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THE PENALTY OF RESTRICTION OF LIBERTY IN THE POLISH PENAL CODE

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Purpose: *to examine the provisions of Articles 34 and 35 of the Polish Penal Code governing the penalty of restriction of liberty and the form in which it is imposed.* ***Methods:*** *the basic method used in the analysis is the legal dogmatic method.* ***Results:*** *pursuant to Article 34 § 1 of the Penal Code, unless otherwise provided by law, the penalty of restriction of liberty shall be for not less than one month and not more than 2 years; it is imposed in months or years. In accordance with Article 34 § 1a PC, the penalty of restriction of liberty involves: the obligation to provide unpaid, supervised work for community purposes; the deduction of 10 to 25% from the monthly salary for the social purpose indicated by the court. The obligations and deductions referred to in § 1a are to be imposed combined or separately. When serving a sentence of restriction of liberty, a convicted person may not change his place of habitual residence without the court's consent and is required to provide explanations as to the serving of his sentence. Article 35 of the Penal Code provides that unpaid, supervised work for community purposes is to be carried out between 20 and 40 hours per month. A deduction may be imposed against an employed person; in the period for which the deduction is imposed, the person convicted cannot terminate the employment relationship without the consent of the court.* ***Discussion:*** *it is worth noting the increasing importance of the penalty of restriction of liberty in the total number of convictions, which leads to a conclusion that it was appropriate to introduce such a punishment into Polish criminal law. This seems to correspond to current trends in criminal policy.*

Keywords: *penalty of restriction of liberty; deduction from salary; work for community purposes.*

Formulation of the problem. The penalty of restriction of liberty was first introduced in the Polish Penal Code of 1969 and was the result of a search for a new penal measure to replace short-term custodial sentence. The Penal Code of 1969 regulated the penalty of restriction of liberty in Articles 33 to 35. The first of them defined the basis for a new kind of punishment, which lasted from 3 months to 2 years and was imposed in years and months. The convict may not have changed his habitual residence without the consent of the court; he was required to perform the work assigned by the court; was deprived of his right to hold office in social organizations and had an obligation to provide explanations about the serving of his sentence. Article 34 was essential to understand the nature of the penalty of restriction of liberty, its §1 stated that the obligation to perform the court-assigned work consisted of providing unpaid supervised work for community purposes for between 20 and 50 hours per month, while its § 2` provided that, in relation to a person employed in a non-privately owned entity, the court could impose a deduction from 10 to 25% of the remuneration for work for the benefit of the Treasury or for a specified social purpose instead of the obligation to perform work. Furthermore, the convict could not terminate his employment relationship without the consent of the court during the period of serving his sentence and could not be granted a higher salary or promoted. Article 35 provided for the possibility of imposing additional obligations on the convict, such as the obligation to remedy all or part of the damage caused by the offence or to apologise the victim [1] p. 61 et seq.].

The intention behind the introduction of the Penal Code (PC) of 1997 was to change the penal policy. This was done by reshaping both the catalogue of penalties and principles for the imposition of punishment with a view towards preference for non-custodial penalties. The location of the penalty of restriction of liberty in Article 32 PC as a second item, between the fine and the penalty of imprisonment, meant that it was intended to be treated as an indirect sanction compared to these two penalties [2, p. 33 et seq.]. The explanatory memorandum to the government's draft Penal Code indicates that the lawmakers decided to fundamentally change the content of the penalty of restriction of liberty, but, contrary to critical voices, it has been maintained in the newly adopted criminal law. It was considered that to pursue a rational criminal policy, a non-custodial alternative to the fine was necessary, since the property sanctions could only be imposed on those capable to pay them or who could be enforced. It was assumed that the sentence of restriction of liberty would also be imposed when imposing a fine was not reasonable and there was no need to impose a penalty of short-term imprisonment. Its imposition would affect the attitudes of the perpetrators by sensitizing them to the social values they have infringed by their act. The legislature's intention was that the penalty of restriction of liberty in the new form should correspond to the idea of community service, more and more applied elsewhere in the world. This objective was first and foremost intended to be achieved by filling it with probationary elements [3, p. 139 et seq.]. The penalty of restriction of liberty was designed as an alternative to non-custodial sanctions, which should only be used as a last resort, since they constitute *ultima ratio* sanctions [4, p. 478 et seq].

In the original form, the penalty of restriction of liberty in the Penal Code of 1997 used to be imposed in months and lasted at least one month and at most 12 months. Article 34 § 2 PC stipulated that when serving the sentence of restriction of liberty, the convicted person: 1) may have not changed the place of permanent residence without the court's consent; 2) was obliged to perform work indicated by the court; 3) was obliged to provide explanations concerning the serving of the sentence.

The obligation specified in item 2 consisted in performing unpaid, supervised work for community purposes assigned by the court in a given enterprise, health care facility, social welfare institution, organisation or institution providing charitable assistance or for the benefit of the local community, for 20 to 40 hours per month. in relation to an employed person, the court could instead order a deduction of between 10% and 25% of his salary for the Treasury or for the social purpose indicated by the court; during the period of the sentence, the convict could not terminate the employment relationship without the consent of the court. Pursuant to Article 36 § 1 of the Penal Code, when imposing the penalty of restriction of liberty, the court may place the convicted person under the supervision of a probation officer or a person of public trust, association, institution or social organization whose statutory responsibilities include education, preventing public demoralisation or providing assistance to convicts.

The penalty of restriction of liberty was given its current form as a result of the amendments of 20.02.2015 and 11.03.2016. (Journal of Laws, item 428) and differs significantly from its original formulation. Pursuant to Article 34 § 1 of the Penal Code, the penalty of restriction of liberty is, as a rule, imposed from 1 month to 2 years and is imposed in months and years.

Pursuant to the provisions of the Penal Enforcement Code (Art. 53 § 1 PEC), the purpose of the penalty of restriction of liberty is to arouse in the convicted person the will to shape socially desired attitudes, in particular the sense of responsibility and the need to respect the legal order.

Main material. Grounds for imposing the penalty. The penalty of restriction of liberty is imposed when it appears in the sanction for a given type of criminal act and in situations listed in the general part of the Penal Code, such as:

- in the case of extraordinary mitigation of punishment (Art. 60 § 6 item 3 and 4 of the Penal Code);
- in the event of imposing the so-called mixed penalty, composed of imprisonment and restriction of liberty for up to 2 years (Article 37b PC) – *«In a case of a misdemeanour punishable by imprisonment, regardless of the lower limit of the statutory penalty range provided for in law for a given act, the court may also impose a penalty of imprisonment for a period not exceeding 3 months, and if the upper limit of the statutory penalty range is at least 10*

years the court may impose a penalty of imprisonment for a period not exceeding 6 months and restriction of liberty for up to 2 years The provisions of Articles 69 to 75 do not apply. The penalty of imprisonment is executed first, unless the law provides otherwise»);

- based on Article 37a of the Penal Code *(«If the offence is only punishable by a penalty of imprisonment not exceeding 8 years, and the penalty of imprisonment to be imposed for it would not be more severe than a year, the court may instead impose a penalty of restriction of liberty not lower than 3 months or a fine not lower than 100 day-fine units, if at the same time it imposes a penal measure, compensation measure or forfeiture»);*

- as a replacement penalty pursuant to Article 75a § 1 of the Penal Code *(«For a person sentenced to imprisonment with a conditional suspension, who during the probation period grossly violates the legal order, in particular when he has committed a crime other than that specified in Article 75 § 1, or if he evades paying a fine, from supervision, performance of imposed obligations or imposed penal measures, compensatory measures or forfeiture, the court may, if the objectives of the penalty are thus met, taking into account the importance and type of the offence attributed to the offender, instead of ordering the execution of the penalty of imprisonment, replace it with a penalty of restriction of liberty in the form of an obligation to perform unpaid, supervised work for community purposes, assuming that one day of imprisonment equals two days of restriction of liberty, or a fine, assuming that one day of imprisonment is equal to two day-fine units. The penalty of restriction of liberty may not last longer than 2 years, and the fine may not exceed 810 day-fine units»).*

Pursuant to Article 34 § 2 PC, when serving a sentence of restriction of liberty, a convicted person may not change his place of habitual residence without the court's consent and is required to provide explanations as to the serving of his sentence. These obligations are intended to ensure proper judicial supervision over the serving of the sentence.

Forms of the penalty of restriction of liberty. The penalty of restriction of liberty involves: 1) the obligation to perform unpaid, supervised community work; 2) a deduction of between 10% and 25% of the salary on a monthly basis for the social purpose indicated by the court (Article 34 § 1a PC).

It is essential that the obligation and deduction referred to in Article 34 § 1a PC are imposed jointly or separately (Article 34 § 1b PC). It must also be noted that the period for which the court has imposed the obligation of community work or the obligation to deduct from salary does not necessarily coincide with the period during which the restriction of liberty has been imposed. The penalty of restriction of liberty can therefore be of a complex nature. It may occur that the offender will be sentenced to 2 years' imprisonment, the first year of which will consist of performing unpaid supervised work for community purposes and the second year will involve the deduction (of 10 to 25%) from offender's salary. It can therefore be seen that there is some possibility of theoretical variants of constructing a penalty of restriction of liberty, which may, depending on the structure adopted, constitute a punishment which may be either more lenient or more severe [5, p. 461].

The obligation to work consists in carrying out unpaid, supervised work for community purposes, in the amount of 20 to 40 hours per month (Article 35 § 1 PC) and it can be imposed both on an offender who is employed and an unemployed person. The working time of a convicted person who does not have an employment relationship may not exceed 8 hours per day, but may be extended to 12 hours at his request. A convicted person who has an employment relationship is to be assigned work which he may perform during non-employment (the total duration of that work may not exceed 8 hours per day, with the option to extend to 12 hours at the request of the convicted person). The unpaid, supervised work for community purposes, in accordance with Article 57a § 3 PEC, may also be provided on public holidays and holidays applicable at the entity for which it is performed [6, p. 498 et seq.). The activities related to organising and supervising the performance of the penalty of restriction of liberty and the obligations imposed on the sentenced person are carried out by a professional court-appointed curator (Article 55 § 2 PEC). To make the convict perform unpaid, supervised community work, the court sends a copy of the judgment to the competent professional court-appointed curator (Article 56 § 1 PEC), who, within 7 days from its service, calls the sentenced person

and instructs him about the rights and obligations and consequences of evasion of executing the sentence. Having heard the sentenced person, the curator also specifies the type, place and date of commencement of the work, which he immediately communicates to the competent authority of the municipality and the entity for whom the work will be carried out (Article 57 § 1 PEC). The work may be carried out, *inter alia*, for institutions or organizations representing the local community and in educational establishments, youth educational centres, youth social therapy centres, health care entities within the meaning of the provisions on health care activities, social assistance bodies, foundations, associations and other public utility organizations providing charitable assistance (Article 56 § 3 PEC). It should be noted that the penalties of restriction of liberty in the form of the obligation to perform unpaid, supervised work for community purposes are not to be ruled out if the defendant's state of health, or his personal traits and conditions justify believing that he will not fulfil this obligation (Article 58 § 2a PC).

Regarding an employed person, the court may order a deduction of 10 to 25% from his salary per month for a designated social purpose. During the period of serving the sentence, the convicted person may not terminate the employment relationship without the court's consent (Article 35 § 2 PC). Neither the provisions of the Penal Code nor of the Penal Enforcement Code specify what is to be understood by salary. Therefore, it should be concluded, in accordance with the provisions on civil enforcement, that the term means all pecuniary benefits due to the employee from the employer, i.e. both salary within the meaning of the labour law and other benefits due from the employer for the employment relationship, but not constituting a salary, such as incentive bonuses or participation in the company bonus fund. The resolution of the Supreme Court of 16.12.1971 (VI KZP 56/71), stating that the deductions under Article 35 § 2 PC are made from the amount of salary remaining after deduction of taxes and other charges due under the law, remains valid [7, p. 142].

If a deduction of a certain part of the salary has been adjudicated against a convicted employed person, the court sends a copy of the ruling to the establishment employing the convicted person, indicating at the same time for whom the deductions are to be made and where they should be paid, as well as from what components of the salary and how they should be made (Article 59 § 1 PC). When paying a salary to the convicted person, the part of it specified in the judgment must be deducted and the amount deducted must be promptly transferred in accordance with the instructions received, notifying the court thereof. The costs related to the transfer of these amounts are deducted from the deductions made (Article 59 § 2 PEC).

Modifications in the amount of penalty. Pursuant to Article 61 § 2 PC, it is possible to reduce the number of hours of work to be performed on a monthly basis or the amount of monthly deductions from the remuneration for work, but not more than to the statutory minimum limit specified in Article 34 § 1a (4) PC and Article 35 § 1 PC. The execution of the penalty of restriction of liberty may be postponed (Article 62 PEC), it is possible to break serving it (Article 63 PEC) and change the form of the obligation to perform work (Article 63a PEC) or the option of considering the penalty as executed despite not having performed full-time work or failure to make all deductions from remuneration or failure to perform other obligations - Article 64 PEC [8, pp. 83-89].

After the amendment of 20 February 2015, it is no longer possible to conditionally suspend the execution of the sentence of restriction of liberty, but there is a possibility of early release from serving part of the sentence of restriction of liberty (Article 83 PC – «A person sentenced to a penalty of restriction of liberty who has served at least half of the sentence while respecting the legal order, and who has fulfilled the obligations imposed on him, imposed penal measures, compensatory measures and forfeiture, the court may release him from the remaining penalty, deeming it executed»). However, this is not a conditional early release as there is no probationary period involved.

The penalty of restriction of liberty is executed at the place of permanent residence or employment of the convicted person or at a short distance from this place, unless important reasons justify the execution of the sentence elsewhere (Article 54 of the PEC).

Other obligations imposed in the context of the penalty of restriction of liberty. When imposing the penalty of restriction of liberty, the court may impose on the convicted person an obligation of payment

(Article 39 (7) PC) or obligations listed in Article 72 § 1 points (2) to (7a) PC, namely oblige him to apologise the injured person; to carry out his duty to bear the maintenance of another person; to carry out employment, to study or undertake vocational education; to refrain from abusing alcohol or using other substances; to undergo addiction therapy or other therapy, in particular psychotherapy or psycho-education; to participate in corrective and educational procedures; to refrain from staying in specific environments or places; to refrain from contacting the victim or other persons in a specific way or approaching the victim or other persons (Article 34 § 3 PC).

The time and manner of performance of the duties imposed is determined by the court after hearing the sentenced person, and the imposition of obligations in the form of undergoing an addiction therapy or other therapy, in particular psychotherapy or psycho-education, shall also require the consent of the sentenced person (Article 35 § 4 in conjunction with Article 74 PC).

If the convicted person evades serving a sentence of restriction of liberty, the court shall order, and if the convict evades the payment or obligations imposed under Article 34 § 3 PC – the court may order the execution of a substitute custodial sentence. Where the convicted person has served part of the custodial sentence, the court shall order the execution of a substitute custodial sentence corresponding to the penalty of restriction of liberty remaining to be enforced, assuming that one day of the substitute custodial sentence is equivalent to two days of the penalty of restriction of liberty (Article 65 § 1 PEC). If the law does not provide for a custodial sentence for a given offence, the upper limit of the substitute custodial sentence may not exceed 6 months (Article 65 § 2 PEC).

The court may at any time suspend the execution of a substitute custodial sentence in the event that the convicted person declares in writing that he will resume serving the sentence of restriction of liberty and submit to related requirements. The execution of the substitute custodial sentence is suspended until the sentence of restriction of liberty has been fully served (Article 65a § 1 PEC). If the convicted person evades serving the sentence of restriction of liberty, the court orders the execution of the substitute custodial sentence (Article 65a § 2 PEC).

Distinctions in terms of the penalty of restriction of liberty imposed on soldiers. It is worth noting that far-reaching differences concern the penalty of restriction of liberty imposed on soldiers. The provisions of Article 34 §1a (1) PC (Article 323 § 1 PC) do not apply to soldiers. While serving a sentence of restriction of liberty, the convicted person may not be promoted to a higher military rank or appointed to a higher official position; he may not take part in celebrations and parades organized in the military unit or with the participation of the unit. Soldiers of services other than the compulsory military service serve a sentence of restriction of liberty while remaining in a specific place at the disposal of their superior during the period from the end of their official duties for 4 hours 2 days a week. The court may also order a deduction of 5 to 15% of the monthly basic pay for a specific social purpose (Article 323 § 3 PC). Compulsory service soldiers serve a sentence of restriction of liberty in a separate military unit, according to the rules set out in the Penal Enforcement Code (Article 323 § 4 PC). If a sentenced to a penalty of restriction of liberty, according to the rules specified in Art. 323 § 1-4 PC, upon commencing its execution in whole or in part ceased to be a soldier or, in the case provided for in Article 317 § 2 PC, an employee of the military, the court converts this penalty into a penalty of restriction of liberty imposed under general rules.

In the Polish legal system, the penalty of restriction of liberty is also found in the Code of Infractions (CI) of 20.05.1971. Its essence does not differ from the penalty of restriction of liberty imposed for crimes outside its statutory scope. In accordance with Article 20 § 1 CI, the sentence of restriction of liberty may be imposed for a period of 1 month only, and is therefore strictly defined.

Statistical picture of the penalty of restriction of liberty.

Table 1. Percentage of the penalty of restriction of liberty relative to the total number of convictions

	Total convictions	**Restrictions of liberty**	**%**
2010	432,891	49,692	11.5
2011	423,464	49,611	11.7
2012	408,107	50,730	12.4
2013	353,208	41,287	11.7
2014	293,852	33,009	11.2
2015	260,034	31,096	12.0
2016	289,512	61,720	21.3
2017	241,436	53,854	22.3
2018	275,768	78,172	28.3

Source:https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5515/2/18/1/rocznik_statystyczny_rzeczypospolitej_polskiej_2018_.pdf

In view of the data presented in Table 1, it appears that in 2018 there were almost 60% more restriction of liberty sentences than in 2010. The upward trend has been observed since 2015, which seems to be linked to the amendment of 20.02.2015, which significantly reduced the possibility of conditional suspension of the sentence imposed (before the amendment, it was possible to suspend a custodial sentence of up to 2 years, and one year after the amendment). It is also clear that the percentage of restriction of liberty sentences in the total number of convictions is steadily growing (from 11.5% in 2010 up to 28.3% in 2018).

Table 2. Forms of the penalty of restriction of liberty imposed

	Restriction of liberty with:	**the obligation to exercise unpaid supervised work**	**a deduction from salary**
2010	49,692	49,249	443
2011	49,611	49,251	360
2012	50,730	50,438	292
2013	41,287	41,080	207
2014	33,009	32,829	178
2015*	31,096	31,006	273
2016	61,720	63,939	915
2017	53,854	56,566	669
2018	78,172	80,541	851

**- until 2014 the above-mentioned forms of penalty may be imposed only separately. Under the Act of 20 February 2015 amending the Penal Code and certain other laws (Journal of Laws U. 2015 item 396), additional forms of restriction of liberty and the possibility to impose several forms of sanctions at the same time were introduced. In the data for the years 2015-2018, broken down into particular forms of penalty, a convicted person can be shown more than once, hence the higher figures as compared to the total number of restriction of liberty sentences.*

The data presented in Table 2 show that the basic form of the penalty of restriction of liberty over the period presented is unpaid, supervised community work, accounting for 99.1% of the total convictions for the restriction of liberty in 2010 and 99.7% in 2015.

References

1. Śliwowski J. Kara ograniczenia wolności. Studium penalistyczne, Warszawa 1973.
2. Ornowska A. Kara ograniczenia wolności, Warszawa 2013.
3. Fredrich-Michalska I., Stachurska-Marcińczak B. (ed.). Nowe kodeksy karne z 1997 r. z uzasadnieniami, Warszawa 1997.
4. Sieradzki W. Uwagi na tle unormowania «wojskowej» kary ograniczenia wolności, WPP 1981, no. 4.
5. Mozgawa M. (ed.) Prawo karne materialne. Część ogólna, Warszawa 2020.
6. Postulski K. Kodeks karny wykonawczy. Komentarz, Warszawa 2016.
7. Mozgawa M. (ed.) Kodeks karny. Komentarz, Warszawa 2019.
8. Zagórski J. Orzekanie i wykonywanie kary ograniczenia wolności oraz pracy społecznie użytecznej w Polsce w świetle analizy przepisów i wyników badań, Warszawa 2003.

Катаржина Назар

ПОКАРАННЯ У ВИДІ ОБМЕЖЕННЯ ВОЛІ У КРИМІНАЛЬНОМУ КОДЕКСІ ПОЛЬЩІ

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Мета: *проаналізувати положення статей 34 та 35 Кримінального кодексу Польщі, що регулюють покарання у виді обмеження волі та форму його застосування.* ***Методи:*** *основний метод, який використовується в аналізі, нормативно-догматичний метод.* ***Результати:*** *відповідно до пункту 1 статті 34 Кримінального кодексу, якщо інше не передбачено законом, покарання у виді обмеження волі становить не менше ніж один місяць і не більше 2 років. Відповідно до пункту 1а статті 34 Кримінального кодексу Польщі, покарання у виді обмеження волі передбачає: зобов'язання надавати неоплачувану роботу під наглядом у громадських цілях; відрахування від 10 до 25% від місячної заробітної плати на соціальні цілі, зазначені судом. Зобов'язання та відрахування, зазначені у § 1а, повинні накладатися разом або окремо. Під час відбування покарання у виді обмеженням волі засуджений не може змінити місце свого постійного проживання без згоди суду і зобов'язаний надати пояснення щодо відбування покарання. Стаття 35 Кримінального кодексу Польщі передбачає, що неоплачувану роботу у громадських цілях слід виконувати від 20 до 40 годин на місяць. На таку особу накладаються додаткові відрахування із заробітної плати і вона не може самостійно змінити місце роботи в період відбування цього покарання.* ***Обговорення:*** *слід відмітити, що значення цього виду покарання постійно зростає в загальній кількості обвинувальних вироків. Це дозволяє дійти висновку про доцільність застосування цього виду покарання у судовій практиці Польщі. Це, здається, відповідає сучасним тенденціям у кримінальній політиці. Досліджуючи досвід зарубіжних країн, вказуємо, що, наприклад, у кримінальному законодавстві України передбачений такий вид покарання.*

Ключові слова: *покарання у виді обмеження волі; відрахування від заробітної плати; робота у громадських цілях.*