

Key problems relating to the enforcement of restriction of liberty in Poland. Remarks in the context of changes in criminal enforcement law

ADAM KWIECIŃSKI

Department of Criminal Enforcement Law, University of Wrocław

From the very beginning the authors of the 1997 criminal codification had high hopes for restriction of liberty with regard to a reduction of reoffending rates, especially when it came to petty and medium-severity crimes. These hopes were based not only on examples from other countries in which a similar sanction referred to as community service became a popular measure in criminal law (USA, Western Europe), but also on domestic experience in this respect¹. It would be difficult to challenge the view, widely presented in the Polish literature, concerning the humanitarian dimension of the punishment, its contribution to a reduction of the prison population, lower social and economic costs as well as a range of other factors giving it an advantage over other types of penal sanctions, in

¹ Under the Polish Criminal Code (Articles 34 and 35) the main form of restriction of liberty involves unpaid supervised community work between 20 and 40 hours a month. In addition, the convicted offender may not change his or her habitual residence without permission of the court and is obliged to report on the progress of the sentence. In the case of employed offenders the court may order that between 10 and 25% of their remuneration be deducted for the benefit of a community cause indicated by the court. In both forms the punishment is measured in months and lasts no longer than 12 months.

particular short-term custodial sentences². At the same time when previous Criminal Codes were in force organisational and normative barriers were indicated as significantly reducing the effectiveness of this punishment and causing it to be imposed less and less frequently³.

The expectation that after 1997 restriction of liberty would become a real alternative to short-term custodial sentences and fines⁴ have proved misguided, as is evidenced by the fact that the share of this penalty in all sentences is still low⁵. A few years after the entry into force of the new Criminal Code a common view in the literature was that the undoubted potential of this sanction had not been properly and fully utilised in Poland⁶. This paved the way for a discussion about necessary changes in this respect. The most important of these changes were introduced in

² M. Szewczyk, 'Kara ograniczenia wolności', [in:] *System prawa karnego. Kary i środki karne. Poddanie sprawcy próbie*, ed. M. Melezini, vol. VI, Warszawa 2010, p. 233. Also: A. Ornowska, *Kara ograniczenia wolności*, Warszawa 2013, pp. 27–51; R. Giętkowski, *Kara ograniczenia wolności w polskim prawie karnym*, Warszawa 2007, pp. 41ff.

³ K. Maksymowicz, *Powrotność do przestępstwa po wykonaniu kary ograniczenia wolności*, Wrocław 1996. Also: S. Zimoch, 'Z problematyki wykonywania kary ograniczenia wolności w świetle badań akt sądowych', *Nowe Prawo* 1978, No. 7–8; E. Janiszewska-Talago, *Problemy wykonywania kary ograniczenia wolności w literaturze naukowej oraz w orzecznictwie SN*, Warszawa 1974.

⁴ An interesting discussion started among experts on criminal law about restriction of liberty as an alternative punishment. Cf. A. Bałandynowicz, 'System probacji — kary średniej mocy i środki wolności dozorowanej jako propozycja sprawiedliwego karania', *Prokuratura i Prawo* 2005, No. 12; M. Szewczyk, 'Czy i jaka alternatywa dla kary pozbawienia wolności', *Przegląd Prawa Karnego* 1992, No. 7; J. Skupiński, 'Problem alternatyw pozbawienia wolności w obecnej i przyszłej polskiej polityce kryminalnej', [in:] *Alternatywy pozbawienia wolności w polskiej polityce karnej*, ed. A. Błachnio-Parzych et al., Warszawa 2009.

⁵ For several years this percentage has remained within the range of about 10 to 12% of all sentences handed down by courts of first instance. Cf. T. Szymanowski, J. Migdał, *Prawo karne wykonawcze i polityka penitencjarna*, Warszawa 2014, pp. 134–135.

⁶ T. Szymanowski, 'Propozycje wprowadzenia korekt i zmian do obowiązującego prawa karnego', *Palestra* 2012, No. 11–12, pp. 37ff. Similarly: M. Szewczyk, 'O nowy kształt kary ograniczenia wolności', [in:] *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga Pamiątkowa ofiarowana Prof. A. Markowi*, ed. V. Konnarska-Wrzosek, J. Lachowski, J. Wójcicki, Warszawa 2010; R. Giętkowski, 'Prawne zmiany w zakresie wykonywania kary ograniczenia wolności', *Przegląd Sądowy* 2012, No. 6.

2003, 2009 and 2011. The most recent major change in this respect is a result of a broad reform of criminal law introduced by the Act of February 2015. The author of the present study examines only some of the changes concerning enforcement proceedings relating to this sanction.

The amendment to the Criminal Enforcement Code of 24 July 2003⁷ removed the deficiencies of the legislative process of 1997, when at the last stage of the process the legislator brought back the possibility of imposing restriction of liberty in the form of a deduction from remuneration without properly regulating the enforcement of this form of punishment⁸. The amendment expanded, for example, the provision specifying the objectives of the punishment, referring them to both its forms (Article 53(1) of the Criminal Enforcement Code). Under this amendment paragraph 2 was added to Article 57 of the Criminal Enforcement Code, specifying the commencement of the punishment in the form of deduction from remuneration (the first day of the period in which an amount is deducted from the sentenced offender's remuneration). What constituted a very important change when it came to ensuring efficient enforcement of the sentence was the provision whereby the court, in addition to indicating the beneficiary of the deduction, should, in a copy of the sentence sent to the entity employing the offender, indicate from which components of the remuneration and how the deductions in question were to be made. At that time the legislator also amended the provision of Article 61(2) of the Criminal Enforcement Code, harmonising the obligations the court could impose in its restriction of liberty sentence with those that could be modified in enforcement proceedings. Under paragraph 2 of this provision, it now became possible to shorten the sentence on account of educational considerations in both forms of the punishment. Similar equalisation of rights followed from the amended Article 64 of the Criminal Enforcement Code. From now on all offenders sentenced to restriction of liberty could take advantage of a new measure in criminal enforcement law, i.e. punishment is regarded as having been enforced despite the fact that not all obligations associated with it have been fulfilled.

⁷ Journal of Laws of 2003, No. 142, item 1380.

⁸ K. Postulski [in:] Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Gdańsk 2006, pp. 260–261.

The same amendment led to another, completely different change. A regulation was reintroduced (Article 63a of the Criminal Enforcement Code) making it possible to change the form of punishment the enforcement of which had already started. At the same time the legislator introduced a “parity” for such an exchange (possible in both directions), assuming that 20 hours of community service would be equal to 10% of remuneration for paid employment. The provision was to be applied in practice in “special cases”. S. Lelental is right in saying that the phrase used here is unfortunate⁹, because it limits the principle, introduced in Article 63a of the Criminal Enforcement Code, making enforcement proceedings flexible, and the application of this provision can be sufficiently justified by changes on the labour market and the need to avoid the imposition of an alternative sanction¹⁰.

What came as a breakthrough in the reform of the Polish model of restriction of liberty was the amendment of penal laws adopted on 5 November 2009¹¹. A starting point for the measures adopted in the Criminal Enforcement Code at the time was a reorganisation of the provisions of the Criminal Code. A decision was made to transfer the court’s powers to indicate the type of work to be performed by the offender, the place and manner in which it was to be performed, to professional probation officers (amending Articles 34(2)(2) and 35(1), and removing Article 35(3) of the Criminal Code). At the same time the legislator decided to do away with the supervision by probation officers during the punishment period (Article 36(1) was removed). Given the greater burden placed on the probation service and associated with the organisation and supervision of sentence enforcement, it has to be said that such a decision was fully justified, as it removed the unnecessary overlapping of proba-

⁹ S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2014, p. 223.

¹⁰ L. Osiński [in:] *Kodeks karny wykonawczy. Komentarz*, ed. J. Lachowski, Warszawa 2015, p. 298. Polish measures regarding restriction of liberty provide for a possibility of imposing an alternative custodial sanction when the offender evades restriction of liberty or the obligations imposed on him or her and associated with this punishment (Article 65 of the Criminal Enforcement Code).

¹¹ Journal of Laws of 2009 No. 206, item 1589. More broadly on the topic: A. Ornowska, *Kara ograniczenia wolności w świetle nowelizacji Kodeksu karnego i karnego wykonawczego*, Opole 2013.

tion officers' activities¹². In addition, the catalogue of obligations which the court could impose was expanded (Article 36(2) in connection with Article 72 of the Criminal Code) and the possibility of making deductions from remunerations for the benefit of the State Treasury was abolished (from now on such deductions would only be made for the benefit of a community cause — Article 35(2) of the Criminal Code). The legislator also expanded the possibilities for imposing restriction of liberty by raising the upper limit of the punishment (to two years) in the case of its extraordinary enhancement (Article 38(2) of the Criminal Code) and when a custodial sentence was forgone, if its upper limit did not exceed five years (Article 58(3) of the Criminal Code). This move was well received by practitioners¹³.

The objective of the changes introduced into the Criminal Enforcement Code in 2009 was to make the enforcement process more efficient and increase the effectiveness of restriction of liberty. Among the most important changes intended to help to achieve these objectives the most frequently mentioned is the expansion of the group of entities where unpaid community work can be done (Article 56(2) and (3) of the Criminal Enforcement Code). The assumption was that this would considerably increase the number of jobs for offenders sentenced to this type of punishment. Yet it must be noted that accomplishing this objective is by no means easy. Some of these entities (including health care entities, educational and care facilities, foundations, associations and charity organisations) are not obliged to accept sentenced offenders as employees and the benefits associated with their "unpaid" work have proved illusory in practice¹⁴.

Drawing on previous experience, the legislator wanted to avoid a situation in which reluctance on the part of these entities to employ con-

¹² See also: J. Lachowski, 'Kilka uwag o nowym modelu kary ograniczenia wolności na gruncie Kodeksu karnego z 1997 roku', [in:] *Nauki penalne wobec szybkich przemian socjokulturowych. Księga Jubileuszowa Prof. M. Filara*, vol. I, ed. A. Adamski et al., Toruń 2012, p. 225; K. Postulski, 'Zmiany w wykonywaniu kary ograniczenia wolności', *Probacja* 2011, No. 3, p. 119.

¹³ K. Postulski, 'Zmiany w wykonywaniu...', p. 119.

¹⁴ A. Ornowska, 'Zmiany prawa karnego wykonawczego wprowadzone w latach 2009–2014 odnoszące się do kary ograniczenia wolności', [in:] *Zmiany w prawie karnym wykonawczym w latach 2009–2014*, ed. A. Kwieciński, Warszawa 2014.

victed offenders would paralyse the enforcement of restriction of liberty. That is why the new Article 58 of the Criminal Enforcement Code (and its implementing regulations) reduced to a necessary minimum the formalities — to be completed by the entities employing sentenced offenders — relating to the organisation and documentation of the work carried out by the offenders. What is also important in this context is the provision of the new Article 56a of the Criminal Enforcement Code whereby the cost of accident insurance for convicted offenders doing the work in question is to be covered by the State Treasury. As a result of the changes the employing entity no longer has to cover the cost of liability insurance against claims for compensation for the damage caused by the convicted offenders to third parties in connection with the work done by them¹⁵. However, the employers still have to cover the cost of medical examination of the offenders about to begin their work¹⁶. This form of punishment was to be made more attractive also by the new Article 57a(3) of the Criminal Enforcement Code. The provision introduces a principle whereby unpaid supervised community work can also be done on statutory holidays as well as non-statutory holidays recognised by the entity for which the work is to be performed. Despite initial doubts as to its constitutionality¹⁷ the provision was well received by some experts¹⁸.

Among the changes in the regulations concerning the enforcement of restriction of liberty, many authors highlight those relating to the strengthening of the role of professional probation officers in the process¹⁹. Examples can be found in the new Articles 55(2), 56(1) and 57 of the Criminal Enforcement Code. The legislator has transferred to pro-

¹⁵ See: L. Osiński, op. cit., p. 271.

¹⁶ More: A. Ornowska, 'Badania lekarskie skazanych na karę ograniczenia wolności — propozycja zmian w prawie karnym', [in:] *Oblicza Temidy*, ed. I. Zgoliński, Bydgoszcz 2013, pp. 23–24. Similarly: R. Giętkowski, 'W sprawie nowych regulacji dotyczących wykonywania kary ograniczenia wolności', *Przegląd Sądowy* 2010, No. 9, pp. 39–40.

¹⁷ W. Wróbel, *Opinia prawna o rządowym projekcie ustawy o zmianie o zmianie ustawy — Kodeks karny, ustawy Kodeks postępowania karnego, ustawy — Kodeks karny wykonawczy, ustawy — Kodeks karny skarbowy oraz niektórych innych ustaw*, Sejm of the 6th term, Parliamentary Document No. 1394, pp. 1, 20–21.

¹⁸ A. Ornowska, 'Zmiany prawa karnego wykonawczego...'

¹⁹ J. Lachowski, op. cit., pp. 224–225.

bation officers all powers — with the exception of those relating to sentence imposition — concerning the organisation and supervision of the enforcement of restriction of liberty. What raises concerns in this context is the imprecise phrasing of Article 57 of the Criminal Enforcement Code concerning the circumstances making it obligatory for probation officers to apply to the court for the imposition of an alternative custodial sentence²⁰. Many authors believe these circumstances have been defined too narrowly²¹.

As a direct consequence of the considerable modification of the form of restriction of liberty under substantive law, introduced in February 2015²², it also became necessary to modify the rules regulating its enforcement²³. Following the incorporation of electronic supervision into the substance of restriction of liberty (Article 34(1a)(2) of the Criminal Code), it became necessary to add to Article 53(2) a provision under which the sentenced offender would be obliged to observe specific rules of conduct not only at his or her workplace but also in his or her place of residence (where the punishment is enforced in practice)²⁴.

Adaptive nature should also be attributed to the new paragraph 5 added to Article 57 of the Criminal Enforcement Code in connection with the

²⁰ K. Postulski, 'Zmiany w wykonywaniu...', pp. 134ff.

²¹ S. Leleñtal, *Kodeks karny wykonawczy...*, p. 210.

²² Act of 20 February 2015 amending the Criminal Code and some other acts, Journal of Laws of 2015, item 396.

²³ The most important amendments to the Criminal Code include:

- extension of the period for which restriction of liberty can be imposed to two years;
- definition of two groups of elements (the so-called mobile and fixed elements) on the basis of which the sanction is to be constructed;
- introduction into its substance (as part of its mobile elements) of electronic supervision;
- introduction of a possibility of imposing, jointly or severally, mobile elements (unpaid work, deduction from remuneration, obligations referred to in Article 72(1)(1)–(4) of the Criminal Code or electronic supervision);
- elimination of the possibility of suspending a restriction of liberty for a trial period.

For more on the topic: T. Sroka, 'Kara ograniczenia wolności', [in:] *Nowelizacja prawa karnego 2015. Komentarz*, ed. W. Wróbel, Kraków 2015, pp. 83–153.

²⁴ K. Dąbkiewicz, *Kodeks karny. Komentarz*, Warszawa 2015, p. 290.

fact that under Article 34(1a)(3) of the Criminal Code restriction of liberty also encompasses the obligations of Article 72(1)(4)–(7) of the Criminal Code. The authors of this provision rightly decided to make it clear that the rules of the enforcement of this sanction (defined in Article 57(1)–(3) of the Criminal Enforcement Code) would also concern a situation in which the sanction was composed of elements which were probationary in nature. Similar reasons determined the new form of Article 57a(1), (2) and (4) of the Criminal Enforcement Code. The Article sorts out questions concerning the day on which the sentence commences depending on its form and grounds for imposing the sentence.

The possibility of sentencing an offender to restriction of liberty combined with obligations referred to in Article 72(1)(4)–(7a) of the Criminal Code made it necessary to exclude the release of the offender from fulfilling the obligations in enforcement proceedings, if only one obligation had been imposed on him or her. In the view of the authors of the bill, this would be inadmissible and would in fact mean that the offender would be released from punishment in general²⁵. The new Article 61 of the Criminal Enforcement Code takes such a situation into account in its paragraph 1 and at the same time adapts the references in the normative part of this regulation to changes in the forms of restriction of liberty introduced into the Criminal Code.

The changes in the forms of restriction of liberty, defined in the Criminal Code, also led to terminological modifications in Articles 64(1) and 66(1) of the Criminal Enforcement Code amended in February 2015. There was a slightly different rationale behind and nature of the changes to Articles 64(2) and 64a of the Criminal Enforcement Code. The first of these provisions points to the criteria that should be followed by the court seized of the case in crediting the restriction of liberty served so far towards another punishment. The second provision stems from the first in terms of admissibility of appeal against the court's decision in the matter.

In the statements of reasons behind the amendments to Article 65(2) of the Criminal Enforcement Code the authors stressed that it contained

²⁵ Statement of reasons behind the government bill amending the Criminal Code and some other acts of 15 May 2014, p. 11, <http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2393> (access: 15.12.2015).

a substitute of the risk of a restriction of liberty enforcement order (in the obligatory and optional variant), which could arise in traditional probation. Further on in the provision (paragraph 2) the legislator has rightly restored the regulation whereby if an act of parliament does not provide for a custodial sentence for an offence, the upper limit of an alternative custodial sanction may not exceed six months, which thus satisfies the principle of justice and ultima ratio of custodial sentences²⁶.

The same principle was behind the introduction of Article 65a into the Criminal Enforcement Code. It restores the measure allowing the court to suspend the alternative custodial sanction, if the offender pledges in writing that he or she will serve the sentence and will submit to all restrictions resulting from it. At the same time, under this provision if the offender again evades serving the sentence, it will be obligatory for the court to order custodial sentence enforcement.

Given the fact that under the analysed amendment the mobile elements of restriction of liberty would include electronic supervision, it became necessary to take into account in enforcement proceedings the specificity of punishments involving electronic supervision. A decision was, therefore, made that the provisions of Chapter IX of the Criminal Enforcement Code, with the exception of Articles 53, 62 and 64a, would not apply to restriction of liberty consisting in an obligation to remain at the place of habitual residence or other place designated for the offender with electronic supervision in place.

The legislator intended the recent amendments to the Criminal Code and Criminal Enforcement Code to increase the number of cases in which restriction of liberty would be imposed and to make its enforcement more efficient, which should also improve its effectiveness. It is evident that the legislator clearly recognised the potential of the sanction. Obviously, it was not possible to eliminate all deficiencies and inconsistent regulations in enforcement proceedings straight away. Some of them were not eliminated until the amendment of 2011, for example²⁷. However, scholars and practitioners agree that what may constitute the biggest obstacle to the implementation of the legislator's concept is the organisational

²⁶ R. Giętkowski, 'Prawne zmiany...', p. 59.

²⁷ Journal of Laws of 2011, No. 240, item 1431.

inefficiency of the probation service²⁸. It is associated on the one hand with the constantly expanding responsibilities of the profession and on the other with long-standing lack of new full-time positions for professional probation officers. Some practitioners are also concerned that the new substance of restriction of liberty may complicate its enforcement so much that it will ultimately discourage courts from applying the sanction. We should hope that an efficient implementation of the new regulations by enforcement agencies will cause the reverse to be true instead.

Summary

The legislator's attempts to improve the existing legal regulations concerning the enforcement of restriction of liberty, attempts made since 1997, have so far failed to bring the expected results. Today, when on the eve of a major reform of criminal law this sanction has been assigned important tasks in the fight against petty and medium-severity crime, efficient mechanisms of its enforcement seem particularly essential. The present study is an attempt to show the evolution of enforcement proceedings in this respect, including the most recent amendments of February 2015.

Keywords: restriction of liberty, enforcement proceedings, amendments to criminal law, probation officer, community work, electronic supervision.

²⁸ T. Szymanowski, 'Zmiany prawa karnego wykonawczego', *Państwo i Prawo* 2012, No. 2, p. 50.