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PENAL POLICY IN SLOVENIA (DISCREPANCY BETWEEN EXPECTATIONS AND REALITY)

Penal policy can be defined and assessed in different ways. It could be simply considered as a kind of policy, while its assessment depends on a value judgement and expectations of the estimator. Such an assessment is of course inevitably subjective. Arising from the belief that the sentence imposed should represent a just recompense to aperpetratorfor the evil he caused, I cannot consider the current penal policy in Slovenia appropriate and fair. Penal policy in Slovenia is in my opinion too lenient and even offensive for victims of crime.

It has been known for a long time that courts in Slovenia impose sentences which are near the minimum of prescribed frame of penaltyfor a given criminal offence. It is simply not possible to believe that the majority of criminal offences processed by courts deserve in terms of their seriousness and dangerousness a sentence which is near the minimum sentence set out for a given criminal offence. If this was really true, it would mean that prescribed penalties are disproportionally heavy. This presumption does not however hold true, because a comparative overview shows that prescribed penalties in Slovenia are quite comparable to the penalties in other European countries or that they are even much lighter.

In spite of the fact that penal policy is treated in this paper as a kind of policy, it could be nevertheless defined in a more concrete way. We can make a distinction between statutory penal policy (in terms of penalties laid down in statutes) and court penal policy (sentencing policy). While a statutory penal policy consists of a deliberate prescription of penalties for criminal offences contained in a criminal code on the ground of their dangerousness for protected goods, a court sentencing policy refers to a type and severity of sentence imposed by courts on offenders for concrete criminal offences.[i]

For a more objective assessment of the adequacy of penal policy it seems reasonable to make a short analysis of both types of penal policies, their relationship and also to examine the non-reaction of state agencies in the cases, when elements required for the commission of a serious criminal offence have been fulfilled. Something has also to be said about a prosecutorial discretion regarding sentencing, which becomes increasingly important.

Professor Filipčič, Ph.D believes that penal policy in Slovenia is getting tougher. [ii]

Yet, a more profound analysis indicates that neither the adding new criminal offences nor the increasing of penalties for the existing criminal

offences, do not necessarily mean a real harshening of penal policy.

A special problem regarding penal policy is the rule on mandatory use of a more lenient law, derived from the first paragraph of Article 15 of the International Covenant on Civil and Political Rights. We are referring to the rule, well known to lawyers, according to which it is mandatory in the case, when a criminal code has been modified subsequent to the commission of a criminal offence until the final judgement and a provision is made by law for the imposition of the lighter sentence, to use a new, more lenient law. On the ground of this rule it is possible that the legal order rewards those who are able to outwit it. This is an anomaly which should be in my opinion eliminated.

The increase of penalties for the already existing criminal offences either does not contribute to the harshening of penal policy. If we followed through a longer period of time criminal offences related to illicit drugs (narcotics), we would perceive a slow trend of increasing penalties, which could lead us to the conclusion that penal policy has gradually got tougher. Yet, the inactivity of prosecution agencies shows that the harshening of penal policy is only apparent.

Professor Filipčič estimates that sentencing policy of courts in Slovenia is getting tougher. Such a conclusion is made on the basis of the analysis of statistical data. She established that the number of prisoners in Slovenia had been increasing since 1990. Although Professor Filipčič admits that it is not possible to assess the seriousness of crimes committed only from statistical data, she nevertheless concludes that the structure of criminal offences has not changed greatly after 1990.[iii]

Contrary to Professor Filipčič, I am convinced that the structure of criminal offences has considerably changed after 1990. There is an increasing number of property criminal offences with elements of violence, for example robberies with the use of firearms, resulting in deaths. A decline of social control after 1990 resulted in increased possibilities for the operation of organised criminal groups. Law enforcement agencies have already detected in Slovenia the operation of powerful foreign criminal groups, dealing with narcotic drugs, trafficking in human beings, trafficking in arms and with similar serious forms of crime. All of this makes me think that the court sentencing policy has not become more severe, but has been rather adapted to the changed structure of crime.

A gradual renunciation of the principle of legality and giving more and more discretionary powers to public prosecutors have lead to the development of prosecutorial sentencing policy, which also deserves all attention.

The current Criminal Procedure Act (hereinafter CPA) already vests public prosecutors with large powers. A public prosecutor may transfer under certain conditions a crime report or a summary charge sheet to a settlement procedure, he can suspend prosecution with the consent of the injured party or he is not obligated at all to initiate criminal proceedings or can abandon prosecution. The mentioned provisions show that a public prosecutors can exercise sentencing

policy even before the case comes before a court (if a defendant complies with the instructions of a prosecutor and carries out tasks that he imposed on him, the case will not even be brought to court, because a crime report will be rejected by a prosecutor). These provisions are in my opinion very questionable, because they mean that a public prosecutor is vested with powers to set «sentencing frameworks» in each individual case, what represents a relatively large risk for the violation of the principle of equality before the law. Even worth is the situation with the institute of guilty plea agreement or plea bargaining.

Courts still render their judgements in the name of the people. It is neither desirable nor convenient if people wonder about or even disdain judgements rendered in their name. In such a case people either do not understand a message given by a judicial branch of government or something might be wrong with this message. The time will show how the mentioned novelties concerning prosecutorial sentencing policy will function in practice and how will be the "bargaining with justice" accepted by people.

i Horvatić Ž.: «Kaznena politika», the entry in the book Rječnik kaznenog prava. Zagreb: Masmedia 2002, p.167.

ii Filipčič K.: «Kaznovalna politika v Sloveniji», 3. Konferenca kazenskega prava in kriminologije, Zbornik 2010, Ljubljana, GV Založba in Pravna fakulteta v Ljubljani, p. 15-17.

iii Filipčič, op.cit., pp. 17-21.

Filipčič, op.cit., pp. 17-21.

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CRUELTY AND PERFIDITY REGARDING THE CRIME OF MURDER IN SUBSTANTIVE CRIMINAL LAW OF SLOVENIA

{0>Člen 116<}100{>Slovenian Criminal Code, the so-called CC1, adopted in the parliament in 2008 (entered into force on November 1st 2008, OJ RS Nr.: 50/12 from 29th of June 2012, including amendments, adopted until present), in Art. 116 under the title "Murder" offers the following incrimination:<0}
{0>Kdor koga umori s tem, da mu vzame življenje<}0{>"Whoever takes the life of a human being <0}

1) {0>na grozovit ali zahrbten način;<}0{>in a cruel or perfidious manner;<0}

2) {0>zaradi ukrepanja pri uradnih dejanjih varovanja javne varnosti ali v predkazenskem postopku ali zaradi odločitev državnih tožilcev ali zaradi