# ON THE UNDERLYING ASSUMPTIONS FOR THE 2015 CRIMINAL LAW REFORM AND THE MOST IMPORTANT CHANGES IN THE PENAL SYSTEM

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The Act of 20 February 2015 amending the Criminal Code and some other laws[1] has been the biggest amendment to the Criminal Code since it was passed in 1997. Due to the scope and type of changes introduced as well as some expectations, it is especially important for the penal policy that aims at rationalisation and flexible treatment of the so-called petty and 'small' scale crimes. The main motive behind the Criminal Code amendment, presented in the statement of reasons for the bill, was "a defective structure of penalties ruled by courts in relation to the level and characteristic features of criminality"[2].

It must be reminded that the basic criminal and political underlying assumption for the Criminal Code of 1997 was to create such a system of penal response measures in which a penalty of imprisonment would be treated as a category *ultima ratio* in relation to petty and 'small' scale criminality. The main means of penal response to that category of crimes was to be first of all a fine and imprisonment, and possibly a penalty of conditionally suspended imprisonment. At the same time, the Criminal Code established a directive on the primacy of non-custodial penalties and measures over imprisonment in case of crimes that are subject to the alternative non-custodial penalties and imprisonment (Article 58 § 1 of the CC) and created a possibility of ruling non-custodial penalties even in case of crime that is subject to the penalty of imprisonment not exceeding five years (Article 58 § 3 of the CC). With the new approach to imprisonment, the Code also modified the legal shape of, inter alia, a fine and community sentencing and extended the use of conditional discontinuance of the

[1] Journal of Laws of 2015, item 396.

[2] Statement of reasons for the government bill of 15 May 2014 to amend the Act on the Criminal Code and some other laws and the projects of secondary legislation to these acts, paper no. 2393, p. 1.

proceeding as well as conditional suspension of the punishment execution, including a fine and imprisonment[3]. Undoubtedly, the Criminal Code of 1997 with its new philosophy of punishment created opportunities to rationalise penal policy and get closer to the standards of penal policy of most European countries. Moreover, promoting moderation in punishment, it was justified to assume that the solutions adopted in the Criminal Code would lead to the limitation of prison population.

However, the assumption that the penal system should be rational has not been fully implemented. A defectively implemented penal policy has been the source of the continuous high level of the prison population. In 2013 the rate exceeded 221 per 100,000 citizens and the Polish incarceration rate is one of the highest in the European Union. What is even worse, due to highly populated prisons, the number of imprisonment penalties awaiting execution is continually rising (from 28,761 in 2001 to 52,846 in 2014), and the number of people sentenced increased from 26,963 in 2001 to 42,709 in 2014. At the same time, in comparison to the European Union countries, criminality in Poland is at the moderate level having shown a clear tendency to decline since 2005[4].

Thus, the need to modify the system of responding to crime and to implement the formerly adopted assumptions became the main reason for amending the Criminal Code.

The main aim of the Criminal Code amendment was the substantial limitation of the use of conditional suspension of the execution of imprisonment, which was the basic measure of penal response to petty and medium impact crime. The justification of the bill highlights the overuse of a suspended imprisonment sentence in court judgements (applied to almost 60% of all the convicted perpetrators in a year), a measure that is most often ruled in the form of pure probation. Attention was drawn to inappropriate practice of sentencing suspended imprisonment penalty in case of a period longer than

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[3] To read more on the topic see A. Zoll, Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności [Political and criminal assumptions for the Criminal Code in the light of contemporary challenges], *Państwo i Prawo* 1998, no. 9–10, pp. 40–50; A. Marek, Nowy kodeks karny – zasady odpowiedzialności, nowa polityka karna [New Criminal Code: liability rules, new penal policy], *Monitor Prawniczy* 1997, no. 12, pp. 474–475; T. Kaczmarek, Kryminalnopolityczne założenia nowego kodeksu karnego [Criminal and political assumptions for the new Criminal Code], [in:] L. Bogunia (ed.) *Nowa kodyfikacja prawa karnego [New criminal codification]*, Wrocław 1997, pp. 11–30; New Criminal Codes of 1997 with justification, Warszawa 1998, pp. 135–143, 150–165. (Also see M. Melezini, *Punitywność wymiaru sprawiedliwości karnej w Polsce w XX wieku [Criminal justice punitivity in the 20th century Poland]*, Białystok 2003, pp.166–167).

[4] To read more on the topic see T. Szymanowski, *Przestępczość i polityka karna w Polsce w świetle faktów i opinii społeczeństwa w okresie transformacji [Crime and penal policy in Poland in the light of facts and public opinion in the transformation period]*, Warszawa 2012, pp. 47–178; *ibid*., Skazania na bezwzględne kary pozbawienia wolności jako następstwo nieefektywnej polityki karnej [Definitive imprisonment sentencing as a result of inefficient penal policy], *Państwo i Prawo* 2014, no. 4, pp. 79–92; K. Krajewski, Rozmiary i dynamika populacji więziennej w Polsce na tle tendencji europejskich. Uwagi na tle dwóch kwestii spornych [Size and dynamics of prison population in Poland against the background of European tendencies], *PWP* 2008, no. 59, pp. 37–54; M. Melezini, Aktualne problemy polityki karnej, [in:] J. Majewski (ed.), *Nadzwyczajny wymiar kary*, Toruń 2009, s. 27–47; Justification of the bill to amend the Act on the Criminal Code (developed by the Criminal Code Codification Committee, edited on 5 November 2013), CzPKiNP [Czasopismo Prawa Karnego i Nauk Penalnych] 2013, vol. 4, pp. 43–47.

in the case of sentencing this penalty without conditional suspension of its execution. At the same time, it was established that almost half of the imprisoned served a sentence based on the order to execute the penalty of imprisonment that had been conditionally suspended. This kind of sentencing practice resulted in relatively low rate of non-custodial sentences, i.e. fines (21.3% sentences) and community service (12.3%). Definitive imprisonment sentences constituted 9.6% of all the convictions[5].

The diagnosis of the causes of the defectively implemented penal policy and the indication of "the necessity of fast sentencing of really severe penalties" induces, as it was emphasised in the statement of reasons, "complete substitution of fine and non-custodial penalties for suspended imprisonment penalties"[6]. Thus, the legislator made another attempt to make non-custodial penalties (a fine and community service) the basic measure of penal response to petty and medium impact crime[7]. This direction in criminal law reform undoubtedly deserves approval.

Therefore, the amendments limiting sentencing suspended imprisonment penalties, on the one hand, and broadening grounds for sentencing non-custodial penalties, on the other hand, are of key importance to meeting the main aim of the criminal law reform.

In the context of the legislator's striving for radical limitation of the use of suspended imprisonment penalties, it must be straightaway noted, that the Criminal Code amendment eliminated the possibility of conditional suspension of the execution of non-custodial and fine penalties completely. The argument for the decision regarding non-custodial penalties provided in the statement of reasons for the bill was mainly that in the current legal state a non-custodial penalty is saturated with probation elements, which will even strengthen its content after the amendment enters into force, and therefore, "there is no justification for sentencing this penalty with conditional suspension of its execution". Moreover, the decision was substantiated by the scarce amount of penalties in that form applied in practice. Sentencing conditionally suspended fines is also very seldom and this kind of penalty is commonly believed to be useless, which was an argument for giving it up[8].

The amendment introduced substantial changes to the premises of the conditional suspension of the execution of imprisonment. The amended Article 69 § 1 CC limited the possibility of using this measure only to the case of up to one year's imprisonment sentence (formerly it was up to two years' imprisonment) if the perpetrator of crime had not been sentenced to imprisonment (definitive or conditionally suspended one), and it is sufficient to achieve the punishment aim, especially the prevention of their commission of a crime again. It must be added that in accordance with the new wording of Article 69 § 4 of the CC, with regard to perpetrators of hooliganism and perpetrators of crime under Article 178a § 4 CC, the application of conditional suspension of execution of the penalty of imprisonment was limited to really well substantiated cases.

Despite the introduction of such radically stricter conditions for suspension of execution of imprisonment penalty, the amending Act repealed the provision of Article 69

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5 See the justification of the government bill, pp. 2–4.

6 Justification of the government bill, pp. 4–5.

7 J. Majewski, *Kodeks karny. Komentarz do zmian 2015 [Criminal Code: Commentary on the 2015 amendments]*, Warszawa 2015, p. 49.

8 Statement of reasons for the government bill, p. 13.

§ 3 CC, annulling all limitations to the use of this measure towards perpetrators specified in Article 64 § 2 CC and as a result towards perpetrators specified in Article 65 CC, i.e. those for whom crime is the source of income or who committed a crime as members of an organised criminal group or union, towards a criminal committing a crime of a terrorist nature and a perpetrator of a crime specified in Article 258 CC. Seemingly, giving up formal limitations to the use of conditional suspension of penalty execution (formerly laid down in Article 69 § 3 CC) results from the change of premises of the admissibility of that measure that have been limited to such an extent that it does not really seem to be possible to make conditional suspension of penalty execution applicable to multi-recidivists.

The amendment also introduced a shorter probation period. The decision is undoubtedly connected with the decrease in the imprisonment penalty the execution of which can be suspended. Under the new wording of Article 70 § 1 CC, a probation period ranges from one to three years (in the former legal state it was from two to five years). The exception is a different probation period from two to five years applicable to the conditional suspension of penalty execution in case of juveniles and, what is new, a perpetrator who committed a violent crime against a co-resident (Article 70 § 2 CC).

Another modification is the fine amount that can be ruled in connection with conditional suspension of imprisonment penalty execution. The Act amending the Criminal Code lifted the maximum limit (270 daily rates) and decided that a fine shall be applied in compliance with general rules. This means that the fine amount shall be established in compliance with Article 33 § 1 CC, which lays down that the maximum fine limit is 540 daily rates.

It is necessary to mention a substantial change introduced within the modified wording of Article 72 CC regarding obligations of the probation period. Namely, the legislator introduced a compulsion to impose at least one probationary obligation from the list of duties laid down in Article 72 § 1 CC in case no penal measure has been ruled. Therefore, in the current legal state it is not possible to apply the so-called simple conditional suspension of the imprisonment penalty execution because since the sentence becomes valid, some kind of hardship for the perpetrator will always be applied.

Discussing the modifications that are of key importance in order to achieve the main aim of the reform, i.e. the limitation of the number of people imprisoned, it is necessary to mention two new solutions laid down in Article 7 § 3a and Article 75a CC. The provision added to Article 75 § 3a CC introduces a measure of shortening the period of imprisonment in case of its execution resulting from negative assessment of the probation period. The statement of reasons for the bill highlights two circumstances that constitute grounds for the introduction of "a possibility of reducing a penalty in relation to a penalty ruled with suspension of its execution". Firstly, it was decided that, when taking the decision to reduce imprisonment, a court should take into account the fulfilment of obligations by a convict before the reasons for ruling a penalty execution appeared because the convict would not have been obliged to fulfil them if the penalty had not been ruled as conditionally suspended. Secondly, It must be taken into account that "ruling a penalty, a court treats the decision on its conditional suspension as an integral element of the penalty, which results in its higher amount than in case of

a definitive penalty"[9]. The provision of Article 75 § 3a CC stipulates that the convict's performance during the probation period, especially the completion of assigned duties, is to be the ground for reduction of a penalty in connection with a ruling to execute it in cases specified in Article 75 § 2 and § 3 CC. It must be added that a court may mitigate a penalty maximum by half (Article 75 § 3a *in fine* CC).

The institution of a penalty change laid down in Article 75a CC is an important novelty in the context of the implementation of criminal law reform. Its essence consists in the fact that if there are grounds for ruling the execution of a conditionally suspended imprisonment penalty, a court may rule its execution or change it into supervised community service not exceeding two years, or a fine not exceeding 810 daily rates. Such a change of imprisonment to non-custodial penalty or a fine may contribute to the achievement of the main aim of the reform, i.e. reduction of the number of imprisoned convicts. The bill justification indicates that the introduction of this amendment "aims at increasing flexibility of judicial decisions in particular cases and preferring non-custodial penalties, especially towards perpetrators sentenced based on the current regulations, i.e. in cases where the conditionally suspended penalty is overused"[10]. It is worth adding that in compliance with Article 75a § 4 CC, the change of a suspended imprisonment penalty into a non-custodial penalty or a fine does not exempt the convict from the execution of other penal measures ruled: forfeiture, compensation, preventive measures, even if a concurrent sentence is issued later. If a convict evades imprisonment, paying a fine, fulfilling assigned obligations or the ruled penal measures, forfeiture or compensation, a court is obliged to annul the change and rule the execution of the imprisonment penalty (Article 75a § 5 CC)[11].

The legislator linked the deep changes in the area of conditional suspension of the imprisonment penalty execution with a range of changes making penal response to petty and medium impact crime more flexible.

Among various changes, it is first of all necessary to highlight a solution introduced in Article 37a CC, which created a possibility of ruling non-custodial penalties (a fine or community service with the exception of the form laid down in Article 34 § 1a (3) CC) in all cases that are subject to an imprisonment penalty not exceeding eight years. Modifying the statutory penalty of maximum eight years, the provision of article 37a CC added two statutory non-custodial penalties that could not be ruled in the past, i.e. a fine and community service, which resulted in substantial extension of basis for non-custodial penalties sentencing. This makes it practically possible to answer the calls for making non-custodial penalties (a fine and community service) basic penal measures of response to petty and medium impact crime. It must be taken into account, however, that due to the addition of Article 37a CC, the legislator modified not only

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[9] Statement of reasons for the government bill, p. 14.

[10] Statement of reasons for the government bill, pp. 14–15.

[11] For more on interpretational doubts regarding provisions of Article 75 a CC see A. Zoll, Środki związane z poddaniem sprawcy próbie i zamiana kary [Measures connected with probation and a change of penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz [Criminal law amendment of 2015: Commentary]*, Kraków 2015, pp. 443–447; J. Majewski, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 266–278.

Code-incorporated statutory imprisonment penalties not exceeding eight years but also non-Code-incorporated statutory penalties[12].

The legislative motives include the fact that the provision of Article 37a CC is to play two roles. The first of them "is connected with non-Code-incorporated penal law within which there are great discrepancies in how a penal sanction is tailored (…). Because of that, the provision changes uniform sanctions existing in non-Code-incorporated regulations into alternative ones and provides a possibility of ruling a fine or a non-custodial penalty if the non-Code-incorporated penal law does not provide this possibility. On the other hand, the provision constitutes a directive on a judicial punishment, which prompts courts to rule non-custodial penalties instead of imprisonment"[13]. It is necessary to mention here that the wording of the content of the Article 37a CC and its justification in the bill evoked different doctrinal opinions on the character of the norm expressed in Article 37a CC. One can sometimes notice expressions of a directive on judicial penalty sentencing.

The amendment of Article 58 § 1 CC, which originally stipulated a directive on *ultima ratio* definitive imprisonment, corresponds to the modification of the system of statutory penalties. In the current legal state, the provision lays down that, if an act provides a possibility of choosing the type of punishment and a crime is subject to maximum five years' imprisonment, a court rules an imprisonment penalty only if another penalty or penal measure cannot achieve the aim of punishment. Thus, the amendment changed a directive on *ultima ratio* definitive imprisonment into a directive on *ultima ratio* imprisonment in general, thus also conditionally suspended penalty of imprisonment. At the same time, it extended the range of the directive application to all crimes that are subject to imprisonment not exceeding five years'. In the former legal state, the directive referred to crimes that were subject to alternative non-custodial penalties, which were generally applied instead of penalties not exceeding one or two years' imprisonment, and exceptionally (in the special part of the Criminal Code) not exceeding three or five years' imprisonment. Comparing the new directive of Article 58 § 1 CC with the modification of statutory punishment in case of crimes that are subject to a penalty not exceeding eight years' imprisonment expressed in Article 37a CC, it is necessary to conclude that the directive on definitive imprisonment penalty may be broadly applied, however, only to crimes that are subject to a penalty not exceeding five years' imprisonment. In case of a crime that is subject to a statutory penalty of a higher maximum limit, the imprisonment penalty loses its *ultima ratio* character. Moreover, it must be emphasised that (definitive or suspended) imprisonment penalty sentencing under Article 58 § 1 CC is connected with a belief that another non-custodial penalty or penal measure cannot achieve the aims of punishment.

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[12] See J. Giezek, O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzanej kary [On alternative sanctions and a possibility of choosing a type of punishment], *Palestra* 2015, no. 7–8, pp. 25–36; J. Majewski, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 49–51 and 85–101; M. Małecki, Ustawowe zagrożenie karą i sądowy wymiar kary [Statutory penalty and punishment imposed by a court], [in]: W. Wróbel (ed.), *Nowelizacja prawa karnego 2015[Criminal law amendment of 2015]*, pp. 284–295.

[13] Statement of reasons for the government bill, p. 13.

The legislator's striving to radical limitation of suspended imprisonment penalty application for the benefit of non-custodial penalties sentencing, inter alia a fine in particular, which should account for 60% of all penalties[14], was also expressed by repealing a directive of Article 58 § 2 CC, which banned sentencing a fine in case a perpetrator's income, property or financial possibilities constitute grounds for a belief that the convict will not pay a fine and it will not be possible to enforce it. In Part IX of the statement of reasons for the amending bill entitled "Assessment of the regulation effects", it was pointed out that the main source of "problems and pathologies connected with sentencing a fine" is the directive that bans sentencing a fine in case it is established that a perpetrator cannot pay it and it cannot be enforced. It was assumed that the provision that "was to tame simple change of a fine into a substitute imprisonment as well as was to prevent a convict's family from being burdened with that fine (…), in fact contributed to substantial limitation of the role of a statutory fine in the penal policy"[15]. It seems that the conclusion is intuitive because the results of research into files conducted by W. Dadak with respect to statutory fines prove that in majority of cases courts rule fines irrespective of the ban on sentencing an unenforceable fine. According to that author, "the dysfunctionality of the solution does not consist in a binding ban on sentencing an unenforceable fine but in the fact that a court does not establish circumstances necessary to impose a fine, i.e. data on a perpetrator's status"[16]. He rightly concludes that repeal of the ban would be groundless because it functions as a guarantee that prevents sentencing penalties that cannot be enforced in their basic form.

It is necessary to raise one more argument against the decision on repeal of Article 58 § 2 CC, which W. Górowski points out. Namely, it is not possible to impose a fine following the system of daily rates regardless of a perpetrator's financial status, because at the second stage of the fining procedure establishing a daily rate, a court is obliged to take into account a perpetrator's income, living and family circumstances, property relationships and opportunities to earn money. If, as a result of the process, a court establishes that the accused has no property, and the directive on a penalty is to impose a fine, the circumstance will only influence the amount of a daily rate, which should be at the lowest level, and not the decision of sentencing a fine[17].

The amended regulations on a non-custodial penalty constitute very important changes. Apart from extended grounds for this penalty based on a solution laid down in Article 37a CC, the amendment totally reformed the legal shape of a non-custodial penalty. The statement of reasons for the bill highlighted that "The planned amendments to Article 34 and 35 are aimed at intensifying burdens connected with a non-custodial penalty. A non-custodial penalty should become the main punishment imposed for misdemeanours of not especially high social impact" [18]. In the attempts to make it more

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[14] *Ibidem*, p. 126.

[15] *Ibidem*, p. 125.

[16] See W. Dadak, *Grzywna samoistna w stawkach dziennych [Statutory fine in daily rates]*, Warszawa 2011, pp. 492–493.

[17] See W. Górowski, Orzekanie kary grzywny po 1 lipca 2015 r. [Sentencing a fine penalty after 1 July 2015], *Palestra* 2015, no. 7–8, pp. 67–68; *ibid*., [in:] W. Wróbel (ed.) *Nowelizacja prawa [Criminal law amendment]*, pp. 71–73.

[18] Statement of reasons for the government bill, p. 8.

flexible and attractive, a non-custodial penalty was constructed based on numerous elements that make it possible to differentiate its burden depending on the needs of a particular case. At the same time, the length of time for which a non-custodial penalty can be imposed was increased from one to two years. The amended Article 34 § 1 CC stipulates that a non-custodial penalty shall be served for the minimum of one month and the maximum of two years, and shall be imposed for a specified number of months and years.

After the amendment, a non-custodial penalty[19] consists of three groups of elements that form a possible combination of specified burdens of the penalty. These are: (1) constant elements, which affect every convict sentenced to a non-custodial penalty, (2) changeable (mobile) elements, which are freely chosen by a court and can be imposed separately or cumulatively, but at least one of them must be applied, (3) additional elements, which may be imposed on a convict as an additional burden.

The constant elements of a non-custodial penalty that are applied in any form of this penalty were not amended. There is still a ban to change the place of residence without a court's consent and an obligation to provide information about the course of serving the penalty (Article 34 § 2 (1) and (3) CC).

The main changes were introduced in the area of changeable (mobile) elements that form the contents of a non-custodial penalty and make it possible to freely establish the level of its burden. Apart from former two forms of a non-custodial penalty (unpaid supervised community service, deduction of 10–25% of remuneration for charity purposes), the legislator introduced new forms, i.e. the so far unknown electronic monitoring (tagging) and made the duties laid down in Article 72 § 1 (4) CC be the elements of a non-custodial penalty and not, as it was earlier, additional measures applied towards a convict sentenced to a non-custodial penalty.

As a result, in the present legal state, non-custodial penalties include:

1) Obligatory supervised unpaid community service for 20–40 hours monthly;
2) Obligatory stay in the place of permanent residence or another assigned place with the use of an electronic monitoring system (tagging) for a maximum of 12 months and not longer than 70 hours weekly and 12 hours daily taking into account convict's working hours and other obligations imposed;
3) Obligatory probation laid down in Article 72 § 1 (4)–(7a) CC, however, some of the obligations can be ruled individually or cumulatively; they include:
   A) Employment, education, vocational training,
   B) Refraining from abuse of alcohol or use of other intoxicating substances;
   C) Undergoing drug rehabilitation;
   D) Undergoing therapy, especially psychotherapy and psycho-education,
   E) Participation in correctional-educational programmes;

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[19] For more see T. Sroka, Kara ograniczenia wolności [Non-custodial penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego [Amendment to criminal law]*, pp. 85–153; *ibid*., Koncepcje jedności kary ograniczenia wolności w nowym modelu tej kary po nowelizacji z 20 lutego 2015 r. [Uniformity conception of non-custodial penalty in the new model of this penalty after the amendment of 20 February 2015], *Palestra* 2015, no. 7–8, pp. 47–56; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, pp. 291–314; J. Majewski, *Kodeks karny. Komentarz [Criminal code: Commentary]*, pp. 54–82.

F) Refraining from spending time in specified circles and places,
G) Complying with a restraining order instructing to refraining from getting in touch with the victim or other people in a specified way or to stay a certain distance away from the victim or other people.

4) Deduction of 10–25% of monthly remuneration for a charity recommended by a court, which is applicable only towards an employed person. However, without a court's consent, the person cannot resign from the job in the period covered by the sentence.

Moreover, the content of the non-custodial penalty may include additional elements that are optional. Under Article 39 (7) CC, they include:

1) Monetary contribution, laid down in Article 39 (7) CC, of maximum PLN 60,000 to Fundusz Pomocy Pokrzywdzonym oraz Pomocy Postpenitencjarnej [Victims and Post-penitentiary Aid Fund],
2) Obligations laid down in Article 72 § 1 (2) and (3) CC. i.e.:
   a) Making an apology,
   b) Obligatory maintenance payment.

Undoubtedly, a present non-custodial penalty is a very flexible type of punishment and it makes its contents be composed in such a way that it may be very lenient, but it may also be very severe. Obviously, it will allow for more individualised penal response, however, it is rightly pointed out in literature that Code approach to a non-custodial penalty, which constitutes a "mixture of many differentiated rigours, which may be applied in various options, does not comply with the principle of a fixed penalty and "provides a judge with too much room for discretion in tailoring it in particular situations". It is highlighted that "each penal measure, especially if it is called a penalty, should be to some extent uniform and be called what it really is"[20]. However, based on the established model of a non-custodial penalty, it must be said that the character of a penalty is to large extent non-uniform. Moreover, reservations about the use of an electronic monitoring system within a non-custodial penalty are expressed. It is especially pointed out that there is "a lack (…) of specifically determined factual premises in the use of this penal system" in case of its application under Article 37a CC in connection with Article 34 § 1a (1), (2) and (3) CC and within the so-called mixed (combined) penalty[21].

In this context, it is necessary to mention an important change proposed in the bill on amending the Act–Criminal Code and the Act–Penalty Execution Code of 22 December 2015. Namely, having taken into account the multiplicity of forms of a non-custodial penalty, it is proposed that the electronic monitoring system should not be treated as a form of a non-custodial penalty execution. The statement of reasons for

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[20] J. Skupiński, Kolejny projekt nowelizacji Kodeksu karnego. Kilka uwag szczegółowych na tle ogólniejszych refleksji [Subsequent bill to amend the Criminal Code: Some detailed comments against the background of general reflections], [in:] Z. Jędrzejewski, M. Królikowski, Z. Wiernikowski, S. Żółtek (ed.), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego [Between science and criminal law practice. Professor Lech Gardocki jubilee book]*, Warszawa 2014, p. 301. Also see A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 294.

[21] See T. Szymanowski, Nowelizacja prawa karnego wykonawczego – przegląd ważniejszych zagadnień [Penalty execution law amendment – review of key issues], *Palestra* 2015, no. 7–8, pp. 186–187.

the bill highlights that "the attractiveness of the electronic monitoring system as a form of influencing a convict, joining repressive and correctional advantages, causes that the system may constitute a more effective tool of developing penal policy if it can be a form of imprisonment execution"[22]. Thus, there is a proposal to amend Article 34 § 1a CC by repealing point (2) as well as Article 35 CC by repealing § 3.

The so-called mixed penalty (Article 37b CC) introduced by the 2015 amendment Act is a novelty that increases the flexibility of legal and penal response to more serious misdemeanour. It allows for sentencing a misdemeanour perpetrator to two penalties at the same time: a short-term imprisonment and a non-custodial penalty. The statement of reasons for the bill indicates that an addition of a new Article 37b CC was connected with the radical limitation of sentencing suspended imprisonment in the amended Code. However, as a result, it might lead to excessive sentencing of the substitute for this form of penal response in the form of definitive imprisonment. Taking this into account, the bill proposes a solution that allows for inclusion of non-custodial penalties for illegal acts subject to 1–10 years' or 2–12 years' imprisonment. It is then emphasised that "In many situations, a short-term imprisonment sentence for a misdemeanour perpetrator will be sufficient to achieve a special preventive aim connected with the sanction. A non-custodial penalty would supplement penal influence in this case, would be aimed at establishing socially desired behaviour of a convict but would not contain the strong stigma effect. (…) Due to the necessity of keeping certain gradation of penal sanctions influence, there is a stipulation that imprisonment is to be served first[23].

According to Article 37b CC, in case of misdemeanour subject to imprisonment irrespective of the minimum statutory penalty, a court may rule at the same time:

1) One to three months' imprisonment, if the maximum statutory imprisonment penalty is less than ten years, and a non-custodial penalty from one month to two years;
2) One to six months' imprisonment, if the maximum statutory imprisonment penalty is over ten years, and a non custodial penalty from one month to two years.

In case of a mixed penalty, imprisonment is executed first unless a statute stipulates otherwise.

It is worth mentioning that there is a difference in opinion in jurisprudence whether it is possible to suspend the mixed penalty. The dominating opinion is that there are no formal reasons why a penalty under Article 37b CC should not be suspended[24]. At the same time, attention is drawn to special problems that arise in connection with the lack of a statutory ban on conditional suspension of imprisonment. Inter alia, it is raised

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[22] Statement of reasons for the government bill to amend the Act on the Criminal Code and the Act on the Penalties Execution Code of 22 December 2015, pp. 15–16.

[23] Statement of reasons for the government bill, pp. 10–11.

[24] See J. Majewski, *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 100; A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 331. M. Małecki presents a contrary opinion, showing a lack of possibilities of conditional suspension of execution of a consecutive imprisonment penalty. See M. Małecki, Ustawowe zagrożenie karą i sądowy wymiar kary [Statutory penalty and punishment imposed by a court], [in:] W. Wróbel (ed.), *Nowelizacja [Criminal law amendment of 2015: Commentary]*, pp. 298–299; *ibid*., Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37 b k.k.) – zagadnienia podstawowe [Sequence of short-term imprisonment and a non-custodial penalty (Article 37 b CC) – basic issues], *Palestra* 2015, no. 7–8, pp. 45–6.

that there is a possibility of doubling obligations that are contents of changeable or additional elements of a non-custodial penalty (if a court included them in the contents of a non-custodial penalty) with the probation obligations laid down in Article 72 § 1 CC. It is pointed out that in case of the so-called simple suspension of imprisonment penalty execution, the total burden of a mixed penalty would decrease so much that there would be an impression of impunity[25].

The Criminal Code amendment bill of 22 December 2015 presents a solution to this problem. It proposes the amendment to Article 37b CC consisting in the introduction of a ban on applying Article 69 § 1 CC.

Finally, it is necessary to emphasise that the presented changes are of key importance for the implementation of the legislator's penal policy ideas. They create opportunities to limit the role of imprisonment, especially the suspended one, in the penal policy and make a fine and a penalty of limitation of liberty basic penal measures of response to petty and medium impact crimes. Undoubtedly, they go in the right direction. But only time will tell whether they will result in overcoming the deadlock in the penal policy, because the success of the criminal law reform depends not only on the change of regulations but also on its support by the justice system practitioners.

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[25] See A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz [Criminal Code: Commentary]*, p. 331.

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## ON THE UNDERLYING ASSUMPTIONS FOR THE 2015 CRIMINAL LAW REFORM AND THE MOST IMPORTANT CHANGES IN THE PENAL SYSTEM

### Summary

The article deals with the most important amendments to the provisions of the Part on general issues of the Criminal Code introduced by Act of 20 February 2015 in the context of criminal and political assumptions for the criminal law reform. Taking this into account, the article discusses the aims of the reform and then analyses particular solutions the legislator intends to use to implement it. As the main aim of the criminal law reform was to change the deficiently implemented penal policy towards petty and medium impact crimes, where conditionally suspended imprisonment was a dominating penalty, it was decided that the most important changes are those that aim to limit the application of suspended sentences and make non-custodial penalties the main measure of legal penal response. Thus, the analysis is focused on the key regulation for the whole reform, i.e. a conditionally suspended sentence and its numerous modifications. Moreover, the article discusses new solutions of Article 37a CC introducing a fine and a non-custodial penalty for crimes that are subject to statutory imprisonment not exceeding eight years, the issue of repealing the directive on fining laid down in Article 58 § 2 CC, thorough modification of a non-custodial penalty and a new solution of the so-called mixed penalty laid down in Article 37b CC.

Key words: *criminal law reform*, *change in the penal system*, *conditionally suspended imprisonment sentence*, *non-custodial penalties*, *fine*, *community service*, *the so-called mixed penalty*

## O ZAŁOŻENIACH REFORMY PRAWA KARNEGO MATERIALNEGO Z 2015 R. I NAJWAŻNIEJSZYCH ZMIANACH W SYSTEMIE KARANIA

### Streszczenie

Przedmiotem artykułu są najważniejsze zmiany wprowadzone do przepisów części ogólnej kodeksu karnego na mocy ustawy z 20 lutego 2015 r., przedstawione w kontekście założeń kryminalno-politycznych reformy prawa karnego. Mając to na uwadze, w artykule omówiono cele reformy, a następnie analizie poddano poszczególne rozwiązania, za pomocą których ustawodawca zmierza do ich realizacji. Ponieważ głównym celem reformy prawa karnego było dążenie do zmiany wadliwie realizowanej polityki karnej w zakresie drobnej i średniej przestępczości, w której dominującą pozycję zajmuje kara pozbawienia wolności z warunkowym zawieszeniem jej wykonania, uznano, że najważniejszymi zmianami są takie, które zmierzają do ograniczenia stosowania warunkowego zawieszenia wykonania kary i uczynienia z kar nieizolacyjnych głównego środka reakcji prawnokarnej. W związku z tym analizie poddana została kluczowa dla całej reformy regulacja warunkowego zawieszenia wykonania kary i jej liczne modyfikacje, a ponadto omówiono: nowe rozwiązanie przewidziane w art. 37a k.k. wprowadzające możliwość orzeczenia grzywny oraz kary ograniczenia wolności za przestępstwa zagrożone karą pozbawienia wolności nieprzekraczającą 8 lat, problem uchylenia dyrektywy wymiaru grzywny zawartej w art. 58 § 2 k.k., gruntowną modyfikację kary ograniczenia wolności oraz nową instytucję tzw. kary mieszanej, ujętą w art. 37b k.k.

Słowa kluczowe: *reforma prawa karnego*, *zmiany w systemie karania*, *kara pozbawienia wolności z warunkowym zawieszeniem jej wykonania*, *kary nieizolacyjne*, *grzywna*, *kara ograniczenia wolności*, *tzw. kara mieszana*