IMPLEMENTATION OF THE PRINCIPLE TREATING DEPRIVATION OF LIBERTY AS *ULTIMA RATIO* IN THE PRACTICE OF APPLYING CRIMINAL LAW

MIROSŁAWA MELEZINI*

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A thesis that the legislator and justice implementation practice should treat a penalty of deprivation of liberty as *ultima ratio* is at present one of the principles of criminal policy recognised and expressed in the binding Criminal Code of 1997. It results from the recognition of the high value of human freedom, which beside life and health is one of the most precious rights of an individual.[1] Since deprivation of liberty, because of its content, is perceived as very painful and burdened with numerous drawbacks (inter alia, imprisonment, separation from relatives, deprivation of needs, low efficiency in reducing recidivist criminality),[2] it forces reduction of the application of a penalty of deprivation of liberty in favour of shortening its length and non-custodial penalties.

The process of ousting a penalty of deprivation of liberty by non-custodial penalties has been observed for years and results in systematic changes in the penal system.[3] The process has not been completed because, in spite of the fact that there is progress in reducing the application of a penalty of absolute deprivation of liberty,

* Prof. PhD hab., Department of Law and Administration, Faculty of Social Sciences and Humanities of Łomża State University of Applied Sciences; e-mail: mmelezini@pwsip.edu.pl; ORCID: 0000-0001-6168-5590

1 See *Uzasadnienie rządowego projektu kodeksu karnego*, [in:] *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Wydawnictwo Prawnicze, Warsaw 1997, p. 141.

2 See F. Ciepły, *Sprawiedliwościowa racjonalizacja wymiaru kary kryminalnej wobec współczesnych tendencji polityki karnej w Polsce*, Wydawnictwo KUL, Lublin 2017, pp. 247–259 and literature referred to therein; T. Szymanowski, *Recydywa w Polsce. Zagadnienia prawa karnego, kryminologii i polityki karnej*, Wolters Kluwer, Warsaw 2010, pp. 293–313.

3 See M. Melezini, *Sankcje alternatywne wobec kary pozbawienia wolności w polskim prawie karnym na tle standardów międzynarodowych*, [in:] J. Kasprzak, W. Cieślak, I. Nowicka (eds),

there is still a high number of the imprisoned (about 74,000 in 2017), with a huge number of people sentenced to deprivation of liberty and waiting for their penalty execution because they cannot be admitted to prison due to overcrowding (over 44,000 in 2018).

In fact, already the Criminal Code of 1997,[4] in its original version, adopting a new penal philosophy appropriate to a democratic state ruled by law and modern development tendencies in the European criminal law, materialised the pursuit of less restrictive criminal law and more rational penalisation expressed in the doctrine for years. The authors of the Criminal Code decided that: "a penalty of deprivation of liberty is too expensive in every respect to apply it with no restrictions". They emphasised that the penalty of deprivation of liberty in the new version of the Criminal Code should, first of all, serve the protection of society against perpetrators dangerous for the legal order, which means giving up its domination in penal policy. On the other hand, in case of petty crime, the penalty is to be an alternative one applied when another penalty or penal measure cannot fulfil the aims of punishment.[5]

The treatment of an absolute penalty of deprivation of liberty as *ultima ratio* in relation to petty crime resulted directly from the constitutional principle of proportionality (adequacy) expressed in Article 31 para. 3 of the Constitution of the Republic of Poland. In accordance with this provision, "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of the freedoms and rights". In this context, a penalty of deprivation of liberty must be perceived as a necessary legal-penal interference in order to protect certain constitutional values (the protection of individuals' and universal rights). It can be imposed only when another less painful measure is not sufficient enough to achieve the aims of protection listed in Article 31 para. 3 of the Polish Constitution.[6]

The constitutional principle of proportionality has been given its statutory representation in the solutions of the Criminal Code concerning the catalogue of

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Meandry prawa karnego i kryminalistyki. Księga jubileuszowa prof. zw. dra hab. Stanisława Pikulskiego, Wyższa Szkoła Policji w Szczytnie, Szczytno 2015, pp. 187–208.

[4] Act of 6 June 1997: Criminal Code, Journal of Laws [Dz.U.] No. 88, item 553; hereinafter also CC.

[5] See A. Zoll, *Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności*, Państwo i Prawo No. 9–10, 1998, p. 47; A. Marek, *Nowy Kodeks karny – zasady odpowiedzialności, nowa polityka karna*, Monitor Prawniczy No. 12, 1997, p. 475.

[6] See W. Wróbel, *Zasady wymiaru kary i środków karnych*, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Vol. 1, Wolters Kluwer, Warsaw 2012, pp. 735–736 and 804; M. Królikowski, R. Zawłocki, *Aksjologiczne i normatywne uwarunkowania odpowiedzialności karnej*, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz*, Vol. 1, C.H. Beck, Warsaw 2015, pp. 10–13; M. Melezini, *Założenia aksjologiczne systemu reakcji karnych na przestępstwo na tle kodeksu karnego z 1997 roku*, [in:] A. Grześkowiak, I. Zgoliński (eds), *Aksjologiczne podstawy polskiego prawa karnego w perspektywie jego ewolucji*, Wydawnictwo Kujawsko-Pomorskiej Szkoły Wyższej w Bydgoszczy, Bydgoszcz 2017, pp. 121–122.

penalties and the construction of penal sanctions as well as the adopted principles and directives of penalty imposition.[7]

The new approach to the penalty of deprivation of liberty is reflected in particular in the content of Article 58 §1 CC, which laid down a directive prescribing the treatment of a penalty of absolute deprivation of liberty as *ultima ratio* in case of offences carrying alternative non-custodial penalties, i.e. a fine, a penalty of limitation of liberty and a penalty of deprivation of liberty. The directive was applicable to all types of offences carrying alternative sanctions, within which non-custodial penalties (a fine and a penalty of limitation of liberty) were prescribed beside the penalty of deprivation of liberty in general for a period from one to two years, and exceptionally up to three years as well as up to five years. In accordance with the original wording of Article 58 §1 CC, if statute prescribes a possibility of choosing the type of penalty, a court must rule on the penalty of deprivation of liberty without conditional suspension of its execution only when another penalty or penal measure cannot fulfil the aims of punishment. As a result, the priority of non-custodial penalties and penal measures over a penalty of absolute deprivation of liberty laid down in Article 58 §1 CC obliged a court to thoroughly justify a decision on the choice of a penalty of absolute deprivation of liberty and indicate the reasons for abandoning the adjudication of one of non-custodial penalties or a penal measure or a combination of those penal sanctions. The idea of the penalty of absolute deprivation of liberty as *ultima ratio* was also extended to cover other offences carrying only a penalty of deprivation of liberty for up to five years, which was laid down in Article 58 §3 CC. In such a case, there was a possibility of adjudicating a fine or a penalty of limitation of liberty instead of a penalty of deprivation of liberty if a court imposed a penal measure at the same time. It must be emphasised, however, that the directive on the imposition of punishment laid down in Article 58 §3 CC did not give the penalty of deprivation of liberty a special status (*ultima ratio*). As a result, the application of a non-custodial penalty required thorough justification. What constitutes the supplementation of the above solutions was the establishment of the possibility of abandoning imposition of punishment at all and adjudicating a penal measure in case of offences carrying a penalty of deprivation of liberty for up to three years or a more lenient penalty in case of an act with a lower level of social harmfulness and a penal measure sufficient enough to fulfil the aims of punishment (Article 59 CC).[8]

Successive amendments also confirm the change of the role of a penalty of deprivation of liberty in the prevention of petty crime. Namely, the catalogue of penalties (Article 32 CC) was compiled in accordance with an abstractive level of painfulness from the most lenient penalty (a fine) to the most severe one (a life sentence). In the new regulation, a penalty of deprivation of liberty, formerly holding the first position in the catalogue of penalties, was placed third, following

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[7] For more on the issue, see M. Melezini, *System środków reakcji prawnokarnej. Rys historyczny*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i inne środki reakcji prawnokarnej*, 2nd edn, C.H. Beck, Instytut Nauk Prawnych PAN, Warsaw 2016, pp. 54–68; M. Melezini, *Środki karne jako instrument polityki kryminalnej*, Temida 2, Białystok 2013, pp. 94–99.

[8] See V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Wydawnictwo Uniwersytetu Mikołaja Kopernika w Toruniu, Toruń 2002, pp. 114–141.

a fine and a penalty of limitation of liberty. As it is emphasised in the justification for the Criminal Code Bill, such a sequence of penalties is to give a judge guidelines on statutory priorities concerning the choice of the type of punishment,[9] i.e. that non-custodial penalties should be given priority over the penalty of deprivation of liberty. At the same time, the pattern of sanctions in the Special Part of the Criminal Code was modified, which changed the sequence of alternative penalties starting the list with a fine and finishing it with the penalty of deprivation of liberty.

In the context of the length of a penalty of deprivation of liberty, lowering of the minimum threshold of this penalty from three months to one month (Article 37 CC) was an important change. It was decided that a too high minimum of this penalty contributed to its adjudication at a higher level.[10] It was also noticed that there were advantages of a short-term penalty of deprivation of liberty as a short shock penalty.[11]

Obviously, the authors of the Criminal Code did not limit themselves to changes reforming a penalty of deprivation of liberty. Striving to decrease the significance of the penalty of deprivation of liberty for the criminal policy was also connected with the modification of the entire penal system. Actually, the aim was to create a broad possibility of applying non-custodial penalties and penal measures that would provide courts with more discretion over the choice of penalties and penal measures for petty crimes.[12]

Unfortunately, expectations concerning rationalisation of criminal policy were not fulfilled in the practice of the administration of justice. The statistical data presented in Table 1 show that in the period 1999–2013, the penalty of deprivation of liberty continued to be a prevailing form of penal response. The share of imprisonment sentences in the total number of convictions was at the level of 64–78%. However, it should be noticed that there were significant differences in the application of the two different forms of the execution of the penalty of deprivation of liberty. While the share of a penalty of absolute deprivation of liberty was not very high as it accounted for 8.5–14% in the period 1999–2013, the share of a penalty of deprivation of liberty with the suspension of its execution constituted 54–64% of all convictions.

In general, the presented situation concerning the application of a penalty of deprivation of liberty should not raise major objections because the principle of *ultima ratio* referred exclusively to the absolute form of this penalty. However, the problem consisted in the fact that in practice a penalty of deprivation of liberty with the conditional suspension of its execution was overused. The statistical analysis shows that this form of penal response to offences was applied to over a half of all convictions, and this concerned a very high number of the convicted offenders (127,000–291,000 annually). Mass application of the penalty of deprivation of liberty with conditional

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[9] *Uzasadnienie rządowego projektu*..., p. 137.

[10] See A. Marek, *Prawo karne*, 10th edn, C.H. Beck, Warsaw 2011, p. 254; F. Ciepły, *Sprawiedliwościowa racjonalizacja*..., pp. 253–254.

[11] See M. Melezini, K. Kazmiruk, *Kara krótkoterminowego pozbawienia wolności a problem przeludnienia więzień*, [in:] Z. Ćwiąkalski, G. Artymiak (eds), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, Wolters Kluwer, Warsaw 2009, pp. 577–591.

[12] A. Zoll, *Założenia politycznokryminalne*..., pp. 48–50. Also see M. Melezini, *Założenia aksjologiczne*..., pp. 126–133.

suspension of its execution was accompanied by a seldom use of probation elements in the form of supervision and imposition of obligations. The lack of actual probation-related influence on a convicted offender resulted in his relapse into crime.[13]

Table 1. Penalty of deprivation of liberty in all convictions in the period 1999–2013

Year	All convictions	Penalty of deprivation of liberty					
		All types		Absolute type		Conditionally suspended execution	
		Total	%	Total	%	Total	%
1999	207,492	153,445	74.0	26,083	12.6	127,362	61.4
2000	222,785	174,162	78.2	30,680	13.8	143,482	64.4
2001	315,013	221,762	70.4	36,943	11.7	184,819	58.7
2002	365,326	250,275	68.5	35,790	9.8	214,485	58.7
2003	415,933	269,643	64.8	36,588	8.8	233,055	56.0
2004	513,410	327,331	63.7	48,993	9.5	278,338	54.2
2005	504,281	334,378	66.3	42,969	8.5	291,409	57.8
2006	462,937	315,074	68.1	42,421	9.2	272,653	58.9
2007	426,377	294,826	69.1	37,685	8.8	257,141	60.3
2008	420,729	289,269	68.7	38,495	9.1	250,774	59.6
2009	415,272	281,887	67.9	37,913	9.1	243,974	58.8
2010	432,891	290,669	67.1	39,582	9.1	251,087	58.0
2011	423,464	280,023	66.1	40,947	9.7	239,076	56.4
2012	408,107	265,876	65.1	41,691	10.2	224,185	54.9
2013	353,208	235,032	66.5	39,684	11.2	195,348	55.3

Source of total numbers: Management Statistical Information Department of the Ministry of Justice (https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie); author's own calculations

[13] See J. Skupiński, *Warunkowe zawieszenie wykonania kary pozbawienia wolności*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i środki karne. Poddanie sprawcy próbie*, C.H. Beck, Instytut Nauk Prawnych PAN, Warsaw 2010, p. 1062; T. Darkowski, *Warunkowe zawieszenie wykonania kary – próba oceny potencjalnego wpływu nowelizacji na politykę karną*, [in:] A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Wolters Kluwer, Warsaw 2016, pp. 50–51.

In literature, attention is drawn to the fact that the penalty of deprivation of liberty with conditional suspension of its execution was most often adjudicated in the so-called consensual mode, which made it possible to apply it regardless of the conditions laid down in Article 69 CC, i.e. regardless of whether a positive criminological forecast was made. Such practice led to multiple sentencing of the same offender to the penalty of deprivation of liberty with conditional suspension of its execution and increased the probability of ruling the execution of the penalty of deprivation of liberty. At the same time, it was emphasised that a court adjudicating the penalty of deprivation of liberty with conditional suspension of its execution often determines a penalty at a higher level, disproportionate to the gravity of an act, than when it adjudicates a penalty without suspension of its execution. As a result, in case of ruling the execution of the penalty of deprivation of liberty, a perpetrator of petty crime faced a penal repression disproportionate to the level of guilt and the gravity of the committed offence.[14]

The defective practice of applying the penalty of deprivation of liberty with conditional suspension of its execution led to very frequent ruling of its execution, increased the number of offenders deprived of liberty and did not allow decreasing the number of convicted offenders waiting for serving the penalty of deprivation of liberty.

Still in 1999, 41,656 offenders sentenced to a penalty of deprivation of liberty were kept in prisons and remand centres. In 2014, the number rose to 71,221. The imprisonment rate of 147 convicts per 100,000 inhabitants in 1999 increased to 221 convicts in 2013. Among the European Union countries, Poland ranked among the countries with the highest imprisonment rate (Poland – 217, Hungary – 186, England and Wales – 148, Italy – 106, France – 101, Germany – 79, and Sweden – 67). At the same time, the number of adjudicated and not executed penalties of deprivation of liberty increased (from 28,761 in 2001 to 52,846 in 2014) and so did the number of offenders involved (from 26,963 in 2001 to 42,709 in 2014).[15]

The diagnosis of problems connected with the results of that penal policy justified the need of amending the Criminal Code and reorganising the penal system so that non-custodial penalties, i.e. a fine and a penalty of limitation of liberty, would become the basic means of penal response to petty crime and the possibility of applying a penalty of deprivation of liberty with conditional suspension of

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[14] See W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Znak, Kraków 2010, p. 483; J. Skupiński, *Warunkowe zawieszenie wykonania kary*..., p. 1123; T. Darkowski, *Warunkowe zawieszenie*..., pp. 53–54. Also see M. Melezini, G.B. Szczygieł, *Warunkowe zawieszenie wykonania kary pozbawienia wolności jako instrument polityki kryminalnej*, [in:] P. Góralski, A. Muszyńska (eds), *Współczesne przekształcenia sankcji karnych – zagadnienia teorii, wykładni i praktyki stosowania*, Instytut Wydawniczy EuroPrawo, Warsaw 2018, pp. 187–188; *Uzasadnienie projektu ustawy Kodeks karny Komisji Kodyfikacyjnej Prawa Karnego*, Czasopismo Prawa Karnego i Nauk Penalnych No. 4, 2013, pp. 45–47.

[15] See T. Szymanowski, *Skazania na bezwzględne kary pozbawienia wolności jako następstwo nieefektywnej polityki karnej*, Państwo i Prawo No. 4, 2014, pp. 87–89; A. Nawój-Śleszyński, *Problem przeludnienia więzień w Polsce w świetle rekomendacji R (99) 22 Rady Europy z 30 września 1999 r.*, Przegląd Więziennictwa Polskiego No. 81, 2013, pp. 5–32; G.B. Szczygieł, *Kara pozbawienia wolności*, [in:] *System Prawa Karnego*, Vol. 6: *Kary i inne środki reakcji*..., pp. 292–295.

its execution would be also limited. The amendment to the Criminal Code of 20 February 2015 was to ensure the achievement of this goal.[16]

Among numerous changes introduced to the provisions of the Criminal Code, from the perspective of the practice of law application, the most important amendments were those consisting in radical limitation of the possibility of adjudicating the penalty of deprivation of liberty with conditional suspension of its execution with the simultaneous considerable extension of grounds for adjudicating non-custodial penalties as well as the new approach to the directive on *ultima ratio* of the penalty of deprivation of liberty.

In accordance with the new wording of Article 58 §1 CC laying down *ultima ratio* of a penalty of deprivation of liberty, if statute stipulates that there is a possibility of choosing the type of punishment and an offence carries a penalty of deprivation of liberty not exceeding five years, a court must adjudicate the penalty of deprivation of liberty only in case another penalty or a penal measure cannot fulfil the aims of punishment. The directive of this provision still prescribes the treatment of the penalty of deprivation of liberty as *ultima ratio* but the new approach concerns both penalties of deprivation of liberty, the absolute one and that with conditional suspension of its execution. It is a very important change strengthening the primacy of non-custodial penalties and penal measures in case of offences carrying alternative penalties of a fine or limitation of liberty and a penalty of deprivation of liberty for up to five years. The modification of the wording of Article 58 §1 CC obliges a court to thoroughly justify a decision on the choice of the penalty of deprivation of liberty adjudicated not only as an absolute one but also one with conditional suspension of its execution, and to indicate reasons why none of non-custodial penalties or penal measures cannot fulfil the aims of punishment.[17] It must be added that apart from the change of the wording of Article 58 §1 CC, Article 58 §2 was repealed as it limited the formal possibility of adjudicating a fine due to a perpetrator's financial situation, which justified a conviction that he would not pay a fine and its execution would be unfeasible. Thus, the derogation of Article 58 §2 CC aimed to constitute an additional incentive to adjudicate a fine instead of the penalty of absolute deprivation of liberty and the penalty of deprivation of liberty with conditional suspension of its execution.[18]

The legislator's striving to extend grounds for adjudicating non-custodial penalties was also reflected in the new solution adopted in Article 37a CC, which substituted the repealed Article 58 §3 CC. In accordance with the added Article 37a CC, if statute prescribes a penalty of deprivation of liberty that does not exceed eight years, a court may adjudicate a fine or a penalty of limitation of liberty

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[16] Act of 20 February 2015 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2015, item 396. Also see *Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z projektami aktów wykonawczych z 15 V 2014 r.*, print no. 2393, pp. 1–5.

[17] See V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 4th edn, C.H. Beck, Warsaw 2018, pp. 448–449; J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Wolters Kluwer, Warsaw 2015, pp. 165–168.

[18] See J. Majewski, *Kodeks karny…*, pp. 168–171.

referred to in Article 34 §1a(1) or (4). There is no doubt that the solution aims to limit the application of the penalty of deprivation of liberty, both the absolute one and with conditional suspension of its execution.[19] It considerably extends the scope of cases in which it is possible to impose a fine or a penalty of limitation of liberty on an offender because Article 37a CC is applicable to statutory penal provisions as well as those not laid down in the Code. The condition that the offence must carry a penalty of deprivation of liberty not exceeding eight years is the only limitation to its application resulting from Article 37a CC.

It must be highlighted that there are divergent views on the application of Article 37a CC presented in the doctrine. According to some scholars, Article 37a CC is applicable exclusively to a simple sanction in the form of a penalty of deprivation of liberty for up to eight years.[20] Others admit a possibility of applying Article 37a CC to a complex, cumulative sanction[21] where apart from a penalty of deprivation of liberty for up to eight years, a cumulative fine can be applied as well as to an alternative sanction where the penalty of deprivation of liberty for up to eight years is an alternative to a penalty of military detention, a penalty of limitation of liberty, a fine and a penalty of limitation of liberty and military detention.[22] There is also an opinion presented in literature that the scope of application of Article 37a CC covers all types of prohibited acts carrying the penalty of deprivation of liberty for up to eight years, regardless of whether a given type of offence carries another type of punishment.[23] The divergence of opinions also concerns the issue of the legal nature of Article 37a CC. In literature, there is a stand that Article 37a CC constitutes a modification of the statutory penalty prescribed for the commission of prohibited acts. It co-determines statutory punishment in cases where provisions prescribe a penalty of deprivation of liberty not exceeding eight years. In accordance with this opinion, Article 37a CC transforms simple sanctions, including the penalty of deprivation of liberty, into alternative sanctions including a fine and a penalty of limitation of liberty.[24] According to the adverse opinion, Article 37a CC constitutes a special directive on judicial administration of a penalty enabling adjudicating

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19 See A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, 5th edn, C.H. Beck, Warsaw 2018, pp. 340–341; J. Kosonoga-Zygmunt, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 4th edn, Warsaw 2018, p. 340.

20 See A. Grześkowiak, [in:] *Kodeks karny. Komentarz…*, p. 342; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Praktyczny komentarz*, Kantor Wydawniczy Zakamycze, Kraków 2014, p. 122; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, 2nd edn, Wolters Kluwer, Warsaw 2018, p. 234; M. Królikowski, R. Zawłocki, *Prawo karne*, 3rd edn, C.H. Beck, Warsaw 2018, p. 320.

21 See V. Konarska-Wrzosek, *Kodeks karny. Komentarz…*, p. 235.

22 See J. Majewski, *Kodeks karny…*, pp. 89–90; J. Kosonoga-Zygmunt, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz…*, pp. 343–344.

23 See M. Małecki, *Stosowanie art. 37a k.k. Glosa do postanowienia Sądu Najwyższego z 31.03.2016 r. (II KK 361/15)*, Przegląd Sądowy No. 3, 2017, pp. 121–123; J. Majewski, *Kodeks karny…*, p. 85.

24 See J. Majewski, *Kodeks karny…*, pp. 85–94; M. Małecki, *Ustawowe zagrożenie karą i sądowy wymiar kary*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Krakowski Instytut Prawa Karnego Fundacja, Kraków 2015, pp. 284–289; J. Giezek, *O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzonej kary*, Palestra No. 7–8, 2015, pp. 25–36; E. Hryniewicz-Lach, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, 4th edn,

courts to apply a non-custodial penalty (a fine or a penalty of limitation of liberty) instead of a penalty of deprivation of liberty prescribed in statute, i.e. a sanction.[25] Regardless of doctrinal differences concerning the legal nature of Article 37a CC, the undoubted penal policy aim of the regulation is to considerably extend the possibility of adjudicating a fine or a penalty of limitation of liberty and to limit the application of a penalty of absolute deprivation of liberty or one with conditional suspension of its execution.

The far-reaching modification of the institution of conditional suspension of the execution of a penalty of deprivation of liberty with the simultaneous abandonment of the possibility of conditional suspension of the execution of a fine or a penalty of limitation of liberty became a key change correlated with the aims of the criminal law reform. Indeed, the possibility of applying conditional suspension of the penalty execution was considerably limited by lowering the maximum limit for a penalty of deprivation of liberty that may be suspended from two years to one year and by adding a new condition excluding the application of conditional suspension of the execution of a penalty of deprivation of liberty towards a perpetrator who, at the moment of crime commission, was subject to a penalty of deprivation of liberty (an absolute or suspended one). Apart from those conditions, it is necessary to match a requirement that the application of conditional suspension of the penalty execution will be sufficient to achieve the aims of punishment, i.e. in particular prevent relapse into crime (Article 69 §1 CC).[26] If the modification of Article 58 §1 CC treating a penalty of deprivation of liberty (the absolute one and with suspension of its execution) as *ultima ratio* is taken into account, it turns out that, in case of statutory penalties that make it possible to choose between a penalty of deprivation of liberty for up to five years and non-custodial penalties, the possibility of applying conditional suspension of the execution of the penalty of deprivation of liberty was limited only to those cases where a court decides that "another penalty or a penal measure will not fulfil the aims of punishment".

It should be added that the mitigation of criminal liability resulting from what is called a consensual mode was also eliminated. It is connected with the possibility of conditionally suspending the execution of a penalty of deprivation of liberty for

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C.H. Beck, Warsaw 2017, pp. 640–641; J. Kosonoga-Zygmunt, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*…, pp. 342–343.

[25] See V. Konarska-Wrzosek, *Szczególne dyrektywy sądowego wymiaru kary*, [in:] T. Kaczmarek (ed.), *System Prawa Karnego*, Vol. 5: *Nauka o karze. Sądowy wymiar kary*, 2nd edn, C.H. Beck, Instytut Nauk Prawnych PAN, Warsaw 2017, pp. 302–304; A. Grześkowiak, [in:] *Kodeks karny. Komentarz*…, pp. 343–344; M. Mozgawa, [in:] *Kodeks karny. Praktyczny komentarz*…, p. 120; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warsaw 2016, p. 165; M. Królikowski, R. Zawłocki, *Prawo karne*…, p. 320; B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warsaw 2016, pp. 209–210.

[26] For more on the issue of conditional suspension of the execution of the penalty of deprivation of liberty, see A. Zoll, *Środki związane z poddaniem sprawcy próbie i zamiana kary*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015*…, pp. 436–438; J. Majewski, *Kodeks karny*…, pp. 223–224 and 237–282; J. Skupiński, *Warunkowe zawieszenie wykonania kary*, [in:] M. Melezini (ed.), *System Prawa Karnego*…, Vol. 6, 2016, pp. 1124–1136. Also see articles in A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Wolters Kluwer, Warsaw 2016, p. 272.

up to five years, while the maximum determined in Article 69 §1 CC in the original version was two years. This legislative step resulted from an accurate diagnosis that the overuse of this form of penal response was a significant, if not the main, obstacle to implement one of the basic penal policy objectives of the binding Criminal Code, which was (and still is) the achievement of a state in which a fine and a penalty of limitation of liberty becomes a basic (from the statistical point of view) means of penal response to crime of "petty" and "medium" significance.[27]

The drastic limitation of the possibility of applying conditional suspension of the execution of a penalty of deprivation of liberty resulting from the amended Article 69 §1 CC faced numerous objections expressed by the representatives of jurisprudence. On 20 May 2014, the Commission for Criminal Law Codification issued a statement[28] in which it presented its opinions about the solutions proposed in the Bill amending the Act: Criminal Code and some other acts adopted by the government on 8 May 2014. It drew attention to the view that implementation of such a drastic proposal to limit the use of conditional suspension of the execution of a penalty of deprivation of liberty "poses a risk that the prison population will increase and additional financial and social costs will have to be incurred".

The solutions adopted next were assessed as too drastic, although the aim and direction of change were approved of. Criticism concerned, in particular, the reduction of the maximum threshold for the adjudicated penalty of deprivation of liberty the execution of which may be conditionally suspended from two years to one year due to high probability of increasing the number of absolute deprivation of liberty sentences as well as because of the abandonment of the use of a court probation officer's direct influence on a convicted offender in the long-term and "misunderstanding of the role of well-implemented probation".[29] Also subjective limitations of conditional suspension of the execution of the penalty of deprivation of liberty excluding the application of this measure to a perpetrator who was already sentenced to deprivation of liberty at the moment of crime commission is considered too far-reaching as a general preventive restriction considerably limiting

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[27] *Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw*, print no. 2393, sub-section II. 4; J. Majewski, *Kodeks karny…*, pp. 203–204; J. Skupiński, J. Mierzwińska-Lorencka, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz…*, pp. 524–527.

[28] Statement of the Commission for Criminal Law Codification of 22 May 2014 (copied print).

[29] See A. Zoll, *Regulacja warunkowego zawieszenia wykonania kary pozbawienia wolności w ustawie z 20 lutego 2015 r.*, [in:] M. Bojarski, J. Brzezińska, K. Łucarz (eds), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław 2015, p. 412; V. Konarska-Wrzosek, *Ustawowe przesłanki warunkowego zawieszenia wykonania kary po nowelizacji kodeksu karnego*, [in:] A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary…*, pp. 168 and 180; J. Lachowski, *Ocena wybranych zmian w zakresie instytucji warunkowego zawieszenia wykonania kary w ustawie z 20 lutego 2015 r.*, [in:] M. Bojarski, J. Brzezińska, K. Łucarz (eds), *Problemy współczesnego prawa karnego…*, pp. 250–255; T. Szymanowski, *Nowelizacja kodeksu karnego z 2015 r.*, Przegląd Więziennictwa Polskiego No. 87, 2015, p. 19; P. Burzyński, *Zmiany normatywne w zakresie instytucji warunkowego zawieszenia wykonania kary pozbawienia wolności – uwagi praktyczne*, [in:] A. Adamski, M. Berent, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary…*, pp. 60–63.

the possibility of individual imposition of the penalty and covering a great number of cases at the same time.[30]

Striving to limit the application of the penalty of deprivation of liberty (the absolute one and with suspension of its execution) was also reflected in a series of other amendments to the Criminal Code, in particular in the introduced possibility of exchanging the suspended penalty of deprivation of liberty into a fine or a penalty of limitation of liberty (Article 75a CC), in the reform of a penalty of limitation of liberty (Articles 34–35 CC), which is to become a real alternative to a penalty of deprivation of liberty (also that with conditional suspension of its execution), in the introduction of the possibility of imposing on a perpetrator the so-called mixed penalty, i.e. a short-term penalty of deprivation of liberty and a penalty of limitation of liberty (Article 37b CC), which "should be especially attractive in case of more serious offences",[31] or in the extension of the possibility of applying conditional discontinuation of proceedings concerning all offences carrying a penalty of deprivation of liberty not exceeding five years (Article 66 CC).

It is worth considering whether the expectations connected with the reform of criminal law were met in the practice of justice administration and influenced the change in the position of the penalty of deprivation of liberty within the structure of adjudicated penalties.

Table 2. Penalty of deprivation of liberty among all convictions in the period 2014–2017

Year	All convictions	Penalty of deprivation of liberty					
		All types		Absolute type		Conditionally suspended execution	
		Total	%	Total	%	Total	%
2014	295,353	199,167	67.4	35,633	12.1	163,534	55.4
2015	260,034	167,028	64.2	33,952	13.1	133,076	51.2
2016	289,512	125,368	43.3	43,695	15.1	81,673	28.2
2017	241,436	99,346	41.1	44,527	18.4	54,818	22.7

Source of data: Management Statistical Information Department of the Ministry of Justice (https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie); author's own calculations.

[30] J. Skupiński, *Zalety i wady instytucji warunkowego zawieszenia wykonania kary w założeniach nowej polityki karnej*, [in:] A. Adamski, M. Biernat, M. Leciak (eds), *Warunkowe zawieszenie wykonania kary…*, p. 190; V. Konarska-Wrzosek, *Ustawowe przesłanki stosowania…*, p. 180; A. Zoll, *Regulacja warunkowego zawieszenia…*, pp. 412–413; J. Lachowski, *Ocena wybranych zmian…*, pp. 253–254.

[31] Justification for the government bill, p. 12.

The statistical data in Table 2 show that there are evident changes in the picture of the application of the penalty of deprivation of liberty after the criminal law reform of 2015 but the direction of those changes does not always meet the expectations.

First of all, in accordance with the expectations, the share of the penalty of deprivation of liberty in the total number of convictions clearly decreased from 67.4% in 2014 to 41.1% in 2017, i.e. by 26.3%. In the period 2016–2017, the share of the penalty of deprivation of liberty within the structure of all convictions fell below 50% for the first time from 1999. This does not mean, however, it can be claimed that the penalty of deprivation of liberty is treated in terms of *ultima ratio* in the practice of justice administration. In fact, the analysis of the structure of convictions indicates that the penalty of deprivation of liberty was still a basic means of penal response as in 2017, when the share of a fine accounted for 35.1% and of a penalty of limitation of liberty for 22.3%.[32]

It is worth emphasising that the importance of non-custodial penalties, i.e. a fine and a penalty of limitation of liberty, in the penal policy increased. In 2017 the share of the total number of those penalties accounted for 57.4% and outnumbered the share of the penalty of deprivation of liberty (41.1%). Thus, a conclusion can be drawn that the criminal law reform of 2015 contributed to the increase in the importance of non-custodial penalties in practice, and those penalties became a dominating form of penal response to crime.

On the other hand, an alarming tendency has appeared in the picture of the application of a penalty of absolute deprivation of liberty. Indeed, an increase in the frequency of the application of the penalty of absolute deprivation of liberty is observed every year. While in 2014 the share of the penalty of absolute deprivation of liberty accounted for 12.1%, in 2017 it rose to 18.4%. Such a big share of the penalty of absolute deprivation of liberty in all convictions was recorded for the first time after the Criminal Code of 1997 entered into force. At the same time, the number of adjudicated penalties of absolute deprivation of liberty rose considerably (from 35,633 in 2014 to 44,527 in 2017). Undoubtedly, it is a negative phenomenon, which results especially from the substantial limitation of the possibility of applying a penalty of deprivation of liberty with conditional suspension of its execution. It will result in an increased number of adjudicated penalties of deprivation of liberty without execution, which is reflected in the prison population.

It must be taken into account that, in the currently binding legal environment, the penalty of absolute deprivation of liberty is not only a self-standing penalty but it also constitutes an element of a mixed penalty (a penalty of absolute deprivation of liberty and a penalty of limitation of liberty). In 2017, there were 2,029 offenders sentenced to the mixed penalty, however, the penalty of deprivation of liberty with conditional suspension of its execution was adjudicated in 20 cases. Thus, if 2,009 cases of the mixed penalty sentences are taken into account, it turns out that the number of adjudicated deprivation of liberty penalties grew to 46,536, which accounts for 19.3% of all convictions.

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[32] The author's own calculations based on statistical data of Management Statistical Information Department of the Ministry of Justice.

In accordance with the assumptions of the criminal law reform, the share of the penalty of deprivation of liberty with conditional suspension of its execution decreased considerably. Still in 2014 the number of adjudicated penalties of deprivation of liberty with conditional suspension of their execution accounted for 163,534 and the share of this means of penal response in all convictions was at the level of 55.4%. In 2017 the number of the adjudicated penalties of deprivation of liberty with conditional suspension of their execution fell to 54,818, i.e. by 108,716, and its share in the structure of adjudicated sentences decreased to 22.7%, i.e. by 32.7%. As a result, the penalty of deprivation of liberty with conditional suspension of its execution lost its leading position among applied penal response measures.

The phenomenon might be positively assessed, in terms of treating the penalty of deprivation of liberty with conditional suspension of its execution as *ultima ratio* in the practice of justice administration, if the recognition of the penalty of absolute deprivation of liberty as *ultima ratio* were practically not ceased at the same time. This state was undoubtedly affected by drastic limitation of statutory possibilities of applying the penalty of deprivation of liberty with conditional suspension of its execution. It led to a situation in which, on the one hand, in accordance with the assumptions of the criminal law reform, non-custodial penalties, i.e. a fine and a penalty of limitation of liberty, partially substituted for the penalty of deprivation of liberty with conditional suspension of its execution; and, on the other hand, against the legislator's expectations, the penalty of absolute deprivation of liberty to some extent substituted for the penalty of deprivation of liberty with conditional suspension of its execution.

A question is raised whether the observed changes in the structure of the application of the penalty of deprivation of liberty are reflected in the size of prison population.

Table 3. Offenders temporarily arrested and serving a sentence

Deprivation of liberty	2014		2017		30 September 2018	
	Total	%	**Total**	%	**Total**	%
Total	77,371	100	73,822	100	73,035	100
Temporarily arrested	6,238	8.1	7,239	9.8	7,476	10.2
Convicted and serving a sentence	70,125	90.6	65,769	89.1	64,526	88.3
Punished	1,008	1.3	814	1.1	1,033	1.4

Source: Ministry of Justice, Central Board of Prison Service, *Roczna informacja statystyczna za rok 2017* and *Miesięczna informacja statystyczna – listopad 2018*.

The analysis of the data presented in Table 3 shows that in the period 2017–2018 (as of 30 November) the number of offenders deprived of liberty decreased in comparison to 2014. While in 2014 it accounted for 77,371, the figure was 73,035

in 2018. The number of offenders convicted and serving the penalty of deprivation of liberty went down (from 70,125 to 64,526), which should be positively assessed. However, at the same time, the number of adjudicated and not executed penalties of deprivation of liberty and the number of offenders concerned rose. Thus, the number of adjudicated and not executed penalties of deprivation of liberty increased from 52,846 in 2014 to 54,989 on 30 November 2018. The number of offenders concerned rose from 42,709 in 2014 to 44,292 on 30 November 2018.[33]

Attention should also be drawn to an alarming tendency in the application of temporary detention. Indeed, the number of the temporarily arrested clearly increased. Still in 2014, the number of the temporarily arrested accounted for 6,238 but in 2017 it rose to 7,239, and to 7,476 in 2018 (as of 30 November). The share of temporarily arrested persons in the prison population increased from 8.1% to 10.2%. In this context, it should be noticed that temporary detention influences the adjudication of the penalty of deprivation of liberty. Thus, the increase in the temporarily arrested population may next translate into the increase in the adjudicated penalties of deprivation of liberty and their length.

Summing up, it should be stated that the penalty of deprivation of liberty is still not treated in terms of *ultima ratio*, although at the same time the role of non-custodial penalties is becoming more important in the penal policy. It seems that a proposal, expressed in literature many times, to extend grounds for the application of the penalty of deprivation of liberty with conditional suspension of its execution should be considered. It is a probation measure, which is very important in the penal policy; and the introduced limitation of the possibility of applying it is too restrictive, which results, inter alia, in the growing share of the penalty of absolute deprivation of liberty in the total number of convictions as well as the growing number of adjudicated but not executed penalties of absolute deprivation of liberty.

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[33] The data are based on 2018 statistics provided by the Central Board of Prison Service (www.sw.gov.pl/dział/statystyka).

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IMPLEMENTATION OF THE PRINCIPLE TREATING DEPRIVATION OF LIBERTY AS *ULTIMA RATIO* IN THE PRACTICE OF APPLYING CRIMINAL LAW

Summary

The article discusses the issue concerning the implementation of the principle of treating a penalty of deprivation of liberty as *ultima ratio* in the practice of justice administration. The statutory solutions adopted in the original version of the Criminal Code of 1997 are the starting point of the analysis. It shows a new approach to the penalty of deprivation of liberty, which – as it was assumed – was to become a subsidiary penalty applied to petty crime. In practice, it turned out that an attempt to minimise the role of the penalty of deprivation of liberty in the penal policy was a failure, which resulted in a considerable size of prison population and a big number of offenders convicted and waiting for the penalty execution. A penalty of deprivation of liberty with conditional suspension of its execution adjudicated on a massive scale remained the basic means of penal response to petty crime. The diagnosis of the reasons for the actual situation became the basis for the criminal law reform of 2015. The article discusses the most important amendments to the provisions of the Criminal Code, which are to contribute to the increase in the importance of non-custodial penalties (a fine and a penalty of deprivation of liberty) and to limit the scope of application of the penalty of deprivation of liberty (its absolute type and with conditional suspension of its execution). The statistical overview of the penalty of absolute deprivation of liberty and the penalty of deprivation of liberty with conditional suspension of its execution presented in the article makes the author draw a conclusion that the penalty of deprivation of liberty is still treated as *ultima ratio* in the practice of justice administration. Despite a considerable decrease in the importance of the penalty of deprivation of liberty with conditional suspension of its execution in the penal policy and a growing share of non-custodial penalties in the structure of adjudicated penalties, the share of the penalty of absolute deprivation of liberty in all convictions is growing and the number of adjudicated and not executed penalties of absolute deprivation of liberty is also higher. That is why, the author expresses an opinion that failure in the implementation of the penal policy assumptions of the 2015 criminal law reform results from too drastic limitation of a possibility of applying the penalty of deprivation of liberty with conditional suspension of its execution. Therefore, she supports the proposals expressed in literature to extend grounds for adjudicating the penalty of deprivation of liberty with conditional suspension of its execution.

Keywords: penalty of deprivation of liberty, penalty of deprivation of liberty with conditional suspension of its execution, criminal law reform, practice of justice administration, penal policy, non-custodial penalties, prison population

REALIZACJA ZASADY TRAKTOWANIA KARY POZBAWIENIA WOLNOŚCI JAKO *ULTIMA RATIO* NA PŁASZCZYŹNIE STOSOWANIA PRAWA KARNEGO

Streszczenie

Przedmiotem rozważań jest realizacja zasady traktowania kary pozbawienia wolności jako *ultima ratio* w praktyce wymiaru sprawiedliwości. Punktem wyjścia analizy są rozwiązania ustawowe przyjęte w pierwotnym brzmieniu kodeksu karnego z 1997 r., ukazujące nowe podejście do kary pozbawienia wolności, która w założeniu miała stać się karą subsydiarną w odniesieniu do drobnej i średniej przestępczości. W praktyce okazało się, że próba zminimalizowania roli kary pozbawie-

nia wolności w polityce karnej nie powiodła się, czego rezultatem był wysoki poziom populacji więziennej oraz duża liczba osób skazanych na karę pozbawienia wolności i oczekujących na jej wykonanie. Podstawowym środkiem reakcji karnej na przestępstwa drobne i średniej wagi pozostawała niezmiennie kara pozbawienia wolności z warunkowym zawieszeniem jej wykonania, orzekana na masową skalę. Diagnoza przyczyn zaistniałych niepowodzeń stała się podłożem reformy prawa karnego z 2015 r. W opracowaniu omówiono najważniejsze zmiany w przepisach kodeksu karnego, które mają przyczynić się do zwiększenia roli kar nieizolacyjnych (grzywny i kary ograniczenia wolności) i ograniczenia zakresu stosowania kary pozbawienia wolności (bezwzględnej i z warunkowym zawieszeniem jej wykonania). Prezentowany w opracowaniu statystyczny obraz bezwzględnej kary pozbawienia wolności oraz kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania skłonił autorkę do wniosku, że kara pozbawienia wolności nadal nie jest traktowana w praktyce wymiaru sprawiedliwości jako *ultima ratio*. Pomimo wydatnego ograniczenia znaczenia kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania w polityce karnej i rosnącego udziału kar nieizolacyjnych w strukturze kar orzeczonych, powiększa się udział bezwzględnej kary pozbawienia wolności wśród skazań ogółem oraz wzrasta liczba orzeczonych i niewykonywanych bezwzględnych kar pozbawienia wolności. Autorka wyraża pogląd, że na niepowodzenia w zakresie realizacji założeń politycznokryminalnych reformy prawa karnego z 2015 r. rzutują nazbyt drastyczne ograniczenia możliwości zastosowania kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania. W związku z tym przyłącza się do zgłaszanych w piśmiennictwie postulatów rozszerzenia podstaw orzekania kary pozbawienia wolności z warunkowym zawieszeniem jej wykonania.

Słowa kluczowe: kara pozbawienia wolności, kara pozbawienia wolności z warunkowym zawieszeniem wykonania, reforma prawa karnego, praktyka wymiaru sprawiedliwości, polityka karna, kary nieizolacyjne, populacja więzienna

EJECUCIÓN DEL PRINCIPIO DE TRATAR LA PENA DE PRIVACIÓN DE LIBERTAD COMO *ULTIMA RATIO* DESDE LA PERSPECTIVA DE APLICACIÓN DE DERECHO PENAL

Resumen

Se analiza la ejecución del principio de tratar la pena de privación de libertad como *ultima ratio* en la práctica. Se parte de análisis de regulaciones legales adoptadas en la primera versión del código penal de 1997 que demuestra nueva aproximación a la pena de privación de libertad que debería ser una pena subsidiara en la delincuencia pequeña y mediana. En la práctica, resulta que el intento de minimizar el papel de la pena de privación de libertad en la política penal fracasó, cuyo resultado fue un nivel alto de la población prisionera y elevado número de personas condenadas a la pena de privación de libertad y que esperaban su ejecución. La medida de reacción penal básica para los delitos de pequeña y mediana gravedad era la pena de privación de libertad con la suspensión condicional de su ejecución que se dictaba en escala masiva. El análisis de fracaso ocurrido fue objeto de reforma de derecho penal en 2015. El artículo analiza las modificaciones más importantes del código penal que han de incrementar el papel de penas no privativas de libertad (multa y pena de restricción de libertad) y reducir el ámbito de aplicación de la pena de privación de libertad (sin suspensión y con suspensión condicional de su ejecución). Las estadísticas presentadas en el artículo de la pena de privación de libertad sin la suspensión condicional de su ejecución y de la pena de privación de libertad con la suspensión condicional de su ejecución le llevan a la autora a la conclusión que la pena de privación de

libertad sigue siendo sin tratarla en la práctica como la *ultima ratio*. A pesar de limitar de forma sustancial la importancia de la pena de privación de libertad con la suspensión condicional de su ejecución en la política penal y aumentar la participación de penas no privativas de libertad, dentro de las penas impuestas, se aumenta la participación de la pena de privación de libertad sin la suspensión condicional de su ejecución en las condenas totales y se aumenta el número de penas de privación de libertad sin la suspensión condicional de su ejecución que son impuestas y no ejecutadas. La autora sostenta que al fracaso en el ámbito de ejecución de principios de política criminal de la reforma de derecho penal en 2015 contribuyen limitaciones demasiado drásticas para poder aplicar la pena de privación de libertad con la suspensión condicional de su ejecución. Por lo tanto, se junta a los postulados de la doctrina de ampliar requisitos para aplicar la pena de privación de libertad con la suspensión condicional de su ejecución.

Palabras claves: pena de privación de libertad, pena de privación de libertad con la suspensión condicional de su ejecución, reforma de derecho penal, práctica judicial, política penal, penas no privativas de libertad, población prisionera

РЕАЛИЗАЦИЯ ПРИНЦИПА ИНТЕРПРЕТАЦИИ НАКАЗАНИЯ В ВИДЕ ЛИШЕНИЯ СВОБОДЫ КАК ПОСЛЕДНЕГО ДОВОДА – *ULTIMA RATIO* – В РАМКАХ СОБЛЮДЕНИЯ УГОЛОВНОГО ПРАВА

Резюме

Предмет исследования – реализация принципа интерпретации наказания в виде лишения свободы как последнего довода – *ultima ratio* – в судебной практике. Точкой отсчёта для анализа служат законодательные решения, принятые в первоначальном варианте Уголовного кодекса от 1997 года, указывающие на новый подход к наказанию в виде лишения свободы, которое концептуально должно было выступать в качестве субсидиарной ответственности в отношении преступлений малой и средней тяжести. Как показала практика, попытка минимизировать роль наказания в виде лишения свободы оказалась безуспешной, результатом чего были перегруженность мест лишения свободы, большое количество приговорённых к наказанию в виде лишения свободы и ожидающих приведения в исполнение данного приговора. В качестве основного средства уголовного преследования за преступления малой и средней тяжести всегда выступало наказание в виде лишения свободы с условным приостановлением его исполнения, определяемое на массовом уровне. Диагностика причин упомянутых сложностей стала основанием для реформы уголовного права 2015 года. В статье рассматриваются наиболее важные изменения в положениях Уголовного кодекса, целью которых является повышение актуальности роли наказаний, не связанных с лишением свободы (штрафы и наказания в виде ограничения свободы), и ограничение объёма применения наказания в виде лишения свободы (до абсолютного наказания и с условным приостановлением его исполнения). Представленный в исследовании статистический вывод об абсолютном наказании в виде лишения свободы, а также наказания в виде лишения свободы с условным приостановленнием его исполнения позволил Автору прийти к заключению, что наказание в виде лишения свободы по-прежнему не воспринимается в практике правосудия как *ultima ratio*. Несмотря на существенное ограничение значимости наказания в виде лишения свободы с условным приостановлением его исполнения в уголовной политике и возрастающего количества наказаний, не связанных с лишением свободы, среди определяемых наказаний растёт коэффициент безусловных наказаний в виде лишения свободы среди общего количества наказаний, а также увеличивается количество определенных судом и не приведенных в исполнение безусловных наказаний в виде лишения свободы. Автор высказывает мнение, что трудности и недостатки

реализации политико-криминалистических принципов реформы уголовного законодательства 2015 года являются следствием чрезвычайно радикальных ограничений возможностей применения наказания в виде лишения свободы с условным приостановлением его исполнения. В связи с этим автор присоединяется к предлагаемым в предметной литературе постулатам, связанным с расширением оснований для определения наказания в виде лишения свободы с условным приостановлением его исполнения.

Ключевые слова: наказание в виде лишения свободы, наказание в виде лишения свободы с условным приостановлением его исполнения, реформа уголовного права, практика правосудия, уголовная политика, наказание, не связанное с лишением свободы, тюремное население

DIE BEHANDLUNGSREGELVOLLSTRECKUNG DER FREIHEITSSTRAFE ALS *ULTIMA RATIO* AUF EBENE DER STRAFRECHTSANWENDUNG

Zusammenfassung

Der Erörterungsgegenstand ist die Behandlungsregel der Freiheitsstrafe als *ultima ratio* in der Gerichtsbarkeitspraxis. Als Ausgangspunkt der Analyse dienen gesetzliche Lösungen angenommen im primären Wortlaut des Strafgesetzes von 1997, welcher eine neue Herangehensweise zur Freiheitsstrafe bietet, welche voraussetzend eine subsidiäre Strafe in Bezug auf minderwertiges oder durchschnittliches Verbrechen werden sollte. Die Praxis hat jedoch bewiesen, dass die Minimalisierungsprobe der Rolle der Freiheitsstrafe in der strafrechtlichen Politik misslungen ist, was mit einer hohen Gefängnispopulation resultierte und auch eine hohe Anzahl von zur Freiheitsstrafe Verurteilten erwartete deren Vollstreckung. Das Hauptmittel der Strafreaktion minderwertige oder durchschnittliche Verbrechen blieb unveränderlich die Freiheitsstrafe auf konditioneller Bewährung deren Vollstreckung, erkannt im großen Ausmaß. Die Ursachendiagnose der aufgetretenen Misserfolge lag zugrunde eine Strafrechtsreform im Jahre 2015. In dieser Bearbeitung wurden die wichtigsten Änderungen in den Regelungen des Strafgesetzbuches beschrieben, welche zur Rollenverstärkung von nicht Freiheit entziehenden Strafen (Bußen und Freiheitsstrafen) und zur Beschränkung des Anwendungsgebietes der Freiheitsstrafe in Form von bedingungsloser gegeben falls auf bedingter Bewährung deren Vollstreckung beitragen sollen. Die in dieser Bearbeitung dargestellte statistische Illustration der bedingungslosen Freiheitstrafe und der Freiheitsstrafe auf bedingte Vollstreckungsbewährung hat die Autorin zur Folgerung geneigt, dass die Freiheitsstrafe weiterhin nicht als *ultima ratio* in der Gerichtsbarkeitspraxis betrachtet wird. Trotz wesentlicher Beschränkung der Bedeutung der Freiheitstrafe auf bedingter Vollstreckungsbewährung in der Strafpönalisierung und trotz wachsenden Anteils der nicht Freiheit entziehenden Strafen in der Struktur von erkannten Strafen vergrößert sich der Anteil von bedingungslosen Freiheitsstrafen unter der allgemeinen Verurteilungsanzahl, und es wächst diejenige von erkannten und nicht vollstreckten bedingungslosen Freiheitsstrafen. Die Autorin vertritt die Meinung, dass die Misserfolge in Bezug auf Abwicklung politisch-krimineller der Voraussetzungen der Strafrechtsreform von 2015 allzu einschneidende Einschränkungen der Freiheitsstrafenanwendung auf bedingter Vollstreckungsbewährung beeinflusst haben. Demnach schließt sich die Autorin zu den eingehenden Postulaten im Schrifttum einer Regelausbreitung der Freiheitsstrafenerkennung auf bedingter Vollstreckungsbewährung.

Schlüsselwörter: Freiheitsstrafe, Freiheitstrafe auf bedingter Vollstreckungsbewährung, Strafrechtsreform, Gerichtsbarkeitspraxis, Strafpolitik, nicht Freiheit entziehende Strafen, Gefängnispopulation

MISE EN ŒUVRE DU PRINCIPE DU TRAITEMENT DE L'EMPRISONNEMENT EN TANT QU'*ULTIMA RATIO* SUR LE NIVEAU D'APPLICATION DU DROIT PÉNAL

Résumé

Le sujet à examiner est la mise en œuvre du principe du traitement de l'emprisonnement en tant qu'*ultima ratio* dans l'exercice de la justice. Le point de départ de l'analyse est constitué par les solutions législatives adoptées dans le libellé initial du Code pénal de 1997, montrant une nouvelle approche de la peine d'emprisonnement, censée être une peine de substitution pour les crimes de petite et moyenne gravité. En pratique, il s'est avéré que la tentative visant à minimiser le rôle de la peine d'emprisonnement dans la politique pénale a échoué, ce qui a entraîné une forte population carcérale et un grand nombre de personnes condamnées à l'emprisonnement et en attente de son exécution. Le moyen fondamental de réaction pénale aux crimes de petite et moyenne gravité consistait invariablement en une peine d'emprisonnement assortie d'une suspension conditionnelle de son exécution, prononcée à grande échelle. Le diagnostic des causes d'échec est devenu la base de la réforme du droit pénal de 2015. L'étude examine les modifications les plus importantes apportées aux dispositions du code pénal, qui doivent contribuer à renforcer le rôle des peines non privatives de liberté (une amende et la peine de limitation de la liberté) et à limiter la portée de l'emprisonnement (absolue et avec suspension conditionnelle de son exécution). Le tableau statistique de l'emprisonnement absolu et de l'emprisonnement avec suspension conditionnelle de son exécution présenté dans l'étude a amené l'auteur à conclure que la peine de privation de liberté n'est toujours pas traitée dans la pratique de la justice comme un *ultima ratio*. Malgré l'importante limitation du sens de l'emprisonnement avec suspension conditionnelle de son exécution dans la politique pénale et la part croissante des peines non privatives de liberté dans la structure des peines prononcées, la part de l'emprisonnement absolu dans le total des condamnations augmente, de même que le nombre de peines d'emprisonnement absolues prononcées et non exécutées. L'auteur exprime l'opinion que les limitations trop sévères de la possibilité d'appliquer une peine d'emprisonnement avec suspension conditionnelle de son exécution affectent l'échec de la mise en œuvre des principes politiques et pénaux de la réforme du droit pénal de 2015. À cet égard, elle rejoint les postulats proposés dans la littérature d'étendre les motifs pour prononcer la peine d'emprisonnement avec suspension conditionnelle de son execution.

Mots-clés: peine d'emprisonnement, peine d'emprisonnement avec suspension conditionnelle de son execution, réforme du droit pénal, exercice de la justice, politique pénale, peines non privatives de liberté, population carcérale

ATTUAZIONE DEL PRINCIPIO DEL TRATTAMENTO DELLA PENA DI RECLUSIONE COME *ULTIMA RATIO* A LIVELLO DI APPLICAZIONE DEL DIRITTO PENALE

Sintesi

L'argomento in discussione è l'attuazione del principio del trattamento della pena di reclusione come *ultima ratio* nella prassi del sistema giudiziario. Il punto di partenza dell'analisi sono le soluzioni legislative adottate nella versione originale del codice penale del 1997, che

mostrano un nuovo approccio alla pena di reclusione, con la supposizione che essa doveva diventare una punizione sussidiaria per i reati di piccola e media criminalità. Nella prassi si è rivelato che il tentativo di minimizzare il ruolo della pena di reclusione nella politica penale è fallito, il che ha portato a un alto livello di popolazione carceraria e a un gran numero di persone condannate a una pena detentiva e in attesa della sua esecuzione. La pena di reclusione con sospensione condizionale (inflitta su larga scala) rimaneva sempre la misura di base della reazione penale ai reati minori e di media gravità. La diagnosi delle cause del fallimento è stata la base per la riforma del diritto penale del 2015. L'articolo discute le modifiche più importanti delle disposizioni del codice penale, che contribuiranno all'aumento del ruolo delle sanzioni non detentive (multe e sanzioni per restrizione della libertà) e alla limitazione dell'ambito di applicazione della pena di reclusione (quella senza sospensione e con sospensione condizionale). Il quadro statistico della pena di reclusione senza sospensione e quella con sospensione condizionale, presentato nello studio ha portato l'Autrice alla conclusione che la pena di reclusione non viene ancora trattata come *ultima ratio* nella prassi del sistema giudiziario. Nonostante la significativa limitazione dell'importanza della pena di reclusione con sospensione condizionale nell'ambito della politica penale e della crescente partecipazione delle pene non detentive nella struttura delle pene inflitte, la totale delle pene di reclusione senza sospensione sul numero totale delle pene è in aumento (lo stesso per quanto riguarda il numero di pene di reclusione senza sospensione inflitte e non eseguite). L'Autrice ritiene che il fallimento nell'ambito dell'attuazione dei presupposti politici e penali della riforma del diritto penale del 2015 viene causato da restrizioni troppo drastiche alla possibilità di applicare la pena di reclusione con sospensione condizionale. A questo proposito, l'Autrice si unisce ai postulati riportati nella letteratura per estendere le basi dell'infliggere la pena di reclusione con sospensione condizionale.

Parole chiave: pena detentiva, pena detentiva con sospensione condizionale dell'esecuzione, riforma del diritto penale, prassi del sistema giudiziario, politica penale, pene non detentive, popolazione carceraria

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