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NON-CUSTODIAL PENALTIES LAID DOWN BY STATUTE AND DETERMINED BY COURT IN THE LIGHT OF THE AMENDMENT TO CRIMINAL CODE OF 13 JUNE 2019

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The amendment to the Criminal Code of 13 June 2019, which is waiting for the Constitutional Tribunal judgment whether it is in conformity with the Constitution of the Republic of Poland,[1] was based on the assumption that it was necessary to strengthen the penal law protection of fundamental legal interests such as life, health, sexual freedom and ownership; to raise the level of the punitive response to criminality by means of increasing the severity of penal sanctions and developing institutions that would influence penalty imposition in such a way that they direct a court decisions towards the limitation of the possibility of making use of the reduction of a sanction, or extend the possibility of aggravating a penal sanction towards perpetrators of offences with a high level of blameworthiness.[2] The changes introduced are justified by the conviction that 'criminal law, with the use of its instruments, is to satisfy the social demand for the sense of security and justice'.[3]

In order to achieve the above-mentioned objectives, the directives on penalties that are laid down by statute and those determined by court were amended.

In particular, the maximum level of the standard penalty of deprivation of liberty was raised from 15 to 30 years (see the amended Article 37 CC), which made the penalty of deprivation of liberty for a period of 25 years useless and resulted in

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1 Act of 13 June 2019 amending the Act: Criminal Code and some other acts, Sejm print no. 3451; hereinafter CC.

2 Compare Uzasadnienie do projektu ustawy z dnia 13 czerwca 2019 r. o zmianie ustawy – Kodeks karny oraz innych ustaw [Justification of the Bill of 13 June 2019 amending the Act: Criminal Code and some other acts], Sejm print no. 3451, p. 1.

3 See *ibid*.

its abolition (by repealing Article 32(4) CC). However, another extremely severe penalty of life imprisonment was maintained (see Article 32(5) CC) and the minimum period of serving it before the application for conditional release is admissible was raised from 25 to 35 years (see the amended Article 78 § 3 CC), moreover, a new solution gave the possibility of ruling a ban on conditional release by a trial court (see the added Article 77 §§ 3 and 4 CC). Obviously, amendments were made to many sanctions for the offences specified in the Special part of the Criminal Code and, as a result, the penalty of deprivation of liberty was aggravated and the period raised to 20, 25 or 30 years.

At first sight, no amendments were made to the basic statutory non-custodial penalties prescribed within the field of common criminal law. Article 33 § 1 CC maintains the principle of the lowest number of daily rates of a fine imposed for the commission of an offence and stipulates it should account for ten, and the highest one for 540 rates. The basic statutory penalty of limitation of liberty for perpetrators of offences is to be at least one month and the longest period shall be two years (Article 34 § 1 CC). However, §§ 1a and 2a, and § 1aa were added to both provisions, respectively, and they modify the minimum penalty of a fine and limitation of liberty in the case of all types of offences carrying an alternative or cumulative sanction in which, apart form a non-custodial penalty, the penalty of deprivation of liberty is also envisaged.

Thus, in accordance with the added Article 33 § 1a CC,

> If the statute does not prescribe otherwise, and an offence is subject to a fine as well as the penalty of deprivation of liberty, the penalty of a fine shall be at least:
> 1) 50 rates – in the case of an act carrying the penalty of deprivation of liberty for a period of up to one year;
> 2) 100 rates – in the case of an act carrying the penalty of deprivation of liberty for a period of up to two years;
> 3) 200 rates – in the case of an act carrying the penalty of deprivation of liberty for a period of up to three years;
> 4) 300 rates – in the case of an act carrying the penalty of deprivation of liberty for a period exceeding three years.

The minimum limits of a fine indicated are also applicable to a fine imposed beside the penalty of deprivation of liberty (see the added Article 34 § 2a CC).

With the use of the statutory reservation made in Article 33 § 1 CC concerning the daily rates of a fine accounting for the minimum of 10 and the maximum of 540 if the statute does not stipulate otherwise, the provisions added in Article 33 § 1a CC change all common and military criminal law penalties that were laid down for different types of offences for which, apart from non-custodial penalties, the penalty of deprivation of liberty for alternative application as well as cumulative sentencing were prescribed. Taking into account the fact that in our legal system there are relatively few types of offences carrying only non-custodial penalties (Special part of the Criminal Code prescribes such penalties in just nine cases) and in general even petty crimes carry, apart from non-custodial penalties, a selection of penalties of deprivation of liberty, the amendment results in a general revision of the existing penal law assessment of all types of offences and considerable aggravation of penalties. One can wonder why

it was not decided to raise the minimum levels of fines prescribed in criminal law if the legislator believes that a fine of ten daily rates is absolutely insufficient for an offence, especially in comparison to some penalties prescribed for misdemeanours.[4] It is also puzzling why the legislator did not decide to directly change the sanctions in the provisions classifying particular types of offences and did it in a complete way in the provisions of the General part of the Criminal Code. The answer seems to be simple. The introduction of changes to penalties for many types of offences in the whole legal system is, from the technical point of view, much easier when it is done by introducing one general provision that is universally applicable to the legal system. However, a question should be asked whether the adoption of such a solution really modifying penal sanctions for a big number of offences is in conformity with the fundamental principles of criminal law established centuries ago in the criminal law doctrine and then directly or indirectly confirmed in domestic, international and the European Union legal acts. It concerns the obligation to adhere to the principle *nulla poena sine lege certa*.[5] In the system of sanctions determined relatively, which is applicable inter alia in our country, the principle results in the legislator's obligation to unequivocally determine a penalty for a given type of conduct and specify its nature and the limits of its imposition. It should be highlighted here that information included in the sanction of criminal law provision should be clear and complete. The principle is not betrayed when only the type of penalty is determined without specifying its minimum and maximum limits. This is so because the type of penalty can be imposed within its whole scope, i.e. a penalty can be imposed within the range from the statutory minimum to the statutory maximum determined in the general provisions of the Criminal Code. However, it is inadmissible to introduce sanctions misinforming their addressees. Unfortunately, one will deal with such a situation if the amendment of 13 June 2019 enters into force. Due to the regulations in the added provisions of Article 33 §§ 1a and 2a CC, the fines will be totally different from those specified in the sanctions for particular types of offences. A number of offences will in fact not carry a fine from 10 to 540 daily rates but from 50 to 540 rates, or from 100 to 540 rates, or from 200 to 540 rates, or from 300 to 540 daily rates.

The *nulla poena sine lege certa* principle will also be betrayed in the case of offences carrying, inter alia, the penalty of limitation of liberty because, in accordance with § 1aa added to Article 34 CC,

> If the statute does not stipulate otherwise and an offence carries both the penalty of limitation of liberty and the penalty of deprivation of liberty, the penalty of limitation of liberty shall be imposed for a period of at least:
> 1) two months – in case an act carries the penalty of deprivation of liberty for a period of up to one year;
> 2) three months – in case an act carries the penalty of deprivation of liberty for a period of up to two years;
> 3) six months – in case an act carries the penalty of deprivation of liberty for a period of up to three years;
> 4) nine months – in case an act carries the penalty of deprivation of liberty for a period exceeding three years.

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[4] Compare the arguments presented in the justification of the Bill of 13 June 2019, *ibid.*, p. 8.
[5] See e.g. Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2012, p. 37.

The norm laid down in Article 34 § 1aa CC means that instead of the penalty of limitation of liberty in its full range, which is stipulated in the provisions on particular sanctions, *de facto* many types of offences will carry the same type of penalty within different, more severe limits from two months, or from three months, or from six months, or from nine months to two years.

It is essential that the legislator adhere to the *nulla poena sine lege certa* principle not only for the guarantee reasons but also because the information about offences and penalties has to perform an important role, namely a preventive and educational function in general as well as special prevention, and via it also a protective function. Due to the fact that the criminal and penal provisions are first of all addressed to the general public (not experts in criminal law), the message that statutes send should be easy to read and understand and not provided in a camouflaged way, difficult for the majority of people to decode properly. This untypical way of introducing a general change in the severity of statutory penalties that was applied in Article 33 §§ 1a and 2a and in Article 34 § 1aa CC for a big number of offences penalised in our legal system is not able to start a mechanism expected by the legislator and to act as an effective crime deterrent resulting in better protection of legal interests before they are infringed.

It should also be raised that the aggravated minimum limits of a fine or the penalty of limitation of liberty are not integrated with any, in particular negative, features of a perpetrator or an offence committed by them. These are new aggravated limits of non-custodial penalties that courts shall impose within the standard sentencing whenever they co-exist in conjunction with the penalty of deprivation of liberty for any period. In the pre-amendment legal state, in the same way as in the two previous criminal codes, i.e. CC of 1932 and CC of 1969, the departure from the basic minimum and maximum limits of a given type of penalty could take place based on the provisions of the General part of the Criminal Code and only in the case special circumstances occurred that required the application of extraordinary aggravation or extraordinary extenuation of punishment.[6] The amendment of 13 June 2019 compromises the established principle, which should encounter criticism because the legislator, with no rational grounds (except for a subjectively perceived need to raise the level of the criminal law punitive response),[7] interferes with the sphere of a court's discretion and limits it.

The principle of a court's sentencing discretion, which is inseparably connected with the system of relevantly determined sanctions, is to guarantee a just and, at the same time, preventive selection of penal responses to a perpetrator's criminal act. Its role is to materialise another fundamental rule that is in force in criminal law, i.e. individualised penalty and other penal measures (see Articles 53–56 CC). This individualisation is reflected in the proper selection of the type of penalty and its severity so that it is relevant to a given individual case. Only a trial court's relatively broad discretion can ensure real individualisation of a sentence issued in

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[6] For more on the issue, see V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, pp. 41–45.

[7] Compare justification of the Bill, *supra* n. 3, p. 1.

relation to a particular offence committed by a particular perpetrator. Each instance of narrowing a court's sentencing possibilities by a legislator, especially when it is arbitrary and not rational, i.e. not supported by any significant arguments, makes the individualisation of a sentence in a given case impossible to implement and the administration of justice may become unjust and useless. It is necessary to avoid situations and solutions that can lead to that. Raising the statutory minimum levels of the penalty of a fine following a determined pattern, the legislator totally ignored the two-stage process of its imposition and the intended objectives of the system of daily rates fines. The daily rates system of fines adopted in the Criminal Code was aimed at satisfying the sense of justice and at achieving preventive objectives laid down in Article 53 § 1 CC through the imposition of an adequate amount of daily rates ruled in an individual sentence.[8] Courts will find those objectives difficult to achieve as the minimum amount of a fine was established at a strictly fixed and rather high level. It will be even more difficult, due to the fact that the catalogue of aggravating and extenuating circumstances was introduced to the Criminal Code (see Article 53 §§ 2a and 2b CC) with the obligation to take them into account in every single sentence issued (see the amended Article 53 § 1 CC). Raising the minimum number of daily rates of a fine that shall be imposed when selecting this and not another one out of the prescribed sanctions, the legislator, unfortunately, also ignored the poor financial condition of the Polish society. For years, the individual economic situation of perpetrators of offences that courts have to take into account when determining the daily rates of a fine, in accordance with a special directive formulated in Article 33 § 3 CC, causes that over 70–80% of all fines imposed as the only penalty for offences do not exceed PLN 2,000[9] (after the calculation of the whole amount to be paid). This means that in the case of a fixed minimum of daily rates for particular types of offences, courts will not be able to impose the number of daily rates based on their own individualised assessment of the level of social harmfulness of an act and the level of a perpetrator's guilt as well as the needs of prevention; what is more, they will not be able to impose higher amounts than the available minimum, i.e. PLN 10, so that a convict can pay the whole amount after calculation and it is not necessary to execute the fine in a substitute form. This way, the system of fines expressed in daily rates lost its sense and raison d'être.

Therefore, the general increase in the minimum levels of punishment, based on a certain schematic pattern, in relation to non-custodial penalties prescribed in alternative or cumulative sanctions in which they co-occur with the penalty of deprivation of liberty, does not deserve a positive assessment. The adopted method of

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[8] See M. Melezini, [in:] M. Melezini (ed.), *Kary i inne środki reakcji prawnokarnej*, Vol. 6: *System Prawa Karnego*, Warszawa 2016, pp. 122 and 126.

[9] In 2018, fines in the amount of PLN 2,000 imposed as the only penalties occurred in 71 cases, accounting for 22% of all fines; in 2017 in 74 cases, 42% of all fines, and in 2016 in 79 cases, 52% of all fines for offences. Fines imposed in the amount of PLN 2,001–5,000 as the only penalties accounted for 21.09% of fines in 2018, 18.64% in 2017, and 14.78% in 2016. Fines exceeding PLN 5,000 accounted for 7.69% in 2018, 6.93% in 2017, and 5.70% in 2016. The author's own calculations based on court statistics, compare skazania-prawomocne-dorośli-wg-rodzajów-przestępstw-i-wymiaru kary-w-l-2008-2018, https://isws.ms.gov.pl/pl/baza-statystyczna (accessed 15.02.2020).

changing the statutory penalties within the whole common (and military, compare Article 317 § 1 CC) criminal law system consisting in schematic correlation between the minimum limit of non-custodial penalties and the maximum limit of the penalty of deprivation of liberty for a given type of offence is questioned by the representatives of the criminal law doctrine and is recognised as senseless.[10]

As it has been signalled earlier, the narrowing of a court's discretion by introducing the catalogue of aggravating and extenuating circumstances and the necessity of taking them into account when sentencing as well as treating the objectives of a penalty in the field of social influence as the issue of key importance do not serve the reinforcement of the principle of individualisation of punishment (see the amended Article 53 § 1 and added §§ 2a, 2b and 2c CC).

The introduction of the catalogue of extenuating circumstances to the Criminal Code, in particular, obliges courts to thoroughly examine whether such circumstances have occurred in a given case and analyse whether and to what extent they justify a more lenient treatment of a perpetrator within the standard sentencing and to what extent they justify the application of the extraordinary extenuation of a sentence, as prescribed in Article 60 CC. It should be noticed that the catalogue of extenuating circumstances laid down in Article 53 § 2b CC lists as many as 12 circumstances in ten subsections, which are connected with the commission of an offence recognised as a reason for a more lenient assessment of a prohibited act and its perpetrator. It is a broad and open catalogue. This means that there can be more reasons why a court should form the opinion that a perpetrator should be treated more leniently. Some of the circumstances listed in Article 53 § 2b CC are the same as the circumstances that may justify extraordinary extenuation of a sentence. This creates a problem of assessment and appropriate indication to what extent the occurrence of particular extenuating circumstances justifies the application of a more lenient sentence within the standard sentencing and in what cases their occurrence should justify extraordinary extenuation of a sentence. It should be raised here that limiting a court's discretion by introducing the catalogue of extenuating circumstances, which is open, the legislator did not indicate the criteria making it possible to measure their intensity in order to properly weigh whether it is right to remain in the area of standard sentencing or use the institution of extraordinary extenuation of a sentence. The introduction of the catalogue of extenuating circumstances to the Criminal Code causes that the only hint that allows deciding whether it will be more appropriate to apply the standard mode of sentencing or extraordinary extenuation of a sentence is the statutory indication in Article 60 § 2 introductory sentence CC, which stipulates that it concerns a particularly justified case 'when even the lowest penalty prescribed for an offence would be disproportionally severe'. However, the problem arises how far this severe penalty prescribed for an offence is to be disproportional. Taking into account the changed general directives on sentencing laid down in the amended Article 53 § 1 CC, answering the question is not easy. It is not clear whether this

[10] Compare J. Giezek, J. Brzezińska, D. Gruszecka, R. Kokot, K. Lipiński, *Opinia na temat projektu zmian przepisów kodeksu karnego*, https://www.rpo.gov.pl/sites/default/files/Opinia %20 Katedry%20 Prawa (accessed 15.02.2020).

disproportionality is to be referred to the level of social harmfulness of an act, or the number or intensity of the established extenuating circumstances, or to the needs in the area of social influence, or to the special preventive needs, or eventually to the level of a perpetrator's guilt. It seems that in the legal circumstances after the amendment, contrary to the intentions of the authors of the bill, courts will find it more difficult than before to issue just and uniform sentences in similar cases.

The difficulty becomes even more serious because of the obligation to impose just punishment on offenders (taking into consideration the level of social harmfulness of an act and aggravating and extenuating circumstances) that must be fulfilled within the reduced limit of a court's discretion (which has been discussed above), and the necessity of taking into account the objectives of a penalty within the scope of its social influence and preventive objectives that a penalty is to achieve in relation to the convict, with the abolition of severity exceeding the level of guilt at the same time (compare the amended Article 53 § 1 CC). In the light of such general directives on sentencing, which should be commonly applied in the case of all perpetrators regardless of the type of an offence they have committed, courts would be obliged to issue sentences in individual cases in the manner that would primarily influence the entire society, i.e. it would serve general prevention; what is more, it is to be done in line with the negative general prevention,[11] i.e. by deterring people from violating the law. What comes to mind in this situation is Immanuel Kant's significant remark approved of in the whole civilised world, according to which no man (even a criminal) can be treated as a means to an objective because such treatment cannot be reconciled with the inherent human dignity.[12] That is why, exchanging the positive general preventive directive, which concerns the obligation to take into account the needs of developing the society's legal awareness while issuing an individual sentence, for the negative general preventive directive should be assessed critically. It deserves this negative assessment in particular due to the fact that those general preventive objectives of punishing an individual were assigned a fundamental role to fulfil. It should be raised here that in the former wording of Article 53 § 1 CC, the general preventive objective of a sentence issued was subsidiary in nature in relation to justice-related and individual preventive objectives. Another matter of concern is the fact that in the amended Article 53 § 1 CC, the rank of the objectives of individual prevention was reduced; they became secondary. Moreover, they were considerably limited to the need to take into account only preventive aims, thus to develop a sentence in such a way that a penalty and other penal measures prevent or at least significantly hamper the commission of an offence by a convict again.[13] On the other hand, the legislator totally eliminated from the directives on sentencing the necessity of taking into account educational objectives to be achieved in relation to a convict. The discussed amendments to the Criminal Code adopted changes in

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[11] For the issue of negative general prevention, see T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, pp. 207–208.

[12] Compare I. Kant, *Uzasadnienie metafizyki moralności*, Warszawa 2002, pp. 86–89. Also see J. Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, pp. 41–43.

[13] V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 429.

the general directives on sentencing which create a risk that: 'As a result, a penalty will become primitive revenge, like that taken in old times, repeatedly discredited and recognised as ineffective and inefficient.' Almost all the representatives of the criminal law jurisprudence are strongly critical of the whole criminal law reform, and justifiably and unanimously warn against it.[14]

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NON-CUSTODIAL PENALTIES LAID DOWN BY STATUTE AND DETERMINED BY COURT IN THE LIGHT OF THE AMENDMENT TO CRIMINAL CODE OF 13 JUNE 2019

Summary

The article discusses amendments to the General part of the Criminal Code passed on 13 June 2019, concerning penalties laid down by statute and determined by court. In particular, the author analyses the issue of seemingly directive-like changes concerning the imposition of a fine and the penalty of limitation of liberty in the case those penalties co-occur with the penalty of deprivation of liberty, which in fact increase the minimum limits of those penalties for many offences in the field of the whole common and military criminal law. The author examines the provisions added to Article 33 CC: §§ 1a and 2a, and to Article 34 CC: § 1aa, in the context of the *nulla poena sine lege certa* principle, the principle of individualised sentencing and the principle of

[14] See *Naukowcy w PAN piszą do prezydenta: Przyjęta nowelizacja kodeksu karnego cofa nas o co najmniej wiek wstecz*, Gazeta Prawna.pl, https://prawo.gazetaprawna.pl/artykuły/1417622,naukowcy-z-pan-do-prezydenta-kodeks-karny.html of 14 June 2019 (accessed 15.02.2020).

a court's discretion in the process of imposing a penalty or other penal measures. The author also assesses the purposefulness of the introduction of the catalogue of aggravating and extenuating circumstances to the Criminal Code (Article 53 §§ 2a and 2b CC added). She mainly draws attention to difficulties that can occur in a court's assessment to what extent the occurrence of given extenuating circumstances justifies taking them into account within standard sentencing and when it will give grounds for the application of the institution of extraordinary extenuation of a sentence. The article also presents the amendments to the wording of Article 53 § 1 CC within the scope of general directives on a penalty determined by court, which mainly tend to direct sentencing towards revenge for an offence committed and general prevention. Taking into account individual prevention was pushed to the background, and the objective of preventing a convict from returning to crime was narrowed, while striving to achieve educational objectives in the field of a convict's attitudes and conduct was totally ignored. The article is strongly critical of the amendments passed. That is why, it is expected they will not enter into force.

Keywords: penalty laid down by statute, penalty determined by court, *nulla poena sine lege certa* principle, principle of individualised sentencing, principle of a court's discretion, non-custodial penalties and their limits, general directives on court sentencing

USTAWOWY I SĄDOWY WYMIAR KAR WOLNOŚCIOWYCH W ŚWIETLE NOWELI DO KODEKSU KARNEGO UCHWALONEJ DNIA 13 CZERWCA 2019 R.

Streszczenie

Publikacja dotyczy zmian uregulowań części ogólnej Kodeksu karnego uchwalonej ustawą z 13 czerwca 2019 r. w zakresie ustawowego i sądowego wymiaru kary. W szczególności podjęto w niej kwestię z pozoru dyrektywalnych zmian dotyczących wymiaru kary grzywny i kary ograniczenia wolności, gdy kary te współwystępują w sankcji z karą pozbawienia wolności, które w istocie podwyższają dolne granice tych kar za liczne typy przestępstw w obszarze całego prawa karnego powszechnego i wojskowego. Przeanalizowano postanowienia dodanych do art. 33 k.k.: § 1a i 2a oraz do art. 34 k.k. – § 1aa w kontekście zasady *nulla poena sine lege certa*, zasady indywidualizacji wymiaru kary i zasady swobodnego uznania sądu przy wymierzaniu kary i innych środków penalnych. Oceniono także celowość wprowadzenia do Kodeksu karnego katalogu okoliczności obciążających oraz łagodzących (dodany art. 53 § 2a i 2b k.k.). Zwrócono przede wszystkim uwagę na mogące pojawiać się trudności przy ocenianiu przez sąd, na ile wystąpienie danych okoliczności łagodzących uzasadnia ich uwzględnienie w ramach tzw. zwyczajnego wymiaru kary, a kiedy upoważniać będzie do zastosowania instytucji nadzwyczajnego złagodzenia kary. W artykule zajęto się także zmianami przeprowadzonymi w treści art. 53 § 1 k.k. z zakresie dyrektyw ogólnych sądowego wymiaru kary, które ukierunkowują ten wymiar przede wszystkim na odpłatę za popełnione przestępstwo i prewencję ogólną. Wzgląd na prewencję indywidualną zszedł na plan dalszy, przy czym zawężono jej cele do zapobiegania powrotowi sprawcy do przestępstwa z całkowitym pominięciem starań o osiągnięcie celów wychowawczych w zakresie postaw i zachowania karanej jednostki. Artykuł ma charakter zdecydowanie krytyczny wobec uchwalonych zmian. Dlatego należy oczekiwać, że nie wejdą one w życie.

Słowa kluczowe: ustawowy wymiar kary, sądowy wymiar kary, zasada *nulla poena sine lege certa*, zasada indywidualizacji wymiaru kary, zasada swobodnego uznania sądu, kary wolnościowe i ich granice, dyrektywy ogólne sądowego wymiaru kary

LA DIMENSIÓN LEGAL Y JUDICIAL DE LAS PENAS NO PRIVATIVAS DE LIBERTAD EN EL MARCO DE LA REFORMA DEL CÓDIGO PENAL PROMULGADA EL 13 DE JUNIO DE 2019

Resumen

La publicación se refiere a las modificaciones en la parte general del Código Penal introducidas mediante la ley de 13 de junio de 2019 en cuanto a la dimensión legal y judicial de la pena. En particular, trata de modificaciones de las directivas de imposición de la pena de multa y la pena de restricción de libertad cuando estas sanciones figuren como penas alternativas a la pena de privación de libertad. Estas modificaciones agravan la pena mínima de estas sanciones por muchos delitos comunes y de la parte militar. Se analiza los preceptos añadidos al art. 33 CP – § 1a y 2a y al art. 34 CP – § 1aa desde el punto de vista del principio *nulla poena sine lege certa*, principio de individualización de la sanción y libertad del Tribunal a la hora de imponer la pena y otras medidas penales. Se juzga la finalidad de introducir al Código Penal el catálogo de circunstancias agravantes y atenuantes (nuevo art. 53 § 2a i 2b CP). Se destaca las dificultades a la hora de juzgar por el Tribunal si las circunstancias atenuantes justifican la imposición de la pena normal o si es posible imponer la pena extraordinariamente atenuada. El articulo versa también sobre las modificaciones del art. 53 § 1 CP en cuanto a las directivas generales a la hora de imponer la pena por el Tribunal que como finalidad tengan sobre todo la compensación del delito y la prevención general. La prevención individual ha sido marginalizada y se restringen sus fines a la vuelta del sujeto a cometer el delito, prescindiendo totalmente de esfuerzos a conseguir los fines educativos en cuanto a la postura y comportamiento del penado. El artículo definitivamente critica las modificaciones, por lo que hay que esperar que no entren en vigor.

Palabras claves: pena legal, pena judicial, principio *nulla poena sine lege certa*, principio de individualización de la pena, principio de libertad del Tribunal, penas no privativas de libertad y sus límites, directivas generales de pena judicial

ЗАКОНОДАТЕЛЬНАЯ И СУДЕБНАЯ СИСТЕМА НАКАЗАНИЙ, НЕ СВЯЗАННЫХ С ЛИШЕНИЕМ СВОБОДЫ, В СВЕТЕ ПОПРАВОК К УГОЛОВНОМУ КОДЕКСУ ОТ 13 ИЮНЯ 2019 ГОДА

Аннотация

Статья посвящена поправкам к общей части Уголовного кодекса, введенным Законом от 13 июня 2019 года в отношении законодательной и судебной системы наказаний. В частности, в статье рассмотрен вопрос об изменениях (носящих, как кажется, директивный характер) в отношении наказания в виде денежного штрафа или ограничения свободы в тех случаях, когда эти меры предусмотрены параллельно с наказанием в виде лишения свободы. На практике принятые изменения повышают нижние пределы этих наказаний за целый ряд преступлений в рамках общего и военного уголовного права. Анализируются положения, внесенные в ст. 33 §§ 1a и 2a и в ст. 34 § 1aa УК, с точки зрения принципа *nulla poena sine lege certa*, принципа индивидуализации наказания и принципа свободного усмотрения суда при назначении меры наказания и других мер уголовно-правового воздействия. Кроме этого, автор оценивает целесообразность внесения в Уголовный кодекс перечня отягчающих и смягчающих обстоятельств (добавлены ст. 53 § 2a и 2b УК). В этом контексте внимание, прежде всего, обращено на трудности, с которыми суд может столкнуться при попытке оценить, в каких случаях наличие тех или иных смягчающих

обстоятельств оправдывает их учет в рамках назначения меры наказания в общем порядке, а в каких будет оправдано применение института чрезвычайного смягчения наказания. В статье также рассмотрены поправки к ст. 53 § 1 УК, которые касаются общих директив относительно системы судебных наказаний. По мнению автора, эти поправки направлены, главным образом, на осуществление мер возмездия за совершенное преступление и на общую превенцию. Специальная превенция отходит на второй план, а ее цели сведены к предупреждению рецидивизма. При этом полностью игнорируются усилия по достижению воспитательных целей, призванных исправить поведение и взгляды осужденного. Подвергнув жесткой критике принятые изменения, автор выражает надежду, что они не вступят в силу.

Ключевые слова: законодательная система наказаний, система судебных наказаний, принцип *nulla poena sine lege certa*, принцип индивидуализации наказания, принцип свободного усмотрения суда, меры наказания не связанные с лишением свободы и их пределы, общие директивы относительно системы судебных наказаний

DIE GESETZLICHE UND GERICHTLICHE STRAFZUMESSUNG BEI FREIHEITSSTRAFEN IN ANBETRACHT DER AM 13. JUNI 2019 VERABSCHIEDETEN NOVELLE ZUM POLNISCHEN STRAFGESETZBUCH

Zusammenfassung

Der Beitrag behandelt die durch Gesetz vom 13. Juni 2019 beschlossenen Änderung der Regelungen des allgemeinen Teils des polnischen Strafgesetzbuches im Bereich der gesetzlichen und gerichtlichen Strafzumessung. Insbesondere wird auf die Frage der potenziell richtlinienändernden Änderungen bei der Strafzumessung bei Geldbußen und freiheitsbeschränkenden Strafen eingegangen, da diese Strafen nebeneinander und zusammen mit der Sanktion des Freiheitsentzugs verhängt werden und im Kern die Untergrenzen der Strafen für eine ganze Reihe von Straftatbeständen im Bereich des gesamten allgemeinen Strafrechts und des Militärstrafrechts anheben. Analysiert werden die Artikel 33 des polnischen Strafgesetzbuches (kodeks karny, k.k.) – § 1a und 2a, sowie Artikel 34 k.k. – § 1aa hinzugefügten Bestimmungen mit Blick auf das Prinzip *nulla poena sine lege certa*, dem strafrechtlichen Bestimmtheitsgrundsatz, d.h. dem Grundsatz der Individualisierung der Strafzumessung und des freien richterlichen Ermessens bei der Verhängung von Strafen und anderer Strafmaßnahmen. Einer Bewertung unterzogen wurde daneben auch die Zweckmäßigkeit der Aufnahme eines Katalogs von erschwerenden und mildernden Umständen in das polnische Strafgesetzbuch (hinzugefügter Artikel 53 § 2a und 2b k.k.). Vor allem wird auf mögliche Schwierigkeiten bei der Würdigung durch das Gericht hingewiesen, inwiefern das Vorliegen der betreffenden strafmildernden Umstände rechtfertigt, dass diese im Rahmen der sog. gewöhnlichen Strafzumessung Berücksichtigung finden und wann das Gericht eine außerordentliche Strafmilderung anwenden kann und sollte. Der Artikel befasst sich außerdem mit den an Artikel 53 § 1 k.k. vorgenommenen Änderungen in Bezug auf die allgemeinen Richtlinien zur richterlichen Strafzumessung, wobei diese vor allem auf eine Vergeltung für die begangene Straftat und die allgemeine Prävention abzielen. Die Ausrichtung auf die individuelle Prävention rückt in den Hintergrund, wobei sich der Zweck der individuellen Prävention nunmehr darauf beschränkt, Wiederholungsstraftaten zu verhindern, d.h. zu verhindern, dass Straftäter rückfällig werden, bei einem vollständigen Verzicht auf das Erzielen einer erzieherischen Wirkung im Bereich der Einstellung und des Verhaltens des bestraften Individuums. Der Artikel steht den beschlossenen Änderungen entschieden kritisch gegenüber und es ist zu erwarten, dass diese nicht in Kraft treten.

Schlüsselwörter: gesetzliche Strafzumessung, richterliche Strafzumessung, Bestimmtheitsgrundsatz *nulla poena sine lege certa*, Grundsatz der Individualisierung der Strafzumessung, Grundsatz des freien Ermessensspielraums des Gerichts, Freiheitsstrafen und ihre Grenzen, allgemeine Richtlinien zur richterlichen Strafzumessung

LE QUANTUM LÉGAL ET JUDICIAIRE DES PEINES DE LIBERTÉ À LA LUMIÈRE DE L'AMENDEMENT AU CODE PÉNAL ADOPTÉ LE 13 JUIN 2019

Résumé

La publication concerne les modifications du règlement de la partie générale du Code pénal adopté par la loi du 13 juin 2019 concernant les sanctions légales et judiciaires. En particulier, il aborde la question des modifications apparemment directives concernant l'imposition d'amendes et la peine de restriction de liberté, lorsque ces peines coexistent avec la peine d'emprisonnement, ce qui en fait augmente les limites inférieures de ces peines pour de nombreux types d'infractions dans le domaine du droit pénal commun et militaire. Les dispositions des § 1a et 2a ajoutées à l'art. 33 du Code pénal et du § 1aa à l'art. 34 du Code pénal ont été analysés dans le contexte du principe *nulla poena sine lege certa*, du principe d'individualisation de la peine et du principe de la libre discrétion du tribunal lors de l'imposition de la peine et d'autres mesures pénales. L'opportunité d'introduire un catalogue des circonstances aggravantes et atténuantes dans le Code pénal a également été évaluée (art. 53 § 2a et 2b ajouté au Code pénal). Tout d'abord, l'attention a été attirée sur les difficultés qui peuvent surgir lors de l'appréciation par le tribunal dans quelle mesure la survenance de circonstances atténuantes données justifie leur inclusion dans ce que l'on appelle punition ordinaire, et lorsqu'elle autorise l'application d'une atténuation extraordinaire de la peine. L'article traite également des modifications apportées au contenu de l'art. 53 § 1 du code pénal dans le cadre des directives générales du quantum judiciaire de la peine, qui orientent ce quantum principalement vers le paiement des délits commis et la prévention générale. La prise en compte de la prévention individuelle est tombée à l'arrière-plan, ses objectifs pour empêcher le délinquant de retourner au crime étant réduits, contournant complètement les efforts visant à atteindre des objectifs éducatifs en termes d'attitudes et de comportement de la personne punie. L'article est définitivement critique pour les changements adoptés. Il faut donc s'attendre à ce qu'ils n'entrent pas en vigueur.

Mots-clés: quantum légale de la peine, quantum judiciaire de la peine, principe *nulla poena sine lege certa*, principe de l'individualisation de la peine, principe de la libre discrétion du tribunal, peines de liberté et leurs limites, directives générales du quantum judiciaire de la peine

DETERMINAZIONE LEGALE E GIUDIZIALE DELLE PENE DETENTIVE ALLA LUCE DELLA RIFORMA DEL CODICE PENALE PROMULGATA IL 13 GIUGNO 2019

Sintesi

La pubblicazione riguarda le modifiche delle norme della parte generale del Codice penale, introdotte con la legge del 13 giugno 2019, nell'ambito della determinazione legale e giudiziale della pena. In particolare sono state trattate le modifiche, apparentemente conformi alle

direttive, circa la determinazione della pena pecuniaria e della pena detentiva, quando tali pene coesistono in una sanzione con pena detentiva, e aumentano il limite inferiore di tali pene per numerosi tipi di reati, nell'ambito dell'intero diritto penale e militare. Sono state analizzate le norme aggiunte all'art. 33 § 1a e 2a, nonché all'art. 34 § 1aa del Codice penale nel contesto del principio *nulla poena sine lege certa*, del principio di personalizzazione della pena e del principio di libera valutazione del giudice nella determinazione della pena e di altre misure penali. È stata anche valutata l'opportunità dell'introduzione nel Codice penale del catalogo di circostanze aggravanti e attenuanti (aggiunto art. 53 § 2a e 2b del Codice penale). Si è concentrata soprattutto l'attenzione sulle difficoltà che potrebbero emergere nella valutazione, da parte del giudice, circa quanto la presenza di determinate circostanze attenuanti motivi la loro considerazione nell'ambito della cosiddetta pena ordinaria e autorizzi ad utilizzare l'istituzione delle attenuanti straordinarie. Nell'articolo si sono trattate anche le modifiche introdotte nella norma dell'art. 53 § 1 del Codice penale, nell'ambito delle direttive generali sulla determinazione giudiziale della pena, che orientano l'ammontare della pena soprattutto come retribuzione per il reato commesso e per la prevenzione generale. La questione della prevenzione individuale è passata in seconda linea, riducendo il suo obiettivo alla prevenzione della recidiva di reato, trascurando completamente gli sforzi per raggiungere obiettivi educativi nell'ambito dell'atteggiamento e del comportamento della persona punita. L'articolo ha un carattere decisamente critico nei confronti delle modifiche promulgate. Per questo bisogna augurarsi che non entrino in vigore.

Parole chiave: determinazione legale della pena, determinazione giudiziale della pena, principio *nulla poena sine lege certa*, principio di personalizzazione della pena, principio di libera valutazione del giudice, pene detentive e loro limiti, direttive generali sulla determinazione giudiziale della pena

Cytuj jako:

Konarska-Wrzosek V., *Non-custodial penalties laid down by statute and determined by court in the light of the amendment to Criminal Code of 13 June 2019 [Ustawowy i sądowy wymiar kar wolnościowych w świetle noweli do Kodeksu karnego uchwalonej dnia 13 czerwca 2019 r.]*, „Ius Novum" 2020 (14) nr 2, s. 55–67. DOI: 10.26399/iusnovum.v14.2.2020.13/v.konarska-wrzosek

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