

SYSTEM OF PENALTIES IN THE PENAL CODE OF 1997, AND IN THE DRAFT OF THE AMENDMENTS TO THE PENAL CODE OF 24TH APRIL 2007

Krzysztof Indeck

Profesorius habilituotas daktaras
Lodzės universiteto
Teisės ir administravimo fakulteto
Baudžiamosios teisės katedros vedėjas
Uniwersytecka 3, 90–137 Łódź
Tel. 0048 42 665 58 21
El. paštas: KIndeck@wpia.uni.lodz.pl

Straipsnyje nagrinėjamos pagrindinės Lenkijos baudžiamosios teisės tendencijos, susijusios su bausmių sistema galiojančiame Lenkijos baudžiamajame kodekse ir numatytame šio kodekso pakeitimų įstatymo projekte. Straipsnyje analizuojama bauda, laisvės apribojimas, laisvės atėmimas, bausmės skyrimo pakeitimai, įstatymo nustatytos viršutinės bausmės ribos švelninimas arba žymus griežtinimas bei pagrindinės aptariamų Lenkijos baudžiamojo kodekso pakeitimų priėmimo pasekmės.

The article analyses the main tendencies in Poland according to the system of penalties basis on the provisions of Polish Penal Code and amendments to them. The article focuses on the review of the penalties like: fine, restriction of liberty, deprivation on liberty, modifications of adjudicated penalty, mitigation or extraordinary enhancement of the statutory maximum penalty and the main consequences in the case of the introducing these amendments to the Penal Code.

Introduction

According to Article 32 of currently binding Penal Code¹ the penalties are: fine, restriction of liberty, deprivation of liberty, deprivation of liberty for 25 years, deprivation of liberty for life.

These penalties are the subject of study and review². From that reason seems to be interested to exam the scope of changing

introduced by Draft of changing of act – Penal Code and some other acts (hereinafter referred to as: Draft)³.

The main motive for making decision of introducing amendment to the penal code was a necessity to eliminate commonly-perceived impediments in efficient and effective application of penal law instruments in binding provisions of the code; amendments to the provisions which have

¹ O. J. 1997, No 88, pos. 553, (Dz. U. z 1997 r., nr 88, poz. 553).

² See: K. Indeck, A. Liszewska. Prawo karne materialne. Nauka o przestępstwie, karze i środkach penalitych. Łódź 2002, p. 247.

³ Draft of changing of act – Penal Code and some other acts is introduced on the web-sites of Ministry of Justice, on www.ms.gov.pl and in the system of Lex, on number 430.

been burdened with substantive drawbacks, or the ones have curbed the achievement of expected and desired objectives within the range of penal policy, particularly in the field of executing protective function of penal law and performance of needs in the range of developing legal awareness of the society, and moreover, a necessity to eliminate loopholes which have been detected during application of provisions of the existing legal status⁴.

According to the declaration, a series of crucial changes have been introduced into the Draft, also as far as the system of penalties is concerned⁵. The changes mainly concern modification of some already existing penalties and elimination of some others. Let's present some of them.

1. Fine

Fine has been provided for in all the Penal Codes binding in Poland. In the Penal Code of 1932, a fine was imposed in an amount of from 5 zloty to 200 000 zloty (art. 42 pc of 1932). J. Makarewicz estimated that upper limit of the fine is relatively high. He explained it, however, in the following way: "(...) the Code shall consider two issues: firstly, if it is possible, the penalty of deprivation of liberty should be avoided for minor offences (...), secondly, well-off people could not feel the burden of fine severely enough. A fine of a few hundred zloty is not of great importance for the budget of a person who spends 50 000 zł annually for maintaining a green house for exotic plants. The range of the

fine amount should take into consideration a variety of living standards"⁶.

If the act of crime has been committed for profit, the court metes out the penalty of deprivation of liberty provided for by the law along with fine, unless fine sentence would be pointless.

It should be added that the provision shall be applicable for the type of prohibited acts, which were subject exclusively to imprisonment penalty.

The Penal Code of 1932 provided for a possibility of adjudicating a fine – as cumulative or compulsory penalty.

Cumulative penalty, for example, in article 159 § 2, where it is provided for that for spreading information from secret court hearing was subject to the penalty of arrest up to 6 months **or** (K.I.' emphasis) penalty of fine. On the other hand, the offence of intentional handling stolen property (art. 160 pc of 1932) was liable to imprisonment of up to 5 years **and** (K.I.' emphasis) fine. In the latter case, it is a compulsory fine.

In the Penal Code of 1969, a fine shall be imposed in an amount of from 500 to 25 000 zloty; a fine adjudged together with a penalty of deprivation of liberty shall be imposed in an amount of from 500 do 1 000 0000 zloty. The latter was adjudicated, if a perpetrator acted for profit, or in other cases stated by the Act (the term did not relate to the penal code, – it meant out-of-the code penal acts which provided for compulsory fine).

The Penal Code of 1969 maintained the amount fine. A crucial change was related

⁴ See above.

⁵ See above.

⁶ J. Makarewicz. Kodeks karny z komentarzem i orzecnictwem Sądu Najwyższego 1935 – 1936. Zb. Nr 1 – 134, Lwów, 1935, p. 133.

to a new type of sanction – so called “alternative” one, on the basis of which it was possible to adjudicate sole fine, e.g. for unintentional liberation of a person deprived of liberty by virtue of a court decision (art. 257 § 2 pc of 1969), the court could impose one of the following penalties: deprivation of liberty for 2, restriction of liberty or fine.

The fine can be adjudicated as sole penalty or cumulative penalty. The division of fine types was maintained in the Penal Code of 1997, however, the term “sole fine” became a legal term (see: art. 69 § 1). A second type is a cumulative fine. From a point of view of the penal code which is currently in force it is a fine, which does not appear in the form in the sanction related to the type of prohibited act. In out-of-the code Acts it appears in a form of complex cumulative sanction or alternative cumulative sanction⁷.

The penal code of 1997 introduced a system of daily fine rates. The provision of art. 33 pc § 1 that is currently in force determines that a fine shall be imposed in term of daily rate defining the number of daily rates to be levied and the amount of each rate; unless otherwise provided by law, the lowest number of daily rates shall be 10, and the highest shall be 360. According to the provision, the court may impose a penalty of fine along with a penalty of (fixed-term) deprivation of liberty, if a perpetrator has committed an offence for profit, or if he has achieved a profit. While determining a daily rate, the court

takes into consideration a perpetrator’s income, his/her personal and family conditions, his/her property status and earning chances; a daily rate cannot be lower than 10 zł, and cannot exceed 2000 zł.

According to the Draft (Art. 33) numbers of daily rates are to be changed. The lowest rate shall total 10, and the highest – 720. While determining a daily rate, the court is obligated, just as it has been before, to take into consideration a perpetrator’s income, his/her personal and family conditions, his/her property status and earning chances, however, a daily rate cannot be lower than 10 zł, and cannot exceed 10 000 zł.

It is simple to calculate that in the current legal status a fine can be imposed at the amount from 100 to 720 000 zł (i.e. from about 25 euro to about 185 000 euro). After passing the draft, the highest fine amount shall be 7 200 000 (i.e. more than 1,8 mln. euro).

In the justification to the proposed change of a fine amount, it is stated that rising of its maximum limit shall allow to make a penalty financially more retributive for perpetrators of the most serious offences otherwise speaking allow on realization *ultima ratio* directive in relation to deprivation of liberty⁸. In the opinion of drafters it shall enable “the courts to adjust the amount of an accepted daily rate to the material status of a perpetrator more flexibly”⁹. It has been decided that an existing range of daily rate value is inadequate to needs of adjusting fine to

⁷ A. Zoll [in:] A. Zoll, K. Buchała. *Kodeks karny. Część ogólna. Komentarz*, t.1. Zakamycze 1998, p. 590.

⁸ See above.

⁹ See above.

considerable differences of material status among perpetrators¹⁰, which are revealed in practice. As we read in the justification “The Draft (...) unifies maximum limit of fine penalty and the amount of daily rate possible to impose on the ground of the penal code and the fiscal penal code, assuming there is no reason for existence of such substantial discrepancies within the range of maximum limit of fine as they result from ruling regulations, particularly if we realize that factors for determining the amount of daily rate are identical in both the codes”¹¹.

Sole fine can be adjudged on the basis of existing regulations, i.e. if it appears as simple sanction or complex alternative sanction, or alternative-cumulative one, related to a type of prohibited act, whose criteria has been executed by a perpetrator, while imposing extraordinarily mitigated penalty for less serious offences (art. 60 § 6 sections 2 and 3), in reference to application of the institution defined in art. 58 § 3, referred to as “change of a type of penalty for mitigated one”¹².

A fine shall be imposed, independently of the fact if the objective of achieving a profit meets the criteria of offence or not.

According to the settled strategy of jurisdiction, a penalty of cumulative fine can be administered only if a perpetrator attempts to achieve foul and illegal profit¹³.

Regulations of adjudicating cumulative fine are provided for by art. 33 § 2 of the Draft in new wording. The regulation states that cumulative fine is adjudicated if a perpetrator has committed an offence for profit, or he/she has achieved such profit, and in other cases determined by the Draft.

The case indicated in the Draft contains also provisions of the penal code, e.g. pursuant to art. 289 of the Draft, a fine can be imposed along with a penalty of deprivation of liberty on a perpetrator, who takes away somebody else’s mechanical vehicle to appropriate it.

We deal here with cumulative fine that is adjudicated relatively compulsorily – the term “relatively” means that the court may adjudge such fine if specific circumstances are for such decision.

In the justification to the Draft it is stated that “Proposed solution shall guarantee adjudicating of the penalty, as for its principle, in all cases where political-criminal factors indicate a necessity of influencing a perpetrator not only by means of a penalty of deprivation of liberty, but also by means of a penalty which is economically retributive, particularly to underline unprofitability of criminal acts which are motivated by the objective of achieving material profit, or to make it impossible for a perpetrator to achieve profit. From the other hand, in all cases where, due to particular circumstances (related to an act or a perpetrator), adjudicating of fine penalty along with a penalty of deprivation of liberty can be considered as unfair or inadvisable, the court shall have a possibility of not imposing such penalty, with simultaneous obligation of indicating – in orally

¹⁰ See above.

¹¹ See above.

¹² See: J. Majewski [in:] A. Zoll, K. Buchała. *Kodeks ...*, p. 589.

¹³ See: judgement of the Supreme Court of Poland given on 17.05.1972 r., III KR 67/72, OSNKW 1972, paper no 10, pos. 157; and judgement given on 15.02.1977 r., VII KZP 16/76, OSNKW 1977, paper no 4–5, pos. 34.

expressed motives of the sentence and its written justification – circumstances that justify making such a decision. It can be legitimately expected that, thanks to such a structure of adjudicating cumulative fine, an efficient jurisdiction policy shall develop, which, on one hand, shall exclude *de facto* uncontrolled, also by the court that executes institutional supervision of the sentence, arbitrariness of the decision of not imposing cumulative fine, in spite of optional adjudication (as it often happens on the ground of the currently binding legal status), on the other hand, it eliminates automatism of adjudicating fine in any case and gives an opportunity of rational resignation from the measure of penal repression in cases justified by special circumstances of a given court case”¹⁴.

Cumulative fine **can** (emphasis of – K.I.) be adjudicated also if a perpetrator has done a damage to somebody’s else property (art. 33 § 3 of the Draft).

Legitimacy of introducing such a regulation shall be based on justice reasons and political –criminal factors¹⁵. An example of legitimacy of such fine should be complete or partial damage to the property of an injured party by a perpetrator.

In the Draft, a division into sole fine and the fine adjudicated along with a penalty of deprivation of liberty (cumulative fine) has been maintained¹⁶.

To complete an image of adjudication of fine in the Polish penal code, it is nec-

essary to add that the new Draft of penal code has not repealed a regulation pursuant to which a fine was defined by amount. The regulation contains even art. 5 § 2 section 43 of provisions that introduce the Penal Code¹⁷. Moreover, the amount determination of a fine has taken place also in the acts passed after the penal code of 1997 entered in force.

As it has been rightly observed “co-existence of both the systems of adjudicating a fine: daily rate fine and amount fine shall not be only a temporary phenomenon in our penal code”¹⁸.

In such a situation, it shall be accepted that fines, from special acts, which are not determined by amount, are not adjudicated according to the rules provided for in the penal code. In the background of the fines there appears one more problem: sanctions that are determined in amounts do not specify a minimum limit of the statutory penalty. Thus, in the doctrine there appear different proposals as to determination of the limits of the threshold, according to some, the threshold is made by 10 daily rates¹⁹, 100 zł²⁰, or 1 zł²¹.

¹⁷ Ustawa z dnia 6 czerwca 1997 r. Przepisy wprowadzające kodeks karny, OJ No 88, pos. 554 with amendments (Dz.U. nr 88, poz. 554 ze zmianami).

¹⁸ J. Majewski [in:] K. Buchała, A. Zoll. Kodeks..., p. 627.

¹⁹ See: W. Wróbel, Grzywna w nowym kodeksie karnym [in:] Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze, Warszawa 1998, p. 65 and next pages.

²⁰ See: M. Bojarski, W. Radecki. Pozakodeksowe prawo karne, t. 2. C.H. Beck, Warszawa, 2003, p. 173.

²¹ See: J. Majewski. Grzywna w projekcie nowego kodeksu karnego PS 1994, paper no 11 – 12, pos. 74 and J. Majewski, O niektórych wątpliwościach związanych z wykładnią przepisów dotyczących orzekania grzywny w nowym kodeksie karnym, Palestra 1998, paper no 3–4, pos. 6, p. 12, compare also: A. Zoll, [in:] K. Buchała, A. Zoll. Kodeks ..., p. 632 up to sections. 22–24.

¹⁴ Motive of the draft of amendment on www.ms.gov.pl and in the system of Lex, on number 430 (druk sejmowy nr 430, Sejm V Kadencji).

¹⁵ Above.

¹⁶ See above.

Specification of the first of minimum limits of a penalty has been justified by negation of the fact that these are not fines “specified by amount”, so the content of art. 11 § 2 (introductory provisions of penal code) does not determine them, so the minimum limit of a penalty is decided on the basis of art. 33 § 1 pc in concurrence to art. 116.

Determining the minimum limit of the penalty at the amount of 100 zł seems discretionary. It is inadvisable to accept the basis for its calculation (the lowest number of daily rates x the value of a single daily rate) – this way of calculation breaches a prohibition of analogy to a perpetrator’s disadvantage²².

Gradually, in the Polish literature of the subject and jurisdiction system, the opinion starts to prevail pursuant to which a minimum limit of fine penalty is 1 zł²³. The belief that backs maintaining the limit is that if no provision determines minimum limit of amount fines, and the limits of individual fines are, without exception, given in zloty, it can be accepted that, where the provision does not determine minimum statutory penalty limit of amount fine, the minimum limit shall be 1 zł, i.e. the lowest amount that can be given in zloty²⁴. Taking into consideration the content of art. 53 § 1 pc that rules considering needs to develop the legal awareness of the society while determining a penalty amount – the fine of the amount shall not be adjudicated often²⁵.

²² See also: J. Majewski [in:] K. Buchała, A. Zoll. Kodeks ..., p. 633.

²³ See: judgement of the Supreme Court of Poland given on 21.05. 2004 r. I KZP 4/04, not published.

²⁴ J. Majewski [in:] K. Buchała, A. Zoll. Kodeks ..., p. 638.

²⁵ See: J. Majewski, O niektórych..., p. 12.

J. Majewski draws attention to one more setback resulting from the existence of two systems of adjudicating a fine. According to Article 7 § 3 pc misdeed is an act subject to, among others, a minimal fine at the amount of above 30 daily fine rates. An offence is an act subject to fine up to 5000 zł. There is no clear criterion (as it was in the pc of 69) that should clearly differentiate between misdeeds and offences, as in the Polish Penal Law there are acts liable to fine of 5000 zł – these are not sanctions where the amount of fine exceeds 39 daily fine rates, or the ones where the fine amount does not exceed an amount of 5000 zł.

A Draft does not take these problems into consideration.

2. Penalty of restriction of liberty

The penalty of restriction of liberty was first introduced into the penal code of 1969. In the code, such penalty was provided for both in general part (art. 33–35), and the military part (art. 294) of the penal code.

The content of the penalty is undergoing it “at large”; its nuisance is limitation, to some extent, of liberty of a convict, which is of course, not so severe, as in case of penalty of deprivation of liberty²⁶.

According to the Article 33 § 1 pc of 1969, the penalty of restriction of liberty shall last minimum 3 months and maximum 2 years; it shall be imposed in years and months. According to § 2:

While undergoing the penalty of restriction of liberty, a convicted person:

- 1) must not change his/her fixed place of living without permission of the court;

²⁶ Compare: J. Bafia, K. Mioduski, M. Siewierski. Kodeks karny. Komentarz, Warszawa, 1987, p. 123.

2) is obligated to perform the work designated by the court; 3) is deprived of the right to perform functions in social organizations; 4) has the obligation to make reports concerning the course of the execution of the penalty.

Article 34 pc of 1969, in § 1 stated that “The obligation specified in Article 33 § 2 section 2 consist of performing unremunerated supervised work for public purpose of public purpose for from 20 to 50 hours per month”. In the § 2, it was provided for that “with regard to a person employed in a socialized work establishment, the court, instead of the obligation specified in par. 1, can order a reduction of from 10 up to 25% of the remuneration for work for the benefits of the State Treasury, or for a social purpose designated by the court; the sentenced person while undergoing the penalty cannot terminate his labour relation without permission of the court, the employer is neither permitted to grant a convicted person an increase of salary nor to promote him to a higher position”. In the § 3, it was stated that the court, instead of the obligation specified in par. 1, may direct a person being in an employment relation, if educational consideration warrants it, to an appropriate socialized work with the application of the measures mentioned in § 2.

The court can impose additional obligations on a person sentenced for restriction of liberty, namely, by virtue of Article 35, a convicted person can be obligated to 1) to redress the damage resulting from the offence in its whole or in part; 2) to apologize an injured party.

If a person sentenced for such penalty, has failed to perform the obligations im-

posed on him/her by course of art. 35, a release after doing the rest of sentenced penalty (half of it) would be impossible by virtue of art., 88. What is more, such behaviour could be considered as evasion from doing the penalty of restriction of liberty and could result in imposition of substitute penalty of fine or deprivation of liberty (according to z art. 84 § 2 and 3 pc)

In the penal code of 1997, the penalty of restriction of liberty is adjudicated for the term from 1 month up to 12 months; the penalty is imposed in months (art. 34 § 1 pc).

The maximum limit of statutory penalty has been lowered from 24 months to 12 months.

The draft of changes to the penal code provides for the return to the solutions from the penal code of 1969 – again the penalty is to be adjudicated up to 2 years.

In pc of 1997 and in the Draft, the ways of restriction of liberty have not been changed and the changes are not planned.

In pc of 1997 the provision equivalent to art. 34 pc of 1969 r has been modified (it is art. 35 pc now). According to currently binding art. 35 pc, the obligation to perform work designated by the court shall be performed as supervised work at the amount of from 20 to 40 hours, without remuneration and for community purposes designated by the court, in suitable establishment, health service or a social welfare unit, an organization or an institution conducting charity work or work for the purpose of a local community. With regard to an employee, the court can decide that, instead of obligation specified in par. 1, between 10 and 25% of the re-

muneration be deducted for the benefits of the State Treasury or for in a suitable establishment, health service or a social welfare unit, an organisation or an institution conducting charity work or work for the purposes of a local community. After hearing the sentenced person's statement, the court shall determine the place, time, type and method of fulfilling the obligation of work, referred to in § 1²⁷.

In the Draft, the provision is repealed according to which place, time, type and way of executing the obligation of work is determined by the court after hearing out a convict.

A repeal of such provision has been based on the belief that the regulation included in the provision (referring to time, place, type and way of executing the obligation of work related to the penalty of restriction of liberty) relates to the issue of the range of executive proceeding²⁸.

In the opinion of drafters, raising maximum limit of the penalty of restriction of liberty up to 2 years shall make the penalty of restriction of liberty more retributive and broaden a scope of cases when it could be treated as an adequate penal measure for reality of a given case, with simultaneous increase of possibility of individualisation of its term length. It shall allow for treating the penalty as a real alternative for short-term penalties of deprivation of liberty²⁹.

Consequently, for a change in a form of raising maximum limit of any type of penalty of restriction of liberty, the way

of determining the length of the term is amended – such type of penalty, according to provisions of the Draft shall be imposed in months or years.

There are no amendments as for the other provisions on the penalty of restriction of liberty. According to the article 36 § 1 – while imposing a penalty of restriction of liberty, the court can put a convict in the custody of probation officer or a trustworthy person, an association, an institution or a social organization, whose activity is to care for education and prevention of depravity of convicts. In § 2, it is provided for that while imposing a penalty of restriction of liberty the court can adjudicate the obligations as stated in art. 72 § 1 section 2, 3 or 5³⁰ and in § 2 for the convict. The last provision is crucial as it gives a probation character (to some extent) to the penalty of restriction of liberty³¹. It points out at the obligation of supervision of professional probation officer over the course of the penalty of restriction of liberty, which results from art. 55 § 2 and 58 § 1 and 2 executive penal code³². Only optionally, the probation officer can supervise execution of the penalty of restriction of liberty in the form of deductions.

³⁰ Article 72. § 1. In suspending the execution of a penalty, the court may obligate the sentenced person:

- 1) to inform the court of the probation officer about the progress of the probation period,
- 2) to apologies to the injured person,
- 5) to refrain from abusing alcohol or using narcotics,

§ 2. The court may obligate the perpetrator to redress the damage in whole or in part, unless it has adjudicated a penal measure as specified in Article 39 section 5, or a payment of consideration as specified in Article 39 section 7.

³¹ See: M. Szewczyk [in:] K. Buchała, A. Zoll. Kodeks ..., p. 651.

³² See also: A. Marek. *Komentarz do kodeksu karnego, Część ogólna*. Warszawa 1999, p. 109, M. Szewczyk [in:] K. Buchała, A. Zoll. Kodeks ..., p. 651.

²⁷ See more: M. Szewczyk. [in:] K. Buchała, A. Zoll. Kodeks ..., p. 643 -653.

²⁸ Above.

²⁹ Above.

The court can conditionally suspend execution of the penalty of restriction of liberty (Art. 69)³³.

Draft abolishes this possibility.

3. Deprivation of liberty

In the penal code of 1932, apart from death penalty, the penalties of imprisonment and arrest were provided for.

The penalties were treated as two separate types of deprivation of liberty, which were substantially distinct: “one of them – imprisonment – belongs to the progressive system; the other one – arrest, which is as a matter of fact a short-term measure cannot be applied for such objective.”³⁴

The penalty of imprisonment shall last minimum 6 months and maximum up to 15 years, if the Act does not provide for the life imprisonment.

Life imprisonment was provided for by the penal code of 1932, only in 5 cases (art. 93, 94, 101, 102, 225 § 1)

In practice, in relation to imprisonment penalty imposed from 6 months to 15

years; such penalty could be adjudicated for the term from 1 month or 3 months, by only by force of regulations that are stiff effective, which provide for such penalties – these regulations were binding before the introduction of the penal code of 1932³⁵.

The penalty of arrest lasted for at least a week up to maximum 5 years. And again, in reference to provisions included in the introductory regulations, arrest can be applied within the limits stated below. In the Regulation of the President of the Republic of Poland of 26th March 1928³⁶ in art. 17. 4 of we can read that: “The guilty of damage or destruction of graphical marks due to carelessness shall be subject, in the course of court case, to the penalty of arrest up to 3 days or fine up to 30 zł”, it is worth adding that in relation to arrested persons and the imprisoned ones the rule was applied that “imprisoned must work”³⁷.

In the penal code of 1969 a uniform penalty of deprivation of liberty was introduced, without divisions known from the penal code of 1932 into imprisonment and arrest.

In pc of 1969, the basic penalties were: 1) deprivation of liberty, 2) restriction of liberty, 3) fine. Moreover, it was decided that the basic penalty of an exceptional charter, provided for the most serious crimes is the death penalty³⁸. The basic penalty of 25 years deprivation of liberty can be imposed for an offence liable to the death penalty and also in others cases provided for by law³⁹.

³³ Article 69. § 1. The court may conditionally suspend the execution of a penalty of deprivation of liberty of up to 2 years or execution of a fine adjudicated as a one-off penalty, if it is regarded as sufficient to attain the objectives of the penalty with respect to the perpetrator, and particularly to prevent him from relapsing into crime.

§ 2. In suspending the execution of a penalty, the court shall primarily take into consideration the attitude of the perpetrator, his personal characteristics and conditions, his way of life to-date and his conduct after the commission of the offence.

§ 3. Suspension of the execution of the penalty shall not be applied to the perpetrator as specified in Article 64 § 2, unless there is an exceptional case justified by extraordinary circumstances; suspension of the execution of the penalty specified in Article 60 § 3 through 5 shall not be applied to the perpetrator as specified in Article 64 § 2.

³⁴ See: J. Makarewicz. Kodeks..., p. 125.

³⁵ See above, p. 128.

³⁶ O.J. of R.P., position 319.

³⁷ See above, p. 131.

³⁸ See: art. 30 §. 3 pc of 1969 r.

³⁹ See: art. 30 §. 3 pc of 1969 r.

The penal code of 1997 maintained, as for the principle, the system of penalties described above, eliminating only the death penalty, and introducing the penalty of deprivation of liberty for life in its place.

The penalty of deprivation of liberty has been also maintained in the draft of changes to the penal code with the same justification (as we read in the Draft: “application of (penalty of deprivation of liberty – K.I.) is essential due to the fact that the catalogue (of penalties – K.I.) does not provide for death penalty”⁴⁰).

It is suggested, on the other hand, to abolish (by repealing art. 32 section 4 pc of 1997), of the penalty of deprivation of liberty for 25 years, which has been treated in the Polish system of penal law as a separate type of penalty. It is determined as non-term penalty (strictly determined) and the feature of the penalty has constituted the main reason of its being criticized in the writing on the subject.

A planned repeal of the penalty of deprivation of liberty for 25 years shall result in changes of the system of penalties. In the currently binding penal code (according to art. 37) “The penalty of deprivation of liberty listed in Article 32 subsection 3 shall be for no less than one month and not more than 15 years and it shall be imposed in years and months, in the drafted version of art. 37 it is stated that. Unless otherwise provided for in law, the deprivation of liberty shall be for no less than one month and not more than 25 years; it shall be imposed in months and years”.

In the justification for the change, it is underlined that the change shall lead to repeal of so called “inner injustice of the sentence, which is particularly visible in cases of criminal co-operation, when one of accomplices can be sentenced (according to existing legal status) for maximum 15 years of deprivation of liberty, while the other can be sentenced for 25 years of deprivation of liberty”⁴¹. The Drafters assume that prolongation of the fixed-term deprivation of liberty up to 25 years (from 1 month) shall broaden a range of the court’s liberty “it facilitate, to much larger extent than in the existing legal status, imposing just penalty which complies with code directive of its term”⁴².

The proposed change shall be considered desirable as it can result in more effective application of individualisation of the penalty, and it can also result in “broadening the range of adjudication freedom of the court”⁴³.

In the opinion of the drafters “(The -KI) change does not mean toughening in the range of the system of penalties, as it can be rationally expected that the effect of the change, after its entering into force, shall be imposition of more lenient penalty to a perpetrator than the one that could be adjudicated on the basis of the currently binding legal status. In the issues referring to the most serious offences, it often happens that justice reasons, sometimes backed up with a necessity of taking into consideration the above-mentioned rule of “inner justice” of the sentence, result in adjudicat-

⁴⁰ Draft of amendment is introduced on www.ms.gov.pl and in the system of Lex, on number 430 (druk sejmowy nr 430, Sejm V Kadencji).

⁴¹ See above.

⁴² See above.

⁴³ See above.

ing a penalty of 25 years of deprivation of liberty for a perpetrator, in spite of the fact that the term of a penalty is not adequately related to significance of the offence and to other circumstances determining the term of penalty by virtue of art. 53 § 1 pc, and the true reason for its adjudication is a belief among members of adjudicating panel that the penalty of 15 years of deprivation of liberty, which is a maximum limit of fixed-term penalty, in the circumstances of a given case could appear to be grossly unjust due to its excessive leniency”⁴⁴.

The difficulty in assessment of the thesis results from lack of research that could help to verify it. The belief shall be expressed that the change, if it is to be introduced, shall not work in the direction opposite to the one determined above. Such threat appears to be real; it is sufficient to point out the necessity of statutory penalty threat in all provisions of special part of the penal code, where one of the penalties possible to adjudicate was the penalty of deprivation of liberty for 25 years. Such changes can refer to 12 types of offences.

For example, in the currently binding legal status, art.148 § 1 (killing a human being) shall be subject to the penalty of the deprivation of liberty for a minimum term of 8 years (according to art. 37 – to 15 years), the penalty of deprivation of liberty

for 25 years or the penalty of deprivation of liberty for life.

After introduction of the changes provided for in the draft, the act shall be subject to penalty of deprivation of liberty for minimum term of 10 years (up to 25 years) or the penalty of deprivation of liberty for life.

There is a certain problem occurring in relation to art. 148 § 2. Currently, for killing a human being with particular cruelty, the perpetrator shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

Apart of the abolishing the penalty of deprivation of liberty for 25 years, the act shall be exclusively subject to the penalty of deprivation of 25 years and of deprivation of liberty for life.

Another problem occurs in relation to the type of sanctions which is related to offences subject to the penalty of deprivation of liberty from 3 years (currently to 15 years), where the possibility of adjudicating the penalty of deprivation of liberty for 25 years has not been provided for.

There is a proposal not to amend the sanctions leaving the maximum statutory penalty between 3 up to 15 years or to increase a minimum limit of penalty. In the first case – e.g. in the article 117 paragraph 2⁴⁵, legislator determines that an act stated in § 2 is liable to the penalty of deprivation of liberty for a term from 3 to 15 years (currently “the minimum term of 3 years”).

⁴⁴ Above. Article 53. § 1. The court shall impose the penalty according to its own discretion, within the limits prescribed by law bearing in mind that its harshness should not exceed the degree of guilt, considering the level of social consequences of the act committed, and taking into account the preventive and educational objectives which the penalty has to attain with regard to the sentenced person, as well as the need to develop a legal conscience among the public.

⁴⁵ Art. 117 § 2. Whoever makes preparation to commit the offence specified under § 1, shall be subject to the penalty of the deprivation of liberty for a minimum term of 3 years.

In a situation when the current minimum limit of the statutory penalty is higher than 3 years (and it is e.g. 5 years and 12 years) the draft provides for that the maximum statutory penalty in such cases shall be 25 years of deprivation of liberty⁴⁶.

4. Modifications of adjudicated penalty

A proposal of repeal of strictly defined penalty (deprivation of liberty for 25 years) has opened a possibility of modification of length of penalty term. The modifications refer to, according to drafted article 59, creating of possibility of renouncement of imposition of penalty and application of penal measure.

According to the provision, if the offence is subject only to the penalty of deprivation of liberty not exceeding 3 years or, alternatively, to the penalties specified in Article 32, sections 1 through 3, the social consequences of the act are not significant and the objectives of the penalty have thus been achieved, the court may:

- 1) impose the penalty of deprivation of liberty of less than 1 month; the penalty shall be imposed in weeks, or
- 2) renounce the imposition of the penalty, if it simultaneously adjudicates a penalty measure.

The currently binding provision (art. 59 pc) reads differently. It states that: “If the offence is subject only to a penalty of a deprivation of liberty not exceeding 3 ye-

ars or, alternatively, to the penalties specified in Article 32, sections 1 through 3 (i.e. fine, restriction of liberty, deprivation of liberty – K.I.’ note) and the social consequences of the act are not great, the court may renounce the imposition of the penalty if it decides to impose a penal measure at the same time, and the purpose of such a penalty is thus served by the measure.”

At the fundament of the changes – as it can be read in the justification of the Draft – there lie rational assumptions – in the case indicated in the section 1 of the Article 59 referring to the penalty of deprivation of the liberty for the term of from 1 week up to 4 weeks, the motive that lies at the fundament of the solution is purposefulness of introducing into the penal code a possibility of inflicting a perpetrator with a very short-term of the penalty of the kind in the situations where a different/another term of deprivation of liberty would be too severe, application of another penalty would be impossible or groundless due to circumstances of the specific case or by political-criminal reasons, and application of the institution of renunciation from imposing a penalty would be manifestation of unjustified forbearance that would more thwart the objectives at the ground of preventive effects⁴⁷.

In the opinion of the authors of the Draft – a very short-term penalty of deprivation of liberty could in some situations be an alternative for the penalty of deprivation of liberty with conditional suspension of its execution with elements of its being actually retributive, which shall meet an

⁴⁶ See draft of amendment introduced on www.ms.gov.pl and in the system of Lex, on number 430 (druk sejmowy nr 430, Sejm V Kadencji).

⁴⁷ See above.

objective of repression and of educational function with considerably low costs of its execution and lack of excessive after-effects in the area of personal and family life of the convict as well as of his/her professional work.

Modification can also include (according to the draft) maximum penalty limit of adjudicated penalties of deprivation of liberty, which, at the term of aggregate penalty, shall be 30 years (art. 86 of the Draft). According to the provision the court adjudicates an aggregate penalty of the form higher than the highest of penalties imposed for individual offences up to their total, not exceeding, however, the penalty of 1080 daily rates of fine, 3 years of restriction of liberty or 30 years of deprivation of liberty. While imposing an aggregate penalty of fine, the court determines anew an amount of daily rate, taking into consideration the factors as defined in art. 33 par. 4; the amount of daily rate cannot exceed the highest rate that has been specified before. If at least one of the fine amounts that are subject for aggregation is imposed in amount form, the aggregate penalty shall be also imposed as the amount.

The analysis of the content of drafted provision shall lead to a conclusion that in the Draft the regulations related to adjudicating of aggregate penalty are subject to the change. It is proposed that the penalty shall be adjudicated within the limits from the penalty exceeding the highest of the penalties imposed for individual offences up to the total of the penalties, unless the total of the penalties shall be lower than the maximum limits states in the quoted provision.

The Draft toughens a term of aggregate penalty, as according to current regulations – an aggregate penalty is awarded within the limits from the highest of the penalties imposed for individual offences up to their total, but it cannot exceed 540 daily rates, 18 months of restriction of liberty and 15 years of deprivation of liberty.

In the justification to suggested solution it is stated that „A drafted change is aimed at exclusion of the possibility of adjudicating an aggregate penalty with application of the rule of complete absorption, the application of which leads to excessive and unjustified neither by the reasons of justice nor by political-criminal reasons, privileges for convicts that commit several offences under circumstances of real coincidence, and it creates the mechanism that guarantees, to larger extent that on the grounds of the binding law, that the term of aggregate penalty shall correspond to significance of concurrence offences committed by an perpetrator.

A drafted change of maximum penalty limit of aggregate penalty of fine and aggregate penalty of deprivation of liberty results from raising the maximum penalty limit of the type of penalties. In reference to the drafted raise of maximum penalty limit of aggregate penalty of deprivation of liberty, it should be pointed out that there are conceptual reasons of penal policy that weight in favour of its raising. A possibility of imposing the penalty exceeding 25 year-deprivation of liberty, i.e. the maximum type limit of drafted term penalty of deprivation of liberty, is essential in case of aggregating a few long-term penalties, particularly in such cases when at least one

of the adjudicated penalties that are subject to aggregation shall be the penalty of 25 year-deprivation of liberty.

The Draft, by the change of the article 89 pc excludes a possibility of aggregation of the penalty of deprivation of the liberty, the execution of which has been conditionally suspended, with any other penalty of deprivation of liberty (both the one adjudicated with conditional suspension of its execution and the one imposed without such institution). Conditional suspension of aggregate penalty is only acceptable while simultaneous imposition of the penalty (not in an aggregate sentence). The regulation that is currently in force appears as illogical and leading to a possibility of aggregating penalty imposed on the perpetrator in relation to whom a benefit of conditional suspension of execution of the penalty has been applied. If we take into consideration general criticism of the present wording of the article 89 pc that results from fundamental interpretative doubts in relation to the provisions included there (its manifestation is, among others, the sentence of 7 judges of the Supreme Court of 12th November 2001, I KZP 14/01, with two separate votes) a change that has been included in the draft appears justified and necessary⁴⁸.

5. Mitigation or extraordinary enhancement of the statutory maximum penalty

Currently binding Article 38 states that (in § 1) – if law provides for mitigation or an

extraordinary enhancement of the statutory maximum penalty, in the case of the alternative prescription of penalties listed in Article 32 subsection 1 through 3, the mitigation or enhancement shall relate to each of these penalties. In § 2 we can read: the extraordinarily enhanced penalty may not exceed 540 times the daily rates of fine, 18 months of restriction of liberty or 15 years of deprivation of liberty, in § 3: if law provides for mitigation of the maximum statutory penalty, the penalty imposed for an offence carrying the penalty of deprivation of liberty for life may not exceed 25 years, and for an offence carrying the penalty of deprivation of liberty for 25 years may not exceed 15 years.

If the Act provides for mitigation or extraordinary enhancement of the statutory maximum penalty, in the case of the alternative prescription of penalties listed in Article 32 § 1 subsection 1 through 3, the mitigation or enhancement shall relate to each of these penalties. Next, § 2 provides for that “The extraordinarily enhanced penalty may not exceed 540 times the daily rates of fine, 18 months of restriction of liberty or 15 years of deprivation of liberty, and the § 3 states that: if law provides for mitigation of the maximum statutory penalty, the penalty imposed for an offence carrying the penalty of deprivation of liberty for life may not exceed 25 years, and for an offence carrying the penalty of deprivation of liberty for 25 years may not exceed 15 years.

The Draft repeals regulations included in Article 38 § 2 and 3 pc, as due to removal from the catalogue/list of penalties, the penalty, separate as for the type, of depri-

⁴⁸ See to the whole: draft of amendment introduced on www.ms.gov.pl and in the system of Lex, on number 430 (druk sejmowy nr 430, Sejm V Kadencji).

vation of liberty for 25 years with simultaneous raising of maximum limit of term penalty of deprivation of liberty, specific regulations related to limitation of the term of the penalty together with tightening or lowering the maximum limit of statutory penalty threat shall be redundant⁴⁹.

Conclusions

Intended changes can be considered as leading to modification of the regulations in the system of penalties which are impossible to accept. A key problem is proposal of repeal of strictly determined penalty in the form of 25 year-deprivation of liberty. Repeal of this penalty creates relatively severe system, which is not justified by the result of the study on level criminality in Poland which is diminishing.

According to the majority of scientific opinions this trend is not acceptable, especially as regard the increasing of sanctions.

The possibility of sentencing the imprisonment up to 25 years instead of 15 years might cause the result of general increasing of the level of sanctions.

The change has resulted, however, in the necessity of adjustment of other provisions, in particular related to penalty of deprivation of liberty. Three types of penalty of deprivation of liberty have been replaced by two.

A possibility of imprisonment of a convicted person in the penal institute for the term of 1 week seems questionable. It is

difficult to perceive a real burden of the penalty in the solution. For the other side for the less demoralized offenders this penalty should deter from prohibited activity.

It is difficult to accept two existing models of fine – amount fine and daily rate fine.

As for the amount of the fine itself – the arguments quoted above that should justify an increase of its maximum limit gives rise to reflection that the high fine can impede claims in the civil proceeding⁵⁰. It necessary to add that the fine might be put together with the all kinds of deprivation of liberty (also live time deprivation).

In general – proposed system of basic penalties appears to be coherent⁵¹, with a reservation, however, that while it is evaluated in total it seems to be a system (in opinion of its drafters) that prefers execution of protective function of penal law⁵²; it is doubtful that the system – for the reason of its severity – shall result in desired changes in the range of developing legal awareness of the society.

⁵⁰ In A. Zoll opinion: “increasing of penalties in the situation where we have 20 000 sentenced person more than the places in prisons and 50 000 non-executed sentences is a top of irresponsibility”. A. Zoll. Będą wyższe kary więzienia i grzywny // *Gazeta Prawna* z 14 czerwca 2007, s. 19.

⁵¹ Above opinion considers only provisions presented in this article. In the Draft there are rules which have to be probably changed, e.g. provision of obligatory using the penal responsibility to the acts committed by a “child” previously settled in house of correction. This provision seems to be in opposite to the Convention of the Right of the Child. See also: A. Zoll. Będą...

⁵² See: Z. Ziobro. Będą wyższe kary więzienia i grzywny, *Gazeta Prawna* z 14 czerwca 2007, s. 19.

⁴⁹ See motive to the draft of amendment introduced on www.ms.gov.pl and in the system of Lex, on number 430 (druk sejmowy nr 430, Sejm V Kadencji).

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BAUSMIŲ SISTEMA 1997 m. LENKIJOS BAUDŽIAMAJAME KODEKSE IR 2007 m. BALANDŽIO 24 d. BAUDŽIAMOJO KODEKSO PAKEITIMŲ IR PAPILDYMŲ ĮSTATYMO PROJEKTE

Krzysztof Indeck

S a n t r a u k a

Lenkijos baudžiamasis kodeksas įsigaliojo prieš 10 metų. Per šį laikotarpį kodeksas buvo pakeistas daugiau nei 20 kartų. Nepaisant to, vis dar siūloma nemažai Baudžiamojo kodekso pakeitimų ir papildymų. Kai kurie jų yra susiję su kodekso nuostatomis, apibūdinančiomis bausmių sistemą.

Todėl šiame straipsnyje aptariamas vadinamųjų pagrindinių bausmių modelis: laisvės atėmimo, bausmės, laisvės apribojimo, Baudžiamojo kodekso pakeitimų ypatumai.

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Pagrindinė Baudžiamojo kodekso pakeitimų pro-

blema yra susijusi su siūlymu atsisakyti kodekse numatytos griežtai apibrėžtos bausmės – 25 metų laisvės atėmimo. Taip pat kodekso projekte siūloma pakelti viršutinę laisvės atėmimo bausmės ribą nuo 15 metų kaip numatyta dabar galiojančiame Baudžiamajame kodekse (Lenkijos BK 37 str.) iki 25 metų. Šis projekto siūlymas, daugumos Lenkijos baudžiamosios teisės mokslo specialistų nuomone, gali gero- kai sugriežtinti baudžiamąją politiką.

Pagal Baudžiamojo kodekso pakeitimų įstatymo projektą, didinami ir bausmės dydžiai, be to, baudą pagal projektą numatoma skirti privalomai kiekvienam atveju, kai buvo padarytas nusikaltimas, siekiant turtinės naudos.

Straipsnyje taip pat aptariami bausmės skyrimo pakeitimai, įstatymo nustatytos viršutinės bausmės ribos švelninimas arba griežtinimas.

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