

SUBSTANTIVE PREREQUISITE FOR CONDITIONAL RELEASE: SOME REFLECTIONS

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GRAŻYNA B. SZCZYGIEŁ *

In the 19th century, S. Budziński¹ wrote that thanks to conditional release from serving the full sentence “a penalty does not extend beyond the need and this way the inconveniences of long imprisonment may be avoided; moreover, the hope for better fate inspires a convict to better conduct and fear of coming back to prison prevents him from unlawful acts, which is a guarantee of public security”. This opinion has not lost its validity, which is confirmed by the standpoint of the Committee of Ministers of the Council of Europe. In the Committee’s opinion,² conditional release “is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community”.

It is worth adding that conditional release confirms respect for the principles of humanism and individual treatment of the execution of the most painful measure in the penal response to the crime catalogue, i.e. the penalty of deprivation of liberty.

In accordance with the binding regulations, conditional release from serving the full sentence is subject to a discretionary decision. The Criminal Code (henceforth: CC)

* Prof., PhD hab., Department of Criminal Law and Criminology, Faculty of Law of the University of Białystok; e-mail: g.szczygiel@uwb.edu.pl

¹ S. Budziński, *Myśli do ułożenia nowego prawa karnego w formie projektu z motywami*, Warsaw 1865, p. 65.

² Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole) (adopted by the Committee of Ministers on 24 September 2003 during the 853rd Meeting of the Ministers’ Deputies), text [in:] *Przegląd Więziennictwa Polskiego* No. 72–73, 2011, pp. 291–301. Also see, Recommendation No. R(99)22 concerning prison overcrowding and prison population inflation (adopted by the Committee of Ministers on 30 September 1999 during the 681st Meeting of the Ministers’ Deputies), text [in:] *Przegląd Więziennictwa Polskiego* No. 72–73, 2011, pp. 131–137; Recommendation 1741(2006) of the Parliamentary Assembly of the Council of Europe on social reintegration of prisoners, text [in:] *Przegląd Więziennictwa Polskiego* No. 72–73, 2011, pp. 221–224.

and the Penalty Execution Code (henceforth: PEC) do not lay down the instrument of conditional release as a convict's right. As the Constitutional Tribunal emphasised in its judgement,³ the passage of a certain quantum of punishment "constitutes only one of the prerequisites for conditional release that is necessary for the examination of a motion. However, the fulfilment of this criterion does not mean that a convict will be conditionally released. The substantive prerequisites laid down in Article 77 Criminal Code are decisive".

In accordance with Article 77 §1 CC, a convict sentenced to the penalty of deprivation of liberty can be released from serving the rest of the sentence only when his attitude, features and personal conditions, circumstances of the crime commission and conduct after the commission of a crime and during his service in prison justify the belief that the convict will comply with the ordered penal or preventive measures and will abide by the legal order, in particular, he will not commit a crime. The substantive prerequisite for conditional release focuses on the fulfilment of individual preventive aims.

The content of the provision discussed does not give grounds for stating in the justification, as some courts do,⁴ indicating the legislator's use of the phrase "only when", that conditional release from serving the full sentence constitutes an exception to the rules of serving the full sentence. The phrase should be referred to the criminological prognosis. Conditional release is inadmissible when a criminological prognosis cannot be determined.⁵

The Appellate Court in Wrocław⁶ rightly noticed that "adjudicating on conditional release is facultative in nature and is limited to determination, based on the grounds laid down in Article 77 §1 CC, of a social and criminological prognosis. On the other hand, in case of recognition that a convict will comply with the law after the release (positive prognosis), a court is obliged to decide on conditional release. In case of refusal to conditionally release a convict, it can be effectively raised in appeal that the substantive right laid down in Article 77 §1 CC was violated".

In the opinion of the Appellate Court in Kraków,⁷ "Refusal to release a convict who deserves it undermines the penitentiary activities because it may indicate that even a basic change of convicts' attitudes, perfect conduct in prison, involvement in prison initiatives, etc. do not receive courts' recognition. Such a belief might lead to a conviction that courts are too rigorous, in compliant with justice, and frustrate the

³ Constitutional Tribunal judgement of 10 July 2000, SK 21/99, OTK 2000/5/144.

⁴ Ruling of the Appellate Court in Łódź of 23 March 1999, II AKz 114/99, LEX No. 4123; ruling of the Appellate Court in Kraków of 21 June 2000, II AKz 217/00, LEX No. 41735; ruling of the Appellate Court in Kraków of 27 June 2000, II AKz 214/00, LEX No. 42967; ruling of the Appellate Court in Gdańsk of 22 August 2000, II AKz 630/00, LEX No. 144270; ruling of the Appellate Court in Kraków of 2 October 2012, II AKz 1066/12, LEX No. 1274943; ruling of the Appellate Court in Kraków of 10 May 2012, II AKz 421/12, LEX No. 1227527 [accessed on 26/01/2018].

⁵ E. Bieńkowska, [in:] G. Rejman (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 1999, p. 1174.

⁶ Ruling of the Appellate Court in Wrocław of 31 January 2006, II AKz 1238/06, LEX No. 211707 [accessed on 26/01/2018].

⁷ Ruling of the Appellate Court in Kraków of 24 March 2009, II AKz 195/09, LEX No. 504069 [accessed on 26/01/2018].

effects of rehabilitation of prisoners, and the whole penitentiary activity". It should be added that the refusal to conditional release in case of a positive prognosis would be in conflict with the principle of humanitarianism laid down in Article 4 PEC.

A prognosis, and thus predicting future events, involves a certain degree of risk.⁸ Therefore, the legislator's use of the term "conviction", which is a synonym of certainty, a belief, cannot be assessed as appropriate.⁹ It is hard to provide arguments for the substitution for the term "supposition", which was used in the Criminal Code of 1932 (Article 65 §1 "allows supposing") and the Criminal Code of 1969 (Article 90 §1 "substantiate supposition"). It may be assumed that the legislator could not provide arguments for this change because it was not justified.

A convict's conduct after the release from prison can be assessed with the use of a set of available information only as probable. It is not possible to predict all circumstances and factors that can determine conduct. It should also be taken into consideration that a convict does not have influence on some of them. The Appellate Court in Kraków¹⁰ rightly noticed that: "Positive criminological and social prognosis, as any other prognosis, involves an element of risk connected with the possibility of non-performance. It is obvious that nobody can fully guarantee the accuracy of a prognosis. The point is to limit the risk connected with non-performance to a certain acceptable level, i.e. such one that does not negate the sense of rehabilitation and reduces the risk to predictable and reasonable limits".

Conditional release from serving the full sentence is adjudicated at the stage of serving the penalty of deprivation of liberty. The aim of the penalty is, in accordance with Article 67 §1 PEC, to "induce a convict to cooperate in the shaping of his socially desired attitude, especially the sense of responsibility and the need to comply with the legal order". The use of the phrase "the shaping of socially desired attitude" and not "the development" suggests that the legislator assumes that it is a certain complex process taking place over a period of time and not limited exclusively to the period of a convict's service in prison. It may be continued in non-custodial conditions. The legislator really notices, as many years' experience shows, that rehabilitation in prison is difficult to achieve. If a convict undertakes steps to change his anti-social attitude to a pro-social one, conditional release from serving the rest of the sentence, for a probation period, the duties and supervision imposed on him make it possible to continue this process in non-custodial conditions and to supervise it at the same time.

⁸ G. Wiciński, *Podstawy stosowania warunkowego zwolnienia z odbycia reszty kary*, Przegląd Więziennictwa Polskiego No. 24–25, 1999, p. 38; V. Konarska-Wrzošek, *Teza 3 do art. 77 k.k.*, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, WK 2016, Lex/el; J. Lachowski, *Teza 73 do art. 77 §1 k.k.*, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, 4th edition, WK 2017, Legalis/el; A. Zoll, *Teza 16 do art. 77 k.k.*, [in:] W. Wróbel (ed.), A. Zoll (ed.), *Kodeks karny. Część ogólna*. Vol. II, part 2: *Komentarz do art. 53–116*, 5th edition, Legalis/el; T. Kalisz, *Warunkowe zwolnienie z reszty kary pozbawienia wolności z perspektywy problemów z ustaleniem treści i kierunku prognozy kryminologicznej*, Nowa Kodyfikacja Prawa Karnego, Vol. XXX, Wrocław 2013, p. 180; S. Lelental, *Warunkowe przedterminowe zwolnienie*, [in:] M. Melezini (ed.), *System Prawa Karnego*, Vol. 6: *Kary i inne środki reakcji prawnokarnej*, 2nd edition, Warsaw 2016, p. 1175.

⁹ J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności*, Warsaw 2010, p. 249.

¹⁰ Ruling of the Appellate Court in Kraków of 28 August 2015, II Kzw 799/15, LEX No. 1997429 [accessed on 27/01/2018].

A criminological and social prognosis is to justify the belief that after the release a convict will comply with the penal or preventive measures adjudicated and the legal order, especially that he will not commit a crime again. The legislator often uses a phrase “legal order” but does not define it. In the doctrine¹¹ and judicature¹², it is indicated that it is the entirety of norms, obligations and bans resulting from various branches of law. Such a broad approach to this prerequisite in relation to a convict’s future conduct does not seem to be realistic. In S. Strycharz’s¹³ opinion, as the legislator refers to the unclear term of “legal order”, it is necessary to consider its content and scope within the instrument the regulation of which refers to the concept; it is necessary to assume that it covers norms laid down in criminal law and not in other branches of law. J. Lachowski,¹⁴ in the justification for the opinion that “a decision on conditional release should mainly depend on the evaluation of the probability of reoffending and not on the violation of other branches of law”, indicates the guarantee function of criminal law.

It is worth mentioning the opinion that “The belief that a convict will not commit a crime in the future may be practically relativized only to acts similar to the one in connection with which the release is to be applied”.¹⁵ It seems that the authors of the opinion excessively narrow the expectations concerning a convict’s conduct. Although the legislator expects that a convict will comply with the legal order, noticing difficulties that may occur in the assessment of complying with bans and obligations of different branches of law, pays particular attention to lack of reoffending, however, does not indicate its connection with the crime for which the convict has served the sentence.

Article 77 §1 CC lays down criteria that a court should use to formulate a prognosis. These are: attitude, personal features and conditions, circumstances of crime commission and conduct after the commission of a crime and in the course of serving the sentence. It is a closed catalogue. The Supreme Court¹⁶ rightly noted that “the directives of imposing a penalty laid down in Article 53 CC, Article 54 §1 CC and Article 55 CC (Article 56 CC)” are not the prerequisites for taking a decision on conditional release.

¹¹ See, T. Szymanowski, [in:] T. Szymanowski, W. Świda, *Kodeks karny wykonawczy, Komentarz*, Warsaw 1999, pp. 323–324; Z. Hołda, [in:] Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Gdańsk 1998, p. 475; K. Postulski, *Kodeks karny wykonawczy*, 3rd edition, Warsaw 2016, pp. 575–576.

¹² Ruling of the Appellate Court in Kraków of 25 June 2013, II AKz w 631/13, LEX No. 1391610 [accessed on 27/01/2018].

¹³ S. Strycharz, *Pojęcie porządku prawnego w kodeksie karnym*, Nowe Prawo No. 6, 1970, p. 852 ff.

¹⁴ J. Lachowski, *Przesłanka materialna warunkowego przedterminowego zwolnienia na gruncie kodeksu karnego*, Prokuratura i Prawo No. 11, 2008, Legalis/el. Also see, J. Lachowski, *Warunkowe zwolnienie...*, pp. 251–252.

¹⁵ J. Skupiński, J. Mierzwińska-Lorencka, *Teza 5 do art. 77 k.k.*, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, 3rd edition, WK 2017, Legalis/el.

¹⁶ The Supreme Court resolution of 26 April 2017, I KZP 2/17, www.sn.pl/sites/orzecznictwo3/orzeczenia3/ikzp2-17.pdf; Supreme Court ruling of 24 May 2017, V KK 82/17, LEX No. 2319706; also see, the ruling of the Appellate Court in Kraków of 20 October 1999, II AKz 441/99, LEX No. 38624; ruling of the Appellate Court in Białystok of 31 January 2013, II AKz w 43.13, LEX No. 1271803 [accessed on 22/01/2018].

In the doctrine¹⁷ and judicature¹⁸, attention is drawn to the need of considering all quantifiers, which of course means that each of them must be positively assessed. Complex assessment should constitute the basis of the decision on conditional release or its refusal. Ignoring any of the bases of the prognosis, as J. Lachowski¹⁹ notes, “constitutes a violation of a provision of substantive law, i.e. Article 77 §1 CC, and justifies quashing or reversing a decision on conditional release pursuant to Article 438(1) CPC, regardless of whether it has had impact on the content of the judgement or not”.

The legislator, first of all, indicates a convict’s attitude. The evaluation of a convict’s attitude is rather difficult, especially if ambiguity of this concept is considered.²⁰ The dictionary of the Polish language²¹ defines it as “a man’s approach to life or certain phenomena expressing his opinions; also: the way of acting and behaving in connection with certain phenomena, circumstances or in relations with people”. Taking into account that the legislator does not define the objects of attitude and does not clearly characterise the relation to the object of attitudes, J. Macharski²² believes that “the characteristic is possible based on the analysis of aims that are to be fulfilled with the use of provisions for which the issue of attitudes is especially important”. Thus, it will be an attitude to social norms and rules, the attitude to other people and to the violation of the rules of social coexistence. The attitude to the act committed is also important, i.e. pleading guilty and apologising to the aggrieved. However, such conduct does not always reflect the change of attitude but it can also take place in expectation of a more lenient sentence. In the judicature,²³ “the attitude to social norms and rules and more or less visible inclination to violation of interests protected by law” is pointed out. Obviously, the persistence of the reoccurring conduct towards a specific interest or value is also important for defining “attitudes”.²⁴

The next criterion concerns a convict’s personal features and conditions. The analysis of literature²⁵ makes it possible to point out that these are a convict’s physical

¹⁷ J. Lachowski, *Przesłanka materialna...*; by this author, *Wybrane zagadnienia sporne na tle wykładni przepisów o warunkowym zwolnieniu*, [in:] J. Majewski (ed.), *Środki związane z poddaniem sprawcy próbie*, Toruń 2013, p. 11; M. Mozgawa, *Teza 6 do art. 77 k.k.*, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz aktualizowany*, LEX/el 2017; S. Lelental, *Warunkowe przedterminowe zwolnienie...*, [in:] M. Melezini (ed.), *System...*, p. 1175.

¹⁸ Ruling of the Appellate Court in Lublin of 29 August 2012, II AKzW 866/12, LEX No. 1293502; ruling of the Appellate Court in Lublin of 27 October 2010, II AKzW 846/10, LEX No. 677930 [accessed on 22/01/2018].

¹⁹ J. Lachowski, *Teza 71 do art. 77 k.k.*, [in:] R. Zawłocki, M. Królikowski (eds.), *Kodeks karny...*

²⁰ J. Macharski, *Pojęcie „postawy” w polskim prawie karnym*, PiP No. 8–9, 1996, p. 129.

²¹ *Słownik języka polskiego*, <https://sjp.pwn.pl/szukaj/postawa.htm>.

²² J. Macharski, *Pojęcie „postawy”...*, p. 134.

²³ Ruling of the Appellate Court in Wrocław of 12 January 2005, II AKzW 116/04, OSA 2005, No. 8, item 54.

²⁴ See, A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Komentarz. Część ogólna*, Vol. I, Warsaw 2007, p. 833.

²⁵ J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny...*; S. Lelental, *Warunkowe przedterminowe zwolnienie...*, [in:] M. Melezini (ed.), *System...*, p. 1175; J. Lachowski, *Warunkowe zwolnienie...*, p. 255, A. Kwieciński, *Wykonywanie kary pozbawienia wolności w systemie terapeutycznym*, Warsaw 2017, pp. 327–328.

features, state of psychological health, character traits, age, the level of intellectual development, temperament, capacity for self-criticism, impulsiveness, calmness, rationality, being industrious, taking care of relations, consistency, ambitions, respect for other people, compassionateness, empathy, inclination to addiction, alcoholism or drug addiction. As far as personal conditions are concerned, the most frequently indicated ones are environmental conditions, family and financial status.

When evaluating a convict's attitude, his personal features and conditions, it is necessary to look at them from the evolutionary point of view.²⁶ This raises a question about the perspective from which the assessment should be made. There are two conceptions. One of them assumes taking into consideration the period of serving the sentence and the time preceding the conditional release because "the current attitude and not the future one influences the prospect for a criminological prognosis".²⁷ The supporters of the other conception believe that the period before the commission of crime is as important as the time after it.²⁸ Of course, the analysis of a longer period of a convict's life makes it possible to carefully evaluate a convict's attitude and changes that are essential for predicting a convict's conduct when he leaves prison. However, one must share the opinion that a convict's attitude is more important for a decision on release of prisoners sentenced for shorter periods of deprivation of liberty and less important in case of prisoners serving longer imprisonment sentences.²⁹ In case of longer periods, it is more difficult to establish all facts in a prisoner's life.

Personal features and conditions constitute one of the special directives for administration of penalties (Article 56 §2 CC) and have been taken into account in adjudication on punishment. When formulating a prognosis, it is important to verify changes that have taken place since this moment. It is also important to look into the future, i.e. establish the conditions in which a convict will live after the release from prison, especially his family, professional and financial situation. Obviously, indicating the Recommendation of the Council of Europe concerning conditional release, J. Lachowski³⁰ rightly notices that the assessment of these conditions cannot determine a criminological prognosis. It should be noticed that the assessment of a convict's situation after the release from prison will be especially important for the development of probation, i.e. taking a decision concerning the obligations and supervision as well as providing a convict with assistance, e.g. in finding a temporary domicile or employment, as the authors of the Recommendation concerning conditional release (par. 18) recommend.

²⁶ T. Kalisz, *Warunkowe zwolnienie...*, p. 182. Also see, A. Kwiecieński, *Wykonywanie kary...*, p. 327.

²⁷ J. Skupiński, J. Mierzwińska-Lorencka, *Teza 5 do art. 77 k.k.*..., [in:] R.A. Stefański (ed.), *Kodeks karny...*

²⁸ P. Hofmański, L.K. Paprzycki, A. Sakowicz, *Teza do art. 3 i do art. 77 k.k.*, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, WK 2016, Legalis; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny...*

²⁹ E. Bieńkowska, [in:] G. Rejman (ed.), *Kodeks karny...*, p. 1170; S. Lelental, *Warunkowe przedterminowe zwolnienie...*, [in:] M. Melezini (ed.), *System...*, p. 1177.

³⁰ J. Lachowski, *Warunkowe zwolnienie...*, p. 256.

The other two prerequisites for a prognosis concern the circumstances of the crime commission and conduct after the crime commission. What they have in common is non-changeability in time. A convict does not have influence on the change of these circumstances.³¹ The circumstances of the crime commission belong to the features of an offence and conduct after the crime commission belongs to special directives for penalty administration (Article 53 §2 CC), and as such they have been taken into account in a sentence. Thus, it is rightly indicated in the doctrine³² and case law³³ that these circumstances that do not belong to statutory features and may only indicate a convict's characteristics should be taken into consideration.

The conduct after the commission of a crime concerns: striving to prevent the consequences of a crime or attempting to prevent them, repairing the loss, and meeting the social sense of justice.³⁴ Thus, it concerns every type of conduct that may reflect positive or negative changes of a convict's personality.

The catalogue of criteria on which a court should base its prognosis ends with a convict's conduct when serving the sentence. Right at the beginning, it should be highlighted that a convict's future conduct is assessed from the perspective of conduct in specific conditions of isolation from the community to which he is going to come back. A convict has a number of duties in prison. In accordance with Article 5 §1 PEC, he must obey orders issued by competent bodies, comply with the provisions laying down the rules and mode of serving the sentence and the order established in prison, and follow the instructions of superiors and other authorised persons (Article 116 §1 PEC). Failing to fulfil those duties results in disciplinary penalties and even the use of direct coercive measures. On the other hand, a convict is rewarded for fulfilling duties. Disciplinary penalties and prizes cannot be the only factors that affect the assessment of a convict's conduct in prison. They should only be part of the assessment. Obeying bans and fulfilling duties may result from good adaptation to prison conditions and creation of an image of a "good prisoner". On the other hand, penalties must be viewed from the perspective of reasons for a convict's conduct.

Another essential issue concerning a convict's conduct is his belonging to the prison subculture. The bans laid down in Article 116a PEC include one concerning membership of groups organised without the permission and knowledge of the

³¹ S. Lelental, *Warunkowe przedterminowe zwolnienie...*, [in:] M. Melezini (ed.), *System...*, p. 1102; J. Utrat-Milecki, *Doktrynalne i normatywne źródła kryzysu więziennictwa*, [in:] J. Utrat-Milecki (ed.), *Reforma prawa karnego. W stronę spójności i skuteczności*, Warsaw 2013, p. 67.

³² V. Konarska-Wrzosek, *Teza 4 do art. 77 k.k.*, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz...*; J. Lachowski, *Teza 80 do art. 77 k.k.*, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny...*; J. Lachowski, *Warunkowe zwolnienie...*, p. 258; S. Lelental, *Warunkowe przedterminowe zwolnienie...*, [in:] M. Melezini (ed.), *System...*, p. 1180.

³³ Ruling of the Appellate Court in Wrocław of 21 October 2004, II AKZW 709/04, OSA 2005, No. 4, item 23; ruling of the Appellate Court in Lublin of 8 October 2008, II AKzw 743/08, LEX No. 500235; ruling of the Appellate Court in Lublin of 27 December 2007, II AKzw 1075/07, LEX No. 375121 [accessed on 4/02/2018].

³⁴ J. Lachowski, *Teza 87 do art. 77 k.k.*, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny...*; J. Lachowski, *Prześlanka materialna...*

superior concerned. In literature³⁵ as well as in the judicature³⁶, there is an opinion that participation in the “second life” indicates a negative criminological prognosis. However, the Appellate Court in Kraków is right to present the opinion that being a member of the prison subculture “is a method of a convict’s adaptation to functioning in prison, and while it has a strong impact on his conduct there (serving a penalty in a standard mode, contact only with other prison slang users), it has scarce impact on his functioning outside prison. The membership of the criminal subculture alone cannot constitute grounds for refusal to release a prisoner from serving the full penalty”.

In courts’ opinion,³⁷ in order to make a positive criminal prognosis, it is essential that a prisoner should demonstrate conduct exceeding the standard, which means passive submission to the requirements from persons serving a sentence, i.e. a convict’s activity in striving to show readiness to respect the rules of coexistence in society, special involvement and activity in order to change personality and former mode of life.

The involvement and activity aimed at changing the former attitude may be reflected in serving the sentence in the remedial system. Of course, it does not consist in a convict’s consent to serve the sentence in this system because consent does not always mean the readiness to verify the attitude and approach to the social environment but can be the result of sheer calculation of immediate profits.³⁸ What matters is activity demonstrating itself in a convict’s participation in the development of an individual remedial programme, its implementation, and initiation of changes in it. A convict’s activity is what the prison commission takes into account in a periodical assessment of the implementation of an individual remedial programme.

A convict’s consent to establish a period of preparation for release (Article 164 PEC) and, when such a period is established, fulfilling tasks, i.e. establishing contact with a probation officer or institutions or organisations that are to assist a convict after the release from prison, should be positively assessed. A convict’s conduct and activities undertaken when, in the period of preparation to the release, he obtains a permission to leave prison in order to organise living conditions after the release are not less important.

A convict’s conduct when he is allowed to leave prison is especially important, i.e. during the penitentiary pass, which an inmate of half-open prison (Article 91(7) CC) or open prison (Article 92(9) CC) can get, and prizes in the form of conjugal visits outside prison to spend time with a close or trusted person (Article 138(7) PEC) or permission to leave prison without supervision (Article 138(8) PEC) as well as when he is on leave from serving a sentence. Obtaining a pass alone indicates a positive assessment

³⁵ See, A. Marek, *Kodeks karny. Komentarz*, 4th edition, Warsaw 2007, p. 199; J. Lachowski, [in:] M. Królikowski, R. Zawłocki (eds.), *Kodeks karny...*

³⁶ Ruling of the Appellate Court in Kraków of 13 July 2009, II AKZw 641/09, LEX No. 53397; ruling of the Appellate Court in Kraków of 11 May 2007, AKZw 285/07, LEX No. 297275 [accessed on 6/02/2018].

³⁷ Ruling of the Appellate Court in Kraków of 26 August 2014, II AKZw 903/14, LEX No. 1615732; ruling of the Appellate Court in Kraków of 8 March 2012, II AKZw 113/12, LEX No. 1169414; ruling of the Appellate Court in Lublin of 25 August 2010, II AKZw 672/10, LEX No. 628249; ruling of the Appellate Court in Kraków of 19 February 2015, II AKZw 112/15, LEX No. 1767834 [accessed on 6/02/2018].

³⁸ T. Kaczmarek, *Resocjalizacja sprawcy jako cel wymiaru oraz wykonywania kary pozbawienia wolności*, [in:] T. Kalisz (ed.), *Prawo karne wykonawcze w systemie nauk kryminologicznych. Księga pamiątkowa ku czci Profesora Leszka Boguni*, Wrocław 2011, p. 88.

of his conduct. The issue of a permission to leave prison should be preceded by the development of a criminological prognosis when a prize or a pass is granted for the first time and also after a break longer than six months after significant changes in a convict's legal or family situation have occurred.³⁹ When outside prison, a convict may demonstrate self-discipline and ability to solve problems.

Courts⁴⁰ pay much attention to the use of a permission to leave prison because it makes it possible to check a convict's conduct outside prison and are conducive to his re-adaptation to the community without a risk of reoffending and, as they emphasise, conditional release could not be granted to an inmate without formerly checking his conduct outside prison.

The assessment of a convict's conduct in prison should take into account the whole period spent in prison. It should take into account all the facts and situations concerning an inmate because then one can determine whether there were changes in a convict's approach to socially desired attitudes and the obligation to comply with the law.⁴¹

The Penalty Execution Code indicates two other criteria that a court should take into account when making a decision on conditional release. One of them is, in accordance with Article 162 §1 CC, an agreement obtained in mediation. The other concerns inmates sentenced for the crimes laid down in Articles 197–203 CC, committed in connection with irregularities in sexual preferences. Conditional release in case of those convicts is possible after positive expert opinions are obtained.

Obliging a court to take into account a mediation agreement raises a question whether it refers to mediation in preparatory proceedings or jurisdictional proceedings, or at the stage of execution. The analysis of the opinions in the doctrine makes it possible to point out two options.⁴² The supporters of the assumption that it refers to mediation in preparatory or jurisdictional proceedings justifying their opinion indicate that the provisions of execution proceedings do not envisage mediation at the stage of sentence execution.⁴³ The supporters of the opinion that it applies to mediation in execution proceedings in their justification refer to Article 1 §2 PEC, in accordance with which the provisions of the Penalty Execution Code may be applied in execution proceedings, respectively.⁴⁴

³⁹ See, the Regulation of the Minister of Justice of 14 August 2003 on conducting remedial programmes in prisons and remand centres (uniform text), Journal of Laws [Dz.U.] of 2012, item 1409, (§25(2)).

⁴⁰ Ruling of the Appellate Court in Kraków of 19 December 2006, II AKzW 984/06, LEX No. 252473 [accessed on 6/02/2018].

⁴¹ Ruling of the Appellate Court in Lublin of 1 March 2006, II AKzW 124/06, LEX No. 179038 [accessed on 6/02/2018].

⁴² K. Dąbkiewicz, *Mediacja w postępowaniu wykonawczym – refleksje na tle historii pewnej nowelizacji (art. 162 §1 k.k.w.)*, *Probacja* No. 4, 2013, p. 66.

⁴³ K. Postulski, *Kodeks karny wykonawczy...*, p. 669; S. Leleńtal, *Kodeks karny wykonawczy, Komentarz*, 6th edition, Warsaw 2017, p. 659; K. Dąbkiewicz, *Kodeks karny wykonawczy. Komentarz*, 3rd edition, WK 2015, Legalis/el. Also see, C. Kulesza, *Za i przeciw mediacji w sprawach karnych na gruncie aktualnej regulacji prawnej*, [in:] L. Mazowiecka (ed.), *Mediacja karna jako forma sprawiedliwości naprawczej*, LEX/el. 2014.

⁴⁴ T. Szymanowski, *Zmiany prawa karnego wykonawczego (o potrzebie i zbędności nowelizacji przepisów)*, *PIP* No. 2, 2012, p. 58; L. Osiński, [in:] J. Lachowski (ed.), *Kodeks karny. Komentarz*,

In the light of the current provisions, it is necessary to share the opinion that it applies to mediation in preparatory or jurisdictional proceedings. Pursuant to the Regulation on the detailed scope of information concerning convicts sent by a court to prison or remand centre directors,⁴⁵ a court is obliged to send information on a convict's participation in mediation with the aggrieved together with a shortened copy of the agreement.

It should be noticed that the legislator does not seem to notice that mediation, and in fact its effects, is taken into account when taking the decision on the penalty. In accordance with Article 53 §3 CC, imposing a penalty, a court takes into account the positive results of the mediation between a perpetrator and the aggrieved or the agreement between the aggrieved and a perpetrator concluded in the proceedings before a court or a prosecutor. The results of mediation may be also taken into consideration in a prognosis as conduct after the commission of a crime. It should also be considered that in mediation the will of both parties, a perpetrator and the aggrieved, is important. Thus, even a convict's readiness to mediate when the aggrieved is not interested in mediation should be noticed and taken into consideration in the assessment of a convict's conduct after the crime commission. It seems that the admission of mediation at the stage of the execution proceedings is justified. It will correspond to the aim of the penalty of deprivation of liberty, i.e. the change of attitudes from anti-social to pro-social because it can confirm the change of the attitude to the committed crime, understanding of the need to accept liability for one's act.

In case of a prisoner sentenced for the crimes laid down in Articles 197–203 CC committed in connection with sexual preference irregularities, conditional release cannot be applied without obtaining expert opinions. Requesting expert opinions is obligatory.

The analysis of the prerequisites for a criminological prognosis invokes a statement that the legislator does not define particular criteria, and the analysis of the opinions of the doctrine does not make it possible to determine them unambiguously. As a result, as the analysis of case law indicates, courts face difficulties in identifying the prerequisites and this most often results in referring to a convict's conduct in prison. As T. Kalisz⁴⁶ rightly notices, the period of a convict's stay in prison is best documented. These are specialist opinions, diagnoses and, what is especially important, regular assessment. However, a court may get acquainted with personality and psychological tests⁴⁷ conducted in prison and a criminological-

2nd edition, Warsaw 2016, p. 607; E. Bieńkowska, *Mediacja w sprawach karnych*, Warsaw 2011, pp. 14–15.

⁴⁵ Regulation of the Minister of Justice of 11 August 2006 on the detailed scope of information concerning convicts sent by a court to prison or remand centre directors, *Journal of Laws [Dz.U.]* No. 181, item 1333.

⁴⁶ T. Kalisz, *Warunkowe zwolnienie...*, p. 183.

⁴⁷ Personality and psychological tests in particular consist in the analysis of: (1) a convict's personal data; (2) information concerning a convict's family life; (3) a convict's social contacts; (4) reasons for and circumstances of the crime commission by a convict; (5) a convict's record; (6) the level of a convict's susceptibility to the influence of criminal sub-culture; (7) conduct indicating the possibility of mental disorders or alcohol, drug or psychotropic substances addiction; (8) a convict's ability to adapt to prison conditions and requirements; (9) results of psychological and psychiatric tests. (§9.1. Minister of Justice announcement of 10 April 2013 on the publication

social prognosis that must be developed in prison for an inmate who has the right to apply for conditional release from serving the full sentence. The criminological-social prognosis is one of the elements of the opinion that the prison director sends to a penitentiary court together with the application for granting conditional release. In other cases, a court or a convict applying for release may request such an opinion.

The research⁴⁸ shows “that prison administration remains the real decision-maker in the application of conditional release”. It should be noted that, according to the data provided by the Central Board of Prison Service (Centralny Zarząd Służby Więziennej),⁴⁹ only 519 of 24,853 motions concerning conditional release filed by prison directors in 2015 were refused; and there were 514 applications of the total of 23,258 that were refused in 2016.

In the light of the current regulations, the courts’ practice of justifying the refusal of conditional release by referring to circumstances beyond the catalogue laid down in Article 77 §1 CC is inadmissible and alarming. The analysis of case law indicates that the following data are referred to: the nature of a crime,⁵⁰ the remote end of the sentence period,⁵¹ the time of the sentence already served,⁵² the type of the crime committed,⁵³ the crime high incidence⁵⁴ and social harmfulness⁵⁵. The research findings also confirm this.⁵⁶

Thus, a question arises about such an elaborated catalogue of prerequisites that a court should consider when predicting a convict’s conduct after the release. The Criminal Code of 1932 (Article 65 §1 CC) obliged a court to take into account a convict’s conduct when serving the sentence and his personal conditions. The Criminal Code of 1969 (Article 90 §1 CC) laid down the catalogue of criteria for a prognosis: personal

of the uniform text of the Regulation of the Minister of Justice concerning the way of conducting remedial programmes in prisons and remand centres, *Journal of Laws [Dz.U.]* 2013, item 1067).

⁴⁸ P. Wiktorska, *Czekając na wokandę. Warunkowe przedterminowe zwolnienie młodocianych*, Warsaw 2010, p. 277.

⁴⁹ MS CZSW, Roczna informacja statystyczna, www.sw.gov.pl/strona/statystyka-roczna.

⁵⁰ See, ruling of the Appellate Court in Kraków of 30 June 2009, AKzW 547/09, LEX No. 552036; ruling of the Appellate Court in Lublin of 15 April 2009, AKzW 285/09, LEX No. 508303, ruling of the Appellate Court in Lublin of 8 August 2007, AKzW 527/07, LEX No. 314627, [accessed on 23/01/2018].

⁵¹ Ruling of the Appellate Court in Lublin of 24 April 2010, II AKzW 291/10, LEX No. 593380; ruling of the Appellate Court in Kraków of 27 February 2004, AKzW 28/04, LEX No. 108554; ruling of the Appellate Court in Lublin of 20 June 2007, AkzW 434/07, LEX No. 344489, [accessed on 23/01/2018].

⁵² See, ruling of the Appellate Court in Lublin of 27 October 2010, II AKzW 846/10, LEX No. 677930; ruling of the Appellate Court in Lublin of 2 October 2006, AKzW 768/06, LEX No. 229387 [accessed on 23/01/2018].

⁵³ Ruling of the Appellate Court in Lublin of 7 November 2007, AKzW 768/07, LEX No. 418185 [accessed on 23/01/2018]. Also see, the ruling of the Appellate Court in Kraków of 8 April 2003, II Akz 125/03, discussed in S. Lelental, *Warunkowe przedterminowe zwolnienie w orzecznictwie Sądu Najwyższego i sądów apelacyjnych w latach 2003–2004*, *Przegląd Więziennictwa Polskiego* No. 49, 2005, pp. 272–273.

⁵⁴ Ruling of the Appellate Court in Lublin of 27 July 2008, AKzW 154/08, LEX No. 452635 [accessed on 23/01/2018].

⁵⁵ Ruling of the Appellate Court in Wrocław of 24 January 2007, AKzW 76/07, LEX No. 250067 [accessed on 23/01/2018].

⁵⁶ See, P. Wiktorska, *Czekając na wokandę...*, p. 285.

features and conditions, way of living before the commission of a crime and conduct after the commission of a crime, especially in the course of serving the sentence. In the initial version of the Criminal Code of 1997, the legislator indicated a convict's attitude, personal features and conditions, the way of living before the commission of a crime, circumstances of the commission of a crime, a convict's conduct after the commission of a crime and conduct at the time of serving the sentence. The amendment to the Criminal Code of 2011⁵⁷ repealed the circumstance concerning the way of life before the commission of a crime and introduced an agreement resulting from mediation. S. Lelental⁵⁸ rightly notes that the legislator does not indicate the motives for introducing successive quantifiers of a prognosis and the extension of the catalogue does not have impact on the frequency of adjudicating on conditional release. In the period when the Criminal Code of 1969 was in force, courts granted conditional release more often than when the Criminal Code of 1997 entered into force.

This inspires consideration whether it is purposeful to take into account prerequisites that a court analysed when it issued a sentence, i.e. circumstances of the commission of a crime or conduct after its commission. J. Utrat-Milecki⁵⁹ rightly notes that the elimination of these criteria is justified "due to the *ne bis in idem* principle". It should be highlighted what the Supreme Court⁶⁰ emphasised: "a court adjudicating on conditional release from serving the full sentence cannot base its judgement on the same prerequisites that were decisive for issuing the sentence". In the above-mentioned Recommendation on conditional release (par. 18), it is recommended that the criteria which prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners' personalities and social and economic circumstances as well as the availability of resettlement programmes. The substantive prerequisite for conditional release does not meet this recommendation.

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⁵⁷ Act of 16 September 2011 amending the Act: Penalty Execution Code and some other acts, *Journal of Laws [Dz.U.]* No. 240, item 1431.

⁵⁸ S. Lelental, *Warunkowe przedterminowe zwolnienie...*, [in:] M. Melezini (ed.), *System...*, p. 1174.

⁵⁹ J. Utrat-Milecki, *Doktrynalne i normatywne...*, [in:] J. Utrat-Milecki (ed.), *Reforma prawa...*, p. 65.

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SUBSTANTIVE PREREQUISITE FOR CONDITIONAL RELEASE: SOME REFLECTIONS

Summary

The subject matter of the article is the substantive prerequisite for conditional release from serving the full sentence. The analysis of literature and case law makes it possible to state that the quantifiers laid down in Article 77 §1 CC, which a court should take into account when developing a prognosis concerning a convict's conduct after the release from prison, give rise to difficulties connected with their identification. As a result, in their justification for refusal to grant conditional release courts often indicate criteria which are not laid down in Article 77 §1 CC. However, it seems purposeful to give up taking into account circumstances considered by a court when issuing the sentence because of their static nature.

Keywords: conditional release form serving the full sentence, criminal and social prognosis, penalty of deprivation of liberty

MATERIALNA PRZESŁANKA WARUNKOWEGO PRZEDTERMINOWEGO ZWOLNIENIA – KILKA REFLEKSJI

Streszczenie

Przedmiotem rozważań jest przesłanka materialna warunkowego przedterminowego zwolnienia. Analiza literatury przedmiotu i orzecznictwa pozwala na stwierdzenie, iż wskazane w art. 77 §1 k.k. kwantyfikatory, które sąd powinien uwzględnić przy formułowaniu prognozy co do zachowania skazanego po opuszczeniu zakładu karnego, rodzą trudności przy ich identyfikowaniu. W rezultacie sądy często w uzasadnieniu odmowy udzielenia warunkowego zwolnienia wskazują na przesłanki nie wymienione w art. 77 §1 k.k. Celowe więc wydaje się zrezygnowanie z uwzględniania tych okoliczności, które sąd oceniał przy wymierzaniu kary, zważywszy na ich statyczny charakter.

Słowa kluczowe: warunkowe przedterminowe zwolnienie, prognoza kryminologiczno-społeczna, kara pozbawienia wolności

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