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Reasoning of Criminal Judgments in the Czech Republic

Diplomová práce

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Abstract

The topic of the diploma thesis is the reasoning of the criminal judgment, especially with regard to the sentence imposed. The obligation for judges to reason a sentence arises from the Code of Criminal Procedure and the principles of the rule of law; therefore, with some exceptions, it is an essential part of the judgment. The first part focuses on the aspects of the reasoning of the judgment in general (Chapters 1-6), explaining the reasons why judgments need to be justified, the different approaches to reasoning, the principles of good reasoning, and the problems that arise in reasoning. The next part of the thesis (chapter 7) deals with the justification of the sentence in the criminal judgment. The purpose of punishment, principles that influence the process of punishment of offenders, as well as factors (circumstances) that influence the selected punishment are discussed. The next part of the thesis (chapter 8) is devoted to the empirical part: the research which analyzes a representative sample of 366 judgments of Czech district courts in terms of the sentence imposed. Based on the law and the literature used, the data and factors that will be recorded during the analysis whereas the main research question is: How and to what extent do Czech district courts justify imposing sentences? This question is broken down into several research sub-questions and at the end of the research it should be possible to draw partial conclusions on how courts deal with the issue of reasoning of punishment at district level (Chapter 9). The aim of this research is to provide an insight into how Czech district courts decide on punishments, what factors they attach most importance to, whether they consider the purpose of the sentence, whether they individualize the sentence and whether they further elaborate the circumstances. Based on the results of the research, it should be possible to say what the state of reasoning of sentences in the Czech Republic is at the district level, ie whether it is going in the direction that the law or scholarship presupposes.

Abstrakt

Tématem diplomové práce je odůvodnění trestního rozsudku zejména s ohledem na uložený trest. Povinnost pro soudce odůvodnit trest vyplývá z trestního řádu i z principů právního státu, je tedy až na výjimky nezbytnou součástí rozsudku. První část práce se soustředí na aspekty odůvodnění rozsudku obecně (kapitoly 1.-6.), přičemž jsou rozvedeny důvody, proč je třeba odůvodňovat rozsudky, různé přístupy k odůvodňování, zásady dobrého odůvodnění, a problémy, které při odůvodnění vyvstávají. Další část práce (kapitola 7.) se zabývá odůvodněním trestu v trestním rozsudku. Jsou rozebrány účely trestání, principy, které mají vliv na proces trestání pachatelů, a také faktory (okolnosti), které vybraný trest ovlivňují. Další část (kapitola 8.) je potom věnována empirické části: výzkumu, který analyzuje reprezentativní vzorek 366 rozsudků českých okresních soudů z hlediska uloženého trestu. Na základě zákona a použité literatury budou stanoveny údaje a faktory, které budou v průběhu analýzy zaznamenávány, přičemž hlavní výzkumnou otázkou je: Jak a v jaké míře odůvodňují české okresní soudy ukládané tresty? Tato je rozložena do několika dílčích výzkumných otázek a na konci výzkumu by tak mělo být možné učinit dílčí závěry o tom, jak se soudy vypořádávají s otázkou odůvodnění trestů na okresní úrovni (kapitola 9). Cílem tohoto výzkumu je poskytnout vhled do toho, jak české okresní soudy rozhodují o trestech, jakým faktorům přikládají největší váhu, zdali zvažují účel trestu, zdali uložený trest individualizují a jestli zohledněné okolnosti dále rozvádějí, a také jestli naplňují minimální obsahové nároky na odůvodnění trestu. Na základě výsledků výzkumu by tak mělo být možné říci, jaký je stav odůvodňování trestů v České republice na okresní úrovni, tedy jestli se ubírá směrem, který předpokládá zákon nebo věda.

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1. Introduction

The thesis is focused on the issue of reasoning of a court decision in general but mainly discussing its function in criminal proceedings in district courts as first instance courts where a sentence of guilt and punishment is announced regarding minor offenses. What is the function of written reasoning in the legal order and what is its purpose? What are the essentials of a statement of reasons in general and what are the requirements of a criminal judgment? What should a good reasoning look like? Further, the individual arguments of the reasoning of the court decision are discussed. Account will be taken of the reasoning of the court decision as a decision of the first instance court by which the offender was convicted and punished. The elements of the grounds of the judgment, such as its purpose, specifics and content will be taken into account. And because the Czech approach is mainly continental, i.e. judges are bound by the law only when deciding, the attention will also be focused on interpretation of the law.

In the next part of the thesis I focus on the specifics of the sentence justification. Undoubtedly, the rationale for punishment is an essential source of knowledge about how courts punish offenders. Perhaps judges do not always give true and complex reasons, but insight into their practice will help us to better understand how they make decisions. Individual aspects of punishment that may affect the choice of punishment (purpose of punishment, factors affecting punishment, sentencing principles), their legal regulation and theoretical concepts are discussed.

The empirical part of the thesis is devoted only to the analysis of the reasoning of the sentences in criminal judgments.

The research will focus on the analysis of the reasoning of imposed sentences in randomly selected 366 criminal judgments of Czech district courts (1st degree criminal courts) issued in 2016. The method of analysis was the so-called *systematic content analysis*, when the data and factors were determined in advance and monitored during the analysis.

The aim of the research is to provide an insight into the judiciary and to answer at least a partial parts of the main research question which is: *How and to what extent do Czech district courts reason the sentences imposed?*

2. The reasons to reasoning

Reasoning is, in the most general sense, the giving of reasons of the actors in which they explain why they decided to conduct in a certain way (MacCormick, 1978, Foreword). Legal reasoning is reasoning in the narrower sense, that is, it is reasoning used by lawyers to solve a legal problem, to advise a client, to justify a legal decision or comment on a legal text or case (Samuel, 2018, p. 1)In the following text, the discussion will focus on legal reasoning to justify a legal decision (especially with regard to the specifics of a criminal sentence).

The need for grounds for the judgment expressed in the court decision is in general given by several aspects. First, by the rules of ***natural justice***, giving the reasons is essential to fair procedure and arbitrary decisions should be avoided(Thomas, 1963). If judges have a duty to justify their decisions, the possibility of punishment based on incorrect principles or misunderstandings is greatly reduced (Thomas, 1963).

The requirement for ***consistency*** of court decisions means that like cases should be treated alike; however, it should be noted that deviations from established practice are not arbitrary if the court has justified them (i. e. the requirement of treating different cases differently). This is an important aspect of sentencing because it implies the ***transparency*** and ***predictability*** of judicial decisions, as well as ensuring the ***legitimacy*** of the criminal system and ***public confidence in sentencing*** (Pina-Sánchez and Linacre, 2014).

The ***rationalization*** is a process in which the reasons, which must be rational and legitimate, for a decision arise, both for judges in the manner of self-control, but also for actors and for the public. Thus, rationalization of decisions is another aspect that is decisive for the need for a justification of court decisions, since law cannot stand on irrational considerations.

Regarding sentencing, the question of rationalization is related to the **purposes** of punishment. In many cases, as Thomas (Thomas, 1963) points out, the choice of punishment involves careful consideration of various and often contradictory factors, as a result of which a judge may face a direct conflict between the needs of a particular offender and the need to protect the public; If the judge is required to formulate and state the reasons for his decision, it will be necessary for him to reach a decision which can be justified. The immediate effect of the mandatory justification is to eliminate some of the obvious systemic risks, thus avoiding

the risk of punishment based on an immediate emotional response to a certain feature of the offense, as well as avoiding factors that are not relevant.

Further, the right of ***defense*** (Article 40 (4) of the Czech Charter of Fundamental Rights and Freedoms), thus, the right of a party to give arguments, objections and suggestions to which is corresponding the duty of the court to deal with them in the decision.

Finally, it is important due to ***reviewability*** of the decision by the higher courts. (Bobek and Kühn, 2013, p. 81) The statement of reasons for the decision may be necessary for the right to challenge the decision, since the grounds form part of the decision and the error of law which is apparent in the statement of reasons justifies the annulment of the decision.

Another important purpose of the reasoning of the judicial decision is to support its ***acceptance*** by the actors of the case (Andrews, 2011), in the case of a convicting criminal sentence, to support the acceptance of guilt and the sentence imposed.

As a further purpose of the reasoning of the judgment, Stürner (Stürner, 2011) emphasizes support for the ***debate*** between the professional and general public with a view to the social internalization of important decisions.

3. Different approaches

The reasoning of a court decision is the process by which the court gives the reasons which led him to decide on the specific case. The judge justifies his decision to be acceptable both by himself in the context of self-control, by the actors of the case and eventually by the court of appeal. The reasons given and the way they are reproduced can be determined by different approaches to law, differences can by seen in formalistic and non-formalistic approaches, positivistic and iusnaturalist approaches, and differences between continental and common law systems. While in continental systems the syllogical, legalistic and magistrate style will prevail, in common law systems it is a rather discursive and more personal approach to reasoning (Stürner, 2011).

The **fundamental difference** between these approaches stems from the tension between the formalist and anti-formalist attitudes to the interpretation of law.

While in the formalistic process, typical of continental legal culture, legal interpretation is considered a logical process, where the rules of interpretation are strictly logical, thus the conclusions are drawn from the premises by a logical-deductive procedure and the justification will be given by austere magistrate style, arguing that it pretends that there is only one correct answer to the legal question (Kühn, 2002, p. 348).

The style of these decisions is syllogical-legalistic (Stürner, 2011), syllogical by means that the court typically deduces a conclusion based on premises in a logical process, one of which is the major (typically the provision of the law) and one minor (typically the facts), legalistic by means that the legal norm will be in the center of interest.

The advantages of this style are clarity, division into disputed and undisputed facts, division of the parties' submissions, always the same placement of proposals and unchanging course of the procedure, allowing judges both self-control and legal subsumption and fulfilling the obligation to carry out a picture of the problems of finding the truth; the disadvantage may be that this style is too official and formalistic (Stürner, 2011).

According to the anti-formalist attitude, typical for common law systems, interpretation does not have exclusively logical form and therefore it does not have exclusively logical form. standard interpretative rules (legal principles, extralegal standards, value considerations, etc.) (Kuhn, p. 348). Typical in this case will be discursive style as an argumentative, more personal and more individual, dialectical style in that manner that the arguments for and against ruling are discussed. (Kühn, 2002 p. 348-349, cf. to Stürner). It is more individual and irregular, oriented on factual problems; the advantage is better comprehensibility of judges' considerations (Stürner, 2011). The disadvantage on the other hand may be that sometimes due to a more discursive approach and due to the nature of case-law, issues that go beyond the case are discussed (Kühn, 2002, p. 355), the justification may be incomprehensible to the addressee.

Stürner (Stürner, 2011) states that the main purpose of the reasoning in criminal proceedings is to provide justice in terms of its social internalization. This implies that the emphasis is that criminal conduct is condemnable and thus to be perceived by society and the convict and that punishment should also be just. For criminal cases, the author recommends a rather discursive and factually oriented style supporting communication and focused on factual

arguments, because the syllogically oriented and rather formal style is not sufficient in itself. Individually-personal style leaves room for subjective evaluation especially in the field of evidence evaluation, the advantage lies in language comprehensibility and factual-oriented reasoning permits greater differentiation than syllogical deduction from abstract rules (Stürner, 2011), Any mode of evaluative argument must involve, depend on, or presuppose, some ultimate premises which are not themselves provable, demonstrable or confirmable in terms of further or ulterior reasons (MacCormick, 1978, p. 265). Thus, the judge will use arguments that are tied to the judge's internal persuasion of what is right or based on legal principles or criminal policy.

Principles of law certainly authorize decisions: if there is no relevant principle or analogy to support a decision, that decision lacks legal justification; and if there is a relevant principle or analogy the decision supported thereby is a justifiable decision – but the adduction of the principle or analogy although necessary to is not sufficient for a complete justification of the decision: the ruling which directly governs the case must be tested by consequentialist argument as well as by the argument from ´coherence´ involved in the appeal to principle and analogy (MacCormick, 1978, p. 250).

4. The elements of good reasoning

Pursuant to the case law of the Czech Constitutional Court, the obligation to justify a judicial decision arises from the constitutional order, i.e. from the right to a fair trial, Art. 36 et seq. Of the Charter of Fundamental Rights and Freedoms and also follows from the concept of the rule of law, Article 1 of the Constitution. This is stated, for example, in Constitutional Court judgment III. US 94/97, where the Constitutional Court adds: The reasoning excludes arbitrariness in decision-making. The statement of reasons must show the relationship between the facts and the considerations in assessing the evidence on the one hand and the legal conclusions on the other.[1]

As Kuhn (Kühn, 2002, p. 23) notes, each final judicial decision consists of several sub-decisions, i.e. decisions on the **choice and validity** of a rule of law, a decision on the **meaning** of a rule of law, a decision on **facts** (factio) and a decision determining the legal **consequences**; in

[1] Also I. ÚS 1561/08, III. ÚS 521/05

criminal proceedings, this corresponds to finding the applicable law, the decision on the validity of the criminal law to be applied by the judge, including the determination of the applicable law on the basis of the conflicting rules (lex specialis derogat generali, lex superiror derogat inferioiri, etc.), further the interpretation of the legal norm with regard to the proven facts of the case (questio facti), and finally the decision on the legal consequences, i.e. the punishment. In criminal proceedings emphasis is placed on the detailed justification of the **results of the evidence procedure** and the factual **conclusions** resulting therefrom, their legal **assessment** and in great detail the **factors** which the court must take into account when deciding on the sentence and which it is obliged to deal with in the justification of the decision (Holländer, 2011).

For a judgment more than any other document in official communication, there is an exceptional requirement of accuracy of expression, perfect formal and content adjustments, brevity and clarity.(Šámal, 2013, p. 1690)

Kischel (Kischel, 2011) sets out four principles of good reasoning: the principles of clarity, truthfulness, timeliness and completeness. **Clear** justification is one that is understandable, acts to justify decisions and to provide legal certainty or transparency. The minimum legal guarantee is the constitutional prohibition of arbitrariness and the requirement of a reasoning logic (internal contradictions in the reasoning are a violation of the logic, which implies the incorrect application of the law and is the reason for the revision of the reasoning). Requirements for clarity are clear style, abandoning over-composite sentences, illustrative choice of words and fluent description of things. If general intelligibility (intelligibility for people) is sought, then the legal language needs to be additionally translated into the general language: to describe technical legal terms in other words, to avoid Latin expressions, foreign expressions, outdated turnovers.(Kischel) The requirement of clarity and comprehensibility of a court decision is a prerequisite for the review of the court decision, both by the higher court and for the understanding of the reasons by the addressee or by third parties. (Kuhn, p. 349).

Concerning **truthfulness** of the reasoning, the judge should state the reasons which led him to make the decision and which he truly believes, this claim arises from the rules of general discourse (as set by Alexy); Kuhn argues that this also implies that the interpreter of the law

must give the interpretation of the law which he considers correct (Kühn, 2002, p. 63). That could be controversial, because it is repeated that judges do not give the real reasons that led them to make decisions (e.g. their mood, prejudice, etc.)

According to Kischel, the truth of the statement of reasons implies first of all the elimination of feigned reasons which would lead to a decision being internally contradictory, even if the real reasons should be wrong, as the feuded reasons are easily detectable. Next, the veracity of a decision is bound by its authenticity, i.e. whether it comes from the decision-maker. The timeliness of the statement of reasons mentions Kischel to the effect that it should be filed as soon as possible after the judgment is delivered, since a later statement of reasons postpones its effects (in terms of providing explanations to the Acts and applying legal protection); but timeliness is also important from the internal point of view of the judge, as he may need to reconstruct the grounds because he cannot remember them, and thus the principle of the truthful reasoning may be violated.

The last requirement Kischel puts forward is the **completeness** of the statement of reasons. The completeness of the statement of reasons means that it must state the essential factual and legal grounds which led the judge to make his decision and should be concise and comprehensible.

5. The problems of legal reasoning

Syllogical approach is the most basic in legal argumentation, it is a logical-deductive deduction of conclusion from previous premises. A deductive argument is an argument which shows that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the ´premises´ of the argument (MacCormick, 1978, p. 21). The logical validity of an argument does not guarantee the truth of the premises but if both premises, given criteria adopted for legal purposes, true, the conclusion also must be true (MacCormick, 1978, p. 25-27). Generally, there are two types of premises: major and minor premise. Whereas the major premise is usually statement of the law (e.g. the legal definition of a specific crime), minor premise is either statement of proven primary fact or conclusion of secondary fact derived from the former by deduction from some major premise which is a rule of law.(p. 29)

This is the case of legal qualification; it is a subsumption of facts under the provisions of the law.

Such strictly logical-deductive approach in legal reasoning presents many pitfalls, especially in terms of the interpretation of law, since legal expressions are vague and social phenomena too complicated for law to cover all variability of human life. Strictly deductive-logical process is possible only when the rule is unambiguous, there is no room for interpretation, so it can be applied to easy cases (Samuel, 2018, p. 93).

Easy cases are those where justification of decision can be achieved by simple deduction from clear established rules (MacCormick, 1978, pp. 197). The cases which do proceed to decision by simple deductive argument are those in which either: a) no doubt of interpretation of the rule or classification of facts could conceivably have arisen; or b) no one thought of raising and arguing a point which was in truth arguable; or c) where such an argument has been tried but dismissed as artificial or far-fetched by the court. Kühn (Kühn, 2002) clarifies this postulate by saying that easy case is one where law is not to be interpreted (because the meaning of a legal rule coincides with the text of a legal standard), but also if there is no doubt about the correct solution to the legal arguments of logical, quasilogical, systematic and doctrinal character. (Kühn, 2002, p. 42).

Hard cases on the other hand are those where problems of **interpretation**, **classification** or of **relevancy** rise out and we have to recourse so-called second-order justification (MacCormick, 1978, p. 197). In **second-order justification** in hard cases there is a complex interplay between considerations of principle, consequentialist arguments, and disputable points of interpretation of established valid rules (MacCormick, 1978, p. 156). The emphasis will thus be placed on various value judgments, purposes, interests, policies.

Kuhn states: especially in the continental juridical system, it is typical that the judge often does not give some premise for the verdict and tries to give the impression that the decision results from the premise contained in written law, which of course does not mean that this is not a complex case of application of law (Kühn, 2002, p. 48).

Since a criminal decision of guilty and punishment is imposed, it is undoubtedly such a hard case, because at least consideration of punishment cannot be carried out by a judge by a pure

logical-deductive procedure derived from the letter of the law. Given that our criminal law does not know absolutely certain sanctions, and in particular that the Criminal Code does not have any rules on imposing penalties that would lead to an unambiguous result, imposing penalties in criminal law is an extremely frequent situation in a complex case of law enforcement (Kühn, 2002, p. 45).

According to Wroblewski (in Kühn, 2002, p. 59) in hard cases (even in cases which are problematic in proving facts), the justification of a judicial decision should include at least: determination of the **validity** of a legal norm (judge must also consider a dispute of standards, principles, justify the application of a standard using the rules of dispute resolution, eventually discuss in detail the mutual comparison of principles or other standards), **interpretation** of the applied legal norms in the case that its literal wording is not certain and clear (when interpreting the law it is necessary to carefully justify the selection and use of individual interpretative rules), precise justification of the **facts** of the case, qualification of the facts of the case and subsumption under the relevant legal norm, determination of legal **consequences** (if the law does not determine these consequences clearly enough, so if it gives the artist some discretion as to the consequences, the interpreter must make an assessment and relevant considerations regarding this part of the application process).

The judge should apply the **valid** legal norms which are relevant and applicable, as it to say if the provision of the law relates to proven facts and complies with the rules of logic (MacCormick, 1978, p. 53-54). In criminal proceedings, the judge will consider the question of the legal classification of the offense and the choice of punishment under the Criminal Code. The applied norms will be valid as long as they correspond to the facts and are properly subsumed under the relevant provisions of the law. While the positivist approach sees norms as "what is written, it is given", iusnaturalists stress that for a standard for norm to be valid it needs to comply (or at least not contradict) with general legal principles that are not codified in written law (MacCormick, 1978, p. 61-62).

According to Constututional Court I.ÚS 1561/08: In the event that the legal conclusions are in **extreme contradiction** with the factual findings made or do not result in any possible interpretation of the grounds of the judicial decision, such a decision must be considered contrary to Article 36 (1) of the Charter of Fundamental Rights and Freedoms Constitution.

There is therefore a requirement for the factual findings to be in conformity with a rule of law; if there is no such compliance, the decision suffers from legal defect.[2] This defect is one of the defects in the evidence procedure where the Constitutional Court may intervene on the basis of a constitutional complaint. In other case Constitutional Court said that the reasoning of the decision must be clear, logical, without internal contradictions so as to show what reasoning has led the general courts to reach the conclusions reached and how they have dealt with the objections of the parties capable of establishing the opposite decision (Docket number: I.ÚS 854/09).

With regards to criminal proceedings could be add that proper reasoning is complete, correct and comprehensible and only such can fulfill the purpose of criminal proceedings (Jelínek, Říha and Sovák, 2015, p. 314) and that The requirement of correctness of reasoning implies its importance in the in the review of the judgment by the appeal courts (Jelínek, 2018, p. 456).

The problem of the **ambiguity** of legal terms entails the need to **interpret** legal norms. As stated above, a purely deductive-logical approach to hard cases is not sufficient unless a legal rule can be interpreted without any doubt as to its meaning. There are two basic approaches to the interpretation of a rule of law: a purely normative approach that does not allow interpretation beyond the text of the law and does not distinguish between a normative sentence and a norm (cognitive approach); and an explicative theory approach that differentiates between a norm and a normative sentence in a law, taking legal norms as meaningful content of normative sentences expressed by law (Kühn, 2002, p. 29). The modern approach to law is more likely to use explicative theory, as the meaning of a rule of law rarely matches its linguistic expression. Legislation and the individual normative sentences contained therein should therefore be understood as a medium allowing and mediating knowledge of a legal norm, but not as a legal norm itself (except in cases of easy case) ; the content of the legal norm thus decides with certainty the applying authority (Kühn, 2002, pp. 30).

A judge in an open system of law can then exercise discretion in the application of legislation, and the legal rule must be complemented in content by very often extra-legal factors that cannot be found directly in the text of the law or other source of law; with consideration either

[2] Further sp. zn. III. ÚS 84/94, III. ÚS 166/95, II. ÚS 182/02, IV. ÚS 291/2000

in the antecedent of the rule of law, in the consequence of the rule of law, or in both (if the discretion is allowed in an antecedent legal norm, the information contained therein (or at least some of it) is delimited by an abstract notion, such a definition of antecedent is typical of the current continental legal system) (Kühn, 2002, p. 35).

Legal concepts, according to Samuel, "artefacts" that can be interpreted controversially include legal institutions (persons, things and actions), legal terms (e.g. ownership, right and duty), legal categories (contract, property, etc.), legal descriptive terms (fault, damage, interest, etc.) and other terms employed by lawyers and lawyers. (Samuels, 1981, p. 87)

As regards the **interpretation** of the text of the law, there is a problem with the **uncertainty** of the legal norm. A rule of law should, in the first instance, be interpreted according to its most obvious meaning which results from the normal use of language. The use of less obvious meaning can be justified by good arguments from consequences and/or from legal principle and at the same time, that interpretation is consistent in that language permits such a meaning to be ascribed (MacCormick, 1978, pp. 204). These would bet he cases where the most obvious meaning does not correspond to the specificities of the case or principles of interpretation.

Legal concepts are vague in the sense that an interpreter of law places individual facts under a general rule of law. Kuhn divides vague terms into extralegal terms (e.g. personal circumstances), highly vague principles (in particular constitutional rights), and vague terms of another type, which include hardship clauses, demonstrative or exhaustive enumerations, one of which has a priori open nature, and discretion (the court must or does not have to decide, or has a choice of several decisions); such vague terms, however, may not give rise to interpretative doubts if they can be operated without reasonable doubt, that is to say, if their use is consistent with their normal use under the legal system or on the basis of extralegal factors, it is ultimately an easy case (Kühn, 2002, p. 38).

Vague norms prevail in the legal system and therefore give space for interpretation of the norms, whether by judicial or legal literature by using an explanatory approach, which goes beyond argumentation according to the letter of the law. Classically it will be an **interpretation** by the spirit and rationality of the legislation and by the intention of the legislator. (Samuel, 2018, p. 96).

If the legal framework for the reasoning of judicial decisions focuses on the issue of narration and the evidential procedure, the case law on judicature also emphasizes the need for a convincing **interpretation** of the relevant law (Holländer, 2011, p. 257). According to resolution 30 Cdo 4389/2009 of the Czech Supreme Court: the General Court must, in the reasoning of the decision, adequately explain its legal reasoning with a possible citation of published **case law** or **legal science** opinions.

There is also a problem of classification being different from the problem of interpretation; and the problem of classification is of practical importance in some contexts, being treated as a difference between questions of law and of fact (or secondary fact), there is no theoretical difference between them so far as concerns the theory of justificatory arguments in law (MacCormick, 1978, p. 203).

6. Second-order justification

Second-order justification is a justification that involves value judgments: considerations of **principle**, **consequentalist** arguments and **interpretation** of valid rules. (MacCormick,p. 156) The following explanation is based on MacCormick's theory of second-order justification (MacCormick, 1978, pp. 101).

Second-order justification involves justifying choices which are choices between rulings. It is a discursive approach to justification, the necessity of which is that the law (with the exception of easy cases) cannot be applied solely on the basis of a simple subsumption, but needs to be justified by other arguments, not just by existence of a legal rule.

There are usually two rival hypothesis as explanation and the judge is testing them and choosing between them (Will I impose a prison sentence on the defendant or will I give him a chance of liberty?). But judge is not usually choosing between two hypothesis but is considering the whole legal system, so legal decisions must make sense in the world and in the context of a legal system. So the testing of hypothesis must involve rejecting those of rulings which do not satisfy relevant tests (what makes sense in the world, what makes sense in the context of legal system.

In the manner of what makes sense in the world?, the **consequences** need to be concerned. First, it must be considered what are consequences of chosen ruling, at least in the manner of testing alternative consequences that were possible. Second, it involves evaluating of these consequences in the meaning of acceptability or unacceptability of those consequences *(Is it acceptable to send a sick person to prison?)*. Thirdly, consideration of the consequences must be subjective in the sense that the judge may give different weightings to the evaluative criteria such a common sense, justice, consistency with legal principles and public policy.

In the manner of what makes sense in the system? there is idea of the consistent and coherent legal system. Coherency in the system means that rules should make sense when taken together. Consistency means that like cases should be treated alike and different differently. Consistency and coherence as between related legal rules in similar areas of law is itself and important legal value, being indeed one aspect of justice, of treating like cases alike and refraining from arbitrary differentiation of cases.

7. Reasoning of the criminal sentence

As stated above, the requirement for a justification emerges from the Constitution and from the case law of the Constitutional Court, the law embodied this requirement in Section 125 of the Code of Criminal Procedure.

As required in § 125 of Criminal Procedure, if the judgment contains reasoning[3], the court shall briefly state what **facts** has taken as proven, and what **evidence** it has based on its factual findings and what **considerations** he has followed in evaluating the evidence, especially if they contradict each other. The reasoning must show how the court dealt with the defense, why it failed to comply with the proposals for further evidence, and what legal **considerations** it dealt

[3] According to § 129 of Criminal Procedure, the court may make a simplified judgment, if, after the judgment has been delivered or within the prescribed time-limit by court, the prosecutor and the defendant have waived the right to appeal and declared that they do not insist on a statement of reasons, and the defendant also states that he does not wish to appeal to another entitled party, a simplified judgment which does not contain a statement of reasons. Simplified judgment without reasoning can not be made if the appeal in favor of the defendant can be brought by authorized persons even against his will and these persons did not give up the appeal.

with when assessing the proven facts under the relevant provisions of the law on guilt and punishment. The following text will deal with aspects of the reasoning of the judgment from the perspective of the sentence imposed.

Concerning the **factual side** of the cases, it is not clear what the standard of proof should be as to the facts on which the court imposes a sentence; however, the standard of proving these facts is likely to be different (at least in practice) from the standard of proving guilt decisions (Drápal, 2018). The court will draw some evidence from the case, about the seriousness of the crime or criminal record of the offender but also by asking the offender about his personal circumstances. As Thomas (Thomas, 1970)states, the problem is that the bare verdict of guilty does not determine the facts at a sufficient level of detail for the sentence. The sentence should be established after conviction by proper evidence to a proper level of certainty and subject to the same rights of cross examination as the evidence on which the conviction is founded; the hearing about sentence thus would be separate and following the conviction phase and judge should explicitly state the facts he assumes as the basis for sentence (Thomas, Establishing). According to the criminal theory(Roberts, 2008) and the Recommendation of Council of Europe(Europe, 1993), aggravating circumstances should be proved beyond reasonable doubt.

While the burden of proof on the offender, is simply to establish mitigating factors on a balance of probabilities (Roberts, 2008), in the language of the Council of Europe Recommendation: “before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exist.” While there is no legal expression of these principles, to clarify the different standard of proof for contested claims for mitigation and aggravation is, according to Roberts, one of the requirements for comprehensive sentencing guidance.

As Drápal (Drápal, 2018) points out proving the sentence could be carried out in a separate procedure in order to avoid a "schizophrenic" situation where, on the one hand, the defendant is trying to prove his innocence, on the other hand, trying to prove mitigating circumstances if he was convicted.

The reasons for sentence imposed are directed to several audiences: the defendant, the legal profession, the Court of Appeal, the public (Anleu and Mack, 2015). From the defendant's

point of view, it will be particularly important to understand the reasons why he was convicted and why he was sentenced to such punishment. If they do not understand the reasons, the punishment is more likely to be ineffective (Tyler, 2016). From the point of view of the legal professions, the statement of reasons for the lawyer of the defendant will be crucial in terms of formulating the grounds for appeal. Rationale for specific decisions is also important for the development of case law and practice of sentencing. Concerning Court of Appeal, as stated above, the Court of Appeal cannot rule on the appeal if the grounds of the judgment are defective. If a sentence is imposed, the appellate court will examine the proportionality of the sentence (the disproportionality of the punishment imposed is the only ground of appeal in the Code of Criminal Procedure relating to the sentence).

From the public's point of view, it will be crucial for the court to uphold legitimacy (to decide legally and by authoritative organ) and to make decisions on similar matters differently and differently, i.e. to be consistent. Only in this way can trust in the justice and the legitimacy of the judicial system be maintained (Anleu, Sharyn Rach; Mack, 2015).

It can therefore be summarized that giving of reasons helps the judge himself in the effort to be fair and rational and makes it possible for others to judge whether he has succeeded (Frankel, 1972).

7.1. The purposes and determinants of the sentencing

Roberts (Roberts *et al.*, 2009) mentions two important area of sentencing: the ***purposes*** of legal punishment and the ***determinants*** of crime seriousness, including the factors which justify a harsher or more lenient sentence and that sentencing purposes and sentencing factors are clearly related (whether a given factor is relevant to sentencing will depend on the purpose of sentencing); sentencing purposes and sentencing factors are clearly related: whether a given factor is relevant to sentencing will depend on the purpose of sentencing (Roberts *et al.*, 2009). There is also a relationship between the purposes and determinants of punishment on the basis of which a better interpretation can be made: when we are in doubt about the proper meaning of the rule in a given context, reference to the principle (purpose of the sentence) may help us to explain how it is to be understood; also we can explain why the rule is considered to be worth adhering to (MacCormick, 1978, p. 152).

7.1.1. The purposes of punishment

The Czech Criminal Code does not contain a definition of the purpose of the sentence unlike the previous Criminal Code (Act No. 141/1961 Coll.), which defined the purpose of the sentence in its Section 23. Pursuant to Section 23 (1) of the Criminal Code, the purpose of the sentence was to protect society from the perpetrators of crime, to prevent convicted in further committing the crime and bring him up to lead a proper life and thus have a rehabilitation effect on others members of society. We do not have such a definition in law since the current Criminal Code came to effect in 2010.

In this respect, it should be noted that criminological literature (Frankel, 1972) states that the basic principles laid down in the legislation should be the purpose of the sentence, also mitigating and aggravating the circumstances and procedures governing the imposition of the sentence. Frankel recommends that not only the purpose of the sentence be expressed in substantive law, but also in the requirements to reason the judgment; he states that "measures of this nature could provide at least a start toward rationality on the process"(Frankel, 1972, p. 43).
In its settled case-law, the Constitutional Court has promoted the protection of society against crime as the main objective of criminal sanctions.
According to Czech legal science, the purpose of the reasoning is to convince the justification of judgment in terms of its correctness, legality and justice and also to achieve persuasiveness and thus its **rehabilitation** effect. (Jelínek, Říha and Sovák, 2015, p. 314). The rehabilitation effect of sentencing the Commentary of Czech Criminal Code also emphasize[4] as well as the protection of society (ŠÁMAL, 2012, p. 503-504).

In June 2014, the Constitutional Court ruled that "unless the legislature specifies its criminal policy in detail in terms of punishment, then each sentence must strictly observe and respect the principles of proportionality and ultima ratio (subsidiarity of criminal sanctions)". (docket

[4] Commentary on the Criminal Procedure Code (Šámal, 2013, p. 1690) states: A well-founded judgment, in addition to the obvious requirement for the lawfulness of its statement, has the necessary rehabilitation effect and can affect the defendant and other members of society.

number I. ÚS 4503/12) Furthermore, in 2017 the Constitutional Court continued that “The current legislation… does not allow the imposition of sanctions that would favor preventive, educational, preventive, etc. purposes as fair sanctions for the offense committed” (docket number II. ÚS 2027/17).

7.1.2. Principle of proportionality

In Section 37 and 38 of the Criminal Code are stated general principles on imposing punishment: legality of criminal sanctions, prohibition of imposing disproportionate and cruel sanctions and that by the performance of the criminal sanction must not be humiliated human dignity. Following § 38 adds principle of proportionality when sanctioning. Principle of **proportionality** is cumulating three aspects: imposing of sanction taking into account the **character** and **seriousness** of the offense and the offender's **circumstances**, imposing of the **less affecting sanction when possible** and taking into account the **rights of a victim**.

Principle of proportionality generally in law implies the requirements of suitability (the choice of means suitable of achieving the intended objective), necessity (the requirement to choose from many possible means one which is a necessary minimum intervention to achieve the set goal) and proportionality in restrictive sense (adequacy of the scope and scope of the measures to the degree of urgency of the intervention) of state intervention against an individual; in the sentencing area that means that criminal penalties should limit the perpetrators only to the extent necessary, priority is given to criminal penalties which are less punitive, and the sanction is imposed having regard to the nature and importance of the fundamental rights concerned, taking into account the seriousness of the offense and the offender's circumstances (ŠÁMAL, 2012, p. 503-504).

When deciding on a sanction as to its proportionality, apart from being "less affecting", the decisive criteria are the **character and seriousness** of the offense defined by the factors mentioned in Section 39 (2) (According to commentary to the Criminal Code it is a non-exhaustive list (ŠÁMAL, 2012, p. 505)) and the **offender's circumstances** which are personal, family, property and other. At the same time, § 39 adds factors that enable a deeper

individualization of the sentence imposed, particularly with regard to the peculiarities of the offender 's personality (the way of life so far, behavior after an act, etc.) (ŠÁMAL, 2012, p. 505). The punishment should be proportionate to the particular circumstances of the case and the individuality of the convict, and therefore should be individualized (principle of individualization will be discussed later).

Disproportionality of the sentence imposed is the appeal reason pursuant to Section 258 (1) (e) of the Criminal Procedure and is the only reason through which a decision on punishment can be reviewed.

Commentary to Criminal Procedure states that disproportionate punishment is a punishment which, by its type and length, does not formally violate the provisions of the Penal Code, but does not, in a particular case, correspond to the decisive factors for imposing the punishment that is, in particular, the nature and seriousness of the offense, the defendant's personal and other circumstances, the possibilities for his or her remedy, including mitigating and aggravating circumstances, so the punishment imposed is too strict or too moderate (Šámal, p. 3059). In the Czech criminal law, the judge has a choice between the types of punishment and in the length of the sentencing is limited only by range of sentence and thus has a relatively great discretion as to what punishment to consider appropriate.

The idea of the proportionate or ´deserved´ sentence has had considerable influence in the last two and a half decades; it has been applied both in the form of US sentencing guidelines as well as in continental law (Von Hirsch, Ashworth and Roberts, 2009, p. 1).

The proportionalist sentencing model (Von Hirsch and Ashworth, 2005, pp. 3) is sometimes referred as the ´just deserts´ model which, in recent three decades, has challenged a classic approaches to punishment, led by the idea of retribution or crime prevention concerning the rehabilitation, deterrence and incapacition. Crime-prevention approaches, while aiming at humanism, focus primarily on protecting citizens from criminals, which can be problematic as it may ultimately lead to overly severe and unfair sanctions. The theory of crime prevention thus concerns the interests of society, but not so much of the defendant's interests. This impact was supposed to mitigate the rehabilitative approach, but the interest of society always outweighs the interest of the perpetrator, and therefore this approach was not a

solution to the mentioned problems (Hirsch, Ashworth give an example of interdeterminate sentence abuse in the 1970s in the US: *those involved sentencing the convicted offender for indefinite periods until it was believed he was ´cured´ of his criminal inclinations, it often led to lengthy periods of confinement of persons convicted of less serious crimes*)(Von Hirsch and Ashworth, 2005, p. 4)).

Unlike the traditional retributive approach (which aims at the classical harm-for-harm, eye-for-an-eye), and preventive approaches, the just desert approach offers the achievement of fairer results based on deservedness and proportionality. The proportionalist approach is based on the role of justice in the sentencing system, and aims to avoid unfair results; it takes into account both the interest of society (convicting the perpetrator for an act that society perceives as condemnable) and the convict's interest in the sense that it should not be subject to a sentence that does not correspond to the degree of blameworthiness for the offense.

The concept of procedural justice is also related to the provision of "fair" judgments: If the courtroom decorum is preserved, this will strengthen the formal judicial authority; if the defendant experiences relief and accepts the result as fair, it may also increase the positive view of the judiciary. Presentation of the reasons indicating that the individual circumstances of the defendant have been considered may prove that the defendant is treated as a person and not as an offence category (Anleu and Mack, 2015). If the criminal system wants the convict to accept his guilt, to accept the sentence as fair and to execute it properly, he must require the courts to justify their decisions in a way that convicts can understand (Drápal, 2019).

And in order for the decision of the punishment to be fair, it is necessary, on the one hand, to be **consistent** in the sense that in a similar case the court would treat the defendant in a similar way, on the other hand, to be customized to the circumstances of the case and to the person of the accused, i. e. to be **individualized**.

7.1.3. The principle of individualization of the sentence

"It is not enough to use a flat-line phrase quotation of the law, but it is necessary to assess and determine the degree of peculiarity and uniqueness of the case." (ŠÁMAL, 2013, p. 1693), i. e. the **individualization** of the penalty is another requirement that should reflect in the

reasoning. The choice between different punishments in the proposed scenarios depends on the purpose of the punishment - the values behind criminal law which directly affect the individualization of punishment (Drápal, 2018)In other words, the individualization of punishment will thus depend on the purpose of the punishment the judge decides in a particular case, and since the purpose of the punishment is not defined in the Criminal Code, this choice will be somewhat problematic.

If each judge has to decide about the purpose of the sentence alone without sufficient time for reflection, it can lead to unintended conclusions, but also to different practices across the Czech Republic, these decisions could also be made in a non-transparent way because the first instance court will not explain why a certain purpose of punishment (Drápal, 2018).

The principle of individualization is intended to enable the judge to consider different cases differently and similar cases similarly, on the basis of certain rules whereas the objectives of individualization of punishment are to impose a fair punishment, to understand and accept the punishment as a just by offender - It is therefore about strengthening the concept of procedural justice (Drápal, 2018). Presentation of the reasons indicating that the individual circumstances of the defendant have been considered may prove that the defendant is treated as a person and not as an offence category (Anleu and Mack, 2015).

In order to avoid arbitration or injustice in sentencing, the legislator lays down certain rules aimed at striking a balance between excessive certainty (which could lead to an unjust punishment) and flexibility (which could lead to arbitration). In the sentencing area, there appears to be legal individualization, i.e. the setting the punishment rates by the legislature, and judicial individualization, which includes the judge's options as to the choice of the type and length of the sentence (Drápal, 2018). Consideration of how the judge has moved within the legal framework should appear in the reasoning of the sentence, as it is a reasoning that must necessarily accompany the choice of sentence and its length in a judge's internal decision on what is a fair and proportionate punishment (see above requirement for truthfulness of the decision). This consideration will be guided by weighting of various sentencing factors - the criteria that will influence the choice of punishment (determinants of punishment) as well as the intended purpose of punishment. As Schuyt (Schuyt, 2010, Chapter 2.1) states: In the final judgment, the punishment to be imposed, a balance must be found between different,

sometimes contradictory, factors; . A judge can only arrive at a well-balanced punishment if he is aware of the factors he has taken into account in favor of or against the defendant.

7.1.4. The problems of judge´s discretion

The individualization takes place through **discretion**, which is given to the judge when deciding on punishments in particular through the punishment rate and the type of punishment and should be then expressed in the reasoning of the sentence in the criminal judgment.

Discretion that is to say the flexibility of courts in decision - making limited by legal rules, poses a threat of discrimination and disparity (Gelsthorpe and Padfield, 2011, p. 1-2) as a rule, discrimination against the perpetrator will be apparent from the grounds of the judgment, but prejudices may play a role in the judge's internal decision-making process. As Council of Europe stated in its Recommendation: No discrimination in sentencing should be made by reason of race, colour, gender, nationality, religion, social status or political belief of the offender or the victim; factors such as unemployment, cultural or social conditions of the offender should not influence the sentence so as to discriminate against the offender.(Europe, 1993). An example of a discriminatory judgment is the case of the European Court of Human Rights Paraskev Todorova v. Bulgaria, 37193/07 - discriminatory passage in the justification of the sentence – court declared that no conditional sentence will be imposed because minorities do not take it as a sentence, § 40, 41, 46).

Discretion should be seen as dependent on the legitimacy of the law enforcement authority. Reasons may convey that the decision is based on legal norms and logic thereby aligning with Weberian concepts of impersonal legal authority and legitimacy (Anleu and Mack, 2015). The judge needs discretion in order to choose from the possibilities of punishment (Killias, 1994) to adapt the punishment to the circumstances of the case and the person of the perpetrator, as well as the purpose of the punishment.

By establishing legal requirements, facts, assessing the offense and the offender, the judge can prove that the sentence is the result of careful justification and objective evaluation rather than personal misrepresentation or emotional reaction (Thomas, 1970). This can reinforce the formal legitimacy of the exercise of judicial authority (Anleu and Mack, 2015). Frankel comments on such misconduct in the statement that: The explanation or revelations sometimes disclose reasoning so perverse or mistaken that the sentence, normally unreviewable, must by invalidated on appeal (Frankel, 1972); this also applies to the Czech judiciary. Long-term reasoning therefore leads not only to improving the system as a whole,

but also to consistency in the imposition of penalties by individual judges and across judges and courts (Drápal, 2019).

If the courts do not properly justify the penalties imposed, it is likely in the long run that the legislature will begin to reduce the discretion of judges, even in a way that is significantly problematic (e.g. compulsory US federal sentencing guidelines) but which will primarily be a response to non-transparency (Drápal, 2019).

As Schuyt (Schuyt, 2010, Summary) comments, it is summarized in the following paragraph: Granting a large amount of discretion in sentencing - has a function that allows the judge to manage the circumstances of each individual case and the offender. This freedom can only be maintained if it is properly accounted for. Only thorough accounting - which can be carried out under the criminal framework - will not force the legislature to change the open nature of the system and the courts will be able to retain their discretion. Judgments are accountable if sentence justification, here the judge motivates how he came to this decision and which factors had influence.

Disparity on the other hand is more an error in the sentencing system: it occurs when similar cases are treated differently or different cases similarly, it is a consistency defect. Equal treatment involves the impartial applications of the rules and procedures, regardless of the outcome (procedural justice) and the efforts that the law ensure equal outcomes (substantive justice)(Gelsthorpe and Padfield, 2011). Inconsistency in sentencing can lead to arbitrariness, which can endanger the legitimacy of the sentence and of the judge passing the verdict. (Schuyt, 2010, Summary)

In the Czech environment, discretionary grounds are regulated by laws as well as by self-regulation of the court system through an appeal system or by case law.

When recognizing the disparity in sentencing as international problem, the Council of Europe has issued Recommendation Concerning **Consistency** in Sentencing (Council of Europe, 1993) to Member States declaring the principles that states should implement in order to improve the sentencing process while taking into account their constitutional principles and legal tradition.

Pursuant to Letter E: *1. Courts should, in general, state concrete reasons for imposing sentences. In particular, specific reasons should be given when a custodial sentence is imposed. Where sentencing orientations or starting points exist, it is recommended that courts give reasons when the sentence is outside the indicated range of sentence. 2. What counts as a "reason" is a motivation which relates the particular sentence to the normal range of sentences for the type of crime and to the declared rationales for sentencing* (Council of Europe, 1993).

The Czech legislature has implemented the requirement to reason the sentence imposed by amending § 125 of the Czech Criminal Procedure Code[5], adding a requirement to justify the sentence statement in addition to the claims for the statement of guilt. This implies that the sentence statement should be reasoned as carefully as the statement of guilt (ŠÁMAL, 2013, p. 1693), moreover, by the amendment the legislator gave detailed instructions on how to reason the sentence statement which is disproportionate, because it did not give such detailed instructions to the other statements of the judgment. This reflects both the meaning of the sentence statement and the urgency of responding to the wrong practice of the courts (Jelínek, Říha and Sovák, 2015, p. 336): This amendment has been adopted because of the lack of judicial practice in the reasoning of judgments and designed to clarify the circumstances with which the court has to deal with when reasoning.(Government Office, 2009)

Also in legal scholarship it is declared (without empirical verification) that the reasoning often contains only a general enumeration of the legal criteria relevant to the assessment of the sentence, without being specified in relation to the particular circumstances of the case and that courts rarely take into account all the circumstances and focus only on some (Jelínek, Říha and Sovák, 2015, p. 335).

The fact that the court does not disclose all the circumstances of the case, important for the decision on the sentence, leads not only to material misconduct, especially in the use of all the components and modalities of some types of punishment, but also weakens the correctional and preventive effect of the punishment even in those cases where the sentence can be considered to be factually correct (Jelínek, Říha and Sovák, 2015, p. 335).

[5] Act No. 41/2009 on Amending Certain Acts in the Context of Adoption of the Criminal Code

7.2. The determinants of punishment

According to the case-law of the European Court of Human Rights, the question whether a court has complied with its obligations can be assessed only on the basis of the specific circumstances of the case (Ruiz Torija v. Spain, No 18390/91, § 29).

The requirements for reasoning of the imposed sentence are set out in Section 125 of the Criminal Procedure Code as a list of various factors that the court should take into account when deciding on a penalty. This enumeration was inserted into the law by an amendment by Act No. 41/2009 Coll., On Amendments to Certain Acts in Connection with Adoption of the Criminal Code. This adjustment is more or less a list of factors that the court should take into account as set out in § 39 of the Criminal Code. First, according to § 125, the court will state by what considerations it was guided when imposing the sentence and how the character and seriousness of the act has been evaluated. Aspects that determine character and seriousness of the act the legislator defined as follows: the significance of the protected interest affected by the offense, the way by which the offense was committed, the circumstances under which the offense was committed, **the offender's person,** the degree of his / her culpability and by his / her motive, intent or aim, change of situation, time passed since the offense, the length of criminal procedure if it was unreasonably long, taking into account the complexity of the case, the action of law enforcement authorities, the importance of the proceedings for the offender and his / her behavior to which he / she contributed to delays in the proceedings. At the same time, it should be stated which **mitigating** (Section 41 of the Criminal Code) and **aggravating** (Section 42 of the Criminal Code) circumstances were taken into account by the court in determining the type of sentence and its assessment.

The court shall also indicate how it has taken into account the personal, family, property and other offender´s circumstances, the way of life so far and the possibility of the rehabilitation, the behavior of the offender after the crime, in particular the effort to remove the damage or other harmful consequences of the crime and in the case of cooperating accused, the level of significant contribution to clarifying the crime. The factors are almost the same as in § 39 (1), (2) and (3) of the Criminal Code which lays down the determination of type and length of the

punishment and adds the effects and consequences that can be expected from punishment for offender´s future life as further sentencing factor.

Since this enumeration seems to be demonstrative, it gives guidance to the court on how to justify the sentence imposed to meet the individualization of the sentence.

It is not clear why the legislator opted for such a division of circumstances, as some factors overlap and this creates problems for the researcher. For example, personal circumstances overlap with the way of life so far and the possibility of the rehabilitation. The possibility of rehabilitation overlaps with effects and consequences that can be expected from punishment for offender´s future life. The offender´s person is one of the aspects of the character and seriousness of the crime, and on the other side, the way of life so far, the possibility of rehabilitation and personal, family, property and other circumstances should be evaluated as special aspects.

The commentary to the Code of Criminal Procedure states that this is a demonstrative list of factors (ŠÁMAL, 2012, p. 505) but also states that the sentence statement should be justified as carefully as the statement of guilt (ŠÁMAL, 2013, p. 1693) Can a judge therefore choose only some of the aspects referred to in Section 125 of the Code of Criminal Procedure (hence Article 39 of the Criminal Code) while maintaining the rigor of the statement of reasons? The author of the thesis considers that yes, if the judge respects the requirements in the reasoning in a way that is comprehensible, clear, complete and factually correct. At the same time, however, the judge must comply with the requirements for individualization of the sentence, i.e. to consider the circumstances of the offense and the person of the offender.

Consideration of mitigating and aggravating circumstances is also one of the criteria of the character and seriousness of the offense. These are listed in § 41 and § 42 of the Criminal Code and their list is undoubtedly demonstrative. Thus, the judge may also consider extralegal factors as mitigating or aggravating the sentence.

The mitigating circumstances include, for example, § 41 letter i): the offender assisted in clarifying its crime or make a significant contribution to clarifying a crime committed by others, including in particular the guilty plea and cooperation with law enforcement authorities, or that the offender referred to in point (n) he sincerely regretted (i.e. remorse), or letter (j) that

the offender has taken the initiative to eliminate the harmful consequences of the crime or has voluntarily compensated for the damage caused.

Letter (o) that the offender has led a proper life before committing the crime it is interesting from an interpretative point of view because it has not yet been defined what it means: does it mean merely criminal impunity for the offender or that he is employed or has not been punished for an administrative offense? This will include value judgments, including moral and socially just attitudes of the judge.

Section 42 of the Criminal Code also lists several aggravating circumstances related to the intention of the perpetrator, resp. its modification, (with thought or after consideration, out of revenge, out of racial hatred ...), the way of committing (miserable, crafty), context (exploited his position, natural disaster), consequence (higher damage, more victims), but the supposed biggest role will be played by letters (n): the offender has committed multiple offenses and letter (p): has already been convicted of the offense. According to point (n), the commission of multiple crimes relates mainly to the concurrence of crimes, and this aggravating circumstance is the consequence of the absorption principle under § 43 of the Criminal Code (ŠÁMAL, 2012, p. 566): that is, in the case of concurrency of offenses, the sanction is imposed for the most strictly punishable; in the case of multiple action, the upper limit of the penalty can then be increased by a third. However, re-committing an offense may also be a legal feature of the facts (Section 205 (2) - theft for which a previous conviction is required) or it may be a circumstance conditional on the use of a higher penalty (Section 140 (3) (h)). (ŠÁMAL, 2012, p. 566), in such a case, taking into account the aggravating circumstance under point (n) would be contrary to the prohibition of double attribution in criminal law.

Another, perhaps most important, aggravating circumstance is that the perpetrator has already been convicted of a criminal act. Point (p) above states that the court is entitled, according to the nature of the previous conviction, not to regard this circumstance as aggravating having regard, in particular, to the importance of the protected interest affected by the act, the way by which the act was committed and its consequences, the circumstances in which the act was committed, the person of the offender, the degree of fault, his motive and the time passed since the last conviction, and if they are the perpetrators of a crime

committed in a state caused by a mental disorder, or the perpetrators who indulge in the abuse of an addictive substance and who committed an offense under its influence or in connection with its abuse.

The provision that the court is entitled, according to the nature of the previous conviction, not to consider the aggravating circumstance that the perpetrator had previously been convicted of the crime, prevents a mere formal assessment of the recidivism as an aggravating circumstance; the nature of the previous conviction here means not only the nature and gravity of the previously committed offense and the type and extent of punishment imposed in the past by the offender, but also all other circumstances related to the conviction (in particular the time passed since the previous conviction, the perpetrator has executed the entire sentence imposed, as he has behaved since the previous conviction, or since serving the sentence, what is the relationship between the previous and now tried and so on) (ŠÁMAL, 2012, p. 573).

What is the impact of a previous conviction in our judicial system and what factors can it possibly outweigh? Perhaps at least part of the question can be answered by research, especially in answering the partial question of how often the courts relate to previous convictions when imposing a custodial custodial sentence or what mitigating circumstances they take into account when imposing a suspended sentence.

Each factor requires political judgment, suited precisely to legislative measures and is certainly not appropriate for accidental changes on a case-by-case basis, otherwise arbitration decisions could be arbitrary; thus, the law should lay down the determinants of what i. e. it considers to be personal circumstances, or how far with the criminal past can judge go, it also should be stated weight of individual factors (Frankel, 1972). If there is no such provision in law, there is nothing to prevent the judge from carrying out such an assessment himself (Schuyt, 2010, Summary), if the judge explains what factors he has taken into account, how he has assessed them, how he has given them weight and how he has compared them, such justification should be understandable and controllable.

Schuyt (Schuyt, 2010, Chapter 3) has developed a sentencing theory that has helped to analyze the decisions to determine the extent to which it fulfills its primary functions, namely explication function, the control function and the reflection function. The *explication function*

is closely link to the concept of procedural justice. Judge by explaining why he imposes a specific punishment gives reasons for the convict, the victim and also the society and therefore legitimize his decision. This function requires the judgments to be understandable which means that it must be clear what factors played and role and what weight they had. The *control function* mainly concerns the reviewability of the decision from the perspective of appeal courts. This means that it should be clear on what legal grounds is the decision based, so it could be legally controlled by higher courts. The *reflection function* relates to judge himself. When deciding on certain penalty, judge is asking himself whether he properly weighed relevant factors and whether the arguments for imposing concrete sentence are legitimate.

Schuyt introduces five elements of proper reasoning of the sentence in the form of questions that the judge should answer in the text, these are: question of “what”, of “who”, of “how”, question of “effects” and question of “context”. The “what” question implies seriousness of the offense, which includes the question of assessing whether an offense has occured, its social gravity and legal qualifications are involved, the central concern would be the protected interest. The question of “who” has objective and subjective sides, on the objective side there are factors which describe the offender or his relationship with the victim. The subjective side is defined by several possible motives of the offender.

According to commentary of the Criminal Code the defendant's circumstances include his / her age, health status, current family situation, work and social status, property level, etc. (ŠÁMAL, 2012, p. 510)The aspects of the possibility of correcting the offender and the behavior of the offender after the crime can also be classified under the "who" category.

The question of “how” refers to modus operandi of the crime and also to its subjective side – such a premeditation or reckless behavior. Next considered question it the question of the “effect” of the crime, in Criminal Code there are some qualified effects which make the use of a higher penalty rate but the effects should be considered as sentencing factor as well; effects can be sentence elevating but also sentence reducing. The last question is the question of the “context”, which in Czech legal requirements represents the formula “the circumstances in which the offense was committed” means circumstances that occurred during the offense and

related to either the situation, the victim or the object of the crime. These include cases of vulnerable victim or that the act was committed during natural disasters. In summary the relevant questions (categories) of sentencing are: the seriousness of the act, perpetrator's person, the way the offense was committed, the consequences of the offense, circumstances under which the offense was committed.

Schuyt (Schuyt, 2010, Summary) also emphasizes that it is important that it is ultimately clear which factors played a role in the decision-making process, what role it was and the relative weight of each factor. This increases the requirement for proper justification of sentences and gives outlines of the framework; this framework assists the judge in listing, clarifying and systematizing the factors that contribute to punishment in a particular case. The framework is present in law, but it does not prevent judges from making their own framework, they can categorize factors and consider their impact on convictions; this enhances the demand for proper reasoning of sentences and sketches the contours of the framework, which assists the judge in compiling an inventory, clarifying and systematizing factors that contribute to punishment.

7.3. Evaluations of court practice

Czech Supreme Court publishes irregular reports on the evaluation of the practice of the courts on punishment, where criticism emerges in relation to reasoning of the criminal sanctions imposed. In its 1965 report, the Supreme Court states, that *there are still many judgments in which sufficient attention is not paid to the statement of the sentence. In many of these judgments, the inadequate statement of reasons for the sentence is the result of an incomplete finding and assessment of all the circumstances of the sentence. (…) The punishment in such cases is usually justified on a flat-rate and non-specific basis, so it is not possible to examine the reasons why the court chose a certain type of punishment and what aspects and considerations it followed in determining the assessment or modification of the sentence. (…) The courts are still not sufficiently aware that the circumstances relevant to the assessment of the sentence, as well as the facts of the guilt, are the subject of evidence and*

assessment of the evidence in the trial, and that the judgment must then be justified on the basis of the same principles as the guilt. (…)The most frequent deficiency in the evaluation and justification of the circumstances decisive for the assessment of punishment is still the incompleteness of the assessment of all facts relevant to the degree of danger to society, which are demonstrated in § 3 of the Criminal Code. In such cases, the courts focus their attention only on some of these circumstances or even on one of them, leaving the others either unnoticed or registered, but not evaluated (Supreme Court, 1965).

The next report is from 1984. While the Supreme Court notes in this report that the courts are fully and correctly finding the facts necessary to assess the degree of disruption and the possibilities for redress, and that they impose penalties that are properly differentiated and individualized, it notes in the next passage the deficiencies that are allegedly rare. *In particular, this is an incomplete or insufficient clarification of all the circumstances relevant to the correct decision on the punishment and, in particular, an incomplete or unilateral assessment of these circumstances when not comprehensively assessed, but the court takes into account only some circumstances. The correct, lawful and convincing decision on punishment for the public and for the perpetrator requires an insight into the nature of the case, its causes, and the motivation of the perpetrator; Such a responsible decision on punishment is difficult, requiring judges not only to have legal knowledge, but also to have the right political-law approach and certain life experiences to apply different, often contradictory aspects, which are decisive under the law of punishment.*(Czech Supreme Court, 1984)

Most recently, the Supreme Court comment the practice of courts in imposing penalties in the 2014 report. This report evaluates the practice of the courts in imposing penalties after the adoption of the new Penal Code and deals with reasoning of the punishment in relation to individual types of punishment and does not reflect how the courts comply with § 125 of the Code of Criminal procedure.

The report deals in more detail with the claims of Section 55 (2) of the Criminal Code[6]. In the report, the Supreme Court states that in imposing unconditional imprisonment, the courts

[6] if a court imposes custodial sentence for an offense referred to in Section 55 (2) of the Criminal Code, it shall interpret the considerations of that decision and why the penalty could not be imposed directly not linked to imprisonment. Paragraph 55 (2) provides: An unconditional sentence of imprisonment may be imposed for offenses for which the maximum term of imprisonment does not exceed five years, provided that, in view of

take into account the provisions of § 55 para. of the Code, although it is not explicitly mentioned in the reasoning, but which, given the specific nature of this provision, should properly do and deal with it consistently. (Czech Supreme Court, 2014)

7.4. Reasons for empirical research concerning the reasoning of criminal sanctions imposed

It follows from the foregoing that there is little idea of on what grounds the courts decide on punishments and empirical research on this topic has not yet been conducted in Czech Republic (Drápal, 2018) .

There is a theory in the theory that the courts apply a policy of silence rather than giving reasons or giving it vague to prevent any appeal (Frankel, 1972).This theory can only be verified by practical research. There are also objections that research on the justification of punishment will not reveal all of the judge's intentions. Drápal (Drápal, 2019) states that any evaluation and assessment of practice must be based on an empirical analysis of these decisions; otherwise, we evaluate only the impressions of persons who cannot serve as a sufficient basis for evaluating the practice, even if they can provide interesting information (Drápal, 2019). If we do not know how the courts justify punishments, we do not know whether they individualize punishments. We also do not know what courts accentuate the purposes of punishment and thus do not have an insight into their policies and the sentencing principles they favor.

So far, research on justification in common law systems has shown that the reasons for a decision are often absent or linked mainly to the seriousness of the offense, rather than to a more detailed description of the factors on which their decision was based (Ewart and Pennington, 1988).

8. Empirical part

the offender, the imposition of another sentence does not manifestly lead to the offender conducting proper life.

8.1. Methodology

The systematic content analysis method (Hall and Wright, 2008) was used to analyze the decisions in question. This (in brief) emphasizes an objective approach to assessing the content of the text, which determines, before the analysis begins, which information will be recorded during the analysis. Its aim is therefore to record whether certain requirements have been met, to quantify these findings and to draw some conclusions on the frequency of events. Its conclusions should therefore be controllable by other scientists, who should achieve very similar results.

The monitored categories were defined to meet the requirements of theory and law, including our research questions. The monitored categories were defined to meet the requirements of theory and law, including our research questions. The first aspect was the degree of specification of the judgment, i.e. whether the courts justify the sentence in general only (for example, they state that the court has taken into account the circumstances on which they should express themselves in accordance with the Criminal Procedure Code without specifying them) or specify the punishment by elaborating at least one circumstances which they justify which they specify with respect to the person of the offender and the circumstances of the case.

The second approach represents the absolute minimum of considering that a sentence could be duly justified. Indeed, it cannot be assumed that a sentence could be properly justified if the court made only a general reference to the general provisions of criminal law, or did not specifically address any circumstance (for example, if he only stated that he had taken into account the offender's criminal history, but did not specify the criminal past, let alone mention how the criminal past affected the choice of punishment).

It was also monitored whether the courts mentioned which of the listed circumstances played a role in imposing penalties. Even if the court list perfectly the circumstances which, according to the court, affected the imposition of the sentence and did not only express those circumstances in general but specify them in relation to particular circumstances, there could not be sufficient justification, as it would not explain which circumstances played an essential role when imposing a specific sentence. For example, if the offender's actions after the crime

were tried to remedy the damage caused by the offender, and the offender's criminal history, which was extensive without mentioning which of these facts plays a major role in imposing the sentence (or its type, modality and it would be impossible to find out why the court ruled in a certain way. Thus, at least a statement as to what weight is attached to the individual facts, or which of them is decisive, is thus necessary to designate the justification as duly implemented. The results of this research were published as a journal article in *Státní zastupitelství* of which the author of this diploma thesis is the co-author - the main author (Tomšů and Drápal, 2019).

The above mentioned legal and theoretical requirements were then considered, starting with whether the purpose of the sentence was expressed in the judgment and what purpose it was.

A significant part of the analysis deals with the circumstances on which the court bases its verdict on the sentence. These circumstances were established in advance on the basis of an analysis of Section 125 (1) of the Code of Criminal Procedure and the provisions of the Penal Code on punishment and punishment of perpetrators of offenses (in particular § 38 - § 42 of the Penal Code). It was noted in relation to what aspect of the sentence the circumstance was mentioned, ie whether in relation to the type of sentence, its length, modality or more than one of these aspects, whether the circumstance was individualized in relation to the circumstances of the case and the offender this circumstance played a role (mitigating, aggravating or not mentioned). It was also taken into account whether it was expressed how much weight this circumstance has, i.e. whether its influence on the imposition of the sentence was decisive, medium or low.

The different approaches of the Criminal Code and the Code of Criminal Procedure regarding the classification of individual circumstances led to the necessity to build up their own system of classification of these circumstances. The examined circumstances were first divided into general, mitigating, aggravating, specific legal circumstances and others according to the following key: The general factors were those referred to in Section 125 of the CPP, respectively. § 39 CC. Section 125 of the CPC mentions what the court should state in the judgment in justifying the sentence, and Section 39 of the CC sets out what the court should take into account when imposing the sentence and, in addition to Section 125 of the CPC, lists the effects and consequences that can be expected from the sentence for the offender's

future life. For research purposes, subcategories of the following general circumstances have been created according to the wording of § 125 CP:

1) The character and seriousness of the crime, which was recorded both in general (i.e. if the court mentioned the nature and gravity but did not further elaborate it), and according to the aspects as stated in Section 125[7] of the Penal Code (or Section 39 of the Penal Code).

2) Personal, family, property and other conditions of the offender.

3) The way of life so far.

4) Behavior of the offender after the crime.

Mitigating and aggravating circumstances were recorded in accordance with Sections 41 and 42 of the Criminal Code and we included in the category of specific legal circumstances the issues of complicity, participation, preparation and experimentation and gaining of assets. Finally, a category of "other" circumstances was created, which included those unforeseen by the law. Another monitored legal aspect was the requirement expressed in Section 125 (1) of the Code of Criminal Procedure, which, in conjunction with Section 55 (2) of the Criminal Code, stipulates imprisonment for a minor offense[8] can only be imposed on condition that, given the offender's person, the imposition of another sentence would not lead to a proper life.

This method has both its strengths and weaknesses, firstly it has been examined whether the courts justify the penalties to be reviewable, but it cannot be inferred from the results whether the punishment was properly individualized in a particular case. The aim of this research is to map the practice of imposing sentences in order to reach more general conclusions about sentencing system.

The sample examined was 366 district court judgments imposing a punishment but not a summary sentence, the case was not handled by a criminal order and there was not a

[7] Thus, according to the significance of the particular protected interest affected by the act, the way in which the act was committed, the consequences, the circumstances in which the act was committed, the offender´s person, the degree of fault, motivation, intention or objective the offense, any changes in the situation and the length of the criminal proceedings, if they lasted for an unreasonably long period.

[8] negligent offenses and those intentional offenses for which the Criminal Code provides for a maximum term of imprisonment of up to five years

simplified judgment. Criminal statistics sheets provided by the Ministry of Justice were used to select the decisions: out of a total of 24,173 cases in 2016, 445 original decisions were selected using the stratified random sampling method. These were subsequently requested under the Freedom of Information Act. Excluded from this sample were cases where a simplified judgment was made (44 cases), a collective sentence was imposed (10 cases), the sentence was changed by the Court of Appeal (9 cases), the reasoning was blackened (6 cases) and various other reasons (the sentence was acquittal, a criminal order was imposed or proceedings were still pending, 10 cases).

The total number of judgments analyzed was 366, the total number of circumstances taken into account was 1700 (4.6 cases per case on average), the types of circumstances recorded were 55. As regards the seriousness of the crime committed, minor offenses prevailed (84 %). The most common form of crime was property crime (39%, 23% of all cases were theft), further offenses against public order (15%) and violent crime (14%), other recorded categories of crime were non-payment of alimony (8%), driving under the influence of an addictive substance (6%), drug offenses (5%), violations of domestic freedom (5%) and other crime (9%).

Most often, the sentence was conditional imprisonment (46% of cases), very closely followed by the unconditional prison sentence, which in our sample was imposed in 42% of cases.

Less often as a primary sanction were imposed community services (7%), financial penalty (2%), no sanction was imposed (2%), expatriation (1%) and house arrest was imposed in one case.

In terms of the sentence imposed these are therefore more serious cases, this is because, unless there is a custodial sentence, the convicted person will not insist on justifying the decision and a simplified judgment will be issued pursuant to Section 129 (2) of the Code of Criminal Procedure. This is not a substantial limitation of research: there is an assumption that if the court imposes a stricter penalty, the quality of the justification should be at higher level.

8.2. Results

8.2.1. General reasoning and weighting

The basic question was whether the courts drafted the reasoning only in general or whether at least one circumstance had been elaborated. In 7% (a total of 26) of the cases, only a general reasoning on why a particular sentence was imposed was included in the sentence reasoning. In general reasoning, the court used a formulation similar to the following: "When considering the type and size of the sentence, the court proceeded from the general provisions of the Criminal Code on the determination of criminal sanctions, their proportionality and the procedure for their imposition (Sections 37 to 39 of the Criminal Code), ie. for which the accused is condemned, to the possibilities of redress, his circumstances and his way of life. " In one case, the reasons for sentence were not given at all.

Of the remaining 93% of cases, 10% of judgments were justified by the fact that the court had at least one circumstance but did not explain how it was individualized (for example, it stated that it had taken into account personal circumstances but no longer specified). These first results are not encouraging - in 17% of cases (ie in one seventh of the sample) it was either not mentioned what circumstances the court took into account or did not elaborate on this circumstance. However, this is not a deviation from an otherwise exemplary practice; that courts do not individualize factors at all or only vaguely means that the courts in an important group of cases do not sufficiently individualize the sentence.

A second possible view of the practice of the courts is not to look at the scale of the problems, but at the frequency of the proper reasoning. The main requirement for reasoning, which can be understood and possibly replicated in its application, is to balance the individual circumstances, i.e. to explain what weight they are given and how they affect the type, modality and punishment. Such weighting was carried out by the courts in 36 cases out of 366 judgments, which cannot be considered an ideal situation. Below are excerpts from judgments that contain at least some weighting of the reasons.

"The injured suffered quite a serious injury with permanent consequences, namely the loss of one tooth and the damage to several other teeth. On the other hand, he confesses his confession and his regret, which is sincere because he apologized to the victim the next day. The court therefore decided to give the defendant the opportunity not to impose a custodial sentence in connection with direct enforcement, but a cumulative alternative sentence in the

form of community service at the upper limit of the statutory rate." - Okresní soud (i.e. district court, further „OS" Nový Jičín *1 T 8/2016*

'The court considers that, in view of the aggravating circumstance (criminal past), the defendant must be directly served, but not punishable by imprisonment, especially given the less serious nature of the defendant's conduct.' - OS Bruntál, 1 T 59/2015

"Although he has now found a job, the court ruled that it was necessary to impose a severe punishment on him for committing another violent crime in a short time."- OS Náchod 3 T 69/2016

"When considering the punishment of the defendant, it eases her confession, the stolen things then returned to the damaged society. The court then did not fail to notice that the defendant had made considerable efforts to redress their lives. She established cooperation with a therapist, sought help from a non-profit organization. She performed the previously imposed sentence of community service in a very short time, although its assessment cannot be considered as low. However, she is aggravated by the fact that she has already shown a propensity for property crime in the past and has committed the present deed during two probation trial periods. However, in spite of the latter, the court considers that the prospect of remedying the defendant is not yet completely lost. The defendant seems to have really understood the gravity of her situation and is working to get out of it "(OS Kolín 8 T 156/2015).

"Even if the accused has committed several attacks by two acts committed, the court considers, given his criminal integrity to date, that he seeks to cover his debts to the maximum extent and nature in the course of insolvency pending tr. activities that a 1-year and 3-month imprisonment may be imposed at the lower limit of the statutory notice, with the execution of the sentence being conditionally suspended for a probationary period of 2 years." - OS Frýdek-Místek 3 T 274/2014

8.2.2. Purposes of punishment

It was also monitored how often the courts referred to the purposes of punishment and which they preferred. Although the Criminal Code does not explicitly state which purpose of punishment the penalties should pursue, the courts mentioned the purpose of punishment in 50% of the decisions. Most often they referred to the rehabilitation purpose of the sentence,

which was mentioned 120x, individual deterrence 53x, general deterrence 16x, protection of society 10x and the retributive purpose of punishment 9x. This frequency shows that the purpose of punishment is a significant factor in deciding on punishment, and its non-expression in the Criminal Code may be problematic (for more see Drápal, 2018).

Rehabilitation purposes were taken into account by the courts both for the offender's (they stated that the offender's custody was sufficient to educate the offender) and to his disadvantage (the rehabilitation purpose was mentioned if the court imposed an unconditional prison sentence). Examples are given below.

"Taking into account all these circumstances, the court considers that it is appropriate to impose an educational punishment on the accused, in order to realize in the future that it is not possible to proceed in this way in legal relations" - OS Benešov 10 T 63/2016

"Particularly in view of the fact that the accused can be regarded as a person of good repute, it was possible to opt for a moderate, educational sentence of imprisonment with conditional suspension of his execution." - OS Bruntál 66 T 158/2016

"When considering the amount and nature of the sentence, the court respected the provisions of Section 39 et seq. Of the Criminal Code. In the past, the defendant has been prosecuted once, but in the probationary period of a suspended sentence of imprisonment, however, proved himself as of 22 January 2015. In this situation, it is necessary to look at him as if he has not yet been prosecuted and thus leading of good life so far mitigates him. An aggravating circumstance could be the fact that he committed two offenses. After assessing all the circumstances of this criminal case, the court concluded that the punishment of the accused is sufficient to impose a sentence that is not connected with the direct execution and imposed a sentence of imprisonment of 8 months as an aggregate punishment respecting the principles set out in § 43 para. of the Criminal Code. " - OS České Budějovice 31 T 44/2015

"After such evidence, the court concluded that the defendant can be served by an educational sentence imposed as a financial penalty, assessed with respect to the defendant's property and earnings conditions." - OS Hradec Králové 6 T 81/2016

"The accused was mitigated to have confessed to his conduct, but he was aggravated by the fact that he had been repeatedly convicted of the same crime and that this was a special

relapse. Educational punishments carried out at large did not have any re-education effect on the accused. Furthermore, the court took into account the length of the offense and the amount of maintenance due and considers that the re-education and remedy of the defendant already requires an unconditional sentence but still at the lower half of the statutory penalty, namely a four-month prison sentence '. Karviná 101 T 118/2016)

Where decisions were justified by general or individual prevention, these were mostly cases where the court named these two purposes and did not specify what it meant in relation to a particular case. In addition, individual prevention was recorded in cases where the court justified a sentence by requiring preventive action against the offender (and preventing him from committing further offenses), as he was a serious offender, and if the offender was banned from driving a secondary punishment or if the offender appeared to be unacceptable.

'In the light of all the circumstances of the case and of the defendant, the court considers that the defendant should be subject to an unconditional imprisonment, in particular of a preventive nature, given that he has repeatedly committed violent crimes under the influence of alcohol, where the previous unconditional conviction, in addition to which protective alcohol treatment was also imposed, did not have the necessary effect. At the same time, with regard to the conclusions of the expert opinion in the field of health care, the psychiatry sector, the defendant was order protective alcohol treatment in an ambulant form." - OS Frýdek-Místek 6 T 4/2016).

If the courts emphasized the protection of society as the purpose of punishment, this was where the perpetrators were typically sentenced to imprisonment, and they were perpetrators of more serious crime or repeat offenders, as illustrated in the following examples.

"It cannot be overlooked that the defendant has intruded into the homes of people who have thus undermined privacy and a sense of security and in one case even threatened the victim with a firearm that was actually (although not possessing a gun license) armed. Quite a large part of the victims, in addition to the above, also suffered considerable emotional harm, because the defendant's acts lost the valuables to which they had a deeper emotional relationship, as the victims testified. in the general value of things as quantified by an expert opinion, but in the opinion of the court it should be taken into account in criminal

considerations. Last but not least, the court could not overlook the assessment of the personality of the defendant XXX in an expert opinion in the field of psychiatry and psychology, prepared in a parallel criminal case, where the possibility of redressing the defendant was assessed as unrealistic. Thus, the protective function of the sanction is increasingly important, i.e. the protection of society against defendant´s negative influence." - OS Hradec Králové 5 T 90/2016

"At the same time, the court decided, pursuant to Section 73 (1) of the Criminal Code, to impose a ban on driving a vehicle of all kinds for a period of one year, since the defendant committed an offense in connection with such activity. and the imposition of this kind of punishment requires the protection of society against repeated and total recklessness and failure to respect the rules governing the driving of motor vehicles by the defendant who repeatedly drove the vehicle despite the fact that he was banned from doing so." - OS Praha 5 3 T 102/2016

Where retribution was mentioned as the purpose of punishment, this was done in cases where the court placed emphasis on the punitive component of the punishment without explaining what it meant.

"It is thus obvious that the defendant is a person against whom the individual preventive element of the sentence is completely absent, because despite the previous punishment, imprisonment sentences are again committed in a relatively short period of time after their execution. For this reason, the defendant should be punished solely by represive punishment, i.e. again by imprisonment." OS Ústí n. Labem 27 T 21/2016

The courts also mentioned in 44 cases more than one purpose of the sentence in the judgment. For example, the following decision:

"When deciding on the type and size of the sentence, the court took into account the provisions of Section 39 (1) (2) of the Criminal Code, the court did not find any mitigating circumstances, the accused was aggravated by recidivism, and the court also did not miss the fact that he was committing the offense at the time of the conditional conviction of the local court, dock number XXX. therefore, in those circumstances, the court considered the only possible remedial measure of the accused to impose only an unconditional prison sentence, which, since he had not yet been sentenced to imprisonment, still assessed at the lower limit

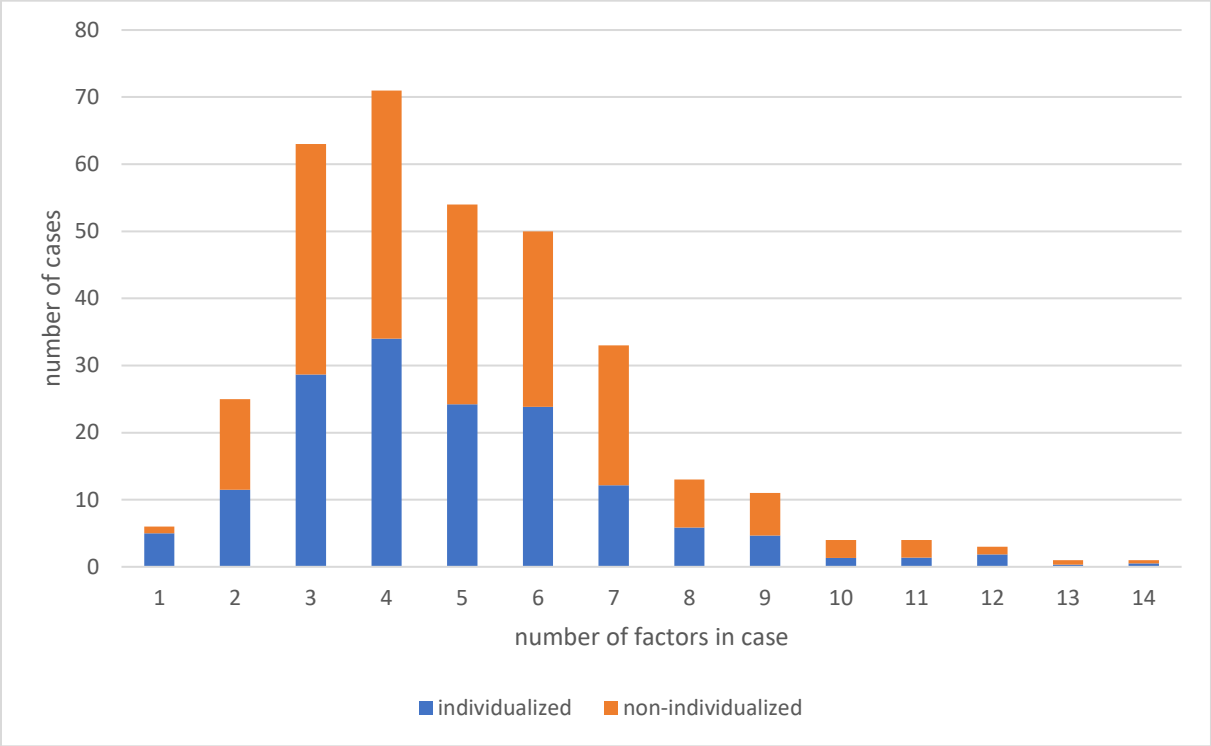
of the sentence, should meet the purpose of punishment in terms of repression and general prevention." - OS Cheb 2 T 87/2016

The question is what real impact the expressed purposes have on the sentence imposed, and if any. Interestingly, however, judges work most with the educational (rehabilitation) purpose of punishment, although critical summaries of criminological research conclude that the choice of a stricter punishment has no significant impact on the convict's further career (Nagin, Cullen, & Jonson, 2009; Villettaz, Gillieron, & Killias , 2015).

8.2.3. Frequency of circumstances and their individualization

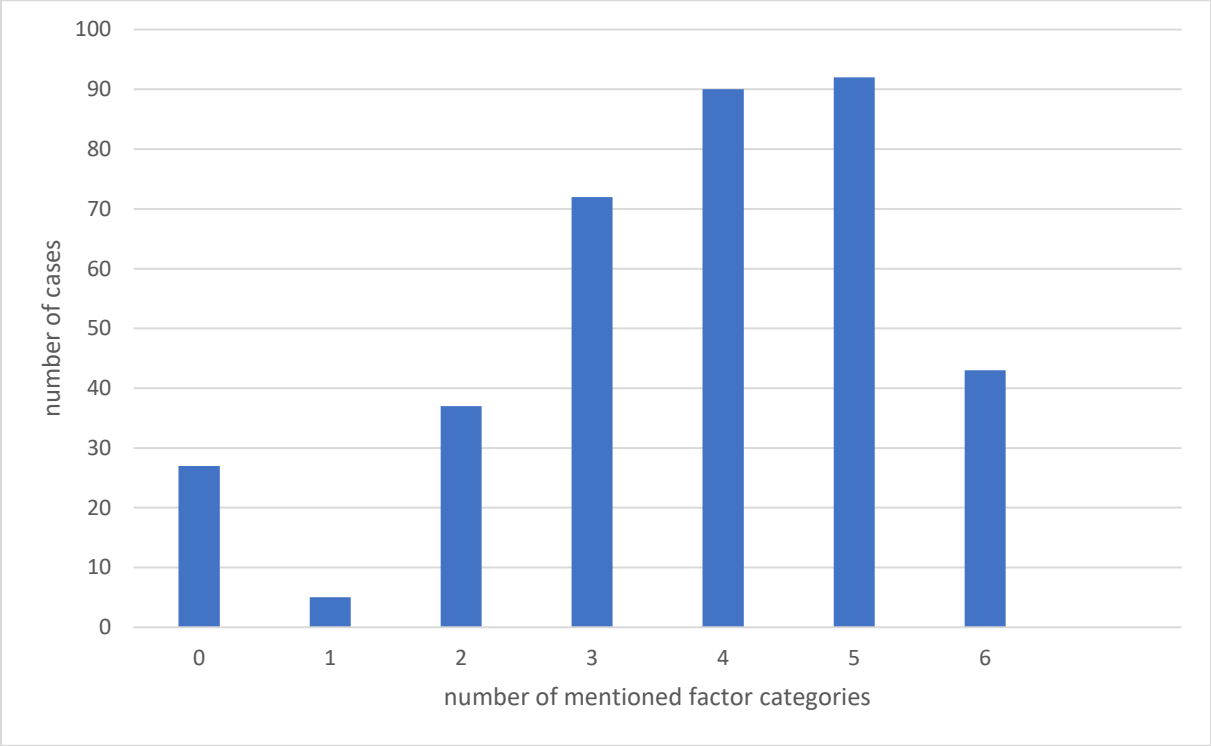
The following paragraphs present how many and which circumstances the courts mention in their decisions. Figure 1 shows the frequency of individual circumstances by the courts of the judgments analyzed, with the courts most often taking into account 4 circumstances and the highest number of circumstances taken into account in one judgment was 14. The color coding of the columns subsequently shows the proportion of individualized and non-individualized circumstances. Graph 1 shows the frequency of individual circumstances by the courts of the judgments analyzed, the courts most often took into account 4 circumstances and the highest number of circumstances taken into account in one judgment was 14. The color coding of the columns then shows the proportion of individualized and non-individualized circumstances.

Graph 1: number of circumstances in judgments



Graph 2 shows the extent to which courts succeeded in meeting the requirements of Section 125 of the Code of Criminal Procedure, i.e. whether they took into account the character and seriousness of the crime, the perpetrator's personal circumstances, his way of life so far, behavior after crime and mitigating and aggravating circumstances. The character and seriousness as a circumstance was methodologically demanding in terms of processing, as it is determined by various aspects according to § 125, which then overlap with other aspects (e.g. offender person vs. personal circumstances). Therefore, this circumstance was recorded as sufficient if the court mentioned at least one aspect or the nature and gravity in general, without elaborating on what it meant. The attenuating and aggravating circumstances stand next to the four main requirements as fifth and sixth because of their specific position in the Criminal Code. All six general categories received 43 judgments, i.e. only 12% of the total number of cases (and with minimum requirements for factor specification).

Graph 2: Number of judgments with a given number of mandatory categories under Section 125



As mentioned above, in the 366 judgments analyzed, 1700 circumstances were mentioned, of which 44% were individualized; specified with regard to the person of the offender.

Table 1 presents the frequency of individual circumstances taken into account, broken down by categories according to Section 125 (1) of the Code of Criminal Procedure, i.e. according to the character and seriousness of the offense, personal, family, property and other circumstances of the offender. Mitigating and aggravating circumstances are categorized according to their meaning divided to appropriate categories according to Section 125 (1) of the Code of Criminal Procedure. In the first column is the name of the circumstance, followed by the relevant paragraph in which the circumstance appears, and in how many cases the circumstance was individualized and its total frequency. The last column then shows the proportion of the number of individualized cases of a given circumstance in the total number of decisions with at least one individualized circumstance (83%, ie 304 judgments in total). The table shows both the circumstances foreseen by the law and those not foreseen by the law but could be categorized into the four categories.

Table 1: Numbers of individual circumstances

Category of § 125 CP	Factor	§ CC / CP	Individualized		Total	% of individualized factors of all individualized cases
			Yes	No		
Chování pachatele po činu	Doznání a spolupráce s OČTŘ	§ 41 písm. l)	39	97	136	12.8
	Lítost	§ 41 písm. n)	9	27	36	3
	Postoj obžalovaného		25	11	36	8.2
	Chování pachatele po činu obecně	§ 125	16	10	26	5.3
	Spolupracující obviněný	§ 41 odst. m)	2	1	3	0.7
Povaha a závažnost	Spáchal více trestných činů	§ 42 písm. d)	13	42	55	4.3
	Okolnosti spáchání trestného činu	§ 125	34	12	46	11.2
	Společenská škodlivost	§ 125	24	11	35	7.9
	Způsob spáchání	§ 125	16	15	31	5.3
	Následek	§ 125	10	20	30	3.3
	Způsobil menší škodu	§ 41 písm. i)	15	13	28	4.9
	Způsobil větší škodu	§ 42 odst. k)	12	13	25	3.9
	Ve větším rozsahu, na více věcech nebo více osobách, anebo trestný čin páchal nebo pokračoval po delší dobu	§ 42 písm. m)	13	22	25	4.3
	Povaha a závažnost obecně	§ 125	15	9	24	4.9
	Doba, která uplynula od spáchání	§ 125	7	14	21	2.3
	Pohnutka	§ 125	8	8	16	2.6
	Chráněný zájem	§ 125	10	3	13	3.3
	Náhrada škody obžalovaným	§ 41 písm. j)	9	2	11	3
	Spolupachatel-míra,jakou se podílel	§ 39 odst. 6 písm. a)	6	2	8	2
	Míra zavinění	§ 125	5	2	7	1.6
	Ze ziskuchtivosti a jiné zavrženíhodné pohnutky	§ 42 písm. b)	0	7	7	0
	S rozmyslem/po předchozím uvážení	§ 42 písm. a)	0	6	6	0
	Množství návykové látky		1	4	5	0.3
	Získal vyšší prospěch	§ 42 písm. l)	1	3	4	0.3
	Záměr/cíl	§ 125	4	0	4	1.3
	Zranitelná oběť	§ 42 písm. h)	3	0	3	1
	Pokus	§ 39 písm. c)	0	2	2	0
	Surový, trýznivý způsob spáchání	§ 42 písm. c)	1	1	2	0.3
	Člen organizované skupiny	§ 42 písm. o)	1	1	2	0.3
	Získal majetkový prospěch	§ 39 odst. 7	1	0	1	0.3
	Zneužití postavení	§ 42 písm. f)	1	0	1	0.3
	Svedl k TČ mladistvého	§ 42 písm. i)	1	0	1	0.3
	Nemorálnost činu		1	0	1	0.3
	Pod vlivem návykových látek		1	0	1	0.3
Osobní okolnosti	Osobní okolnosti obecně	§ 125	122	58	180	40.1
	Účinky a důsledky, které lze očekávat pro budoucí život pachatele	§ 125	4	37	41	1.3
	Ostatní uložené tresty		15	6	21	4.9
	Uložení nepodmíněného trestu	§ 55 odst. 2	2	8	11	0.7

	Nízký věk	§ 41 písm. f)	2	5	7	0.7
	Doba strávená ve vazbě		1	1	2	0.3
Dosavadní způsob života	Byl již pro TČ odsouzen	§ 42 písm. p)	160	50	210	52.6
	Vedl řádný život před spácháním TČ	§ 41 písm. o)	64	52	117	21.1
	Dosavadní způsob života obecně	§ 125	19	17	36	6.3
	Efektivita předchozích trestů		20	6	26	6.6
	Ve zkušební době		7	11	18	2.3

The data in Table 1 gives us an interesting insight into the justification of penalties. The main factors mentioned are the criminal history of the offender, his personal circumstances and whether he has confessed to the crime, i.e. all circumstances relating to the person of the offender, but not his offense; this is in line with the aforementioned purposes of punishment, which are primarily aimed at the person of the offender. It is therefore possible to formulate the hypothesis that the Czech district judge is more interested in the person of the perpetrator in imposing penalties than in the specifics of crime.

Frequent mentioning of selected circumstances without their individualization is problematic, especially in circumstances, whether he committed more crimes, consequences or effects and consequences that can be expected for the offender's future life. All these facts are difficult to assess without specifying and discussing how they affected the imposition of punishment.

Circumstances which were not categorized above and were mentioned by the courts were: (a) the absence of mitigating circumstances (27 circumstances, 3 of which were individualized) where the courts stated that they found no mitigating circumstance; (b) absence of aggravating circumstances (7 circumstances, 1 individualized) according to which the courts have not recognized any aggravating circumstance; (c) all circumstances of the case (28 circumstances, without individualization) where the courts referred to "all circumstances of the case" without specifying them; (d) a context in which circumstances which are not circumstance but committing a wider context, such as that "the court imposed reasonable restraints, supervision and protective treatment", or that "the prosecutor also imposes an unconditional prison sentence," (12 circumstances, 9 individualized) and finally the other five circumstances that could not be categorized.

8.2.4. Further elaboration of circumstances

In all circumstances, it was recorded what aspect of the sentence was affected, whether the type of sentence, its modality (conditionally suspended prison sentence or not) or the assessment. The courts most often mentioned the influence of individual circumstances on several aspects of punishment, which was mainly due to the use of the initial wording: "In considering the type and amount of the sentence, the court took into account ..." Thus the courts mentioned influence in 1087 circumstances. They also referred to the modality of the sanction, i.e. when deciding whether to impose a suspended or unconditional prison sentence (147 circumstances) and a sentence (160 circumstances). The question is whether the courts should make no more distinction as to which circumstances are more likely to affect the range of penalties and to the extent to which they are imposed, as these circumstances may differ.

How much influence the circumstance has on the sentence imposed (i.e. whether low, medium or decisive) was mentioned only 40 times out of a total of 1,700 circumstances. If the court stated that the circumstance had little effect on the sentence, it was in cases where it stated that one circumstance prevailed over the other (“The accused is mitigated by the circumstance of confession and expressed regret, but these cannot be overestimated due to the existence of aggravating circumstances, which significantly outweigh the attenuating circumstances” MS Brno-město 5 T 54/2016) or when he stated that the confession cannot be overestimated because the offender was caught in the act.

The medium influence of the circumstance on the sentence was recorded in cases where the court stated that it had highlighted some of the circumstances above others and typically stated the phrase “especially with regard to…” or “the court took into account in particular…” E. g.: "especially with regard to serious health consequences for more persons" (OS České Budějovice 6 T 11/2016), "especially with regard to the irreparability and incorrigibility of the defendant" (OS Litoměřice 5 T 90/2016).

If the court stated that the circumstance had a decisive influence, it was in cases where there was one essential circumstance that influenced the judge's consideration of the type, modality or punishment of the punishment to such an extent that he could no longer consider another option. Typically, this was the case when a court sent a "inconvenient" recidivist to prison and

stated that, in view of the defendant's way of life so far (criminal offenses are committed repeatedly), it is no longer possible to consider conditional imprisonment.

The lack of consideration of the significance of the circumstance is certainly linked to the infrequent balancing of individual circumstances in the imposition of sanctions. However, the significance of the circumstances thus specified is crucial to understanding which circumstances have influenced the choice of punishment and hence decoding the court's reasoning allowing a critical view of it.

8.2.5. Aggravating and mitigating circumstances

In the sample of judgments studied, the ratio of mitigating and aggravating circumstances was as follows: For 41% of the circumstances it was not mentioned whether it was aggravating or mitigating, with 31.3% and 27.5% being found to be aggravating. Only 76 out of 1700 circumstances explicitly referred to statutory provisions on mitigating circumstances. In mitigating circumstances under Section 41 of the Criminal Code, the courts took the highest consideration of the fact that the perpetrator has led a good life before committing the offense. o), 117 cases] that the offender assisted in clarifying his / her crime (confession, point (a)). l), 136 cases] and that the offender regretted sincerely [lit. n), 36 cases]. The circumstances set out in letters a) -e), g) and h) were not mentioned at all.

The most frequently mentioned mitigating circumstances, i.e. that the offender has led a good life before committing the offense [lit. o)], the courts normally stated that they had taken into account that the perpetrator had previously been criminally impeccable. E.g. The District Court in Jihlava stated "... and at the same time led a proper life when he was not tried for offense or convicted of any crime and is working properly" (5 T 25/2015).

The courts have written three times that it mitigates the accused that the previous crime was different crime category. The courts also mentioned that the accused was mitigated by that he had proved himself in the past, or that his convictions had been obliterated.

The second most common mitigating circumstance, i.e. the perpetrator assisted in clarifying up his crime [a] l)], in the vast majority of cases was specified only as a guilty plea, so the court usually stated the wording: "The court considered it mitigating that the offender had

confessed to the crime," without further elaborating on it. When the courts specified the guilty plea factor, they usually state that its influence on the punishment cannot be overestimated due to the circumstances of the confession (i.e. “low influence”): *'The' confession 'of the defendant is not regarded as a major mitigating circumstance by the court. As is apparent from the foregoing, the defendant confessed only what he knew there was irrefutable evidence against him ”*(OS Litoměřice 5 T 90/2016), or: *"It should be noted, however, that he was caught by a police patrol while driving under the influence of alcohol."* (OS Náchod 1 T 10/2016), *“The court found in the case of the accused an attenuating circumstance in the form of a confession, but this cannot be overestimated, as it is not a qualified confession”* (OS Děčín 2 T 253/2013), “The confession of the accused as an mitigating circumstance cannot be overestimated, as the accused was caught in committing crimes” (OS Hradec Králové, 6 T 39/2016).

Of the aggravating circumstances under Section 42 of the Criminal Code, the courts took the most into account of previous convictions [(p), 210 cases], to the fact that the offender committed multiple crimes [(n), 55 cases] and that the offender obtained a higher benefit by the offense [(l), 25 cases]. The aggravating circumstances expressed in points (d), (e), (g) and (j) were not mentioned at all. Regarding the most common aggravating circumstance, ie previous convictions, the courts usually cited an extract from the criminal record and, after referring to the defendant's criminal past, justified the sentence imposed. This circumstance played a role in 86,5% of cases where the prison sentence was imposed (134 cases) as opposed to 30 cases of suspended sentences. The courts also mentioned in several (18) cases as an aggravating circumstance that the offender committed a criminal offense during the probationary trial period and in 26 cases mentioned the effectiveness of previous convictions.

The criminal history of the offender was taken into account in particular in connection with the application of Section 55 (2) of the Criminal Code, according to which, when a court imposes a custodial sentence for minor offense it must take into account that, given the offender's person, another sentence would not lead the offender to lead a proper life, which must also be reasoned by the courts pursuant to Section 125 (1) of the Code of Criminal Procedure. In principle, the courts fulfilled this condition (98% of the 141 cases in which an unconditional prison sentence was imposed), but to different degrees of divergent reasoning, as indicated in the passages below.

"When considering the type and amount of punishment, it was taken into account that defendant is a person with strict tendency to commit crimes of a property character, in this case it is a special recidivist when the defendant commits a crime shortly after his release from the last sentence of imprisonment, moreover, at a time when he was already punished for homogeneous crime by unconditional imprisonment, when the execution of the prison sentence did not prevent the defendant from continuing to repeat the crime." - OS Frýdek-Místek 5 T 5/2016

"Defendant XX committed a crime during the probationary period of conditional release, hooliganism has repeatedly committed himself, and has also been repeatedly discussed by the offense commission for violent and threatening conduct. He was also the one whose offense was stronger and therefore socially more harmful than the accused XY. The court did not find any mitigating circumstances. The court already considers the punitive punishment corresponding to social harmfulness and to the person of the defendant to be punished in the middle of the legal punishment rate." (OS Trutnov 17 T 61/2015).

"The court found no mitigating circumstances about the accused. On the other hand, the defendant is aggravated by his criminal history, especially several convictions for crimes of the same nature. The court therefore considers that, in this case, a total unconditional prison sentence should be imposed, already in the second half of the statutory penalty rate referred to in § 196 para. of the Criminal Code, when the court accused the defendant for the execution of this sentence with regard to the nature of the crime and the possibilities of his / her employment in the execution of the sentence pursuant to § 56 para. Code to the prison with supervision." (OS Olomouc 9 T 86/2015).

In most (80%, ie 113) cases where an unconditional prison sentence was imposed, the courts stated that they imposed a custodial sentence without prior reference to Section 55 (2) and explicitly stated that in relation to the person of the offender would not lead to a proper life being imposed. However, this requirement was implicitly included in the reasonings in such a way that the courts stated that defendant is a recidivist.

The courts referred to Section 55 (2) of the Criminal Code explicitly only eight times. For example:

'With regard to Article 55 (2) of the Criminal Code, the court considers that, given the offender's person, the imposition of a sentence other than an unconditional sentence of imprisonment would not achieve the purpose of criminal law, also protection of society against the defendant's criminal activities. It is therefore not possible to impose a custodial sentence other than an unconditional sentence." - OS Olomouc 7 T 238/2015

"It is stated from the above that the convicted person repeatedly commits special recidivism and that the sentences not connected with the restriction of his personal freedom did not lead to any correction. Moreover, as the court found out from the attached file of the District Court in Nový Jičín sp. No. XXX, the defendant commenced the sentence of community service on XXX and performed only 8 hours on XXX and certainly does not stand his defense that he went to work or helped in the garden or roof repair. In this situation, the court considers that, with regard to Section 38 and Section 39 of the Criminal Code and Section 55 (2) of the Criminal Code, it is only possible to impose a custodial sentence on the defendant." - OS Nový Jičín 20 T 98/2016

When the courts imposed imprisonment for offense, they placed particular emphasis on the correctional (rehabilitation) purpose of the sentence (35 cases in total).

"When deciding on the type and size of the sentence, the court took into account the provisions of § 39 para. of the Code, the court did not find any attenuating circumstances, the accused was aggravated by relapses; Z. XXX, therefore, in these circumstances the court considered the imposition of only an unconditional imprisonment as the only possible remedial measure of the accused "(OS Cheb 2 T 87/2016).

"*When deciding on the type and size of the sentence, the court took into account Section 39 (1), (2) of the Criminal Code, the court did not find any mitigating circumstances, the accused was aggravated by recidivism, and the court also did not escape the attention of the court that he was currently committing the offense at the time of the conditional conviction in the case of the local court file no. Z. XXX, therefore, in these circumstances the court considered the imposition of only an unconditional imprisonment as the only possible correctional measure of the accused."* - OS Cheb 2 T 87/2016)

“The accused was mitigated to have confessed to his conduct, but he was aggravated by the fact that he had been repeatedly convicted of the same crime and that this was a special recidivism. Correctional punishments performed in freedom had no correctional effect on the accused. Furthermore, the court took into account the length of the offense and the amount of maintenance due and considers that the correction and remedy of the defendant already requires an unconditional sentence but still at the lower half of the statutory penalty, namely a four-month prison sentence.” - Karviná 101 T 118/2016

“In the case of the defendant, no punishment other than unconditional is possible, as it is a person who is significantly disturbed, when it is evident that a mere threat of punishment would not lead to his remedy.” - OS Kutná Hora 6 T 97/2016

The courts took account of leading good life in 20 cases by stating that the offender had not shown in the past that he was able to lead a good life. Thus, the courts used the following argumentation:

“It is therefore evident that the defendant shows a strong tendency to commit various types of crime, even if the execution of the last sentence of imprisonment did not cause him to lead a good life and repeatedly commits other criminal activities” - OS Ostrava 15 T 31/2016

“It is obvious that the prison sentences imposed so far for the same type of previous crime did not have practically any major effects and consequences for the defendant's life, which repeats the intentional delinquency.” - OS Hradec Králové 6 T 39/2016

The second most common aggravating circumstance, i.e. the fact that the offender committed more crimes, was not usually specified in any way and the court only stated this fact.

8.2.6. Content requirements: questions of "what", "who", "how", "effects" and “context”.

The substantive requirements of the statement of reasons were also monitored, i.e. questions which the judge should answer in the statement of reasons in order to be comprehensible: questions of "what", "who", "how", "effects" and “context”. In only nine cases the courts answered all five questions in the reasoning. To demonstrate what the answer to these questions in the judgment and subsequent analysis look like:

"When imposing the sentence for the defendant's conduct specified in the operative part of this judgment, the court assessed all facts relevant to its type, size and purpose, including the danger and harmfulness of its conduct, within the meaning of Section 39 of the Criminal Code. In relation to the accused, the court assessed the court within the meaning of § 41 let. 1, Letter (o) of the Criminal Code as a circumstance mitigating her previous good ***life (the "who" question)****; on the contrary, within the meaning of § 42 let. a) of the Criminal Code aggravates that the alleged conduct committed deliberately and after previous consideration* ***(the "how" question)****, according to letter b) of the same statutory provision that the conduct in question was committed for* ***profit****, according to letter k) of the same statutory provision, that the conduct complained of caused higher damage, in this case almost three times in relation to the amount of the legal classification used* ***(the "effect" question)****, according to letter (m) the same legal provision also aggravates the defendant for having committed the alleged conduct for a prolonged period* ***(the „what" question)****. For the alleged infringement within the meaning of Section 209 (4) of the Criminal Code, the defendant was threatened with a punishment rate ranging from 2 to 8 years. With regard to her civic integrity* ***(the "who" question)*** *so far, even though it was a borderline situation, the court found the only possible imposition of a still correctional alternative conditional sentence albeit in the maximum legal area for imposing such a sentence, that is, for a period of 3 years with conditional postponement for a maximum statutory probationary period of 5 years. In the case of the accused, the sum of the aggravating circumstances exceeds the mitigating circumstances, but it must also be borne in mind that the Czech Social Security Administration, in particular, allowed the accused to commit the alleged conduct* ***(the „context" question).*** *The sentence imposed in this way will surely be sufficient instruction for the defendant to live a proper life in the future without conflict with the law."* – OS Ostrava 9 T 145/2014

Four questions were answered in 28 cases, three questions were answered in 84 cases, two questions in 140 cases, one question in 78 cases and zero question in 27 cases. The 27 cases where was not any question answered are the same cases where only general reasoning of the sentence was given

9. Conclusion

It should be noted that, given the results of the research, the courts do not properly justify the sentence imposed. In 17% of cases, no individualized circumstance was mentioned, only 10% of cases could be described as reviewable (replicable), as the courts stated which circumstances took into account and mentioned how they influenced the sentence. However, even in the judgments in which the factors were mentioned, the factor was individualized only in a minority of cases, and it was only exceptionally stated how important these factors played in the imposition of the sentence. In the average case, therefore, the statement of reasons for a sentence cannot serve to understand why a particular sentence was imposed, nor to review it in an appeal. It can therefore be said that the justification does not fulfill its basic functions: clarity and reviewability.[9]

The courts did not even meet the minimum content requirements in terms of Section 125 of the Criminal Code. In most cases, they did not individualize their decisions or specify general legal terms, i.e. they did not interpret them.

This is problematic from several points of view. From the research point of view, the results do not give much opportunity to find out how the courts are actually considering punishment. The judgments are often incomprehensible to the offender and other actors in the reasoning of the sentence. Frequency of only general justification, respectively a formulation that only repeats legal notions is a consequence of this phenomenon. Nor is the reasoning complex in the content context of the "what", "who", "how", "effects" and "context" issues. The fact that courts do not predominantly weigh factors, do not express the importance they attach to individual factors is also problematic.

This raises questions for further research: how do regional (appeal) courts respond to such practice in their appeals judgments? Also the results of this research indicate the question of how to deal with such unsatisfactory practice of district courts?

[9] The research results were published as article: Tomšů, K. and Drápal, J. (2019) 'Odůvodnění trestů: Empirická studie rozhodnutí okresních soudů', *Státní zastupitelství*, 6(16), pp. 9–21.

The solution is offered on several levels; the question is whether it is necessary to change the law (e.g. in anchoring the purpose of punishment, specifying the importance of some circumstances), or it is appropriate to adopt informal guidelines (which work in continental culture in practice e.g. in the Netherlands), or is the solution itself the judicial system, and should the directive on punishment be adopted by the Supreme Court?

This work does not aim, nor does it dare to propose a straightforward solution based on the somewhat vague results of this research. This solution will be the subject of further research and perhaps even of the discussion of the professional legal community.

A general recommendation may be that it is necessary to establish an average case from which the judge can then deviate if necessary. It will then be easier to decipher which circumstances have played a role in the imposition of punishment and what weight they have. It is clear that enumerating all conceivable aspects in the law is not sufficient. It will be necessary to better define the importance of individual circumstances and also to clarify the principles that would guarantee uniform practice of the courts and better punishment efficiency.

The recommendation to the judges may then be to make these circumstances more specific and individual, because only then can the entire judicial system be directed towards greater consistency and justice in the imposition of penalties.

10. Content

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