

**Punitive by negligence:  
The myths and reality of penal nationalism in the Czech Republic**

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Harsh penal policies are often presented as a result of penal populism. Its variants such as populist, penal or new punitiveness or penal nationalism used throughout the scholarship (Bottoms, 1995; Haney, 2016; Pratt, Brown, Brown, & Hallsworth, 2013) mean essentially the same: Enacting policies to win votes instead of promoting justice or reducing crime rate (Roberts, Stalans, Indermaur, & Hough, 2002, p. 5). Yet penal populism requires deliberate action: It is impossible to label harsh policies as “populist” if they are not formulated with the vision of gaining popularity via “law and order” policies. Even highly punitive policies thus might be an unintentional result of inattention to the complexities of criminal justice system or of an enactment of tools aimed to limit punitiveness, which nevertheless cannot achieve it and on contrary resulted in harsher practices. Even if leniently-tempered penal elites are given the possibility to shape the criminal justice system, they might not adopt policies appropriate for the situation at hand due to a lack of sufficient empirical analysis, limited resources or mistaken ideologies. Harsh penal practices might thus emanate not only from the intention – deserving to be called populist if enacted with an aim of gaining popularity – , but also from the negligence of the legislator to properly investigate causes of harsh sanctions and to prepare theoretically and practically sound solutions.

Penal policies and practices were examined by criminological scholarship both comparatively (e.g. Cavadino & Dignan, 2006; Dünkel, 2017; Lappi-Seppälä, 2011; Lappi Seppälä, 2008) and in higher detail at the level of individual countries. Upon examination of individual countries, most of the attention was paid to Western countries, especially the U.S. Yet there is still little known about the development of penal policies in other parts of the world. Of specific importance is the examination of the role criminal policies played in countries experiencing a transformation from authoritarian to democratic regimes, since penal policies are one of the topics easily misused by emerging democratic politicians. The scarce research published on the development of penal policies in Central and Eastern Europe published in English (Krajewski, 2016; Lévy, 2012; Šelih & Završnik, 2012; Tripkovic, 2016; Válková & Hulmáková, 2007) is thus disappointing. A focus on this region is important since its countries have generally larger prison populations than the Western countries do (Dünkel, 2017) and previous research has argued that politicians in these countries used penal issues to invent a specific form of penal populism: penal nationalism (Haney, 2016).

To further comprehend the development of penal state following the transformation of the political system, I examine in this paper penal policies between 1989 and 2019 in the Czech Republic. I firstly summarize the context and research on development of penal policies in the Central and Eastern Europe with specific focus on penal nationalism. To assess Czech penal state I then analyze the five dimensions of penal states as defined by Garland (2013). Since the findings on

penal state are not in line with the suggested theory of penal nationalism, I examine causes for this dissonance. To verify the theory that penal policies resulting in high prison population rate (number of prisoners per 100.000 inhabitants, henceforth “PPR”) might be a result of negligent legislator, I discuss as a case study the causes of high Czech PPR and a specific problem of serving prison sentences consecutively, which is one of the main contributor to high Czech PPR. I close with the discussion of “punitiveness by negligence” in the Czech Republic consisting in the lack of coordination of criminal justice agencies, of proper analysis of high PPR’s causes and the enactment of wrong tools by lenient penal elites.

### **Penal populism in Central and Eastern Europe and Czech context**

Development of criminal justice policies and penal punitiveness east of Germany has been long neglected by researchers with one of few exceptions being Haney (2016) who focused on penal policies in four Central European countries: the Czech Republic, Hungary, Poland and Slovakia with Hungary being the prime focus. The article claims that politicians have re-imagined the post-socialist society by using tough “law and order” rhetoric (p. 348) to provide solutions to the dilemmas of democratization and Europeanization. According to the article national values in these countries are imagined and they are opposed to the criminal other, which are construed primarily as sex offenders, Roma minority and migrants. Such depiction is similar to Lévy (2012)’s description of Hungarian policies discussing the introduction of ‘three strikes’ sentencing legislation and of mandatory life sentences in 2009.

Yet it is unclear to what extent the presented development in Hungary is generalizable to other countries in the region since researchers describing them paint more complex pictures. Polish criminal justice system for example strongly emphasized the alternative sentences after the turn-over. “The increases in severity have not resulted primarily from harsher laws and stricter sentencing practices. Polish judges are not unusually punitive. They attempt to keep substantial proportions of convicted offenders out of prison ... Unfortunately, the tools most available to them are probably the wrong tools“ (Krajewski, 2016, p. 215). In the Czech Republic, the penal measures taken since 1989 were described as predominantly well-founded and frequently based on criminological research with attention being paid to human rights in which international NGO’s played large role (Karabec et al., 2008). Similarly Serbian penal policy gradually moved towards moderation both from the viewpoint of legislative changes and penal philosophy, yet unofficial pressure of punitive politicians lead to some judges imposing harsher sentences (Tripkovic, 2016). These accounts provide more composite picture than the suggested “law and order” rhetoric.

To examine in detail the development of penal policies following transformation from authoritarian to democratic system and to analyze the dissonance between various researchers, I describe in detail the development of Czech penal policies after 1989. The Czech Republic is an ideal country to study the effects of the transformation since its PPR is higher than the average in Central and Eastern Europe: It incarcerates 197 inmates per 100.000 inhabitants, ranking 7<sup>th</sup> among 57 European states (World Prison Brief, 2020). Yet it has strong democratic traditions. Prior to the communist putsch in 1948 it was a democratic country and in between world wars it was the only democratic state in Central Europe. Democratic tradition re-surfaced during the 1960's (Prague spring) being crushed by the Soviet occupation in the 1968. 20 years of "dulling" of the society followed. After 1989 it transformed back to a rule-of-law democratic country and quickly joined Council of Europe (1991), NATO (1999) and EU (2004). In 1993 Czechoslovakia was peacefully divided into the Czech Republic and Slovakia. Concerning criminal justice system, prior to the communist 1948 putsch modern criminal justice system was put in place following strong criminal law and criminological traditions. After 1989 the country thus could relate to its historical democratic and modern criminal practices. Yet as PPR signals, it might have not fully happened.

### **Dimensions of Czech penal state**

To holistically analyze Czech penal state, I first examine its dimensions as suggested by Garland (2013): State and internal autonomy, control of the power to punish and modes of penal power and powers' resources and capacities. Such analysis logically concentrates primarily on politicians (Snacken, 2010) and state actions because in modern democracies only states might deploy penal powers (Garland, 2013). Since present states form a complex set of relationships, the focus needs to be primarily on "those aspects of the state that enact penal law, shape penal policy, and direct penal practice" (Garland, 2013, p. 495), thus the apparatus of the state that determines the direction. In the analysis below I follow Garlands' distinction of five dimensions of the penal state to provide insight into what direction the Czech apparatus took over the last 30 years and is taking.

#### *State autonomy*

Leadership might easily yield to demands of interest groups, public opinion polls, media or voter ballot initiatives. To identify to what extent the elites might have been influenced by such pressures, I below analyze the criminal justice programs of all political parties elected to Czech Lower House of Parliament, where lies the center of legislative activity: To be elected a party needs to gain at

least 5 % of the votes. The political programs were chosen since they represent both the issues the political parties consider appealing to potential voters – thus possibly populist – and the future legislation since the parties upon being elected need to deliver the promises made. Criminal justice issues mentioned in 53 political programs from 1990 to 2017 elections were analyzed and grouped to the following categories according to their frequency:

- **Police** (voted for by 74.5 % of the population, 37 out of 53 political programs): Political parties were emphasizing a need for more policemen (especially in the streets and not behind desks) and the necessity of professionalization of the police. Calls for reforms and for the improvement in functioning of the police and of the prosecution were the next most common themes.
- **Prevention** (voted for by 48.91 %, 24 out of 53): The parties frequently mentioned that prevention is more important than repression. Specific preventive measures were suggested to tackle the issues of criminality in socially excluded places (ghettos) and of youth and drug criminality. Resocialization programs were suggested to prevent recidivism. Several times the prevention was emphasized without specific measures being suggested.
- **White collar and organized crime** (voted for by 46.96 %, 22 out of 53): These forms of criminality were often labeled as those requiring the highest attention of the system. The tools suggested to fight it were the following: Increasing the effectiveness of the police, of the prosecution and of courts and enacting various legislative measures. The call for more intensive fight against organized crime was seldom linked to the criminality of foreigners.
- **Corruption** (voted for by 41.55 %, 19 out of 53): Corruption was together with white-collar crime a common issue at which the attention of the police and prosecution should focus and for which sentences should increase.
- **Drugs** (voted for by 37.94 %, 19 out of 53): When discussing drug issue, both prevention and repression were emphasized: Drug addiction was often considered a social problem and its production and distribution were suggested to be punished more severely than use. Repression was to be aimed primarily at those who profited from the system and at hard drugs, while decriminalization of soft drugs was sometimes suggested.
- **Prison conditions** (voted for by 29.39 %, 16 out of 53): Politicians were interested in four issues regarding prison conditions: Its humanization (also via modernization), prisoners working (especially to increase their employment rate), the need for effective programs inside them (including their indebtedness) and favorable conditions upon their release (e.g.

tax breaks for their employers or more effective post-penitentiary care). Only twice it was suggested that the prison conditions should be harsher and not a state-paid vacation.

- **Alternative punishments** (voted for by 26.49 %, 13 out of 53): Calls for new alternatives to imprisonment and for the increased use of the existing ones were repeated in the parties' programs, specifically aimed at wider imposition of fines, electronic monitoring, community service and home detention and wider use of pre-trial diversions. The sometimes mentioned rationale was that imprisonment, especially the short one, is criminogenic and expensive.
- **Increased repression of primarily very serious offenses** (voted for by 24.72 %, 12 out of 53): Political parties also stressed that more severe punishments need to be imposed for very serious offenses, which were either not specified or the following ones were mentioned: Murder, manslaughter, violent criminality generally, against children, committed by young offenders, drug offenses and rape. It was also suggested that the age of criminal responsibility should be lowered from 15 to 14. Especially in the early 90's few smaller parties suggested re-introduction of death penalty, adding of sentences for multiple offending, life imprisonment without the possibility of conditional release or measures aimed at Roma criminality. None of these measures were enacted.
- **Victims** (voted for by 17.37 %, 8 out of 53): The need for further victim's rights and their protection was suggested several times.
- **Three strikes** (voted for by 6.07 %, 6 out of 53): The efforts to implement a three-strikes approach were brought up in two contexts: First, in the 1990's and 2006 two minor political parties suggested adopting an approach similar to the US one. Such law was not enacted contrary to the literature saying such legislation was enacted "across the [Central European] region" (Haney, 2016, p. 354). Secondly, a principle called "three-strikes" was proposed by two political parties in 2013 and 2017, yet in an entirely different context: It was designated to tackle small thefts via specifying that if one commits an administrative offense of theft thrice over a specific period, it would become a criminal offense (with none or very low sentencing minimums).

The main recurring topics in the political parties programs was the police (and its reform) and crime prevention followed by criminality common to transitional countries: White-collar and organized crime and corruption. Concerning sanctions, there is clear demand for bifurcation via wide use of alternative sanctions while at the same time punishing more severely very serious offenses; the demand for alternative sanctions was, however, greater than for the harsh punishments. The typical penal populist rhetoric of "prison works", "incapacitation", "segregation" or "three strikes and

you're out" are either not suggested or marginal. Overall, the topic of criminal justice system did not seem to be very interesting to the political parties: It was mentioned on average in 6/10 of the political program (i.e. on average on 6<sup>th</sup> page of 10-page program); not even one criminal justice issue was mentioned in 4 political programs. Successful Czech political parties thus did not seem to be strongly influenced by public opinion polls, interest group demands, media or voter ballot initiatives regarding penal populism. Or these groups have not considered it important to focus on the criminal justice topics from the populist perspective.

The enacted penal policies were not, however, close to the second position of state autonomy suggested by Garland: In accordance with the state officials' interests and ideologies. I suggest a third variant might exist: The criminal justice policies were not primarily coordinated by the government or by the politicians and were a result of uncoordinated individual laws. Such assertion is in line with the analysis of changes in penal law between 1993 and 2008, which suggests that from 1997 onward the changes in the penal legislation were not primarily the result of governmental initiative, but of the initiative of one or more individual members of parliament without any broader concept of penal policy (Wintr & Raček, 2010). The government prepared itself several important laws – including the new 2009 penal code – yet these laws were a result of an individual committees lead by penal elites and not of coordinated plan for the criminal justice system. So even though the politicians were permitted to act according to their best opinion, they did not take stock of such opportunity and the state lacked a clear and concise strategy.

Such findings are not in line with Haney's contention that Czech politicians used "tough, law and order rhetoric to reimagine the postsocialist community" (2016, p. 348). What is the source of this dissonance? Haney considers as the main voice of Czech nationalist punitiveness Václav Klaus, Czech president (2003-2013) and prime minister (1992-1998). The article highlights his statements regarding "final solution of crime" echoing Hitler (p. 358), pedophiles "stealing "our" children" (p. 357) and his anti-Roma sentiments (p. 358). This argumentation is complicated on several levels. Authenticity-wise these statements are not findable using regular techniques and since they are not referenced, their validity is not verifiable. Methodologically, a single persona is selected while omitting an analysis of the entire political spectrum, or at least of the primary holders of legislative powers (political parties). Another defining figure of the 1990's and 2000's, Václav Havel, president in 1990-2013, who cannot be labeled a penal nationalist in any respect, is also omitted.

Even if Václav Klaus used these expressions and even if he were the main voice of nationalist punitiveness, his other statements and actions regarding penal policies needed to be analyzed as well since they provide a rather different picture: When a new penal code was enacted

in 2009, in an era when according to the article there should have been the peak of penal nationalism, he criticized the penal code for lowering of penal responsibility to 14 from 15 years old,<sup>1</sup> for insufficient decriminalization of certain acts, and for putting low pressure on judges to impose alternative sanctions; yet he also suggested that harsher sentences should be imposed to violent offenders (Klaus, 2009). Furthermore in 2013 he enacted one of the largest amnesties ever: 111.263 people and 19.820 non-suspended prison sentences were pardoned<sup>2</sup> with the prison population being reduced by one third (Štůsek, 2013). An equivalent in proportion to the population would be a pardon of 620.000 non-suspended prison sentences in the USA or 112.000 in England and Wales. While Václav Klaus is clearly opposed to a wide array of human rights and environmental initiatives, to label him as a “main voice of nationalist punitiveness” at least misses his more complex picture, if not mislabeling him. Czech society was not re-imagined by “law and order” rhetoric of politicians.

Problematic is also the second main assertion regarding penal nationalism in the Czech Republic that the politicians “criminalized the other”: Haney (2016) argues the country has directed its attention towards sexual offenders, Roma minority, migrants and German criminals. While the public opinion regarding these groups is definitely troubling, it is not clear whether they were the center of “criminalizing the other” and whether any approach was taken against them at all. I will deal with these groups individually,<sup>3</sup> beginning with sex offenders since the article claims that “Czech[s] are especially preoccupied with sex offenders” (p. 355). This, however, does not seem to be supported by criminological research: When a public was asked whether they were in favor or against an introduction of register of sexual offenders, more than half of the respondents were either against it or in favor of it as long as it was not made public (Blatníková, Faridová, & Zeman, 2014, p. 104). There is no registry of sexual offenders.

Czech Roma minority is highly discriminated against (Feischmidt, Szombati, & Szuhay, 2014; Úřad vlády, 2013). To illustrate how politicians took stock of this deep dislike Haney (2016) quotes a former MP Miroslav Sládek who made a biological connection between crime and Roma minority. Yet Miroslav Sládek cannot be considered an important figure in the debates over penal nationalism. His ideology attracted limited attention in the first several years after the Velvet revolution and virtually none in the last twenty years: He was last member of Parliament in 1998 for a minor party which did not succeed in 1998 election and in all the following elections received less

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1 After a further discussion the age of criminal responsibility was again returned to 15 years old prior to the new penal code becoming enforceable.

2 Not all of them began to serve the sentences.

3 I do not deal with German criminal since the article does not mention any specific approach taken towards them.



than 1 % of votes. The article further mentions that Roma “criminality is presented as fundamental to who they are, biologically and culturally or “mentally” as the leader of the Czech Party of Civil Rights recently put it (Mares, 2012)” (p. 358). Yet the original material which the article references (Mareš, 2012) does not provide a basis for such quotation. The referenced material mentions neither “Czech Party of Civil Rights” (there is no party with such name) nor assertions about biological, cultural or mental predisposition for crime of Roma minority.

Concerning migrants, Czech reaction to primarily Syrian refugees in 2015 was one of the most unwelcoming in Europe and it has become an important topic in elections. Czech government refused to accept almost any refugees, blocked the suggestion of redistribution of refugees according to quota system suggested by the European Commission and was later found in breach of the European law. Yet it might be oversimplification to label migrants as the object of criminalization. Such claim would need to deal with acceptance of refugees from former Yugoslavia including thousands of Muslim refugees in the 1990’s and with different approach to other groups of migrants, namely Ukrainians and Vietnamese who form important minorities in the Czech Republic. During the 2015 crisis Czech politicians repeatedly emphasized that Europe need to be prepared for potential refugees from Ukraine following the Russian aggression and war in Eastern Ukraine and signaled they are willing to accept large numbers of these refugees. Since the approach to migrants seems to be complex and because the area of crimmigration is not a traditional part of penal policy, it does not seem correct to make it one of the main arguments for penal nationalism.

“Criminalizing the other” thus does not seem to be a deliberate strategy taken by politicians developing penal nationalism in the Czech Republic. While there is ample evidence of discrimination or even hostile attitudes of Czech society towards refugees and Roma minority, there is no or very little evidence to suggest that these groups were intentionally targeted and criminalized via penal law measures. The state was thus provided with the autonomy to focus professionally on criminal justice issues.

### *Internal autonomy*

The second dimension of penal state is the role of its elites: Are they consulted prior to the enactment of laws and do they draft them? Or are the laws enacted by the legislator without important input from the elites? Penal elites play important role especially since they tend to oppose harsh retributive punishment; similar role might be also fulfilled by human rights treaties and their implementing institutions (Garland, 2013).

The most important Czech criminal laws since 1989 were and are written by professors of criminal law, criminologists and criminal judges: The introduction of probation service in the criminal justice system was initiated by them in 2000 as well as the new law on youth offenders in 2003. Both of these reforms include strong restorative aim and ethos. Similarly the new 2009 Penal code was written primarily by a criminal law professor, later a President of the Supreme Court. In 2020 the new code of criminal procedure is being written under supervision of several academics and highly-regarded practitioners. Supreme Court and Supreme Prosecution are as of 2020 also obligatory advisory bodies shaping the preparation of a legislation. Concerning human rights treaties, the Czech Republic is member to all major criminal justice treaties and especially its prison conditions are regularly controlled by national and international organizations.

Czech penal state seems to have rather large internal autonomy. One might almost ask whether the autonomy is not too distant from the instructions of politicians or of a civil service, who either do not even define the main guiding principles for drafting of the codes or these instructions shift with rather frequent replacements of Ministers of Justice (Karabec et al., 2008, p. 117). The discussion even on the most important principles is thus left primarily to ad-hoc created committees of the penal elites consisting primarily of judges, academics, attorneys and prosecutors. Yet a coherent and effective criminal justice policy requires a long-term perspective and structured cooperation which cannot be achieved by ad-hoc committees or penal elites writing individual laws.

### *Control of the power to punish*

Who controls the power to punish: Is it the judges, prosecutors, prison administrators or probation officers? Might they be indirectly influenced, e.g. by being elected or via politicians instructing them? And are there differences in the provisions across the state? There is neither much vertical nor horizontal division of the power to punish: From the vertical perspective, the same rules apply to everyone in the Czech Republic. Horizontally, the power to punish is not importantly distributed across the agencies since Czech judges decide on everything: They impose sentences and decide on their execution including on the breaches, on probation and on parole. While doing so, they wield a rather wide discretion since there are no sentencing guidelines and no sentencing commission. Judges might even easily impose sentences below the statutory minima if the sentence would be strongly disproportionate and the case can be considered extraordinary.

Even though judges control the power to punish virtually alone, they are not provided with any guidance except very general legislative principles. The exercise of their discretion is not controlled either by the public or by the experts since both judges and prosecutors are not elected

and their decision-making is not analyzed. Such wide discretion could be a possible way-in for punitive politicians to which i.e. Serbian judges sometimes give way (Tripkovic, 2016). Such influences do not seem to be an issue in the Czech republic since 90 % of non-suspended prison sentences in 2016 were below or equal to the half of the sentencing range (Drápal, 2020); Czech judges serve more as actors mitigating high sentencing ranges similarly as in Italy (Corda, 2016) or Poland (Krajewski, 2016).

Prosecutors are the only ones partly controlling the judiciary since they suggest a sentence, yet neither the sentence suggestion nor the legal classification of the offense binds the judge. As opposed to many other countries, prosecutors are not favoring harsh sentencing practices: On contrary, Supreme Prosecution is advocating for the decrease of high prison population including producing special reports of its causes (2019) and emphasizing wider use of alternative sanctions and diversions via the organization of seminars and lobbying for legislative changes. Prison authorities have virtually no power except for preparing reports for parole hearings held by courts and probation officers might only suggest to find an offender in breach. The control of the power to punish is thus wielded by independent judges.

On a more general level, as a result of the involvement in various international organizations, Czech penal policies are influenced – or bound – by international and European norms. Haney (2016) argues that such integration processes (especially to EU) was experienced and labeled by Czech politicians as a dictating of policies to which they reacted with renewed calls for nationalism including in the penal sphere. The example used to illustrate this is the persistence on keeping surgical castration against the criticism and recommendation of the European Committee for the Prevention of Torture (CPT). It is presented as an example of shaming rituals and not evidence-based policymaking (Haney, p. 354). While the general idea of Czech opposition to the EU policies is correct with the Czechs being one of the most skeptical nations towards European Union (European Commission, 2019), its influence on the introduction of penal nationalism is at best inconclusive. Haney suggests that Czechs were supposed to respond to the CPT criticism that “it was their “right,” as a “sovereign nation” to decide how to treat “men who can’t control their sexual instincts and are sexually aggressive” (CPT, 2009: 7)” (2016, p. 354). Yet in the responses of Czech Government such argumentation cannot be found: The idea that it was the Czech Republic’s right as a sovereign nation is not expressed and the word “sovereign” does not even appear in the government’s responses.<sup>4</sup>

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4 The reference does not make clear whether the year relates to the year of the visit or the year of its publications; for clarity both reports were examined: Materials CPT/INF (2009) 9 and CPT/Inf (2010) 23.

On contrary Czech Ministry of Health stipulated in 2008 response that they believe that the decision to use surgical castration in the context of treatment of sexual offenders “is a purely professional issue”.<sup>5</sup> Surgical castration was later strongly defended by Czech medical community: In a report prepared by the Sexologist society of the Czech Medical Association of J. E. Purkyně, such practice was carefully evaluated and described as “fulfilling all professional and ethical conditions” (Zvěřina, Weiss, & Holly, 2014, 2016). While surgical castration is certainly a controversial topic and the cited responses are only the official positions of the Government, labeling such response as “tough rhetoric” of the government is crucially misleading: Using Garland’s conception of penal state the preservation of surgical castration was an expression of internal autonomy and of respect to penal elites, not of punitive politicians.

#### *Modes of penal power and powers’ resources and capacities*

The fourth and fifth dimensions of penal state are qualitative and quantitative aspects of its power. The modes of power (qualitative aspect) are placed by Garland on negative to positive continuum according to their nature, the negative ones represented by segregation, confinement, close control or incapacitation and positive ones by penal-welfare, restorative justice, reentry and resettlement or rehabilitation. The powers’ resources and capacities are situated on the high to low scale based on their capacity, with capacity being defined by e.g. budget, professional expertise, trained personnel, system coordination, rational organization or detailed statistics.

Discussion of these dimensions is difficult because it is unclear to what extent is current situation caused by low attention and budgetary constraints or a result of deliberate action. There is ample evidence that the criminal justice system is not working properly: Penitentiary and post-penitentiary care is neither properly financed nor is it coordinated; there is shortage of both prison and probation staff; diversion programs are often not available outside of the largest cities; prison interventions were in 2015 labeled by the chief prison psychologist as not properly working (Jiříčka, 2015, p. 55).

Yet other actions are situated closer to the positive continuum: Prison service launched its first open prison in 2017 and the pilot project of the first half-way house was realized in 2016. Pilot project of parole boards that investigate in higher detail the requests for parole and whose decisions serve as suggestions for courts on how to decide on parole was in 2019 available in half of Czech prisons and is envisioned to partly replace courts’ powers to grant parole. Prison service continuously develops new interventions following examples of successful interventions realized

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5 Response of the Government, CPT/Inf (2009) 9, p. 9.

abroad and tries to evaluate their effectiveness (Jiříčka, 2012; Jiříčka & Kejřová, 2015). Detailed individual-level statistics are gathered by every criminal justice agency, but they are rarely analyzed. Complex long-term conceptions of prison and probation services are written, even though their quality, understanding of problems and realization varies.

The resources and capacities of Czech penal power seem to be limited especially because of budgetary constraints. Due to low salaries both prison and probation services have problems attracting professionals particularly in large cities. While the situation is not objectively positive, the negative modes of penal power are seldom invoked: On contrary the prison and probation service, the Supreme Court, the Supreme Prosecution and the Ministry of Justice emphasize rehabilitation, publicly set the aim to lower the rate of recidivism, improve the post-penitentiary care and are willing to implement certain aspects of restorative justice. There thus seems to be the will to implement the positive modes – at least partially –, yet the resources, coordinated strategy and resulting actions are often missing.

### **Case study: Causes of high Czech PPR and Czech prisoners serving sentences consecutively**

Why is then Czech prison population rate so high? And isn't the fact that the Czech Republic has one of the largest prison population relative to general population a sign of penal populism in itself? PPR is sometimes considered as an elementary proxy of penal populism, since it captures the willingness of states to use their most intrusive measures on the offenders. While theoretically such measure seems reasonable – and it is the one most easily obtainable – at least two issues make it problematic when employing it in such way. Firstly, to serve as a proxy of penal populism, PPR needs to be a result of a conscious strategy, such as a “prison works” or “general deterrence” strategy. If there is no clear identifiable intention, one cannot distinguish situations when high prison population is the result of intentional punitiveness and when it is an unintended consequence. Labeling the “unintended consequences” situation as “penal populism” over-emphasizes the results and understates the intention – or negligence – of the state actors. While PPR signals harsh outcomes, it does not have to indicate harsh intentions. Without evidence of populist tendencies, it might be better to restrain from using the term “populist”.

Secondly, PPR consists of two combined factors, namely of the number of offenders entering prisons and of the average time an inmate spends in prison. It has been repeatedly remarked that countries strongly differ in these respects (Aebi, Aubusson de Cavarlay, & Stadnic, 2007; Aebi & Kuhn, 2000; Dünkel, 2017). The consequences of these approaches for assessment of punitiveness, not even mentioning of penal populism, are unclear: Is it the same to send 600

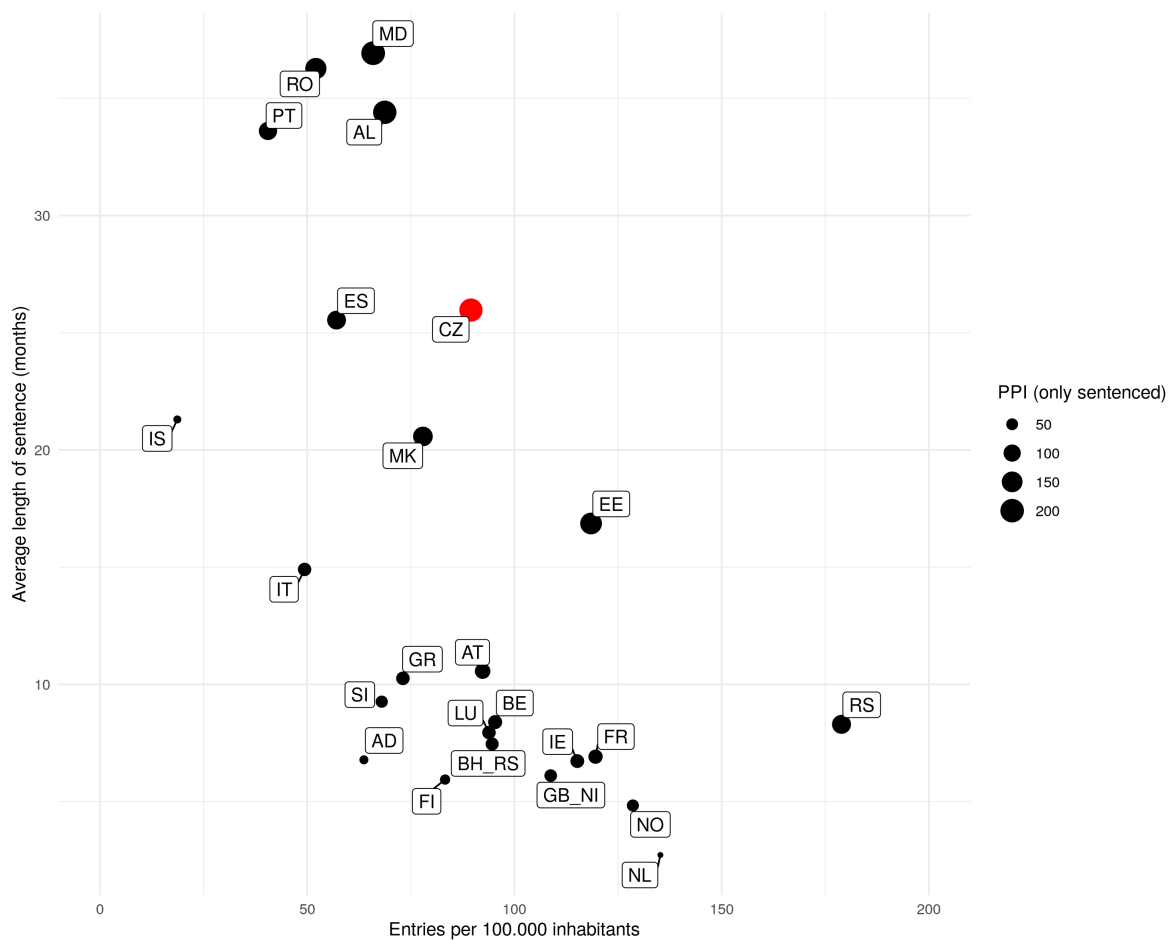
offenders per 100.000 inhabitants to a prison whose average length is 1.2 month and to send 60 offenders per 100.000 inhabitants to a prison whose average length is 12 months? In both cases PPR is the same: 60 per 100.000 inhabitants, yet the penal tendencies are entirely different (Frost, 2008).

To illustrate diverse tendencies and strategies in Europe, Graph 1 demonstrates the differences between the number of entries, the average length of time spend in prison and PPR: High prison population rate is achieved either by sending high amount of offenders to prison for a rather short time, such as in Serbia, or by sending rather few offenders to prison, but for a very long time, such as in the neighboring Romania. It is crucial to distinguish the number of entries and average prison-term since they direct us to causes of high PPR and they suggest what penal strategies the countries need take to lower PPR. Such analysis enables us to delineate the discussion on penal tendencies to the relevant issues.

Graph 1: Number of entries, average length and prison population rate in Europe 2016, 2018<sup>6</sup>

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6 Council of Europe's SPACE I. 2018 report is the primary source; if data for individual countries were not available, they were supplemented by SPACE I. 2016 report.



Czech Republic sends offenders to prisons in a rather low rate: It sends fewer offenders relative to the population to prison than such liberal countries as the Netherlands or Norway or at similar rate as Finland does. This is not surprising: the Czech Republic has since the 1989 revolution hindered the possibility of imposing non-suspended prison sentences via raising the custodial threshold. While the imposition of prison sentence was not limited during the communism, after 1990 prison sentences could be imposed only if none other sanction would secure the offender to lead a law-abiding life. This rule applied if the offender was sentenced for offenses with statutory maxima up to 1 year. In 2001 the threshold was increased to offenses with statutory maxima of 3 years and in 2011 to those with up to 5 years of imprisonment, thus encompassing majority of tried offenses. Even if a prison sentence was imposed, it was suspended in most cases since the criminal law stipulated that prison sentences not exceeding 2 years could be suspended if the execution of the prison sentence was not necessary to achieve sentencing aims. This threshold was in 2010 increased to 3 years, leading to direct incarceration primarily of either repeat offenders or those who committed very serious offenses. Finally, the rules for conditional release were further relaxed in 2010 and 2012. Czech system after the Velvet revolution thus enacted several measures against

imposition of non-suspended prison sentences, which does not signal a typical penal punitive approach. On contrary such changes suggest a penal moderate approach, which was lead by penal elites' distrust of imprisonment and their concerns for its negative effects.

To identify the sources of Czech high PPR, we thus need to examine the causes of high average prison-term. One important root of it is that Czech inmates usually serve several prison sentences consecutively (Drápal, 2020; Supreme Prosecution, 2019): Half of them serve two or more prison sentences in a row and it is not an exception to serve 3 or 4 prison sentences consecutively, as is shown in Graph 2. Yet neither the legislation nor the theory preview imposition of consecutive sentences. How does it then happen? The origin lies – surprisingly – with the intention to impose fewer non-suspended prison sentences and with the effort to fasten the criminal proceedings as much as possible but without enacting sentencing provisions reacting to its consequences. The easiest way to quickly impose sanction other than a non-suspended prison sentence is to impose suspended prison sentences without supervision, which are the most common sanctions in the post-communist countries (Aebi & Tiago, 2018, p. 196; Krajewski, 2007, 2016); to impose another sanction a judge usually needs a report of the probation officer or other information about the offender, making it time-consuming. Suspended prison sentences without supervision can be imposed very easily and the defendants are usually content with not receiving a non-suspended prison sentence, so they do not appeal. Such quick conclusions are popular especially since the speed of the proceedings is the only measure Czech judges are evaluated on. The criminal justice system is that fast that according to the president of Prague Municipal Court, the same offender might be sentenced three times over a week or two (Vávra, 2018).

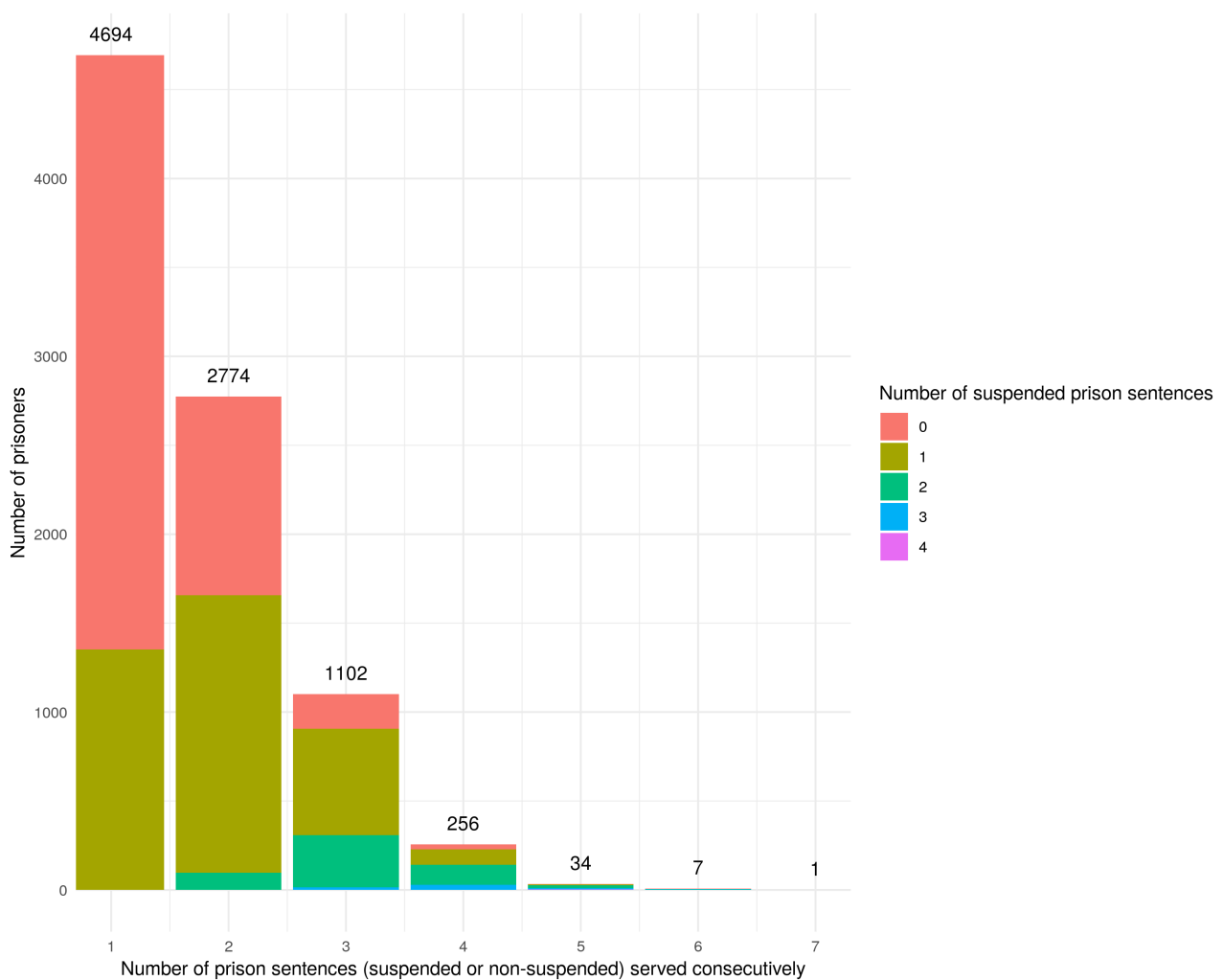
Wide usage of suspended prison sentences and fast criminal proceedings result in many breaches: The typical case is of a low-level thief who is firstly sentenced to community works, then to suspended prison sentence without probation, then to a suspended prison sentence with probation and finally to a non-suspended prison sentence. Upon the final imposition of the non-suspended prison sentence, the offender is found in breach of the previous unserved three sentences and he/she is ordered to serve them consecutively after the non-suspended one, resulting in a very long sentence being served for offenses of low seriousness.

Graph 2: Number of prison sentences served consecutively (Czech prisoners released in 2018)<sup>7</sup>

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<sup>7</sup> For further details on the sample see Drápal (2020).





Such accumulation is not intentional. Neither theorists nor legislator thought about this category of offenders and about providing specific sentencing provisions. These offenders are situated between multiple and repeat offenders, yet the legal provisions historically preview only these two categories of offenders. The rules governing sentencing multiple offender and repeat offender were set prior to introduction of suspended prison sentences in 1919 and this issue was not discussed neither in the literature nor in the jurisprudence until 2019 (Drápal, 2020). By remaining silent Czech legislator did not provide judges with the necessary tools to reduce the often disproportionate sentence resulting from several sentences being served consecutively (Drápal, 2020).

While the accumulation of sentences contributes to the high average prison-terms in the Czech Republic, it is definitely not the only cause: Another contributor are for example high sentencing minimums for drug and repeated property offenses (Supreme Prosecution, 2019). Yet these issues are interconnected: If the legislator does not easily enable the judge to go below the sentencing minimum in a case of accumulation of sentences (as in e.g. Finland) and the sentencing

minimums are high, the accumulated sentence resulting even from sentencing minimums is abnormally high.

Is it possible to consider the practice of serving consecutively several prison sentences a sign of a penal populism? While this practice undoubtedly leads to harsh and disproportionate sentences being served (Drápal, 2020), it has not been enacted intentionally; rather it is a result of a negligent legislator, academia and jurisprudence. Paradoxically, its negative effects were further reinforced by commendable efforts to impose fewer non-suspended prison sentences and to shorten the duration of criminal proceedings. The high Czech PPR seems to be caused at least partially by negligence and lack of complex consideration of functioning of the criminal justice system, which is far from penal populism or nationalism.

### **Discussion: Punitive by negligence?**

The development of criminal justice policies in the Czech republic after 1989 is characterized by the lack of coordination. Penal elites, primarily academics, drafted new generation of laws emphasizing principles of rehabilitation, restorative justice, the role of community sanctions and labeling criminal law as the *ultima ratio*, which suggests defensive (not offensive) model of criminal policy (Kerezsi, 2013). The “main” pieces of work – from the viewpoint of criminal lawyers – were achieved, one by one, taking stock of at least several windows of opportunity (Tonry, 2013). However, the problems in sentencing, in execution of sanctions and in the post-penitentiary care were neither properly analyzed nor resolved. Yet without such coordination it is almost impossible to create a well-functioning penal state. It requires a detailed analysis of the problems, a search for examples of good practices from abroad and inventing new ones, formulation of necessary legislative and practical changes and examination of their effectiveness. Without such supervision over the criminal justice system enabled by sufficient resources, politicians might not be punitive and the criminal codes might be drafted by the penal elites, yet the prisons might still be overcrowded since the proper measures were not identified and taken.

The Czech Republic seems to be an example of such “penal punitiveness by negligence”: The penal issues did not become important political topics and the essential legislation was drafted by the penal elites. The obstacles to the imposition of non-suspended prison sentence gradually increased resulting in relatively few offenders being sent to prison. Yet since instead them suspended prison sentences were imposed and since there were no provisions governing sentencing offenders who are to serve another sentences and some sentencing minimums were high, Czech prisoners are incarcerated for a long period of time. Yet due to a lack of thorough empirical analysis,

there was only limited thorough discussion why are Czech prisons overcrowded and what are the appropriate solutions. Similarly in Poland Krajewski (2016) identifies as one of the causes of high PPR being lenient legislator providing judges the wrong tools. So while topics such as surgical castration or statements of right-wing extremists might seem attractive to prove that high prison population is the result of penal populism, careful analysis shows that such assertions are at best inconclusive and probably mistaken for at least some post-communist countries. A working hypothesis might be that at least some post-communist countries did not simply experience the “western trends” of penal populism and managerialism (Bottoms, 1995), but they lacked the resources to create a coordinated and well functioning criminal justice system. This emphasizes the need to thoroughly study the development of penal policies in individual countries and to distinguish being punitive intentionally motivated by political gain – thus fulfilling the definition of penal populism – and carrying out harsh penal practices which are the result of negligent legislators leading to “punitiveness by negligence”.

Improvement of such situation is not simple: Complex issues can only rarely be resolved by easy solutions. While it might have seemed easy to legislate in the Czech Republic that non-suspended prison sentences could be imposed only as the sentence of the last resort, a complete reorganization of sentencing ranges, whose high minimums are one of the reason for long sentences, is much more complicated task. In absence of strong institutional support by criminologists it is not surprising that the new Penal code mostly copied sentencing ranges from the previous Penal code and did not reorganize them. Yet exactly such difficult and time-consuming empirical-based rethinking would be necessary to further resolve the issue of Czech prisoners serving long sentences. It is also easier to draft a new penal code with a handful of other professionals than to create a dedicated team at the Ministry of Justice that analyses the problems, prepares strategies, coordinates criminal justice agencies, persuades the Treasury to fund seemingly non-vital activities and endures endless re-organizations of the Ministry and repeated calls for cutting the numbers of civil servants. Yet exactly these activities are crucial for identification of problems and their possible solutions in the criminal justice setting.

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