

POLAND

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I. INTRODUCTION

In Poland, the system of sanctions, as well as the rules of sentencing, and statutory limits provided for particular offences, had gone through serious changes during the period of transformation in the 90s, especially after 1997, when the new Polish Penal Code¹ was adopted. All these changes had a common aim — to soften the criminal repression, in reaction to a severe criminal policy, carried out during the times of communism. The 1997 Penal Code abolished the death penalty, which was not executed since 1988 on the basis of a so-called “factual moratorium”, in 1995 changed into a statutory moratorium². The 1997 Code has maintained the penalty of life imprisonment, introduced in 1995, alongside the already existing penalty of deprivation of liberty for a period of 25 years, and besides it has implemented the application of the penalty of fine in a daily rate system. With regard to the judicial sentencing, certain statutory directives were modified. On the one hand, some new, so far unknown rules were adopted, which limited the margin of free appreciation of the court in sentencing, such as, for instance, a directive on level of guilt (Art. 53 Par. 1 of the PC), which delimits the upper limit of the penalty (while other directives may imply the application of a less severe penalty). Also the directive on the priority of non-isolation penalties was introduced

¹ The Penal Code of 6 June 1997, hereinafter referred to as the “PC”. Published in Official Journal (Dziennik Ustaw) 1997 No 86 item 553 with further changes. Came into force on September 1, 1998.

² The Act, dated 12 July 1995 Amending the Penal Code, the Penal Executive Code (...), published in Dz. U. No 95, item 475.

(Art. 58 Par. 1 of the PC), which stipulates that in case the sanction of the legal provision provides for a possibility to choose the type of penalty (it refers to less serious offences), the court shall impose the penalty of deprivation of liberty without suspending execution thereof, only when no other penalty or penal measure would not serve the purpose of the punishment. In every single case the application of penalty of deprivation of liberty without suspension requires a justification. On the other hand, the court was awarded a larger margin of appreciation with regard to the importance and degree of influence of particular circumstances of a given case on the application of the penalty, for example in case of perpetrator's relapse into crime. As it was expected, all these changes have resulted in an important softening of the criminal repression, both before the new Penal Code came into force, and during the first year of its implementation. However, this softening concurred with an important increase of criminality, observed since 1989. It has led to a paradoxical situation when a sudden softening of the criminal repression got together with an equal sudden increase of criminality. For example, a double decrease of application of custodial penalties constituted a solution to an increase of committed robberies, multiplied by five ³.

Generally, two tendencies dominated the practice of punishing until 1999. Firstly, the average length of penalty of deprivation of liberty applied by the courts was shortened. Secondly, the rate of penalties of deprivation of liberty, imposed with the conditional suspension of its execution, grew up each year (in 1999 it was equal to 80 %, while the custodial penalties constituted around 14 % of all penalties applied by the courts). Furthermore, the penalty of deprivation of liberty, imposed with the conditional suspension of its execution, was applied even in case of the most serious offences (e.g. the execution of 40 % of punishments imposed for rapes was suspended). Such a wide application of non-isolation penalties was justly estimated as being only in apparent conformity with the world tendencies. It is due to the fact that contrary to many Western countries, the Polish system of law enforcement is still not provided with any efficient system of probation, which means that in fact the conditional penalties are equal to an acquittal.

Under the social criticism against the softening of repression, in 1999 — 2001 an attempt to harmonise the practise of sentencing was undertaken, by way of directives issued by the Minister of Justice, in Poland performing also the function of the General Prosecutor. These directives were addressed to prosecutors, and encouraged them to file motions to the courts for temporary arrests and severe punishments in certain categories of cases, as well as to appeal from decisions not taking these motions into account, etc. At the same time, works on the reform of the Penal Code system of sanctions and rules of sentencing, as well as works aimed at increasing the statutory limits of sanctions for particular offences have begun. First

³ Od ściany do ściany. Rozmowa z profesorem A. SIEMASZKO. In : *Edukacja prawnicza* 2000 No 3.

attempt to aggravate the rules of penal responsibility, undertaken in 2000, failed due to the President's veto. At present, after the change of power in 2001, a tendency to punish more severely keeps up. Another attempt to amend the Penal Code has been undertaken, but it aims to limit the judges' margin of appreciation to a lesser extent than the draft dated 2000.

The incitement to more severe punishing has had a strong impact on the increase of the penitentiary population. For instance, in 1990 it was equal to 50,165 persons (the rate on 100,000 persons was 131.1), while in 1999 it amounted, accordingly, to 56,765 persons and 146.8, in 2001 to 79,634 persons and 206.1, and in the first half of 2002 the number of detained persons approached 85 thousands. In comparison to 1990, when the number of detainees was the lowest in 10 years, the rate of inmates increased of 57 %. These sudden switches of the practice of sentencing, often compared to a pointless wandering, are criticised by some penalists ⁴. It should be noted that the increase of penitentiary population in Poland, is mostly a result of a higher number of temporary arrests, as well as of a higher percentage of very long penalties. Therefore, some criminologists believe that a more often imposition of not suspended short-time penalties of deprivation of liberty could constitute a remedy to the increasing criminality (according to a rule "who is detained may not sin"). It is also emphasised that such policy should not lead to a further increase of the penitentiary population, feared by many, because of the present overcrowded prisons, but just to a bigger rotation of detainees ⁵. Nevertheless, the idea of an unified policy of sentencing, in the sense of setting a certain general national way of conduct towards all offenders or perpetrators of some type of offences, or for instance with regard to the application of conditional release, is reluctantly accepted by the Polish legal circles. It is not denied that what used to be called the policy of sentencing, in Poland during the last 10 years in fact represented rather a product of individual decisions of particular procedural authorities and should be called the practice of sentencing ⁶. However, any attempt to change this state of things gives raise to critical opinions, warning against negative consequences of the limitations of freedom of judges. This may be a proof of a limited openness to the adoption of common strategies with regard to sentencing, also on European level.

II. GENERAL PRESENTATION OF THE SYSTEM OF PUNISHMENTS

The Polish penal system provides for penalties (see *Table No 1*) and penal measures (previously called "accessory penalties") to be imposed for committing an offence (crime and misdemeanour).

⁴ *Ibidem*.

⁵ *Ibidem*.

⁶ See A. SIEMASZKO (in :) *Atlas przestępczości w Polsce*, 2nd ed., ed. by A. Siemaszko, B. Gruszczyńska, M. Marczewski. Oficyna Naukowa. Warszawa 1999, p. 172.

As it has been mentioned above, the principles establishing the Polish system of penalties, set forth in the Penal Code, were changed during the recent reform of our penal law. Before, the hierarchy of penalties was based on the penalty of deprivation of liberty. At present, the legislator decided to switch the logic of repression towards non-isolation punishments and made the penalty of fine the most important. This is namely visible in the new hierarchy of penalties, where the fine is enumerated in the first, and not the last place, as it was before the reform. Besides, the principle of *ultima ratio* of the penalty of deprivation of liberty was confirmed⁷.

Therefore, pursuant to Article 32 of the PC, the fine is the penalty the imposition of which should be considered in the first place. It is pronounced in a daily rates system. The lowest number of rates is 10 and the highest — 360. The amount of one unit may amount from around 2.5 to 500 Euro. In 1997, fine was imposed as the only penalty in one out of four convictions, and in 2000 in one out of six. The court may impose a fine in addition to the penalty of deprivation of liberty if the perpetrator (1) has committed the act in order to gain material profit or (2) when he has gained such profit (Art. 33 Par. 2 of the PC).

The restriction of liberty constitutes the next penalty in the hierarchy of the Penal Code. It is imposed for a period from 1 up to 12 months. However, in practice, since no regular system of the execution of this particular penalty has been implemented, it is very rarely applied by the courts⁸.

The penalty of deprivation of liberty may be imposed for a period from 1 month up to 15 years.

As it has been previously mentioned, the capital punishment was totally abolished by the new Penal Code, in 1997. Therefore, at present, the two most severe penalties known to the Polish penal law are the penalty of deprivation of liberty for a period of 25 years⁹ and the penalty of deprivation of liberty for life. The latter constitutes the maximum penalty known in our legislation. It is pronounced for committing all the most serious offences, for instance against peace, humankind, State safety, as well as for murder (see *Table No 3*).

As it has been said, the Polish penal law also provides for the penal measures (see *Table No 2*)¹⁰. They are usually imposed in addition to a primary penalty, in the situations set forth by the law. However, they may also exceptionally be applied as principal penalties (on the basis of Art. 59 of the PC).

⁷ Pursuant to Art. 58 Par. 1 of the PC, if the law provides for an option of the type of penalty.

⁸ In 1990, this penalty was imposed in one case out of 20 convictions, and in 2000 in 15.

⁹ This penalty was supposed to substitute the penalty of life imprisonment at the time the Polish Penal Code did not provide for it.

¹⁰ Art. 39 of the PC.

The first and most important of them is the deprivation of public rights (Art. 40 of the PC). It is applied in order to emphasise a strong moral reprobation of the perpetrator. It refers to the notions of honour and moral ability to perform certain social roles. The offender loses two groups of rights : the rights connected with the activity within the public sector, including the loss of military rank ¹¹, and the honourable rights ¹². The court may decide on the deprivation of public rights in the event of sentencing to the deprivation of liberty for a period not less than 3 years for an offence committed with motives deserving particular reprobation.

The interdiction preventing the occupation of specific posts or the exercise of specific profession (Art. 41 Par. 1 of the PC) constitutes the second penal measure. It may be imposed if the perpetrator at the time of committing the offence has abused his post or profession, or has shown that by his continuing in the present post or profession would threaten certain essential interests protected by the law. In the event that a perpetrator has been sentenced for an offence related to a certain economic activity, the court may also impose the interdiction to engage in specific economic activities, if further continuing thereof would threaten certain essential interests protected by the law.

In case of the sentencing of a person participating in road traffic for an offence against the safety of this traffic, the court may impose the interdiction on driving specified types of vehicles, especially if the circumstances of the offence committed indicate that driving a vehicle would endanger public safety in road traffic (Art. 42 of the PC).

All three types of interdictions mentioned above may be imposed in terms of years for a period ranging from one year to 10 years (Art. 43 Par. 1 of the PC). They will take effect from the time the sentence becomes final and valid, but the period for which they were imposed does not run during the serving of a penalty of deprivation of liberty, even if the latter has been imposed for another offence.

All other types of penal measures have a one-time character and refer mostly to financial interests of the perpetrator. Namely, they are the forfeiture and several types of specific payments. The court imposes obligatory the forfeiture of objects directly derived from an offence, unless they are subject to return to the injured person or to another entity. The court may also (optionally) decide on the forfeiture of objects which served or were designed for committing an offence or were subjects of an offence consisting in violation of a prohibition of production, possession or dealing in or of transporting specific objects. It is also possible to impose the forfeiture of benefits, coming even indirectly from committing

¹¹ Including the loss of the right to vote and to be elected to the legislature, professional or business self-governing bodies, the loss of the right to participate in the administration of justice, and interdiction to perform functions in the public administration authorities, local government and professional and self-governing bodies ; as well as the loss of military rank attained and demolition of the rank of private.

¹² Including the loss of decorations, distinctions and honorary titles as well as the loss of the capacity of acquiring them during the period of the deprivation of rights.

an offence, or, if this is not possible, the obligation to pay a pecuniary equivalent of their value, unless they are subject to return to the injured person or to another entity (Art. 44 of the PC).

In the case of conviction for causing death, serious detriment to health, disturbance to the functioning of a body organ or disturbance to health, an offence against safety in road traffic or an offence against the environment, property or commerce, the court, upon a motion from the injured party or another person so entitled, shall impose the obligation to redress the damage, in whole or in part. Instead of this obligation, the court may also decide on a supplementary payment to the injured, in order to compensate them for any serious detriment to health, disturbance to the functioning of a body organ or disturbance to health, or for any wrong suffered.

In the case of conviction or an intentional offence against life or health, or for any other intentional offence which resulted in the death of a person, serious detriment to health, disturbance to the functioning of a body organ or disturbance to health, the court may optionally impose a supplementary payment for a public purpose, connected with health protection. In case of conviction for an offence against the environment, the court may impose a supplementary payment for a purpose relating to environmental protection (Art. 47 of the PC). The amount of the supplementary payment for a public purpose may not exceed the lowest monthly salary at the time of deciding the case in the first instance by a multiple of ten, while the amount of the supplementary payment for an environmental purpose may vary between a multiple of three and twenty times the lowest monthly salary at the time of deciding the case in the first instance (Art. 48 of the PC).

In renouncing the punishment, the court may decide on pecuniary consideration for a designated community purpose. This consideration does not exceed by a multiple of three the amount of the lowest monthly salary at the time of deciding the case in the first instance (Art. 49 of the PC).

The moral reprobation of particular perpetrators may also take form of publishing the sentence. In cases prescribed by the law, the court may decide to make the sentencing judgement public in the manner it has designated — advertisement in the press or in the electronic media, etc. (Art. 50 of the PC).

Historically, the Polish penal law did not set forth criminal responsibility of legal persons. Only in the event of sentencing for an offence which brought material benefits to a natural or legal person or an organisational unit not having a legal personality, and committed by a perpetrator who acted on its behalf or in its interest, the court can oblige the entity which acquired the material benefit, to return it in whole or in part to the benefit of the State Treasury (Art. 52 of the PC). However, very recently, on 28 October 2002, the Act on Responsibility of Group Entities for Prohibited Acts Subjected to Punishment was adopted¹³. It provides for penal sanc-

¹³ Dz. U. No 197, item 1661. It will come into effect only in November 2003.

tions for legal persons, namely for pecuniary penalty (up to 10 % of revenue per year), forfeiture of items and material benefits coming even indirectly from a commission of a prohibited act, as well as for some penal measures (e.g. interdiction to apply for public procurement, interdiction of advertising its activity, services or products, interdiction to benefit from grants and subsidies coming public means or from international organisation, making the sentence publicly known).

The Polish law provides for a different level of responsibility depending on the degree of participation of a given person in committing an offence. It enumerates the following participants in committing an offence : perpetrator, co-perpetrator (accomplice), directing perpetrator, abettor, aider, instigator. The perpetrator and co-perpetrator are persons who commit a prohibited act themselves or together and under arrangement with other persons. A directing perpetrator is a person who, directing the commission of a prohibited act by another person, or taking advantage of the subordination of another person to him, orders such a person to commit such a prohibited act¹⁴. An instigator is a person, who, willing that another person should commit a prohibited act, induces this person to do so¹⁵. Aiders and abettors are persons who, with an intent that another person should commit a prohibited act, facilitate by their behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information. They are also responsible, if, acting against a particular legal duty of preventing a prohibited act, they facilitate its commission by another person through their omission¹⁶.

The Penal Code sets forth a general rule, according to which each person co-operating in the perpetration of a prohibited act shall be liable within the limits of his intent or a lack of it, irrespective of the liability of others co-operating in the perpetration. Namely, a penalty for instigating, and aiding and abetting is to be imposed within the limits of the sanction provided in law for perpetrating. However, when imposing a penalty for aiding and abetting, the court may apply extraordinary mitigation of punishment¹⁷. Moreover, the Code provides that circumstances pertaining to an individual, excluding or mitigating, or aggravating his criminal liability shall be taken into account only with regard to the person they pertain to (Art. 21 Par. 1 of the PC)¹⁸.

The attempt to commit an offence is always punishable (Art. 13 of the PC). The punishment for attempt is applied within the limits of the

¹⁴ Art. 18 Par. 1 of the PC.

¹⁵ Art. 18 Par. 2 of the PC.

¹⁶ Art. 21 Par. 3 and 4 of the PC.

¹⁷ Art. 19 of the PC.

¹⁸ Nevertheless, if an individual circumstance regarding the perpetrator, even if it is conducive only to aggravation of penalty, constitutes a feature of a prohibited act, the co-operating person shall be held liable under criminal law, for this prohibited act, when this person knew about this circumstance, even though it did not pertain to himself (Art. 21 Par. 2 of the PC). With regard to the co-operating person to whom the circumstance referred to under Paragraph 2 does not apply, the court may apply extraordinary mitigation of punishment (Art. 21 Par. 3 of the PC).

penalty provided for the given offence (Art. 14 of the PC). The Penal Code defines attempt as an act by which the actor directly pursues to carry out intended offence¹⁹.

According to the Polish law, also the preparation is subject to a penalty, however only when the law so provides²⁰. It is so in a few cases of the most serious offences, like for instance certain offences against peace, humankind, the State, taking hostages. The preparation only occurs when the perpetrator, in order to commit a prohibited act, undertakes activities aimed at creating the conditions for effecting an act leading directly to commission of the prohibited act, particularly when, for this purpose, he enters into an arrangement with another person, acquires or makes ready the means, gathers information or concludes a plan of action.

III. MARGIN OF APPRECIATION

The Polish penal law provides for some general principles referring to the determination of penalty. It is based on the principle of the free appreciation of the judge within the limits set forth in the law (Art. 53 Par. 1 of the PC), of the individualisation of punishment (Art. 55 of the PC), as well as of the determination of the penalty as to the type and indicated measure (the Polish penal law does not provide for undetermined judgements, consisting in the imposition of a penalty defined only by its upper and lower limits).

The judge's free recognition is always placed between the minimal and maximal limits of sanction, set forth by the law. It is also confirmed by Article 7 of the Criminal Procedure Code²¹, which provides that the judge shall make the decision on the basis of his own conviction, which shall be founded upon the evidence taken and appraised at his own discretion, with due consideration to the principles of sound reasoning and personal experience.

The statutory limits of sanctions for particular offences, put forward in the special part of the Penal Code, usually leave many possibilities of choice of the penalty to the judge. However, a free choice as to the sentencing is not allowed. The court is bound not only by the principles mentioned above and by the statutory limits of sanction (resulting from the provisions). It should also in addition follow certain general indications when imposing a concrete penalty in a sentencing judgement. Art. 53 of the PC provides for the following sentencing guidelines to be compulsory

¹⁹ An attempt also occurs when the perpetrator is not himself aware of the fact that committing is impossible because of the lack of a suitable object on which to perpetrate prohibited act or because of the use of means not suitable for perpetrating this prohibited act (Art. 13 Par. 2 of the PC). In case of such an attempt the court may apply the extraordinary mitigation of punishment.

²⁰ Art. 16 of the PC.

²¹ The Criminal Procedure Code, dated 6 June 1997. Published in Official Journal (Dziennik Ustaw) 1997 No 88 item 554 with further changes. Hereinafter referred to as the "CPC". Came into force on September 1, 1998.

taken into account by the court : the proportion of the penalty to the degree of guilt, the level of social consequences of the act committed, preventive and educational objectives with regard to the sentenced person (individual prevention), the need to develop a legal conscience among the public (general prevention). Serious differences have arisen among the scientists on the mutual relation of the general sentencing guidelines, in particular which of them should play the primary role. The legislator clearly gives the priority to individual prevention guideline exclusively with regard to minor or juvenile perpetrators (Art. 54 of the PC). The dispute remains unsolved as to other cases²², although undoubtedly the indications coming from particular guidelines may lead to different conclusions with regard to the imposition of the penalty in individual cases. Therefore, the final decisions on which guideline should be given the priority, is left to the recognition of the court, what often results in many inconsistencies in sentencing for particular kinds of offences in Poland.

As it has been mentioned, the judge is granted freedom of decision only within the upper and lower limits of sanction, set forth by the law. Furthermore, even within these limits, the judge may not act totally freely. First, he has an important obligation with respect to the imposition of the penalty. Namely, he must be able to give reasons of his choice of the penalty imposed, in the justification of the judgement²³. Secondly, he is further restrained by the legislator in his decisions through several particular²⁴ sentencing guidelines and specific provisions referring to particular institutions.

A. — In this respect the margin of appreciation is to be considered in its two aspects — referring to *circumstances and institutions aggravating as well as mitigating the penalty imposed*.

The Polish law provides for certain categories of *aggravating circumstances* that are to be taken into account when sentencing. Some of them issue from the sentencing guidelines, discussed above, and do not have a compulsory character that would force the judge to increase the statutory maximal limit of the sanction. However, they should affect his

²² See more in A. MAREK, *Penal law*. 2nd ed., C. H. BECK, Warszawa 2000, p. 342 and following.

²³ Art. 424 Par. 2 of the CPC : The statement of reason for a judgement should, in addition, contain an indication of the circumstances taken into account by the court in the process of imposing the penalty ; this provision shall apply in particular to cases in which an extraordinary mitigation of the penalty, or preventive measures have been applied, a civil complaint has been granted, and to other resolutions contained in the judgement.

²⁴ The particular sentencing guidelines are put forward in Art. 53 Par. 2, which stipulates that in imposing the penalty, the court shall above all take into account the motivation and the manner of the conduct of the perpetrator, committing the offence together with a minor, the type and degree of transgression against obligations imposed on the perpetrator, the type and dimension of any adverse consequences of the offence, the characteristics and personal conditions of the perpetrator, his way of life prior to the commission of the offence and his conduct thereafter, and particularly his efforts to redress the damage or to compensate the public perception of justice in another form. Pursuant to Art. 53 Par. 3 of the PC, the court is also obliged to take into consideration also the positive results of the mediation between the injured person and the perpetrator.

appreciation of the circumstances of the case and cause the imposition of a more severe penalty, although still within the statutory limits (ordinary aggravation). For example, we refer to the degree of guilt of the perpetrator, his particularly brutal behaviour during the commission of the offence.

The second type of aggravating circumstances permitted the judge to go beyond the statutory limits of sanctions (extraordinary aggravation), for particular reasons. They are as follows : special type of relapse into crime (in two forms : ordinary and multiple), making commission of offences a permanent source of income, as well as acting in an organised group.

1. Relapse into crime

This institution may take a form of the simple relapse into crime. If a perpetrator sentenced to the penalty of deprivation of liberty for an offence committed with intent, during the 5-year period after having served at least 6 months of the penalty, commits an intentional offence similar to the offence for which he had been sentenced, the court may impose the penalty of deprivation of liberty, prescribed for the offence committed, within the statutory limits, up to the highest statutory penalty further increased by half (Art. 64 Par. 1 of the PC).

The other form of this institution is called the multiplied relapse into crime. It is applied in the case if a perpetrator previously sentenced under the conditions of the simple relapse into crime, who has served the total of at least one year penalty of deprivation of liberty and in the period of 5 years after serving the last penalty in full or in part, commits again an intentional offence against life or health, or rape, robbery, housebreaking or burglary, or other offence against property, committed with the use of violence or the threat of violence, the court shall impose the penalty of deprivation of liberty, prescribed for the offence committed, exceeding the lower statutory limit, or may impose a penalty up to the highest statutory penalty further increased by half (Art. 64 Par. 2 of the PC).

The extraordinarily enhanced penalty may not exceed 540 times the daily rates for a fine, 18 months of restriction of liberty or 15 years of deprivation of liberty (Art. 38 Par. 2 of the PC). However, raising of the highest statutory penalty is not applied to crimes (that is a prohibited act subject to the penalty of deprivation of liberty not lesser than 3 years or to a more severe penalty).

2. Making commission of offences a permanent source of income, and acting in an organised group

These two institutions are new to the Polish penal law and refer to the vague of increasing criminality. They were both conceived as remedies to this phenomenon. They mean that all provisions regarding the level of the penalty, penal measures and the measures connected with placing the perpetrator under probation envisaged with respect to the perpetrator who committed the offence under the conditions of special multiple type of relapse into crime, is also applied to the perpetrator who made commission of offences his permanent source of income, or who commits offences

acting in an organised group or in an association the purpose of which is to commit offences (Art. 65 of the PC).

The Polish penal law puts forward an institution allowing the judge to diminish the penalty in case of occurrence of some attenuating circumstances, that is the *extraordinary mitigation of penalty*. The extraordinary mitigation of penalty may be of a mandatory or facultative character.

— *facultative extraordinary mitigation of penalty (Art. 60 Par. 1 — 2 of the PC)*

The court may apply the extraordinary mitigation of penalty in cases specified by law, as well as with respect to a juvenile, when educational considerations justify it (Art. 60 Par. 1 of the PC). The cases specified by the law, allowing to apply the extraordinary mitigation are of a general or of a more specific nature. The first situation is for instance provided for in Article 23 Par. 2 of the PC, pursuant to which the court may apply the extraordinary mitigation of penalty with regard to a person co-operating in commission of an offence, who voluntarily tried to prevent the perpetration thereof. The second type of situations is set forth in 16 specific types of offences with regard to which, in some circumstances, the court may apply an extraordinary mitigation of penalty or even renounce to apply the penalty at all, only one of them related to terrorism.

The court may also apply the extraordinary mitigation of penalty in particularly justified cases when even the lowest penalty stipulated for the offence in question would be incommensurate, and particularly : (1) if the injured person and the perpetrator have been reconciled, the damage incurred has been repaired, or the injured person and the perpetrator have agreed as to the manner of reparation for the damage, (2) taking into consideration the attitude of the perpetrator, particularly if he attempted to repair the damage or prevent the damage from occurring, (3) if a perpetrator of an unintentional offence or a person close to him has suffered a major detriment in connection with the offence committed (Art. 60 Par. 2 of the PC). In this case the margin of the judge's appreciation is relatively large.

— *mandatory extraordinary mitigation of penalty (Art. 60 Par. 3 — 5 of the PC)*

The judge is obliged to apply the extraordinary mitigation of penalty in two situations, which means that in these cases the margin of free appreciation is seriously limited. The court applies compulsorily the extraordinary mitigation of penalty or may even conditionally suspend the execution of the penalty with respect to a perpetrator who, co-operating with others in the commission of an offence, reveals information pertaining to the persons involved therein or essential circumstances thereof, to the authority responsible for its prosecution (Art. 60 Par. 3 of the PC). Furthermore, additionally, upon a motion from the public prosecutor, the court may (which means that this is just facultative) apply the extraordinary mitigation of penalty or even conditionally suspend the execution of the penalty with respect to a perpetrator, who, irrespective of any explanation provided in his case, revealed and presented to the authority responsible

for prosecution, essential circumstances, not previously known to that authority, of an offence subject to a penalty exceeding 5 years deprivation of liberty (Art. 60 Par. 4 of the PC).

In both cases, when the co-operation with the authorities constitutes the basis for a less severe treatment of a perpetrator, the court, imposing the penalty of deprivation of liberty for up to 5 years, may conditionally suspend the execution of the penalty for a probation period of up to 10 years, if it recognises that, in spite of not serving the penalty, the perpetrator would not commit an offence again. In such cases, the court may also impose a fine and other probation obligations on the perpetrator.

The extraordinary mitigation of penalty consists in the imposition of a penalty below the lower statutory level, or the imposition of a penalty of lesser severity, in accordance with the following principles : if the act in question constitutes a crime, the court shall impose a penalty of not less than one-third of the lower statutory level ; if the act in question constitutes a misdemeanour, and the lower statutory level of the penalty is not less than one year of deprivation of liberty, the court shall impose a fine, the penalty of restriction of liberty or deprivation of liberty ; if the act in question constitutes a misdemeanour, and the lower statutory level of penalty is less than one year of deprivation of liberty, the court shall impose either a fine or the penalty of restriction of liberty.

B. — Change of the penalty to a less severe one

In some cases, when the offence is subject to a penalty of deprivation of liberty not exceeding 5 years, the court, instead of imposing this penalty, may impose a fine or a penalty of restriction of liberty, in particular when it imposes a penal measure at the same time (Art. 58 Par. 3 of the PC). This institution may not, though, be applied to perpetrator of intentional misdemeanour, who have previously been sentenced to the penalty of deprivation of liberty for a period not less than 6 months without the conditional suspension of its execution.

C. — Conditional dismissal of proceedings

This probation institution, although not equal to a sentencing judgement, is cited here as another example of the limited margin of free appreciation granted to the judge. Pursuant to the law, it may be applied in very specific circumstances, namely in the event of the less severe offences (Art. 66 of the PC). The court may apply this institution only if the guilt and the social consequences of the act are not significant, the circumstances of its commission do not give raise doubts, and the attitude of the perpetrator not previously penalised for an intentional offence, his personal characteristics and his way of life to date provide reasonable grounds for the assumption that even in the event of the dismissal of the proceedings, the perpetrator will observe the legal order and particularly that he will not commit an offence. The law provides for another limitation of the judge's freedom of appreciation — the conditional dismissal is applied only to types of offences that are subject to the punishment of

deprivation of liberty up to 3 years, but this limit may be increased to 5 years in the event that the injured party has been reconciled with the perpetrator, the latter has redressed the damage or the injured party and the perpetrator have agreed on the method of redressing the damage.

IV. SUBSEQUENT ADJUSTMENT OF PENALTIES

The Polish penal law sets forth a catalogue of situations where, after a sentencing judgement is issued, no penalty is being imposed. These situations may be decisions of a general character taken by the legislator who decides that in some circumstances the perpetrator shall not be punished *ex lege* (non-submission to the penalty, abolition, amnesty, prescription). In some other cases, the legislator gives the right to give up the penalty to another authority, in principle to the court (renouncement of punishment, pardon, conditional discontinuance of execution of punishment). The most important of both types of these institutions are presented below.

A. — *Abolition and amnesty*

Abolition means legislative pardon of some offences, determined by types. Abolition is usually connected to the amnesty, which is an act of a general character (contrarily from the grace), also requiring a legislative form, which — differently from the abolition — consists not on pardoning and forgetting an offence, but on pardoning or mitigating punishments for offences committed in determined categories of cases. Amnesties have taken place several times in Polish history after 1945 (the last one in 1989). At present, it is believed that the amnesty should not be considered as an ordinary mean of criminal policy but should be applied only in extraordinary situations.

B. — *Pardon*

Pursuant to Article 139 of the Constitution of the Republic of Poland, the application of the power of pardon regarding a particular, having a defined identity person, shall be a prerogative of the President of the Republic of Poland. The pardon is provided for in Articles 560-568 of the CPC. They set forth only procedural questions, though. No provision determines precisely what the pardon may consist on. It is admitted in the literature that, when applying the power of pardon, the penalty pronounced may be diminished, its execution may be conditionally suspended, a person conditionally sentenced may be released from the execution of the remaining part of the penalty, the penalty may be pardoned in a whole, and all the consequences of the sentence having a public character may be annulled (e.g. decision on the cancelling of the entry of sentence). However, the decisions of a civil character, e.g. concerning the redressment of the damage, may not be changed.

There are two types of procedures of pardon — the first one requires the opinion of jurisdictions recognising a given case, the other not requiring such an opinion. In the case of the first procedure, the request of pardon is presented to the President if at least one court (of the first instance or the appeal court) has given an opinion in favour thereof (Art. 565 of the CPC). In the second procedure, the proceeding may be instituted by the General Public Prosecutor (Attorney General) *ex officio*, on the initiative of the President or of himself. The General Public Prosecutor may demand the court to give an opinion or may present the case to the President without it.

Recognising that particularly important reasons favour the application of the pardon, especially when it is justified by a short period of penalty remaining to be served, the court giving an opinion and the General Public Prosecutor may suspend the execution of the penalty or order an interruption in its execution until the conclusion of the pardon proceedings (Art. 568 of the CPC).

The decision of the President on the non-application of the power of pardon is not subject to any appeal. Nevertheless, the person entitled to file a demand may again ask for pardon, but not earlier than before a year after the negative recognition of the previous request (Art. 566 of the CPC).

It should be added that recently, the application of the pardon has been a subject of criticism. The critics in particular referred to unclear procedure within the Presidential Chancellery. They noted that quite precise provisions, mentioned above, set forth a preliminary procedure but the decision on the pardon itself is taken in the issue of a not regulated decisive process, which may then give place to abuses.

C. — *Renouncement of punishment*

This is another institution allowing the judge to adjust the penal responsibility of the perpetrator. In principle it is always facultative, except for one case connected with the necessary defence, provided for in Art. 25 Par. 3 of the PC. The court must compulsory renounce to impose a penalty, if exceeding the limits of necessary defence resulted from fright or emotional distress, as justified by the circumstances of the attack. Other cases are facultative. The renouncement does not apply automatically, but always requires a sentencing judgement to be issued by the court. The court may renounce to impose a penalty in cases specified by the law (for instance excess of the necessary defence — Art. 26 Par. 3 of the PC) or in the case provided for in Art. 60 Par. 3 of the PC, presented above, i.e. in case of a perpetrator co-operating with the authorities, a whistle-blower. The court may also do it if the offence is subject to a penalty of deprivation of liberty not exceeding 3 years, and the social consequences of the act are not great and a penal measure imposed at the time of the renouncement serves the purpose of the penalty (Art. 59 of the PC).

D. — *Conditional suspension of the execution of the penalty*

The conditional suspension of the execution of the penalty is another probation institution known to the Polish penal law. It is discussed in the doctrine whether the institution described here constitutes a way of execution of penalties or a judgement regarding the execution of penalty (this opinion seems to prevail), or maybe an independent penal measure. Hence, the penalty of deprivation of liberty not exceeding 2 years, penalty of restriction of liberty or an independent fine may be imposed with a conditional suspension of its execution, under a condition that there is a positive prognosis regarding the perpetrator's future attitude (Art. 69 of the PC). The suspension of execution of penalty is always facultative ; the court recognising the case makes a decision with regard to this issue in the sentence. The suspension is granted for a probation period, the duration of which depends on the type of penalty suspended. In case of deprivation of liberty, the probation period amounts from 2 up to 5 years and runs from the moment when the sentence becomes final. Suspending the execution of penalty, the court may impose a fine up to 180 daily rates, if its imposition is not possible on other grounds, as well as impose so-called probation obligations on the sentenced person, which may consist among others in reparation of damages (Art. 71 and 72 of the CPC), and place him under a supervision of a probation officer. If educational considerations justify it, the court may, during the probation period, institute, extend or modify obligations, or release him from these obligations (except for the obligation to redress the damage), as well as place the sentenced person under a supervision of a probation officer or release the person from this (Art. 74 Par. 2 of the PC). The decision in this matter is taken by the court.

E. — *Conditional release*

The conditional release from serving the remaining part of the penalty constitutes another legal institution consisting on changing a penalty pronounced and submitting the perpetrator to a trial. The meaning of this institution consists on shortening the stay of the sentenced person in a penitentiary institution, when such a stay is no longer necessary.

As it has been previously mentioned, the law provides for a special safety period in case of the conditional release from penalties to be served (in principle at least half of the sentence, but not earlier than after 6 months). The Penal Code sets forth some further requirements for perpetrators condemned on the basis of provisions referring to the special type of relapse into crime (they may apply for it after serving the two-thirds or the three-quarters of the sentence, however the conditional release may not occur before the lapse of one year). The person sentenced to 25 years of deprivation of liberty may be conditionally released after having served at least 15 years of the sentence, and the person sentenced to deprivation of liberty for life, after having served 25 years of the sentence (Art. 78 Par. 3 of the PC).

These rather general conditions may be modified to more severe restrictions in a specific case by the court pronouncing the penalty. For example, in a judgement the court may decide that a sentenced person who is not prosecuted on the basis of provisions referring to the relapse into crime ("recidivist") may not be conditionally released earlier than after having served three-fourths of the penalty, or that a person sentenced to a deprivation of liberty for life before having served 30 years of the penalty. However, such a decision may not totally exclude a possibility to apply the conditional release (Art. 77 Par. 2 of the PC).

Although serving some part of a penalty by the sentenced person remains the basic grounds for the admissibility of the conditional release, it is not the only one. The court may apply the conditional release only when the attitude of the perpetrator, his personal characteristics and situation, way of life prior to the commission of the offence, the circumstances thereof, as well as his conduct after the commission of the offence and while serving the penalty, justify the assumption that the perpetrator will after release respect the legal order and in particular that he will not return to committing other offences (Art. 77 Par. 1 of the PC).

The conditional release is imposed on a probation period, the duration of which is, in principle, equal to the part of the penalty remaining to be served (it may not, however, be less than 2 years and longer than 5 years, in case of deprivation of liberty for life it is equal to 10 years — Art. 80 of the PC). The person conditionally released may be submitted to some probation obligations, which, in principle, are the same as in case of the conditional suspension of execution of penalty ; such a person may also be placed under supervision. If the prognosis of the future attitude of the perpetrator has proved to be accurate and the probation period has ended successfully, the penalty is considered served at the moment of the conditional release.

The decision on the conditional release is taken by the penitentiary court (Art. 159 of the Penal Executive Code²⁵) upon a motion of a prosecutor, sentenced person, his defence counsel, head of penitentiary institution or probation officer. The sitting concerning this issue should take place in the penitentiary institution. The refusal to apply a conditional release may be subject to an appeal, submitted by a person who has filed a motion. The prosecutor may submit an appeal on the decision on the application of the conditional release, which must be recognised within 14 days. The appeal is to be filed to the court that has rendered the attacked decision. If the court does not grant the appeal, it is immediately transferred to the court of a higher instance, together with the files of the case (Art. 20 Par. 1 of the Penal Executive Code).

The conditional release is to be compulsory revoked if the released person commits a similar intentional offence in the probation period and is sentenced to a penalty of deprivation of liberty without the conditional

²⁵ The Penal Executive Code, dated 6 June 1997. Published in Official Journal 1997 No 90, item 557. Came into force on September 1, 1998.

suspension of execution. It may be revoked if the released person flagrantly violates the legal order, namely when he commits another offence or when a penalty other than deprivation of liberty without the conditional suspension of execution is imposed on him or when he evades the surveillance or other duties or penal measures (Art. 160 of the Penal Executive Code).

V. TAKING INTO ACCOUNT OF FOREIGN JUDGEMENTS

The Polish law does not provide directly for a possibility to take into account judgements of foreign courts. Nevertheless, in one of its judgements, the Supreme Court allowed a possibility that a penalty of deprivation of liberty pronounced by foreign jurisdiction and actually served abroad constituted the ground to accept a special type of relapse into crime ("recidive")²⁶. It results also from the provisions referring to the international judicial assistance in penal matters that within this assistance information concerning the criminal record of accused persons may be revealed (Art. 585 of the Criminal Procedure Code). It comes from this provision that the Polish party may also demand such information from another state. This information may be always taken under account by the court when imposing a penalty, on the basis of a provision of the Penal Code referring to "the way of life of the perpetrator prior to the commission of the offence" (Art. 53 Par. 2 of the PC). It should however be added that this possibility is allowed only theoretically, because in practice there is no system allowing to establish whether a given person has been actually sentenced abroad. Therefore, even if the court learns (usually by accident) that an accused person has been previously punished abroad, it will hesitate to take it into account and to aggravate the penalty, since such a possibility would unfairly affect the situation of one person with regard to another, whose previous punishability abroad has not been known to the court.

Notwithstanding this provision, the rules referring to the principle *ne bis in idem*, taking over/transferring the prosecution, as well as the execution of judgements of foreign courts allow to some extent to take indirectly into account, for example, the fact that the perpetrator has been previously punished abroad for the same act or for another act.

The principle *ne bis in idem* does not fully apply in the Polish law. Therefore, a sentencing judgement given abroad shall not bar criminal proceedings for the same offence from being instituted before a Polish court. This provision does apply only when a sentencing judgement given abroad has been transferred to be executed within the territory of the Republic of Poland, and also when the judgement given abroad regarded an offence, in connection to which either a transfer of the prosecution or extradition from the territory of the Republic of Poland has occurred.

²⁶ See ONKW 1975, p.6, item 71 ; OSPIKA 1976, p. 6 item 121 with an commentary by L. Gardockiego.

Nevertheless, even though the Polish law denies the *ne bis in idem* principle, the court shall credit to the penalty imposed the period of deprivation of liberty actually served abroad and the penalty there executed, taking into consideration the differences between these penalties.

The Polish law provides for the situation of transferring the sentenced person to serve in Poland the penalty imposed. Pursuant to Article 114 Par. 4 of the PC, if a Polish citizen validly and finally sentenced by a court in a foreign country, has been transferred to execute the sentence within the territory of the Republic of Poland, the court shall determine, under Polish law, the legal classification of the act, and the penalty to be executed or any other penal measure provided for in the Penal Code. The basis for determination of the penalty or other measure subject to execution shall be provided by the sentencing judgement given by a court of a foreign country, the penalty prescribed for such an act under Polish law the period of actual deprivation of liberty abroad, the penalty or other measure executed there. All differences between these penalties should be considered to the favour of the sentenced person.

VI. CONCLUSION. OBSTACLES TO HARMONISATION ON EUROPEAN LEVEL

In the beginning it should be emphasised that terrorism, offences against environment as well as cybercriminality should in particular be subject to harmonisation, for at least two reasons. Firstly, the most often, these have a trans-border character, and therefore a differentiated prosecution of the perpetrators in different states would be in collision with a very strong social sense of the justice. Secondly, these are relatively new offences, not having a long tradition, the punishment of which is based on common values.

When considering the issue of eventual obstacles in Poland to the harmonisation on the European level, two aspects of this problem should be put forward. Namely, they are, firstly, any eventual obstacles resulting from the presently binding legal system, and, secondly, eventual obstacles of practical nature.

It should be noted that from a legal point of view there are no such formal obstacles. The Polish Constitution, dated 1997, provides *expressis verbis* that the Republic of Poland, may, by the virtue of international agreement, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters (Art. 90). This provision does not set forth any limitations or exclusions. The delegation of competencies may then also refer to the penal law.

The lack of limitations is also a result of the status of the norms of the international law in the Polish legal system. A ratified international treaty, after having been published in the Official Journal of the Republic of Poland, constitutes a part of the domestic legal order and is applied directly, unless its application hinges on issuing a statutory act. Furthermore, an international treaty ratified with a prior consent expressed in an

act shall prevail over an domestic statutory act, if this act cannot be reconciled with the treaty (Art. 91 of the Constitution).

The non-existence of formal obstacles does not certainly mean that an attempt to carry out the harmonisation of sanctions on the European level would not meet any material obstacles. Undoubtedly, this would take place if the harmonisation caused a decrease of repressivity of the system with regard to the present situation, i.e. the diminution of statutory limits of sanctions. Nonetheless, since the European logic would generally be based on giving minimum rules about maximum penalties, and in Poland the statutory limits of sanctions for particular offences are relatively high, the risk of such situation is not very big.

Referring to the harmonisation of sanctions with regard to the sentencing, it is possible to implement it only by way of acceptance of all statutory sentencing guidelines, or eventually, by working out of other type of sentencing guidelines.

The Polish Penal Code puts forward only the statutory sentencing guidelines. However, notwithstanding their more general or more specific character, they usually leave a certain margin of appreciation to the judges. These guidelines are supposed to help to clear the judge's mind on the choice of the punishment and/or delimit its new statutory limits, and always give the judge quite a large margin of freedom of appreciation. Therefore, it may be assumed that if the guidelines on the European level were formulated in a similar way, the idea of such harmonisation could be accepted.

The institution of binding sentencing guidelines (in Poland known and criticised during the period of socialism, in form of the directives of the Supreme Court, binding to the courts of lower instances, so that the non-observance of them would result in quashing the judgement by a court of higher instance) would not for sure be admitted. As it has been mentioned, such guidelines give raise to less doubts, if they are implemented by the prosecutors, who are entitled also to file motion referring to the sentencing and, with a certain margin of freedom, are hierarchically subordinated. Certainly, if the guidelines were addressed only to the judges, they would be considered as an inadmissible limitation of their freedom of appreciation. Therefore, it seems that in Poland, also the harmonisation referring to the sentencing may be accepted, if only the above reservation maintained.

Besides, the harmonisation of the execution of penalties also seems to be possible. This is connected with the fact of quite a large freedom of judges as to — for example — the application of the conditional release, and, what is more important, a growing acceptance for the idea of the execution of foreign penal judgements.

Bibliography

- K. BUCHAŁA, *Dyrektywy sądowego wymiaru kary*, Warszawa 1964.
L. LERNELL, *Podstawowe zagadnienia penologii*, Warszawa 1977.
J. ŚLIWOWSKI, *Prawo i polityka penitencjarna*, Warszawa 1982.

- L. SŁUGOCKI, *Kara grzywny samoistnej i jej wykonanie*, Warszawa 1984.
J. ŚLIWOWSKI, *Kara ograniczenia wolności*, Warszawa 1973.
J. WASZCZYŃSKI, *Kary dodatkowe w kodeksie karnym*, PiP 10/1969.
R. STEFAŃSKI, *Zakaz prowadzenia pojazdów*, Warszawa 1990.
J. GIEZEK, *Okoliczności wpływające na sędziowski wymiar kary*, Wrocław 1990.
S. PAWELA, *Kodeks karny wykonawczy. Komentarz*, Warszawa 1993.
J. BEDNARZAK, *Amnestia*, Warszawa 1965.
Atlas przestępczości w Polsce, 2 ed, ed. by A. Siemaszko, B. Gruszczyńska, M. Marczewski, Warszawa 1999.