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THE MITIGATION OF CRIMINAL REPRESSION AGAINST DRUG USERS BY THE NEW CZECH PENAL CODE

Introduction and Background

The adoption of Penal Code No. 40/2009 Coll. has undoubtedly been the most significant event in Czech criminal law in recent years. The new code replaced Penal Code No. 140/1961 Coll., which had been in force for almost 50 years. Although no fundamental changes were announced in the legal regulation of drug offences regarding the categories of behaviour prosecuted as this type of criminality, the new penal code can be considered a milestone for Czech drug legislation.

Drug offences were first regulated in the Czechoslovakian Penal Code No. 86/1950 Coll.¹. Unauthorised manufacture and possession of narcotics and poisons² were penalized under Sections 197 and 198. The subsequent Penal Code No. 140/1961 Coll. originally contained two similar drug offences (Sections 187 and 188). According to Section 187, cases of unauthorized manufacture, import, export, procurement for another person or possession of narcotics or poisons were all

¹ These offences were based on regulations already contained in the Opium Act No. 29/1938 Coll., by which the International Opium Conventions and the Convention on the Limitation of Production and Regulation of Distribution of Narcotic Substances were implemented. This act also contained penal provisions.

² Here a peculiarity of Czech penal legislation concerning illegal drugs should be mentioned. In the Czech Republic, along with narcotic drugs and psychotropic substances, which are regarded as interchangeable with the term illegal drugs, the unauthorized handling of poisons is prosecuted as a part of drug offences. According to the author, the differences between poisons and illegal drugs are obvious and therefore drug offence regulation cannot be suitable for these substances (M. Štefunková, *Jsou jedy drogy?* [Are poisons drugs?], "Kriminalistika" 2016 [peer review]). Despite this fact, this rare approach that goes beyond international obligations in the field of drug control was also used in the new penal code. In this paper, attention will not be paid to poisons.

prosecuted. The most basic offence was punishable by imprisonment for up to two years or other corrective measures, or a fine. Section 188 prohibited the manufacture, procurement for oneself or another person, or possession of an object specifically used in the unauthorized manufacture of narcotics or poisons. This offence was punishable by imprisonment for up to two years, corrective measures, fines or forfeiture³.

The new era of penal legislation concerning illegal drugs started in the former Czechoslovakia after the fall of the Iron Curtain. Overall legislative changes that would reflect the new situation and principles of democracy were needed⁴. We can state that Czechoslovakian and subsequent Czech legislation covering penalties for unlawful handling of illicit drugs are greatly influenced by the obligations arising from internationally binding documents. The main influence has been UN drug control treaties: the 1961 Single Convention on Narcotic Drugs⁵, amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs⁶, the Convention on Psychotropic Substances of 1971⁷, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988⁸. After the Velvet Revolution, Section 187 of the penal code was extended to cover more forms of handling illegal drugs (i.e. smuggling, offering, mediation and sale). The range of substances was extended as well. Besides narcotic drugs and psychotropic substances (hereinafter also referred to as NDPS) and poisons, drug offences began to also cover preparations containing NDPS (Sections 187 and 188) and their precursors (Section 187). Furthermore, the new offence of promoting drug use (Section 188a) was introduced to the code. This provision held liable anybody who enticed someone else to abuse addictive substances⁹ other than alcohol, or who supported another person in said abuse, or who otherwise incited or propagated the abuse of such substances. Over time, the punishments for drug offences were tightened and subsequently the range of aggravating circumstances was expanded¹⁰.

Section 187 originally allowed the prosecution of all kinds of NDPS possession. The amendment to Penal Code No. 175/1990 Coll. limited this criminal liability only to cases of drug possession on behalf of another person. Since July 1990, the

³ P. Zeman, *Legislation and Practice Concerning Prosecution of Drug Offences in the Czech Republic*, "Journal of Drug Issues" 2007, no. 37 (1), pp. 45–72.

⁴ Z. Karabec, J. Vlach, S. Diblíková, P. Zeman, *The Criminal Justice System in the Czech Republic*, IKSP, Praha 2011.

⁵ Published in Order of the Minister of Foreign Affairs, no. 47/1965 Coll.

⁶ Published in an announcement of the Ministry of Foreign Affairs, no. 458/1991 Coll.

⁷ Published in Order of the Minister of Foreign Affairs, no. 62/1989 Coll.

⁸ Published in an announcement of the Ministry of Foreign Affairs, no. 462/1991 Coll.

⁹ The term "addictive substance" was defined in the penal code as including alcohol, narcotic drugs, psychotropic substances and other substances that can adversely affect a person's psyche, one's self-control, cognitive abilities, or social behaviour. The same definition can be found in the new code (Section 130).

¹⁰ P. Zeman, *Legislation and Practice...*, *op. cit.*

possession of NDPS for personal use could only be regarded as an administrative (misdemeanour), not criminal offence¹¹. During the previous establishment, illegal drugs were taboo and were rather on the periphery of political interests. The newly-acquired freedom and relaxation of societal boundaries led to the fast development of a drug scene and drug markets of the kind only known until then in western countries. From the 1990s onwards, the drug issue quickly became a hot political topic¹². An apple of discord, between the proponents of more repression on one side and the pragmatics supporting a risk/harm reduction model on the other, has mainly been a question about decriminalizing possession (of a small amount) of drugs for personal use¹³. Several attempts were made during the 1990s to reinstate criminal liability for drug possession for personal use¹⁴. On 1 January 1999, an amendment to Penal Code No. 112/1998 Coll. finally introduced the new criminal offence (Section 187a) of unauthorized possession of NDPS and poisons for personal use. To commit this criminal offence, the offender had to possess drugs in an “amount greater than small” and could be sentenced to imprisonment for up to two years. This legislative change aroused quite a lot of controversy¹⁵. To calm down these heated discussions, the government funded a scientific study to evaluate the practical impacts of the new drug legislation. This three-year study, “An Impact Analysis Project of the New Drug Legislation in the Czech Republic (PAD)”, utilized a combination of methods to test five main hypotheses¹⁶. The authors of the study concluded that criminalizing possession of drugs for personal use had neither a positive nor negative impact on drug-related problems in the Czech Republic. In terms of social costs, enforcement of this offence had been disadvantageous. Furthermore, the authors discovered that penalizing possession for personal use had been enforced in a very selective manner, randomly and occasionally – not in accordance with the principles of officialdom and legality¹⁷.

The re-codification of criminal law had already been intended as a part of justice reform for quite some time. The first commission for re-codification was offi-

¹¹ *Ibidem*.

¹² T. Zábanský, *Czech Drug Laws as an Arena of Drug Policy Battle*, “Journal of Drug Issues” 2004, no. (34) 3, pp. 661–686.

¹³ *Ibidem*; M. Nekola, *Pragmatists, Prohibitionists and Preventionists in Czech Drug Policy*, “Central European Journal of Public Policy” 2012, no. (6) 2, pp. 56–82; V. Mravčík, V. Běláčková, K. Grohmannová, T. Zábanský (2015), *Nové psychoaktivní látky a jejich výskyt v ČR* [New psychoactive substances and their prevalence in the Czech Republic], “Časopis lékařů českých” 2015, no. 154 (5), pp. 216–221.

¹⁴ P. Zeman, *Legislation and Practice...*, *op. cit.*; T. Zábanský, *Czech Drug Laws...*, *op. cit.*

¹⁵ *Ibidem*; P. Zeman, *Legislation and Practice...*, *op. cit.*

¹⁶ T. Zábanský, *Czech Drug Laws...*, *op. cit.*; T. Zábanský, V. Mravčík, H. Gajdošíková, M. Miovský, PAD: *projekt analýzy dopadů novelizace drogové legislativy v ČR* (*Souhrnná závěrečná zpráva*) [PAD: Impact Analysis Project of New Drugs Legislation (Summary Final Report)], ResAd/Scan, Praha 2001.

¹⁷ *Ibidem*.

cially appointed by the Minister of Justice in 1995¹⁸. The ensuing complicated process resulted in the adoption of a new penal code in 2009, although the new Code of Criminal Procedure had still not been adopted. Regarding the development of drug legislation, the government adopted Resolution No. 1177/01 in response to the PAD conclusions, putting the relevant ministries in charge of taking measures to improve the approach to the drug situation in the Czech Republic. Among other things, this required the preparation of the legislative division of illegal drugs into two or three categories according to their medical and social dangerousness. Furthermore, the government required the revision of drug offence definitions and the related sanctions for the purpose of re-codification, and that the PAD results be generally applied in the process of national drug policy implementation¹⁹. The division was prepared by an expert group from the Ministry of Public Health in March 2003. It proposed a three-category division taking into account the somatic, psychological, social and epidemiological aspects of all the relevant substances. These categories were (1) marijuana, hashish and other cannabis products, (2) LSD and psilocybin-containing fungi, and “ecstasy” (MDMA, MDEA and MDA), (3) all other illegal drugs. The Commission for Re-codification of Criminal Law submitted the first version of the new penal code for comments in July 2003. The proposal included many novelties, e.g. changing to a purely formal concept of crime (instead of the material concept), and the binary categorisation of criminal offences into felonies and transgressions etc.²⁰ As regards to drug offences, compared to the previous code, only minor changes to wordings were made. No categorization of illegal substances was proposed. This omission in the government’s recommendations was heavily criticized²¹. The commission took the criticism and comments into consideration and the new version submitted in October 2003 introduced, among other changes, different regimes for cannabis and for all the other drugs in terms of their possession for personal use²².

Drug Offences in the New Penal Code

After the long preparations, Penal Code No. 40/2009 Coll. was finally adopted in 2009 and came into effect on 1 January 2010. In the area of drug offences, the new code has not brought any significant change to the approach applied thus far, but

¹⁸ Z. Karabec et al., *The Criminal Justice...*, *op. cit.*

¹⁹ Vláda ČR [The Government of the Czech Republic], *Usnesení Vlády ČR k Analýze dopadů novelizace drogové legislativy* [Resolution of The Czech Government Regarding Results of The Impact Analysis of Amended Drug Legislature], 2001, vol. 1177/2001, 1177/01.

²⁰ Z. Karabec et al., *The Criminal Justice...*, *op. cit.*

²¹ P. Zeman, *Legislation and Practice...*, *op. cit.*

²² Idem, *The Penal Legislation Concerning Illegal Drugs in the Czech Republic: The Right Time for Change Now?*, in: *Organised crime, Trafficking, Drugs: Selected papers presented at the Annual Conference of the European Society of Criminology, Helsinki 2003*, HEUNI, Report Series no. 42, Helsinki 2004, pp. 233–246.

rather presents an attempt to introduce greater differentiation of criminal penalties depending on the degree of severity of the offence. It can be summarized that, through the new legislation, lawmakers on one hand declared the intention to toughen penalties for offences related to drug supply, while on the other intended to mitigate the repression against drug users, as most of the changes relate to the latter group of offenders²³. Compared with previous legislation, the new penal code includes five drug offences²⁴.

- *Unauthorised Manufacture and other Handling of Narcotic Drugs and Psychotropic Substances and Poisons (Section 283)*

Except for some changes in aggravating circumstances, this offence corresponds to Section 187 from the previous penal code and is intended mainly to penalize drug manufacturing and drug trafficking. Pursuant to the basic provision, imprisonment from one to five years can be imposed on the offender.

- *Possession of Narcotic Drugs and Psychotropic Substances and Poisons (Section 284)*

As stated above, the division of drugs into “soft” and “hard” was established for this offence. Based on this classification, punishments have been stipulated for unlawful possession (of a drug for personal use in a quantity greater than small) that are different for cannabis than for other NDPS. For possession of cannabis, an offender should be punished by imprisonment of up to one year, forfeiture or prohibition from undertaking certain activities. An offender in unauthorized possession of any other narcotic drug or psychotropic substance or poison in an “amount greater than small” should be punished by imprisonment for up to two years, forfeiture or prohibition from undertaking certain activities. In cases where the drug kept for personal use is “greater” or “considerably extended”, the sentence is the same regardless of the kind of drug involved. It should be mentioned that lighter penalties are only given for drug possession when its amount is assessed as exceeding the limit which qualifies it for criminal liability (an “amount greater than small”), providing that the offender illegally possesses it for personal use exclusively, or in other words, if the only reason for its possession is personal consumption. If the NDPS are intended for any person other than the person possessing them, such actions would be considered under Section 283, regardless of the amount and type of the NDPS.

- *Unauthorised Cultivation of Plants Containing Narcotic Drugs or Psychotropic Substances (Section 285)*

This provision specifies an entirely new offence. According to legislators, the purpose of this privileged offence was to mitigate the punishments for users who

²³ Vláda ČR [The Government of the Czech Republic], *Důvodová zpráva k trestnímu zákoníku* [Explanatory report for the penal code], Vládní návrh trestního zákoníku, sněmovní tisk 410/0, část č.1/9, 2008, <http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=410&CT1=0> [accessed: 06.10.2015].

²⁴ Current wording of drug offences in the Czech Penal Code (wording effective in January 2016) can be found in Annex 1 at the end of this paper.

are self-suppliers and differentiate between supply for personal use and that for “commercial” cultivation²⁵. This should also eliminate ambiguity in the legal qualification of acts involving the cultivation of plants containing NDPS²⁶. In relation to Section 284, the severity of sentencing differs between the cultivation of cannabis for personal use in an “amount greater than small” (imprisonment for a period of up to six months) and the cultivation of other plants containing NDPS (imprisonment for up to one year).

- *Manufacture and Possession of Items for the Illegal Manufacture of Narcotic Drugs and Psychotropic Substances and Poisons (Section 286)*

Only slight changes were made to this offence that address the handling of precursors and other items intended for unlawful drug manufacture. The basic provision was specified in accordance with the 1988 UN Convention. Imprisonment was set to up to five years and the range of aggravated circumstances was extended.

- *Promotion of Drug Use (Section 287)*

This particular offence also remained unchanged, and only the range of aggravated circumstances was extended. As stated within the explanatory report to the penal code, “the purpose of this provision is not the prosecution of activities aimed at the reduction of the negative mental, medical and social impacts of drug use on their users.... It relates to tertiary prevention in the social work area, where modern methods of work such as syringes and needle exchanges or toxicological testing for certain substances (e.g., ecstasy) are used. The aim of tertiary prevention is not to reduce demand for drugs but to minimize the harm and deaths caused by drugs”²⁷.

Besides the provisions defining drug offences, the new penal code also brought some other novelties concerning the prosecution of drug offences. The previous legislation had already used the term “amount greater than small” to establish a threshold of criminal liability in regard to the possession of drugs for personal use. However, no specific values were set for particular types of NDPS because every case should be considered individually for each different substance in terms of a case’s circumstances and the offender’s personality. This gave courts considerable discretion in deciding individual cases. On the other hand, this approach has been criticized for violation of the principle of equality before the law²⁸. In practice, it caused problems because of inconsistent interpretations of legislation by law enforcement authorities (see below). The new legislation was supposed to harmonise the practice by authorising the government (Section 289 par. 2) to establish the amounts of NDPS (and preparations containing them) that are considered to be greater than small. This form of secondary legislation should have

²⁵ Vláda ČR, *Důvodová zpráva...*, *op. cit.*

²⁶ P. Zeman, *Legislation and Practice...*, *op. cit.*, p. 60.

²⁷ Vláda ČR, *Důvodová zpráva...*, *op. cit.*

²⁸ P. Zeman, *Legislation and Practice...*, *op. cit.*

allowed a flexible response to changes on the drug scene, namely with regard to the emergence of new psychoactive substances²⁹. These values were set in Government Decree No. 467/2009 Coll. Drug use itself is not punishable in the Czech Republic, so an “amount greater than small” of an illegal substance possessed for future use has to exceed one usual dose for the offender³⁰. However, it must be noted that unauthorized possession of drugs in small amounts for personal use is not legal and is still considered a misdemeanour punishable by fines up to 15,000 CZK (approx. 550 EUR)³¹.

The same solution was chosen for Section 285. The legislator authorised the government to issue a decree stating which plants and mushrooms should be regarded as containing NDPS and specifying an amount greater than small. This issue is regulated by Government Decree No. 455/2009 Coll., which lists cannabis and coca as plants containing NDPS³² and an amount that is greater than small as more than five plants. Meanwhile, mushrooms must contain psilocybin or psilocin, and an “amount greater than small” is considered to be more than 40 individual fungi.

Finally, the overall change in understanding of the substantive criminal law that was introduced by the new penal code needs to be mentioned as it also affects the area of drug crime prosecution: namely, transition from the material to the formal concept of crime. The formal concept of crime means that if an act meets the legal definition of an offence (set out in the penal code), it is a criminal offence regardless of its level of social danger. Conversely, according to the material concept of crime, an act has to meet the legal definition of an offence and a specific level of social danger (as assessed by the judge) to be found a criminal offence. Doubts were expressed about this philosophy in relation to drug offences in that it might, contrary to the legislator’s intention, have a negative effect and result in the inappropriate extension of criminal liability of persons possessing NDPS for personal use. Persons who would avoid a penalty under the previous legislation because the court concluded that there was an insufficient level of social dangerousness of the act (although the legal definition of a drug offence would be met)³³, would now be at risk of criminal prosecution due to the application of a formal concept of crime³⁴.

²⁹ Mravčík et al., *Nové psychoaktivní...*, *op. cit.*

³⁰ P. Zeman, *Legislation and Practice...*, *op. cit.*

³¹ Section 30 par. 1(j) of the Act on Misdemeanours, No. 200/1990 Coll.

³² As regards the substances that are considered NDPS, their schedules are included in the annexes to Government Decree No. 463/2013 Coll., implementing the Act on Addictive Substances No. 167/1998 Coll.

³³ E.g. an old man cultivating a few cannabis plants in his garden and using cannabis as a therapy exclusively for his own use; an offender possessing a drug in an “amount greater than small”, but given the level of his/her addiction, such amount represents his/her common dose.

³⁴ P. Zeman, *Drogové trestné činy podle trestního zákoníku v kontextu formálního pojetí trestného činu* [Drug offences according to the new penal code in context of the formal concept of crime], in: D. Sehnálek, J. Valdhans, R. Dávid, L. Kyncl (eds), *Dny práva – 2009 – Days of Law: the Conference Proceedings*, Brno 2009.

Practical Implications of the New Penal Code

As several years have already passed since the new penal code went into effect, it is possible to try assessing the impact of these changes in practice. The Institute for Criminology and Social Prevention (IKSP) has been continuously conducting research related to drug crime and general drug problems over a long period of time³⁵. IKSP's research entitled "Detection and Prosecution of Drug Crime after Adoption of the New Penal Code" (2013–2015) was designed to evaluate the impact of the new legislation in practice³⁶.

The aims of the research were: to analyse developments in the legal regulation of drug offences and related criminal law institutes; to collect the necessary data on their practical application by criminal authorities; to define the situation, development and forms of this type of criminal activity; and to use all this to evaluate the impacts of the adoption of the penal code on the detection and prosecution of drug offences. The subject of the research was the reaction of the state (the Czech Republic) in the area of repression of drug offences, as established through comparison of the situation before the adoption of the new code and after it. Qualitative and quantitative procedures, standard methods and techniques of criminological research were used to address the research task, specifically conducting analyses of Czech legal regulations including available case law material, statistical data from the Ministry of Justice, statistics from the Police Presidium and from the National Drug Headquarters, scientific literature, relevant official documents, expert questionnaire surveys of judges, public prosecutors and police officers, semi-standardised interviews with selected employees from law enforcement authorities, and criminal case files³⁷.

This paper is focused on the partial results of this research and tries to assess the impact of the new legislation on the detection and prosecution of drug crime, with a special emphasis on the impact for drug users.

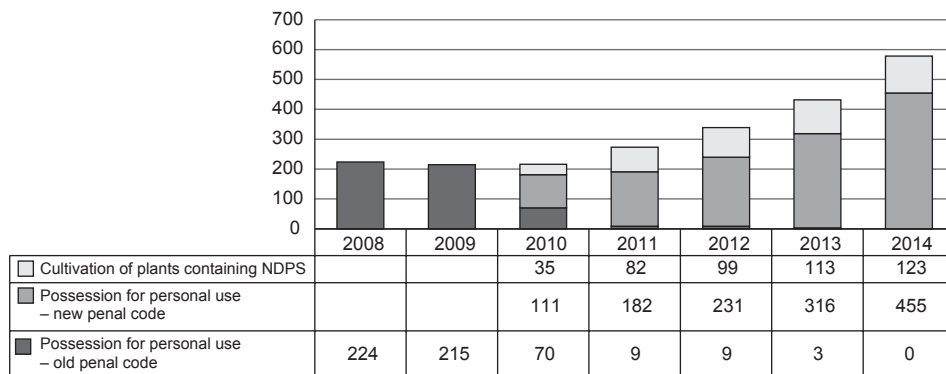
³⁵ I. Trávníčková, P. Zeman, *Možnosti trestní justice v protidrogové politice I. (vývojové aspekty)* [Criminal Justice Opportunities in Drug-Prevention Policy I. (Developmental Aspects)], IKSP, Praha 2007; eidem, *Možnosti trestní justice v protidrogové politice II. (empirická část)* [Criminal Justice Opportunities in Drug-Prevention Policy II. (Empirical Part)], IKSP, Praha 2008; eidem, *Kriminální kariéra pachatelů drogové kriminality* [The Criminal Career of Drug Offenders], IKSP, Praha 2010; P. Zeman, I. Trávníčková, M. Štefunková, *Vybrané aspekty drogové problematiky z pohledu občanů* [Selected Aspects of the Drug Issue from the Citizens' Point of View], IKSP, Praha 2011.

³⁶ Drug crime in this project represents drug offences that are specifically offences against drug laws (crimes committed in violation of drug and other related legislation) in accordance with the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) classification (C. Carpentier, *Drugs and crime – a complex relationship*, EMCDDA 2007, <http://www.emcdda.europa.eu/html.cfm/index36331EN.html> 2007 [accessed: 12.10.2015]).

³⁷ P. Zeman, M. Štefunková, I. Trávníčková, *Drogová kriminalita a trestní zákoník* [Drug Offences and the Penal Code], IKSP, Praha 2015.

Number of Convicted Offenders

Regarding trends in the number of persons convicted of drug offences targeted at drug users (involving Possession of Drugs for Personal Use according to the old and new penal codes and Cultivation of Plants Containing NDPS based on the statistical data of the Ministry of Justice), we can see that the number has been rising constantly since 2010, and by 2014 it had almost tripled compared to 2008. In more detail, according to the type of drug held for personal use, the majority (approximately 60%) of offenders were convicted of cannabis possession. With regard to the cultivation of plants containing NDPS, this offence applies exclusively to cannabis cultivation, as nobody has been convicted of cultivation of other plants or mushrooms since the new code took effect (Graph 1). With some simplification disregarding the effect of latency and development of other drug offences³⁸, we can conclude that the number of convicted drug users in the Czech Republic is rising and that most of them are convicted in connection with cannabis.



Graph 1. Number of persons convicted of drug offences targeted at drug users: Possession of drugs for personal use according to the old and new penal codes and cultivation of plants containing NDPS

Source: Ministry of Justice of the Czech Republic.

The number of convicted cannabis users can be even higher depending on when the offender was caught in the act. Even though mitigation of the punishment was declared by legislators, the opinion issued by the Criminal Division of the Supreme Court on 4 December 2014, No. Tpjn 300/2014, stated that: “The act of unauthorized cultivation of cannabis plants cannot be equated with the term ‘manufacture of narcotic drugs or psychotropic substances’ within the meaning of Section 283 par. 1 of the penal code. Only cases where the cannabis plant was harvested and subsequently unlawfully processed into a substance suitable for consumption (marijuana) or to obtain the psychotropic substance tetrahydrocannabinol (THC)

³⁸ *Ibidem*.

can it be regarded as manufacture, or more precisely one of its stages. This also applies even when the perpetrator undertook such manufacture for his/her own use, and for that purpose procured or possessed cannabis plants; in this case, the actual procurement or possession of cannabis plants has to be considered as an attempted offence of unauthorized manufacture and other handling of narcotic drugs and psychotropic substances and poisons according to Section 21 par. 1 and Section 283 par. 1, not only preparation within the meaning of Section 20 par. 1³⁹. This confusing opinion has been criticized in several ways. Amongst these observations are the contradictions between the statement and UN conventions as well as lawmakers' declared intentions³⁹. Even if the court's decisions do not serve as formal sources of law in the form of precedents that are binding on other courts in the Czech Republic, the decisions of the Supreme Court do in fact influence the decision making of lower courts in practice as one of the Supreme Court's tasks is to contribute to the consolidation of the lower courts' decision making processes. Therefore the application of the Supreme Court's opinion creates a paradoxical situation when the user cultivating cannabis for personal use commits an offence under Section 285 (cultivation of plants) which carries a criminal penalty not exceeding six months' imprisonment, but after harvesting the cannabis and during the process of drying it, the offender is "manufacturing marijuana" for personal use and faces a penalty of between one and five years' imprisonment. When the plants have finally dried, the offence will be classified as possession for personal use under Section 284, and is punishable with a maximum penalty of imprisonment for one year. Therefore, according to the Supreme Court, cannabis users should receive more lenient penalties only if they are "caught" before or after drying the cultivated plants.

Sanctions

Typically, a conviction does not mean that an offender will automatically end up in prison, since drug users' contact with the criminal justice system can create conditions and an opportunity for treatment and resocialization measures. It seems, however, that this is not the case in the Czech Republic. With regard to the sanctions given to offenders convicted of these user-targeted offences, the proportion of those who get an unconditional prison sentence has decreased since 2010, while alternative penalties are still imposed very rarely. Since 2008, the proportion of community service penalties was under 10% and other sanctions were even lower. Most commonly, the imprisonment sanction is conditionally suspended. In 2013, this was the case for almost 80% of the convicted offenders (see Table 1), while no special care is given to this group of offenders except that they are at permanent risk of

³⁹ P. Zeman, "Výroba konopí z konopí? ["Manufacturing" cannabis from cannabis?], "Trestně-právní revue" 2015, no. 9, pp. 211–215.

imprisonment in the case they breach their conditions. And in the case of drug use, this may happen quite easily.

Table 1. Sanctions imposed on offenders convicted of drug offences targeted at drug users: Possession of drugs for personal use according to old and new penal codes and cultivation of plants containing NDPS⁴⁰

	2008	2009	2010	2011	2012	2013	2014
Prison sentence	25%	25%	14%	15%	13%	9%	10%
Prison sentence conditionally suspended	58%	60%	70%	78%	72%	79%	76%
Community service	11%	7%	7%	4%	7%	6%	8%
Other penalties (e.g. a monetary penalty, forfeiture of an item, deportation...)	2%	3%	5%	3%	6%	4%	6%
Conviction without punishment imposed	5%	5%	2%	0%	1%	1%	1%

Source: Ministry of Justice of the Czech Republic

In this context it is rather surprising that courts only rarely order measures such as compulsory addiction treatment or conditionally-suspended prison sentences under the supervision of a probation officer, within which undergoing addiction treatment can be specified as one of the offender's duties, and their relative number is even decreasing (Table 2).

Table 2. Compulsory treatment and conditionally-suspended prison sentences under supervision of probation officers imposed on offenders convicted of drug offences targeted at drug users: Possession of drugs for personal use according to old and new penal codes and cultivation of plants containing NDPS⁴¹

	2008	2009	2010	2011	2012	2013	2014
Compulsory treatment	2	4	3	1	0	5	0
Inpatient	1	1	1	0	0	1	0
Outpatient	1	3	2	1	0	4	0
Conditionally suspended PS with supervision by a probation officer	19	12	14	19	22	17	44
From all convicted persons	10%	8%	8%	7%	6%	5%	8%

Source: Ministry of Justice of the Czech Republic

⁴⁰ The percentages do not specify offenders exclusively convicted of one of the selected offences. The offender may have been convicted of more offences committed together with at least one of the selected user-targeted drug offences.

⁴¹ The numbers do not specify offenders exclusively convicted of one of the selected offences. The offender may have been convicted of more offences committed together with at least one of the selected user-targeted drug offences.

As discussed above, new unified threshold quantities regarding possession for personal use were introduced by government decree in 2010. Prior to 2010, different instructions had been in place in parallel for police and public prosecutors on how to deal with “amounts greater than small” in practice. The Chief of Police issued Binding Instruction No. 39/1998, which described police methods to be used in detecting illegal activities related to drug addiction (followed by Instructions No. 64/2001, No. 102/2003, No. 86/2006 and No. 55/2009). An appendix to the instruction contains a chart showing “amounts greater than small” for selected drugs. Shortly afterwards, the public prosecutor’s office issued its own General Instruction of the Supreme Public Prosecutor, No. 6/2000 (later replaced by Instructions No. 2/2006 and No. 1/2008). An appendix to this document also contained a chart detailing the amounts of the most frequently-used drugs. This chart was also adopted by courts as an auxiliary tool⁴². The police and public prosecutor’s office derived these threshold quantities from the amounts of active substance. In the new government decree, a combination of quantitative indicators was used (the total seized substance had to contain at least a minimal amount of active substance). As drug consumption and possession of a dose intended for direct consumption are not considered a criminal offence in the Czech Republic, an “amount greater than small” represents certain multiples of what is considered a habitual daily dose (the so-called dose of consumption) for users. Due to the shift to a formal concept of crime and the loss of the court’s discretion in deciding individual cases, the “amounts greater than small” were set as larger in magnitude for the majority of drugs in the decree as compared to previously used amounts (Table 3). However, in June 2013, the authorisation and a relevant part of the Government Decree No. 467/2009 Coll. concerning the stipulation of values for a quantity of NDPS that is greater than small were revoked by a ruling of the Constitutional Court (ruling of the Constitutional Court of 23 June 2013, file ref. Pl. ÚS 13/12, published under No. 259/2013 Coll.). This was due to the inconsistency with Article 39 of the Charter of Fundamental Rights and Freedoms in combination with Article 78 of the country’s constitution, specifically due to breach of the principle of *nullum crimen sine lege*⁴³. The ensuing discussion of how the term “amount greater than small” should be specified for the purposes of the penal code concentrated on the issue of the opinion of the Criminal Division of the Supreme Court (Supreme Court opinion of 13 March 2014, No. Tpjn 301/2013, published under No. 15/2014 in Reports of Cases and Rulings). The Supreme Court made its decision on threshold values, stated in the annex to this unifying opinion, after considering two opposing positions. The proponents of the harm/risk reduction approach called for an increase in the thresholds at seven times the (average) daily dose, whereas the representatives

⁴² P. Zeman, *Legislation and Practice...*, *op. cit.*

⁴³ P. Zeman, M. Štefunková, I. Trávníčková, *Drogová kriminalita...*, *op. cit.*; V. Mravčík, K. Grohmannová, M. Štefunková, V. Běláčková, T. Zábranský, *Narcotic and Psychotropic Substances Are... – a Proposal for a Legal Definition of Illicit Drugs in the Czech Republic*, “Adiktologie” 2016 [in print].

of the Ministry of the Interior and the Police National Drug Headquarters proposed the lowering of threshold limits for selected drugs⁴⁴. The outcome was that the Supreme Court lowered the threshold for two drugs (for methamphetamine from 2 to 1.5 grams and for herbal cannabis from 15 to 10 grams), while threshold quantities for the other drugs remained the same as in the annulled decree (see Table 3). In addition, according to this opinion, courts needed to also consider other circumstances, besides the quantity of the drug, such as the level of addiction, which in this respect means returning to the material concept of crime. Despite this change, it can be concluded that the new threshold quantities, in particular for cannabis, have formally effected the mitigation of criminal repression and thus give no explanation for the rise in the number of convicted offenders.

Table 3. Instructions for considering an “amount greater than small” (selected substances)

	General Instruction of the Supreme Public Prosecutor	Government Decree No. 467/2009 Coll.		Unifying opinion of the Supreme Court No. Tpjn 301/2013
	Amount of active substance (more than)	Amount of total seized substance (more than)	Amount of active substance (more than)	Amount of total seized substance/ Amount of active substance (more than)
Heroin	0.15g	1.5g	0.2g	unchanged
	(approx. 5 doses)		0.22g	
			/hydrochloride/	
Cocaine	0.25g	1g	0.54g	unchanged
	(approx. 5 doses)		0.6g	
			/hydrochloride/	
Methamphetamine	0.5g	2g	0.6g	1.5g/0.5g 0.6g /hydrochloride/
	(approx. 10 doses)		0.72g	
			/hydrochloride/	

⁴⁴ V. Mravčík, *(De)criminalisation of possession of drugs for personal use – A view from the Czech Republic*, “International Journal of Drug Policy” 2015, <http://dx.doi.org/10.1016/j.drugpo.2015.01.022> [accessed: 06.10.2015].

MDMA	1g	4 tablets/capsules or 0.4g of powder or crystal substance	0.34g	unchanged
	(approx. 10 doses)		0.4g	
			/hydrochloride/	
LSD	0.5mg	5 papers, tablets, capsules or crystals	0.134mg	unchanged
	(approx. 10 doses)		0.250 mg / tartrate/	
THC	0.3g	marijuana 15g	1.5g	10g/1g
	(approx. 10 doses)	hashish 5g	1g	unchanged

Drug Use Among the Population

Another possible explanation is that the rise in the number of convicted persons can be influenced by increases in drug use in the general population. Nevertheless, according to the latest annual report from the National Monitoring Centre for Drugs and Addiction, drug use in the Czech Republic has recorded stable levels. The most commonly used illicit drug is cannabis, which has been taken at least once by approximately one quarter of the adult population. In all, 9% of the population reported having used this illicit drug within the last year. The use of other illegal drugs occurs at significantly lower levels. However, long-term trends suggest a decline in the level of current cannabis use among the general population, particularly as far as younger age groups are concerned⁴⁵.

A recent study has also shown that the legislative change in 2010 did not affect the age of onset of cannabis use. The authors assume that the change of the policy did not cause an increase in supply or access to cannabis for young people. On the other hand, it seems that the more lenient legislation did not persuade abstainers to start using cannabis⁴⁶.

The attitudes of the population of the Czech Republic to substance use have also remained consistent over the long term. A survey carried out in 2013 indicates that the level of public acceptance of tobacco smoking has recently moderately decreased, while a growing number of people find it acceptable to use alcohol and

⁴⁵ V. Mravčík et al., *National Report: The Czech Republic – 2013 Drug Situation*, Úřad vlády České republiky, Praha 2014.

⁴⁶ J. Červený, P. Chomynová, V. Mravčík, J.C. van Ours, *Cannabis Decriminalization and the Age of Onset of Cannabis Use*, CentER Discussion Paper Series No. 2015-007, 2015, <http://dx.doi.org/10.2139/ssrn.2556731> [accessed: 06.10.2015].

cannabis. There has been a continuous increase in the percentage of the population that opposes the criminalisation of cannabis users, particularly those using cannabis for medical purposes⁴⁷.

Expert Opinion Survey

Substantive laws and the wording in the penal code are not the only factors that influence whether or not the offender will be convicted. It appears that procedural institutes and the approach of law enforcement agencies that decide individual cases are of greater significance in this respect. This assumption is also confirmed by the results of the expert opinion survey that was carried out as part of the IKSP research among police officers, public prosecutors and judges. The aim of the survey was to obtain the opinions of employees of the law enforcement authorities involved in the detection and prosecution of drug offences, specifically about the changes brought by the new penal code for this field, as well as other observations, experiences and proposals concerning the subject of research. The questionnaire consisted of closed, semi-open and open questions. A snowball sampling was used to identify the respondents. In total, 139 questionnaires were collected (34 from police officers, 47 from prosecutors and 58 from judges)⁴⁸.

On the one hand, respondents considered the new legislation to be more detailed and more precise. They appreciated the introduction of the new offence regarding illegal cannabis cultivation and the division between cannabis and other drugs. The judges, in particular, praised changes that provide room for the individualisation of criminal penalties. On the other hand, respondents were apparently reluctant to use this “room” as they think that in some respect the mitigation of the legislation was not necessary. One of the prosecutors stated that the penal code “also reduces the level of criminal repression in cases that do not deserve it”.

In the answers to the question regarding what kinds of possible amendments to the penal code would be most desirable in terms of improving the efficiency of drug crime prosecution, respondents quite frequently called for an increase in penalties and the imposition of heavier punishments. The police officers would even appreciate tighter repression, in terms of the criminalisation of certain forms of drug use. The prosecutors and judges considered it to be more important to change the liberal attitude of society towards the problem of drugs. In this regard, one of the prosecutors stated: “It is perhaps not so much about the change in the penal code, but rather about approach, because Czech society in general is very liberal, mainly when it comes to petty drug crime, i.e. it would be worth prosecuting the drug of-

⁴⁷ It should be noted that in 2013, medical cannabis was legalised in the Czech Republic. See V. Mravčík et al., *National Report...*, *op. cit.*

⁴⁸ P. Zeman, M. Štefunková, I. Trávníčková, *Drogová kriminalita...*, *op. cit.*

fences more consistently”. With regard to the threshold “amount greater than small”, the respondents were rather inclined to reduce the current values.

The transition to a formal concept of crime can also create an environment for a more repressive approach. Disregarding the social danger of an act can sometimes lead to senseless criminal prosecutions. One of the judges stated: “It is difficult to react appropriately to senseless prosecution. I have seen a judgement in a regional court, where a 19-year-old boy got 8 years for passing a joint (a cigarette of marijuana) around at a bonfire on holiday where there was also a girl under 15 who also puffed on it. Fortunately, a high court stepped in and conjured up a suspended sentence. This is a typical example proving that the institution of social dangerousness should have been kept”.

Conclusions

Although the new penal code did not bring any essential changes to the focus or intensity of legal repression in the area of drug policy, somewhat more lenient punishments for cannabis users can be considered a step forward for evidence-based legislation. However, despite the declared legislative intention to mitigate criminal repression against drug users, according to statistics the number of convicted users/offenders is increasing. The differentiation itself opens the door to variable prosecution of the illegal disposal of different kinds of drugs, but it is nevertheless up to authorities applying the law how they will utilize this “room”. The results of the IKSP research suggest that the attitudes of law enforcement representatives who are empowered to decide individual cases are of considerable importance. Substantive law only provides a framework for a final decision (e.g. whether or not to prosecute, or what sanctions should be imposed), while the subjective view of the deciding authority cannot be eliminated.

Although the respondents in our survey appreciated the fact that the new legislation distinguishes between cannabis and other NDPS, it introduces a new offence relative to drug users and thus provides room for the individualisation of criminal punishments. At the same time, they show a repressive and punitive approach toward drug use. A partial explanation for the punitive attitudes of respondents may be due to the perceived liberal climate regarding drugs and their users in Czech society. The opinion that the Czech public takes an excessively tolerant and liberal approach to drugs strongly resonated across all the professional groups of respondents. However, research findings do not support this feeling and rather suggest that the public is fairly evenly divided between the proponents of preventive and rehabilitative approaches and those supporting repressive/punitive approaches⁴⁹. Several mechanisms are applied in practice by law enforcement authorities to balance

⁴⁹ P. Zeman, *Drogami rozdělená společnost – realita nebo mediální zkreslení?* [Society divided by drugs – reality or medial bias?], “Bulletin Národní protidrogové centrály” 2013, no. (2), pp. 3–15.

this perceived inequity, e.g. over-policing drug offences, using less formal summary procedures, or the above-mentioned Supreme Court judgements influencing the decisive practices of other courts. All these could lead to a rising number of convicted persons, while no special emphasis is put on their treatment. The “war” between the advocates of public health/evidence-based knowledge and those calling for tougher repression of drug use to be incorporated into legislative reaction is apparently still going on. At the same time, it seems that some conflicts only stem from misinterpretation or lack of information. It is therefore essential to put an emphasis on the dialogue between the involved parties, especially between the lawmakers and the law enforcement authorities about adopting new legislations. If there is no consensus reached, then even very well constructed provisions for drug offences can have an adverse impact in practice.

Annex 1: Drug offences in the Czech Penal Code No. 40/2009 Coll.

(Wording effective in January 2016)

Section 283

Unauthorised Manufacture and other Handling of Narcotic Drugs and Psychotropic Substances and Poisons

- (1) Whoever manufactures, imports, exports, transports, offers, provides or sells or otherwise procures or possesses for another person, a narcotic drug or psychotropic substance, or product containing narcotic drugs or psychotropic substances, precursors or poisons without authorisation, shall be punished by a prison sentence of one to five years or a monetary penalty.
- (2) An offender shall be punished by a prison sentence of two to ten years or forfeiture of property, if he/she committed an act referred to in Subsection 1
 - a) as a member of an organised group,
 - b) though he/she was convicted or punished for such an act within the last three years,
 - c) to a considerable extent, or
 - d) to a greater extent against a child, or in an amount greater than small against a child younger than fifteen years.
- (3) An offender shall be punished by a prison sentence of eight to twelve years or forfeiture of property, if,
 - a) he/she caused grievous bodily harm by committing an act referred to in Subsection 1,
 - b) he/she committed such an act with the intention of gaining a considerable benefit for himself/herself or someone else,
 - c) he/she committed such an act to a large extent, or
 - d) he/she committed such an act against a child younger than fifteen years to a greater extent.

- (4) An offender shall be punished by a prison sentence of ten to eighteen years or forfeiture of property, if
 - a) he/she caused grievous bodily harm to at least two persons or death by committing an act referred to in Subsection 1,
 - b) he/she committed such an act with the intention of gaining a benefit of large extent for himself/herself or someone else, or
 - c) he/she committed such an act in connection with an organised group operating in several states.
- (5) Preparation of the offence is punishable.

Section 284

Possession of Narcotic Drugs and Psychotropic Substances and Poisons

- (1) Whoever, for his/her own use, possesses the narcotic drug of cannabis, cannabis resin, or any psychotropic substance containing tetrahydrocannabinol, isomer thereof, or its stereochemical variant (THC) in an amount greater than small without authorisation, shall be punished by a prison sentence of up to one year, prohibition to undertake certain activities, or forfeiture of items.
- (2) Whoever, for his/her own use, possesses another narcotic drug or psychotropic substance other than the ones referred to in Subsection 1 or a poison in an amount greater than small without authorisation, shall be punished by a prison sentence of up to two years, prohibition to undertake certain activities, or forfeiture of items.
- (3) An offender shall be punished by a prison sentence of six months to five years or a monetary penalty if he/she committed an act referred to in Subsection 1 or 2 to a greater extent.
- (4) An offender shall be punished by a prison sentence of two to eight years if he/she committed an act referred to in Subsection 1 or 2 to a considerable extent.

Section 285

Unauthorised Cultivation of Plants Containing Narcotic Drugs or Psychotropic Substances

- (1) Whoever, for his/her own use, cultivates cannabis in an amount greater than small without authorisation, shall be punished by a prison sentence of up to six months, a monetary penalty, or forfeiture of items.
- (2) Whoever, for his/her own use, cultivates a mushroom or another plant other than the ones referred to in Subsection 1 containing narcotic drugs or psychotropic substances in an amount greater than small without authorisation, shall be punished by a prison sentence of up to one year, a monetary penalty, or forfeiture of items.
- (3) An offender shall be punished by a prison sentence of up to three years or a monetary penalty if he/she committed an act referred to in Subsection 1 or 2 to a greater extent.

- (4) An offender shall be punished by a prison sentence of six months to five years if he/she committed an act referred to in Subsection 1 or 2 to a considerable extent.

Section 286

Manufacture and Possession of Items for the Illegal Manufacture of Narcotic Drugs and Psychotropic Substances and Poisons

- (1) Whoever manufactures, procures for himself/herself or another person, or possesses a precursor or other item intended for the unlawful manufacture of narcotic drugs or psychotropic substances, products containing narcotic or psychotropic substances or poisons, shall be punished by a prison sentence of up to five years, a monetary penalty, prohibition to undertake certain activities, or forfeiture of items.
- (2) An offender shall be punished by a prison sentence of two to ten years, if,
 - a) he/she committed an act referred to in Subsection 1 as a member of an organised group,
 - b) he/she committed such an act to a considerable extent,
 - c) he/she committed such an act to a greater extent against a child, or
 - d) he/she gained a considerable benefit by committing such an act for himself/herself or another person.

Section 287

Promotion of Drug Use

- (1) Whoever entices another person to the abuse of addictive substances other than alcohol or supports him/her in it, or whoever otherwise incites the abuse of such substances or promotes it, shall be punished by a prison sentence of up to three years or prohibition to undertake certain activities.
- (2) An offender shall be punished by a prison sentence of one to five years or a monetary penalty if he/she committed an act referred to in Subsection 1
 - a) as a member of an organised group,
 - b) against a child, or
 - c) by use of the press, film, radio, television, publicly accessible computer networks, or other similarly effective means.
- (3) An offender shall be punished by a prison sentence of two to eight years if he/she committed an act referred to in Subsection 1 against a child younger than fifteen years of age.

Section 289

Common Provisions

- (1) The Act stipulates what is considered narcotic drugs, psychotropic substances, products containing narcotic drugs or psychotropic substances, precursors used for illegal manufacture of narcotic drugs or psychotropic substances.
- (2) The Government Decree stipulates what is considered to be a poison within the meaning of Section 283, 284 and 286.

- (3) The Government Decree stipulates which plants and mushrooms are considered to be plants and mushrooms containing narcotic drugs or psychotropic substance under Section 285 and what amount is greater than small under Section 285.