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NEW DIRECTIONS IN CRIMINAL LAW THE PRIMACY OF NON-CUSTODIAL PENALTIES AND THE COMPENSATORY FUNCTION

Summary
The paper is focused on the consequences of the amendment of the Penal Code provisions relating to the penalties, providing a theoretical background for the problems of penalties considered as a part of the Penal Code as well as indicating the current problems of judicial practice in that respect. Especially, the author focuses on the legislator's assumptions, namely the introduction of the primacy of non-custodial penalties and the emphasis of the compensatory function of criminal law.

Key words: *criminal law, executive penal law, criminal policy, penalties, custodial sentence, restriction of personal liberty, compensatory measures*

Introduction

It may easily be said that upon the enactment of the act amending the Penal Code Act and some other acts dated February 20th 2015[1] and the act on the amendment of the Criminal Procedure Code Act and some other acts[2], dated September 27th 2013, the Polish criminal law has been revolutionized. The legislator's intention was to encourage the courts to take up structural changes regarding the imposed penalties. Incentive seems to be a very euphemistic notion here and one may even state that the legislator made a lot of effort so as it would not be easy to impose a conditionally suspended custodial sentence and so as the restriction of

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[1] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).

[2] Act dated September 27th 2015, amending the Code of Criminal Procedure and some other acts (2013 Journal of Laws No. 1247).

personal liberty, a penalty used rather rarely, would gain more popularity. The philosophy of the viability of punishment and the decrease in the time of waiting to serve the sentence serves as the basis for these changes. It is not a secret that up to now, the judges were unwilling to apply restriction of personal liberty which, by definition, is supposed to be also a corrective instrument. The substantiation to the amendment of the Penal Code[3] was critical of the current penal policy, especially indicating the flawed structure of the penalties imposed by the courts in relation to the level and the characteristics of the crime.

1. The penalty. The purposes of the penalty

The definition of the penalty has not been included in criminal law provisions. The notion, however is a part of everyday life and is commonly understood. Włodzimierz Wróbel and Andrzej Zoll have made the effort to create a legal definition of the penalty in the criminal law handbook: "In legal terms, the penalty is the reaction to the infringement of prohibitions or orders given by the sanctioned norm. The penalty is an ailment that is consciously inflicted upon the perpetrator and which is the reaction to the committed crime - it expresses the condemnation of the crime, administered by a constitutionally entitled authority[4]". In no case may such a definition be countered. On one hand it is very simple, while it includes all the necessary elements on the other. Most of all, one must remember that punishment must be strictly related to the culture and society. One should not analyze the notion of punishment without considering the social and cultural context. The boundary for the strictness of punishments is the punitivity of a given society. The penal policy of a country may not be considered in isolation and separated from reality. Punishing certain phenomena will find approval in some societies while the behaviour will be socially acceptable in other cultures in which the punishment would not be understandable. To exemplify this: polygamy is penalised in the Polish Law, while in it is allowable, or even related to high social standing and a privilege in Arab countries. Punishing and criminal sanction as such, is

[3] Substantiation for the draft amendment of the Penal Code and some other acts, Sejm of the Republic of Poland, Term VII, issue No. 2393.
[4]W. Wróbel, A. Zoll, *Polskie Prawo Karne Część Ogólna*, Wydawnictwo Znak Kraków 2013, pp. 413-414.

to fulfil several basic aims. It is to fulfil a repressive function (repression, as the essence and the body of the punishment for crime, is based on the retroactive view of the occurrence and the expression of condemnation – a retaliation), a preventive function (in terms of individual and general prevention), justice function (to satisfy the need of justice in a given society) and a compensatory function[5]. Of course, the compensatory function of criminal law, in its essence, departs from the traditional concepts of retaliation and vendetta ("eye for an eye"). One could even assume that the modern notion of justice, understood as the fulfilment of the social sense of justice, may not reject the considerations regarding the inclusion of the satisfaction of the victim's interests, that are mainly the subject of the restorative justice[6].

Modern criminal law does not however marginalize the compensatory function - in the modern times the idea of the restorative justice has been strongly accentuated, especially along the enactment of the act amending the Penal Code Act and some other acts[7] dated February 20th 2015, that has amended the act on July 1st 2015. The legislator, moving with the times, has assumed the idea that the punishment is not only a retaliation or retribution, but also the compensation of the victim's interests, especially by allowing for the possibility to discontinue criminal proceedings based on the victim's motion in case of conciliation (art. 59a of the Penal Code). Despite the fact this regulation did not last long[8], it is undeniable that it absorbed other functions of penal law while highlighting the compensatory function. The institution has fully departed from the former philosophy used in the resolution of criminal law disputes[9].

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[5] E. Hryniewicz-Lach, Kara kryminalna w świetle Konstytucji RP, Rozdział IX. Współczesny model kary kryminalnej w świetle Konstytucji RP, C.H.Beck 2015, Legalis 2015.

[6] T. Kaczmarek, System Prawa Karnego tom 5 Nauka o karze. Sądowy wymiar kary, C.H.Beck 2015, Legalis 2015.

[7] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).

[8] Art. 59a repealed by Art 7 section 5 of the act dated March 11th 2016 (2016 Journal of Laws No. 437) among others amending the Act on April 15th 2016.

[9] R. Zawłocki, Reforma prawa karnego materialnego od 1.7.2015 r. Uwagi ogólne dotyczące najważniejszych zmian w Kodeksie karnym, Monitor Prawniczy 2015, Issue 11, p. 571.

It is not a new finding that one of the purposes of the criminal procedure, expressed in Art. 2 of the Code of Criminal Procedure, is to consider the legally protected interests of the victim. This means, that the Polish legislator has assumed that the compensatory function should also be reflected in the basic aims that are to be reached by the criminal procedure, and thus, has assumed the function to be extremely important – also in the view of the procedural law.

This function is related to the idea of the restorative justice that has been promoted in our country for the past several years. While this is a generalisation, some basic rules behind the restorative justice may be distinguished. These include the rule of kindness and solidarity between people, the rule of subsidiarity, the rule of respect for human rights and the rule of support to the weaker[10].

The compensatory function of penal law is not as much related to the punishment in the strict sense, as it is with additional penal law instruments, such as, among other things, the compensatory measures in the current legal order. Besides punishments, the legislator introduced a series of measures of penal response, that play various roles and the main task of which may not necessarily be repression. To adjust the effect of criminal law to a given perpetrator, a series of penal measures has been introduced, including the recent compensatory measures. Currently the Criminal Code provides for two compensatory measures: the duty to redress the damage and the vindictive damages. This does not mean that the compensatory function was not present in other substantive criminal law instruments, such as the compensatory discontinuation as provided for by Art. 59a of the Penal Code. The duty to redress a damage and the vindictive damages have been moved by the legislator to the group of penal measures named compensatory measures on July 1st 2015. This does not mean that their nature, structure or ontological character was changed. They continue to fulfil the idea of restorative justice, which, first of all, is aimed at the elimination of conflicts. In general, the compensatory measures constitute the fulfilment of the compensatory (restorative) function of criminal law.

It should be underlined that the functions of criminal law are not competitive – quite contrarily - they blur their boundaries and it is

[10] M. Płatek, *Sprawiedliwość naprawcza. Idea. Teoria. Praktyka*, M. Płatek and Michał Fajst (eds.), Warszawa 2005, p. 20.

sometimes difficult to distinguish the end of one function from the beginning of another. Despite this, it is difficult to talk about the completion of all functions of the criminal law at the same time and to the same extent.<0} In specific cases, a certain function may precede another and its fulfilment will be more important than the fulfilment of others to the same extent. The factors upon which the level of the fulfilment of the given function depends include: the type of the crime, the political and social situation and the exacerbation of criminality[11].

2. The primacy of the compensatory function

The idea of restorative justice somewhat departs from the traditional understanding of the criminal law understood as the payment for the committed wrongs, retaliation or retribution. In Tomasz Kaczmarek's opinion, the meaning of the term "criminal law" is more and more conventional. This is because the entire legal system is subject to continuous transformation and "criminal law" was subject to the deepest and the broadest changes in the last century[12]. Criminal law is currently facing a change in paradigm and the decades-long crisis of efficiency of the standards applied within the system has resulted in the necessity to seek alternatives[13]. Such alternatives are constituted by concepts related to the primacy of the restorative justice. The ideas which consider the primacy of the restorative justice of the criminal law, move the burden of adjudication towards the parties to the dispute while limiting the judicial discretion. The punishment does not have to be related to suffering at all. However, problems arise whether the protective, guarantee and justice function of the criminal law should be compromised and only the compensatory function should be fulfilled? May a court interfere in the agreement regarding the redressing of damage if no harm is done to the willing party? In case of the restorative justice understood this way, may one even speak of criminal law? Already Władysław Wolter noted that "the more the moment of hardship is eliminated from the punishment and the more the negative part of the punishment becomes a framework for

[11] W. Wróbel, A. Zoll, *Polskie…*, p. 39.
[12] T. Kaczmarek System Prawa Karnego volume 5 Nauka o karze. Sądowy wymiar kary, C.H.Beck 2015, Legalis 2015 p. 92.
[13] W. Zalewski, Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego?, Gdańsk 2006, p. 7

another sense, the more the punishment becomes a protective measure"[14]. Thus, the more there is the element of hardship in the punishment the more it is of a punishment. Otherwise it is closer to other penal reaction measures, but not necessarily the ones that include the classic penal elements of criminal law, which is thus increasingly moving towards instruments that are not classic.

Criminal law is one of the branches of the legal system that is binding in Poland. In the view of formal and legal aspects, criminal law is a set of legal standards defining the acts prohibited under the penalties and specifying the rules of responsibility for these acts[15]. The most important element in the above definition is the punishment understood as a negative reaction to the prohibited act, provided for by the law. The punishment is not isolated and is related to the blameworthy act for which it is administered. The notion is strictly related to criminal law. The notion of the liability for damages, on the other hand is assumed to be the pillar of civil law[16]. It is one of the basic notions of civil law - it is thus difficult to introduce notions related to the liability for damages to words used by criminal lawyers. In criminal law, compensation is a kind of a hybrid including both the elements of civil and criminal law. Compensation may thus be realized in a voluntary way - after the perpetration of the crime, but even before the institution of criminal proceedings by actually redressing the damage or by the compensation of the inflicted harm. It may also simply be the fulfilment of a judgement, a manifestation of the state's mean of coercion - by applying the compensatory measure (former penal measure), the measure of redressing a damage or vindictive damages. The voluntary nature of redressing a damage or compensation for the inflicted harm, will not however cause the criminal proceedings to lose all sense. It is quite contrary – in most cases – in line with the principles of legality, the criminal act will have to be prosecuted and the perpetrator will have to be held liable. Of course, the compensation will have an impact on the sentence. In most situations, however, even the complete fulfilment of the compensatory function will not compromise the realization of the remaining functions of criminal law. This is because the compensation is

[14] W. Wolter, *Zarys sytemu prawa karnego*, vol. 2, Kraków 1934, p. 11.
[15] A. Marek, *System Prawa Karnego* Volume 1, C.H.Beck, 2010, pp. 2-3.
[16] A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne*, 2001, p. 34, A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1969, p. 243.

not the basic function of criminal law. In the modern world, the notion of "compensation" is a notion above the division into the branches of law and, although it stems from the civil lawyers' language, it currently belongs both to civil and criminal laws.

In the Polish criminal law, the idea of compensation is supposed to be fulfilled by means of compensatory measures. Currently, two compensatory measures may be distinguished in view of criminal law - the duty to redress the damage and the vindictive damages. It may, however, be observed that both of these are characterized by multifaceted structure and occur in two forms. The duty to redress a damage may be imposed in a classic form – to redress a damage, but also in the form of compensation of the inflicted harm. The vindictive damages may be understood as the substrate of the duty to redress a damage to a victim or another entitled person or - in case of certain crimes - to an organisation or institution.

The common trait of the above compensatory measures, distinguished by the legislator as a separate group since July 1st 2015[17], is the fact that their purpose is to compensate and to punish. Thus, the restitutive elements prevail over the repressive and penal elements. One may not, however, neglect the fact that although there is a relatively small number of compensatory measures in a strict sense, the idea of the restorative justice may be also fulfilled outside the named compensatory measures. Moreover, it must be noted that both the duty to redress a damage and the vindictive damages are characterized by complex structures and are multifaceted. Due to their characteristics, they shall fulfil the idea of compensation to a larger or smaller extent. Sometimes it will not be a compensation in a strict sense – sometimes it will be the opposite – as in the case of vindictive damages towards an organisation or institution, a compensation in a broad sense - towards the general public.

Currently, the compensatory discontinuation based on Art. 59a of the Penal Code[18] may only be viewed as historical, but it cannot be ruled out

[17] Signature and title of Section 5a added by Art. 1 section 16 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

[18] Art. 59a added by means of art. 12 section 1 of the act dated September 27th 2013 (2013 Journal of Laws No. 1247) among others amending the Act on July 1st 2015, Art.

that the institution will return to criminal law some day. I shall thus provide its brief characteristics.

Filing a motion by the victim was a condition to apply the restitutive discontinuation. The victim was thus granted a great power. They could be even considered the main decision maker in terms of the culprit's future and the criminal proceedings in general. Without their motion, the proceedings were based on general rules. At this point, one should agree with the view presented by Radosław Koper, stating that if the idea of restorative justice is supposed to provide the victim with a proper place in the system of redressing damages and harms, then the entity that could - to a large extent - contribute to releasing the perpetrator from criminal liability, should be the victim[19]. Of course, filing the motion by the victim was the condition necessary to discontinue the proceedings based on Art. 59a of the Penal Code, but that was not the only condition. The previous sentences the perpetrator served for a conscious violent crime were a negative premise for the discontinuation of the proceedings. Due to the above, the exclusion wasn't very broad. The positive premises, however, were the conciliation of the perpetrator and the victim and the co-occurrence of the redressing of a damage or compensation for the inflicted harm. This institution could only be applied in criminal proceedings concerning an offence subject to a penalty of less than 3 years of imprisonment as well as an offence against property subject to a penalty of less than 5 years of imprisonment as well as the offence specified in Art. 157 § 1 of the Penal Code. Ultimately, it was the court (or the attorney before the act of indictment) who decided whether to discontinue the proceedings or to proceed based on general rules.

The provision of Art. 59a § 1 of the Penal Code had a very definite wording, because the word "discontinue" has a very categorical and obligatory meaning. Ultimately, however, the decisive body had the possibility not to give consideration to the motion in case of special circumstances that would make the discontinuation against the need to fulfil the purposes of the punishment. This was a kind of a general clause including broad notions and notions that could be appraised by the competent body in a given actual state.

59a repealed by Art 7 section 5 of the act dated March 11th 2016 (2016 Journal of Laws No. 437) among others amending the Act on April 15th 2016.

[19] R. Koper, Wniosek pokrzywdzonego o umorzenie postępowania karnego w trybie art. 59a kk, Monitor Prawniczy rok 2014 No. 10, p. 506.

The first processual conclusion that may be drawn in case of an unconditional discontinuation based on Art. 59a of the Penal Code, is the lack of breach of the presumption of innocence. As a consequence, in theory, the perpetrator remained an innocent person. Despite that, however, the fulfilment of such a motion provided for the culprit's confession to a given criminal offence against the victim[20]. Moreover, the body making decision on the discontinuation had to be sure that the given person has committed the offence indicated in the act[21]. There was thus the prejudgement regarding the perpetration of a given act fulfilling the criteria of the specific part of the Penal Code. Further consequences of the restitutive discontinuation included the fact that the act was not reflected in the criminal history of the culprit. The price for the "clear criminal history" was the full compensation in terms of the restorative justice. Another serious problem was constituted by need to provide the court and the attorney in competences related to the subject of the motion (Art. 23b of the Code of Criminal Procedure[22]). As a result, a question has appeared – whether the attorney - by discontinuing such proceedings - did not intrude on the competences that are constitutionally reserved for the court. In line with Art. 45, section 1 of the Constitution, everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. Moreover, Art. 175, section 1 of the Constitution states that the administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts. Is it certain that providing the attorney the right to discontinue proceedings based on Art. 59a of the Code of Criminal Procedure did not infringe the constitution? Doctrine experts expressed similar doubts[23]. One could have, however, put forward a courageous proposal, that the discontinuation in that procedure constituted a formal decision subject to premises described above. If these premises were fulfilled altogether, the

[20] R. Zawłocki, Umorzenie restytucyjne z art. 59a Kodeksu karnego – zasady stosowania i związane z nimi podstawowe problemy interpretacyjne, Monitor Prawniczy 2015, No. 14, p. 746.
[21] A. Pilch, Umorzenie kompensacyjne w trybie art. 59a kk – wybrane zagadnienia, Palestra No. 7-8/2015, p. 57
[22] Art. 23a repealed by Art 1 section 3 of the act dated March 11th 2016 (2016 Journal of Laws No. 437) among others amending the Act on April 15th 2016 .
[23] Similarly: R. Koper, *Wniosek pokrzywdzonego...*, p. 506.

proceedings were discontinued, which exhibits the obligatory character of that institution. In view of the fulfilment of these premises, the decisive body was actually denied the freedom to decide. It is, however, difficult to defend the proposal in view of paragraph 3 of the provision in concern, which overcame the lack of the decisive freedom of the body. It seems, that in each case it should have been verified whether no negative premise that could affect the acceptance of the motion occurred due to special circumstances. This in turn resulted in the fact that it was no longer a purely formal institution. It also seems that the legislator has not fully predicted the consequences of the institution. Despite the above, one may assume that while introducing the application of the restitutive discontinuation, the intention of the legislator was to definitively end the criminal proceedings without the possibility of a reconsideration of an ended case. Considering this, the idea to submit the decision in that matter to an attorney should be appraised even more negatively. In general, the introduction of Art. 59a to the Penal Code should be evaluated positively, especially that it allowed for the fullest fulfilment of the victim's interests. It is therefore all the more regrettable that this institution was present in the Penal Code for such a short time. It is not, however, out of the question that the restitutive discontinuation will someday re-appear in a modified form as an instrument of the criminal law. By introducing innovative possibilities, the legislator exposes a variety of solutions. In a broader perspective, the solutions are supposed to fulfil the purposes of the criminal proceedings in the best way possible – not only by means of the institution of the restitutive discontinuation, but also by providing a practically new policy of sentencing.

To summarize, the Polish legislator is more and more sensitive to the victim in the criminal proceedings and the fact that instruments that are aimed at the fulfilment of the idea of restorative justice are introduced should be evaluated positively.

3. Imprisonment as the last resort

The Polish legal system contains a closed catalogue of penalties and in line with Art. 32 of the Penal Code, these include: fine, restriction of liberty, deprivation of liberty, deprivation of liberty for 25 years,

deprivation of liberty for life. As it is underlined in the reference books[24], the chronological sequence of the penalties from the most lenient to the strictest provided by the legislator is not random as it is supposed to induce the courts to primarily review the possibility of applying a more lenient penalties both in terms of type and quantity. Only when the more lenient penalty would not fulfil its purposes in the adjudicating body's view (Art. 52 of the Penal Code), the body should verify whether the more strict penalty would come as more adequate. Currently this is also directly addressed by the provision of Art. 58 § 1 of the Penal Code[25], indicating that if the law provides for an option of the type of penalty and the crime is subject to imprisonment not exceeding 5 years, the court shall use the imprisonment sentence only when no other penalty or penal measure would not serve the purpose thereof. Moreover, Art. 37a of the Penal Code[26] states that if the law provides for the penalty of imprisonment not exceeding 8 years, a fine or restriction of liberty may be ruled, as specified in Art. 34 § 1a, section 1 or 4. The executive Penal Code clearly indicates the purposes of the penalty of imprisonment - the execution of the imprisonment penalty is aimed at inducing the convicted person to cooperate in forming socially desirable attitudes in them, especially the sense of responsibility and need to follow the legal order and thus restraining from the return to the crime (67 §1 of the executive Penal Code).

The imprisonment as a custodial penalty should be applied towards demoralized culprits who have committed an act which is sufficiently socially destructive so as their isolation from the society for a certain time is inevitable. In the isolation conditions, the perpetrator shall be provided the possibility to subdue to the re-socialisation effects (which reflects the rule of humanitarian approach towards the convicted

[24] A. Marek, *Komentarz do art.32 Kodeksu karnego*, as of 3 January 2010, LEX 2010, LEX No. 59707.

[25] Art. 58 § 1 amended by Art. 1 section 25a of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

[26] Art. 37a added by means of Art. 1 section 8 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015 Art 1 section 3 of the act dated March 11th 2016 (2016 Journal of Laws No. 428) among others amending the Act on April 15th 2016.

persons), while noting that the perpetrator does not have the duty to subdue to the effects[27].

The imprisonment may be imposed as an immediate penalty - that is - not conditionally suspended for a trial period. In such case, there are no doubts that after the judgement comes into force, the sentenced person shall be referred to a specified correction unit.

A more complicated situation takes place when the imprisonment sentence is conditionally suspended. A penalty imposed that way is acquainted by a series of sociological phenomena considered by criminology. It is often the case that the court, while deciding to impose a "suspended" penalty, often makes a decision for a longer imprisonment. This way, the court supports the stand that the institution of suspended penalty should not be treated as a court decision relating solely to the penalty of a given type and degree but also as an integral part of the judgment regarding the penalty and a special form of a penalty. As a result, the type and the degree of the penalty as well as the way of execution included in the sentencing decision constitute a result of a unified activity of sentencing[28]. Such a view should be assessed negatively. This is because one should not lose sight of the fact that the conditionally suspended penalties may be executed in the future. In case the perpetrator has several such sentences, problems may arise.

Another sociological phenomenon is the sentenced person's conviction on their clear criminal record. Of course, the sentence of suspended imprisonment finds its reflection in the criminal record, but the sentenced person feels – to a certain extent – unpunished. They did not experience the penalty, the penalty is actually only reflected in writing. This is true, of course, if no penal measure, fine or another probation measure was applied. The penalty is thus imperceptible and this contradicts the philosophy behind the punishment which assumes the inevitability and viability of punishment. Of course, the institution of suspending the penalties is necessary and it should be assessed positively as a chance given to the perpetrator in case of a positive criminological prognosis, however the excessive use of the suspended penalty of imprisonment will not bring any positive outcome in the long run.

[27]R. Zawłocki *Kodeks karny. Część ogólna*. Volume II Komentarz do art. 32, M. Królikowski, R. Zawłocki (eds.), C.H.Beck 2015 Issue 3, Legalis 2015.

[28] Decision by the Gdansk Court of Appeal – 2nd Criminal Division, dated 2012-11-07 II AKa 350/12, Published: www.orzeczenia.ms.gov.pl

Among others, such assumptions constituted the basis for the legislator's intervention and the implementation of changes in criminal law. In the substantiation of the draft amendment[29], it has been noted that the population of persons in correctional institutions remains high and that the probation system remains completely inefficient. It has also been indicated that the overuse of the suspended penalty of imprisonment is a negative practice that constitutes over 60% of the conclusions in proceedings. Moreover, usually the suspended penalty of imprisonment is imposed in the form of pure probation, that is, only allowing for its execution in case of a subsequent infringement of the violation of law. Also using the same sentence in relation to the same person did not find approval – such a practice was applied in relation to approximately 400 000 persons. It has also been noted that Poland is one of the leading countries in terms of persons in correctional institutions. The number is 221 persons per each 100 000 citizens. These considerations led to the amendment of the provisions of the Penal Code in relation to the penalties and led to the primacy of the non-custodial penalties.

4. Primacy of non-custodial penalties – instruments following the amendment

By introducing the amendment that came into force on July 1st 2015[30], the legislator gave priority to the non-custodial penalties, that is the fine and the restriction of liberty. Of course, it should be remembered that the provision of Art. 58 § of the Penal Code[31], that was binding until the enactment, provided for the possibility of selecting the type of the penalty and the court was supposed to impose the unconditional penalty of imprisonment only when another penalty or a penal measure would not fulfil the purpose of the penalty. Currently, the possibility to switch to non-custodial penalties is slightly more accentuated in relation to Art. 58 § 1 of the Penal Code and 37a of the Penal Code.

[29] Substantiation for the draft amendment of the Penal Code and some other acts, Sejm of the Republic of Poland, Term VII, issue No. 2393.
[30] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).
[31] Art. 59 § 2 repealed by Art. 1 section 25 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

Another instrument that allows the courts to apply the penalty of the restriction of liberty more often is the broadening of the forms in which the sentence may be served as well as its prolongation[32] and the decrease in the time of expungement[33].

The main purpose of executing the penalty of restriction of liberty has been given in the provisions of the executive Penal Code. The execution of the penalty of restriction of liberty is aimed at inducing the convicted person's will to shape their socially desirable attitudes, especially the sense of responsibility and the need to follow the legal order (Art. 53 § 1 of the Executive Penal Code.)

Most of all the amendment has introduced a change in the length of the penalty of restriction of liberty. Currently, the penalty of restriction of liberty may be imposed in months and years and it lasts from a month up to 2 years[34]. Until June 30th 2015, the penalty was imposed in months and lasted from a month up to 12 months. Also the time of maximal extraordinary aggravation of the upper boundary of the statutory penalty range has changed in case of the penalty of restriction of liberty. Before the amendment it was possible to aggravate the upper limit up to 18 months. Currently, even in case of extraordinary aggravation of penalty, the perpetrator may be sentenced to up to 2 years of restriction of liberty[35].

Also the broadening of the possible forms of execution of the restriction of liberty is interesting as it results in the greater flexibility of the penalty and thus the easier adjustment of the form to the perpetrator. New possibilities are to result in the ease of application of this penalty, so as the competent body has no doubts that it will be adequately severe and viable for an individual perpetrator while the penalty is executed. In simple words, the greater flexibility will result in the fact that the general purposes of punishing will be fulfilled to a greater extent.

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[32] Art. 34 § 1 amended by Art. 1 section 5a of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.
[33] Art. 107 § 4 amended by Art. 1 section 63a of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.
[34] Art. 34 § 1 amended by Art. 1 section 5a of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.
[35] Art. 38 amended by Art. 1 section 9 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

Most of all, the legislator left the two existing possibilities, that is, the penalty of restriction of liberty consisting in free, controlled work for social purposes and the deduction of 10% to 15% of the remuneration for work on a monthly basis for a social purpose indicated by the court. What is also important, however, the legislator also introduced these two possibilities as an equivalent alternative for serving the penalty of restriction of liberty. Before July 1st 2015, as indicated by the legislative drafting principles, the deduction of the remuneration for a social purpose was only taken into consideration in case of a hired person and instead of the classic penalty of restriction of liberty consisting in the free, controlled work for social purposes. The legislator made these forms of execution of the restriction of liberty equal while adding two more forms[36]: The duty to remain at the place of permanent residence or another indicated place with the application of electronically monitored curfew as well as the duty referred to in Art, 72 § 1, sections 4-7a, that is, the obligation to gainful employment, to study or prepare for a profession, refrain from using alcohol or other drugs, to undergo substance abuse treatment, in particular psychotherapy and psychoeducation, participation in corrective and education activities, to refrain from staying in certain environments or locations, to refrain from contacting the victim or other persons in a specified way or to stay away from the victim or other persons. The two final forms of the penalty of restriction of liberty[37] did not remain binding.

The court has a limited power to impose a penalty of suspended imprisonment. Ultimately, however, the penalty of restriction of liberty plays the same role. The penalty of restriction of liberty will have very similar consequences to the penalty of suspended imprisonment. The difference is, however, that its non-execution is supposed to cause the execution of a substitute penalty of imprisonment. The degree of the penalty will however remain different. If the maximum sentence is 2 years of restriction of liberty, then one day of the substitute penalty of imprisonment may be replaced with two days of the penalty of restriction

[36] Art. 34 § 1a added by means of Art. 1 section 5b of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

[37] Art. 34 § 1a section 3 repealed by Art. 7 section 1a of the act dated March 11th 2016 (2015 Journal of Laws No. 396) among others amending the Act on April 15th 2016, Art. 34 § 1a section 2 repealed by Art. 1 section 1 of the act dated March 11th 2016 (2016 Journal of Laws No. 428) among others amending the Act on April 15th 2016.

of liberty (Art. 65 § 1 of the Executive Penal Code *in fine)* and it is possible to replace the maximal penalty of restriction of liberty to one year of imprisonment. What's interesting is that this remains consistent with the amended text of Art. 69 § 1 of the Penal Code[38], stating that the court may conditionally suspend the execution of the penalty of imprisonment not exceeding one year. This leads to the conclusion that the provisions are consistent, especially in terms of the maximal immediate penalty of imprisonment that may be imposed (currently a year, two years before the amendment) and the penalty of the restriction of liberty (maximum of two years) with the possibility of substitution with a custodial sentence (one year of a substitutive penalty of imprisonment).

Although it may be a bold idea, it seems that the current penalty of restriction of liberty introduced as a promotion of the non-custodial sentences, is nothing but a hidden form of the suspended penalty of imprisonment. This state of things has its positive and negative aspects. First of all, the convicted person gains the possibility to serve the penalty of restriction of liberty in any selected form. If the convicted shall evade the imposed penalty, a substitutive penalty is imposed at the executive stage. One should note that by using the word "orders" the provision of Art 65 § 1 of the Executive Penal Code determines that the activity is obligatory. The mandatory order of execution of the suspended penalty of the imprisonment, on the other hand, is conducted only if the convicted person has intentionally committed a similar offence in the trial period, for which a final and legally binding immediate penalty of imprisonment is imposed (Art. 77 § 1 of the Penal Code) and if the person convicted for committing an offence using violence or unlawful threat against close relatives and partners or other minor residing with the perpetrator in the trial period grossly infringes the legal order by using violence or unlawful threat again against close relatives or partners or other minor residing with the perpetrator (Art. 75 § 1a of the Penal Code) and, moreover, if after a written warning is issued against the perpetrator by a case worker, the perpetrator grossly infringes the legal order in the trial period, especially if they have committed an offence other than specified in § 1 or if they evade paying the fine, evade from supervision, the

[38] Art. 69 § 1 amended by Art. 1 section 33a of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

imposed duties or penalties, compensatory measures or forfeiture, unless special circumstances suggest otherwise (Art. 75 § 2a of the Penal Code). In remaining cases, the court disposes of a large margin of freedom and may but doesn't have to order the execution of a penalty. Such a consequence resulting from the analysis of the provisions should be assessed rather negatively. This is because, to a certain extent the legislative authority has made a decision for the judicial authority – if the convicted person evades the restriction of liberty, he should be imposed a substitute penalty of depravation of freedom while not leaving the freedom to decide to the court. With provisions shaped this way, one may say that the primacy of the non-custodial is only apparent – it may be easily distorted at the stage of executive proceedings. The new text of the provision of Article 65 § 1 of the executive penal code[39] may, however, be assessed positively. It states that the order to execute a substitute penalty of imprisonment may only be made in relation to the remaining time of penalty of restriction of Liberty. The unambiguous wording of the provision should lead to the abandonment of the courts' practice consisting in the substitution of the entire penalty of restriction of liberty to a substitute penalty and, subsequently, crediting the time of the served penalty of restriction of liberty[40]. One should remember that since January 1st 2012[41], one may not substitute the penalty of restriction of liberty with a fine, but only with a more stringent and custodial penalty.

A significant new element in imposing non-custodial penalties along with short-term penalties of imprisonment is the norm included in the provision of Art. 37 b of the Penal Code[42]. With each offence, disregarding the lower statutory penalty range and besides the penalty of imprisonment for up to 4 months (and when the upper range is at least 10 years – a maximum of 6 months), a penalty of restriction of liberty may

[39] Art. 65 § 1 amended by art. 4 section 28 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.
[40] L.Osiński: *Kodeks karny wykonawczy. Komentarz.* Komentarz do art. 65 kkw, J. Lachowski, Piotr Gensikowski, (eds.) J. P., L. Osiński, I. Zgoliński, Komentarz do art. 65 kkw, Legalis 2015, as of 1 July 2015.
[41] Art. 65 amended by Art. 1 section 30 of the act dated September 16th 2011 (2011 Journal of Laws No. 1431) among others amending the Act on January 1st 2012.
[42] Art. 37a added by means of Art. 1 section 8 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015, amended by Art. 7 section 3 of the act dated March 11th 2016 (2016 Journal of Laws No. 437) among others amending the Act on April 15th 2016 .

be imposed. This is a real revolution in terms of penalties as up to now, the penalties of restriction and imprisonment could not have been combined. Such a solution is criticized by doctrine experts. There are opinions, that the execution of these penalties may cause a problem because: first of all – the necessity to place the convicted person in a corrective institution for a short time and second of all - because of the necessity to organize the execution of the restriction of liberty[43]. It is being said that by such punishments, the purposes of the penalty will not be fulfilled. Most of all, the critics wonder whether the penalty of the restriction of liberty will be viable and how to ensure instruments that would support the execution of the restriction of liberty so as it would not occur that - because of the lack of possibility to execute the restriction of liberty, especially in the form of free, controlled work for social purposes - the perpetrator would remain unpunished in their and the society's opinion. The legislator seems to forget that although the idea is laudable, one should primarily make efforts to ensure the physical possibility to execute it. If – due to the lack of proper conditions, the convicted person will not be able to serve the penalty of restriction of liberty, the purposes of the penalty as the reaction to the offence may remain unfulfilled.

In the amendment[44], the legislator has seriously limited the possibility of imposing the conditionally suspended penalty of imprisonment. In line with Art. 69 § 1 of the Penal Code[45], the Court may conditionally suspend the sentences of imprisonment not exceeding one year if the offender was not sentenced to imprisonment at the time of committing the offence and this shall be sufficient to achieve the purposes of punishment to the offender, particularly to prevent recidivism. First, as mentioned earlier, the maximal length of the sentence that may be imposed with a conditional suspension was decreased from two years to a year. Of course, there are exceptions (Art. 60 § 5 of the Penal Code), however, as of now only the penalty of imprisonment may be suspended. Second of all, the trial periods in case

[43] E. Jakubowska, *Reforma prawa karnego. Księga po Zjeździe Młodych Karnistów* , I. Sepioło-Jankowska (ed.), 2015, Legalis 2015.

[44] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).

[45] Art. 69 § 1 amended by Art.1 section 33a of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

of suspension have been decreased[46] - the trial period now lasts from a year up to 3 years. Also in case of a young offender the trial period has been decreased and it currently lasts from 2 to 5 years. The same period of probation has been provided for in case of a perpetrator who committed an offence using violence against a person they reside with. No special period of probation has been provided for a perpetrator specified in Art. 64 § 2 of the Penal Code (offence committed within multiple recidivism). This is not because the probation period in that case is from a year up to 3 years (as in all other cases), but because in case of such a person the conditional suspension of the penalty may not be applied at all since July 1st 2015, which is related with the premises to suspend the penalty of imprisonment becoming more strict, as specified in art. 69 §1 of the Penal Code. This is because upon committing an offence, the perpetrator may not be sentenced to the penalty of imprisonment, which is excluded in case of multiple recidivism (64 §2 of the Penal Code), as the previous sentencing of that person to a penalty of imprisonment is a necessary condition to apply this provision.

Currently, the previous sentencing of a person to the penalty of imprisonment is the primary negative premise to apply the conditional suspension of a penalty. Moreover, the term "was not sentenced to a penalty of imprisonment" concerns all penalties of imprisonment, including the previous conditionally suspended penalties. However, as it is correctly pointed out by Jerzy Lachowski[47], the sentencing of a person to imprisonment upon committing of another act must be final and legally binding, as only then the presumption of innocence is rebutted. However, if the decision sentencing to the penalty of imprisonment has become binding only after a subsequent offence had been committed, no formal objections exist to suspend the penalty of imprisonment in the case regarding the new offence. Also sentencing to other penalties shall not constitute objections to apply the conditional suspension of the penalty of imprisonment for the new act.

A question is raised whether the notion encompasses also the substitute penalty of imprisonment. Such a penalty may be executed

[46] Art. 70 amended by Art. 1 section 34 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

[47] J. Lachowski, *Kodeks karny. Część ogólna.* Volume II Komentarz do art. 32–116, (ed.) M. Królikowski, R. Zawłocki, Komentarz do art. 69 kk, Legalis 2015, as of 1 July 2015.

instead of the applied fine (Art. 44 of the Executive Penal Code) or restriction of liberty (Art. 65 of the Executive Penal Code). In such case, at the stage of the enforcement proceedings: "the court orders the execution of a substitute penalty of imprisonment". Thus, by strictly interpreting the phrase "sentenced to a penalty of imprisonment" and assuming the rule that similar designate may not carry different meaning, one may not conclude that "sentencing" is the same as "ordering to execute". This leads to a conclusion that even an executed substitute penalty of imprisonment will not be the same as sentencing to the penalty of imprisonment. Thus, even in case of a convict placed in a corrective institution, sentenced to a fine or restriction of liberty at the fact-finding stage, which was subsequently ordered to be substituted with an imprisonment penalty, the institution of conditional suspension of the penalty shall be possible to apply.

Intertemporal matters are an interesting issue in the view of the possibility to apply conditional suspension of penalties. The rule is to apply the new act, however the previously binding law should be applied if it's more favourable to the offender (Art. 4 § 1 of the Penal Code). One should agree that in terms of the possibility to apply conditionally suspended penalties, the previously binding act (until July 1st 2015) is more favourable. First of all, previously the provisions did not ban the application of conditional suspension of penalty in case of previous sentencing to imprisonment for any offence (both intentional and unintentional, crime or misdemeanour, material or formal) disregarding the degree of the penalty. Secondly, the previous provisions provided for the suspension of fines and restrictions of liberty as well as the longer penalties of imprisonment, that is, up to 2 years[48]. Thus, if the act was committed before July 1st 2015, Article 69 §1 of the Penal Code in the previous wording could find its application. The provisions binding at the time of the offence shall have the decisive meaning in that respect.

Currently, only the penalty of imprisonment may be suspended. The institution of suspension ceased to be binding in respect to the restriction of freedom and fine. Thus, the amendment[49], has introduced not only the primacy of the non-custodial penalties, but also the primacy of immediate penalties.

[48] Ibidem.

[49] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).

Moreover, imposing of the duties specified in Art. 72 § 1 of the Penal Code[50] became obligatory in case of the conditionally suspended penalty of imprisonment, unless a penal measure is imposed.<0} This will cause that the penalty of imprisonment imposed as suspended will be more viable and felt by the offender.

By means of the act dated February 20th 2015[51], the legislator has also provided for instruments that are facultative and applied at the sentenced person's motion but interfere with the binding decision of the court regarding the penalties. This is related to the will to unify the system of penalties mentioned earlier. And so, Art. 16 of the amending act provides that in cases ended with a binding decision before the enactment of the act, in case of which the conditionally suspended penalty of imprisonment was imposed and no execution of the penalty was enforced, it is possible to substitute the penalty of imprisonment with a fine or restriction of liberty or the penalty of restriction of liberty in the form of the duty to perform free, controlled work for social purposes. Moreover, in cases in which the court has made a decision based on Art. 75 § 2 of the Penal Code before the enactment of the act, the binding judgement on the order to execute a conditionally suspended penalty of imprisonment up to a year, it has been provided for a possibility to substitute the penalty of imprisonment to the penalty of the restriction of liberty in the form of the duty to free, controlled work for social purposes (Art. 17 of the amending act dated February 10th 2015). Finally, in cases in which before the date of the enactment the execution of a substitute penalty of imprisonment was ordered based on Art. 65 § 1 of the Executive Penal Code, it has been provided for the possibility to withhold the execution of the substitute penalty and to change the form of the served penalty of restriction of liberty (Art. 17 of the amending act). In fact, allowing for such possibilities should be assessed positively. Most of all, it is in line with the idea of the rational legislator. If the newer act so strongly promotes non-custodial penalties, the use of the institutions introduced along the amendment should be allowed also for the convicts whose sentences became legally binding earlier. Moreover,

[50] Art. 72 § 1 initial words altered by Art. 1 section 36a, indent 1 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

[51] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).

the interference in the legally binding decision will depend on the sentenced person's will, who - to initiate proceedings to change the penalty - shall have to file a motion. Thus, it will not be an absolute interference in the legally binding decision against the offender's will, but only a possibility. Such a solution may not be assessed negatively.

Moreover, the legislator provides the courts with yet another new instrument promoting the penalty of restriction of liberty and fines and allowing to act alternatively in case when a legally binding conditionally suspended penalty of imprisonment is in place and the premises for it to be executed are fulfilled. Article 75a of the Penal Code[52] is aimed at creating the possibility for the court to react to the infringement of the conditions of suspension in a way different than the execution of the penalty of imprisonment[53]. Of course, the legislator provided for exceptions which result in the impossibility to use the institution specified in Art. 75a of the Penal Code. The exceptions concern a situation in which the offender did not fulfil the imposed duty to abandon the premises in which they lived with the victim (Art. 72 § 1 section 7b of the Penal Code) and the non-fulfilment of the duty specified in Art. 72 § 2 of the Penal Code, that is the liability for damages or payment of a monetary benefit specified in Art. 39, section 7 of the Penal Code, as well as the case of conditional suspension of the penalty of imprisonment up to 5 years based on Art. 60 § 5 of the Penal Code[54].<0} Currently, besides the cases named above, the institution of Art. 75a of the Penal Code may not be applied in cases specified in Art. 75 § 1, 1a and 2a[55], that is, where it is obligatory to order the execution of an increased penalty of imprisonment. To sum up, the court may, instead of ordering the execution of the penalty of imprisonment, substitute the penalty to the penalty of restriction of liberty in the form of free, controlled work for social purposes or a fine. Of course, the substitution of the penalty of imprisonment to a non-custodial penalty is conditional

[52] Art. 75a added by means of Art. 1 section 40 of the act dated February 20th 2015 (2015 Journal of Laws No.396) among others amending - on July 1st 2015, Art. 75a §2 amended by Art. 7 section 8 a of the act dated March 11th 2016 (2016 Journal of Laws No. 437) among others amending the act on April 15th 2016.

[53] J. Skupiński, *Kodeks karny. Komentarz*, Ryszard Stefański (ed.), Komentarz do art. 75a kk, Legalis 2015, as of 1July 2015.

[54] Ibidem 53.

[55] Art. 75a § 2 amended by Art. 7 section 8a of the act dated March 11th 2016 (2016 Journal of Laws No. 437) among others amending the Act on April 15th 2016.

and if the offender shall evade the performance of the penalty of restriction of liberty, it shall be obligatory to order the execution of the penalty of imprisonment. However, it is yet another instrument given to the courts by the legislator so as the courts could actually apply non-custodial penalties, even if the penalty of restriction of liberty or the fine was not found in the sentence subject to execution. One should, however, note that in this case, the interference in the penalty is at the executive stage and not during the substantive proceeding regarding the perpetration and penalty.

Conclusions

Despite the amendment which came into practice on July 15th 2015[56] it did not introduce many changes in criminal law, above changes are significant, we can even state that we are facing a revolution of criminal law in terms of punishing. We should take into consideration the fact that because of the amendment which came into practice on April 15th 2016[57]some of the changes were reversed whereas some of them remained unchanged. Generally speaking it will have an impact on directions of criminal law policy. Most of all the possibility of conditionally suspended custodial was significantly limited and a legislator aims at stimulating courts in terms of non-custodial penalties if it is possible. What is interesting, criminal policy was not liberalized because of that. Quite the opposite, penalties are to become more real and because of that, more oppressive. The legislator, who negatively evaluated the practice of devaluation of penalties, introduced a number of institutions which are supposed to change the previous policy of judicature in this scope. At the same time the legislator predicted penalizing instruments depending on seriousness of a crime: starting from non-custodial reaction, also a longer prison sentence for petty crime, for medium crime the possibility of non-custodial penalty, isolation or mixed, and in the end for serious crime – more serious reaction (also because of possibility of extraordinary restrictions of prison sentence to 20 years). It is an open question whether we are

[56] Act dated February 20th 2015, amending the Penal Code Act and some other acts (2015 Journal of Laws No. 396).
[57] Act dated March 11th 2016, amending the Penal Code Act and some other acts (2016 Journal of Laws No. 427).

dealing with an apparent primacy of non-custodial penalties or not. It is apparent because it may occur that the instruments of the legislator in a long time perspective, not only will not contribute to rehabilitation of convicts through work but the opposite: Poland will still face the problem of overcrowded prisons. It may happen if it occurs that there are not instruments to execute prison sentence. In fact then the convicts will remain without punishment. Moreover, it may happen that because of the inefficiency of a custodial sentence, purposes of punishment can only be achieved through short-term replacement of imprisonment. Furthermore, due to evasion by convicts from execution of sanctions, restriction of liberty will have to be ordered to execute the sentence of imprisonment. This can all contribute to the growth of the population in prisons.

In contrast it should be assessed positively that legislature creates a new group in the Criminal Code, namely the compensatory measures. First of all, an obligation to repair the damage has been settled, emphasizing that compensation function will be the most important function that they will fulfill. The element of penalty has been completely eliminated, although it cannot be excluded that in the specific case, these measures will not have a punitive character for the perpetrator. However, this repression under the premise is to have a secondary character, as merely a side effect, making the compensation to the victim. Therefore, with the compensatory measures the most effective realization of the interests of the victim bears the biggest importance. We can say that through such assumptions, Polish legislator realizes the assumptions of modern penal policy, in which the notion of restorative justice plays an important role. Criminal law is not only the punishment and repression, but also compensation for damage caused by crime[58].

With the current configuration of institutions of obligation to repair the damage, in particular as regards the obligation to apply direct provisions of civil law[59], we can speak about wide implementation of an idea of restorative justice in criminal proceedings and the primacy of the compensation function of criminal law. Even the removal of the

[58] J. Skorupka, Wybrane zagadnienia z problematyki funkcji kompensacyjnej prawa karnego, Z. Ćwiąkalski, G. Artymiak (eds.) Karnomaterialne i procesowe aspekty naprawienia szkody, Warszawa 2010, p. 33.

[59] Art.46 amended by Art. 1 section 20 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.

procedural rules from the institution of adhesion procedure[60] paradoxically - does not eliminate, but rather the opposite - strengthens the position of the victim. It seems that now because liability for damages is such a large institution that procedural institution of a civil action enabling the investigation of civil claims in criminal proceedings is no longer necessary. Moreover it has been stated that "given the scope of the changes, it should be considered that the institution of civil action has become unnecessary in a criminal trial"[61]. The legislator did not see the point of multiplication of similar entities, which consequently led to identical results. The procedure of claims was unified in the scope of criminal process. Institutions of the obligation to compensate and the adhesion procedure were competing against each other, in particular it was not possible to use these two options simultaneously. Therefore, it was reasonable to eliminate one of them, while stretching the other and slightly modifying its character, in particular by reducing its penal character, and exposing compensation. In addition, it should be noted that the victim is the holder of claims, and redress of the harm arising from the offense and he is the decision-maker as to the use of these rights. He also has two alternative ways to pursue those claims - criminal or civil trial, and it depends on him which one to choose. The victim thus remains the most important figure in the implementation of compensation function of criminal law.

Currently when deciding about obligation to repair the damage, it should be decided according to civil law. Criminal courts, deciding about the compensation measure, must turn not only to the text of civil law, but be aware of the rich case law and representatives of the doctrine in this area. All the burden of civil law regarding the obligation to compensation falls therefore on criminal law practitioners, on the other hand, the victim, who is the most important figure of the compensatory measures, gains the ability to overall satisfaction of civil claims arising from crime, already in the criminal proceedings, without having to carry out a separate trial in a civil court. In addition, the introduction of Art.59a of the Criminal Code should be judged positively, primarily the institution allows full realization of the interests of the victim. One can regret that

[60] Chapter 7 amended by Art. 5 section 2 of the act dated February 20th 2015 (2015 Journal of Laws No. 396) among others amending the Act on July 1st 2015.
[61] Substantiation for the draft amendment of the Penal Code and some other acts, Sejm of the Republic of Poland, Term VII, issue No. 2393.

this institution currently has only a historical dimension. Admittedly, it was not without some flaws, but after thorough consideration, it should have its place in criminal law.

Some hard questions related to the multiplicity of instruments of influence on the final decisions of courts in criminal proceedings should be asked. Will criminal justice agencies be treated as exceptional or will they be an important element of interference in the final judgments? We can also raise the question of what value, therefore, can be attributed to the decision of punishment, which after all is a very important feature of the judgment on behalf of the Republic of Poland, if that penalty can be changed so easily? Can the possibility of extensive intrusion in the judgment in the enforcement proceedings, still maintain the will of the sovereign, independent court in this regard? On one hand, the range of instruments in the enforcement proceedings allows considerable flexibility if the situation changes from the date of sentence to the time of execution of the penalty. On the other hand, allowing the possibility of extensive intrusion in the judgment in the enforcement proceedings can lead to the fact that the final court judgment will be subject to far-reaching modifications, but not carried out at the stage of substantive adjudication of perpetration and punishment by the court merit, but only at the executive stage. Such legislative procedure cannot be treated positively, however, in many cases, such a solution will just be practical.

It will be judicial practice that will be able to verify if the amendment, both which entered into force on 1 July 2015 and that entered into force on 15 April 2016, was correct and effective, and if the assumptions that are the base will be effectively implemented and thus the objectives of punishment against offenders will be achieved.

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