

# EXEMPTION FROM THE REMAINDER OF THE PENALTY OF LIMITATION OF LIBERTY (NON-CUSTODIAL PENALTY)

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## ABSTRACT

This article discusses the exemption from the remainder of the penalty of limitation of liberty (non-custodial penalty) under Article 83 of the Penal Code, a legal institution that plays a significant role in criminal policy. It is intended to encourage convicted persons to comply with the law not only during the execution of the penalty but also after exemption, once part of the penalty has been served. However, this objective may not always be achieved due to the absence of additional instruments for influencing the conduct of convicted persons following exemption. The definitive nature of exemption, which precludes any further action in the event of a violation of the legal order by the exempted person, has led to a *de lege ferenda* proposal to make this institution conditional. The article analyses the purpose and legal nature of exemption, the conditions for its application (serving part of the sentence, compliance with the legal order, fulfilment of obligations imposed on the convicted person, penal measures, compensatory measures, and forfeiture), the sentencing procedure, and the consequences of exemption leading to recognition of the sentence as served.

Keywords: legal nature, penalty of limitation of liberty, legal order, penalty amount, probation measure, exemption

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## INTRODUCTION

The penalty of limitation of liberty (non-custodial penalty) is a time-limited sanction, with its statutory parameters defined in Article 34 § 1 of the Penal Code (PC). The court imposes it within this framework and within the limits specified in the sanction corresponding to the relevant criminal provision. The penalty imposed in the judgment does not necessarily have to be executed in full, as the Penal Code provides for the possibility of reducing the sentence by granting an exemption from serving part of it and deeming it completed (Article 83 PC). The considerations presented in this article are guided by the thesis that exemption from serving the remainder of the penalty of limitation of liberty constitutes a legal institution of significant importance in criminal policy. The research hypothesis assumes that, in order to enhance its role in improving the effectiveness of the penalty of limitation of liberty, this institution should be made conditional. Although the exemption is designed to encourage convicted persons to observe the legal order not only while serving their sentence but also after its reduction, this objective may not be achieved due to the absence of any further mechanisms for influencing their conduct. The article also seeks to interpret all components of this institution and to indicate possible directions for reform. Dogmatic, legal, and normative methods are employed to achieve the objectives outlined above.

## EXEMPTION AIM

Polish criminal law first introduced the possibility of exemption from serving part of a non-custodial penalty in the 1969 Criminal Code. Pursuant to Article 88 of that Code, the court could exempt a person sentenced to the penalty of limitation of liberty from serving the remainder of the sentence and deem it served, provided that the convicted person had completed at least half of the sentence, respected the law, performed their work diligently, and fulfilled the obligations imposed. This regulation is similar to the current Article 83 PC.

It is rightly observed in the doctrine that exemption from serving the remainder of a penalty of limitation of liberty creates an incentive for convicted persons to observe the legal order and conscientiously fulfil the obligations imposed upon them as part of the sentence. It has educational value of both an individual and preventive nature.<sup>1</sup> It is a rational reward for the convicted perpetrator.<sup>2</sup> And serves to encourage law-abiding behaviour and the proper performance of obligations.<sup>3</sup> The prospect of partial reduction of the penalty is a strong motivational factor.<sup>4</sup>

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<sup>1</sup> A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2010, p. 252.

<sup>2</sup> V. Konarska-Wrzošek, in: Konarska-Wrzošek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 555.

<sup>3</sup> T. Kalisz, 'Wszczęcie i data zakończenia postępowania w przedmiocie wykonania kary ograniczenia wolności', in: Kalisz T. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. XL, Wrocław, 2016, p. 19.

<sup>4</sup> K. Stasiak, 'Kara ograniczenia wolności i jej rola w resocjalizacji sprawców czynów karalnych', in: Konopczyński M., Kwadrans Ł., Stasiak K. (eds), *Polska kuratela sądowa na przełomie wieków – nadzieje, oczekiwania, dylematy*, Kraków, 2016, pp. 145–159.

For this reason, exemption can be an effective instrument for enhancing the efficiency of the penalty of limitation of liberty in achieving its individual and preventive purposes.

## LEGAL NATURE OF EXEMPTION

Defining the legal nature of exemption from the remainder of the penalty of limitation of liberty should begin with a clarification of terminology. Various terms are used in the literature to describe this institution, including:

- (1) reduction of the penalty of limitation of liberty;<sup>5</sup>
- (2) exemption from the remainder of the penalty of limitation of liberty;<sup>6</sup>
- (3) exemption from a part of the penalty of limitation of liberty;<sup>7</sup>
- (4) early exemption from serving the remainder of the penalty of limitation of liberty;<sup>8</sup>
- (5) early recognition of the penalty of limitation of liberty as served following the exemption of a convicted person from serving a part of it;<sup>9</sup>
- (6) conditional exemption from serving the remainder of the penalty of limitation of liberty.<sup>10</sup>

<sup>5</sup> J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa, 1997, p. 161; E. Bieńkowska, in: Rejman G. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 1999, p. 1198; K. Maksymowicz, 'Zwolnienie od reszty kary ograniczenia wolności', in: Bogunia L. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. VI, Wrocław, 2000, p. 229; M. Kalitowski, in: Górniok O., Hoc S., Kalitowski M., Przyjemski S.M., Sienkiewicz Z., Szumski J., Tyszkiewicz L., Wąsek A. (eds), *Kodeks karny. Komentarz*, Vol. I, Gdańsk, 2005, p. 677; A. Marek, *Kodeks...*, op. cit., p. 252; K. Postulski, 'Stosowanie przepisów kodeksu karnego w postępowaniu wykonawczym (wątpliwości, niespójności, propozycje)', in: Kardas P., Sroka T., Wróbel W. (eds), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, Vol. II, Warszawa, 2012, p. 912; A. Ornowska, *Kara ograniczenia wolności w świetle nowelizacji kodeksu karnego i kodeksu karnego wykonawczego*, Opole, 2013, p. 247; B.J. Stefańska, *Zatarcie skazania*, Warszawa, 2014, pp. 266–267; T. Kalisz, *Wszczęcie...*, op. cit., p. 18; J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Część ogólna. Komentarz. Art. 1–116*, Warszawa, 2021, p. 1158; Z. Sienkiewicz, in: Bojarski M. (ed.), *Prawo karne materialne. Część ogólna i szczególna*, Warszawa, 2023, p. 445; M. Kulik, in: Mozgawa M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 364; K. Liżyńska, 'Skutki prawne faktycznego niewykonywania przez skazanego kary ograniczenia wolności', in: Kalisz T. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. LXVII, Wrocław, 2023, p. 10; M. Filipczak, in: Kulesza J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 207; J. Mierzwińska-Lorencka, in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2025, p. 636.

<sup>6</sup> R. Góral, *Kodeks karny. Praktyczny komentarz*, Warszawa, 2007, p. 17; G. Łabuda, in: Giezek J. (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa, 2021, p. 650; V. Konarska-Wrzošek, in: Konarska-Wrzošek V. (ed.), *Kodeks...*, op. cit., p. 555; J. Majewski, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, p. 536; K. Stasiak, R. Momot, 'Sposoby zakończenia kary ograniczenia wolności. Czy przyjęty model sprzyja wykonaniu kary w pierwotnej formie?', in: Kalisz T. (ed.), *Nowa kodyfikacja prawa karnego*, Vol. LXXII, Wrocław, 2024, p. 112.

<sup>7</sup> T. Bojarski, in: Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 256.

<sup>8</sup> A. Zoll, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część ogólna. Komentarz do art. 53–116*, Vol. I, Warszawa, 2016, p. 385.

<sup>9</sup> P. Hofmański, L.K. Paprzycki, A. Sakowicz, in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 633.

<sup>10</sup> S. Hupś, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, Warszawa, 2019, p. 587.

Among the above-mentioned terms, the expression 'exemption from the remainder of the penalty of limitation of liberty' has the strongest justification, as it appears in Article 83 PC and is thus a normative term. Scholars should employ legal and juridical language in their works on law. Legal language is the language in which normative acts are formulated – it is the language of the legislator, used in statutes, decrees, regulations, and other legal acts. It is of fundamental importance. Juridical language, on the other hand, is based on ordinary language but differs from it mainly through its specific semantic rules concerning the meanings assigned to terms, phrases, and expressions contained in legal texts.<sup>11</sup> Juridical language is that 'used by lawyers who are involved in the law'.<sup>12</sup> It is employed in court rulings, administrative decisions, and scholarly works in the field of jurisprudence.<sup>13</sup>

To determine the nature of this institution, it is essential to establish whether it belongs to substantive criminal law or executive criminal law. In the literature, it is commonly regarded as an institution of executive criminal law. This view is based on the argument that the decision on exemption is made during the execution proceedings and may rely on grounds that are also determined and assessed during those proceedings.<sup>14</sup> Article 83 PC regulates both the formal and substantive grounds for exemption. It has also been argued that there is no rational basis for the provision on reducing the penalty of limitation of liberty to appear in the Penal Code (Article 83). According to this view, it should instead be placed in the Penal Enforcement Code, which already contains provisions of a similar substantive nature, such as those concerning the modification of the form of fulfilling a work obligation (Article 63a § 1), the rules for recognising the penalty as served (Article 64), and the ordering of the execution of a penalty alternative to imprisonment (Article 65 § 1).<sup>15</sup> However, since the grounds for exemption from the remainder of the penalty of limitation of liberty are set out in the Penal Code (Article 83), it should be assumed that it is of a substantive criminal nature. The fact that the exemption is applied during the execution of the penalty of limitation of liberty does not justify classifying it as part of executive criminal law or as having a hybrid nature – i.e., both substantive and executive. The Penal Enforcement Code does not regulate this institution in any substantive respect; it merely specifies procedural aspects, including that its application falls within the jurisdiction of the courts. Regional courts in whose area the penalty is being executed have jurisdiction to adjudicate on the matter (Article 55 § 1 PEC). This Code does, however, contain a similar provision – Article 64 § 1 PEC – concerning the recognition of the penalty of limitation of liberty as served. Nevertheless, this is an entirely different institution. Pursuant to that provision, in cases where the convicted person has failed to perform the full amount of work, make all required deductions

<sup>11</sup> R. Łapa, *Język prawny w świetle analizy językoznawczej. Wybrane zagadnienia składniowe*, Poznań, 2015, p. 47.

<sup>12</sup> B. Wróblewski, *Język prawny i prawniczy*, Kraków, 1948, p. 136.

<sup>13</sup> M. Zieliński, 'Języki prawne i prawnicze', in: Pisarek W. (ed.), *Polszczyzna 2000. Orędzie o stanie języka na przełomie tysiącleci*, Kraków, 1999, pp. 63–64.

<sup>14</sup> E. Bieńkowska, in: Rejman G. (ed.), *Kodeks karny...*, op. cit., p. 989; K. Maksymowicz, *Zwolnienie od reszty kary...*, op. cit., p. 229; A. Ornowska, *Kara...*, op. cit., p. 247.

<sup>15</sup> K. Postulski, *Stosowanie...*, op. cit., pp. 912–913.

from remuneration, or fulfil other obligations, the court must decide whether and to what extent the penalty may be deemed to have been served, taking into account the extent to which the objectives of the penalty have been achieved. The court makes such a decision only after the period for which the penalty of limitation of liberty was imposed has expired, as only then can it be determined that the convicted person has failed to perform the full amount of work, to make all deductions from remuneration, or to fulfil other obligations. The decisive factor in this assessment is a positive evaluation of whether the aims of the penalty, as specified in Article 53 PEC, have been achieved. The penalty may be recognised as served in full or in part, for example, with respect to the work obligation or the fulfilment of other obligations.<sup>16</sup>

With regard to the nature of the exemption from the remainder of the penalty of limitation of liberty, the doctrine considers it a probation measure. It is argued that such a nature results from the probationary recognition of the penalty as served<sup>17</sup> or from the abandonment of further punishment of the perpetrator.<sup>18</sup> This classification, however, is questioned, as it is pointed out that the institution differs from other probation measures, particularly because it is unconditional and does not involve placing the convicted person under probation.<sup>19</sup> Moreover, no probationary obligations are imposed on the convicted person, and the exemption cannot be revoked.<sup>20</sup>

Admittedly, a systemic interpretation supports recognising this institution as a probation measure, since Article 83, which defines it, is included in Chapter VII entitled 'Measures related to placing a perpetrator on probation'. However, the unconditional nature of this institution argues against assigning it a probationary character. The placement of this provision in that chapter is explained in the doctrine by the nature of the reduction of the penalty of limitation of liberty and by its similarity – despite the absence of probationary elements – to conditional early release from the remainder of the penalty of deprivation of liberty (imprisonment). It also reflects the idea of providing the convicted person with an opportunity for early exemption from serving this sentence and encouraging them to behave appropriately, in particular by obeying the legal order, conscientiously performing the work assigned by the court, and fulfilling imposed obligations and penal measures.<sup>21</sup> Furthermore, more lenient treatment of offenders who have met certain conditions within the prescribed period is a typical feature of probation.<sup>22</sup> These

<sup>16</sup> K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2017, p. 459; M. Laskowski, in: Gerecka-Żołyńska A. (ed.), *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2023, p. 353.

<sup>17</sup> M. Filipczak, in: Kulesza J. (ed.), *Prawo karne materialne. Nauka o przestępstwie, ustawie karnej i karze*, Warszawa, 2023, p. 531; M. Filipczak, in: Kulesza J. (ed.), *Kodeks...*, op. cit., p. 207.

<sup>18</sup> M. Królikowski, R. Zawłocki, *Prawo karne*, Warszawa, 2015, p. 386.

<sup>19</sup> A. Ornowska, *Kara...*, op. cit., p. 247; J. Majewski, in: Majewski J. (ed.), *Kodeks...*, op. cit., p. 536; G. Łabuda, in: Giezek J. (ed.), *Kodeks...*, op. cit., p. 650.

<sup>20</sup> J. Śliwowski, *Kara ograniczenia wolności. Studium penalistyczne*, Warszawa, 1973, p. 162; S. Zimoch, 'O zwolnieniu od kary ograniczenia wolności', *Zeszyty Naukowe Instytutu Badania Prawa Sądowego*, 1977, No. 7, pp. 90–91; K. Maksymowicz, *Zwolnienie...*, op. cit., pp. 230–231; A. Ornowska, *Kara...*, op. cit., p. 247.

<sup>21</sup> M. Kalitowski, in: Górniok O. et al. (eds), *Kodeks karny...*, op. cit., pp. 677–678; S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks...*, op. cit., p. 588.

<sup>22</sup> R. Giętkowski, *Kara ograniczenia wolności w polskim prawie karnym*, Warszawa, 2007, p. 50.

arguments, however, are unconvincing. This legislative solution appears incorrect, as Chapter VI, 'Principles of imposing penalties and penal measures', would be a more appropriate place to regulate this matter within the Code.<sup>23</sup>

Making the exemption from the remainder of the penalty of limitation of liberty absolute was an inappropriate legislative choice. Given the relatively short period for which this penalty must be served before the measure can be applied, it is not possible to make an accurate assessment of the convicted person's legal, let alone moral, improvement. Such a brief period does not allow for an error-free, positive criminological prognosis. The assertion that cumulative fulfilment of the conditions provided for in Article 83 PC necessarily demonstrates a positive criminological prognosis and that the aims of the sentence have thereby been achieved, without the need to serve the entire sentence, is not convincing.<sup>24</sup> The finality of exemption prevents its revocation, even if the convicted person flagrantly breaches the law by committing a serious crime. Moreover, when ruling on exemption from the remainder of the penalty of limitation of liberty, the court cannot impose any obligations on the convicted person to ensure continued compliance with the law after the exemption.

As indicated in the doctrine,<sup>25</sup> it is not permissible to amend the exemption order under Article 24 § 1 PEC, which allows for the amendment or repeal of a previous order at any time during the execution proceedings if new or previously unknown circumstances relevant to the decision are revealed. However, such an amendment is inadmissible if it is to the detriment of the convicted person more than six months after the order has become final and binding (Article 24 § 2 PEC). This possibility is rightly rejected in the doctrine, since neither the Penal Code nor the Penal Enforcement Code provides for the revocation of a granted exemption by the court. Therefore, it would amount to 'introducing, in essence, the possibility of revoking a granted exemption "through the back door", i.e. through an interpretation of the provision that is, firstly, inconsistent with the legislator's unequivocal intent in this regard, and secondly, detrimental to the convicted person'.<sup>26</sup>

As a result, this leads to the *de lege ferenda* conclusion that exemption from the remainder of the penalty of limitation of liberty should be made conditional. Article 83 PC should therefore read as follows: 'A person sentenced to the penalty of limitation of liberty who has served at least half of it, respected the legal order, and fulfilled the obligations imposed on them, as well as the imposed penal measures, compensatory measures, and forfeiture, may be conditionally exempted from the remainder of the penalty by the court. The time remaining to be served shall constitute a probation

<sup>23</sup> In the Criminal Code of 1969, Article 88 concerning the exemption from the remainder of the penalty of limitation of liberty was in Chapter XI 'Rules of penalty execution'.

<sup>24</sup> The Supreme Court ruling of 13 July 2010, WZ 29/10, *OSNKW*, 2010, No. 10, item 90; A. Zoll, in: Wróbel W., Zoll A. (eds), *Kodeks...*, op. cit., pp. 385–386; V. Konarska-Wrżosek, in: Konarska-Wrżosek V. (ed.), *Kodeks...*, op. cit., p. 558.

<sup>25</sup> J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks...*, op. cit., p. 1158; K. Postulski, 'Głosa do postanowienia SN z dnia 13 lipca 2010 r., WZ 29/10', *Wojskowy Przegląd Prawniczy*, 2011, No. 1, p. 125; C.P. Waldziński, 'Głosa do postanowienia SN z dnia 13 lipca 2010 r., WZ 29/10', *Prokuratura i Prawo*, 2012, No. 9, p. 187.

<sup>26</sup> V. Konarska-Wrżosek, in: Konarska-Wrżosek V. (ed.), *Kodeks...*, op. cit., p. 556.



period.’ Article 83a should also be added, as follows: ‘If the conditional exemption is not revoked during the probation period and within three months of its completion, the sentence shall be deemed served upon conditional exemption.’

The adjudication on obligations to be imposed on the convicted person during the probation period, and the revocation of conditional exemption, should be regulated in the Penal Enforcement Code, as is the case with a similar institution, namely conditional release from serving the remainder of the penalty of deprivation of liberty (imprisonment). Accordingly, Article 63d should be added to the Code, reading: ‘The court may impose on the person conditionally exempted from the remainder of the penalty of limitation of liberty the obligations specified in Article 72 § 1(4)–(7a) PC,’ and Article 63e, reading: ‘The court may revoke conditional exemption from the remainder of the penalty of limitation of liberty if the person exempted, during the probation period, violates the legal order or evades the obligations imposed.’

## GROUND FOR EXEMPTION

Exemption from the remainder of the penalty of limitation of liberty applies to both forms of this penalty. Article 83 PC refers to the penalty of limitation of liberty in general and is not restricted to any particular form. Interpreting this provision in accordance with the rule of linguistic interpretation *lege non distinguente nec nostrum est distinguere*, it is not permissible to limit its application to only one form of this penalty. For this reason, it is not possible to agree with the view that this institution applies solely to the penalty of limitation of liberty in the form of an obligation to perform unpaid supervised community service, and does not include the form involving remuneration deductions.<sup>27</sup>

Under Article 83 PC, the court may exempt a convicted person from the remainder of the penalty of limitation of liberty if they: (1) have served at least half of the sentence; (2) have complied with the legal order; and (3) have fulfilled the obligations imposed on them, as well as adjudicated penal measures, compensatory measures, and forfeiture. All these requirements must be met cumulatively. The catalogue is closed (*numerus clausus*); the court cannot invoke other circumstances. However, this does not mean that, if the requirements are fulfilled, the court is obliged to issue a positive decision when it determines that the objectives of the sentence have not been achieved. It is rightly held in the doctrine that, when making a positive decision, the court must be convinced that the objectives of the penalty have been achieved, particularly that the convicted person will continue to respect the legal order in the future and will demonstrate socially desirable behaviour.<sup>28</sup> Although the provision does not explicitly make exemption contingent upon

<sup>27</sup> S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks...*, op. cit., p. 588.

<sup>28</sup> J. Śliwowski, *Kara...*, op. cit., p. 163; S. Zimoch, *O zwolnieniu...*, op. cit., p. 94; W. Szkotnicki, ‘Przedterminowe zwolnienie z odbycia części kary ograniczenia wolności’, *Problemy Praworządności*, 1984, No. 8–9, pp. 66–67; E. Bieńkowska, in: Rejman G. (ed.), *Kodeks...*, op. cit., p. 1197; R. Giętowski, *Kara...*, op. cit., p. 167; A. Ornowska, *Kara...*, op. cit., p. 250.

achieving the objectives of the penalty of limitation of liberty,<sup>29</sup> it is not possible to disregard whether those objectives have in fact been met.

However, the view that the statute assumes that the cumulative fulfilment of all requirements leads to a determination of a positive criminological prognosis – allowing the conclusion that the individual preventive objectives of the sentence have been achieved without the need to execute the entire penalty – is unfounded.<sup>30</sup> Therefore, it is not possible to endorse the position of the Supreme Court that: ‘When all the requirements laid down in Article 83 PC are met, allowing for the exemption of the convicted person from the remainder of the penalty of limitation of liberty, and the court nevertheless refuses to grant such exemption, the court is obliged to thoroughly justify its negative position, and may not rely on circumstances other than those it took into account when imposing the penalty.’<sup>31</sup>

## PENALTY AMOUNT TO BE SERVED

The Penal Code requires that the convicted person serve at least half of the adjudicated penalty. This is a formal requirement. The period of serving the penalty cannot be reduced by more than half. This concerns the penalty actually being served. The service of this penalty does not begin at the moment when the judgment becomes final and binding and, under Article 9 § 2 PEC, becomes enforceable, unless otherwise stipulated by statute. The Penal Enforcement Code provides differently for the penalty of limitation of liberty, specifying the commencement of execution separately for each form of non-custodial penalty.

Serving the sentence in the form of an obligation to perform unpaid supervised community service begins on the day the convicted person starts performing the assigned work (Article 57a § 1 PEC). This is considered the first day of the convicted person’s service of the penalty.<sup>32</sup>

By contrast, serving the sentence in the form of a deduction of 10%–25% of the monthly remuneration for a social purpose designated by the court commences on the first day of the period in which the deduction is made (Article 57a § 2 PEC). This is the day when the deduction from remuneration actually occurs.<sup>33</sup>

Until that point, the penalty of limitation of liberty does not attain enforceability status and cannot be executed.<sup>34</sup> When calculating whether half of the penalty of

<sup>29</sup> J. Zagórski, ‘Prawnomaterialne podstawy stosowania kary ograniczenia wolności oraz pracy społecznie użytecznej w Polsce’, *Państwo i Prawo*, 2004, No. 1, p. 79.

<sup>30</sup> P. Hofmański, L.K. Paprzycki, A. Sakowicz, in: Filar M. (ed.), *Kodeks...*, op. cit., p. 633.

<sup>31</sup> The Supreme Court ruling of 13 July 2010, WZ 29/10, OSNKW, 2010, No. 10, item 90, with a critical gloss by C.P. Waldziński, *Prokuratura i Prawo*, 2012, No. 9, pp. 184–189, and an approving one by K. Postulski, *Wojskowy Przegląd Prawniczy*, 2011, No. 1, pp. 122–126. Such a stance is also presented in the doctrine (A. Tobis, *Kara ograniczenia wolności za przestępstwa przeciwko rodzinie*, Warszawa, 1987, p. 177; K. Maksymowicz, *Zwolnienie...*, op. cit., pp. 239–240; J. Majewski, in: Majewski J. (ed.), *Kodeks...*, op. cit., p. 536).

<sup>32</sup> L. Osiński, in: Lachowski J. (ed.), *Kodeks karny wykonawczy. Komentarz*, Warszawa, 2021, p. 308.

<sup>33</sup> Ibidem, p. 309.

<sup>34</sup> T. Kalisz, *Wszczęcie...*, op. cit., pp. 14–15.



limitation of liberty has been served, it is also necessary to take into account any period that has reduced the execution time due to actual imprisonment in connection with the case and recognised as part of the sentence served (Article 63 § 1 PC), or any other concurrent proceedings (Article 417 PEC).<sup>35</sup>

There is no absolute minimum amount of the penalty that must be served. This means that, formally, there are no obstacles to granting exemption from the remainder of the penalty in cases where the sentence was imposed at its statutory minimum – namely, one month (Article 34 § 1 PC). In the literature, it is sometimes assumed that, in such cases, the required portion of the penalty to be served is 15 days.<sup>36</sup> However, this interpretation is inconsistent with the statutory time unit of this penalty. According to Article 34 § 1 PC, the penalty of limitation of liberty is expressed in months and years. Therefore, half of the sentence cannot be measured in days; it must amount to at least one month. For this reason, this penal measure cannot be applied in the case of one-month non-custodial penalties.

It is recommended in the literature that, in the event of very short periods of serving the penalty, this measure should be applied sparingly<sup>37</sup> or not applied at all.<sup>38</sup> This recommendation is sound, as serving this penalty for a relatively brief period does not enable the court to be convinced that the penalty has fulfilled its purpose.

The maximum amount for calculating half of the penalty served corresponds to the limit designated in the sentence as the total period for which the penalty was imposed on the convicted person. This applies not only to half of that period but also to half of the total number of hours of community service assigned by the court, or to half of the total deduction from remuneration, corresponding to the product of the monthly deductions specified in the judgment and the number of months constituting half of the penalty duration.<sup>39</sup> Taking into account only the period of actual service when calculating the portion of the penalty served would result in the completion of unpaid supervised community service relatively soon after its commencement. At the request of the convicted person, and for important reasons – particularly those justified by the person's gainful employment or health condition – the court may determine that the hours of unpaid supervised community service be settled in periods other than monthly, provided that these do not exceed the overall duration of the penalty imposed or the total number of hours of work performed within that period (Article 63b PEC).

In the event that the obligation to perform unpaid supervised community service or to make deductions from remuneration for a social purpose designated by the court has not been fulfilled, or the convicted person has failed to comply with

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<sup>35</sup> S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks...*, op. cit., p. 588; M. Kulik, in: Mozgawa M. (ed.), *Kodeks...*, op. cit., p. 364; J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks...*, op. cit., p. 1161; V. Konarska-Wrzošek, in: Konarska-Wrzošek V. (ed.), *Kodeks...*, op. cit., p. 557; J. Majewski, in: Majewski J. (ed.), *Kodeks...*, op. cit., p. 536.

<sup>36</sup> G. Łabuda, in: Giezek J. (ed.), *Kodeks...*, op. cit., p. 650.

<sup>37</sup> A. Ornowska, *Kara...*, op. cit., p. 249.

<sup>38</sup> M. Kalitowski, in: Górniok O. et al. (eds), *Kodeks karny...*, op. cit., p. 679; R. Giętkowski, *Kara...*, op. cit., p. 167; V. Konarska-Wrzošek, in: Konarska-Wrzošek V. (ed.), *Kodeks...*, op. cit., p. 557.

<sup>39</sup> R. Giętkowski, *Kara...*, op. cit., p. 166.

imposed obligations, penal measures, compensatory measures, or forfeiture, but the period for which the penalty was imposed has lapsed and there are no grounds for concluding that the person has evaded execution of the penalty of limitation of liberty, the court, in accordance with Article 64 § 1 PEC, shall decide whether and to what extent the penalty may be deemed to have been served, taking into account the extent to which the objectives of the penalty have been achieved.<sup>40</sup>

## RESPECTING THE LEGAL ORDER BY THE CONVICTED PERSON

In the context of the convicted person's obligation to respect the legal order, certain doubts arise as to the period to which this requirement applies – whether it concerns the period of serving the sentence or the period from the date when the sentence becomes final and binding. In the doctrine, the latter interpretation is adopted,<sup>41</sup> and this view is correct, since from that moment onwards it is assumed that the accused has been sentenced to the penalty of limitation of liberty.

The term 'legal order' is also employed in other provisions of the Penal Code (Article 66 § 1, Article 68 § 3, Article 75 §§ 1a–3, Article 77 § 1, Article 84 §§ 1 and 2a, Article 107 § 2, and Article 115 § 21) as well as in the Penal Enforcement Code (Article 43p § 2, Article 43q § 3, Article 43zza § 1(2), Article 62 § 3, Article 139 § 1, Article 156 § 1, Article 160 §§ 2 and 3, Article 182 § 3, and Article 202b § 2). In accordance with the prohibition of homonymous interpretation, this concept should be accorded the same meaning across all these provisions.<sup>42</sup>

In its broadest sense, *legal order* refers to the set of norms that govern behaviour in interpersonal relations and in an individual's relations with society. It constitutes the entire body of positive statutory law within a given community. It encompasses all legal material applicable to the spatial sphere of life of that community and in force at a given time.<sup>43</sup> The legal order is a functioning system of law composed of multiple interrelated elements.<sup>44</sup> It includes legal norms contained in the Constitution, statutes, ratified international agreements, and regulations (*arg. ex* Article 87 of the Constitution of the Republic of Poland), as well as in international law (*arg. ex* Article 9 of the Constitution of the Republic of Poland).<sup>45</sup>

In criminal law, including in Article 83 PC, the term is not confined solely to the norms of the Penal Code or the Misdemeanour Code but also extends to the norms of other branches of law.<sup>46</sup>

<sup>40</sup> K. Liżyńska, *Skutki prawne...*, op. cit., p. 101.

<sup>41</sup> J. Majewski, in: Majewski J. (ed.), *Kodeks...*, op. cit., p. 537.

<sup>42</sup> L. Morawski, *Wstęp do prawoznawstwa*, Toruń, 2014, p. 148.

<sup>43</sup> A. Kość, 'Porządek prawny jako społeczny porządek norm', *Roczniki Nauk Prawnych*, 2000, Vol. 10, Issue 1, pp. 43–44.

<sup>44</sup> W. Lang, 'System prawa a porządek prawny', in: Bogucki O., Czepita S. (eds), *System prawny a porządek prawny*, Szczecin, 2008, pp. 13 and 16.

<sup>45</sup> K. Majewski, P. Majewska, 'Legalność jako kryterium nadzoru nad samorządem terytorialnym – ius czy lex', *Roczniki Administracji i Prawa*, 2016, No. 1, p. 121.

<sup>46</sup> S. Strycharz, 'Pojęcie porządku prawnego w kodeksie karnym', *Nowe Prawo*, 1970, No. 6, p. 853; J. Skupiński, 'Rażące naruszenie porządku prawnego jako podstawa odwołania środka

The essence of this concept is aptly reflected in the case law, which states that:

‘The concept of “legal order” used in criminal law as a premise relating to the perpetrator’s attitude should not be reduced solely to the order within the criminal law sense. Committing a crime is only one form of violating this order. It may also concern petty offences, as well as behaviour that does not constitute a prohibited act carrying punishment, such as violating civil or employment obligations. Therefore, a violation of the legal order by the convicted person includes conduct contrary to prohibitions or orders arising from criminal law (commission of a crime), administrative law (commission of a petty offence), as well as conduct contrary to the rules whose observance falls within the scope of the aims and purposes associated in criminal law with institutions such as conditional release, conditional suspension of the execution of a sentence, conditional discontinuation of criminal proceedings, or postponement or interruption of the execution of a sentence.’<sup>47</sup>

#### FULFILMENT OF OBLIGATIONS IMPOSED ON THE CONVICTED PERSON, ADJUDICATED PENAL MEASURES, COMPENSATORY MEASURES AND FORFEITURE

Article 83 PC makes exemption from the remainder of the penalty of limitation of liberty conditional, *inter alia*, upon the fulfilment of the obligations imposed on the convicted person. These obligations include: (1) apologising to the injured party; (2) fulfilling the obligation to support another person; (3) engaging in gainful employment, education, or vocational training; (4) refraining from abusing alcohol or using other intoxicating substances; (5) undergoing addiction therapy; (6) undergoing therapy, in particular psychotherapy or psychoeducation; (7) participating in corrective and educational activities; (8) refraining from staying in certain environments or places; and (9) refraining from contacting the injured party or other persons in a specified manner, or from approaching the injured party or other persons (Article 34 § 3 in conjunction with Article 72 § 1(2)–(7a) PC). These

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probacyjnego’, in: Michalska-Warias A., Nowikowski I., Piórkowska-Flieger J. (eds), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin, 2011, p. 317; G. Wiciński, *Postępowania incydentalne związane z wykonaniem kary pozbawienia wolności w programie probacji*, Łódź, 2012, pp. 219–220; A. Ornowska, *Kara...*, op. cit., p. 249; S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks...*, op. cit., p. 589; J. Tekliński, ‘Podstawy zakończenia odroczenia wykonania kary pozbawienia wolności’, *Probacja*, 2020, No. 2, pp. 77–78; M. Kulik, in: Mozgawa M. (ed.), *Kodeks...*, op. cit., p. 365; J. Lachowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks...*, op. cit., p. 1162; V. Konarska-Wrzošek, in: Konarska-Wrzošek V. (ed.), *Kodeks...*, op. cit., p. 558; J. Majewski, in: Majewski J. (ed.), *Kodeks...*, op. cit., p. 489; the Supreme Court resolution of 29 January 1971, V KZP 26/69, OSNKW, 1971, No. 3, item 33; ruling of the Appellate Court in Kraków of 23 June 2006, II AKzW 415/06, *Krakowskie Zeszyty Sądowe*, 2006, No. 6, item 71; ruling of the Appellate Court in Kraków of 11 June 2007, II AKzW 391/07, *Prokuratura i Prawo* – supplement, 2007, No. 12, item 24; ruling of the Appellate Court in Lublin of 12 May 2010, II AKzW 188/10, LEX No. 593384; ruling of the Appellate Court in Kraków of 25 June 2013, II AKzW 631/13, *Krakowskie Zeszyty Sądowe*, 2013, Nos 7–8, item 43, with an approving gloss by K. Postulski, LEX/el., 2014; ruling of the Appellate Court in Kraków of 17 June 2013, II AKzW 444/13, *Krakowskie Zeszyty Sądowe*, 2013, Nos 7–8, item 47.

<sup>47</sup> Ruling of the Appellate Court in Kraków of 15 May 2019, II AKzW 373/19, *Prokuratura i Prawo* – supplement, 2020, No. 9, item 28.

obligations must be fulfilled within the period required for the application of the exemption; this also applies to obligations of a continuous nature.

This provision does not specify the quality of the convicted person's performance in any way. In the literature, it is emphasised that the fulfilment of the obligations imposed on the convicted person should be conscientious, and that the performance of work must be particularly distinguished, as this primarily ensures the achievement of the intended purpose of the imposed penalty.<sup>48</sup> The obligation to conscientiously perform assigned work was originally included in Article 83 PC, but this requirement was repealed by the Act of 20 February 2015 amending Act: Penal Code and Certain Other Acts.<sup>49</sup> It may be presumed that these requirements are related to the obligation of the convicted person, under Article 53 § 2 PEC, to conscientiously fulfil the obligations imposed on them and to observe the established rules of conduct, order, and discipline in the workplace or place of residence. However, the difficulty arises from the fact that the conditions for exemption from the remainder of the penalty of limitation of liberty, as set out in Article 83 PC, are, as previously indicated, exhaustively enumerated and cannot be supplemented by any additional requirements, including those contained in the Penal Enforcement Code.

The completion of obligations imposed on the convicted person, or of adjudicated penal measures, compensatory measures, and forfeiture, occurs when these have been fully executed or when the court has exempted the convicted person from fulfilling them (Article 35 § 4 in conjunction with Article 74 § 2 PC), or when the court has deemed the penal measures to have been executed (Article 84 PC).

## ADJUDICATION MODE

Exemption from the remainder of the penalty of limitation of liberty is optional.<sup>50</sup> This is evidenced by the use of the word 'may' in Article 83 PC. It is 'an expression that gives the entire statement or part thereof a shade of assumption, possibility of choice, hesitation, doubt, or a weakening of decidedness'.<sup>51</sup> The phrase 'the court may' expresses an individual competence norm.<sup>52</sup> In the literature, this phrase is interpreted as introducing an additional premise by the legislator – the occurrence of which, together with other premises explicitly indicated in the provision, obliges the court to render the decision provided for in that provision, consistent with the purpose for which it was introduced into the legal system. It is argued that, in criminal law, the

<sup>48</sup> K. Stasiak, R. Momot, 'Sposoby zakończenia...', op. cit., p. 113.

<sup>49</sup> Journal of Laws of 2015, item 396, as amended.

<sup>50</sup> K. Maksymowicz, *Zwolnienie...*, op. cit., p. 231; A. Ornowska, *Kara...*, op. cit., p. 248; S. Hypś, in: Grześkowiak A., Wiak K. (eds), *Kodeks...*, op. cit., p. 588; M. Kulik, in: Mozgawa M. (ed.), *Kodeks...*, op. cit., p. 364; G. Łabuda, in: Giezek J. (ed.), *Kodeks...*, op. cit., p. 650; V. Konarska-Wrzošek, in: Konarska-Wrzošek V. (ed.), *Kodeks...*, op. cit., p. 556; J. Mierzwińska-Lorencka, in: Stefański R.A. (ed.), *Kodeks...*, op. cit., p. 636.

<sup>51</sup> S. Skorupka, A. Auderska, Z. Łempicka (eds), *Mały słownik języka polskiego*, Warszawa, 1968, p. 405.

<sup>52</sup> M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa, 2010, pp. 135–136.

phrase 'the court may' should be interpreted as 'the court is obliged to' if the conditions expressly stated in the provision containing this phrase are satisfied and the reasons underlying its introduction do not argue against the decision provided for therein. Therefore, the court is obliged not only to verify whether all the conditions expressly indicated in Article 83 PC have been met but also to consider the objectives that motivated the legislator to introduce the institution of exemption from the remainder of a non-custodial penalty into the Penal Code. The purpose of this institution is to modify the execution of the imposed penalty of limitation of liberty to achieve the aims of the sentence for the convicted person, particularly in the area of individual deterrence. There is no need to continue executing the penalty of limitation of liberty if the court is satisfied that its objectives have already been achieved, especially when the convicted person demonstrates respect for the legal order and exhibits socially desirable attitudes.<sup>53</sup>

The fulfilment of all requirements under Article 83 PC does not, however, obligate the court to issue a positive ruling. As mentioned above, the court must also assess whether the penalty has fulfilled its intended purposes.

It is emphasised in the doctrine that the optional nature of adjudication on exemption does not imply arbitrariness; a negative ruling is justified only by the absence of at least one of the conditions necessary for a positive decision,<sup>54</sup> or by the detailed indication of circumstances that argue against granting exemption.<sup>55</sup> It is also assumed that, when the statutory conditions are met, exemption should constitute the rule, and refusal the exception.<sup>56</sup> The position that the absence of even one requirement allows for the issuance of a decision refusing exemption cannot be accepted.

## EXEMPTION CONSEQUENCES

Exemption from the remainder of the penalty of limitation of liberty results in the penalty being considered served. It does not occur *ex lege* but arises from the court's decision to exempt the convicted person from the remainder of the penalty. Article 83 *in fine* PC expressly provides that, by exempting a convicted person from the remainder of the penalty of limitation of liberty, the court simultaneously deems the penalty to have been served. This constitutes a legal fiction, as it is assumed that the penalty has been served in full, despite the fact that only at least half of it has actually been executed. The moment the exemption decision is issued, the penalty is deemed served.<sup>57</sup> Consequently, the penalty irreversibly loses its enforceable status.<sup>58</sup>

<sup>53</sup> C.P. Waldziński, 'Glosa...', op. cit., pp. 188–189.

<sup>54</sup> K. Postulski, 'Glosa...', op. cit., p. 124.

<sup>55</sup> S. Zimoch, *Zwolnienie...*, op. cit., p. 91.

<sup>56</sup> J. Śliwowski, *Kara...*, op. cit., p. 164; K. Strzepek, 'Kierunki rozwoju wykonawstwa kary ograniczenia wolności', *Nowe Prawo*, 1976, No. 4, pp. 572–573; A. Duracz-Walczak, 'Kara ograniczenia wolności w ocenie prokuratorów', *Problemy Praworządności*, 1980, No. 3, p. 13.

<sup>57</sup> K. Maksymowicz, *Zwolnienie...*, op. cit., p. 232.

<sup>58</sup> J. Majewski, in: Majewski J. (ed.), *Kodeks...*, op. cit., p. 537.

## CONCLUSIONS

1. Exemption from the remainder of the penalty of limitation of liberty, provided for in Article 83 PC, is a legal institution that plays a significant role in criminal policy. It serves as an important incentive for convicted persons to comply with the law and to fulfil the obligations imposed as part of the sentence, as well as any penal measures, compensatory measures, and forfeiture.
2. This exemption is not a probation measure, even though it is regulated in the Penal Code (Article 83) within Chapter VIII, which concerns measures related to placing a perpetrator on probation. It is not probationary in nature, as the exemption is unconditional: it is not granted for a probationary period, no probationary obligations are imposed on the convicted person, and the exemption cannot be revoked.
3. Exemption from the remainder of the penalty of limitation of liberty may be granted after a relatively short period of serving the sentence, as it may occur after at least half of the sentence has been served – which means after one year if the penalty was imposed for the maximum period. Such a short period of serving the sentence does not allow for the formulation of a reliable, positive criminological prognosis. Furthermore, the finality of exemption prevents its revocation, even if the convicted person flagrantly breaches the legal order by committing a serious crime after the exemption.
4. The aforementioned shortcomings justify the *de lege ferenda* proposal to make exemption from the remainder of the penalty of limitation of liberty conditional in nature. Exemption should be granted for a probationary period covering the remaining duration of the sentence, with the possibility of imposing specific probationary obligations on the convicted person and revoking the exemption in the event of a violation of the legal order or evasion of imposed obligations during the probationary period. The sentence should be considered served upon conditional exemption, unless the exemption is revoked during the probationary period or within three months following its completion.

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