions after the changes, which have been implemented as a result of adopting the new Criminal Code within the context of sanction policies applied in the Czech Republic after 1989. The study analyzes the impact of applying the new Criminal Code on the application practices of selected criminal justice institutions, on the character and structure of the imposed sanctions and thus also on the composition of prison population and activities of the penitentiary system as well as the system of the Probation and Mediation Service. **The objective of the research** is to verify if the above mentioned legislative changes have

fulfilled their purpose especially with regard to the number of people who serve prison terms, to the effectiveness of the imposed sanctions and to the elimination of at least some of the problems of the application practices. Special attention is given to the effectiveness of four selected criminal sanctions – house arrest sentences, community service orders, conditional sentences with supervision and short-term prison sentence. Because of the extent and complexity of the subject of the research, a wide spectrum of **research methodologies and techniques**, quantitative as well as qualitative, have been utilized. Among others, these include legal analyses and comparisons that focus on the development of the Czech criminal legislature, an analysis of available statistical data (especially judicial statistics, police statistics, statistics of the Prison Service of the Czech Republic and statistics of the Probation and Mediation Service of the Czech Republic), a secondary analysis of the relevant sources from the Czech as well as foreign literature, questionnaire surveys conducted on samples of employees of judicial bodies, of the Probation and Mediation Service of the Czech Republic and of the Prison Service of the Czech Republic, or expert surveys in the form of controlled interviews.

The submitted publication presents some of the findings that we have acquired during the first two years of the project. The intention of the authors has been to provide a brief but comprehensive view of the new Criminal Code and, at the same time, to confront the changes it has brought about with available statistical data, based on which we can assess their application in practice. Furthermore, this view is complemented by findings acquired from media analyses, which allow us to see how the new Criminal Code and its introduction have been presented to the public and, partially, by opinions and attitudes of our population, mapped in a public opinion survey.

Changes in sentences pursuant to the new Criminal Code (and related amendments from 2011 and 2012) especially apply to the expansion of the scale of sanctions by two new sentence types, **house arrest** and prohibition to enter sport, cultural and other social events. The first mentioned sanction represents a court order, specifying that a given offender is obliged to be at a certain specified address at specified times, with the exceptions specified by the law. In the sequence of the sentence taxonomy, this should be the most severe alternative sanction, which can be imposed on persons who have to be imminently punished by limiting their personal freedom because of the character and seriousness of their crime, the personalities of the offenders and possibilities of their re-socialization, however, for whom a significantly less intense intervention is sufficient because of their personal characteristics and family relations. In comparison to imprisonment, the offenders do not lose contact with their

close ones and can continue going to work. However, the reality is that courts do not use the house arrest sentence too often. The main reason of this situation is the absence of across-the-board tools for executing the sentence by the means of electronic monitoring.

**The prohibition to enter sport, cultural and other social events** means that the sentenced person is prohibited from participating in the events of the stated types during the duration of the sentence. The sentence can be imposed for up to ten years on offenders who committed any intentional criminal act in relation with participating in such an event. When serving the sentence, the sentenced person is obliged to cooperate with a probation officer, proceeding in accordance with the given probation plan, participating in specified social training and re-education programs and psychological counseling programs and, provided the probation officer considers it necessary, reporting to a specified unit of the Police of the Czech Republic short time prior to the given prohibited event in accordance with the instructions of the probation officer.

Besides the introduction of the new types of sanctions, the conditions for imposing the already existing types of sentences were significantly modified. These modifications clearly reflect the philosophy of an overall limitation of the space for imposing imprisonment terms, supported by widening the options for applying alternative sentences. On the other hand, the new Criminal Code also made sentences related to crimes of a serious character more severe. This approach applies two opposing sentencing courses, leading to their deeper differentiation.

**Imprisonment sentences** continue to represent a universal type of punishment, which can be imposed for any criminal act and on any adult offender. It is the most severe punishment and the law expects that it should be imposed only if it cannot be expected, because of the identity of the offender, that imposing a different sentence would result in the offender leading an orderly life. The new Criminal Code extended the general maximum permitted imprisonment term from 15 to 20 years. This time can be extended only for extraordinary imprisonment cases when imposing imprisonment terms on offenders who have committed criminal acts for the benefit of an organized crime group and in the cases of extraordinary sentences. For conditional sentences, offenders who are, based on their age, close to being minors can be newly subjected to some of the corrective measures stated in the Youth Justice Act. For conditional sentences **with supervision**, the probation period was made identical to conditional sentences without supervision, i.e. 3 years. It means that the difference between both of the above stated sentences is now only in the conditions attached to given sentences.

**Community service orders** were considerably changed. Courts can newly impose them only on offenders who committed a misdemeanor (i.e. all negligent criminal acts and intentional criminal acts with the maximum severity of the sentence of 5 years). The extent of the service was reduced and it can be now in the range of 50 to 300 hours (previously between 50 and 400 hours). On the other hand, sanctions were made more severe for convicted persons who do not comply with the sentence or who do not maintain orderly life – even just one hour of the sentence not performed is transformed into one day of imprisonment (previously, the ratio was two hours / one day). The deadline for completing community service orders was extended from one to two years. When imposing this type of sentence by the means of a criminal order, a report of the appropriate probation officer is newly required. The report needs to address the possibilities of serving the sentence and health abilities of the defendant, including his/her opinion with regard to the imposed sentence.

In comparison with the previous legislature, **fin**es were subjected to significant changes in the new Criminal Code as well. They are related to a new procedure for their assessment, which is now governed by the system of daily tariffs (at least 20 and at the most 730 whole daily tariffs). Daily tariff amounts are within the range of 100 CZK and 50,000 CZK. The number of daily tariffs is determined by the court, which takes into account the character and seriousness of the given criminal act. The amount of a single daily tariff of the fine is determined by the court, which takes into account personal and proprietary relations of the offender. When doing so, the court considers the income of the offender, his/her assets and revenues from them, which the offender has or could have on average per day.

The difference from the old Criminal Code is clear from the perspective of **protective measures** – the new Criminal Code does not only specify them but it also defines general principles for their imposition. It therefore respects the requirements of criminal studies for the protective measures to accent the adequacy principle, subsidiarity principle of a more severe sanction and legality principle. These principles have been already applied in modern amendments abroad. One of the important measures is **security detention**. The conditions for facultative imposition of security detention were newly expanded also for offenders who abuse addictive substances, provided they repeatedly commit an especially serious crime even though they had been already sentenced to an imprisonment term of at least two years in the past for an especially serious crime, committed under the influence of an addictive substance or in relation to its abuse, and it cannot be expected that ordering a protective treatment would sufficiently protect the society, while always considering the already expressed attitude of the offender with regard to the protective treatment.

On January 1<sup>st</sup>, 2012, Act No. 418/2011 Coll., on **Criminal Liability of Legal Entities and Legal Proceedings against them** came into effect. By addressing liability of legal entities for committing criminal acts, the Czech Republic complies with international obligations arising from international agreements and EC/EU legal regulations. The Czech Republic was the last EU country without a legal regulation that would address this responsibility. Criminality of acts committed in the Czech Republic by a legal entity, which has a registered seat, its branch or organizational unit here, or which conducts its business or has its assets here, is assessed pursuant to this law. It comprehensively specifies 78 criminal acts, to which criminal responsibility of legal entities can apply. Individual bodies of crime are specified by the Criminal Code. Sentences that can be imposed on legal entities are partially different from sentences that can be imposed on physical persons – they include dissolution of the legal entity, forfeiture of assets, fines, forfeiture of an object or of another asset value, prohibition to do business, prohibition to participate in public contracts, concession proceedings or public tenders, prohibition to accept grants and subsidies and also publishing the sentence. Protective measures can be also imposed for criminal acts committed by legal entities – seizing an object or another asset value.

**Analyses of judicial statistics** allow for monitoring the impact of the above stated changes on sanction policies. However, we have to state here that the new Criminal Code has been in effect for a very short time so far. Moreover, we have to also consider other factors, which can have a great impact on the imposition of sanctions, such as securing their effective performance or the assessment manner of the given criminal proceeding bodies when applying various types of sanctions and procedures. Nevertheless, we can see that the growth in the number of imprisonment sentences, which had began earlier, has continued even after the new Criminal Code came into effect. This has been the case despite the fact that, since 2010, the number of prosecuted, indicted as well as sentenced people has decreased. An increase of the share of imposed imprisonment terms on the total number of sanctions, imposed as the main sentence, is also clear. After a relatively stable period between 2002 and 2009, when this share amounted to 13.6-15.6%, the share in 2010 and 2011 was 17% and in 2012 16.5%. Changes can be also observed in the structure of the imposed imprisonment terms based on their length and also based on their share of the total number of sentenced persons. The share of imposed imprisonment terms for up to one year significantly declined in 2011 and 2012 while the share of imposed imprisonment terms for between 1 and 5 years increased. The number of sentences for up to 15 years slightly declined.

The share of house arrest sentences with regard to the **overall structure of imposed sanctions** has been negligible during the first three years the new Criminal Code has been in effect – for example, it amounted to only 0.6% in 2012. The same situation applies to the sentence on the prohibition to enter sport, cultural and other social events, which has not been practically imposed as the main sanction almost at all. In 2010, this order was imposed in two cases, in 2011 in five cases and in 2012 in three cases. Even when connected to other sanctions, imposition of this order is rather exceptional, even though there has been some increase in the number of cases when it was imposed. The share of community service orders has decreased significantly. In comparison with 2006 through 2009, when it was between 16 and 18%, since 2010 it has been in the range of 9.4 and 11.5%. However, at the same time, the decline of the share of community service orders is compensated by an increase of the conditional sentences (without supervision). In comparison with 2000 through 2009, when their share was somewhere between 53 and 56%, in 2010-2012, this share soared to 60-61%. The rise is probably caused by cases when courts, deciding by the means of a criminal order, opt for conditional sentences because of the more difficult conditions for imposing community services or house arrests. The share of the number of conditional sentences with supervision has also grown. On the other hand, after the introduction of the new Criminal Code, the share of fines has not changed much and these orders are still used in a very limited extent as a main sanction. The same is true for the institutes of waiving punishment and conditional waiver of punishment with supervision, which are used by the courts only rarely.

The analysis of statistical data thus basically suggests that the expected depenalization (after the new Criminal Code came into effect) has not materialized so far. To the contrary, the trend of a growing number of imposed imprisonment terms has continued its course. The new alternative punishments have not made any headway, which is, in the case of a house arrest, probably related to the problems connected to its execution. More changes of the criminal regulations have been already adopted as a reaction to this situation and to the previous negative trend of a high number of convicted people in prisons. We can expect to see their impact in the coming years.

As a part of the project, a **media analysis** has been conducted. It focused on exploring the media perception of the changes of sanction policies and of the application of the new Criminal Code. This is an important aspect of the given topic since the media represent a fundamental source of information for the public and thus for forming people's attitudes and opinions. The study, conducted so far, uses a combination of qualitative and quantitative content analyses of the text. The study focuses on the first three months of 2010, i.e.

immediately after the new Criminal Code came into effect. Examined materials were selected from 5 national daily newspapers (MF Dnes, Lidové noviny, Právo, Hospodářské noviny and Blesk). Based on individual keywords, a total of 289 relevant articles were gathered from the above stated period. The analysis especially focused on the manner, in which the newly introduced legal changes were commented on, which topics were presented most often and in what context, and which legislative changes the media presented in a positive light and which as problematic.

When informing about the new Criminal Code, the press used general informative news related to the legislative changes, case interpretations, expert commentaries, media accentuation of the topic on the front page, photographs and also informative articles or interviews. Individual newspapers used these methods to various degrees. The most often mentioned legislative changes applied by the new Criminal Code included the introduction of house arrest sentences, legal regulations related to the criminal act of murder (more severe sanction for this crime and the differentiation between a murder and manslaughter), legal regulations related to theft, driving motor vehicles without a driving license, poaching and unauthorized production of alcohol (topics related to the media-attractive new year's amnesty), newly introduced crime of stalking, issues related to drugs (new legal regulation with regard to the conditions for drug possession) and the newly introduced alternative sanction of prohibition to enter sport, cultural and other social events.

Because of the orientation of the project and its parts, a special attention has been paid to the topic of community services and security detentions. It was determined that the partial legislative changes, introduced to these institutes by the new Criminal Code, are not too attractive topics for the media. Similarly, the overall concept of the new Criminal Code was not presented either. The media tend to present particular legislative changes, especially in relation to particular criminal acts. Nevertheless, the media did inform about the important changes. This is true, for example, for the introduction of new alternative sentences, even though in the case of house arrest sentences, their attractiveness for the media is rather caused by the organizational problems related to the implementation of the tender for electronic monitoring of the house convicts. The new sanctions were presented in the media mostly in a positive light and with an expectation of their more extensive application in the future.

The research project also envisions repeated surveys of the **public opinions with regard to punishments, sentencing and sanction policies**. The first survey was conducted in October and November 2012. It focused on evaluating how well people are informed about individual types of punishments and the frequency of their imposition, on their perception of

the basic trends of the criminal policies (i.e. if sentences have been getting more or less severe over time) and also on their opinions with regard to the options for reducing the number of the prison population. Some of the questions were prepared in a way as to be able to compare the gathered data with the previous ICSP studies. Data were collected by PPM Factum Research, s.r.o., using the CAPI method as a part of the so-called omnibus survey. The number of respondents from a representative sample of 1,000 respondents 15 years and older, who answered the questions, was 963. The sample of the respondents was selected using the standard quota selection method pursuant to the following criteria: age, gender, education and residency address.

When it comes to the types of punishments, which represent alternatives to imprisonment terms, people most often recognize fines, conditional sentences and community services (even though they often quote it under the wrong name of “public services”). Almost one third of the respondents were even able to state the house arrest option when asked a question without the possibility to choose from several alternatives. Other alternatives were stated only rarely. Only slightly more than one quarter of the respondents were able to state three or more correct answers. On the other hand, about one fifth of the respondents were not able to give a single correct answer. Almost one half of the respondents stated that the most commonly imposed sentences in the Czech Republic are conditional sentences.

Despite the fact that the new Criminal Code made sentences for serious crimes more severe, the Czech public believes that the sanction policies in the Czech Republic are getting rather more lenient – only just under seven percent of the respondents think that sentences for serious crimes have become more severe during the last ten years while a little more than one half of the respondents believe that these sentences are less severe today. The largest part of the population of the Czech Republic believes that the most effective way for reducing the number of inmates in our overcrowded prisons is to make the prison conditions stricter (32% of the respondents selected this option) and punishments more severe (30% of the respondents). 17% of respondents recommended the use of alternative sentences and 11% of them think we should focus more on prevention. 7% of the people believe that the best option is to build new prisons. The monitored demographic characteristics of the respondents did not play a big role for most of the questions. Exceptions to this rule were represented by a slightly better knowledge and support of alternative sentences by the middle age generation and by respondents with higher education, and by the fact that the most “punitive” opinions with regard to solving the issue of overcrowded prisons were recorded among people between 45 and 59 years old.

Translated by: Presto