УДК 343.37

K. Wiak,
Hab. PhD, Professor of the Catholic University of Lublin, Head of the Department of Criminal Law, Associate Dean, Faculty of Law, The John Paul II Catholic University of Lublin

REFORM OF A PENALTY OF RESTRICTION OF LIBERTY IN POLAND

After the reform of 20 February 2015, the Polish penal law still respects the principle of preference for the penalties which do not entail imprisonment of the sentenced. However, the legislator has given a penalty of restriction of liberty a new, richer content, which in specific cases will be shaped by the court making use of its wide margin of discretion. The content of the penalty conforms to its name more than before, because it clearly entails restriction of numerous liberties and rights of a man. When analysing the new model of a penalty of restriction of liberty, we may see in it an attractive alternative for imposing short-term deprivation of liberty, a penalty of deprivation of liberty with conditional suspension of its execution and a fine. The intention of the authors of the penal law reform was to stop a penalty of deprivation of liberty from playing the role of a fundamental reaction to crime, which role was to be taken by a penalty of restriction of liberty in a new form. The judiciary practice in the near future will verify if it has really happened.

***Key words**: penalty of restriction of liberty, penal law, reform of the Polish penal law*

1. Place of a penalty of restriction of liberty in the Polish penal law

A penalty of restriction of liberty was first introduced in the Polish penal law after World War II as a penalty of correctional work under the act of 19 April 1950 on the security of socialist discipline of work[1]. It stems from the Soviet law. Due to its clearly educational nature, it was to replace the arrest, which consisted in short-term imprisonment[2]. However, in the years to follow it took the form similar to the so-called community service, i.e. the work performed for the benefit of the local community, which was widely used in the Western countries[3].

In the current legal environment, a penalty of restriction of liberty is one of the principal forms of reaction to crime in the Polish penal law. Among the penalties

[1] The Official Journal of Laws of the Republic of Poland. – 1950. – No. 20. – Item 168.
[2] Giętkowski R. Kara ograniczenia wolności w polskim prawie karnym / R. Giętkowski. – Warsaw, 2007. – P. 16.
[3] See: Szeleszczuk D. Prawo karne / ed. A. Grześkowiak, K. Wiak. – Warsaw, 2015. – P. 203.

listed in art. 32 of the Penal Code (hereinafter: the PC)[4] it can be found in item 2, between a fine (item 1) and forms of deprivation of liberty (items 3–5). In the literature and judicature, an abstract hierarchy of penalties stems from this order of individual sanctions – from the most lenient to the strictest one, plus the directive which obligates the courts to choose in the first place the penalties which do not entail isolation of the sentenced person (a fine and restriction of liberty) before the penalties of imprisonment[5].

In the original version of the Penal Code, restriction of liberty could be imposed for a period from 1 month to 12 months (art. 34 § 2 of the PC). The essence was that while serving the penalty of restriction of liberty, a sentenced person was obligated to perform supervised work for 20 to 40 hours a month, without remuneration and for community purposes (art. 35 § 1 of the PC). If fulfilling this obligation collided with the obligations of the sentenced person towards their employer, the court could decide that instead of this obligation between 10 and 25 % of the remuneration would be deducted (art. 35 § 2 of the PC). While serving this penalty, the sentenced person could not change their permanent place of residence without the permission of the court and was obligated to provide explanations regarding the progress of terms of serving the penalty (art. 34 § 2 of the PC).

2. The Amendment of Penal Code of 20 February 2015

In recent years, the Polish penal law has been subject to intensive legislative transformations, the effect of which was almost 70 amendments of the Penal Code in the years 1998–2015. The reform of 20 February 2015 brought the most extensive and most fundamental changes in the Penal Code[6]. We should search for the origin of these changes in the new punitive thinking[7], which emerged as a result of a wave of criti-

[4] Penal Code of 6 June 1997 (The Official Journal of Laws of the Republic of Poland. – No. 88. – Item 553).

[5] See: Grześkowiak A. Kodeks karny. Komentarz / ed. A. Grześkowiak, K. Wiak. – Warsaw, 2015. – P. 275; Majewski J. Kodeks karny. Część ogólna. Komentarz. T I / J. Majewski ; ed. A. Zoll. – Warsaw, 2007. – P. 492–493.

[6] The Official Journal of Laws of the Republic of Poland. – 2015. – Item 396.

[7] See: Kardas P. Nowa filozofia karania, czyli o założeniach i zasadniczych elementach nowelizacji Kodeksu karnego / P. Kardas, J. Giezek // Palestra. – 2015. – No. 7–8. – P. 10.

cism of a high degree of punitiveness and a defective structure of penalties imposed by courts compared to the recorded crime rate in Poland. In the *Statement of reasons* attached to the amendment, the proponents have pointed to the abuse of a penalty of deprivation of liberty with a conditional suspension of its execution by the courts, which accounted for more than 60 % of all court decisions in the overall structure of imposed penalties[8]. In 2011, the absolute penalty of deprivation of liberty was imposed on 40084 people (9.6 % of the sentenced), while a penalty of deprivation of liberty with a conditional suspension of its execution on 237234 people (56.9 % of the sentenced). Penalties which did not entail imprisonment of the sentenced were used significantly less often. Restriction of liberty was imposed on 50330 people (12.1 %), and fines on 88907 people (21.3 % of all convictions)[9]. The proportions of imposed penalties presented above did not change in the years to follow. In 2014, penalties were imposed as follows: deprivation of liberty was imposed on 199167 convicts (67.4 %), out of which absolute deprivation of liberty on 35633 of the convicts (12.1 %) and with conditional suspension of execution on 163534 of the convicts (55.4 %). Restriction of liberty was imposed on 33009 people (11.2 %), and a solely-imposed fine on 63,078 people (21.4 %)[10].

Treating a penalty of deprivation of liberty with conditional suspension of its execution as a fundamental measure of reacting to crime by the courts has led to a number of violations in the judiciary practice. In the statement of reasons for the draft amendment of the Penal Code of 20 February 2015 it was pointed out that courts would impose this penalty, even many times, on criminals who could be reasonably suspected that they would commit the crime again, so there were no grounds for conditional suspension of the penalty execution for a probation period. The result was that almost half of the convicts were imprisoned due to the court's order to execute the

[8] Statement of reasons. – P. 2 / available at : http://sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2393.
[9] Ibid. – P. 3.
[10] Prawomocne skazania osób dorosłych w latach 1946–2014 / Ministerstwo Sprawiedliwości. Departament Strategii i Funduszy Europejskich. – Warsaw, 2015. – P. 131.

penalty of imprisonment, which was previously conditionally suspended[11]. Consequently, a significant increase in punitiveness of the Polish penal law system took place. Poland entered the top ranks among the Member States with the highest ratio of the imprisoned – 221 prisoners per 100000 inhabitants. Only the Czech Republic was higher. The rate of imprisonment penalties in such countries as Germany, Great Britain, and the Netherlands was below 20 %, while in Poland it was close to 60 %[12].

In addition, conducted studies demonstrated that when imposing imprisonment with conditional suspension instead of a fine and restriction of liberty, the courts would determine the size of this sanction much more higher compared to imprisonment sentences without conditional suspension. In case of unsuccessful probation period and execution order, this "excess" in the sanction size resulted in excessive severity compared to the actual weight of the committed crime[13].

As indicated in the *Statement of reasons*, the changes implemented with the act of 20 February 2015 were to "intensify the inconveniences related to a penalty of restriction of liberty and to reduce the attractiveness of the probational regime related to imposing a penalty of imprisonment with the conditional suspension of its execution. Apart from a fine, a penalty of liberty restriction should become a principal penalty imposed for offences with insignificant social harmfulness. The content of a penalty of restriction of liberty, which becomes the most flexible and shapeable on a case by case basis, is subject to fundamental reconstruction[14].

After the changes implemented with the act of 20 February 2015, a penalty of restriction of liberty still consists in the obligation to perform unpaid supervised work for community purposes, however its content may be supplemented with subsequent elements, such as the obligation to stay in the permanent place of residence or another designated place with the use of the electronic surveillance system, plus numerous ob-

[11] Statement of reasons. – P. 2, 112.
[12] Ibid. – P. 3–4.
[13] Statement of reasons. – P. 4–5; Kardas P. Nowa filozofia karania, czyli o założeniach i zasadniczych elementach nowelizacji Kodeksu karnego. – P. 14; Wróbel W. Uwagi wstępne / ed. W. Wróbel // Nowelizacja prawa karnego 2015. Komentarz. – Warsaw, 2015. – P. 27.
[14] Statement of reasons. – P. 9.

ligations which are probational in nature and which have been imposed so far on a convict in the event of an imposed penalty of imprisonment with a conditional suspension of its execution. The period for which restriction of liberty may be imposed was extended to 2 years. An important decision of the legislator is also abolishing the possibility of conditional suspension of this penalty.

In the current legal environment, a penalty of restriction of liberty is composed of fixed elements, indicated in art. 34 § 2 of the PC, and variable elements listed in art. 34 § 1a of the PC[15].

The first category includes:

1) prohibition to change the permanent place of residence by the sentenced person, without the permission of the court;

2) obligation to provide explanations regarding the progress of terms of serving the penalty.

The other group includes:

1) obligation to perform supervised work, without remuneration and for community purposes;

2) obligation to stay in the permanent place of residence or another designated place, with the use of the electronic surveillance system;

3) obligations to: a) perform remunerated work, pursue an educational activity or train for an occupation, b) refrain from abusing alcohol or using narcotics, c) submit to addiction treatment, d) submit to therapy, specifically psychotherapy or psychoeducation, e) participate in corrective and educational programmes, f) refrain from frequenting specified community circles or places, g) refrain from contacting the victim or other people in a specific manner or approaching the victim or others;

4) deduction between 10 and 25 % of the remuneration per month for the community purpose designated by the court (art. 34 § 1a of the PC).

In addition, according to the court's decision, the additional and optional elements of a penalty of restriction of liberty may be the obligations to: make a supple-

[15] See: Grześkowiak A. Kodeks karny. Komentarz. – P. 313–314.

mentary payment, apologize to the injured person and carry out a duty incumbent upon the sentenced person to provide support for another person.

3. Importance of the so-called variable elements of a penalty of restriction of liberty

The purpose of the so-called fixed elements of a penalty of liberty restriction, i.e. the prohibition to change the permanent place of residence by the sentenced person, without the permission of the court and the obligation to provide explanations regarding the progress of terms of serving the penalty is to ensure proper execution of the penalty, in particular the supervision of the sentenced person's fulfilment of the remaining obligations. Surely, these are not the elements which decide about the scope and intensity of the inconvenience arising from a penalty of restriction of liberty, but the so-called variable elements. The fundamental element of a penalty of restriction of liberty which constitutes its core and determines the degree of inconvenience is identified in affecting the sentenced person with the use of at least one of the forms listed in art. 34 § 1a of the PC[16]. The linguistic and systemic interpretation determine the court's obligation to indicate in the ruling at least one of these penalty elements.

According to art. 34 § 1b of the PC, the obligations and deduction from the remuneration may be ruled jointly or separately. It means that the court may select the individual variable components of a penalty of restriction of liberty at its discretion, and construct the penalty content in the most flexible manner. The essence of the penalty may become the inconvenience resulting from the obligation to fulfil one obligation, all of them or any combination of these obligations. In this way, as J. Majewski vividly describes, the legislator attempts to make a penalty of liberty restriction "more attractive": "First of all, the legislator makes the penalty much more flexible than it was so far in the sense that he makes it possible for the court to shape its inconvenience in a much broader scope in the way adapted to the circumstances of a specific

[16] See: Sroka T. Kara Ograniczenia wolności / T. Sroka // Nowelizacja prawa karnego 2015. Komentarz ; ed. W. Wróbel. – Warsaw, 2015.– P. 87.

perpetrator and a specific case; figuratively speaking, he makes it easier to <custom-ise> it"[17].

The obligation to perform supervised work, without remuneration and for community purposes specified in art. 34 § 1a item 1 of the PC may be performed for 20 to 40 hours a month (art. 35 § 1 of the PC). The work performed by the sentenced person is unpaid, which means that they do not receive for it any financial equivalent being remuneration. The work performed is supervised not only by a probation officer but also by persons designated for this purpose who are responsible for organizing the work in the institution or a plant for the benefit of which the work is performed. The work is performed by the sentenced person for community purposes, which means that the work should be socially useful, should bring benefits for the community and should be performed for the common good[18]. Locations where such work can be performed are designated by a competent body of the gmina (gmina administrator, mayor or city mayor). These locations may include e.g. national or local-government organizational units, institutions or organizations representing the local community as well as educational centers, youth care centers, youth sociotherapy centers, healthcare units, social welfare units, foundations, associations and other institutions conducting charity work.

The legislator formulates negative circumstances for imposing this obligation in art. 58 § 2a of the PC. According to this provision, the obligation to perform supervised work, without remuneration and for community purposes, shall not be imposed if the health of the perpetrator or his properties and personal situation provide reasonable grounds for the supposition that the perpetrator would not fulfil this obligation.

According to the provisions of the Executive Penal Code (hereinafter the EPC)[19], after imposing the penalty, the court shall send a copy of the judgment to a competent probation officer (art. 56 § 1 of the EPC). Within 7 days from judgment

[17] Majewski J. Kodeks karny. Komentarz do zmian 2015 / J. Majewski. – Warsaw, 2015. – P. 54.

[18] See: Grześkowiak A. Kodeks karny. Komentarz.– P. 317; Szewczyk M. Kary i środki karne. Poddanie sprawcy próbie. System prawa karnego / ed. M. Melezini. – Warsaw, 2010. – P. 247–250.

[19] Executive Penal Code of 6 June 1997 (The Official Journal of Laws of the Republic of Poland. – No. 90. – Item 557).

delivery, the probation officer shall summon the perpetrator and inform them of their rights and duties plus the consequences of evading performance of the penalty, and after hearing the sentenced person's statement they shall determine the type, place and time of starting the work (art. 57 § 1 of the EPC). If the sentenced person fails to answer a summon or informed of their rights and duties plus the consequences related to performing work for community purposes refuses to take up such work to the probation officer, or if they fail to take up the work within the designated time or otherwise evade performance of a penalty of restriction of liberty or fulfilment of their obligations, the probation officer shall apply to the court for an alternative penalty (art. 57 § 2 of the EPC) which may take the form of a fine or a penalty of deprivation of liberty.

A penalty of restriction of liberty in the form of the obligation to stay in the permanent place of residence or another designated place, with the use of the electronic surveillance system, as defined in art. 34 § 1a item 2 of the PC consists in the supervision if the sentenced person stays in the place designated by the court on specific days of the week and at specific times (art. 43b § 3 item 1 of the EPC). The time for performing the obligation shall be specified by the court, taking account of the working conditions of the sentenced person and the amount of other imposed obligations, whereas it may not exceed 12 months as well as 70 hours a week and 12 hours a day (art. 35 § 3 of the PC).

Execution of a penalty of restriction of liberty with the use of the electronic surveillance system is possible when technical conditions allow for it (art. 43h § 1 of the EPC). In addition, the legislator requires prior written consent of adult cohabitants of the sentenced person, which also covers agreement for performing checking operations (art. 43h § 3 of the EPC). This regulation is aimed at neutralising the allegation of infringement of rights of third parties (privacy) obliged to provide access to their premises in order to install the recorder and perform checking operations.

A penalty of restriction of liberty in the form of the obligation to stay in the permanent place of residence or another designated place, with the use of the electron-

ic surveillance system, directly affects the sentenced person's private life, enforcing the discipline of staying in designated places at designated times. It also entails the necessity to submit to numerous general obligations (continuously carry the signal transmitter, protect it and ensure continuous power, provide explanations to the court, probation officer and the operator of the monitoring unit regarding the progress of terms of serving the penalty, appear when summoned by the judge and the probation officer) as well as specific obligations related to the execution of stationary supervision (stay in the place designated by the court at a designated time, receive calls from the recorder, enable the probation officer's entry to the sentenced person's flat)[20].

A new form of a penalty of restriction of liberty defined in art. 34 § 1a item 3 of the PC are the already-mentioned numerous obligations imposed on the sentenced person, such as e.g. the obligation to perform remunerated work, refrain from abusing alcohol or using narcotics, submit to therapy or refrain from contacting or approaching the victim. These obligations are identical to the ones which were probational until the reform of 20 February 2015 and were used in the case of the conditional suspension of the execution of a penalty of deprivation of liberty. This form of a penalty of restriction of liberty may consist in obligating the sentenced person to perform one specific obligation, several obligations or all of them. There seem to be no obstacles to obligating the sentenced person to perform the obligations for a period shorter than the period for which a penalty of liberty restriction was imposed. Obligations can be imposed for concurrent (at the same time of performing the penalty) or sequential performance (one after another). For example, it may be reasonable to firstly obligate the sentenced person to refrain from abusing alcohol and submit to addiction treatment, and then to perform remunerated work.

Art. 61 § 1 of the EPC states that if educational considerations warrant this, the court may, during the execution of a penalty of restriction of liberty, institute, extend or modify the obligations, or release a convict from these obligations, unless only one obligation was imposed. In the literature, such a regulation raises reasonable doubts to

[20] See: Grześkowiak A. Kodeks karny. Komentarz.– P. 319.

the extent that it would allow for extending or instituting new obligations. A. Grześkowiak aptly states that changes in the content of a penalty of restriction of liberty during its execution might be connected with mitigating the inconvenience of the obligations imposed pursuant to art. 34 § 1a item 3 of the PC and not with its exacerbation[21]. Similarly, T. Sroka allows for such modifications which, taking account of the number, type and scope of the obligations, would not exacerbate the degree of inconvenience of a penalty of restriction of liberty specified in the conviction[22].

The last of the so-called variable forms of a penalty of liberty restriction is deducting 10 to 25 % of the remuneration a month for a community purpose designated by the court, which may be imposed only on an employed person. While undergoing this penalty, the sentenced person may not terminate their employment without the permission of the court (art. 35 § 1 of the PC). The deduction shall comprise a fraction of "the remuneration" (net), that is a specific portion of all pecuniary considerations payable to an employee based on the employment relationship, as well as considerations related to other legal relationships from which the sentenced person earns income[23].

One of the most important changes introduced with the amendment is the possibility of concurrent imposition of both, the obligation to perform supervised work, without remuneration and for community purposes and deduction of some of the remuneration. This makes the court more flexible in deciding on the content of a penalty of restriction of liberty, which consequently may become much more inconvenient than it was before the amendment of 20 February 2015.

4. Term of a penalty of restriction of liberty

In the new model, the upper limit for a penalty of restriction of liberty significantly changed. After the reform of 20 February 2015, the minimum service is 1 month, and the maximum 2 years (art. 34 § 1 of the PC). It may not be exceeded

[21] Grześkowiak A. Kodeks karny. Komentarz.– P. 309.
[22] Sroka T. Kara ograniczenia wolności. – P. 128.
[23] Giętkowski R. Kara ograniczenia wolności. – P. 110–111; Hryniewicz–Lach E. Kodeks karny. Część ogólna. Komentarz. Tom II / E. Hryniewicz–Lach ; ed. M. Królikowski, R. Zawłocki. – Warsaw, 2015. – P. 31.

even in the case of an extraordinary enhancement of the penalty or imposition of a concurrent penalty.

When analysing the new solutions we should point to the fact that the term of performing individual obligations and the deduction is largely independent of the time for which a penalty of restriction of liberty was imposed. This may result from different specification of the moment of starting the service in its individual forms, especially if the court has jointly imposed at least two obligations. So, the start of:

1) serving the penalty in the form of performing supervised work, without remuneration and for community purposes, takes place on the day when the sentenced person starts to perform the designated work (art. 57a § 1 of the EPC);

2) electronic surveillance takes place on the day when necessary technical measures are activated with reference to the sentenced person (art. 43k § 6 of the EPC);

3) serving the penalty connected with obligating the sentenced person to perform specific obligations takes place on the day when the court ruling becomes valid (art. 57a § 4 of the EPC);

4) serving the penalty in the form of deduction of some of the remuneration takes place on the first day of the period when the deduction is made (art. 57a § 2 of the EPC).

In the case of a concurrent imposition of at least two obligations or a deduction from the remuneration, it should be assumed that serving a penalty of restriction of liberty starts on the day when the sentenced person begins to perform one of the imposed obligations[24]. It means that a penalty of restriction of liberty (whole penalty) begins to run irrespective of the fact that in reality some obligations will be performed later. For example, it may lead to a situation where, due to the need to perform a number of preparatory activities prior to starting electronic surveillance, the period for which a penalty of restriction of liberty was imposed will expire earlier than the period during which a perpetrator should observe the restrictions resulting from electronic

[24] See also: Majewski J. Kodeks karny. Komentarz do zmian 2015. – P. 71.

surveillance. Although it should be admitted that the time for performing individual obligations may be shorter than the time for which a penalty of restriction of liberty was imposed, however, due to the fundamental guarantee rules of the penal law, it may never exceed the term of a penalty of restriction of liberty, that is exceed the day on which the term specified in the conviction expires.

Summary. After the reform of 20 February 2015, the Polish penal law still respects the principle of preference for the penalties which do not entail imprisonment of the sentenced. However, the legislator has given a penalty of restriction of liberty a new, richer content, which in specific cases will be shaped by the court making use of its wide margin of discretion. The content of the penalty conforms to its name more than before, because it clearly entails restriction of numerous liberties and rights of a man.

When analysing the new model of a penalty of restriction of liberty, we may see in it an attractive alternative for imposing short-term deprivation of liberty, a penalty of deprivation of liberty with conditional suspension of its execution and a fine. The intention of the authors of the penal law reform was to stop a penalty of deprivation of liberty from playing the role of a fundamental reaction to crime, which role was to be taken by a penalty of restriction of liberty in a new form. The judiciary practice in the near future will verify if it has really happened.

Виак К. Реформирование наказания в виде ограничения свободы в Республике Польша

После реформы, проведенной 20 февраля 2015 г., в польском уголовном законодательстве утвердился принцип предпочтения назначения уголовных наказаний, которые не влекут за собой лишение свободы осужденного. Также законодатель придал наказанию в виде ограничения свободы новое, более богатое содержание, которое в отдельных случаях может определяться судом по своему широкому усмотрению. Содержание этого наказания стало больше соответствовать своей сущности, поскольку оно влечет за собой ограничение многих прав и свобод человека. Анализ новой модели наказания в виде ограничения свободы показал, что в ней просматривается привлекательная альтернатива назначению краткосрочного лишения свободы, наказания в виде лишения свободы с условной отсрочкой его исполнения и штрафа. Намерение авторов

уголовно-правовой реформы заключалось в том, чтобы нивелировать значение наказания в виде лишения свободы как основной реакции на преступление, эта роль должна быть возложена на наказание в виде ограничения свободы в новой форме. В ближайшем будущем практика судебной системы покажет, произойдет ли это на самом деле.

***Ключевые слова**: наказание в виде ограничения свободы, уголовное право, реформа польского уголовного права.*

Віак К. Реформування покарання у виді обмеження волі в Республіці Польща

Після реформи, проведеної 20 лютого 2015 р., у польському кримінальному законодавстві закріпився принцип переваги призначення кримінальних покарань, що не тягнуть позбавлення волі засудженого. Також законодавець надав покаранню у виді обмеження волі новий, більш об'ємний зміст, який в окремих випадках може тлумачитися судом за своїм углядом, що має широкі межі. Зміст цього покарання більше відповідає своїй суті, оскільки воно тягне обмеження багатьох прав і свобод людини. Аналіз нової моделі покарання у виді обмеження волі показав, що в ній вбачається приваблива альтернатива призначення короткострокового обмеження волі, покарання у виді обмеження волі з відстрочкою вироку його виконання та штрафу. Задум авторів кримінально-правової реформи полягав у тому, щоб нівелювати значення покарання у виді обмеження волі як основного реагування на злочин, натомість ця роль має покладатися на покарання у виді обмеження волі у новій формі. Найближчим часом практика судової системи покаже, чи відбудеться це у реальності.

***Ключові слова**: покарання у виді обмеження волі, кримінальне право, реформування польського кримінального права.*