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MIXED (JOINED) PENALTY – CONTROVERSIES OVER THE SCOPE OF ITS APPLICATION

AGNIESZKA WOŹNIAK*
REMIGIUSZ WRZOSEK**

Mixed (joined) penalty consists of a short penalty of deprivation of liberty for a period from one month to three or six months and a penalty of limitation of liberty for a period from one month to two years (executed successively, as a rule,[1] starting from the deprivation of liberty and ending with the limitation of liberty) was introduced to the Polish criminal law system by the amendment of 20 February 2015 (see Article 37b of the Criminal Code, henceforth CC, that was added) that entered into force on 1 July 2015.[2] The introduction of this originally constructed (combined in an innovative way) legal reaction to prohibited acts that are lesser degree crimes met with common approval because it extended the range of courts' adjudication possibilities and, as a result, individualisation of penal sanctions. From the very beginning, however, the provision of Article 37b CC caused serious interpretational problems. They were connected with an insufficiently precise definition of crimes for which courts could rule the joined penalty of deprivation of liberty and limitation of liberty for the same prohibited act. Moreover, at the beginning, the statutory regulation did not indicate whether the penalty of deprivation of liberty ruled together with the penalty of limitation of liberty was to be absolute, designed for effective execution, or probably also passed as a conditionally suspended sentence. The Justification for the Bill 20 February 2015 introducing the mixed penalty indicated that a penalty of deprivation of liberty as its part might be imposed in an absolute form as well as with conditional suspension of its execution.[3] That is

* MA, solicitor's trainee at Kujawsko-Pomorskie Region Bar Association in Toruń
** MA, solicitor's trainee at Kujawsko-Pomorskie Region Bar Association in Toruń

1 Article 17a CPC envisages an exception to the rule of execution of the penalty of deprivation of liberty first.

2 Journal of Laws [Dz.U.] of 2015, item 396.

3 See, Justification for the Bill of 20 February 2015 amending the Act: Criminal Code and some other acts, p. 12.

why, it was commonly assumed that the mixed penalty could be imposed in those two different variants. The doubts were dispelled in the amendment to Article 37b CC,[4] stipulating *exspressis verbis* that the provisions of Articles 69–75 CC, i.e. those concerning conditional suspension of the penalty of deprivation of liberty, are not applicable to the mixed penalty of deprivation of liberty and limitation of liberty.[5]

The representatives of criminal law doctrine also disagree over the name of a joined penal response to crimes laid down in Article 37b CC. According to some authors, in conformity with the Justification for the Bill amending the Act of February 2015, Article 37b CC defines a mixed penalty[6] as a combined form of penal sanction. According to other authors, the name is inappropriate because, firstly, it is not one penalty but two penalties joined in a specific way (that is why, the name "joined penalty" is often used) and, secondly, they are not mixed in any way because there is no mixture of the content of the two penalties. They are, to tell the truth, passed at the same time but they maintain their separate form and are executed separately one after the other.[7] Some authors recognise this sequential execution of the two types of punishment passed jointly for the same prohibited act as such an important feature that it justifies the proposal to use the name of "a sequential penalty".[8] In other authors' opinion, it is more adequate to define the penal sanction laid down in Article 37b CC as a certain combination of penalties or a cumulative penalty[9] composed of a relatively short absolute deprivation of liberty and a penalty of limitation of liberty. Summing up this discourse about the name of the new penal response laid down in Article 37b CC, it is necessary to take into consideration a joined sentence to two different types of penalty for the same offence as well as their sequential execution, which is a secondary feature and should not determine the name. It must also be highlighted that defining two penalties ruled in a certain configuration as a penalty (which suggests a unity) is conventional, purely technical, in nature and, that is why, it should not be argued about. Obviously, it would be good if one or possibly two (exchangeable) names adequately expressing the essence of the penal response were adopted and raised no doubts. Taking into

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[4] The Act of 11 March 2016 that entered into force on 15 April 2016 (Journal of Laws [Dz.U.], item 437).

[5] More on the issue in: M. Małecki, *Co zmienia nowelizacja art. 37b k.k.?* [What does the amendment of Article 37b CC change?], Czasopismo Prawa Karnego i Nauk Penalnych Vol. 2, Year XX: 2016, pp. 19–44

[6] For instance, A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2015, pp. 326–330; J. Lachowski, [in:] J. Lachowski, A. Marek, *Prawo karne. Zarys problematyki* [Criminal law: Overview], Warsaw 2016, p. 188.

[7] J. Majewski, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna, Tom I, Komentarz do art. 1–52* [Criminal Code: General Part, Volume I, Commentary on Articles 1–52], Warsaw 2016, p. 745; however, compare A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...* [Criminal Code...], pp. 326–328.

[8] See, e.g. M. Małecki, *Sekwencja krótkoterminowej kary pozbawienia wolności i kary ograniczenia wolności (art. 37b k.k.) – Zagadnienia podstawowe* [Sequence of a 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. 37–46.

[9] For instance, B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, pp. 210–216.

consideration that names are conventional, it seems purposeful to continue using the name that is already common: a mixed penalty or a joined penalty.[10]

Having signalled interpretational problems that occur in connection with Article 37b CC, it is necessary to focus on the issue concerning the application of the mixed (joined) penalty indicated in the title of the article. The Justification for the Bill of 20 February 2015 suggests that the envisaged solutions concerning penalties and other measures of penal response to criminal acts should be a specific remedy to the deficient structure of penalties passed by courts, inadequate to the level and characteristics of contemporary criminality, and in particular should stop the practice of application of the penalty of deprivation of liberty with conditional suspension of its execution on a large scale. To that end, the limitation of a probation measure was introduced (see, the amended Article 69 §1 CC), and the provisions of Article 58 §1 CC concerning the choice of a penalty for crimes carrying an alternative sanction were modified, which made the penalty of deprivation of liberty *ultima ratio*, both in its absolute form and in case of conditional suspension of its execution. The legislator also extended possibility of applying non-custodial penalties for perpetrators of crimes carrying the penalty of deprivation of liberty not exceeding eight years (Article 37a CC) and the mixed penalty (Article 37b CC).[11] The mixed penalty, according to the Justification, "should be especially attractive in case of more serious crimes". The introduction of this new form of penal repression composed of two types of punishment is supposed to influence the change of courts' sentencing practice, which, making the penalty of deprivation of liberty with conditional suspension of its execution a major instrument of the punishment institution, "devalued the assessment of an abstractive level of risk also in case of prohibited acts of such a level of unlawfulness (e.g. a robbery)". On the other hand, the introduction of a possibility of passing the mixed penalty is a way of "incorporating non-custodial punishment to prohibited acts carrying the penalty of deprivation of liberty for a period from one to ten years or from two to 12 years". Moreover, the Justification indicated that "In many situations, inflicting a short-term imprisonment penalty is sufficient to achieve adequate result in the field of special prevention, connected with a sanction", and the penalty of limitation of liberty served next is supposed to establish socially desired behaviour of the convicted perpetrator.[12]

The regulation introducing a possibility of passing the mixed (joined) penalty laid down in Article 37b CC from the very beginning raises doubts what groups of crimes it can be applied to. It results from insufficiently precise indication that the possibility of simultaneous ruling of the penalty of deprivation of liberty for a period not exceeding three months or six months (when the maximum limit of statutory punishment is at least 10 years) and the penalty of limitation of liberty

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[10] For instance, V. Konarska-Wrzosek, *Szczególne dyrektywy sądowego wymiaru kary* [Special directives on sentencing], [in:] T. Kaczmarek (ed.), *System prawa karnego, Tom 5, Nauka o karze. Sądowy wymiar kary* [Criminal law system, Volume 5, On punishment: Sentencing], Warsaw 2017, p. 308.

[11] Compare, Justification for the Bill of 20 February 2015..., p. 1 and pp. 11–17.

[12] Compare, *ibid*., pp. 11–12.

for up to two years is applicable to a crime carrying the penalty of deprivation of liberty, regardless of the minimum statutory limit of punishment laid down in the Act for a given act. The lack of indication in Article 37b CC that it concerns crimes carrying "exclusively" the penalty of deprivation of liberty makes some representatives of the doctrine draw a conclusion that the mixed (joined) penalty may be applied to perpetrators of all crimes carrying the penalty of deprivation of liberty, including those carrying an alternative sanction, in which, apart from the penalty of deprivation of liberty, a non-custodial penalty or penalties in the form of a fine or limitation of liberty are envisaged.[13] According to some representatives of the criminal law doctrine, the possibility of ruling the mixed (joined) penalty may be applied only to crimes carrying the penalty of deprivation of liberty without any non-custodial alternatives, i.e. those that are of medium or high seriousness.[14]

Ambiguousness of the regulation laid down in Article 37b CC led to differences in the imposition of the mixed penalty. Courts apply the mixed penalty to perpetrators of crimes carrying only the penalty of deprivation of liberty as well as those who have committed crimes carrying alternative sanctions, where a court may choose a fine or a penalty of limitation of liberty, or a penalty of deprivation of liberty. The court statistics providing data and information concerning valid convictions of adults in the period of 2011–2015 prove that when the mixed (joined) penalty entered into force, some courts started to apply it for such crimes as non-payment of alimony/maintenance, which carried a penalty of a fine, limitation of liberty or deprivation of liberty for up to two years,[15] and at present, since 31 May 2017, such a sanction for an aggravated type under §1a, and for a basic type under §1 an alternative penalty of a fine, limitation of liberty or deprivation of liberty for up to one year (see Article 209 CC before and after the amendment to CC of 23 March 2017[16]).

Due to divergent interpretation of the provision of Article 37b CC and different practice of applying the mixed (joined) penalty, a question arises about the scope of its application, especially whether it should and may be applied only to perpetrators of serious crimes, which, because of their social harmfulness, carry only a penalty

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[13] See, e.g. M. Małecki, [in:] W. Wróbel (ed.), *Nowelizacja prawa karnego 2015. Komentarz* [Criminal law amendment of 2015: Commentary], Kraków 2015, pp. 294–295; J. Majewski, [in:] W. Wróbel, A. Zoll (red.), *Kodeks karny...* [Criminal Code...], pp. 746–748; J. Lachowski, [in:] J. Lachowski, A. Marek, *Prawo karne...* [Criminal law...], p. 188; B.J. Stefańska, [in:] M. Filar (ed.), *Kodeks karny...* [Criminal Code...], pp. 212–213.

[14] See, e.g. A. Grześkowiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny...* [Criminal Code...], p. 329; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], LEX 2015; T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, pp. 165–166; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code: Commentary], Warsaw 2016, p. 230 and also *Szczególne dyrektywy...* [Special directives...], [in:] T. Kaczmarek (ed.), *System prawa...* [Criminal law...], p. 308.

[15] See, Statystyka sądowa. Prawomocne skazania osób dorosłych 2011–2015 [Court statistics: Valid convictions of adults in the years 2011–2015], Departament Strategii i Funduszy Europejskich. Wydział Statystyczny Informacji Zarządczej, Warsaw 2016, p. 46, which indicates that in the second half of 2015, sentencing perpetrators for alimony/maintenance evasion, in 19 cases courts ruled a mixed penalty under Article 209 CC.

[16] Journal of Laws [Dz.U.], item 952.

of deprivation of liberty, or also minor crimes that carry a penalty of a fine or, alternatively, a penalty of limitation of liberty or deprivation of liberty.

The answer to this question cannot be limited to the grammatical interpretation of the provision of Article 37b CC, including especially reference to the main argument that there is no indication that it applies to a crime carrying "only" or "exclusively" the penalty of deprivation of liberty.[17] The legislator's use of such defining phrases would eliminate the possibility of imposing the mixed (joined) penalty on perpetrators of crimes carrying a penalty of deprivation of liberty and a fine (mainly the obligatory one but also the facultative one), thus it is good that the legislator did not do that. As it has already been proved, based on the wording of Article 37b CC, it is not possible to draw unequivocal conclusions on the scope of application of the mixed (joined) penalty. Different opinions of the representatives of the doctrine and adjudicating courts on this issue confirm that. In order to establish the groups of crimes for which the mixed (joined) penalty may be imposed on their perpetrators, it is additionally necessary to make use of a teleological and systemic interpretation. According to the Justification for the Bill of 20 February 2015, which made a radical reform of Polish criminal law, its main objective was to change the structure of imposed penalties for crimes, and in particular to substantially limit the number of penalties of deprivation of liberty with conditional suspension of its execution and to substitute non-custodial penalties for them, and where it is not possible, to apply a mixed penalty composed of two types of punishment, i.e. a penalty of short deprivation of liberty and a penalty of limitation of liberty.[18] In order to meet this objective, inter alia, the wording of Article 58 §1 CC was changed, Article 58 §3 CC was repealed and Article 37a CC was introduced instead, and Article 37b CC was added to create a possibility of imposing the mixed penalty, which consists in simultaneous sentencing to two different types of punishment for the same crime: an absolute penalty of deprivation of liberty and a penalty of limitation of liberty served sequentially: the penalty of deprivation of liberty served in prison isolation first, and the penalty of limitation of liberty next. Sentencing to the mixed penalty is the second instance of statutory entitlement of courts to impose two types of punishment as a response to the commission of the same prohibited act. Earlier, in accordance with the common criminal law, it was only possible to rule a cumulative penalty of deprivation of liberty and a fine. Therefore, the scope of response to prohibited acts has been extended.

In the light of the above-mentioned different possibilities of penal response to prohibited acts that are classified as less serious crimes, we can see a clearly specified gradation and differentiation of penalties and indications as to how they should be applied based on their harmfulness. The types of a penal response that

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[17] This is done in: J. Majewski, *Kodeks karny. Komentarz do zmian 2015* [Criminal Code: Commentary on the amendments of 2015], LEX 2015, and M. Małecki, *Sekwencja krótkoterminowej kary...* [Sequence of a short-term penalty...], p. 38.

[18] See, Justification for the Bill of 20 February 2015..., pp. 1–3 and 11–18, and A. Jezusek, *Sekwencja kary pozbawienia wolności i ograniczenia wolności jako reakcja na popełnienie przestępstwa (art. 37b k.k.)* [Sequence of a penalty of deprivation of liberty and a penalty of limitation of liberty as a response to crime commission (Article 37b CC)], PiP No. 5, 2017, LEX, pp. 80–94.

are now within the competence of courts have been adjusted to the seriousness of crimes. The criminal law reform shows it strives to maintain internal systemic logics and coherence of the introduced solutions. They match fundamental principles of penalising blameworthy behaviour, in accordance with which a penal response to various acts cannot be the same but must be appropriately differentiated for the reason of justice and prevention. Therefore, for minor crimes carrying an alternative sanction of a fine, a penalty of limitation of liberty or a penalty of deprivation of liberty (usually a short one, i.e. up to one year, up to two years or three years, and in extraordinary situations up to five years), the provision of Article 58 §1 CC lays down a special directive in accordance with which a court must rule a penalty of deprivation of liberty only if another penalty or a penal measure cannot meet the objectives of punishment. This signifies a statutory preference for non-custodial penalties and measures for perpetrators committing minor crimes and a possibility of passing a penalty of deprivation of liberty in any form, i.e. as an absolute penalty of deprivation of liberty as well as a penalty with conditional suspension of its execution in a given case, where the application of a non-custodial penalty or penal measure cannot ensure the achievement of objectives which the penalty should meet towards the punished individual and the society.

In case of crimes classified as criminality of "average" seriousness, which due to general assessment of the level of their social harmfulness do not carry non-custodial penalties but a penalty of deprivation of liberty for up to eight years, the provision of Article 37a CC allows courts to rule, instead of the envisaged penalty of deprivation of liberty, one of non-custodial penalties, i.e. a fine or a penalty of limitation of liberty. The possibility of applying the substitute penalty and ruling a non-custodial penalty instead of the penalty of deprivation of liberty is facultative and within the discretion of a court. Although the provision of Article 37a CC does not lay down any limits on sentencing perpetrators to substitute non-custodial penalties for crimes carrying the penalty of deprivation of liberty for up to eight years, courts must always take into consideration general directives for a penalty referred to in Article 53 §1 CC in such a way that ensures meeting the objectives of punishment by a type and amount of an imposed non-custodial penalty,[19] if necessary, aggravated by a relevant selected and added penal measure.

Directly after the added provision of Article 37a CC, the provision of Article 37b CC was placed, which introduces a possibility of ruling the mixed (joined) penalty composed of two types of punishment: a penalty of deprivation of liberty for up to three months or six months in its absolute form and a penalty of limitation of liberty for up to two years. The mixed penalty consists in combining prison isolation (executed first) with all its hardships and limitations to functioning after the release from prison resulting from the second part of the mixed penalty, i.e. the simultaneous sentence to limitation of liberty. The hardships constituting the content of the mixed penalty that a convict faces are absolutely more severe than those connected with a penalty of deprivation of liberty or a fine imposed as separate ones. This means that the mixed penalty should not be and is not envisaged as one to be imposed on

[19] A. Marek, V. Konarska-Wrzosek, *Prawo karne* [Criminal law], Warsaw 2016, pp. 366–367.

perpetrators of minor crimes where non-custodial penalties are preferred and the penalty of deprivation of liberty is supposed to be an absolute exception limited to the inevitable minimum (see the content of a directive on judicial penalties under Article 58 §1 CC). The mixed penalty is undoubtedly designed for crimes of average and high seriousness, which carry a penalty of deprivation of liberty (without non-custodial alternatives), however, the legislator emphasises that it can be applied to crimes "regardless of the minimum statutory penalty envisaged for a given act in statute". This way, courts are shown that a mixed (joined) penalty may be applied to every crime carrying any type of a penalty of deprivation of liberty and not only a severe or even the most severe one. However, the phrase cannot be interpreted as entitlement to imposing the mixed penalty for all crimes carrying a penalty of deprivation of liberty if they are minor and already carry alternative sanctions instead of simple ones with a penalty of deprivation of liberty. Such interpretation of the provisions of Article 37b CC does not match the necessity of adjusting a certain penal repression to the weight of a crime committed and being ruled by a court. The mixed (joined) penalty is supposed to limit the excessive application of a penalty of deprivation of liberty, inter alia, especially to limit its institution in the absolute form to reasonable and sufficient amounts relevant to a committed crime, and not to provide a possibility of imposing it for minor crimes. The interpretation of the provision of Article 37b CC concerning the scope of application of the mixed (joined) penalty, allowing its application also to minor crimes carrying an alternative penalty of deprivation of liberty, is in conflict with the assumptions of the criminal law reform introduced by the Act of 20 February 2015. In conclusion, it must be stated that the application of the mixed (joined) penalty was envisaged for crimes carrying a simple sanction for a prohibited act only in the form of deprivation of liberty and for crimes, the sanctions for which require a cumulative penalty of deprivation of liberty and a fine (or other general or special regulations lay down such a facultative possibility). Taking into consideration the types of penalties adopted in the Polish criminal law and the provision of Article 37b CC stipulating that the mixed (joined) penalty may be applied to crimes carrying "a penalty of deprivation of liberty regardless of the minimum statutory penalty envisaged in the Act for a given act", it must be assumed that it may be applied to crimes carrying a penalty of deprivation of liberty: from one month to three years, from three months to five years, from six months to eight years, from one year to ten years and from two years to 12 years. It must be emphasised at the same time that, as it was indicated in the Justification for the Bill of 20 February 2015 introducing the mixed penalty, its application should be especially attractive in case of serious crimes. Due to the possibility of imposing the mixed (joined) penalty for all crimes carrying a penalty of deprivation of liberty without a non-custodial alternative, and not only for the most serious ones, the legislator differentiated the maximum admissible penalty of deprivation of liberty that can be a part of this penalty, depending on the seriousness of a crime that is to be imposed in accordance with Article 37b CC. In Article 37b CC, the legislator divided the crimes carrying a penalty of deprivation of liberty without a non-custodial alternative into two groups. One of them includes crimes that carry a penalty of deprivation of liberty for up to ten years, i.e. a penalty of

deprivation of liberty for up to three years, up to five years or up to eight years (which are classified as crimes of average seriousness). The other group includes crimes carrying a penalty for ten or 12 years of imprisonment (i.e. prohibited acts classified as aggravated, most serious crimes). For medium-weight crimes carrying a penalty of deprivation of liberty for less than ten years, a penalty of deprivation of liberty within the mixed (joined) penalty cannot exceed six months of deprivation of liberty. The second element of the mixed (joined) penalty in the form of limitation of liberty is not differentiated in statute as far as the maximum amount is concerned and can be imposed for crimes of average seriousness as well as for most serious crimes in its full scope, i.e. from one month to two years. The differentiation of the maximum amount of a penalty of deprivation of liberty within the mixed (joined) penalty for crimes of different weight confirms the intention to maintain the relevant gradation and proportion of using the new possibility aimed at reasonable reduction of the period of perpetrators' stay in the conditions of prison isolation when they are liable not for minor crimes but for those more serious, where the imposition of a substitute non-custodial penalty is inadequate or inadmissible because of the too serious statutory punishment exceeding eight years.

Having the above in mind, it is difficult to approve of the thesis formulated in *Państwo i Prawo* that "An opinion that the sequence of penalties may be applied only in the case concerning a crime carrying only a penalty of deprivation of liberty would make Article 37b CC empty in the scope in which it envisages the possibility of imposing a penalty of deprivation of liberty for up to three months and a penalty of limitation of liberty for up to two years. Only the second variant envisaged in the provision would be applicable, i.e. the possibility of imposing a penalty of deprivation of liberty for up to six months and a penalty of limitation of liberty for up to two years. Such an interpretational result would be inadmissible".[20]

The first analysis of the courts' adjudication practice in relation to the application of the mixed (joined) penalty indicates that, in general, it is appropriate. Most often courts apply the mixed (joined) penalty instead of a penalty of deprivation of liberty envisaged as a sanction without a non-custodial alternative.[21] According to the 2015 statistics covering the first half of the year after the mixed penalty as a substitute penalty was introduced, courts imposed it for such crimes as: a theft with a burglary under Article 279 §1 CC – 139 cases; a robbery – 94 cases; a theft under Article 278 §1 CC – 45 cases; a theft with the use of violence – 15 cases; extortion – 7 cases; ill-treatment under Article 207 §1 CC – 45 cases and under §2 – 2 cases; causing damage to health under Article 157 §1 CC – 11 cases; taking part in a fight or battery under Article 158 CC – 11 cases; crimes under the Act on preventing drug addiction – 33 cases; driving under the influence of alcohol or a narcotic drug as

[20] A. Jezusek, *Sekwencja kary pozbawienia...* [Sequence of a penalty of deprivation...].

[21] See, e.g. the sentence of the District Court for Warszawa-Praga in Warsaw of 6 April 2017, VI Ka 1629/16, LEX No. 2278417; the sentence of the Regional Court in Szczytno of 13 April 2017, II K 587/16, LEX No. 2280181; the sentence of the District Court in Poznań of 21 April 2017, IV Ka 200/17, LEX No. 2293104; the sentence of the District Court in Siedlce 27 April 2017, II Ka 140/17, LEX No. 2292782.

a relapse to this crime under Article 178a §4 CC – 35 cases; a rape – 5 cases.[22] In case of such crimes, the possibility of applying the mixed penalty gives an opportunity to rationalise a penal repression by a considerable reduction of a penalty of deprivation of liberty in its absolute form, which, if imposed on its own (as it was before the introduction of the provision of Article 37b CC), would be adequately more severe than when it is joined with a penalty of limitation of liberty.

The statistical data on courts' sentencing practice in relation to the mixed (joined) penalty provided in the introduction also indicate that courts sometimes apply this penalty to minor crimes carrying an alternative penalty of deprivation of liberty and non-custodial penalties. This undoubtedly results from differences in the interpretation of the provisions of Article 37b CC that occurred in the doctrine but probably also because of the need for greater individualisation of court decisions on a penalty for some types of crimes than the scope of possibilities laid down in the Act. Some courts still treat the penalty of deprivation of liberty as a main instrument of penal response to a crime, thus they willingly use the mixed (joined) penalty also in case of minor crimes for which the Act envisages and prefers non-custodial penalties. This is a signal that it is necessary to continue looking for new ways of penal response to crimes, inter alia, e.g. to analyse purposefulness of introducing a possibility of imposing other types of penalties jointly, e.g. a penalty of limitation of liberty and a fine (as in fiscal penal law – see Article 110 of the Fiscal Penal Code). In order to avoid misinterpretation of the assumptions and objectives of the criminal law reform of 20 February 2015, which designed substantial reduction of the application of a penalty of deprivation of liberty, especially in its absolute form (which is the most severe punishment for crimes in our legal system) and a very disadvantageous phenomenon of aggravating penal repressions for minor crimes as well as alleviating hardships constituting the consequences of punishment for serious crimes, and thus, what is even more important, to avoid eliminating differences between statutory and judicial sentencing for crimes of different weight, it seems, the content of Article 37b CC should be made more precise as far as its application is concerned.

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[22] M. Melezini, *Polityka karna sądów w kontekście reformy prawa karnego. Wstępne wyniki badań* [Courts' penal policy in the light of criminal law reform: Preliminary research findings], [in:] J. Giezek, D. Gruszecka, T. Kalisz (ed.), *Nowa kodyfikacja prawa karnego* [New criminal law codification], Vol. XLIII, Wrocław 2017, p. 424 and pp. 430–432. Compare also collected data (a bit limited, in general) in Statystyka sądowa, Prawomocne skazania osób dorosłych 2011–2015 [Court statistics: Valid convictions of adults in the years 2011–2015], Departament Strategii i Funduszy Europejskich. Wydział Statystyczny Informacji Zarządczej, Warsaw 2016, pp. 32–46.

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MIXED (JOINED) PENALTY – CONTROVERSIES OVER THE SCOPE OF ITS APPLICATION

Summary

The article is devoted to the interpretation of Article 37b CC with respect to the scope of its application. The provision introduced a mixed penalty to the system of Polish criminal law. It consists in imposing on a perpetrator of a crime the joined penalty of short absolute depriva-

tion of liberty and limitation of liberty instead of an envisaged sanction. It polarised opinions on whether the mixed penalty can be applied to all crimes that carry a penalty of deprivation of liberty, regardless of their seriousness, i.e. also to those which, apart from imprisonment, also envisage alternative non-custodial penalties, or only to crimes of medium and high level of seriousness that carry a penalty of deprivation of liberty without a non-custodial alternative. The article presents arguments indicating that the legislator's will was to make the mixed penalty a substitute for a penalty of deprivation of liberty that was imposed earlier for more serious crimes. It also justifies the interpretation and rightfulness of the opinion that the mixed penalty was not designed and should not be ruled as a response to minor offences. The difference in opinions to what extent the mixed penalty should be applicable is reflected in courts' judgements. That is why, the authors try to resolve the dispute over this issue.

Keywords: mixed (joined) penalty, aim of introduction, scope of application, interpretational differences, application practice, need for detailed statutory specification

KARA MIESZANA (ŁĄCZONA) – KONTROWERSJE WOKÓŁ ZAKRESU JEJ STOSOWANIA

Streszczenie

Artykuł został poświęcony wykładni przepisu art. 37b k.k. w przedmiocie zakresu jego stosowania. Przepis ten wprowadził do systemu polskiego prawa karnego tzw. karę mieszaną, polegającą na wymierzeniu sprawcy występku łącznie krótkiej kary bezwzględnego pozbawienia wolności i kary ograniczenia wolności zamiast kary przewidzianej w sankcji. Wywołał on polaryzację stanowisk co do tego, czy kara mieszana (łączona) może być stosowana do wszystkich występków, które zostały zagrożone karą pozbawienia wolności bez względu na ich ciężar gatunkowy, a więc także do tych, które obok tej kary przewidują kary wolnościowe do alternatywnego wyboru, czy tylko do występków o średnim i poważnym ciężarze gatunkowym, których sankcja przewiduje karę pozbawienia wolności bez wolnościowej alternatywy. Artykuł przedstawia argumenty mające świadczyć o woli ustawodawcy, aby instytucja kary mieszanej zastępowała karę pozbawienia wolności orzekaną dotąd za poważniejsze występki i za zasadnością wykładni oraz trafnością poglądu, że kara mieszana nie została zaprojektowana i nie powinna być orzekana jako reakcja na występki drobne. Rozbieżność stanowisk co do zakresu stosowania kary mieszanej znajduje odzwierciedlenie w działalności orzeczniczej sądów, stąd podjęta przez autorów próba rozstrzygnięcia tego sporu.

Słowa kluczowe: kara mieszana (łączona), cel wprowadzenia, zakres zastosowania, rozbieżności wykładnicze, praktyka stosowania, potrzeba ustawowego doprecyzowania