MIXED PENALTY: A NEW PENAL LAW RESPONSE INSTRUMENT IN POLISH CRIMINAL LAW

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The amendment to the Criminal Code of 20 February 2015[1] (CC) resulted in broad and deep changes in the Polish legal order. The system of penal response to petty crime was substantially reorganised. The justification for the Bill amending the Criminal Code[2] indicates that its basic objective is rationalisation of penal policy by introducing changes in the structure of adjudicated punishments. It is mainly aimed at minimising the significance of the penalty of deprivation of liberty (imprisonment) with the suspension of its execution, and the treatment of the penalty of imprisonment in the judicial practice in general, thus not only the absolute but also the suspended one, as *ultima ratio*. The justification clearly indicates that the high level of the imprisoned convicts' population (80,000) and the enormous number (46,000) of persons sentenced to absolute imprisonment who do not serve it result from the defective structure of punishments adjudicated in relation to the level and characteristics of criminality. According to the authors of the Bill, the reason for that is the fact the courts overuse the penalty of deprivation of liberty with conditional suspension of its execution (over 55% sentences), because persons sentenced to imprisonment with conditional suspension of its execution who have been ruled to serve it constitute almost 50% of the convict population.

Having that in mind, within the new strategy in the penal policy, in particular the possibility of adjudicating the penalty of imprisonment with conditional suspension of its execution was limited (Article 69 §1 CC), the *ultima ratio* principle of absolute imprisonment was changed into the *ultima ratio* principle of imprisonment in

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1 Act of 20 February 2015 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2015, item 396.

2 Justification of the governmental Bill amending the Act: Criminal Code and some other acts, Sejm paper No. 2393, 15 May 2014, pp. 1–9.

general with the extension of its application to all crimes carrying the punishment of deprivation of liberty of up to five years, thus giving priority to a fine or the punishment of limitation of liberty (Article 58 §1 CC), non-custodial punishments (fine and limitation of liberty) were introduced as applicable to all statutory imprisonment punishments of up to eight years (Article 37a CC), and a totally new solution unknown in our legal order before, the "mixed penalty", was added (Article 37b CC).

The provision of Article 37b CC originally stated that: "In case of a misdemeanour carrying a penalty of deprivation of liberty, regardless of the minimum statutory limit of punishment for the act envisaged, a court may rule a penalty of deprivation of liberty of up to three months, and in case the maximum statutory limit of punishment for the act envisaged is 10 years, deprivation of liberty of six months, and a penalty of limitation of liberty of up to two years. The penalty of imprisonment is to be served first unless the Act stipulates otherwise".

The wording of the cited provision indicates that the legislator, enacting the 2015 amendment to the Criminal Code, introduced a new solution creating a possibility of adjudicating two punishments for every misdemeanour carrying a penalty of deprivation of liberty: a short-term imprisonment and limitation of liberty. This innovative statutory conception of penal response to crime has been called "mixed penalty" with an indication that it is a "combined form of penal repression".[3] It seems that the phrase used in the statutory motives adequately reflects the complexity of the construct. It is composed of two parts: two different penalties adjudicated simultaneously and composing one inseparable form of penal response to committed crime. Thus, the term "mixed penalty" describes a mixed legal construction of the provision of Article 37b CC, and not – as some representatives of the doctrine state – "a specifically mixed punishment",[4] or "a mixture of separate penal consequences within one punishment [a penalty of deprivation of liberty and a penalty of limitation of liberty – comment by M. M.]".[5] Still, the components of a mixed penalty do not mix. They constitute two different components of an entire penal response to crime and, in addition, they are executed separately. Article 37b CC overtly stipulates that imprisonment shall be served first and limitation of liberty next.

In the literature on criminal law, the legal construct is usually called "mixed penalty". This is a term A. Grześkowiak uses in the commentary on Article 37b CC, which rightly recognises the fact that "two components of the punishment are placed under one term, thus uniting its elements, which confirms the introduction of a new punishment to the system of criminal law and not only the eclectic idea of sentencing". The author further explains: "mixed penalty incorporates the adequate content resulting from the conjunction of the essence of the penalty of deprivation of liberty and a successive penalty of limitation of liberty. This content (…) results

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[3] Justification of the governmental Bill, No. 2393, p. 11.

[4] M. Małecki, *Co zmienia nowelizacja art. 37b k.k.?* [What does the amendment to Article 37b CC change?], Czasopismo Prawa Karnego i Nauk Penalnych Vol. 2, 2016, p. 19.

[5] M. Małecki, *Ustawowe zagrożenie karą i sądowy wymiar kary* [Statutory penalty and judicial adjudication of penalty], [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz* [Amendment to criminal law of 2015. Commentary], Kraków 2015, p. 297.

from the whole penal response to crime". At the same time, A. Grześkowiak rightly notices that the legislator "did not introduce a mixed penalty into the catalogue of penalties but gave it the features of an institution of penalty adjudication".[6] Also V. Konarska-Wrzosek, in the commentary on Article 37b CC, uses the term "mixed (combined) penalty", emphasising that in case of Article 37b CC we deal with a directive of judicial adjudication of punishment. The author indicates that the institution of a mixed penalty consists in adjudication of two types of punishment in the form of a short-term imprisonment and limitation of liberty.[7] Also A. Sakowicz uses a term "mixed penalty" in the opinion on the Bill amending the Criminal Code.[8] The authors of the course-book *Prawo karne*, M. Królikowski and R. Zawłocki, also use the term and claim that the mixed (or combined) penalty is an important element of the criminal law reform.[9] M. Szewczyk[10] and M. Melezini[11] use the term "mixed penalty" in *System Prawa Karnego*. *Kary i inne środki reakcji prawnokarnej*. Other authors analysing Article 37b CC also use the term "mixed penalty".[12] The term is applied as well as a selected statistical unit in 2015 statistical reports of the Ministry of Justice, concerning persons whose cases are considered in the first instance regional and district courts.[13] Thus, the term "mixed penalty" may be deemed common in literature and is used by the Ministry of Justice in statistical material that is a basis for the analysis of implemented criminal policy.

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[6] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], 3rd edition, C.H. Beck, Warsaw 2015, pp. 326–331.

[7] V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Wolters Kluwer, Warsaw 2016, pp. 229–231.

[8] A. Sakowicz, *Opinia prawna na temat projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw* [Legal opinion on the Bill amending the Criminal Code and some other acts], Sejm paper No. 2393.

[9] M. Królikowski, R. Zawłocki, *Prawo karne* [Criminal law], C.H. Beck, Warsaw 2015, pp. 345–346; see also: R. Zawłocki, *Reforma prawa karnego materialnego od 1.07.2015 r. Uwagi ogólne dotyczące najważniejszych zmian w Kodeksie karnym* [Criminal law reform since 1 July 2015: General comments on the most important changes in the Criminal Code], Monitor Prawniczy No. 11, 2015, paper obtained from System Informacji Prawnej Legalis.

[10] M. Szewczyk, *Kara ograniczenia wolności* [Penalty of deprivation of liberty], [in:] M. Melezini (ed.), *System Prawa Karnego, Tom 6. Kary i inne środki reakcji prawnokarnej* [Criminal law system. Vol. 6: Penalties and other penal law response measures], 2nd edition, C.H. Beck, Warsaw 2016, p. 223.

[11] M. Melezini, *System środków reakcji prawnokarnej. Rys historyczny* [System of penal law response measures. Historical overview], [in:] M. Melezini (ed.), *System Prawa Karnego…* [Criminal law…], pp. 72–73.

[12] See, inter alia, T. Szymanowski, *Nowelizacja kodeksu karnego w 2015 r.* [Amendment to the Criminal Code in 2015], Przegląd Więziennictwa Polskiego No. 87, 2015, p. 12; K. Postulski, *Kodeks karny wykonawczy. Komentarz* [Executive Penal Code: Commentary], 3rd edition, Warsaw 2016, p. 218; E. Hryniewicz-Lach, [in:] M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Tom II. Komentarz. Art. 32–116* [Criminal Code: General part, Vol. II: Commentary, Articles 32–116], 3rd edition, Warsaw 2015, pp. 43–45; M. Błaszczyk, *Kara mieszana* [Mixed penalty], [in:] S. Pikulski, W. Cieślak, M. Romańczuk-Grącka (eds), *Przyszłość polskiego prawa karnego. Alternatywne reakcje na przestępstwo* [Future of Polish criminal law. Alternative response to crime], Olsztyn 2015, pp. 153–163.

[13] See, statistical reports MS-S6 and MS-S6o developed in the department of Statistical Managerial Information of the Ministry of Justice.

According to M. Małecki, the use of the term "mixed penalty" to specify a legal construct under Article 37b CC in the literature is "absolutely inadequate" and "in fact erroneous", suggesting that "we deal with adjudication of one specifically mixed penalty".[14] The author calls the discussed solution "a sequence of penalties" because, in his opinion, Article 37b CC creates a possibility of "adjudicating two different penalties at the same time and executing them in the sequence determined in the statute". He emphasises that "After the application of Article 37b CC, there is no mixing of the two separate penal consequences within one 'penalty' but simultaneous use of both response measures towards one perpetrator with the rules of administration and the way of serving each of those penalties alone taken into consideration".[15]

J. Majewski has reservations about "mixed penalty" and argues that the term is not very fortunate because it suggests that "it is related to adjudication of one punishment (with mixed features partly referring to imprisonment and partly to limitation of liberty), and this is not really so – under Article 37b CC, two penalties are adjudicated and they retain their separate being".[16]

In A. Zoll's opinion, "the sequential sanction (deprivation of liberty for a period from one month to three months or to six months and limitation of liberty for up to two years) laid down in Article 37b CC should be treated as one complex response to committed crime".[17] Sharing the opinion on the comprehensive treatment of the penal response under Article 37b CC, it is necessary to emphasise that the components of this single form of penal response are subject to successive (sequential) execution: first, the penalty of deprivation of liberty, next the penalty of limitation of liberty, and with reference to the execution of a mixed penalty, we can speak about sequencing.

From the point of view of criminal policy, the introduction of the possibility of applying a mixed penalty composed of short-term deprivation of liberty and limitation of liberty extends the range of instruments of penal response to misdemeanour carrying imprisonment. The justification for the governmental Bill amending the Criminal Code indicates that the institution of a mixed penalty "should be especially attractive in case of more serious misdemeanours".[18] Thus, one can see in the new regulation the legislator's attempt to increase the flexibility of response to the so-called medium-weight criminality. It is worth noting that, resulting from the amendment to the Criminal Code, the radical limitation of the

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[14] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 297; and by the same author: *Co zmienia…* [What does the amendment…], p.19; *Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37b k.k.) – zagadnienia podstawowe* [Sequence of short-term penalty of deprivation of liberty and a penalty of limitation of liberty (Article 37b CC – basic issues], Palestra No. 7–8, 2015, pp. 39–43.

[15] M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 297.

[16] J. Majewski, *Kodeks karny. Komentarz do zmian 2015* [Criminal Code: Commentary on amendments of 2015], Warsaw 2015, p. 95.

[17] A. Zoll, *Zmiany w zakresie środków probacyjnych (ustawa nowelizująca Kodeks karny z 11 marca 2016 r.)* [Changes in the scope of probation measures (Act amending the Criminal Code of 11 March 2016)], Czasopismo Prawa Karnego i Nauk Penalnych Vol. 2, 2016, p. 11.

[18] Justification of the governmental Bill, No. 2393 p. 11.

application of the penalty of deprivation of liberty with conditional suspension of its execution, which had constituted a leading instrument of penal response in the judicial practice before, would have to make the adequately severe penalty of absolute imprisonment, which must be treated as *ultima ratio*, an alternative to this form of punishment. In case of medium-weight misdemeanours, the institution of a mixed penalty undoubtedly extends the scope of judicial discretion to shape a hardship adequate to a particular perpetrator and a specific case.

Especially with regard to perpetrators of the most serious misdemeanours who are not subject to Article 37a CC, introducing non-custodial penalties (a fine and a penalty of limitation of liberty) to all statutory crime threats carrying a penalty of deprivation of liberty of up to eight years, a court, seeing the need for giving up the institution of long-term isolation in prison in case of a particular perpetrator, may adjudicate a short-term penalty of deprivation of liberty and a penalty of limitation of liberty under Article 37b CC. In the legislative motives it is rightly indicated that: "In many situations, adjudication of a short-term isolation punishment is sufficient to achieve adequate results within the area of social prevention connected with that sanction", and it is added that: "In such a case, a penalty of limitation of liberty, which would aim at strengthening a socially desired perpetrator's behaviour might be a supplement to penal impact, and at the same time, would be deprived of such strong stigmatising effect".[19]

It seems that the short-term penalty of deprivation of liberty adopted in Article 37b CC is seen as a specific shock therapy connected with full isolation from the outside world, which starts a process of exerting influence to be continued within the non-custodial penalty, i.e. limitation of liberty. If we treat a mixed penalty this way, the penalty of limitation of liberty is not a supplement to penal influence, but – as A. Grześkowiak rightly emphasises – it is "an essential, equally important part and intended continuation of the process".[20]

Treating a mixed penalty as one comprehensive response to a committed crime, one should also treat the hardship of a mixed penalty in a complex way and not as the hardship of its every element apart. It is rightly noticed in the literature that the total hardship may be even bigger if it is combined with additional hardships, e.g. adjudication of a cumulative fine apart from imprisonment or penal measures.[21]

The provision of Article 37b CC constitutes an institution of a judicial imposition of a penalty and is not an element of the statutory punishment for misdemeanours. As far as this issue is concerned, the doctrine is completely unanimous.[22] The wording of Article 37b CC clearly indicates that a court may apply the mixed penalty "in case

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[19] Justification of the governmental Bill, No. 2393, pp. 12–13.

[20] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny…* [Criminal Code…], p. 329.

[21] A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny…* [Criminal Code…], p. 328.

[22] See, inter alia, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 294; and by the same author, *Sekwencja krótkoterminowej kary...* [Sequence of short-term penalty...], pp. 44–45; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], p. 320; J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], pp. 95–97; M. Królikowski, R. Zawłocki, *Prawo karne…* [Criminal law…], p. 346; M. Błaszczyk, *Kara mieszana...* [Mixed

of a misdemeanour carrying a penalty of deprivation of liberty, regardless of the minimum statutory limit envisaged in the Act for the given act". Thus, Article 37b CC is applicable to a specific case at the stage of judicial imposition of a penalty.[23] If it is recognised that Article 37b CC constitutes a directive on the judicial imposition of punishment allowing adjudication of the mixed penalty, the extraordinary mitigation or aggravation of penalty is not applicable to it and the provision of Article 38 §1 CC is not applicable either, which is clearly stated in the legislative motives.[24]

Imposing the mixed penalty, a court must comply with the penal rules and directives on penalty imposition. It should always take decisions based on general directives on punishment imposition as well as directives of special nature. It should also pay attention to ensuring that the hardship resulting from the mixed penalty applied and other potential measures of adjudicated penal response do not exceed the level of the perpetrator's guilt and that the level of social harmfulness of the act is taken into consideration. It is worth drawing attention to the directive under Article 58 §1 CC, which – after the amendment to the Criminal Code of 20 February 2015[25] – laid down the principle of treating the penalty of absolute deprivation of liberty and that with conditional suspension of its execution as *ultima ratio* and, as a result, gave non-custodial penalties a priority status where the Act envisages a possibility of choosing a type of penalty and a crime carries a penalty of deprivation of liberty not exceeding five years. In such cases, the institution of the mixed penalty will be possible only when in a specific situation concerning a particular perpetrator no non-custodial penalty (a fine or a penalty of limitation of liberty) would meet the objective of punishment.

The change of the wording of Article 58 §1 CC, the extension of grounds for adjudicating non-custodial penalties by the provision of Article 37a CC modifying statutory penalties connected with the type of crime as well as radical limitation of the possibility of applying conditional suspension of the execution of a penalty of deprivation of liberty create broad opportunities to adjudicate non-custodial penalties (a fine or a penalty of limitation of liberty). It is also to ensure meeting the main objective of the criminal law reform of 2015, which is rationalisation of penal policy tending to reduce prison population, especially to cut the number of persons waiting for the execution of a valid and final imprisonment sentence. In this context, a mixed penalty should be perceived as an instrument that makes penal response more flexible not only in cases where adjudication of non-custodial penalty or the application of conditional suspension of the execution of a penalty of deprivation of liberty is not well grounded, but especially in relation to misdemeanours carrying a penalty of deprivation of liberty for which no non-custodial alternatives are envisaged.

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penalty...], p. 154; E. Hryniewicz-Lach, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna...* [Criminal Code: General part...], p. 44.

[23] M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 294.

[24] Justification of the governmental Bill, No. 2393, p. 12.

[25] Act of 20 February 2015 amending the Act: Criminal Code and some other acts, Journal of Laws [Dz.U.] of 2015, item 396.

The scope of application of the provision on a mixed penalty covers all misdemeanours carrying a penalty of deprivation of liberty. Here, neither the minimum nor the maximum limit of a statutory penalty is relevant. As J. Majewski rightly notices, the maximum limit of a penalty of deprivation of liberty indicated in Article 37b CC only determines the length of deprivation of liberty adjudicated together with a penalty of limitation of liberty.[26] It should be assumed that a court may apply a mixed penalty not only in cases concerning misdemeanours carrying an alternative penalty of deprivation of liberty and non-custodial penalties. The provision of Article 37b CC does not indicate that it concerns misdemeanours carrying "only" a penalty of deprivation of liberty. Thus, it can be assumed that a mixed penalty may be applied in case of every misdemeanour that statutorily carries not only a penalty of deprivation of liberty but also a fine and a penalty of limitation of liberty. J. Majewski[27] and M. Małecki[28] share such a stand in the doctrine. However, it is worth mentioning that there is also an opinion in the literature that a mixed penalty may be applied in case of a misdemeanour carrying only a penalty of deprivation of liberty without any non-custodial alternatives.[29] It should be added that the application of a mixed penalty is inadmissible in case of misdemeanours carrying only a penalty of a fine or limitation of liberty.

The outcome of my research into the criminal policy implemented by common courts in 2015[30] shows that a mixed penalty is applied in the judicial practice also in cases of misdemeanours alternatively carrying a penalty of deprivation of liberty and non-custodial penalties. From 1 July 2015 until the end of 2015, i.e. in the first period of the criminal law reform being in force, 39 of the total number of 735 mixed penalties adjudicated were a form of penal response applied to perpetrators of misdemeanours carrying alternatively a fine, a penalty of limitation of liberty and a penalty of deprivation of liberty. These were sentences under Article 209 CC (persistent evasion of alimony) – 22 cases, Article 178a §1 CC (driving in the state of insobriety or under the influence of narcotic drugs) – 9 cases, Article 190 CC (punishable threat) – 6 cases, Article 222 CC (violation of bodily integrity of a public official) – 2 cases. Article 37b CC was most often applied in case of perpetrators of serious misdemeanours such as: burglary and theft (Article 279 CC) – 139 cases, robbery (Article 280 §1 CC) – 94 cases, and fraud (Article 286 CC) – 62 cases.

The imposition of a mixed penalty under Article 37b CC may be as follows:

1) where the maximum limit of a statutory penalty is lower than 10 years' imprisonment, a court may adjudicate a penalty of deprivation of liberty for a period

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[26] See, J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], p. 99.

[27] See, J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], p. 98.

[28] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], p. 294

[29] See, A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny…* [Criminal Code…], p. 329; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], p. 230.

[30] See, M. Melezini, *Polityka karna sądów w kontekście reformy prawa karnego. Wstępne wyniki badań* [Courts' penal policy in the context of criminal law reform. Preliminary research findings], [in:] J. Giezek, D. Gruszecka (ed.), *Księga Jubileuszowa ofiarowana Profesorowi Tomaszowi Kaczmarkowi* [Jubilee book presented to Professor Tomasz Kaczmarek], (in press).

from one month to three months, and a penalty of limitation of liberty for a period from one month to two years;
2) where the maximum limit of a statutory penalty is ten years' imprisonment or higher, a court may adjudicate a penalty of deprivation of liberty for a period from one month to six months, and a penalty of limitation of liberty for a period from one month to two years.

The statutory minimum of a penalty of deprivation of liberty imposed within a mixed penalty results from Article 37 CC, which indicates one month. On the other hand, Article 37b CC stipulates that the period of deprivation of liberty within a mixed penalty may be three months or six months. This means that a penalty of deprivation of liberty within a mixed penalty is imposed in months (from one to three months or to six months). The other component of a mixed penalty – a penalty of limitation of liberty – may be imposed for a period from one month to two years and it is laid down in Article 34 §1 CC. At the same time, the provision stipulates that a penalty of limitation of liberty is imposed in months and years.

A court imposing a penalty of deprivation of liberty laid down in Article 37b CC and, at the same time, a penalty of limitation of liberty must cite Article 37b CC in the sentence because only this provision of the Criminal Code envisages a possibility of adjudicating a penalty of deprivation of liberty and a penalty of limitation of liberty within one form of penal response.

As far as a penalty of limitation of liberty as a component of a mixed penalty is concerned, the content of this penalty is laid down in Articles 34–35 CC. After the substantial modification of the legal form of a penalty of limitation of liberty based on the Act amending the Criminal Code of 20 February 2015, this penalty might be adjudicated in any of the four forms laid down in Article 34 §1a CC, or might constitute any combination of hardships connected with content of particular forms of a penalty of limitation of liberty, and might consist in:
1) an obligation to perform unpaid supervised work for social purposes ranging from 20 to 40 hours per month;
2) an obligation to remain in the domicile or another assigned venue, with the use of electronic monitoring system and with a restriction that the period of the obligation could not exceed 12 months, 70 hours per week and 12 hours per day;
3) an obligation under Article 72 §1 (4–7a) CC, i.e. an obligation:
   a) to work, learn and get prepared for a vocation,
   b) to refrain from excessive consumption of alcohol or using narcotic drugs,
   c) to undergo treatment of addictions,
   d) to submit to psychotherapy or psycho-education,
   e) to take part in rehabilitation programmes,
   f) to refrain from frequenting specified community circles or venues,
   g) to refrain from contacting the aggrieved party or other persons in a specified way or approaching them;
4) a deduction of 10–25% of the monthly remuneration in order to contribute to a socially worthy cause designated by a court.

A penalty of limitation of liberty imposed within a mixed penalty may be combined with a cash payment and other duties (Article 34 §3 CC).

This most flexible penalty of all laid down in criminal law makes it possible to compose the content adequate to the needs of a particular case.[31]

However, the amendment to the Criminal Code laid down in two Acts of 11 March 2016,[32] thus after less than a year of earlier amendments being in force, introduced substantial changes to the legal form of the penalty of limitation of liberty. The legislator abandoned two new forms of the penalty of limitation of liberty introduced by the Act of 20 February 2015, i.e. an obligation to remain in the domicile or another assigned venue with the use of electronic monitoring and a possibility of adjudicating extended obligations referred to in Article 72 §1 (4–7a). The legislative motives[33] indicated that the introduction of the form of execution of a penalty of limitation of liberty in the system of electronic monitoring and the abandonment of the system of electronic monitoring as a form of execution of a penalty of limitation of liberty resulted in the fall in the number of convicts under the system of electronic monitoring. It was recognised that the change "proved to be practically extremely ineffective" and in the future might lead to "marginalising of this institution in the sphere of criminal policy". It was emphasised that "the execution of two different types of penalty cannot be exercised in the same form". Therefore, the legislator proposed reintroduction of the system of electronic monitoring as a form of execution of a penalty of limitation of liberty, which was eventually enacted.

The other Act, on the other hand, repealed another form of the penalty of limitation of liberty, consisting in adjudicating obligations laid down in Article 72 §1 (4–7a) CC. At the same time, obligations indicated, in accordance with Article 34 §3 CC, remained facultative obligations to be applied as an additional measure of influencing a convict.

As a result, the two Acts of 11 March 2016 changed the normative model of the penalty of limitation of liberty, which now consists of two forms of that penalty (Article 34 §1a (1) and (4) CC), i.e.:

1) an obligation to perform unpaid supervised work for social purposes ranging from 20 to 40 hours per month;

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[31] For more on the issue of a penalty of deprivation of liberty, see A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…* [Criminal Code…], pp. 293–314; T. Sroka, *Kara ograniczenia wolności* [Penalty of limitation of liberty], [in:] W. Wróbel, *Nowelizacja prawa karnego 2015. Komentarz* [Amendment to criminal law 2015: Commentary], pp. 85–153; J. Majewski, *Kodeks karny. Komentarz*... [Criminal Code: Commentary...], pp. 54–82; M. Szewczyk, *Kara ograniczenia*... [Penalty of deprivation...], [in:] M. Melezini (ed.), *System Prawa Karnego*... [Criminal law system...], pp. 210–227; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny…* [Criminal Code…], pp. 213–222; M. Melezini, *Z problematyki kodeksowej regulacji kary ograniczenia wolności* [Issues of statutory regulation of a penalty of deprivation of liberty], [in:] J. Sawicki, K. Łucarz (eds), *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne i procesowe, Tom I. Księga Jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu* [At the contact point of criminal law and misdemeanour law: substantive and procedural legal issues. Vol. I: Jubilee book for Professor Marek Bojarski], Wrocław 2016, pp. 349–361.

[32] Act of 11 March 2016 amending the Act: Criminal Code and the Act: Executive Penal Code, Journal of Laws [Dz.U.] of 2016, item 428; Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] of 2016, item 437.

[33] See, Bill amending the Act: Criminal Code and the Act: Executive Penal Code. Justification, Sejm paper No. 218, p. 2.

2) a deduction of 10-25% of the monthly remuneration in order to contribute to a socially worthy cause designated by a court.

The provision of Article 34 §1b CC still admits a possibility of adjudicating this obligation and a deduction separately or together, and the amended Article 34 §3 CC envisages a possibility of adjudicating pecuniary consideration laid down in Article 39(7) CC or imposing additional obligations referred to in Article 72 §1 (2–7a) CC. It is worth adding that Article 34 §2 CC has remained unchanged and specifies permanent and obligatory elements of the penalty of limitation of liberty, which occur in every form of this penalty, i.e. a ban on changing domicile by the convict in the course of serving the penalty without the prior court's consent and an obligation to provide information about the course of the penalty execution.

There was a controversy in the doctrine over the issue of admissibility of conditional suspension of the execution of the penalty of deprivation of liberty that is a component of a mixed penalty. A lack of statutory exclusion of the possibility of conditional suspension of the execution of adjudicated penalty of deprivation of liberty made some representatives of the doctrine present an opinion that conditional suspension of the execution of a penalty of deprivation of liberty as a component of a mixed penalty is admissible.[34] Others expressed a totally different opinion on inadmissibility of conditional suspension of the execution of a penalty of deprivation of liberty adjudicated in accordance with Article 37b CC.[35] The outcome of the research into the criminal policy in 2015, which was mentioned above, made it possible to establish that suspension of the execution of a penalty of deprivation of liberty as a component of a mixed penalty was used in the judicial practice. During the six months of the new regulation laid down in Article 37b CC being in force, in 17 of the total number of 735 mixed penalty sentences, the execution of a penalty of deprivation of liberty was conditionally suspended, which accounted for 2.3% of all the adjudicated penalties.

The indicated interpretational problems resulting from the provision of Article 37b CC have been partly solved by the legislator who, with the Act amending the Criminal Code of 11 March 2016,[36] excluded the possibility of suspending the execution of a penalty of deprivation of liberty under Article 37b CC.

After the amendment to the content of Article 37b CC, the presently binding Article 37b CC stipulates that: "In case of a misdemeanour carrying a penalty of deprivation of liberty, regardless of the minimum statutory penalty limit for a given act laid down in the Act, a court may adjudicate a penalty of deprivation of liberty for a period not exceeding three months, and where the maximum statutory penalty limit is at least ten years – for six months, and at the same time

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[34] See, A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…* [Criminal Code…], p. 331; J. Majewski, *Kodeks karny. Komentarz...* [Criminal Code: Commentary...], p. 100; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Kraków 2015, p. 123; M. Błaszczyk, *Kara mieszana...* [Mixed penalty...], p. 157.

[35] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty…], pp. 298–299; and by the same author: *Sekwencja krótkoterminowej kary...* [Sequence of short-term penalty...], pp. 45–46; *Co zmienia…* [What does the amendment…], pp.19–44.

[36] Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, Journal of Laws [Dz.U.] of 2016, item 437.

a penalty of limitation of liberty of up to two years. Provisions of Articles 69–75 are not applicable. A penalty of deprivation of liberty is executed first, unless the Act provides otherwise".

The amendment to the Criminal Code adds a sentence: "Provisions of Articles 69–75 are not applicable". This change is to be assessed positively because to some extent it eliminates interpretational doubts in relation to the content of Article 37b CC. In the justification of the Bill amending the Criminal Code,[37] the draftsman – referring to the new way of forming a penal repression introduced to the Polish legal order, i.e. a mixed penalty – indicates that the essence of a mixed penalty consists in "short-term imprisonment and then a longer period of limitation of liberty". Thus, a penalty of deprivation of liberty is connected with a short period of isolation from the outside world and its deterrent shock effect. The draftsman rightly notes that efficiency of a short-term penalty of deprivation of liberty is substantially decreased where this kind of punishment can be subject to conditional suspension of its execution, which – according to the draftsman – was possible based on the formerly binding regulations. At the same time, the draftsman, drawing attention to the threat connected with excessively frequent application of conditional suspension of the execution of a penalty of deprivation of liberty and, as a result, a possibility of occurrence of an erroneous structure of adjudicated penalties, formulated a proposal to exclude the possibility of conditional suspending the execution of a penalty of deprivation of liberty under Article 37b CC.

It is worth emphasising that if the concept of a mixed penalty is perceived as "one complex response to committed crime",[38] and in my opinion it should be treated as such, as A. Zoll rightly claims, this point of view, without the supplementation introduced by the amending Act, neither allows for the application of conditional suspension of the execution of a penalty of deprivation of liberty adjudicated in accordance with Article 37b CC, nor for a conditional earlier release.[39] However, as A. Zoll rightly notes, if the legislator had decided on inadmissibility of the application of conditional suspension of the execution of a penalty, the conditional earlier release should have also been explicitly excluded, which the legislator did not do though.[40] It should be deemed that the application of conditional earlier release from a penalty of deprivation of liberty is not purposeful because the penalty is to be executed first and the period of service is relatively short.[41]

However, a question arises whether the exclusion of a possibility of applying conditional suspension of the execution of a penalty of deprivation of liberty as an element of a mixed penalty is applicable to somebody who has turned state's evidence (Article 60 §3 or 4 CC) and a mixed penalty has been imposed on him

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[37] Justification of the Bill amending the Act: Criminal Procedure Code and some other acts, Sejm paper No. 207, p. 17. See also: M. Małecki, *Co zmienia…* [What does the amendment…], pp. 44–51.

[38] A. Zoll, *Zmiany w zakresie środków...* [Changes in the scope of probation...], p. 11.

[39] *Ibid*.

[40] For more on this issue, see: A. Zoll, *Zmiany w zakresie środków...* [Changes in the scope of probation...], p. 11.

[41] See, M. Małecki, *Ustawowe zagrożenie…* [Statutory penalty...], p. 301.

in accordance with Article 37b CC, and in case of the application of the provision of Article 87 §2 CC on an aggregate penalty. Unfortunately, the legislator has not solved this problem and this way has not eliminated interpretational differences. Due to potentially different answers in the areas indicated, it seems that in every case of adjudicating a penalty of deprivation of liberty under a mixed penalty, conditional suspension of the execution of a penalty of deprivation of liberty is irrational due to the aims and functions of the institution of binding two penalties into one mixed penalty.

In case of the imposition of a mixed penalty, a penalty of deprivation of liberty is executed first and then a penalty of limitation of liberty follows. This sequential execution laid down in Article 37b CC (in the last sentence) explicitly results from the Act. Article 17a of the Executive Penal Code is an exception concerning the change of the sequence of executing penalties. The provision stipulates the execution of a penalty of limitation of liberty first only when there are legal obstacles to the prompt execution of a penalty of deprivation of liberty, e.g. postponement of the execution of a penalty or interruption of the penalty execution.[42] Statutory determination of the sequence of penalties: first, as a rule, a short-term isolation penalty, i.e. a short shock connected with a convict's isolation from the outside world, then a non-isolation penalty in the form of limitation of liberty and exerting influence on the convict in non-custodial conditions, creates conditions for meeting the aims of a mixed penalty as a whole.

Finally, It must be emphasised that the introduction of an innovative solution to the criminal law consisting in combining a short-term penalty of deprivation of liberty and a penalty of limitation of liberty in the mixed penalty should be assessed positively. This form of reaction extends the ways of responding to crime and makes them more flexible, especially to crimes of medium criminal weight. Due to considerable plasticity of the content of the mixed penalty and a possibility of applying different levels of its hardship, courts are given a lot of freedom in the selection of an adequate penal response to a crime assigned to a perpetrator. However, to what extent the practitioners of the justice system will approve of the normative solution laid down in Article 37b CC will depend on both the procedural stand of public prosecutors and the adjudicating judges' attitude to the method of tailoring penal repression.

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[42] See, K. Postulski, *Kodeks karny wykonawczy...* [Executive Penal Code...], pp. 218–219.

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MIXED PENALTY: A NEW PENAL LAW RESPONSE INSTRUMENT IN POLISH CRIMINAL LAW

Summary

The article discusses an innovative in the Polish legal order solution envisaged in Article 37b of the Criminal Code introduced by the Act of 20 February 2015, which is a extensive amendment to criminal law, amended again by the Act of 11 March 2015. A complex legal construct laid down in Article 37b CC, called "mixed penalty", allows simultaneous imposition of two penalties on the crime perpetrator, i.e. a short-term imprisonment sentence and a penalty of limitation of liberty. While the doctrine is fully compliant with respect to recognising that Article 37b CC constitutes an institution of judicial imposition of a penalty, there are basic differences connected with the nature of the mixed penalty (sometimes described as "a sequential sanction"). A position is presented that the adopted solution creates one, treated as a whole, mixed penalty that is a form of penal response composed of two types of punishment. The author shares this opinion. There is also a stand that Article 37b CC makes it possible to adjudicate two penalties, which are autonomous. The author analyses the complex legal construct of the mixed penalty, discusses the aims and functions of the new type of penal response, criminal policy assumptions, and principles and directives governing a mixed penalty imposition. The article also discusses controversial issues concerning, inter alia, conditional suspension of the execution of a penalty of deprivation of liberty adjudicated in accordance with Article 37b CC before and after the amendment.

Key words: mixed penalty, sequence of penalties, penalty of deprivation of liberty (imprisonment), penalty of limitation of liberty, conditional suspension of the execution of a penalty, amendment to the Criminal Code, misdemeanour

KARA MIESZANA – NOWY INSTRUMENT REAKCJI PRAWNOKARNEJ W POLSKIM PRAWIE KARNYM

Streszczenie

Przedmiotem artykułu jest nowatorskie w polskim porządku prawnym rozwiązanie przewidziane w art. 37b k.k., wprowadzone obszerną ustawą nowelizującą prawo karne z dnia 20 lutego 2015 r., zmodyfikowane następnie ustawą z dnia 11 marca 2015 r. Ujęta w art. 37b k.k. złożona konstrukcja prawna, którą określono terminem „kara mieszana", stwarza możliwość jednoczesnego orzeczenia wobec sprawcy przestępstwa dwóch kar, tj. krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności. O ile doktryna jest w pełni zgodna w kwestii uznania, że art. 37b k.k. stanowi instytucję sądowego wymiaru kary, o tyle zasadnicze rozbieżności związane są z charakterem tzw. kary mieszanej (określanej niekiedy terminem „sankcja sekwencyjna"). Prezentowane jest stanowisko, że przyjęte rozwiązanie tworzy jedną, ujmowaną całościowo tzw. karę mieszaną, stanowiącą formę reakcji karnej, składającą się z dwóch kar. Tego rodzaju zapatrywanie prezentuje autorka tekstu. Wyrażany jest także pogląd, że art. 37b k.k. stwarza możliwość jednoczesnego wymierzenia dwóch kar, które zachowują swoją autonomię. W opracowaniu autorka poddaje analizie złożoność konstrukcji prawnej kary mieszanej, omawia cele i funkcje nowej formy reakcji karnej, założenia kryminalno-polityczne, zasady i dyrektywy wymiaru kary mieszanej. Przedmiotem rozważań są także zagadnienia sporne, dotyczące m.in. warunkowego zawieszenia wykonania kary pozbawienia wolności, orzeczonej na podstawie art. 37b k.k. w pierwotnym brzmieniu i po zmianach.

Słowa kluczowe: kara mieszana, sekwencja kar, kara pozbawienia wolności, kara ograniczenia wolności, warunkowe zawieszenie wykonania kary, nowelizacja kodeksu karnego, występek