

# Positive criminological forecast as a material condition for parole in Polish penal law

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Early conditional discharge is one of the institutions associated with the submission of an offender under probation (next to conditional discontinuance of the proceedings and the conditional suspension of a penalty). This is a modification of a custodial sentence imposed against the offender in their favor at the stage of enforcement proceedings<sup>1</sup>. Application of this institution leads to shortening the residence time of the convict in prison and allowing offenders to operate within the prescribed period and under certain conditions, within the framework of so-called controlled freedom.

Conditional discharge has a long history in Polish penal law. The first regulation on this subject comes from 1927<sup>2</sup>. Since 1932 this institution was comprehensively regulated by the rules of criminal codification, re-

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<sup>1</sup> Compare. G. Wiciński, 'Commentary Provisions of Appeal Court in Łódź dated 23rd March, 1999. II Akz 114/99', *Prok. i Pr.* 2000, No. 7–8, p. 94.

<sup>2</sup> Regulation of the President of the Republic of Poland dated 19th January 1927 on early release of persons imprisoned, *Journal of Laws of the Republic of Poland*. No. 5, item 25. Previously, i.e. after regaining its independence, the Republic of Poland did not have its own criminal law. The law in question was known in various districts of Poland in the shape in which it was regulated by the laws of the partitioning powers, i.e. — Russian Criminal Code of 1903 (with amendments imposed by the provisions of 1917 — former Congress Kingdom, Criminal Law Act on crime, misdemeanors and exceedances of 1852 — the former Austrian partition; Penal Code for the German Reich from 1871 — the for-

spectively from the years 1932, 1969 and 1997. However, despite a rich history, as well as case law and literature on the subject, to this very date, to establish a uniform and rational regulations position of the institution itself has proven unsuccessful. It should be borne in mind that early conditional discharge is regulated in part by the provisions of the Criminal Code — Art. 77–82 Criminal Code (conditions of conditional discharge, probation period, the effects of the positive course of the probation period), and in part by the provisions of the Executive Penal Code — Art. 159–163 Executive Penal Code (adjudication of supervision, defining the requirements for the probation, the procedure for conditional release). Proponents of the transfer of all of the provisions on conditional release to the Executive Penal Code argue their position that this institution is only used in enforcement proceedings, the adjudicating authority is a penitentiary court which belongs to the authorities of executive proceedings<sup>3</sup>. Furthermore, to adjudicate on the matter includes both ruling and enforcement of the provisions on the use of conditional release. Therefore, the regulations on conditional release, regardless of whether they are substantive or procedural, belong entirely to the Executive Penal Code.

In the subject literature one can also find an opposite viewpoint, recognizing to be only rational to place in the Criminal Code provisions specifying the requirements for probation and the conditions for revocation of conditional discharge, because they belong to the field of substantive criminal law<sup>4</sup>. Following this line of reasoning all regulations on conditional release should therefore be included in the Criminal Code. Not denying the validity of the first of the solutions presented it should be noted that despite numerous amendments to criminal law and Executive Penal Code, this problem remains unsolved.

Since the beginning of conditional discharge being in force in Polish law, its applicability is determined by the fulfillment of two conditions together — formal and material. The former, currently regulated in

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mer Prussian partition, see: S. Lelental [in:] *The System of Criminal Law*, vol. 6. *Penalties and Punitive Measures*, ed. M. Melezini, pp. 1064 et seq.

<sup>3</sup> S. Lelental, *Executive Penal Code. Commentary*, 3rd ed., Warsaw 2010, p. 644.

<sup>4</sup> A. Marek, *Penal Code. Commentary*, Lex 2010.

Art. 78 Criminal Code indicates the bare minimum for a sentence which an offender is required to serve in order to be eligible to apply for early conditional discharge. Because of the adopted subject matter of this paper it will not be the subject of analysis.

The second condition is related to the establishment of the so-called positive criminological (social) forecast, which will allow the court adjudicating on conditional release, to assume that despite not serving the sentence in its entirety, a convict, after release from prison, will observe the legal order, in particular will not commit any crime again. This condition requires attention due to several reasons.

First of all, it is evaluative in nature, and its correct form has a significant impact on whether or not the institution of conditional discharge will fulfill its assigned functions related to criminal and penitentiary policy or not<sup>5</sup>.

Prior to a detailed discussion on a material condition it must be emphasized that early conditional discharge is optional in nature. This means that the fulfillment of conditions by a convict, including, above all formal prerequisites, does not imply that a convict acquires the right to early conditional discharge<sup>6</sup>. This stand is confirmed by the Supreme Court resolution of 11th January, 1999<sup>7</sup> in which the Supreme Court stated that “as long as the decision on an early conditional discharge has not been taken, one cannot talk about the acquisition of rights by a convicted person, which could be under protection in light of the constitutional principle of protection of vested rights. The passage of a certain quantum penalty does not form on the side of the convict any claim or even as much as a promise of conditional release, which could be protected”.

A similar stand was adopted by the Constitutional Court in its judgment dated 10th July, 2000<sup>8</sup>, stating that “the Criminal Code and the

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<sup>5</sup> J. Lachowski, ‘Material Premise for Conditional Early Release on the Grounds of the Criminal Code’, *Prok. i Pr.* 2008, No. 11, p. 36.

<sup>6</sup> A. Zoll, *Commentary to the Criminal Code*, Lex 2004.

<sup>7</sup> Resolution of the Supreme Court adopted in plenary session on 11th January, 1999, Ref. IKZP 15/98, OSNKW 1999, No. 1–2, item 1.

<sup>8</sup> Ruling of the Tribunal of 10th July, 2000, Ref. SK 21/99, OTK ZU 2000. No. 5, item 144.

Executive Penal Code do not create an institution for early conditional discharge as an individual right of a convicted person. It is the court, in accordance with Art. 77 and 78 Criminal Code, which may conditionally exempt a convict from serving the remainder of the sentence [...] after the conditions provided for in those regulations have been fulfilled. [...] The passage of the required quantum is merely one of the conditions of conditional release, necessary to hear the case at all. The fulfillment of this condition does not mean however, that conditional discharge will be granted to a convicted person”.

Taking into account the above, the great importance of criminological forecast as a material condition for conditional discharge should be emphasized once again.

As a result of changes in criminal law the material condition has evolved into its shape as specified by Article 77 § 1 Criminal Code.

First of all, it should be noted that a constructed criminology forecast towards a convict is supposed to justify the conviction of the court that despite an early release from prison, a convict will respect the legal order, in particular, will not commit a crime again. It means nothing other than the assumption that even though a sentence has not been fulfilled in its entirety, for a particular convict the goals of serving punishment were achieved. It should be recalled that at that stage of sentence adjudication, the court takes into account both objectives — individual and preventive and general and preventive (Art. 53 § 1 Criminal Code)<sup>9</sup>. At the stage of execution of imprisonment only the objective of an individual prevention plays an important role, which follows directly from the content of Art. 67 § 1 Executive Penal Code<sup>10</sup>.

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<sup>9</sup> Art. 53 § 1 of the Penal Code, the court rules the punishment in its discretion, within the limits provided for by law so that its severity does not exceed the degree of guilt, taking into account the social harm caused and the objectives for prevention and education, which the punishment is to achieve in relation to a convict, and if there is the need also for development of legal awareness of society.

<sup>10</sup> Art. 67 § 1 of the Executive Penal Code, execution of the sentence of imprisonment is to evoke in convicts the will to cooperate in the development of socially desirable attitudes, in particular, a sense of responsibility and the need to respect the law and thus refrain from re-offending.

A comparison between the two provisions, in connection with Art. 77 § 1 Criminal Code<sup>11</sup> leads to the conclusion that the decision on conditional release is dependent on achieving a particular preventive objective in the form of a need to respect the law and refrain from returning to crime. It must therefore be preceded by reasonable assumption that penalty execution has formed in a convict the need to avoid a path of crime<sup>12</sup>.

The existing Criminal Code therefore precludes the possibility of refusing conditional discharge to a convict due to an assessment that the objectives have not been achieved in terms of social impact<sup>13</sup>. The legislator has dropped the existing condition in the Criminal Code of 1969 in reference to general prevention in the form of “achieving the objectives of punishment”<sup>14</sup>.

One must agree with J. Lachowski, who considers it unlikely to make the decision on conditional release dependent on the supposition that the convicted person will observe the legal order<sup>15</sup>. It should be remembered that under the criminal law the concept of “law order” is to be construed broadly, and thus is not limited to compliance with the rules of criminal law, offense law or provisions including order penalties, but also includes norms for instance work, family and care norms, etc.<sup>16</sup> It proves difficult to reasonably assume when deciding on conditional release that the convict will abide by the norms of civil, administrative and labor law. It seems reasonable, considering the functions of the institution under con-

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<sup>11</sup> Art. 77 § 1 of the Penal Code, the court may conditionally exempt from serving the remainder of the sentence the person sentenced to imprisonment, only if their attitude, personal characteristics and conditions, circumstances of the crime and their behavior after committing a crime and during their imprisonment justify the belief that the convicted after release will follow the legal order, especially will not commit the crime again.

<sup>12</sup> J. Lachowski, op. cit., p. 42.

<sup>13</sup> S. Leleń, op. cit., p. 1067.

<sup>14</sup> Compare Art. 90 § 1 with Art. 50 § 1 of the Penal Code of 1969; see: J. Wąsik, ‘Conditional early release from the remainder of the sentence of imprisonment in a passed new Penal Code of 1997’, *Nowa Kodyfikacja Prawa Karnego*, ed. L. Bogunia, Wrocław 1997, p. 256.

<sup>15</sup> Compare. J. Lachowski, op. cit., p. 43.

<sup>16</sup> See: S. Strycharz, ‘Concept of Law Order in Criminal Law’, *Nowe Prawo* 1970, No. 6, pp. 853 et seq.; A. Marek, *Penal Code. Commentary*, Warsaw 2007, p. 183.

sideration, to reduce forecasting to a reasonable belief of not committing a crime, and therefore complying with criminal law norms<sup>17</sup> by an offender.

Another issue related to the substantive condition of early conditional discharge is a degree of probability of a constructed criminological forecast. In the course of the evolution of this institution, the legislative body introduced the ever-increasing demands in this regard. In the Criminal Code of 1932 legislature required that the conditions for forecasting “allowed to assume” that the convicted person will not commit an offense. In the Criminal Code of 1969 those conditions were to “justify the supposition” whereas in the current Criminal Code to “justify the belief” that the convicted person will observe the legal order. According to the dictionary of the Polish language — to suppose, means “to guess at something, assume something with no assurance<sup>18</sup> and a belief is “a judgment, opinion based on a conviction of the truth, fairness of something”<sup>19</sup>.

From a comparison of the two concepts, it clearly transpires that the second one means a greater degree of forecast probability and therefore the current legislation in this respect is more stringent. The question arises whether this is relevant from a practical point of view. There is no doubt that, regardless of whether the criminological forecast justifies the belief or merely an assumption of a court as to the observance of law by the convicted person, the basis for the refusal to grant conditional discharge cannot be the lack of court certainty as to the conduct of an offender in freedom conditions.

As repeatedly emphasized in the literature, the essence of each forecast is uncertainty as to the existence of certain phenomena or events<sup>20</sup>. Therefore, certainty as to the fact that the person will not commit an offense principally does not exist, because future human behavior is de-

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<sup>17</sup> See. J. Lachowski, ‘Conditional early release under Polish law against the laws of the Member States of the Council of Europe’, [in:] *X Years of the Executive Penal Code*, ed. S. Lelental, G.B. Szczygieł, Białystok 2009, p. 223 et seq.

<sup>18</sup> Sjp.pwn.pl/assumption (the definition of assumption as per Polish language dictionary).

<sup>19</sup> Sjp.pwn.pl/conviction (the definition of conviction as per Polish language dictionary).

<sup>20</sup> A. Marek, *Commentary to the Criminal Code. General Content*, Warsaw 1999, p. 156.

pendent on the circumstances of the individual and social nature, the occurrence of which and strength are not predictable with certainty<sup>21</sup>.

Another issue which arouses controversy is the interpretation of the phrase “only if”<sup>22</sup> used in Art. 77 § 1 Criminal Code. At this point I will recall that this provision states that the court may conditionally release a convict from serving the remainder of the sentence, only if listed in that provision elements shaping the criminological forecast justify the belief that the convicted will not return to crime. The analysis of the content of this provision leaves no doubt that the institution may be applied by court when these elements occur together, because only then are they prerequisites for the evaluation of criminological forecast<sup>23</sup>. This does not solve the problem, because the question arises whether all these elements have the same meaning for forecasting and whether each of them must be evaluated positively. To answer this question it is worth pointing out a view expressed in the literature that the judgment on a conditional discharge has to be primarily rational<sup>24</sup>. Therefore, the legislative body made this institution optional, not mandatory in nature. At the same time introducing the various elements forming criminological forecast, defined them in three areas: the characteristics of an offender before committing a crime, the situation related to circumstances occurring at the time of the act and immediately after it and the offender’s behavior after the commission of the crime and during the imprisonment<sup>25</sup>. It is therefore difficult in such a situation to speak of any hierarchy of evidence.

Given the above the stand of the Court of Appeal<sup>26</sup> should be regarded as irrelevant, which states that

the court may conditionally release an offender from serving the rest of the sentence only when there is clearly a positive criminological forecast [...], which ensures that

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<sup>21</sup> See. also G. Wiciński, op. cit., p. 91.

<sup>22</sup> Z. Świda, ‘Nature and Application of the Institution of Conditional Release from Serving the Remainder of a Sentence of Imprisonment’, [in:] *Penology against Problems of Contemporary Crime, Jubilee Book of 70th Anniversary of the Birth of Professor Andrzej Gaberle*, Warszawa 2007, p. 376.

<sup>23</sup> Ibid., p. 92.

<sup>24</sup> G. Wiciński, op. cit., pp. 91ff.

<sup>25</sup> Ibid., p. 91.

<sup>26</sup> Ruling of the Appeal Court in Katowice from 11th December, 2008, II Akzw 1459/08, *Prok. i Pr.* 2009, No. 10, item 23.

after the release a convict will observe the legal order and will not commit a crime. Unambiguously positive criminological forecast means a favorable assessment of all the elements forming this forecast. The adoption of this view would therefore mean the obligation to refuse conditional discharge due to the negative evaluation of even one of the elements which is reasoning *contra legem*<sup>27</sup>.

For it seems that just as you cannot require assurance or guarantee that the convicted person will not return to crime, by the same token it cannot be required to achieve an unambiguously positive forecast for their early release from prison, if the application of the institution is to be rational.

In the literature, the term “only if” is understood also as protection against the ruling not only on the basis of a positive prognosis, but also based on other considerations, going beyond the content of Art. 77 § 1 Criminal Code, including the social impact of the penalty<sup>28</sup>. It seems that a literal interpretation of Art. 77 § 1 Criminal Code leaves no doubt as to the grounds to adjudicate on conditional release. However, analysis of the Court of Appeal rulings indicates that in many cases of refusal to grant conditional discharge from serving the remainder of the custodial sentence was justified by other considerations, for example premises, which led the court adjudicating on the merits to sentence an offender to imprisonment<sup>29</sup>, the distal end of the penalty and consideration of the social sense of justice<sup>30</sup>, failure to meet the objectives of punishment in both dimensions — particular and general-preventive (shaping the legal awareness of the population)<sup>31</sup>.

In the doctrine it is still disputed whether the discussed institution should be treated as an exception to serving a sentence imposed in its entirety or should it be a principle and be used without special restric-

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<sup>27</sup> S. Lelental, ‘Submission of a Delinquent to Probation (Probation Measures). Parole’, [in:] *The System of Criminal Law*, ed. M. Melezini, p. 1097.

<sup>28</sup> See Z. Świda, *op. cit.*, p. 376.

<sup>29</sup> Order of the Appeal Court in Łódź of 23rd May, 1999, II Akz 114/99, *Prok. i Pr.* 2000, No. 7–8, item 89.

<sup>30</sup> Order of the Appeal Court in Gdańsk of 18th June, 2004, II Akzw 542/04, unpublished.

<sup>31</sup> Order of the Appeal Court in Szczecin of 29th October, 2008, II Akzw 560/08, unpublished.



tions<sup>32</sup>. Adoption of the first position can lead to rationing the institution with the greatest caution<sup>33</sup> and relying on the basics of justification not always included in the content of Art. 77 § 1 Criminal Code. While the second is to facilitate its frequent use, however it can lead to applying conditional discharge as a regulator of prison population<sup>34</sup>. At this point again we must appeal to the belief settled in the doctrine, in the rationality when applying the institution of conditional discharge.

Taking into account case law it seems that the choice of repressive or liberal model of the application of the institution, to a large extent will depend on the personal beliefs of the judge as to its fairness<sup>35</sup>.

As already mentioned, positive criminological forecast is formed on the basis of prognostic elements enlisted in the content of Art. 77 § 1 Criminal Code. In each of the three subsequent criminal codes the number of these elements was increased, which was probably intended to restrict or clarify the material conditions.

In the Criminal Code of 1932 (Art. 65 § 1) the behavior of the convicted person while serving a sentence and personal conditions of the convict were the basis for forming criminological forecast.

The Criminal Code of 1969 added personal properties of a convict to these elements, lifestyle before the offense and the behavior after committing the crime, which increased the number of items by up to five.

The Criminal Code in force provides for up to eight prognostic factors. These include:

- the convict's attitude,
- the convict's personal characteristics,
- the convict's personal conditions,
- the convict's lifestyle before the offense,
- the circumstances of the crime,

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<sup>32</sup> Z. Hołda, K. Postulski, *Executive Penal Code. Commentary*, Gdańsk 2005, p. 531.

<sup>33</sup> See. G. Wiciński, 'Commentary on the Provisions of the Appeal Court in Kraków of 19th December, 2006., Ref. II Akzw 984/06', PWP, No. 56–57, Warsaw 2007, p. 279.

<sup>34</sup> Compare K. Postulski, 'Status of the Attorney General in Enforcement Proceedings', *Prok. i Pr.* 2001, No. 12, p. 50.

<sup>35</sup> G. Wiciński, 'Commentary Provisions...', p. 280.

- behavior of the convicted person after the commission of the offense,
- behavior of the convicted person while serving a sentence,
- agreement concluded as a result of mediation.

However, there are doubts whether the increase in the number of prognostic factors really has a positive effect on the development of criminological forecast. Above all, what requires checking is whether the ranges of meaning of various concepts are complementary, creating a logical whole or intersect or even overlap, thereby hampering the forecasting process.

The answer to this question requires a brief overview of specific prognostic factors.

As the first element Art. 77 § 1 Criminal Code indicates the attitude of a convicted person.

In comments to the Criminal Code one can find a concise statement that the attitude of a convicted is both their attitude before crime commission and after it<sup>36</sup>. J. Lachowski indicates that in everyday language attitude means to respond to something, to a stand or views. It stresses, however, that the scope of this term does not include the behavior of the convicted person directly related to the offense committed<sup>37</sup>.

According to S. Lelental, all prognostic factors are set out in the Criminal Code on such a high level of abstraction that the lack of interpretation and relying only on the form in which they are specified in the regulation excludes all fairness of adjudicating and makes supervision over instance rulings difficult<sup>38</sup>. At the same time while explaining this concept he indicates that the term is used to describe the personality as well as to explain and predict human behavior. Describing the attitude is thus made on the basis of possible behavior in the past. For this reason, the concept of attitude coincides in meaning with the content of other prognostic factors, namely, “the convict’s lifestyle before the offense”<sup>39</sup>. In case-law, we can find a few examples of the interpretation of this concept. In one of the judgments the Appeal Court has expressed the view

<sup>36</sup> See M. Filar, *Criminal Code. Commentary*, Warszawa 2010, p. 355.

<sup>37</sup> J. Lachowski, ‘Material Premise...’, p. 44.

<sup>38</sup> S. Lelental, ‘Submission of a Delinquent to Probation’, p. 1096.

<sup>39</sup> Ibid., p. 1098.

that “the attitude of a convicted person expresses their attitude to norms and social rules and tendency to violate the goods protected by law”<sup>40</sup>.

The second predictor are personal properties of a convict. Also in this case there is no uniform definition. It is assumed that the term refers to the biological characteristics of the convicted person (age, sex, state of health), their characteristics, temperament, ability to self-criticism, but also to personality and sensibility<sup>41</sup>. In addition, also education and life experience are pointed out<sup>42</sup>. According to other definitions personal characteristics of the convict include primarily the psyche outline of the convicted person formed during the course of life, as well as the features of character<sup>43</sup>, or all the characteristics of the offender’s personality structure (qualities of intellect, ability to deal with people and themselves)<sup>44</sup>. Merely outlining the scope of this concept proves difficult. This, in turn, shows the scale of the problem faced by the penitentiary court, faced with the need to assess the so-defined prognostic factor. It is therefore necessary to agree with S. Lelental that introducing an element in the form of personal properties of a convict, the legislative body assigned courts with a difficult task, which they are not able to truly realize due to the fact that the condition itself is not recognizable<sup>45</sup>. For this reason, one should consider the merits of its keeping.

Another element of the criminological forecast are personal conditions of a convicted individual. In that respect, the interpretation is fairly uniform, and though reduced to providing examples, this listing is of synthetic nature. What the term “personal conditions” indicates in the literature is: marital status, education, occupation, housing, wealth<sup>46</sup>, thus factors which enable to satisfy the basic needs of life.

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<sup>40</sup> Order of the Appeal Court in Wrocław of 12th January, 2005, II AKz, 1164/04, OSA of 2005, No. 8, item 54.

<sup>41</sup> W. Wróbel [in:] *Penal Code. General Part. Commentary*, vol. I, Kraków 2007, p. 696 et seq.

<sup>42</sup> J. Lachowski, ‘Material Premise...’, p. 45.

<sup>43</sup> J. Bafia [in:] J. Bafia, K. Mioduski, M. Siewierski, *Commentary to the Penal Code*, Warszawa 1971, p. 247.

<sup>44</sup> A. Grześkowiak [in:] *Criminal Law. Issues of Theory and Practice*, Warszawa 1986, p. 221.

<sup>45</sup> S. Lelental, ‘Submission of a Delinquent to Probation...’, p. 1099.

<sup>46</sup> *Ibid.*, p. 1100.

Surprising is the fact that in the published case-law, there is nothing which would narrow down the content of this factor, especially considering the fact that the convict's personal conditions pursuant to Art. 53 § 2 Criminal Code, the court takes into account when sentencing and, therefore, it has mainly a verifying role while serving a sentence.

Another forecasting predictor is an offender's lifestyle before the offense. The basic problem that arises is how long the life of the convicted person before the offense is to be assessed. Generally, the starting point for this assessment should probably be a point from which a convict has the capacity to incur criminal liability, therefore upon the completion of 17 years of age. The only question is whether it is justified. It should be noted that this factor is subject to the court's ruling at the stage of punishment (Art. 53 § 2 of the Criminal Code). The prognostic value of this factor will therefore depend on the length of the penalty imposed and the time of an application for conditional discharge, but it should be borne in mind that in extreme cases the value will be negligible. In addition, it is required to determine the content of this prognostic factor. The literature indicates that in this case it refers to the offender's previous criminal record, permanent place of work, the opinion in the workplace, among neighbors<sup>47</sup>, but also the material conditions, earning capacity, housing and environmental conditions, the commonness of committing acts of crime, their hooliganism or extreme cruelty<sup>48</sup>.

It seems that the content of this predictor corresponds to the same scope with at least one, if not two as outlined above. This raises the question of the legitimacy of such regulation. It seems that the more transparent criteria for assessing the various spheres of activities or characteristics of the offender which compose the criminological prognosis could be obtained by leaving only two or three elements, but selected in a well-considered manner. The validity of the thesis presented confirms the case-law, in which again it is to no avail to seek the definition of the content of this prognostic factor, and the few exceptions come down to repetition of the provision content.

<sup>47</sup> K. Buchała [in:] K. Buchała, A. Zoll, *Penal Code. Commentary. The General Part*, vol. I, Warszawa 2007, p. 398.

<sup>48</sup> W. Rodakiewicz, *Conditional Release of Juveniles from Serving the Remainder of a Prison Sentence*, Wrocław 2005, p. 142.

The legislator requires while constructing prognosis to take into account the circumstances of the offense. In this case, again, it is difficult to ignore this element. First of all, it is a factor that the court takes into account at the stage of pronouncing judgment. In the process of serving a sentence it can be attributed secondary significance at most, insofar as evidence of the personal characteristics of the offender. But the question remains whether there is again a reproduction of the content range of concepts.

In the literature, the fact is also highlighted that the prognostic value largely depends on the notion whether we are dealing with an agent that over time may change and thereby affect criminological prognosis positively or not. Lifestyle before the offense belongs to the static elements that are not subject to change during the period of serving the sentence. While, therefore, it is important at the time of sentencing, it becomes secondary when taking a decision on conditional release.

However, analysis of the case-law indicates that in many cases, actually lifestyle before the offense acted as a basis for refusal to grant parole<sup>49</sup>. It must be marked that this referred to long-term penalties.

For criminological prediction it is also important to assess the behavior of the convict after committing an offense. Voluntary reparation, apology to the victim, to repent, and finally admitting to committing the offense will surely be evaluated<sup>50</sup>. In the latter case, however, that is not admitting the offense is a legal form of exercising the right to defense, and thus may not lead to negative assessments as to the convict's conduct in the future.

The legislature also requires the inclusion of the convict's behavior while incarcerated as an important prognostic factor. The term "behavior" includes various activities and behavior of a convict, the assessment of which may affect the prognosis as to their behavior in freedom. In the literature the specific features of behavior are listed, namely: attitude to work and learning, to the order and discipline of the prison, to superiors, fellow prisoners, participation in social and educational activities, contacts with family, preparing for life after release, getting awards, the

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<sup>49</sup> Ibid., p. 1101.

<sup>50</sup> K. Buchała, *Penal Code. Commentary...*, p. 238.

use of passes, breaks in the execution of the penalty, discipline or finally being subject to disciplinary action<sup>51</sup>. It seems that, especially in case of offenders sentenced to long-term imprisonment, 25 years of imprisonment or life imprisonment when assessing this factor the manifestations of life of a convict in freedom conditions, for example during passes or breaks, in the execution of the penalty will be of more importance than the manifestations of behavior in prison conditions.

Lastly, what needs discussing is the agreement concluded as a result of mediation. This element of a material condition of parole is not regulated in Art. 77 § 1 Criminal Code but in Art. 162 § 1 Executive Penal Code. It was added pursuant to the Act of 27th July, 2005 on amending the Criminal Code — Criminal Proceedings and the Act — Executive Penal Code. According to this provision, a penitentiary court in their proceedings in granting parole is to take into account an agreement concluded as a result of mediation. It must be emphasized, however, that the Executive Penal Code lacks regulations on mediation in enforcement proceedings. It is therefore an agreement reached at an earlier stage of the proceedings before a court or prosecutor, referred to in Art. 53 § 3 Criminal Code. It seems that this element may as well be included in the context of other prognostic factors, which is the behavior after the committing of the crime, because a settlement is a manifestation of behavior that occurred in the period just after the crime. Therefore, the introduction of a separate regulation in this regard must be questioned.

The presented analysis of prognostic factors indicated in Art. 77 § 1 Criminal Code leads to several conclusions.

First of all, consideration should be given if proven reasonable to maintain such a large number of prognostic factors when their ranges overlap or it is difficult to identify their content, because it does not allow in practice for the correct structuring of criminological prognosis. In addition, it should be noted that the cumulative assessment of prognostic factors does not mean the creation of clearly positive criminological forecasts, allowing the inclusion of all elements equally. Other factors will be decisive in the case of short-term sentences, others in the case of being sentenced to long-term penalties.

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<sup>51</sup> S. Lelental, 'Submission of a Delinquent to Probation...', p. 1105.

Uncertainty of the court as to the future conduct of the convicted person and lack of guarantee as to the observance of the law cannot be an obstacle to the rational application of the institution of parole from serving the remainder of a prison sentence.

### Summary

This article refers to one of the most important institution in Polish Penal Code which is early conditional release as a part of probation. It is focused on the material circumstance of that institution which is positive criminological forecast. The aim of this article is to describe all the elements that have an influence on the criminological forecast and to decide if all of them are needed and if there is a chance to change the regulation to simplify them.

**Keywords:** early conditional release, probation, positive criminological forecast, Polish Penal Code, material condition.