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THE PENALTY OF RESTRICTION OF LIBERTY – EXPECTATIONS AND REALITY

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Abstract

This study attempts to answer the question whether the assumptions and expectations of the legislators, as expressed in the 2015 amendment to criminal law concerning the penalty of restriction of liberty, have been fulfilled in judicial practice. Based on the analysis, it appears that the main goal of the reform has been achieved: namely, a significant reduction in the adjudication of the penalty of restriction of liberty with conditional suspension of execution in favour of non-custodial penalties. Consequently, the role of the penalty of restriction of liberty in criminal policy has significantly expanded; however, these changes have also had a negative outcome by increasing the use of unconditional imprisonment. This indicates that for some offenders, limiting the application of conditional suspension of penalty execution has led to a rise in the frequency of unconditional imprisonment. When analysing issues related to the adjudication and execution of the penalty of restriction of liberty, particular attention was drawn to the importance of accurately selecting this penalty in the form of an obligation to perform unpaid, supervised community service in specific cases, and the non-compliance in practice with the directive in Article 58 § 2a of the Polish Criminal Code. This led to an increase in the number of substitute imprisonment penalties ordered in place of the restriction of liberty penalty. Additionally, based on established data, serious concerns arise regarding the effectiveness of the penalty of restriction of liberty, as measured by recidivism rates. This is because it brings the penalty of restriction of liberty closer in effectiveness to unconditional imprisonment and significantly deviates from the effectiveness of other non-custodial penalties and measures.

Keywords: penalty of restriction of liberty, substitute penalty, recidivism, criminal policy, criminal law reform

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INTRODUCTION

The penalty of restriction of liberty is a crucial instrument in criminal law for addressing crimes, particularly following the amendment to the Criminal Code on 20 February 2015. This penalty is envisioned as an alternative to short-term imprisonment and difficult-to-repay fines, and as a substitute for sentences with a conditional suspension of execution – a practice that has been significantly limited due to its overuse. Based on the experience gathered in the adjudication of the penalty of restriction of liberty under the concept adopted in the Polish Criminal Code of 1997 ('CC'), the initial provisions suggested that the penalty did not sufficiently fulfil its assumed functions. The effectiveness of its execution required significant improvement. Consequently, the 2015 reform of the Criminal Code introduced substantial changes to the content, scope, and foundations for imposing this penalty, aiming to prioritise it within criminal policy. This reform raises the question: Have the intended objectives and achieved results in criminal policy been entirely satisfactory? The issues identified will be examined in the considerations below.

THE PENALTY OF RESTRICTION OF LIBERTY IN LIGHT OF THE ASSUMPTIONS OF THE CRIMINAL CODE OF 1997 IN ITS INITIAL WORDING

One of the fundamental assumptions of the criminal policy in the Criminal Code of 1997, particularly concerning minor and medium crime categories, was to create a system where imprisonment would be treated as a last resort (*ultima ratio*), giving primacy to non-custodial penalties. It was believed that fines, restriction of liberty, or possibly imprisonment with conditional suspension of execution, should be the primary measures of legal response.[1] However, the criminal policy implemented over several years following the Criminal Code enactment indicated that judicial practice significantly differed from the expectations of its authors. In particular, it was noted that it was not fines or restriction of liberty that served as primary measures of legal response to crime but rather the penalty of imprisonment with conditional suspension of execution, which dominated the structure of imposed penalties, accounting for over 55% of all convictions[2] between 1999 and 2014. Furthermore, studies indicated that the high prison population was not primarily

[1] Zoll, A., 'Założenia politycznokryminalne kodeksu karnego w świetle wyzwań współczesności', *Państwo i Prawo*, 1998, No. 9–10, pp. 47–49; Buchała, K., 'System kar, środków karnych i zabezpieczających w projekcie kodeksu karnego z 1990 r.', *Państwo i Prawo*, 1991, No. 6, pp. 20–24.

[2] Mycka, K., 'Praktyka orzecznicza sądów polskich w kontekście wykonywania kar i środków karnych', in: Jakubowska-Hara, J., Nowak, C. (eds), *Problemy na tle przeludnienia zakładów karnych*, Warszawa, 2010, pp. 44–61; Melezini, M., 'Aktualne problemy polityki karnej', in: Majewski, J. (ed.), *Nadzwyczajny wymiar kary*, Toruń, 2009, pp. 34–44; Krajewski, K., 'Przemiany polityki karnej po nowelizacji Kodeksu karnego z 2015r.', in: Grzyb, M., Krajewski, K. (eds), *Polityka kryminalna: między teorią a praktyką. Księga jubileuszowa profesor Janiny Błachut*, Kraków, 2022, pp. 190–191.

due to unconditional imprisonment sentences but rather to the orders to execute previously conditionally suspended prison sentences.[3]

Recognising the need to limit the use of imprisonment penalties with conditional suspension and to address the increasing frequency of adjudicating the penalty of restriction of liberty combined with community service, the legislator introduced significant changes in 2009 (under the Act of 5 November 2009[4]). These changes aimed to enhance the effectiveness and execution of the penalty of restriction of liberty, making it a viable alternative to imprisonment. A particularly significant change was the introduction of regulations in Article 58 § 2a CC, prohibiting the imposition of a penalty of restriction of liberty with an obligation to work if the health condition of the accused or their personal characteristics and circumstances indicate that the accused will not fulfil this obligation. In the justification for the draft law, the introduction of this directive was motivated by the fact that, in practice, cases occur where 'the penalty of restriction of liberty with the obligation to work is imposed – especially in judgments delivered at a session without the defendants' presence – on individuals incapable of performing such work.' It was noted that 'the family situation of the defendant, such as direct care of minors or seriously ill, elderly family members, preventing the provision of care during the term of work, or when 'a defendant had previously been sentenced to a restriction of liberty and had evaded its execution,' constituted obstacles that made it impractical to impose a penalty of restriction of liberty with an obligation to work.[5]

Among the various amendments introduced in the revision of the Polish Criminal Code, notable changes included the establishment of a professional probation officer as the body responsible for supervising execution of the penalty of restriction of liberty, expansion of entities where the convicts could work, and exemption of these entities from bearing social insurance costs. Additionally, measures were introduced to facilitate convicts in fulfilling their duty to work on non-working days and to establish 'social purpose' as the exclusive beneficiary of deductions in both forms of the penalty of restriction of liberty.[6]

Unfortunately, the potential of the penalty of restriction of liberty was still underutilised in practice. Between 2010 and 2014, the structure of sentences was predominantly marked by the imposition of imprisonment with conditional suspension of execution, comprising about 55–58% of all convictions. Meanwhile,

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[3] 'Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny' [Justification for the draft act on amending the Act – Criminal Code and Certain Other Acts], *Czasopismo Prawa Karnego i Nauk Penalnych*, 2013, No. 4, pp. 44–47.

[4] Act of the 5 November 2009 on amending the Act – Criminal Code, Act – Code of Criminal Procedure, Act – Executive Penal Code, Act – Penal and Fiscal Code and Certain Other Acts (Journal of Laws of 2009, No. 206, item 1589, as amended).

[5] *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny i innych ustaw* [Justification for the draft law on amending the Act – Criminal Code and Certain Other Acts] (The Sejm print No. 1394, 6th term); Konarska-Wrzosek, V., in: Stefański, R.A. (ed.), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2018, p. 450.

[6] Szewczyk, M., in: Wróbel, W., Zoll, A. (eds), *Kodeks karny. Część ogólna. Tom, I. Komentarz do art. 1–52*, Warszawa, 2016, pp. 719–720; Migdał, J., in: Szymanowski, T., Migdał, J., *Prawo karne wykonawcze i polityka penitencjarna,* Warszawa, 2014, pp. 134–137; Postulski, K., 'Zmiany w wykonywaniu kary ograniczenia wolności', *Probacja*, 2011, No. 3, pp. 119–120.

the penalty of restriction of liberty accounted for only 11–12%. The disparity was substantial; for instance, in 2010, 251,087 convicts received imprisonment with conditional suspension, compared to only 49,692 convicts[7] sentenced to the penalty of restriction of liberty.

Simultaneously, research conducted by A. Janus-Dębska in 2014 on the reasons for the non-enforcement of penalties of restriction of liberty revealed a concerning picture of the practice of adjudicating and executing such penalties. The most common reasons for non-execution were the suspension of enforcement proceedings due to long-term obstacles. These obstacles included the inability to locate the convict, mental illness or other chronic, serious diseases, poor health of the convict, stays in penitentiary units or addiction treatment facilities, difficulties in determining the convict's place of residence, challenging family situations (e.g., caring for children), or living circumstances (e.g., the necessity of earning a livelihood). Opinions from court probation officers indicated that such situations frequently arose, particularly in cases where 'default judgments or those issued under Article 335 of the Code of Criminal Procedure'[8] were submitted to probation teams.

The findings from a survey of 335 court probation officers reveal several reasons for convicts' reluctance to perform community service. These include the imposition of the penalty of restriction of liberty by order, which sometimes results in penalties not aligned with the perpetrator's capabilities or personal conditions; sentencing individuals with disabilities or serious somatic or mental illnesses to restriction of liberty; conflicts between work obligations and the convict's education; addictions, particularly alcohol binges, that prevent work performance; lack of facilities for weekend work and protected work establishments for persons with disabilities; evasion of work execution by convicts; multiple sentences of restriction of liberty for the same individual who has previously evaded this penalty; and sentencing homeless persons to restriction of liberty.[9]

Statistical research conducted by A. Janus-Dębska also shows a year-by-year decrease in the percentage of cases where convicts actually performed the assigned work. This percentage was 54.4% in 2011, 51.7% in 2012, 50.8% in 2013, 46% in 2014, and only 43.5% in 2015. Typically, work performance concluded with an order to execute a substitute sentence of imprisonment or limitation. For example, in 2015, probation teams handled 91,650 cases concerning the penalty of restriction of liberty. Probation officers filed applications under Article 65 § 1 and Article 66 § 1 of the Criminal Enforcement Code in 76,514 cases, of which 69,003 were considered and 49,473 were granted.[10]

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[7] Krajewski, K., 'Przemiany…', op. cit., pp. 186–187.

[8] Janus-Dębska, A., 'Uwarunkowania efektywnego wykonania kary ograniczenia wolności', *Probacja*, 2014, No. 3, pp. 118–120.

[9] Janus-Dębska, A., 'Czynniki utrudniające efektywne wykonywanie kary ograniczenia wolności', in: Kwieciński, A. (ed.), *Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności*, Wrocław, 2016, pp. 47–49; Janus-Dębska, A., 'Uwarunkowania efektywnego…', op. cit., pp. 128–130.

[10] Janus-Dębska, A., 'Czynniki utrudniające…', op. cit., p. 45.

In this context, the sentencing stage of the penalty of restriction of liberty emerges as a significant problem. It is at this stage that the primary and underlying causes of challenges associated with the functioning of this penalty should be sought. These are not the only causes, as it is generally difficult to predict the future behaviour of the convict or the occurrence of individual circumstances (e.g., illness) that may prevent the execution of the penalty. However, studies show that in most cases, courts lack informational material on the accused and often make decisions at a session under Article 335 of the Code of Criminal Procedure ('CCP') or by a court order (Article 500 CCP) without seeing the accused and without the means to verify or update data on the accused. Courts rarely use environmental interviews during court proceedings, and this lack of information on the accused, their health condition, characteristics, personal circumstances (including family situation), and information on prior convictions involving the penalty of restriction of liberty and evasion of its execution, affects the appropriateness of the sentence and the entire court process, which should aim to change the convict's attitude.[11] Although the 2009 Act introduced an important directive in the Criminal Code, prohibiting the use of the penalty of restriction of liberty with the obligation to work in situations specified in Article 58 § 2a CC, studies conducted in 2014 revealed that restriction of liberty is still sentenced with only sporadic use of professional pre-trial diagnostics of the accused in the form of an environmental interview, as specified in Articles 213–214 CCP[12]. This means that, in practice, the directive from Article 58 § 2a CC is often disregarded. This lack of compliance becomes a source of further issues at the enforcement stage for the penalty of restriction of liberty.

NEW LEGAL SHAPE OF THE PENALTY OF RESTRICTION OF LIBERTY FOLLOWING THE 2015 REFORM OF THE POLISH CRIMINAL LAW

In 2015, through a comprehensive reform of the Polish Criminal Code,[13] the legislator introduced significant changes to the existing model of the penalty of restriction of liberty and its adjudication principles. These changes aimed to make this penalty more appealing and encourage courts to use it more frequently, referencing the original political-criminal assumptions of the 1997 Polish Criminal Code, which had not been fully realised. The reform's primary objective was to make non-custodial penalties (fines and the penalty of restriction of liberty) the main response to minor and medium-severity crimes. The reform authors, criticising the structure of

[11] Janus-Dębska, A., 'Czynniki utrudniające…', op. cit., pp. 53–54; Stasiak, K., 'Wymiar kary ograniczenia wolności i jego wpływ na efektywne wykonywanie tej kary – na podstawie badań empirycznych', in: Kwieciński, A. (ed.), *Teoretyczne i praktyczne aspekty wykonywania kary ograniczenia wolności*, Wrocław, 2016, p. 179.

[12] Janus-Dębska, A., 'Uwarunkowania skutecznego wykonania kary ograniczenia wolności w formie prac na cele społeczne na podstawie badań własnych', in: Konopczyński, M., Kwadrans, Ł., Stasiak, K. (eds), *Polska kuratela sądowa na przełomie wieków – nadzieje, oczekiwania, dylematy*, Kraków, 2016, pp. 256–257.

[13] See Act of 20 February 2015 on amending the Act – Criminal Code and Certain Other Acts (Journal of Laws of 2015, item 396).

penalties adjudicated in relation to crime severity and characteristics – dominated by imprisonment with a conditional suspension of its execution – proposed 'the prompt adjudication of genuinely severe penalties'. This approach sought to nearly replace the penalty of imprisonment with a conditional suspension by fines and a more broadly understood penalty of restriction of liberty. Regarding the changes to the regulations on the penalty of restriction of liberty, the amendment's justification highlighted that the 'proposed changes to Articles 34 and 35 aim to intensify the hardship associated with the penalty of restriction of liberty and reduce the attractiveness of the probation regime linked to imprisonment with conditional suspension of execution.' The penalty of restriction of liberty, alongside fines, was intended to become the primary penalty for misdemeanours that are not seriously harmful to society. Additionally, the goal of altering the structure of adjudicated penalties by reducing the overuse of imprisonment with conditional suspension, in favour of more widely applied non-custodial penalties, aimed to reduce the prison population.[14]

The 2015 amendment to the Criminal Code significantly changed the legal structure of the penalty of restriction of liberty, making it a more flexible instrument for criminal law responses and enhancing the individualisation and rationalisation of penal measures. In the new model, the duration of the penalty of restriction of liberty was extended from 12 months to 2 years (Article 34 § 1 CC). The two existing forms of this penalty – performing unpaid, supervised community service (20–40 hours per month) and deducting 10% to 25% of the convict's salary – were expanded with two additional forms. These include an obligation to remain at a permanent place of residence or another designated place with electronic supervision for up to 12 months and obligations specified in Article 72 § 1(4)–(7a) CC. It is also important to add, that while under the previously applicable legal framework the two forms of the penalty of restriction of liberty were adjudicated separately and there was no possibility to accumulate hardships, under Article 34 § 1b CC, as amended, obligations and deductions can now be adjudicated either cumulatively or separately. Moreover, the 2015 amendment to the Criminal Code left unchanged the permanent, obligatory elements of the penalty of restriction of liberty, which are at the core of this penalty and are consistent across all its forms. These include the prohibition against the convict changing their place of permanent residence during the execution of the penalty without the court's consent, and the obligation to provide explanations regarding the course of penalty execution (Article 34 § 2 CC). Additionally, the possibility of imposing a monetary obligation of up to PLN 60,000 alongside the penalty of restriction of liberty was retained, as was the imposition of obligations specified in Article 72 § 1(2) and (3) CC.[15]

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[14] *Uzasadnienie projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw z projektami aktów wykonawczych z 15.05.2014* [Justification for the draft law on amending the Act – Criminal Code and Certain Other Acts, and a draft of an implementing act of 15 May 2014] (the Sejm print, No. 2393, 7th term), pp. 1–10.

[15] For more information, see Szewczyk, M., in: Melezini, M. (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej*, 2nd ed., Warszawa, 2016, pp. 210–226; Majewski, J., *Kodeks karny. Komentarz do zmian 2015,* Warszawa, 2015, pp. 53–82.

It should be emphasised that the 2015 amendment to the Criminal Code preserved the prohibition against adjudicating the penalty of restriction of liberty in the form of an obligation to perform unpaid, supervised community service when the health condition of the accused or their personal circumstances suggest that they will not fulfil this obligation (Article 58 § 2a CC). This directive is crucial in practice because, in 97–99% of cases, the penalty of restriction of liberty is adjudicated in this form – an obligation to work, as specified in Article 34 § 1a(1) CC.

At the same time, the grounds for adjudicating non-custodial penalties (fines and restrictions of liberty) were significantly expanded by introducing these penalties to all statutory offences punishable by imprisonment not exceeding 8 years, where they were previously not included (Article 37a CC).[16] The amendment to Article 58 § 1 CC also facilitated more frequent adjudication of fines and restrictions of liberty, as it replaced the previous *ultima ratio* principle of unconditional imprisonment with the *ultima ratio* principle of imprisonment, including conditional suspension of its execution for crimes punishable by imprisonment not exceeding 5 years. Furthermore, the possibility of joint adjudication of short-term imprisonment and restriction of liberty was introduced within the framework of the so-called 'mixed' penalty for misdemeanours punishable by imprisonment (Article 37b CC). The legislator introduced a new solution: the possibility to impose a penalty of restriction of liberty in the form of an obligation to perform unpaid, supervised community service if the probation period is negatively verified during the conditional suspension of the execution of the imprisonment penalty. In such cases, the court, in accordance with Article 75a CC, could replace the imprisonment penalty with a restriction of liberty. Additionally, the 2015 amendment to the Criminal Code excluded the possibility of applying a conditional suspension of executing the penalties of restriction of liberty and fines, as these measures had not found widespread application in judicial practice.

The solutions adopted regarding the forms of the penalty of restriction of liberty were in effect only for a short time. The Act of 11 March 2016 amending the Act – Criminal Code and the Act – Criminal Enforcement Code[17] removed the new form of executing the penalty of restriction of liberty specified in Article 34 § 1a (3) CC, which allowed for the use of an electronic supervision system and restored electronic supervision as a form of executing the penalty of imprisonment. Moreover, the Act of the same date, amending the Code of Criminal Procedure and Certain Other Acts[18] removed another new form of the penalty of restriction of liberty specified in

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[16] A different position has also been expressed regarding the legal nature of the institution covered in Article 37a CC, suggesting that this provision constitutes a special directive for sentencing misdemeanours punishable solely by imprisonment. See in particular: Konarska-Wrzosek, V., in: Konarska-Wrzosek, V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, pp. 225–226. As a result of the amendment to the Criminal Code by the Act of 19 June 2020 on Surcharges to the Interest Rate of Bank Loans Granted to Entrepreneurs Affected by the effects of COVID-19 and on Simplified Proceedings for the Approval of the Arrangement in Connection with the Occurrence of COVID-19 (Journal of Laws of 2020, item 1086), Article 37a CC was given the character of a special directive of judicial sentencing. See Grześkowiak, A., in: Grześkowiak, A., Wiak, K. (eds), *Kodeks karny. Komentarz*, 7th ed., Warszawa, 2021, pp. 407–409.

[17] Journal of Laws of 2016, item 428.

[18] Journal of Laws of 2016, item 437.

Article 34 § 1a(3) CC, involving obligations specified in Article 72 § 1(4)–(7a) CC.[19] These changes significantly diminished the scope of the penalty of restriction of liberty and limited the possibilities to tailor the degree of hardship of the penalty to the requirements of each case.

It is necessary to emphasise that the authors of the 2015 criminal law reform stressed the need for a profound change in the flawed structure of sentencing towards more frequent adjudication of non-custodial sentences, at the cost of adjudicating the penalty of imprisonment with conditional suspension of its execution. This shift corresponded with a radical limitation on the application of suspended imprisonment. For example, the amended Article 69 CC significantly reduced the upper limit of a prison sentence eligible for conditional suspension from 2 years to 1 year. Additionally, the application of conditional suspension of the execution of the imprisonment penalty was restricted exclusively to perpetrators who, at the time of committing the crime, had not previously been sentenced to imprisonment, either unconditionally or with conditional suspension of execution. As before, a positive criminological prognosis remained a prerequisite for applying suspended imprisonment. Furthermore, Article 69 § 4 CC stipulated that only in particularly justified cases could the execution of the sentence be conditionally suspended for perpetrators of hooligan misdemeanours and crimes specified in Article 178a § 4 CC.[20] Such a drastic limitation on the scope of conditionally suspended imprisonment was almost universally evaluated negatively in the doctrine. It was noted that reducing the limit to one year for the imposed prison sentence eligible for suspension might lead to an increase in the number of unconditional imprisonment sentences and, as a result, undermine the reform objectives.[21]

Considering this, one might reflect on whether the primary goal of the 2015 Criminal Code reform has been achieved and whether the structure of adjudicated penalties aligns with the expectations of the reform's authors.

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[19] For more on this topic, see Melezini, M., 'Zmienione przepisy o karze ograniczenia wolności (wstępne wyniki badań praktyki)', in: Majewski, J. (ed.), *Środki reakcji na czyn zabroniony po reformie Kodeksu karnego z lutego 2015r. Pierwsze doświadczenia*, Warszawa, 2017, pp. 123–124.

[20] For more on this topic, see. Zoll, A., 'Środki związane z poddaniem sprawcy próbie i zamiana kary', in: Wróbel, W. (ed.), *Nowelizacja prawa karnego z 2015 r. Komentarz*, Kraków, 2015, pp. 436–447; Majewski, J., *Kodeks karny*…, op. cit., pp. 237–282.

[21] Zoll, A., 'Regulacja warunkowego zawieszenia wykonania kary pozbawienia wolności w ustawie z 20 lutego 2015 r.', in: Bojarski, M., Brzezińska, J., Łucarz, K. (eds), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław, 2015, pp. 410–413; Burzyński, P., 'Zmiany normatywne w zakresie instytucji warunkowego zawieszenia wykonania kary pozbawienia wolności – uwagi praktyczne', in: Adamski, A., Berent, M., Leciak, M. (eds), *Warunkowe zawieszenie wykonania kary w założeniach nowej polityki karnej*, Warszawa, 2016, pp. 60–63; Konarska-Wrzosek, V., 'Ustawowe przesłanki stosowania warunkowego zawieszenia wykonania kary po nowelizacji kodeksu karnego', in: Adamski, A., Berent, M., Leciak, M. (eds), *Warunkowe zawieszenie*…, op. cit., pp. 167–181.

CHANGES IN THE STRUCTURE OF ADJUDICATED SENTENCES AFTER THE 2015 CRIMINAL CODE AMENDMENT AND THEIR CONSEQUENCES – INTENDED AND UNINTENDED

Table 1. The structure of lawfully adjudicated penalties by courts in 2014 and 2020

Specification	2014		2020	
	No.	%	**No.**	%
Total number of convicts	295,353	100.0	251,369	100.0
Autonomous fine	63,078	21.3	84,081	33.4
Including suspended	998	1.6	26	0.0
Penalty of restriction of liberty	33,009	11.2	74,012	29.4
Including suspended	897	2.7	15	0.0
Immediate custodial sentence	35,633	12.1	48,550	19.3
Custodial sentence with a suspended execution	163,534	55.4	41,974	16.7
Mixed penalties	X	X	2,619	1.0

Source: 'Prawomocne skazania i warunkowe umorzenia osób dorosłych w latach 2001–2020 – czyn główny', published by Wydział Statystyczny Informacji Zarządczej Ministerstwa Sprawiedliwości [Lawful convictions and conditional discontinuation of proceedings against adults in the years 2001–2020 – main act, published by the Statistical Department of Managerial Information of the Ministry of Justice] [http://isw.ms.gov.pl/pl/bazastatystyczna/opracowaniawieloletnie; accessed on: 25 August 2023].

Statistical data indicates that in 2020, compared to 2014, there were significant changes in the structure of adjudicated penalties. After many years of widespread criticism regarding the mass application of conditional suspension of imprisonment, the share of this measure in adjudicated penalties has significantly decreased – from 55.4% to 16.7%. The penalty of restriction of liberty with conditional suspension of its execution has been effectively marginalised in practice, occupying the lowest position among measures of criminal response. In alignment with the 2015 criminal law reform, there was a notable increase in the role of non-custodial sentences. Specifically, the share of the penalty of restriction of liberty rose from 11.2% to 29.4%, with the number of such penalties more than doubling from 33,009 in 2014 to 74,012 in 2020. Notably, the number of imposed liberty restriction penalties abruptly increased in 2016 (from 31,096 in 2015 to 61,542 in 2016), continuing to grow, though less dynamically, in subsequent years.[22]

[22] See more in: Krajewski, K., 'Przemiany polityki karnej…', op. cit., pp. 186–187; Melezini, M., 'Tendencje w polityce karnej po reformie prawa karnego z 2015 r.', in: Góralski, P., Muszyńska, A. (eds), *Racjonalna sankcja karna w systemie prawa*, Warszawa, 2019, pp. 128–132.

Positive changes were also observed in the application of autonomous fines, whose share in the structure of imposed penalties increased from 21.3% to 33.4%. In 2020, the number of convictions to autonomous fines was 84,081, making it the most frequently adjudicated penalty that year.

These changes were expected and aligned with the assumptions of the 2015 reform, although not all expectations were fulfilled. Due to the excessively radical limitation on the application of conditional suspension of imprisonment, there was a significant increase in the share of unconditional imprisonment (from 12.1% to 19.3%). It turns out that in some cases, the penalty of imprisonment with conditional suspension was not replaced by non-custodial penalties; instead, unconditional imprisonment was used as an alternative. The number of adjudicated unconditional imprisonment penalties increased from 35,633 in 2014 to 48,550 in 2020, despite a significantly lower total number of convictions.

Considering the criminal policy context following the 2015 criminal law reform, one might question the rationality of pursuing such a drastic limitation on the scope of conditional suspension of imprisonment while significantly increasing the role of the penalty of restriction of liberty in judicial practice. This is particularly relevant given the extensive research conducted by A. Janus-Dębska in 2014, as previously mentioned, which highlighted numerous obstacles that made it difficult to complete the execution of the penalty of restriction of liberty adjudicated in the form of unpaid, supervised community service. Additionally, research by K. Krajewski shows that the drastic decrease in the number of convictions for imprisonment with conditional suspension resulted in a significant reduction in orders to execute conditionally suspended imprisonment penalties (from 50,904 in 2012 to 9,200 in 2020), which, however, did not contribute to reducing the prison population. In this respect, the expectations of the 2015 reform's authors were, unfortunately, not met.[23]

It seems that this is because along with the increasing number of adjudicated liberty restriction penalties, the number of substitute imprisonment sentences ordered due to convicts evading the execution of the restriction of liberty (and fines) is also rising year by year. As of 30 December, the number of substitute imprisonment sentences being executed was as follows: 1,418 in 2002; 3,259 in 2016; 4,803 in 2018; 6,178 in 2020; 8,126 in 2021; and 10,174 as of 30 June 2023.

At the same time, the number of substitute sentences waiting to be executed is alarmingly high. As of 31 December 2022, there were 33,405 such sentences (out of a total of 52,946 sentences with a court-appointed deadline for serving the sentence), composed of 11,248 substitute imprisonment sentences imposed instead of restriction of liberty, 8,025 such sentences imposed instead of an autonomous fine, and 14,132 substitute arrest penalties instead of a fine or restriction of liberty for minor offences.[24] Therefore, the total number of substitute penalties adjudicated in

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[23] Krajewski, K., 'Przemiany polityki karnej…', op. cit., pp. 188–189 and 197. See also Stańdo-Kawecka, B., 'Niepożądane skutki fragmentarycznych reform systemu karania na przykładzie kary zastępczej za ograniczenie wolności', in: Grzyb, M., Krajewski, K. (eds), *Polityka kryminalna: między teorią a praktyką. Księga jubileuszowa profesor Janiny Błachut*, Kraków, 2022, pp. 306–307.

[24] See www.sw.gov.pl/dział/statystyka [accessed on 20 July 2023].

place of the penalties of restriction of liberty, currently being executed and pending execution, fluctuates around 20,000.

Additionally, it turns out that the effectiveness of the penalty of restriction of liberty, in comparison to other penalties, is unsatisfactory when measured by recidivism within five years of a lawful conviction. This is indicated by the data presented in Table 2.

Table 2. Recidivism in the years 2009–2015 within 5 years from conviction to a specific type of a penalty

Specification	Reporting period		
	2009–2013	2010–2014	2011–2015
Penalty of unconditional imprisonment	36.2%	35.4%	33.7%
Penalty of restriction of liberty (unconditional)	35.6%	35.1%	32.7%
Penalty of restriction of liberty with conditional suspension	23.5%	24.4%	25.1%
Autonomous fine (unconditional)	22.9%	22.1%	20.6%
Penalty of restriction of liberty with suspension	16.1%	14.4%	14.4%
Autonomous fine with suspension	10.7%	10.9%	9.0%

Source: 'Powrotność do przestępstwa w latach 2009–2015' [Recidivism in the years 2009–2015]; Wydział Statystyczny Informacji Zarządczej Ministerstwa Sprawiedliwości [www.ms.gov.pl/pl/baza-statystyczna/publikacje-archiwum; accessed on: 10 August 2023].

The results of the research, titled 'Powrotność do przestępstwa w latach 2009–2014 – I edycja' [Recidivism in the Years 2009–2014 – First Edition] and 'Powrotność do przestępstwa w latach 2009–2014 – II edycja' [Recidivism in the Years 2009–2015 – Second Edition], developed by the Wydział Statystyczny Informacji Zarządczej Ministerstwa Sprawiedliwości [Department of Strategy and European Funds, Statistical Information Management Department] and published on the Ministry of Justice[25] website, covering three reporting periods (2009–2013, 2010–2014, and 2011–2015), indicate that in each of these periods, the largest number of people who reoffended had initially been convicted to unconditional imprisonment (36.2%, 35.4%, 33.7%) or to restriction of liberty (unconditional) (35.6%, 35.1%, 32.7%). It is important to note that the ineffectiveness of both these types of penalties was

[25] Departament Strategii i Funduszy Europejskich, Wydział Statystycznej Informacji Zarządczej, Ministerstwo Sprawiedliwości, *Powrotność do przestępstwa w latach 2009–2014 – I edycja*, Warszawa, 19 October 2015; Departament Strategii i Funduszy Europejskich, Wydział Statystycznej Informacji Zarządczej, Ministerstwo Sprawiedliwości, *Powrotność do przestępstwa w latach 2009–2015 – II edycja*, Warszawa, May 2017 (http://isw.ms.gov.pl/pl/bazastatystyczna/publikacje-archiwum [accessed on 10 August 2023]).

high, with similar recidivism rates. Significantly lower recidivism rates were recorded for imprisonment with a conditional suspension of its execution (23.5%, 24.4%, 25.1%) and for an autonomous fine (unconditional) (22.9%, 22.1%, 20.6%). The lowest recidivism rates were observed for restriction of liberty with suspension (16.1%, 14.4%, 14.4%) and for an autonomous fine with suspension (10.7%, 10.9%, 9.0%), although these measures were removed from the Criminal Code by the 2015 amendment.

It appears that the imprisonment penalty with a conditional suspension of execution is characterised by relatively high effectiveness in preventing recidivism. It is considerably more effective than the penalty of restriction of liberty (unconditional), which, in turn, is only marginally less effective than unconditional imprisonment.

CONCLUSION

In conclusion, it should be stated that, on the one hand, the main goal of the 2015 reform of the Criminal Code has been achieved. The radical limitation in the scope of adjudicating imprisonment sentences with conditional suspension of execution and the significant expansion of the basis for sentencing non-custodial penalties have created opportunities for the penalty of restriction of liberty to assume its rightful position within the structure of sentenced penalties. On the other hand, a serious issue arises concerning proper selection of a criminal response measure appropriate to the specific offence and its perpetrator. The accuracy of the court's selection of the penalty of restriction of liberty, which, in turn, affects the course of enforcement proceedings, depends on the application of the directive provided in Article 58 § 2a CC. However, this directive is sporadically applied due to the lack of information as regards the health, personal conditions and characteristics of the accused. This is particularly relevant given that the penalty of restriction of liberty, with an obligation to perform unpaid, supervised community service, is very often adjudicated in judgments issued at a session or in summary judgments without direct contact with the accused. This impacts the effectiveness of the execution of the penalty of restriction of liberty, which still requires significant improvement.

Undoubtedly, the new, extremely specific principle for determining the penalty of restriction of liberty, which mechanically increases the lower limit of this type of penalty, implemented under the Act of 7 July 2022,[26] does not contribute to the rational development of sentencing practices. According to Article 34 § 1aa CC, the term of the penalty of restriction of liberty and the penalty of imprisonment cannot be lower than:

- 2 months if the act is punishable by imprisonment not exceeding 1 year;
- 3 months if the act is punishable by imprisonment not exceeding 2 years;
- 4 months if the act is punishable by imprisonment exceeding 2 years.

[26] Journal of Laws of 7 July 2022 on amending the Act – Criminal Code and Certain Other Acts (Journal of Laws, item 2600, as amended).

This change has significantly limited judges' discretion in determining the penalty of restriction of liberty. Granting the court a wide latitude in setting the term of the penalty of restriction of liberty stems from the need to implement the principle of individualisation of criminal responsibility.

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