

The substitute forms of primary penalties executions within petty offenses

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A penalty is a reaction of the state to a prohibited act, with the help of which the legislator performs against the perpetrator of a criminal act the objectives of general prevention, special prevention, or equitable retribution. To meet those objectives the penalty should be executed. It is impossible not to notice that the penalty initially meted out to the perpetrator may not always be executed. Therefore, implementation of the substitute forms of penalty, which on the one hand neutralize the effects of not executing the original penalty, and on the other — they are a guarantee of a sense of punishing the perpetrators, as well as achieving the objectives of penalty, prove to be necessary. It should be considered whether current substitute forms of the fine penalty and restriction of liberty meet the goals set by the legislature.

A punishment originally imposed on an offender has to realize its objectives in terms of both: general and special prevention. On the one hand, it must be severe enough to be noticed by the perpetrators, but on the other, it must be possible to execute. The reasons for the failure of the original sentence may be various. It may happen due to the bad will of a perpetrator, but it can also be an effect of an error in sentencing the penalty¹. The error

¹ T. Bojarski, “Z problematyki kary zastępczej”, [in:] *Aktualne problemy prawa karnego kryminologii i penitencjarystyki. Księga ofiarowana Profesorowi Stefanowi Leleńtalowi w 45. Roku pracy naukowej i dydaktycznej*, ed. K. Indeck, Łódź 2004, p. 79.

may stem from the amount of the penalty, for example in the case of fines it may be too high, hence unrealistic to be paid by the offender, however it may as well result from the choice of penalty. Error in the choice of penalty means that a different punishment should be applied than the imposed one. The problem of substitute penalties is not only the issue of enforcement proceedings, but also the issue of the relevance of the selection of the type of penalty and its dimension made by the court, which is the result of individualization of the amount of the sentenced fine and full knowledge of the financial situation of the accused, as well as the full knowledge of his/her family circumstances and health². Only full knowledge of the mentioned circumstances allows for the implementation of the sentence initially imposed. The need for punishment replacement may also be a consequence of changes observed in a perpetrator's personal life, including those of economic character, after announcing the sentence, however not before or during its implementation³.

Regardless of the causes of the failure to execute the primary penalty the issue of the substitute penalty is of vital importance for the penal policy. Within the degree of its repressiveness and harshness the penalty has to force the execution of the essential punishment and has to achieve the objectives of the penalty originally imposed to an offender. The use of alternative penalty, which is closely connected with the originally sentenced principal punishment, is a guarantee of the point of using a particular way of punishing perpetrators, and neutralizes the negative effects of the failure to implement the original sentence⁴.

In the Polish law on petty offenses we can speak of two kinds of substitute penalty — penalty of detention and of socially useful work, while substitute detention refers to cases in which there occurs a failure in execution of restriction of liberty, because it is the only form of replacement provided by the legislature for this type of penalty or in the case of fines in cases specified in the Act, as discussed below. We can deal with the substitute penalty of socially useful work only in the case of unexecuted fine penalties.

² K. Postulski, "Orzekanie i wykonywanie zastępczej kary pozbawienia wolności (stan prawny, obawy, propozycje)", *Probacja* 2013, no. 2, p. 51.

³ See: T. Bojarski, op. cit., p. 79.

⁴ Ibid.

The legislature adopted in the Code of Petty Offenses (abbreviated: CPO), contrary to what they did in the Penal Code⁵, the link between the original and substitute punishment by placing both types of penalties in a single act — the Code of Petty Offenses. Naturally, the Executive Penal Code also finds its implementation in this regard, but only in matters not covered by the Code of Petty Offenses.

It should be considered right that the legislator, when creating the Code of Petty Offenses, assumed the inclusion of substitute penalties to the substantive — general — part of the Code. The Code of Petty Offenses regulates the basic principles of responsibility and shows the scheme of primary penalties and directives of their implementation, so that the punishment meets its objectives in terms of general and specific prevention. Therefore, the legislator in the Code of Petty Offenses, and not in a separate act quite reasonably points to the base of the use of substitute penalties, depicting the scheme of penalties for the offense as a whole, without separating it from the originally imposed penalty. The substitute penalty constitutes the continuation of the punishment of an offender, if the perpetrator does not surrender to the originally imposed penalty, which underlies the principles of substantive law. After all, just as in the case of selecting a principal penalty, the court when ruling on the substitute punishment should be guided by the directives of punishment so that it has the most desired positive criminological effect against the offender. By placing alternative penalties in a single act, the legislator clearly pointed out the consequences which should be taken into account by the offender in case of refusing submission to the will resulting from the decision of the court regarding the imposed penalty. Thus, the legislator created an unbreakable bond between committing a criminal act by a perpetrator, the original penalty and substitute penalty in case of refusing submission to the will of the ruling body concerning the execution of the primary sentence.

Under the provisions of the Code of Petty Offenses we deal with the substitute penalty in exchange for the primary punishment in a situation where an offender sentenced to a fine did not pay it in full, or when the punished person did not perform the detention sentence. Simultaneously,

⁵ In the Penal Code the Polish legislator separated the substitute penalty from the principal punishment by locating substitute penalties in the Executive Penal Code, destroying the clarity of the relationships between these penalties in terms of their unity.

it is possible, of course, to commute the original sentence in a situation when a punished person has not taken up the execution of the sentence, or when he/she did it partially.

According to Article 24 § 1 of CPO, a fine for a petty offense ranges from 20 to 5000 PLN, unless the law provides otherwise. This is the basic punishment, so if a provision lacks the indication of the limits of the fine, it is imposed within the limits indicated in Article 24 § 1 of CPO. The analysis of the specific provisions of the special part of the Code of Petty Offenses indicates that the legislator does not permit the reduction of the lower limit of fines in any separate provision, but simultaneously this limit is raised to 50 PLN in Article 87 § 1 of CPO. When it comes to the upper limit of a fine, it should be noted that it is not raised in any of the provisions of the Code, but we can see that it is decreased by the legislator more than forty times⁶. A fine for petty offenses is sentenced on the basis of the quota system. During the work on amending the Code some voices proposed the possibility of introducing a system of daily fines for offenses. In the initial period, they reported the proposal to establish the upper limit of the fine as a multiple of the average or the minimum wage in the socialized economy, which was to make the degree of discomfort caused by the fine independent of changes in the purchasing power of money⁷. However, both the amount of fines for offenses, and the system of execution of fines is still at the stage of theoretical considerations, and is not reflected in the presented subsequent legislative changes. As we know, the purpose of the fine is to impose on an offender problems of an economic character, and the depletion of the offender's property assets⁸. In Article 24 § 3 CPO the legislator introduced a series of directives concerning the financial status of an offender⁹, which define the condition that should guide the court in identifying the amount of the fine.

⁶ K. Liżyńska, "O celowości kary grzywny za wykroczenia", [in:] *Przegląd Prawa i Administracji* C, Part 2. *Księga jubileuszowa na siedemdziesięciolecie Wydziału Prawa, Administracji i Ekonomii*, Wrocław 2015, p. 544.

⁷ Compare: T. Grzegorzczuk, "O systemie kar za wykroczenia", [in:] *Rozwój polskiego prawa wykroczeń*, ed. T. Bojarski, M. Mozgawa, J. Szumski, Lublin 1996, p. 39.

⁸ B. Kolański, "Kara grzywny w prawie karnym", *Prokuratura i Prawo* 1999, no. 3, p. 13.

⁹ This term is used inter alia by J. Majewski [in:] *Kodeks karny. Część ogólna. Komentarz*, ed. A Zoll, Kraków 2004, p. 615; K. Postulski, op. cit., p. 48.

They are: income of a perpetrator, his personal and family circumstances, property relationships and earning potential. The legislature imposes on a body lodging a request the requirement, in accordance with Article 57 § 2 point 2 of the Code of Petty Offenses Procedure, to include in the application for punishment data concerning the place of employment of the accused and, where possible, data on the material, family and personal conditions. This requirement helps set the appropriate amount of the fine. The essence of ruling the fine penalty is also included already in the same general directives concerning penalties and penal measures referred to in Article 33 of CPO. When choosing a proper form of punishment the court should therefore assess the degree of fault of the perpetrator, the degree of social harmfulness, purposes of punishment in terms of its social impact and objectives of prevention and education the ruled punishment is to achieve in relation to the punished person. When ruling a sentence regarding penalties the court takes into account, *inter alia*, an offender's personal and property circumstances and his/her family relationships. It seems that this directive is a repetition of a special directive concerning the amount of fines specified in the cited Article 24 § 3 of CPO¹⁰.

One should note that the court may impose a fine as an independent punishment, when a special provision allows for using it as a punishment for a committed offense, and in the case of a cumulative fine, occurring in addition to the penalty of detention when the offender committed the offense in order to gain material profits, unless ruling a fine would be pointless. In the first case, a fine serves as a basic means of criminal law's response constituting an alternative to short-term isolation penalties or a custodial sentence. In the second case, a function of a fine, imposed along with the penalty of detention, is to increase the pain of punishment, as well as to ground in the society the belief that committing criminal acts does not pay off well in the financial dimension¹¹.

Failure to pay the fine will result in its execution in a substitute form. K. Postulski rightly points out that the substitute penalty, as an alternative form of execution of a fine penalty, should not change the essence of punishment, in place of which it is imposed, especially change the form

¹⁰ K. Liżyńska, *op. cit.*, p. 545.

¹¹ See: K. Postulski, *op. cit.*, p. 48.

of suffering applied by the court in its judgment. In reality, however, it is a contradiction¹². After the adoption of the Code of Petty Offenses in 1971 the legislator in Article 25 § 1 CPO pointed out that the substitute penalty of detention can be ordered, in particular, when an offender does not have a permanent source of income or a permanent place of residence. After the amendment in 1998, the substitute penalty of detention for not paying a fine could be imposed if an offender was punished with a penalty exceeding 500 PLN and did not consent to the conversion of the fine to community service works, or he/she did not, despite prior consent, perform the sentenced social work and the execution of the fine turned out to be ineffective.

Currently¹³ the substitute penalty of detention replacing a fine may be imposed regardless of the sentenced amount of the fine¹⁴. Execution of the substitute penalty for a fine, in particular of the detention penalty, means that not only the perpetrator experiences symptoms of an economic nature, furthermore the financial burden is borne de facto by the State Treasury incurring expenses related to its execution¹⁵. It is often emphasized that during the enforcement proceedings the courts did not take the opportunity to execute the fine penalty in other forms provided for by the legislature in the Executive Penal Code¹⁶. The legislator created a possibility of dividing the fine into installments if the immediate enforcement of the fine would force the offender or his/her family to pay too heavy consequences (Article 49 § 1 of the Executive Penal Code) and further the possibility of the discontinuity of the fine if for reasons and due to circumstances remaining beyond his/her control and will the punished person could not pay the fine, providing that the execution of the sentence in any other way was impossible or impracticable. Then the court, in particularly justified cases, may discontinue the fine completely or partially without even ruling its

¹² Ibid., p. 47.

¹³ The provision of Article 25 CPO was changed by the Act of 16 September 2011 on the Executive Penal Code and some other laws (Journal of Laws of the Republic of Poland of 2011 No. 240, item 1431), which entered into force on 1 January 2012.

¹⁴ See: K. Liżyńska, "Kształtowanie się kary aresztu w polskim prawie wykroczeń", *Prokuratura i Prawo* 2013, no. 2, p. 13.

¹⁵ See: K. Postulski, op. cit., p. 48.

¹⁶ See: *ibid.*, p. 47; also: L. Sługocki, *Kara grzywny samoistnej i jej wykonanie*, Warszawa 1984, p. 197ff.

execution when the circumstances of the case show that it would be ineffective (Article 51 of the Executive Penal Code). However, courts, often incorrectly, do not use these solutions, counting often deceptively on one-time payment of the fine by an offender after receiving by the offender the information on designation of the meeting concerning sentencing him/her with the substitute penalty, or judging the substitute penalty in this form, because the offender can free himself from paying the originally imposed fines. And yet the presented regulations on the model of execution of the fine penalty for petty offenses create a flexible model, which, together with a specific directive concerning the amount of the penalty can protect a punished person against the substitute penalty of detention¹⁷.

If the court does not see grounds for the discontinuation of a fine, or dividing it into the installment plan, or the court did not consider such solutions, although it should have done so, the substitute penalty for the unpaid fine gains in importance. In such a situation, the legislator provided a substitute form of execution of the fine penalty through:

a) the decision on the substitute penalty of socially useful work, or if the execution of the sentence is impossible or impracticable, or if a punished person does not agree to perform socially useful work, or evades its implementation,

b) the decision on the substitute penalty of detention indicated above.

The substitute penalty of socially useful work lasts at least a week but no longer than two months. This work is controlled by a probation officer. The substitute penalty of detention imposed in case of a failure to pay a fine may not exceed thirty days, that is the statutory maximum limit of the sentence of detention indicated by the legislator in Article 19 CPO. The court assumes that one day of the substitute penalty of detention is equivalent to the fine worth from 20 to 150 PLN.

However, the statement that the deprivation of liberty as the substitute penalty for uncollectable fines becomes *ultimum refugium* only when all other methods cannot be used is still up-to-date¹⁸. This follows directly from the quoted above Article 25 § 2 CPO. Therefore, the court de-

¹⁷ M. Melezini, "Inne rodzaje kar", [in:] *System Prawa Karnego*, vol. 6. *Kary i inne środki reakcji karnej*, ed. M. Melezini, Warszawa 2016, p. 349.

¹⁸ The Project of the Penal Code. Justification of the general part, Codification Commission of the Republic of Poland. Section of penal law. Vol. V, no. 3, Warsaw

ciding on imposing the substitute penalty of detention for the unpaid fine should take into account whether there is another possibility of enforcing the original fines and using the instruments indicated by the legislator, not only in the field of the substitute penalties, but also of the possibilities offered by the Executive Penal Code. The substitute penalty of detention concerning the perpetrators of petty offenses can often bring results contrary to those which the originally sentenced fined is supposed to bring in terms of prevention, above all the special one, whereas imprisonment may contribute to the further demoralization of the offender.

As for imprisonment, the legislator decided that the only substitute form of execution of the penalty is the punishment of detention. This assumption is correct. Because regardless of the systematics of sanctions in cases of petty offences the penalty of restriction of liberty is a punishment more severe than a fine. Affecting human freedom and specifically by its nature reducing it in accordance with the provisions of the Act, it does not allow the penalized to dispose of this legal good in a free way. Therefore, the proper assumption of the legislator is, if the offender evades the penalty of restriction of liberty, there is the possibility of commutation of the sentence of restriction of liberty only to the substitute detention. However, the legislator excluded the possibility of exchanging this penalty for a penalty of a lower specific burden¹⁹. The substitute penalty of restriction of freedom corresponds to fifteen days of detention. The position of a probation officer concerning execution of the penalty of restriction of liberty should be emphasized. According to the Executive Penal Code, a probation officer is a body responsible for overseeing the execution of the penalty of restriction of liberty. The purpose of execution of the penalty of restriction of liberty, and thus shaping socially desirable attitudes, in particular the sense of responsibility and the need to respect the law, is only an offer

1930, p. 59. See also the judgment of the Constitutional Tribunal of 7 October 2014, Ref. K 9/13, OTK-A 2014/9, item 101.

¹⁹ The provision of Article 23 CPO was amended by the Act of 16 September 2011 on the Executive Penal Code and some other laws, Journal of Laws of the Republic of Poland of 2011, item 240, in the previous wording the provision allowed for the possibility of commutation of the sentence of restriction of liberty to both: the detention penalty and the fine penalty, while a month of detention was equivalent to a fine ranging from 75 to 2250 PLN.

proposed to the convict. If the convict does not want to make use of it, he/she must suffer the consequences presented in Article 57 § 2 and 3 of the Executive Penal Code²⁰. An offender must therefore realize the fact that a probation officer will submit to the court for a judgment of the substitute penalty. It may happen when a punished person does not respond to the summons of his/her probation officer (of course only in cases of unjustified absence, providing for avoidance of enforcement of the penalty of restriction of liberty), or when instructed about the rights, responsibilities and consequences associated with the performance of unpaid controlled social works the convict declares to the probation officer that he/she does not agree to perform the sentenced work (Article 57 § 2 of the Executive Penal Code), or if a punished person does not take up work on time, or evades serving the sentence of restriction of liberty or performance of its obligations in any other way (Article 57 § 3 of the Executive Penal Code). The reasons included in Article 57 § 2 and § 3 of the Executive Penal Code are analyzed by a probation officer. It is a probation officer who, as an organ of executive proceedings, has the right to independent evaluation of specific situations and to draw the appropriate conclusions on whether the behavior of a perpetrator bears signs of “penalty evasion”. This is due to the role that the legislator has assigned to a probation officer in the process of execution of the penalty of restriction of liberty²¹. It should be noted that the evasion of the penalty of restriction of liberty means such a behavior of a perpetrator which is an expression of his negative attitude to the imposed penalty or the duties connected with it, and so it is the result of the convict’s ill-will, and not of other reasons: objective or even faultless ones²². It is assumed that the necessary conditions to qualify a behavior of a punished person as the evasion of the execution of the penalty of restriction of liberty are: intent, ill-will of a convict, his negative attitude to this sentence or responsibilities related with it and the consequences of failure in its execution, when despite the existence of objective conditions of the execution of penalty, despite the lack of obstacles independent of the con-

²⁰ K. Postulski, “Zmiany w wykonywaniu kary ograniczenia wolności”, *Probacja* 2011, no. 3, p. 134.

²¹ K. Postulski, “Zmiany w wykonywaniu kary...”, p. 135.

²² Resolution of the Supreme Court of 20 June 1979., Ref. VI KZP 6/79, OSNKW 1979 No. 9, item 89.

vict or those difficult to overcome, a sentenced offender does not perform these duties²³. As indicated by J. Skupiński, to assign a behavior of an offender with the stigma of the evasion of the penalty of restriction of liberty we need to observe either the non-culpable failure in the performance of the penalty of restriction of liberty, or the culpable but unintentional failure to perform the penalty²⁴. When using the substitute penalty instead of the restriction of liberty judges should be conscious of the fact that it relates to that part of the originally imposed penalty which has not been performed and an offender evades the penalty execution. If, therefore, the penalty of restriction of liberty was partially performed, the conversion will be subject to only that portion of the penalty, which remains unexecuted. Otherwise, i.e. when an offender performed part of the penalty of restriction of liberty and the court issued a decision of a complete execution of the penalty of restriction of liberty, it would lead to a double punishment of a perpetrator. When the evasion of serving the sentence regards failure to perform some of the imposed obligations, the court should take into account the degree of their failure, their importance from the point of view of the objectives of punishment and participation in the overall duties — count them in proportion to the corresponding number of days within the days of actual detention whose number will be the basis for the conversion of the detention sentence to the substitute fine penalty²⁵.

Using substitute detention in the law of petty offenses, although aimed at securing execution of the sentence originally imposed, does not change the fact that the sentence has the form of restriction of liberty. At this point, one should pay attention to the inconsistency of the legislator, which on the one hand emphasizes the uniqueness of the penalty of detention in cases concerning petty offenses imposed as the original penalty, on the other — allows courts to impose this particular punishment in the form of substitute penalty even in situations when an act commit-

²³ R. Giętkowski, “Kara ograniczenia wolności orzekana w reakcji za wykroczenie”, *Czasopismo Prawa Karnego i Nauk Penalnych* XII, 2008, no. 1, p. 248.

²⁴ See: J. Skupiński, “Głosa do postanowienia SN z dnia 11 maja 1974 r.”, *PiP* 1975, no. 7, p. 182.

²⁵ R. Giętkowski, “Kara ograniczenia wolności...”, p. 251.

ted by a perpetrator for which he/she has been punished is not subject to detention penalty²⁶.

Detention should be a penalty applied exceptionally, when other penalties fail or fail to meet their objective. Such penalty should always be considered as a last resort also in cases of imposing the substitute penalty. The uniqueness of this type of penalty is pointed out by the legislator in Article 35 CPO, stating that in the case when the law leaves a choice between detention and other punishment, detention may be ordered only if the act was committed intentionally, hence the decision on the penalty of detention should be based on the weight of the committed act or circumstances proving demoralization of an offender. It should be ruled when the way of committing an offence by an offender deserves special condemnation. The uniqueness of the penalty of detention in the Code of Petty Offences is emphasized in Article 26 CPO which states that the penalty of detention, even in the form of a substitute penalty, cannot be imposed if an offender's personal circumstances make it impossible to execute this type of punishment. However, as practice shows, although the punishment imposed as the original penalty is used exceptionally, this uniqueness loses its importance in cases of ruling it as a substitute penalty²⁷. It is rare, in fact, that the disposition of Article 26 CPO is raised in the course of enforcement proceedings. It seems that the court in the enforcement proceedings forgets about the rules discussed above. On the other hand, there is no doubt that this is one of the drawbacks of detention as a form of a substitute penalty, emphasizing also the impotence of the legislature in a situation where the offender does not pay the fine voluntarily, the execution proved ineffective, a perpetrator did not agree to perform the substitute penalty of socially useful work, or a perpetrator does not perform the sentence of restriction of liberty, and his/her personal circumstances do not allow for executing it in a substitute form. In such a situation, the originally imposed penalty would be impossible to execute. When not applying the substitute penalties the legislator allows for the discontinuance

²⁶ K. Liżyńska, "Kształtowanie się kary aresztu...", pp. 12–13.

²⁷ M. Melezini carefully analyzed the statistics which show that the number of inmates in prisons and detention centers due to the execution of a substitute penalty of detention is significantly higher than of those performing a detention sentence due to a principal penalty; M. Melezini, *op. cit.*, pp. 367–373.

of the proceedings of the penalty execution²⁸. M. Melezini seems to find an alternative solution. He proposes to replace the method of execution of the sentence of detention outside the detention center with the system of electronic surveillance²⁹. Only failure to fulfill obligations arising from the electronic surveillance would make enforcement of a sentence of detention in a prison entirely justified³⁰. It is the right solution, which should be considered in future revisions of the Code of Petty Offenses.

Undoubtedly, the issue of substitute penalties is one of the essential elements of the penal policy. When a penalty originally imposed on an offender for various reasons is misguided and impossible to execute, we should apply the instrument provided to us by the legislator in the form of substitute penalties. Their aim is to force an offender to perform the originally imposed sentence. However, when a perpetrator does not undergo the original punishment, when deciding on the nature and length of a substitute penalty, we cannot forget that, here also just like when ruling the primary penalty we should take into account all the directives of punishment, instead of imposing it automatically, as it often happens in practice. Because only such conduct will allow the penalty imposed on an offender to fulfill the expected goal in terms of general prevention and fair retribution.

Summary

A penalty is a reaction of the state on a prohibited act, with the help of which the legislator performs against the perpetrator of a criminal act the objectives of a general prevention, a special prevention, or an equitable retribution. To meet those objectives the penalty should be executed. It is impossible not to notice that the penalty initially meted out to the perpetrator may not always be executed. Therefore, implementation of the substitute forms of penalty, which on the one hand neutralize the effects of not executing the original penalty, and on the other — they are a guarantee of a sense of punishing the perpetrators, as well as achieving the objectives of penalty, prove to be necessary. It should be considered whether current substitute forms of the fine penalty and restriction of liberty meet expected by the legislature goals.

Keywords: Petty Offences Code, substitution punishment, prevention, fine, arrest, restriction of liberty, socially useful work.

²⁸ K. Liżyńska, "O celowości kary grzywny...", p. 548.

²⁹ Compare: M. Melezini, *op. cit.*, p. 376.

³⁰ K. Liżyńska, "Kształtowanie się kary aresztu...", p. 17.