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COMMENTS ON CREDITING THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS PENALTY OF RESTRICTION OF LIBERTY UNDER ARTICLE 63 CRIMINAL CODE

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1. GENERAL REMARKS

As set out in Article 63 of the 1997 Criminal Code,[1] the obligation to credit the period of actual deprivation of liberty towards the penalty imposed in a given case is one of the basic sentencing principles.

This institution dates back to the 1932 Criminal Code[2] in which the legislator allowed the period of pre-trial detention to be credited towards the sentence of imprisonment (Article 58 of the 1932 Criminal Code). The positive adjustment was optional as it depended on the court's discretion in this respect.[3] It was also up to the court to decide whether the period of pre-trial detention was to be credited in whole or in part only. However, the credit could only be granted towards the

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1 Act of 6 June 1997: Criminal Code (Dz.U. 1997, No. 88, item 553; consolidated text Dz.U. 2018, item 1600).

2 Regulation of the President of the Republic of Poland, Criminal Code of 11 July 1932 (Dz.U. 1932, No. 60, item 571).

3 V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2002, p. 58.

imposed sentence of imprisonment (i.e. jail or custody time).[4] It could not be granted towards other penalties, including imprisonment in default of other penalties.[5]

The 1969 Criminal Code[6] brought about far-reaching changes in the legal institution discussed in this paper. Under Article 83 of the 1969 Criminal Code, the legislature required the court to credit the period of pre-trial detention towards the imposed sentence, and the institution itself was qualified as one of the sentencing principles.[7] The period of pre-trial detention had to be credited as a whole by operation of law. A list of penalties with regard to which such credit could be granted was also extended and, in addition to the sentence of imprisonment, there was also a possibility to credit the period of pre-trial detention towards a sentence of restriction of liberty and a fine.[8] The Supreme Court held that: 'The *ratio legis* underlying these provisions was dictated by the assumption, arising from justice and equity considerations, that the burden associated with the application of pre-trial detention to the offender should not remain beyond the scope of the sentence of imprisonment or a sentence of restriction of liberty or a fine, imposed on the offender and enforceable. As such, the crediting of the period of pre-trial detention towards one of these sentences constitutes a statutory benefit offered to a sentenced person.'[9] In this context, it is worth noting that although the literal wording of Article 83 of the 1969 Criminal Code stipulated that only the period of pre-trial detention was to be credited, the case law extended the possibility of crediting towards the sentence also periods of the actual restriction of liberty other than pre-trial detention, e.g.: (1) the period of detention in a closed psychiatric institution for the purpose of psychiatric assessment applied under Article 184 of the 1969 Criminal Procedure Code,[10] ordered by the court or public prosecutor,[11] (2) the period of detention in a juvenile correctional facility or a juvenile pre-trial detention facility,[12] or (3) the period of detention provided for in Articles 206 to 208 of the 1969 Criminal Procedure Code, if it was not subsequently converted into pre-trial detention[13].

In the 1997 Criminal Code, the legislator directly allowed that the actual periods of deprivation of liberty served by the offender in a given case[14] be credited towards

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[4] G.A. Skrobotowicz, *Zaliczenie tymczasowego aresztowania na poczet kary orzeczonej w innej sprawie*, Prokuratura i Prawo 9, 2011, p. 100. See also Z. Sienkiewicz, [in:] O. Górniok, S. Hoc, M. Kalitowski, S.M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, Vol I: *Art. 1–116*, Wydawnictwo ARCHE, Gdańsk 2005, p. 570.

[5] The Supreme Court resolution of 6 August 1968, VI KZP 26/68, Legalis No. 556016.

[6] Act of 19 April 1969: Criminal Code (Dz.U. 1969, No. 13, item 94).

[7] V. Konarska-Wrzosek, *supra* n. 3, p. 58.

[8] Literature accepted that this principle extended to the death penalty as well, since it was convertible into another sentence. Cf. V. Konarska-Wrzosek, *supra* n. 3, p. 58.

[9] Judgment of the panel of seven judges of the Supreme Court of 20 August 1970, R Nw 33/70, Legalis No. 14771.

[10] Act of 19 April 1969: Criminal Procedure Code (Dz.U. 1969, No. 13, item 96).

[11] The Supreme Court judgment of 2 April 1975, Rw 142/75, Legalis No. 18673.

[12] Judgment of the Court of Appeal in Łódź of 8 September 1993, II AKr 215/93, Legalis No. 33227.

[13] The Supreme Court resolution of 19 July 1995, I KZP 24/95, Legalis No. 29416.

[14] The literature assumes that the principle in question concerns: (1) detention under Article 244 Criminal Procedure Code or Article 45 Petty Offence Procedure Code, (2) pre-trial detention (which refers to the period of actual pre-trial detention in the case), (3) placing an offender in a medical hospital for psychiatric observation, (4) detention in a juvenile pre-trial detention facility and stay

the sentences other than pre-trial detention, which was reflected in the content of Article 63 § 1 Criminal Code. Pursuant to the introductory part of that provision, the period of actual deprivation of liberty imposed in a given case is to be credited towards the sentenced person's sentence, rounded up to the nearest full day.

As in the 1969 Criminal Code, it is the duty of the court to credit such periods (and it is one of the sentencing principles). This means that the court has to credit such period on its own motion. A breach of this obligation by the court is tantamount to a violation of substantive law, which results in a decision being reversed or amended.[15]

The credit should be granted towards any sentence,[16] with the assumption that one day of actual deprivation of liberty corresponds to one day of imprisonment, two days of restriction of liberty or two daily rates of a fine[17] (a conversion factor of 1:1 was introduced for the sentence of imprisonment and 2:1 for the remaining sentences).

2. ROUNDING UP OF THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS THE SENTENCE OF RESTRICTION OF LIBERTY

As already indicated above, when applying Article 63 § 1 Criminal Code to converting the period of actual deprivation of liberty into the credit towards the sentence imposed, the principle is that the period to be credited is rounded up to the nearest full day.

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in a juvenile correctional facility, (5) effective detention abroad and the sentence served there, and (6) any other time served in confinement where this is connected with criminal proceedings in a particular case. Joanna Długosz also considers placing of a person detained under Article 244 § 1 Criminal Procedure Code in a sobering-up facility to be the actual time served in confinement that can be credited towards the sentence. Cf. J. Długosz, [in:] M. Królikowski and R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017, pp. 882–883. Legal authors and commentators are inconsistent as to whether this principle also applies to the actual time served in confinement resulting from the detention of a person in a police facility for the purpose of carrying out a procedural action relating to his/her apprehension or awaiting transportation. Some of legal authors and commentators make the possibility of crediting this period dependent on its duration: only a longer detention period is credited (see: V. Konarska-Wrzosek, *supra* n. 3, p. 60; A. Marek, [in:] *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2007, p. 169; I. Zgoliński, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2016, p. 381). In the opinion of other legal authors and commentators, this period is credited regardless of its duration (see: G. Łabuda, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Wolters Kluwer, Warszawa 2012, p. 441; J. Długosz, *supra* n. 14, p. 883; M. Melezini, [in:] T. Kaczmarek (ed.), *System Prawa Karnego*, Vol. 5: *Nauka o karze. Sądowy wymiar kary*, Wydawnictwo C.H. Beck. Instytut Nauk Prawnych PAN, Warszawa 2017, p. 185).

15 M. Melezini, *supra* n. 14, p. 184.

16 Including the sentence of life imprisonment. In such case, crediting of the actual time served in confinement is essential to determine the date from which the sentenced person may apply for conditional early release. Cf. W. Wróbel, [in:] W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 53–116*, Wolters Kluwer, Warszawa 2016, pp. 219–220. See also Z. Sienkiewicz, *supra* n. 4, p. 571; M. Melezini, *supra* n. 14, p. 187.

17 In the case of the amount of a fine, it should be assumed that one day of actual depravation of liberty corresponds to the amount of a double daily rate defined in accordance with Article 33 § 3 Criminal Code.

In this context, Violetta Konarska-Wrzosek points out that the issue of converting the period of actual deprivation of liberty into the credit towards the restriction of liberty has not been regulated in a comprehensive manner. The legislator does not directly determine how to assess the situation where the sentence to be served by the sentenced person is set out in months and days.[18] In her view, in such situation, the duration of the sentence of restriction of liberty resulting from the calculation should be rounded up to a full month.[19] In this respect, Violetta Konarska-Wrzosek proposes to adopt a solution analogous to that of Article 83 § 2 of the 1969 Criminal Code, according to which the period of restriction of liberty, by which the sentence remaining to be served is to be reduced, is rounded up to a full month.[20] The author stresses that in this aspect such an interpretation adheres to the principle of imposing the penalty of restriction of liberty in full months, which applies in our system, and it also works to the sentenced person's advantage.[21] Włodzimierz Wróbel takes a similar view in this respect. According to him, the necessity of rounding up the restriction of liberty to a full month is supported by the fact that this sentence is imposed in months, and the obligation to perform work (community service) is determined on a monthly basis.[22]

However, this view is arguable. First of all, it should be noted that it follows directly from the wording of Article 63 § 1 Criminal Code that one day of actual deprivation of liberty is equal to one day of imprisonment, two days of restriction of liberty or two daily rates of a fine, and any rounding up may only be made to a full day, and not a month. If the legislator intended that the period of restriction of liberty be rounded up to a full month, that would have been made clear in the wording of Article 63 Criminal Code, as it was done in Article 83 § 2 of the 1969 Criminal Code. However, the legislator has now abandoned this provision.

Moreover, it is difficult to find justification for such a far-reaching 'bonus' for sentenced persons whose sentence of restriction of liberty resulting from the application of Article 63 Criminal Code is set out in months and days. Such an interpretation would lead to unequal treatment of those sentenced to restriction of liberty, because if a sentenced person, after converting the actual time served in confinement into a sentence of restriction of liberty, has an insignificant period of time left (e.g. six months and six hours), the whole next month of the restriction of liberty should be deducted from this additional period (these six hours), although the person has actually been deprived of liberty for additional few hours.

It appears that in the case of granting credit towards the penalty of restriction of liberty under Article 63 Criminal Code, the fact that this penalty is imposed in monthly units (full months) is also irrelevant. The institution of crediting the actual

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[18] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63; *eadem*, *W kwestii zaliczania faktycznego pozbawienia wolności na poczet orzeczonej kary*, Przegląd Sądowy 9, 2000, p. 97.

[19] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63; *eadem*, *W kwestii*, *supra* n. 18, p. 97. See also V. Konarska-Wrzosek, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2017, p. 469; M. Melezini, *supra* n. 14, p. 186.

[20] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63; *eadem*, *W kwestii*, *supra* n. 18, p. 97. See also V. Konarska-Wrzosek [in:] R.A. Stefański (ed.), *Kodeks*, *supra* n. 18, p. 469.

[21] V. Konarska-Wrzosek, *supra* n. 3, pp. 62–63.

[22] A. Wróbel, *supra* n. 16, p. 220.

time served in confinement towards the sentence imposed is, in fact, an institution of penal enforcement law. As such, it should be based on the framework set out in the Penal Enforcement Code.[23] At the stage of enforcement proceedings, the penalty of restriction of liberty may be converted into a custodial sentence if the sentenced person evades serving the penalty of restriction of liberty, or fails to pay the amounts imposed or perform the obligations imposed under Article 34 § 3 Criminal Code.[24] In such case, pursuant to Article 65 § 1 PEC, it should be assumed that one day of imprisonment applied as a penalty in default corresponds to two days of restriction of liberty.[25] At the same time, the court is obliged to take into account the period of the restriction of liberty served by the sentenced person before a sentence of imprisonment in default has been imposed on him/her. However, the conversion may only be effected with respect to that part of the sentence not served by the sentenced person before the penalty in default has been activated. An order activating the sentence of imprisonment in default requires the court to carefully take into account the penalty of restriction of liberty actually served by the sentenced person on a day-to-day basis. Importantly, the same mechanism applies to a sentenced person who has evaded serving his/her sentence or performing his/her obligations for a full month (a multiple thereof) as well as for those who have done so for several days (e.g. the sentenced person has served a penalty of restriction of liberty for the first 10 days and subsequently started evading the same). The adjustment is granted in proportion to the time when the sentenced person has actually served the sentence imposed on him/her. It should be stressed that the same mechanism applies where a sentence of imprisonment in default is suspended under Article 65a PEC. In such case, the conversion is effected the other way round, i.e. from a custodial sentence into a non-custodial sentence. However, the court is each time required to grant the sentenced person credit for each period of imprisonment in default towards the restriction of liberty (Article 65a § 3 PEC). A similar principle also applies in the case of a sentence of restriction of liberty in the form of unpaid, supervised community service (or a fine) under Article 75a § 1 Criminal Code, i.e. in lieu of activating a previously suspended sentence of imprisonment.

In the light of the foregoing, it must be concluded that the provisions of the enforcement procedure allow, and indeed prescribe, that non-custodial sentences, including those involving restriction of liberty, be converted into custodial sentences at a 2:1 ratio.[26] The same calculation should be made when crediting the period of actual deprivation of liberty towards the sentence of restriction of liberty.

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[23] Act of 6 June 1997: Penal Enforcement Code (Dz.U. No. 90, item 557; consolidated text: Dz.U. 2018, item 652); hereinafter PEC.

[24] If the sentenced person evades serving the restriction of liberty, the sentence of imprisonment in default is obligatorily imposed. Otherwise, such an activating order is optional.

[25] However, if the law does not provide for imprisonment for a given offence, the upper limit of the replacement sentence imposed in lieu of the restriction of liberty may not exceed six months.

[26] Such a conversion rate also applies when converting a fine into a replacement sentence of imprisonment (cf. Article 46 § 2 PEC).

It should be also noted that it is difficult to understand why it is proposed to round up to a full month the period of actual deprivation of liberty, when crediting the said period towards a sentence of restriction of liberty, which is set out in days, and if the same period is to be credited against a penalty of imprisonment, credit is granted on a day-to-day basis (1:1) with no reservations.[27]

Furthermore, it is worth noting that in the literature referring to Article 57a Criminal Code it is explicitly allowed that the penalty of restriction of liberty can be imposed in a fractional part of a month since it is assumed that the lower limit of this penalty is one month and 15 days.[28] In this regard, Article 57a Criminal Code is considered to be *lex specialis* for Article 34 § 1 Criminal Code, which allows for the imposition of the penalty of restriction of liberty for a fraction of a month. It seems that Article 63 Criminal Code should also be treated as a special rule in relation to the provision laying down general limits on the penalty of restriction of liberty.

In the light of the foregoing, it appears that the period of actual deprivation of liberty which is credited towards a penalty of restriction of liberty can (and should) only be rounded up to a full day, even if – as a result of such calculation – the period of imprisonment which should be regarded as having been served by the sentenced person due to his/her previous detention in custody is set out in months and days.

Importantly, the period of actual deprivation of liberty, to be credited towards the sentence of restriction of liberty, not only affects the length of time of the penalty to be served by the convicted person but also results in the necessity to reduce, as appropriate, the number of hours of unpaid, supervised community service or the amount to be deducted from the sentenced person's work remuneration in the reference month in which the penalty of restriction of liberty remaining to be served covers only a fraction of the month.[29]

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[27] The lower limit of imprisonment is one month and, pursuant to Article 37 Criminal Code, it is imposed in months and years (similar to the penalty of restriction of liberty).

[28] See: R. Hałas, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2018, p. 484; see also M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2017, p. 217 and V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2016, p. 217. A similar view – although with regard to the sentence of imprisonment – was presented by the Supreme Court, which interpreted Article 59 § 1 of the 1969 Criminal Code (equivalent to Article 57a of the currently applicable Criminal Code) and stressed that: 'the lowest penalty for an offence punishable by imprisonment for a term of three months or more, committed in the circumstances stipulated in Article 59 § 1 Criminal Code, is four and a half months.' See the Supreme Court resolution of 20 May 1970, VI KZP 21/70, Legalis No. 14595.

Two other views are also presented by legal authors and commentators in this respect. According to the first one, in such case the sentence imposed should be rounded up to a full month (see I. Andrejew, [in:] I. Andrejew, W. Świda, W. Wolter (eds), *Kodeks karny z komentarzem*, Wydawnictwo Prawnicze, Warszawa 1973, pp. 253–254.). As opposed to this view, there is another interpretation, according to which in such case the lower penalty limit is increased by half and then rounded down to full months (see G. Łabuda, *supra* n. 14, pp. 409–410; W. Zalewski, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017, pp. 846–847).

[29] Cf. L. Osiński, [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2016, p. 315.

In this context, it is worth noting that after the entry into force of the 1997 Criminal Code doubts arose as to how the rounding referred to in Article 63 § 1 Criminal Code should be effected. Wojciech Marcinkowski presented two methods that could be used. The first one consisted in assuming that one day of actual time served in confinement corresponds to a clock day, i.e. the consecutive 24 hours, and the rounding was only effected if 'the last clock day of the period of actual of deprivation of liberty did not reach the full 24 hours'.[30] The other method meant separate rounding of each calendar day to the full day, regardless of 'how many hours per day the offender was actually deprived of his or her liberty'.[31] These doubts were dispelled by inserting of Article 63 § 5 Criminal Code, by force of the Act of 20 February 2015 amending the Criminal Code and certain other acts,[32] whose wording clearly indicates that one day of actual deprivation of liberty to be credited towards the sentence imposed is taken to be 24 hours calculated from the moment of the actual detention in custody.

Under the above-mentioned Act, the legislator also clarified the issue of the time frames with regard to penalties and other measures imposed under provisions of the Penal Enforcement Code. Pursuant to Article 12c PEC, it should be assumed in enforcement proceedings for such penalties and measures that one week counts as seven days, one month as 30 days and one year as 365 days. However, as noted in the literature, against the background of this provision, a discrepancy between the period of one year, which counts as 365 days, and the period of 12 months equivalent of 360 days (12 times 30 days) needs to be considered.[33] In this context, it should be noted that under Article 34 § 1 Criminal Code, the shortest penalty of restriction of liberty lasts one month and the longest penalty of restriction of liberty lasts two years, unless the law provides otherwise, and it is imposed in months and years. However, the legislator has not decided whether the penalty of restriction of liberty should be imposed in 12 months or one year. According to the view prevailing in literature, in such case a penalty of one year should be imposed.[34] It is stressed that such an interpretation is supported by systemic interpretation in the case of regulations governing the sentence of imprisonment.[35] At the same time, it is noted

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[30] W. Marcinkowski, *Wybrane zagadnienia z praktyki stosowania prawa karnego materialnego i procesowego*, Wojskowy Przegląd Prawniczy 4, 2005, p. 128.

[31] Such an interpretation was approved by V. Konarska Wrzosek, *W kwestii*, *supra* n. 18, p. 97.

[32] Dz.U. 2015, item 396.

[33] J. Lachowski, *Wymiar kary w miesiącach i latach na gruncie kodeksu karnego z 1997 r.*, [in:] A. Muszyńska, P. Góralski (eds), *Współczesne przekształcenia sankcji karnych – zagadnienia teorii, wykładni i praktyki stosowania*, Instytut Wydawniczy EuroPrawo, Warszawa 2018, pp. 96–97; M. Szewczyk, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i środki karne. Poddanie sprawcy próbie*, Wydawnictwo C.H. Beck, Instytut Nauk Prawnych PAN, Warszawa 2016, pp. 214–215; I. Zgoliński, [in:] J. Lachowski (ed.), *Kodeks karny wykonawczy. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2016, p. 79.

[34] B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Wolters Kluwer, Warszawa 2016, p. 204; similarly also M. Szewczyk, *supra* n. 33, pp. 214–215; T. Sroka, *Kara ograniczenia wolności*, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz*, Krakowski Instytut Prawa Karnego Fundacja, Kraków 2015, pp. 94–95.

[35] Jerzy Lachowski argues that the Criminal Code (both the general part and the special part) and the Penal Enforcement Code contain a number of provisions in which the legislator

that 'years are plural for one year'.[36] However, the literal wording of Article 34 § 1 Criminal Code does not preclude the possibility of imposing a 12-month penalty of restriction of liberty. The word 'years' means a multiple of one year[37] and, as such, means a time unit greater than one year.[38] It is also worth noting that until 30 June 2015, the penalty of restriction of liberty was, as a rule, imposed for up to 12 months, but in some cases it could be imposed beyond that period, e.g. in the case of an aggregate sentence. In such a situation, the court could impose the penalty of restriction of liberty for a term up to two years, but it had to be imposed (as is the case now) in months and years (Article 86 § 1 Criminal Code effective from 8 June 2010 to 30 June 2015). The above summary leads to the conclusion that the legislator did not associate the concept of 12 months with one year in the case of the penalty of restriction of liberty.[39] It should be pointed out, though, that while before 1 July

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uses the term of one year imprisonment rather than 12 months imprisonment (e.g. Articles 43 § 1, 64 § 2, 279 § 1 Criminal Code or Article 43la § 1(1) PEC). On the other hand, the author notes that the legislator in the Criminal Code uses the phrase of 12 months with regard to certain obligations (this refers to the obligation to report to the Police or another designated authority: Article 41a § 1 and § 2 in conjunction with Article 43 § 1a Criminal Code). In his opinion, in cases where the law provides for a penalty smaller than one year and one month but larger than 11 months, the minimum penalty of one year (either under the provisions of the special or general part of the Criminal Code) should be imposed as one-year imprisonment or restriction of liberty (the same applies to penal measures in which the legislator has set the lower limit of one year), and in cases where the legislator has set the upper limit of some obligations at 12 months (Article 41a § 1 and § 2 in conjunction with Article 43 § 1a Criminal Code), these obligations should be imposed for a maximum period of 12 months rather than one year. The author does not, however, decide the extent to which, in his view, the penalty of restriction of liberty or imprisonment is to be imposed if the court imposes this penalty for more than 11 months, but less than one year and one month, in a situation where this penalty is neither the minimum nor maximum penalty provided for under the statutory length for the offence in question. Compare J. Lachowski, *Wymiar kary*, *supra* n. 33, pp. 100–103.

[36] B.J. Stefańska, *supra* n. 34, p. 204.

[37] *Słownik Języka Polskiego*, the Polish language dictionary entry for 'lata', https://sjp.pwn.pl/szukaj/lata.html (accessed 24.10.2018).

[38] Moreover, the literature points out that the legislator, in Article 34 § 1 Criminal Code (as well as Articles 37 and 322 Criminal Code), when determining the penalty in months and years, uses the conjunction; it should therefore be assumed that a penalty in months and years is possible only if the length of the penalty is at least one year and one month (cf. J. Lachowski, *Wymiar kary*, *supra* n. 33, p. 101).

[39] Against the background of historical and legal remarks, it is worth noting that in the transitional period, i.e. from 1 July 2015 to 14 April 2016, one of the elements of the optionally obligatory penalty of restriction of liberty was the obligation to remain in the place of permanent residence or in another designated place, with the use of the electronic monitoring system (Article 34 § 1a(2) Criminal Code in the wording in effect from 1 July 2015 to 14 April 2016). In Article 35 § 3 Criminal Code (in the wording in effect from 1 July 2015 to 14 April 2016), however, the legislator directly stipulated that this obligation may be imposed for a period not longer than 12 months (and not longer than one year). Therefore, it is inconceivable that a court, intending to impose this obligation for the maximum length (12 months), would be required to impose the one-year restriction of liberty. Importantly, both the replacement of Articles 34 § 1a(2) and 35 § 3Criminal Code and the insertion of Article 12d Criminal Code were performed by way of the same statutory instrument.

In this context, Jerzy Lachowski additionally points out that in the period from 1 September 1998 to 7 June 2010, in the case of an extraordinary aggravation of the penalty of restriction of liberty, this penalty could be imposed for up to 18 months, which directly resulted from

2015 it was only a semantic issue, at present – due to Article 12c Criminal Code – it is of utmost importance for the sentenced person, because the interpretation decides whether he or she will serve the sentence five days longer or not. In the light of the foregoing, one should consider whether to adopt an interpretation that is more favourable for the sentenced person, which in turn would mean that the sentence would have to be served for 12 months rather than one year.[40] Adopting an interpretation unfavourable for the sentenced person would require a final decision on the above issue by the legislator and an amendment to Article 34 § 1 Criminal Code. However, there is also a third option. Any interpretative doubts would be dispelled by amending the wording of Article 12c PEC and assuming that a year means 360 days or 12 months. Such a solution would require the authorities that pursue enforcement proceedings to be particularly accurate in calculating the periods of a sentence as well as other broadly defined measures to correspond to a criminal offence. An alternative solution would be to repeal Article 12c PEC, but in such case the length of the sentence (or another measure) would depend on the length of the month in which it is served, which would put sentenced persons in different situations depending on the months in which they serve the sentence.

The above considerations, although of more general nature, are also relevant in the context of crediting the period of pre-trial detention towards the sentence of restriction of liberty. There is a problem with crediting the period of six months of the actual period of deprivation of liberty towards this penalty. Since under Article 63 § 1 Criminal Code, one day of actual time served in confinement equals two days of restriction of liberty, the sentence to be credited in this example is 12 months, having regard to Article 12c Criminal Code. If the court passes a sentence of one year's imprisonment, the question arises as to what to do with five days' imprisonment, which actually 'remains' to be served by the sentenced person. In such a situation, it is difficult to require the sentenced person to serve those five days of his or her sentence. This would be completely unreasonable and would also generate costs

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Article 38 § 2 Criminal Code in the wording in effect from 1 September 1998 to 7 June 2010. In such case, the penalty was imposed in months. On the other hand, the author argues that this may indicate that the legislator abandoned such a solution (as it did also in the case of the reservation that a sentence of imprisonment shorter than one year was imposed in months and a sentence of imprisonment longer than one year – in months and years, which resulted from Article 32 § 2 of the 1969 Criminal Code); see J. Lachowski, *Wymiar kary*, *supra* n. 33, pp. 101–102.

[40] Initially, Jerzy Lachowski also approved of such an interpretation (cf. J. Lachowski, *Zasady orzekania kary ograniczenia wolności – wybrane zagadnienia*, [in:] T. Kalisz (ed.), *Nowa Kodyfikacja Prawa Karnego*, Vol. XL, Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2016, pp. 38–39). Nevertheless, in more recent studies, the author does not prejudge the issue in question, although at the same time he points out that there are more arguments in favour of the court determining the penalty at 12 months rather than one year in such a case (cf. J. Lachowski, *Wymiar kary*, *supra* n. 33, pp. 100–103).

Tomasz Kalisz also seems to support the view of imposing a 12-month (rather than one-year) penalty of restriction of liberty as he uses the below-mentioned phrase to give examples of the operative part of a judgment which could be issued in the case of a multi-variant (initiated sequentially) penalty of restriction of liberty: 'and for that sentences him/her to 12 months of restriction of liberty consisting in [...]'; cf. T. Kalisz, *Kara ograniczenia wolności. Możliwości i bariery*, [in:] P. Góralski, A. Muszyńska (eds), *Racjonalna sankcja karna w systemie prawa*, Instytut Wydawniczy EuroPrawo, Warszawa 2019, p. 213.

associated with having to implement and enforce the sentence for merely a few days. It is not always possible to take advantage of Article 64 PEC in such case, since the decision whether and to what extent the penalty of restriction of liberty may be regarded as having been enforced is assessed in the light of the achievement by the sentenced person of the objectives of the penalty as set out in Article 53 PEC. In such case, a solution may also be to release the sentenced person from the remainder of the sentence of restriction of liberty under Article 83 Criminal Code. However, the reduction of the sentence under Article 83 Criminal Code may only be applied to a sentenced person who meets the conditions set out in that provision.[41] Thus, not every sentenced person can benefit from this institution.[42] Therefore, solving this problem requires the legislator's interference by amending (or repealing) Article 12c PEC and eliminating the discrepancies between 12 months and one year.

3. CREDITING THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS THE PENALTY OF RESTRICTION OF LIBERTY VS SERVING A SENTENCE UNDER ARTICLE 83 CRIMINAL CODE

In the light of the above, it is worth noting that positive adjustment crediting the actual period of deprivation of liberty towards the sentence of restriction of liberty also has an impact on the sentenced person's eligibility to apply for early release from the remainder of the sentence of restriction of liberty under Article 83 Criminal Code.

One of the grounds on which the legislator has based the possibility of taking advantage of Article 83 Criminal Code by the sentenced person is that he or she has served at least half his/her sentence. The question therefore arises as to whether, when calculating that period, one should also take into account the actual period of restriction of liberty which has been credited towards the sentenced person's penalty of restriction of liberty under Article 63 § 1 Criminal Code. The literature takes the view that this period should be taken into account when assessing whether the sentenced person complies with the provisions (having served the determined part of the sentence) of Article 83 Criminal Code.[43] Nothing prevents the interpretation that this period should be taken into account in such case,[44] all the more so as such interpretation benefits the sentenced person.

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[41] The court may grant such release to a person sentenced to restriction of liberty who has served at least half of his/her sentence (formal grounds) and who has complied with the legal order and fulfilled the obligations imposed on him/her, the imposed penal measures, compensation measures and forfeiture (substantive grounds).

[42] In particular, as the period of time that remains for the sentenced person to serve is very short, there is a risk that the court may not be able to issue its decision in time.

[43] S. Hypś, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2018, p. 567; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Wydawnictwo C.H. Beck, Warszawa 2017, p. 1074.

[44] By way of the Act amending the Criminal Code and some other acts of 20 February 2015, the legislator eliminated the grounds of diligent performance of the indicated work by the sentenced person. This change was connected with the introduction of the new content

The literature stresses that crediting the actual period of deprivation of liberty towards the penalty of restriction of liberty should be treated as one of the forms of serving this penalty.[45] It is worth noting that in exceptional cases the penalty as a whole can be enforced in this very form. This would be the case when crediting of the actual period of deprivation of liberty towards the sentence imposed 'covers' the imposed sentence in its entirety (e.g. a sentenced person has been remanded in custody for three months and then sentenced to six months' restriction of liberty). Above all, however, the credit would only be a modal form of the penalty, which – unlike the traditional forms – has been actually enforced before the convicted person started serving his/her sentence (and even before his/her conviction). In practice, even a long period may elapse between the end of the actual period of deprivation of liberty and the beginning of the penalty of restriction of liberty imposed on the sentenced person. However, it should be pointed out that the period between the end of the actual period of deprivation of liberty and the beginning of the penalty of restriction of liberty served by the sentenced person does not count when assessing whether the sentenced person has served the period required by the legislator in order to be released from the remainder of his/her sentence, as stipulated in Article 83 Criminal Code. Consequently, only the actual period referred to in Article 63 § 1 Criminal Code is relevant when assessing whether the formal grounds for releasing the sentenced person from the remainder of the sentence are present.

In this context, it is worth noting that the beginning of the sentence is connected with the date on which the sentenced person has commenced performing the work prescribed under the sentence of restriction of liberty in the form defined in Article 34 § 1a(1) Criminal Code or with the date being the first day of the period in which a deduction is made from the sentenced person's remuneration in the case of a sentence referred to in Article 34 § 1a(4) Criminal Code. If a sentence is cumulatively imposed in both forms, the commencement of the entire sentence is linked to the date when the enforcement of the first form of restriction of liberty imposed on the sentenced person begins.[46] In such case, the sentence ends upon the end of the period for which the sentence has been imposed, calculated from the date on which the sentenced person has begun to serve the first form of this sentence (regardless of the extent to which the second form has been served and whether it has been served at all). The period during which the sentenced person has served at least half of his/her sentence of restriction of liberty, for the purposes of Article 83 Criminal Code, should also be calculated in the same way. The beginning of

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of the penalty of restriction of liberty; however, although the legislator abandoned two forms of the penalty of restriction of liberty, i.e. the obligation to remain in the place of permanent residence or in another designated place with the use of the electronic monitoring system, as well as the obligation referred to in Article 72 § 1(4) to (7a), the wording of Article 83 Criminal Code was not further amended. Therefore, for the purpose of Article 83 Criminal Code, every form of serving the penalty of restriction of liberty should be acknowledged, including such that has been served by crediting the period of actual deprivation of liberty towards that penalty under Article 63 § 1 Criminal Code.

45 J. Lachowski, *supra* n. 43, p. 1074.

46 T. Sroka, *supra* n. 34, p. 101. Compare also L. Osiński, *supra* n. 29, p. 312.

the period referred to in Article 83 Criminal Code should be counted from the date on which the sentenced person has started (chronologically) to serve the first form of the penalty of restriction of liberty.[47] The part of the sentence period which has been credited to the sentenced person under Article 63 Criminal Code must be added to the period so calculated.

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[47] Legal authors and commentators also present a different view. According to some legal scholars, if both options of the penalty of restriction of liberty are included in a cumulative ruling, at least half of each must be enforced. See: J. Skupiński, J. Mierzwińska-Lorencka, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Wydawnictwo C.H. Beck, Warszawa 2017, p. 579; J. Lachowski, *supra* n. 43, p. 1074.

It seems, however, that such a view is not justified in the light of Article 83 Criminal Code, as well as in the light of the concept of the unity of the penalty of restriction of liberty. Article 83 Criminal Code uses the phrase 'the sentenced person has served at least half of his/her sentence' and does not stipulate that he/she has served at least half of each option of the sentence. In this context, it should be stressed that, in accordance with the concept of the unity of the penalty of restriction of liberty, the forms of penalty cumulatively imposed on the sentenced person constitute a single and indivisible penalty (cf. T. Sroka, *supra* n. 34, p. 144). As such, there are no grounds for assessing the period of time served by the sentenced person referred to in Article 83 Criminal Code from the perspective of its different forms. All the more so because such an interpretation could in practice deprive the sentenced person of taking advantage of Article 83 Criminal Code (or at least make it significantly more difficult) in a situation when a long period of time elapses between the moments when particular forms of penalty are initiated or when the restriction of liberty imposed on the sentenced person takes a consecutive form in which particular options of the sentence are enforced one after another (on the admissibility of using such a model, see T. Kalisz, *Treść i elementy kształtujące karę ograniczenia wolności*, Ius Novum 3, 2016, p. 72).

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COMMENTS ON CREDITING THE PERIOD OF ACTUAL DEPRIVATION OF LIBERTY TOWARDS PENALTY OF RESTRICTION OF LIBERTY UNDER ARTICLE 63 CRIMINAL CODE

Summary

This article discusses certain issues relating to the crediting of the period of actual deprivation of liberty towards the penalty of restriction of liberty in accordance with Article 63 of the Polish Criminal Code. The author presents a method of rounding up the period of a sentenced person's prior detention to be credited towards the penalty of restriction of liberty subsequently imposed upon him/her, which differs from the method adopted so far in the legal doctrine, while indicating that there are no grounds in the current legal state for rounding that period up to a full month and that the rounding up should only be to a full day. The paper also points to the difficulties related to the crediting of the period of actual deprivation of liberty towards the penalty of restriction of liberty resulting from the lack of coherence between the period of one year and the period of 12 months (Article 12c of the Polish Penal Enforcement Code). The article also discusses the impact that crediting of the sentenced person's detention period under Article 63 Criminal Code has on the possibility of releasing such person from serving the remainder of his/her penalty under Article 83 Criminal Code.

Keywords: penalty of restriction of liberty, crediting of the period of actual deprivation of liberty, release of the sentenced person from the remainder of the penalty of restriction of liberty

KILKA UWAG W KWESTII ZALICZENIA OKRESU RZECZYWISTEGO POZBAWIENIA WOLNOŚCI NA POCZET KARY OGRANICZENIA WOLNOŚCI NA PODSTAWIE ART. 63 K.K.

Streszczenie

Artykuł dotyczy wybranych zagadnień związanych z zaliczaniem okresu rzeczywistego pozbawienia wolności na poczet kary ograniczenia wolności w trybie art. 63 k.k. Autorka prezentuje odmienny od przyjmowanego dotychczas w doktrynie sposób zaokrąglania okresu uprzedniej izolacji skazanego na poczet orzeczonej następnie względem niego kary ograniczenia wolności, wskazując, że w aktualnym stanie prawnym brak jest podstaw do zaokrąglania tego okresu w górę do pełnego miesiąca, a zaokrąglenie powinno nastąpić w górę jedynie do pełnego dnia. W pracy zwrócono również uwagę na trudności związane z dokonywaniem zaliczenia okresu rzeczywistego pozbawiania wolności na poczet kary ograniczenia wolności, wynikające z braku koherencji pomiędzy okresem jednego roku, a okresem 12 miesięcy (art. 12c k.k.w.). Omówiony został także wpływ zaliczenia skazanemu okresu izolacji, w trybie art. 63 k.k., na możliwość zwolnienia go od reszty kary na podstawie art. 83 k.k.

Słowa kluczowe: kara ograniczenia wolności, zaliczenie okresu rzeczywistego pozbawienia wolności, zwolnienie skazanego od reszty kary ograniczenia wolności

ALGUNOS COMENTARIOS SOBRE LA CÓMPUTO DEL PERIODO DE PRIVACIÓN DE LIBERTAD EFECTIVA PARA LA PENA DE RESTRICCIÓN DE LIBERTAD EN VIRTUD DEL ART. 63 DEL CÓDIGO PENAL

Resumen

El artículo versa sobre algunos problemas relacionados con el cómputo de periodo de privación de libertad efectiva para la pena de restricción de libertad impuesta en virtud del art. 63 del código penal. La autora presenta el cómputo de redondeo de previo aislamiento, asentado en la doctrina, para la pena de restricción de libertad impuesta posteriormente, indicando que en la regulación vigente faltan bases para redondear este periodo hasta el mes completo, por lo que habrá que redondear únicamente hasta el día completo. Se presta también atención a las dificultades relativas al cómputo de periodo de privación de libertad efectiva para la pena de restricción de libertad, que se deben a falta de coherencia entre el periodo de un año y el periodo de 12 meses (art. 12c del código penal de ejecución). Se habla también de cómo afecta el cómputo de periodo de aislamiento de condenado a la pena de restricción de libertad en virtud del art. 63 del código penal a la posibilidad de eximirle del resto de la pena en virtud del art. 83 del código penal.

Palabras claves: pena de restricción de libertad, cómputo de periodo efectivo de privación de libertad, liberación de condenado del resto de la pena de restricción de libertad

НЕСКОЛЬКО ЗАМЕЧАНИЙ ОТНОСИТЕЛЬНО ЗАЧЕТА ВРЕМЕНИ СОДЕРЖАНИЯ ПОД СТРАЖЕЙ В СРОК НАКАЗАНИЯ В ВИДЕ ОГРАНИЧЕНИЯ СВОБОДЫ В СООТВЕТСТВИИ СО СТ. 63 УК

Аннотация

В статье рассмотрены некоторые вопросы, связанные с зачтением времени содержания под стражей в срок наказания в виде ограничения свободы в соответствии со ст. 63 УК. Автор представляет метод округления времени предварительного заключения осужденного при его зачете в срок назначенного ему наказания в виде ограничения свободы, который отличается от ранее принятого в доктрине. Она указывает, что действующее законодательство не дает оснований для округления этого срока в большую сторону до целого месяца, и что округление должно проводиться в большую сторону только до целого дня. В работе также обращено внимание на трудности, связанные с зачтением времени фактического лишения свободы в срок наказания в виде ограничения свободы из-за несовпадения периода длительностью один год с периодом длительностью 12 месяцев (статья 12c УИК). В ней также обсуждается влияние зачета осужденному времени содержания под стражей в соответствии со ст. 63 УК на возможность его освобождения от отбывания оставшейся части наказания в соответствии со ст. 83 УК.

Ключевые слова: наказание в виде ограничения свободы; зачет времени фактического лишения свободы; освобождение осужденного от отбывания оставшейся части наказания в виде ограничения свободы

EINIGE BEMERKUNGEN ZUR ANRECHNUNG DER TATSÄCHLICHEN DAUER DES TATSÄCHLICHEN FREIHEITSENTZUGS AUF EINE FREIHEITSBESCHRÄNKENDE STRAFE NACH ARTIKEL 63 DES POLNISCHEN STRAFGESETZBUCHES

Zusammenfassung

Der Artikel befasst sich mit ausgewählten Fragen im Zusammenhang mit der Anrechnung der Dauer des tatsächlichen Freiheitsentzugs auf eine freiheitsbeschränkende Strafe nach Artikel 63 des polnischen Strafgesetzbuches. Die Verfasserin stellt eine von der bisher in der Rechtslehre anerkannten Praxis abweichende Methode zur Rundung der Dauer des vorherigen Freiheitsentzugs eines Verurteilten auf die nachfolgend gegen diesen verhängte Freiheitsbeschränkungsstrafe zur Diskussion und weist darauf hin, dass nach dem aktuellen Stand der Rechtsvorschriften keine Grundlage dafür besteht, diese Zeitdauer auf volle Monate aufzurunden und eine Aufrundung nur auf ganze Tage erfolgen sollte. Die Arbeit machte auch auf die Schwierigkeiten im Zusammenhang mit der Anrechnung der tatsächlichen Haftdauer auf eine freiheitsbeschränkende Strafe aufgrund der mangelnden Kohärenz zwischen dem Zeitraum von einem Jahr und der Zeit von 12 Monaten (Artikel 12c des polnischen Strafvollstreckungsgesetzbuches – *Kodeks karny wykonawczy*) aufmerksam. Ebenfalls erörtert wird der Einfluss, den die Anrechnung der Isolationszeit eines Verurteilten nach Artikel 63 des polnischen Strafgesetzbuches auf die Möglichkeit hat, diesem den Rest seiner Strafe gemäß Artikel 83 des polnischen Strafgesetzbuches zu erlassen.

Schlüsselwörter: Freiheitsbeschränkungsstrafe, Anrechnung der Dauer des tatsächlichen Freiheitsentzugs, Befreiung einer zu Freiheitsbeschränkung verurteilten Person von der Reststrafe

QUELQUES REMARQUES CONCERNANT L'IMPUTATION DE LA PÉRIODE EFFECTIVE DE PRIVATION DE LIBERTÉ SUR LA PEINE DE RESTRICTION DE LIBERTÉ PRÉVUE À L'ARTICLE 63 DU CODE PÉNAL

Résumé

L'article concerne certaines questions liées à l'imputation de la période effective de privation de liberté sur la peine de restriction de liberté conformément à la procédure de l'art. 63 du Code pénal. L'auteur présente un moyen, différent de celui adopté jusqu'à présent dans la doctrine, d'arrondir la période d'isolement préalable d'un condamné à la condamnation ultérieure à une restriction de liberté, en indiquant que, dans le cadre juridique actuel, il n'y a aucune raison d'arrondir cette période à un mois complet, et que l'arrondi devrait avoir lieu vers le haut jusqu'à la journée complète. L'auteur attire également l'attention sur les difficultés liées à l'imputation de la période effective de privation de liberté sur la peine de restriction de liberté résultant d'un manque de cohérence entre la période d'un an et la période de 12 mois (article 12c du Code pénal exécutif). L'impact de l'octroi au condamné d'une période d'isolement conformément à l'art. 63 du Code pénal pour la possibilité de libération du reste de sa peine conformément à l'art. 83 du Code pénal a également été discuté.

Mots-clés: restriction de liberté, l'imputation de la période d'emprisonnement effective, libération du condamné du reste de la peine de restriction de liberté

ALCUNE OSSERVAZIONI SULLA DETRAZIONE DEL PERIODO DI EFFETTIVA PRIVAZIONE DELLA LIBERTÀ DALLA PENA DETENTIVA SULLA BASE DELL'ART. 63 DEL CODICE PENALE

Sintesi

L'articolo riguarda aspetti selezionati legati alla detrazione del periodo di effettiva privazione della libertà dalla pena detentiva ai sensi dell'art. 63 del Codice penale. L'autrice presenta un modo diverso da quelli finora assunti di arrotondamento del periodo di precedente isolamento del condannato, da detrarre dalla pena detentiva successivamente comminata nei suoi confronti, indicando che nell'attuale contesto normativo non vi sono le basi per arrotondare tale periodo per eccesso al mese intero, mentre l'arrotondamento dovrebbe essere svolto per eccesso unicamente al giorno intero. Nel lavoro si è posta anche l'attenzione sulle difficoltà legate alla detrazione del periodo di effettiva privazione della libertà dalla pena detentiva derivanti dalla mancanza di coerenza tra il periodo di un anno e il periodo di 12 mesi (art. 12c del Codice penale esecutivo). È stato anche trattato l'effetto della detrazione del periodo di isolamento del condannato, ai sensi dell'art. 63 del Codice penale, sulla sua possibile liberazione condizionale sulla base dell'art. 83 del Codice penale.

Parole chiave: pena detentiva, detrazione del periodo di effettiva privazione della libertà, liberazione condizionale del condannato

Cytuj jako:

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