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Sankční politika a její uplatňování

Teoretické a trestněpolitické aspekty reform trestního práva v oblasti trestních sankcí IV.

Sanction policy and its implementation

Theoretical and penal-political aspects of the criminal law reform in the area of penal sanctions IV.

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Summary

After the adoption of the new Criminal Code (No. 40/2009 of the Collection of Laws of the Czech Republic), which came into force on 1 January 2010, the question arose to what extent and how quickly the changes brought about by the new Criminal Code, especially regarding alternative sanctions, would manifest themselves in sentencing practice. The legislative regulation expressed by the new Criminal Code offered a relatively broad spectrum of penal sanctions which should enable a more nuanced differentiation when deliberating in search of a suitable response to crime. The issue is, on the one hand, to what extent the possibilities of alternative sanctions started to be used, and, on the other hand, how the toughening of penal policy with regard to most serious offences would influence the application of the unconditional prison sentence. More specifically, whether, in the case of recidivists and perpetrators of very serious forms of crime, the number of persons imprisoned would rise and the length of the term of imprisonment would extend; and also whether and how these legislative changes would influence the make-up of the prison population. In a word, it was necessary, not only from the point of view of scholarly interest, but particularly from the point of view of practice, to answer the question whether and to what extent the new Criminal Code fulfilled the expectations of the legislator.

In order to respond to the need for such an analysis and evaluation, a research project was prepared and implemented, with the title “**Theoretical and penal-political aspects of the criminal law reform in the area of penal sanctions**”. The research team comprised employees of the Institute of Criminology and Social Prevention, and also experts in the area of criminal law and penal policy working at the Faculty of Arts, Charles University and in the justice system. The project was endorsed by the Czech Science Foundation to be implemented between 2012 and 2015 (project No. P408/12/2209). This period was considered adequate for the gathering of a sufficient amount of findings about the implementation of the Criminal Code, enabling its evidence-based analysis and evaluation.

The research objective was the analysis and evaluation of the legislative regulation of penal sanctions after the changes which were brought about as a result of the adoption of the new Criminal Code, placing them in the context of sanction policy as applied in the post-1989 Czech Republic. The research focused on the impact of the new Criminal Code on the

sentencing practice of selected criminal justice institutions, on the character and structure of the sanctions imposed, and, consequently, on the make-up of the prison population, and also on the activities of the Prison Service of the Czech Republic and the Probation and Mediation Service.

The aim was, above all, to ascertain whether the abovementioned legislative changes fulfilled their purpose, which means: whether the numbers of persons serving a term of imprisonment had changed, whether the effectiveness of the imposed sanctions had increased, and whether at least some of the problems in sentencing practice had been removed. The research deliberately focused on gathering findings pertaining to the effectiveness of selected concrete penal sanctions: house arrest, community service, conditional sentence with supervision, and short-term unconditional prison sentences; furthermore, it encompassed also the issues of juvenile offenders, and the relatively recent protective measure of preventive detention. In addition, re-offending in the case of these sanctions was examined, as well as selected characteristics of the offenders on whom these sanctions were imposed. It was ascertained to what extent these institutes fulfilled their expected function, and which factors stimulated – or, conversely, hampered – their application and effectiveness.

Therefore the central axis of the research was sanction policy and the application of penal sanctions. This central topic was examined from several perspectives, including legal analysis of legislative changes in the context of the development of Czech criminal law, the application of sanctions in the practice of criminal justice, and the attitudes and opinions of expert practitioners regarding the new Criminal Code, the sanctions and their effectiveness. Last but not least, the project also aimed at assessing the impact of sanction policy on the development of crime, especially re-offending, which, of course, directly influences the make-up and quantity of the prison population. The unifying element of this broad spectrum of research approaches was the effort to ascertain the effectiveness of penal sanctions, as well as the problems linked with their application and impact; and the measure of re-offending, determined particularly with regard to selected sanctions which were the object of research, served as one of the criteria of their effectiveness.

Of course, the effective application of the new Criminal Code, and the fulfilment of the purposes and aims which it targeted, depend, to a large extent, on the measure of its acceptance and implementation by the justice organs and employees, but also on the measure of its comprehension and acceptance by the civil public. Therefore the research focused not only on ascertaining the opinions and attitudes of judges, prosecutors, the Probation and Mediation Service and the Prison Service, but also on ascertaining the attitudes of the public towards sanction policy, as well as its awareness of the sanctions imposed, the ways of public presentation of sanction policy in the media, and also the perception of sanction policy by the persons who it is imposed on.

On the basis of the findings gained, an evaluation was carried out whether and to what extent the outcomes of the application of the new Criminal Code signal the need for certain corrections, both with regard to its concrete provisions and pertaining to the perspective aims of sanction policy in the Czech Republic.

During the implementation phase, several publications came out, presenting findings gained from the point of view of the aspects listed above. Apart from a number of articles in scholarly periodicals and anthologies, five monographs were published successively.

The concluding monograph summarizes the main findings of the whole four-year research project, attempting to place them in the overall context of the implementation of sanction policy in the Czech Republic.

A counterpart to the evaluation of findings from the analysis of sanction policy, sanctions and their application in justice practice is the analysis of public opinions on sanction policy, and of the opinions of persons sentenced to unconditional imprisonment. In a sense, this is a mirror which society holds up to sanction policy. Obviously, the reflection of sanction policy in this mirror is not objective; and this is because the research, including this final synthesis, deals with the way most information about sanction policy and sanctions reaches the public through the media.

Finally, the concluding summarization presents proposals which follow from the research findings with regard to possible corrections of sanction policy, and also recommended measures or suggestions de lege ferenda.

Due to the complexity, scope, and also development of the issues covered, the research was implemented as medium-term, covering the 4 years between 2012 and 2015. This period made it possible not only to adequately analyse sources and data, but also to observe the application of the Criminal Code and its influence on the implementation of sanction policy in the mid-term horizon.

The research covered a very large field, which demanded the inclusion of a number of specific approaches towards the issues examined, and the **use of a broad spectrum of both descriptive and explorative research methods, and qualitative and quantitative techniques.**

When researching sanction policy and the implementation of the Criminal Code, the methods used included legal analysis and comparison focusing on the development of the Czech penal legislation, analysis of statistical data, and secondary analysis of relevant sources from both Czech and international scholarly literature, including documents and materials published by international organizations. When researching the implementation of provisions of the new Criminal Code, the methods used included primarily analysis of statistical data (analysis of figures from justice statistics, police statistics, statistics of the Prison Service of the Czech Republic, and statistics of the Probation and Mediation Service); a questionnaire survey among judges, prosecutors, and employees of the Probation and Mediation Service and Prison Service; analysis of court files; analysis of data on convicted persons from the Register of Sentences; analysis of materials compiled by district courts at the request of the Supreme Court; case studies; and expert examinations in the form of guided interviews and expert's opinions on selected issues. When researching the public response to the changes in sanction policy and the implementation of the new Criminal Code, the methods used included probes into the opinions and attitudes of the public on a representative sample of the population, in

the form of the so-called omnibus investigation which was repeated for three successive years; content analysis of the print media and analysis of television news reporting; and a questionnaire survey among the prison population.

A prominent feature of the legal regulation of penal sanctions in the new Criminal Code, distinguishing it from the previous regulation, is the application of two opposite lines of punishing, leading to a more nuanced differentiation of penal sanctions. On the one hand, this legal regulation, following the amendments of the previous Criminal Code which had been underway since 1989, implemented the principle of depenalization and stressed the principle that imprisonment must be seen as *ultima ratio* of the sanction system.

Thus the Criminal Code continued with restricting the space for imposing an unconditional prison sentence, further extending the opportunities for the use of alternative sentences and substantive law alternatives for the punishment of the less serious category of offences, i. e. misdemeanours (*přečiny*). A conspicuous manifestation of this tendency was also the inclusion of new alternative sentences in the system of sentences: house arrest, and the prohibition to enter cultural, sports and other social events.

Sanction policy as part of penal policy reflected significant social trends, particularly the strong politicization of crime (which took place in the Czech Republic, too) – the process whereby, over the last few decades, crime has become an important topic of public political discussion, leading to a repeated toughening of penal repression. In response to this, the Criminal Code introduced the opportunity to punish crimes, above all the particularly grave crimes, more severely.

Another way the strengthening of penal repression influenced the newly-adopted Criminal Code was through the toughening of punishments for less serious crimes (such as neglect of compulsory maintenance or obstructing the enforcement of an official decision) and through dependence on re-offending, which led to quite a marked increase in unconditional prison sentences, especially between 6 months and 3 years, causing the long-term growth of the number of prison inmates by 2700 persons. Taking into account also the simultaneous slow onset of the new alternative sentences, particularly house arrest (where the delay was caused by the fact that electronic control of its execution was not introduced concurrently with the Criminal Code, although this had originally been anticipated) and the prohibition to enter cultural, sports and other social events, the combined effect was decidedly negative, because, in the Czech Republic, especially petty property crime and neglect of compulsory maintenance jointly comprise around 70 percent of detected crime.

The imposition of short-term unconditional prison sentences was strongly influenced also by a certain restriction of the imposition of the community service punishment, based on the new provision of § 62 Art. 2 of the Criminal Code, stipulating that the court usually shall not impose a community service punishment in the case of an offender who, in the course of the three years before the imposition of this kind of punishment, had a community service punishment transformed into a prison sentence in line with § 65 Art. 2 of the Criminal Code (see also the regulation of the criminal order where it is now, in line with § 314e Art. 3 of the Criminal Procedure Code, necessary to request a report by a probation officer). Another

phenomenon which must be assessed negatively is the constantly low number of pecuniary punishments imposed.

All of this manifested itself not only in the larger number of unconditional prison sentences imposed, but also in the increasing imposition of the conditional prison sentence at the expense of other alternative punishments.

In the case of diversions with restorative elements, we can, since as early as 2009, see their decreasing implementation during pre-trial proceedings, followed by certain stabilization in the last few years. However, this decrease was not substituted by a conspicuous rise of their implementation during court proceedings. This is broadly linked with the current regulation of shortened pre-trial proceedings, and the pressure on law enforcement bodies to try the case as soon as possible. Consequently, this complicates the collaboration with the Probation and Mediation Service both when preparing conditions for diversions, and when gaining information about the conditions for imposing alternative sanctions.

More conspicuous changes in sentencing practice took place only in 2013, comprising mainly a marked decrease in the percentage of unconditional prison sentences, and, on the other hand, the rise of, particularly, the “simple” conditional sentence. This can be partly attributed to the amendment of the Criminal Code, which, excepting the case of theft, obstructing the enforcement of an official decision and neglect of compulsory maintenance, returned to a previous legal regulation. The 2013 amnesty of the president of the Czech Republic is seen as a significant influence, too. Nevertheless, an important factor will also be the increase in cases dealt with by a criminal order, the prevailing sanction, in this case, being a simple conditional sentence.

Similar trends in sanction policy, although, of course, the ratio of the various sanctions imposed by courts differs markedly, can be observed also in the case of juvenile offenders, and offenders aged 60 years and older.

Thus one of the main aims of the recodification – depenalization and the reduction of the unconditional prison sentences imposed – remained, strictly speaking, unfulfilled. Even after the adoption of the new Criminal Code, the number of persons imprisoned per 100,000 population in the Czech Republic, especially when compared to Western European countries, remains high over a long period.

As expected and in line with existing criminological research on crime career, it was confirmed that re-offending is closely linked with some basic demographic factors, especially gender and age. Of course, a key variable in all analyses was also previous experience with crime, including the number of offences committed, their type, and the age when the given person first came into contact with criminal justice.

The negligible difference between the resultant effect of the sanctions examined by our research confirms the thesis that the central theme of crime policy should not be punishments and their severity or suitability. When comparing the outcomes of this research to similar international studies, we can observe that, in the main, our research project produced the

expected figures, since, in investigations of this type, the standard rate of re-offending is between 30 and 50 %.

The system of post-penitentiary care needs not only to be filled with content and adapted to meet the needs of the persons ending their term of imprisonment, but should also be provided for in its operational, financial and personal aspects so that services and programmes can operate on a multi-year basis. An essential component of post-penitentiary care must be also independent and expert evaluation of the effectiveness of the various programmes so that, in the course of time, really effective programme are put into practice, and their existence and further development are secured. The testimonies of prisoners gained as part of our research decidedly confirm the urgent need to substantially improve the quality of the preparation for release, as well as the quality of follow-up post-penitentiary care. Especially important is assistance in securing employment, and, in the case of some prisoners, also housing; this is linked with the effort to maintain a social (in a more narrow sense, family) background during the term of imprisonment.

The need for temporary housing and/or employment and financial support after the release from prison may apply to two thirds of prisoners; nevertheless, it can be estimated that at least a third of them do need such help with securing “input” conditions after their return to freedom. Therefore the capacity of post-penitentiary care should be arranged in such a way as to be able to deal at least with 30 % released persons.

It would be useful to dedicate more attention also to the presentation of penal policy in the media. The presentation of penal sanctions is strongly influenced by the media attractiveness of depicted crimes. The image of punishing and penal sanctions in television news reporting corresponds, above all, to the most frequently presented punishment of long-term imprisonment. Thus we can say without much exaggeration that, in the media discourse, punishment equals the imprisonment of the offender. From the point of view of the media presentation of penal sanctions and sanction policy, the predominantly depicted attitude towards punishing perpetrators of crime is the repressive approach, with minimum attention being given to alternative sentences, resocialization approaches towards offenders etc. We should realize that this fact significantly influences the formation of attitudes of the lay public. It is essential that alternative sentences are thematized in the media discourse in other than problematizing contexts, too.

Therefore it is no wonder that the outlook of the Czech public remains quite punitive, with some 60–70 % percent of respondents believing in the deterring effect of severe punishment and a severe regime in prisons, and also considering the punishments imposed to be the same or rather more lenient when compared to the situation ten years ago. The knowledge of alternative sentences and measures, and the knowledge of the structure of sentences imposed remains rather limited. These public opinions then naturally result in the public pressure on the further tightening of sanctions or sanction policy.

Admittedly, the present legal regulation including a system of measures for juveniles – despite the abovementioned partial problems – provides sufficient scope for the application of alternative sanctions including possible individualization of a concrete sanction so that it

corresponds to the gravity of the offence and the criminogenic characteristics of the offender while also reflecting the interests of the injured, which applies also to diversions with restorative elements. However, these opportunities are not utilized. Apart from other things, it is necessary to focus on extending co-operation between the various bodies which participate in the imposition and execution of sentences, while also providing sufficient time for this activity.

Conclusions

One of the main conclusions is the finding that the impact of criminal justice and the measures used on the criminal careers of convicted persons is very limited. In line with the opinions of experts (judges, prosecutors, and heads of centres of the Probation and Mediation Service), it can be stated that effective penal policy must not be restricted to the area of punishing, because the effect of the sanctions imposed is, as a rule, much smaller than the influence of various factors operating in the natural social environment of the offender. State interventions can be the most effective when they manage to launch or speed up these natural life processes.

Therefore if our aim is to decrease crime or reduce re-offending, it is absolutely essential to extend the discussion about suitable measures to encompass also the area of broader social policy. It is really not enough to rely on penal repression; although it is often necessary, it addresses only the consequences, not causes of certain negative social phenomena. Not even alternative sanctions can be expected to have a stronger effect on these processes if we do not create the required conditions for their application, both in the area of legislation and criminal justice, and as part of broader social policy. At the same time, it is necessary to focus more on the area of penitentiary and post-penitentiary care.

The abovementioned findings confirm the need for a realistic assessment of the possibilities of penal repression and imposed sanctions, as well as the necessity of deeper analyses which could become the basis of a rationally conceived and more effective sanction policy. Offenders must not be seen only as objects of educational treatment, but it is necessary to strive for their cooperation, while respecting their personality, particularities, rights, and duties they have towards their family, employer, community etc. Therefore it is absolutely essential to develop the positive aspects of the offender's personality and their socially beneficial ties, as attempted, for instance, by the approach based on restorative justice.

Consequently, it is necessary, as far as possible, to create favourable conditions for the resocialization and reintegration of each offender, which should be taken into account not only when imposing a penal sanction, but also in the course of its execution, and, particularly, in connection with the concluding stage of the sanction. As part of the envisaged reform of the prison system, it is therefore important to focus also on securing the smooth transition of convicted persons back into civil life, for instance, through specialized facilities (halfway houses or probation houses) or agencies offering post-penitentiary care. In this respect, it is important to cooperate with the Probation and Mediation Service, social curators, child welfare services, employment agencies, and governmental and non-governmental organizations including churches which provide care for convicted persons and post-

penitentiary care. In the case of other convicted persons, it is important to provide assistance with the search for employment and housing, as well as counselling when solving difficult situations and personal problems.

Only this complex approach can lead to a more effective and functional sanction policy in the Czech Republic.

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