Volume 22, Issue 1
June 2024

ISSN 1731-8297, e-ISSN 6969-9696
http://osap.wpia.uni.opole.pl

ORIGINAL ARTICLE
received 2023-09-28
accepted 2024-02-23
published online 2024-07-17

Amendment to the general directives of judicial sentencing (Article 53(1) of the Penal Code) as a determinant of a change in the punishment philosophy?

Nowelizacja ogólnych dyrektyw sądowego wymiaru kary (art. 53 § 1 k.k.) jako determinanta zmiany filozofii karania?

AGNIESZKA KANIA-CHRAMĘGA
Uniwersytet Zielonogórski
ORCID: 0000-0001-6246-3172, a.kania@wpa.uz.zgora.pl

Citation: Kania-Chramęga, Agnieszka. 2024. Amendment to the general directives of judicial sentencing (Article 53(1) of the Penal Code) as a determinant of a change in the punishment philosophy? *Opolskie Studia Administracyjno-Prawne* 22(1): 37–53. DOI: 10.25167/osap.5159

Abstract: The paper aims to determine whether the amendment (editorial and allocative) to the general directives of judicial sentencing (Article 53(1) of the Penal Code) can be a factor directing towards a pro-repressive modelling of the penal policy. A comparative analysis of the previous and the new (i.e. in force since 1 October 2023) redaction of the general directives of judicial sentencing will serve as a starting point for answering the question whether the courts will be "obliged" to take into account the analyzed regulations "in the spirit" of repressiveness. Giving a negative answer in this respect, the paper will present an attempt to provide the general directives of judicial sentencing with a correct interpretation that *de facto* abstracts from the distorted intentions of the originators. Further in the paper, attention will also be paid to whether the new wording of Article 53(1) of the Penal Code will be of significance to increasing the practical usefulness of the discussed determinants in the process of judicial sentencing.

Keywords: judicial sentencing, general directives of the judicial sentencing, amendment to the Penal Code

Abstrakt: Celem artykułu jest ustalenie, czy zmiana (redakcyjna oraz alokacyjna) ogólnych dyrektyw sądowego wymiaru kary (art. 53 § 1 k.k.) może stanowić czynnik ukierunkowujący na prorepresyjnie zorientowane modelowanie polityki karnej. Komparatystyczna analiza poprzednio obowiązującej oraz nowej (tj. obowiązującej od 1 października 2023 r.) redakcji ogólnych dyrektyw sądowego wymiaru kary będzie stanowiła punkt wyjścia do udzielenia odpowiedzi na pytanie, czy sądy będą zobligowane do uwzględniania analizowanych regulacji w duchu represyjności. Udzielając odpowiedzi negatywnej w tym zakresie, w artykule przedstawiono próbę nadania ogólnym dyrektywom sądowego wymiaru kary prawidłowej wykładni, *de facto* abstrahującej od wypaczonych intencji projektodawców. W dalszej części opracowania zwrócono uwagę również na to, czy zmodyfikowane ujęcie art. 53 § 1 k.k. może mieć znaczenie dla zwiększenia praktycznej przydatności omawianych determinantów w procesie sądowego wymiaru kary.

Słowa kluczowe: sądowy wymiar kary, ogólne dyrektywy wymiaru kary, nowelizacja Kodeksu karnego

1. Introduction

Historical and legal conditions behind the process of law-making allow observing that normative solutions, even though intended to be binding for many years, require – for obvious reasons – introducing necessary amendments (Kania 2019: 161). The need for peculiar "correction", keeping *sui generis* "legislative watch" signaled in this way, refers also to such specific legal regulations as codes (K 2/94; see also: Kępiński, Seweryński, Zieliński 2006: 95; Weitz 2007: 21; K 5/07).[1] The above-mentioned regularity, however, does not give right to uncritically support all attempts at interfering with the existing regulations, in particular such that (aspiring after recodification) base exceptionally on ambitions or *stricte* intuitive convictions of their originators, who – programmati-

[1] The first of the indicated sentences of the Constitutional Tribunal (K 2/94) reminds that: "Codes deserve a special place in the system of legislative law. The essence of the code is creation of a coherent and – as far as possible – complete and lasting regulation in the given domain of life […]. Codes are prepared and enacted in a separate – more complex procedure than «ordinary» acts. The essence of the code is to accomplish codification of the given branch of law." Not less aptly, the issue was addressed by Karol Weitz who observed that: "Codes are acts of the fundamental significance to the given branch of law. It is accepted that they should be characterized by stability and solidity. Stability of a code means that its rules should be subject to amendments as rarely as it is only possible. The legislator's interference with the rules of a code should be well thought-over and justified, especially if it is to be respected. […] Stability of codes is not favored by a situation where there follows a transformation of the foundations of the socio-political system, as it took place in Poland after 1989, or a situation in which modifications of the legal system are treated as an instrument of the political character, as it is the case in our country at present. Nevertheless, it needs acknowledging that as much as it is feasible, the assumption behind the necessity of stability of code regulations ought to hold. Solidity of a code, on the other hand, should be understood as the assumption that it is constituted for a long time, thus also any decision of its replacement with a new regulation should be firmly justified and have real bases resulting from the needs of legal circulation" (Weitz 2007: 21–22).

cally – disregard reconstruction of both theoretical and empirical foundations of constituting law.

Juxtaposing the last observation against the assumptions of the act amending the Penal Code of 7 July 2002 (Dz.U. 2022, poz. 2600 ze zm.), it would be difficult to accept the thesis that a rational and, at the same time – required in a democratic state of law – standard of introducing changes in the penal law stops at the both arbitrary and populistic commonplace, according to which: "The present legal state does not fully realize the protective function of the penal law and as a result does not secure vital social values" (https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024: 3). The view which completes integrally this statement that penal law makes an omnipotent, reliable remedy for all ailments, neglects in a nonchalant manner the fact that its role in the process of forming social realtions is limited by nature. Penal law cannot be treated as the basic regulator of societal life, since otherwise it will turn into an indeed trivial tool, despite *in genere* the unquestionable drastic nature of means of influence, which it has at its disposal. Its instrumental treatment, indisputably supported by tightening repressiveness, superfluous casuistry as well as far-reaching need to restrict judges' discretionary power, turns out to be – as history teaches – not only an example of purely sham actions that in fact have nothing to do with standards of rationally developed penal policy in the state, but also exemplifies highly detrimental tendencies that evidently reverse (in a more or less conscious way) the civilizational development of penal law.

Objecting to the above-mentioned trends, often motivated by the illusive belief that raising the sense of fear and vaguely defined threat imposed by the "system" will allow transforming the penal law into a political mechanism of peculiar control over citizens (Citowicz 2006: 109–110; see also: Bauman 1990: 217), it is worth stressing that making reference to criminal law instrumentation should – framing it in the most general manner – follow when the desired goal cannot be achieved in any other way (Kania-Chramęga 2022: 81 ff.). For this reason every unpremeditated attempt aimed at expanding the penal law should be branded. Too broad a range of penalization (as well as criminalization) does not translate into an increase in the level of protection of the given good. It finally leads to the situation where an inappropriately chosen form of legal reaction will prove – against the cherished hopes – the least suitable means of exerting influence, one that is unable to properly weigh values colliding with one another (see: P 12/09; K 17/05; SK 8/00).[2]

[2] The second of the above-mentioned sentences passed by the Constitutional Tribunal (K 17/05) clarified, at the same time, that: "Collision of rights and principles on the constitutional level cannot lead, in the ultimate result, to a full elimination of one of the rights being in conflict. In this case, the

2. Amendment to the general directives of judicial sentencing in light of the act amending the Penal Code of 7 July 2022

Noticing (at least *prima facie*) the presence of pro-repressive tendencies with reference to the legal indications classified in the literature as general directives of judicial sentencing (Konarska-Wrzosek 2002: 73–74),[3] it needs (to keep things transparent) remarking that in compliance with the new wording of Article 53 § 1 of the Penal Code, the court – while sentencing – ought to take into consideration the degree of social noxiousness of the act, aggravating circumstances and extenuating circumstances, aims in the scope of social impact, as well as protective goals intended towards the convicted. In the second sentence added to the mentioned regulation, it is stipulated that the punitive dimension of the punishment cannot exceed the degree of the guilt. At the same time, it does not follow from the wording of the regulation under discussion (at least not in *verba legis*) that any of the general directives should be invested with the status of the leading directive. Thus, assigning the dominant character to one of the general directives of judicial sentencing shall be the prerogative (like it has been to date) of the court. Such a solution does not mean that the punishment based – *in concerto* – on one directive shall eliminate the remaining penalties. It should be concluded from the amended content of Article 53 § 1 of the Penal Code that the listing in it of the directives of judicial sentencing

problem that requires settling is always to find a certain equilibrium point, a balance for the values protected by the Constitution and to delimit the area of application of each of the rights. […] The existing fundamental axiological preferences that can be decoded on the basis of analysis of values regarded as directional or supreme on the level of general principles of the Constitution are of paramount importance in such cases (a conflict of rights). In the case of rights that are considered, there are two basic values which should be taken into account: common good (Article 1 of the Constitution) and dignity of every person (Article 30 of the Constitution). The first of the indicated principles undoubtedly constitutes a vital axiological justification for introduction of guarantees connected with access to information on activity of public authority organs, since it is common good that is involved in proper functioning of the life of public institutions, whose basic condition remains transparence of actions taken in public space. However, this framework cannot lead to the conclusion that Article 1 of the Constitution makes a peculiar «supernorm» which can lead to exclusion of application of constitutional restrictions with reference to certain rights, which are dealt with in Article 31 § 3 of the Constitution. We come to deal, in this case, rather with a determined interpretative directive. The other value, human dignity, can delineate the constitutionally admissible measure of interfering with personal goods of individuals due to the common interest. Never can protection of common interest, even the most evident, take the form that would consist in violating the inalienable human dignity."

[3] Taking account of the amended redaction of Article 53 § 1 of the Penal Code and the accepted order of listing in this regulation of the analyzed indications of penalty, it needs accepting that the categories of general directives of judicial sentencing (in compliance with the generally approved classification) include the following: directive of the degree of social harmfulness of the act, directive of general prevention, directive of specific prevention (individual) and directive of the degree of guilt.

has in its essence (still) been based on the principle of conjunction and not on that of alternative.

A closer comparative analysis of the new wording of the general directives of judicial sentencing, which has been binding for a few months now, allows in turn noticing that as much as the *status quo*, regarding its content, has been retained by the directive of the degree of social noxiousness of the act as well as the directive of the degree of guilt, their placing in Article 53 § 1 of the Penal Code has undergone a certain relocation. Placing the latter in the second sentence of the above-mentioned Article raises a suspicion whether by doing so its "boundary" role in the process of sentencing will not be weakened (*Nowe kodeksy karne z 1997 r. z uzasadnieniami* 1997: 153).[4] Having in mind the main assumptions behind the amendment under consideration, the following move in the redaction can be read as an unfortunate attempt at demonstrating the fact that the afflictive effect of the penalty shall not be restricted by the degree of the perpetrator's guilt so much as it has been so far (https://kipk.pl/ekspertyzy/populistyczna-nowelizacja-prawa-karnego: 16–17; see also: https://www.senat.gov.pl/prace/opinie-i-ekspertyzy/page,11.html?kadencja=10&rok=2022: 45; Kania-Chramęga 2020: 30).

On the other hand, a more serious change – one interfering *expressis verbis* in the very normative content itself – concerns the general-preventive directive. The expression "the needs in the scope of forming the legal consciousness of society" has been replaced by "the aims in the scope of societal impact of the punishment" – well-known both in the past (Article 50 § 1 of the Penal Code of 1969) and at present (see, among others: II AKa 325/14, II AKa 163/14; II AKa 397/14; *de lege lata* "societal impact of sentencing" constitutes – on the basis of Article 43b of the Penal Code – a reason to sentence the penal means in the form of making the sentence public). The above directive has "advanced" as far as its allocation is concerned in comparison with its "predecessor", which – in the opinions of the creators of the amendment – should eliminate the alleged primacy of the individual-preventive doctrine and guarantee parity of the preventative directives (https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024: 17). Justifying the implementation of such a change, it was stated also that: "[…] the draft stipulates modification of the formula expressing general prevention and does not come down to its desired impact on the state of legal consciousness of society (subordinated to the assumption that the lower limit of sentencing cannot be lower than the need for confirmation

[4] It followed from the justification of the draft of the binding Penal Code that as much as the lower limit of a concrete penalty was delineated by the "necessity of stabilization", "the legal order", associated with positive general prevention, the upper boundary was delineated/limited by the degree of the perpetrator's guilt.

of the justifiability of proceeding compliant with law within the scope of the given detrimental behavior), binding the court to also take into account – while determining the lower limit of the sentence (with reference to both its type and severity) – the political-criminal needs in the sphere of creating or strengthening stimuli discouraging potential perpetrators by means of purely opportunistic reasons from acting which violates the legal prohibition, therefore by deterring from committing a crime" (https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024: 18). The declared, in the above words, broad meaning of the general-preventive directive, which needs underlining, makes (nearly directly) reference to its understanding that the creators of the Penal Code proposed in 1969 (Kania-Chramęga 2020: 26–27). It must be mentioned, however, that the "cohesive" framework of the two aspects of the general-preventive goal has not found its reflection in the then practice of the justice system (Buchała 1993: 146). Consideration of pro-repressively modelled orientation of the penal policy that consistently accompanied the period in which the former Penal Code was binding, causes apprehensions whether the return to the previous wording of the directives of general prevention will not mean a return to the "primary and primitive understanding of the general prevention in which raising fear by sentencing severe punishments is to constitute the surest means of building society's respect for law" (Kaczmarek 2001: 69; see also: Hassemer 2009: 112–113; Küper 1992: 165; Kania 2019: 159).

Moreover, the content and placement of the individual-preventive directive were also modified. By placing it – in the name of the above-mentioned reasons – behind the general-preventive directive, the reference to educational aims was omitted in the new redaction of the indicated sentencing, the content being restricted to exposition of preventative goals. Not entering into a broader analysis of the relation in which educational and preventative aims remain, the legislator expressed the following stance: "The range of the notion of «preventative aim» of a penalty is broader than that of «educational aim» of a penalty. Because internalization of societal norms, as it was added, characteristic of effective educational actions, makes an effective factor in prevention of violation of law, this points to redundancy of parallel use of both terms as it is the case in the present formula of Article 53 § 1 of the Penal Code" (https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024: 19). Generally, the repressive assumptions of the amendment being discussed make one ponder over the question whether the redundancy of a separate treatment of educational goals in general, which is stressed in the above-quoted statement, does not turn out – in reality – to be a negation of the educational aims at all, which results in a weakening of the directive of individual prevention (Kania-Chramęga [ed.] 2020: 29). This supposition becomes confirmed when one recalls a statement contained in the

justification in a draft of the amendment, which was proposed slightly earlier and in which it is demanded that educational aims be removed from the content of Article 53 § 1 of the Penal Code. It was argued there that they are directly at variance with the "modern" vision of perceiving the tasks of criminal law (https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3451: 11).

3. "Anti-repressive" understanding of the general directives of judicial sentencing

The comments presented so far, addressed to the new framework of the general directives of judicial sentencing, raise in this place the question whether courts have been obliged in this way to take into account the decisions of Article 53 § 1 of the Penal Code in the spirit of repressiveness. The answer to the question thus formulated must be in the negative and its justification should not be exclusively words of general dissatisfaction or disappointment with reference to current tendencies in the development of criminal law. Such simplified statements ought to be replaced by arguments of the substantive nature, ones that remind primarily of the truth that the sense of the general directives of judicial sentencing requires reading them in the systemic axiological coherence for which, undoubtedly, the inherent and inalienable human dignity is an indication (Article 30 of the Constitution of the Republic of Poland).

Moving in this direction, it should be clearly stressed that realization of tasks or competences of the state in the scope of punishing its citizens is firmly coupled with the necessity of respecting the above-mentioned value. Therefore, also at the stage of sentencing, it needs taking into consideration the fact that the fundamental message behind the principle of respecting human dignity advocates, among others, humanitarian punishment based on the principle of minimizing sufferance and other afflictions which are connected with application of means of legal reaction (II Aka 388/17). The constitutional human dignity, respecting of which is as a matter of fact required at each stage of concretizing sanctions, ought not to, as a result, constitute a peculiar convention, an agreement, an expression of emotional experiences or an ornament called for in times of legislative wellbeing. Human dignity, treated as an immanent quality of each human being, proves a particular value, the measure of which are crisis situations, occasionally extremely difficult and – at the same time – obliging to assume a clear stance as regards its position and protection (K 44/07). Although an overt (and simultaneously not always obvious) negation of its essence would be posed by not respecting the prohibition of sentencing beyond the degree of the perpetrator's guilt or treating the individual who is being punished as a means to serve deterring potential

criminals, "negligence" of this type, while sentencing, would not make the only instance of distorting the sense of human dignity. From the provisions of the regulations contained in Article 30 of the Constitution of the Republic of Poland one can infer the prohibition of treating the individual as a subject undeserving of realization of educational goals behind punishing, thus – at the same time – an unreflective preponderance of modelling solutions, or at least those co-forming court sentencing, which are geared towards increased repressiveness. Elimination of educational aims of punishment – most probably as they are deemed an alleged barrier to severe punishment of perpetrators, or because their implementation poses a more ambitious (and generally more difficult) task in comparison with achieving preventative goals – strikes with superficiality. Their rejection is connected with not only negation of deepened evaluation of societally appropriate functioning of the individual, but also – or at least to a degree – with negation of rehabilitation, with absolute undermining of its effectiveness and, finally, with questioning the efforts of state organs aimed at allowing perpetrators of crimes rejoin social life. The *a priori* crossing out the effectiveness of "more subtle" instruments of preventative influencing perpetrators – exceeding deterrence and disabling commitment of another legally relevant crime – can thus be understood erroneously as depraving them of a chance of comprehending the reprehensibility of their behavior (Heinichen 2000: 43; Lyons 2000: 142).

Following the route set by this harmful tendency, aimed *de facto* at stark objectification of the perpetrator as an individual programmatically incapable of expressing their own critical self-reflection, is indeed hard to reconcile especially with personal dignity after all acknowledged to be the root of humanity (Zieliński 2019: 112). It is worth emphasizing that even committing a crime does not annul *per se* the dignity of the perpetrator, does not exclude them from the legal protection and should not arbitrarily close the road to correction to them. Thus, perceiving a contradiction between the new redaction of the individual-preventive directive and the basic message resulting from the obligation to respect man's dignity, the following question should be asked: Should the regard for respecting the above-mentioned value determine in a solely decorative way and purely seemingly the intransgressible boundaries in the lawmaking process, or should it allow courageous delineating them in the situation where the legislator "ceases" to respect the fundamental rights and freedoms of the individual? Giving an unambiguously positive answer regarding preserving an attitude of interpretative openness, it should be stated that it is thanks to such a perception of the role of the subject applying law that the man's constitutional dignity would not play the role of an empty platitude, under which all sorts of content can be smuggled (even if useful).

Instead, it would make one of the basic matrixes serving to decode – in the process of interpretation – the binding norms (Zieliński 2019: 127).

The direction of reading the amended framework of the general directives of judicial sentencing, which is proposed here, "could save" in its essence their "constitutionality" and, simultaneously, would not contain in itself characteristics of lawmaking. Furnishing a pro-constitutional interpretation of the indications of sentencing would confirm the fact that it is impossible to declare acceptance of normative and axiological superiority of the fundamental act in the system of law and – at the same time – promote such an understanding of statutory regulations that would contradict the values incorporated in the Constitution of the Republic of Poland.

4. Practical assessment of usability of the amendment to the general directives of judicial sentencing

The analyzed changes incline also toward asking yet another question: Shall the partial re-redaction of the general directives of judicial sentencing impact – and to be precise – augment their usability in the practice of the justice system? Obviously, one cannot deny that with respect to the amended Article 53 § 1 of the Penal Code the legislator made use of terms that are not alien to the national tradition of constituting criminal law; nevertheless, one can have doubts if expressions which are *de facto* characterized by a considerable degree of relativity (and interpretative capacity), provide a sufficient guarantee to protect the individual against randomness of selecting the punishment that is appropriate as far as both its type and severity are concerned.[5]

Referring the above comment to the directive of societal noxiousness of the act, mentioned *in principio* in Article 53 § 1 of the Penal Code, the question must be asked: Is it possible, despite (*de lege lata*) having worked out normative criteria of assessment of social harmfulness (Article 115 § 2 of the Penal Code), to clearly indicate that it is this and not any other severity of the penalty that "takes into consideration" the objectivized degree of the harmfulness? Generally difficult quantification of circumstances determining the degree of societal noxiousness of the criminal act (V KK 119/17)[6] leads

[5] The doubts which have been raised are not neutralized either by accentuating in the new wording of Article 53 § 1 of the Penal Code attenuating and aggravating circumstances (or even their illustrative listing: see Article 53 § § 2a and 2b of the Penal Code).

[6] As it is noted in the following decision of the Supreme Court (V KK 119/17): "[…] making an evaluation of the circumstances determining the degree of societal harmfulness of the act being the subject of criminal proceedings, the court ought to consider which of the premises enumerated in Article 115 § 2 of the Penal Code, appear in the concrete case, carry out a deepened analysis of each

to the conclusion that "ordering" to the degree of societal harmfulness of the act the appropriate type and severity of the punishment will still raise doubts from the perspective of uniformity of applying law. Complementing the above concerns, it is worth adding that, again, in the relocation of the mentioned directive itself, it is not possible to perceive any "added value" that would rationalize judicial sentencing.

Furthermore, unavoidable controversy will be generated also by establishing whether the aims pertaining to the societal impact of the penalty will be achieved by sentencing it. The standpoint represented by the originators of the amendment, saying that modification of the formula expressing general prevention that obligates the court, while determining the lower limit of the punishment, to also take into account "the political-criminal needs in the sphere of creation or strengthening stimuli discouraging potential criminals for purely opportunistic reasons from proceeding that violates legal prohibitions, thus by deterrence from committing crimes" (https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024: 18), does not free (see: Skowroński 2003: 83–84)[7] from the fundamental doubt which results from the necessity of verifying what punishments and of what severity correspond to the needs in the scope of general crime prevention (Kaczmarek 1995: 69; Kania 2016: 67).

The court's not having at its disposal a suitable diagnostic knowledge (which most probably will make the most frequent, if not exclusive, and repetitive scenario in this respect) on crime-generating properties of the environment, ones that would be encompassed by the repercussions of the punishment that is sentenced, inclines to the conclusion that formation of the severity of the punishment in the perspective of the directive of general prevention will still

---

of them, take into account the significance in the existing reality and make an assessment of which of these circumstances heighten and which lower the degree of the harmfulness."

[7] In the context of the binding wording of Article 53 § 1 of the Penalty Code (and the stance taken by its creators) one can ponder over whether the originators of the draft perceived appropriately the basic difference which occurs between the aim and the function of a penalty. Expressing a doubt in this matter, it is worth, in this place, reminding that the creators of the binding Penal Code clearly pointed to the fact that it rejects aims after all and not – as it needs adding – functions consisting in deterring society. Accepting interchangeably that a function of punishment corresponds to its real impact, it should also be said that as much as constructive propagation of approval of the legalistic attitude (to achieve which using escalation of severity of punishment was considered superfluous) remains a positive-preventative aim, it would be impossible to exclude *a priori* the possibility of inducing the deterring effect from the sphere of real effects of application of the given penalty. Then, independent of that, it seems that the criterion of differentiation between negative general prevention and positive general prevention makes essentially a subjective influence of information about the applied sanction, which cannot only evoke fear, but also makes an impact on motivation of a higher order than the very sense of fear of a punishment itself. The above settlement does not change, however, the fact that negative general prevention should not constitute a contemporary goal of punishment, but only its eventual factual function.

be based on the court's intuition to a great extent (Kaczmarek 1998: 25–27).[8] In other words, the sense of general-preventive impact of punishment will be finally filled by the court's (judges') representation regarding societal reception of the penalty as well as with reference to the approving or deterring attitude towards it, expressed by vaguely identified public opinion.

It should also be stated, furnishing further comments, that the normative narrowing of the content of the individual prevention directive for preventative reasons, which a penalty is supposed to provide with reference to the perpetrator, surely cannot be assessed in the category of a measure favoring the process of rationalization of sentencing. Proper taking account of individual-preventive aims demands that the court should have at its disposal reliable personal identification material (VI KRN 207/78; Kaczor 2010: 46 ff.),[9] on the basis of which it would be possible to not only make an accurate social prognosis on the perpetrator, but also foresee potential preventative effects of the penalty that is sentenced.[10] Without obtaining this information, it would be hard to ensure and prove that the punishment dealt has the individual-preventive value and is appropriate regarding its type and severity towards the concrete perpetrator (Kaczmarek 2013: 91).

Considering the question of practical usability of the new framework of general directives of judicial sentencing, it must be observed, too, that making the allocative amendment of the directive of severity of penalties, the creators did not point, at the same time, to either quantifiers or any other criteria, on the basis of which it would be possible to prove that the defined severity of the penalty does not exceed the degree of perpetrator's guilt. With reference to the above-mentioned directive it has not been resigned from the limiting framework of the directive concerning the degree of guilt, though, even if – in the past – this used to raise a clear objection. It is worth recalling that regard-

[8] In this place, it needs mentioning that acceptance of the positive-preventative strategy in the Penal Code of 1997 was meant to free the court from the necessity of recognizing the crime-generating characteristics of the given environment which punishment should exert an influence on, as well as from making conversions of these characteristics to the type and severity of the penalty. This view, however, can generate justified doubts. Exempting the court from the obligation to verify the societal prognosis of the environment whose awareness is to be shaped through punishments dealt gives rise *prima facie* to the question what then should provide the substantive foundation to determine the needs in the scope of forming legal awareness of society?

[9] In the quoted sentence of the Supreme Court, it was aptly noticed that: "Sentencing the appropriate penalty, regarding its type and severity, ought to be conditioned also by collecting and taking into account indispensable personal identification data […], since it is a perpetrator of concrete personality characteristics and concrete behavior before committing the crime, during committing it and after committing it, who is subject to punishing."

[10] However, treatment of the background survey appears in certain contradiction with this assumption (Article 214 of the Code of Criminal Procedure), by principle, as *ultima ratio*.

ing the criticism voiced – relatively shortly after the Criminal Code came into use – it did not give bases for sentenced penalties to actually correspond to the degree of the perpetrator's guilt (https://archiwum.rp.pl/artykul/436694-Kara-dostosowana-do-stopnia-winy-sprawcy.html; see also: Iwaniec 2004: 141–142). Entering into polemics with this kind of interpretation (or even an eventual attempt at normative modification of the directive of the degree of guilt in the future), it should be noticed that the requirement for the affliction of the punishment not to exceed the degree of guilt and dosing the penalty that is commensurate with the guilt do not exclude each other. As a matter of fact, the penalty that does not exceed with its affliction the threshold delineated by the degree of the guilt will be commensurate with the guilt at the same time, unless other grave questions should speak in favor of its commutation (Giezek 2012: 383; see also: Bojarski 1993: 81; Konarska-Wrzosek 2002: 81 ff.).

In this place, being fully aware of a simplification of further considerations on this or another normative wording of the directive of degree of guilt, it should be stated that the very shifting of the restrictive framework of this directive to the position of the second sentence of Article 53 § 1 of the Penal Code does not neutralize *de facto* the doubts raised to date regarding the practical significance of the given indication. For this reason, I keep on asking the following rhetorical question, as it is particularly telling: "Isn't it odd that we demand of the judge that while sentencing they should pay utmost attention to that the penalty does not exceed the guilt of the perpetrator, whereas the very code itself will not settle what should be understood by the guilt and scholars of the highest professional rank have not been able to settle between themselves until this day what makes its essence?" (Kaczmarek 2013: 101; Achenbach 1984: 137; see also: Bojarski 2004: 39).[11]

The above-presented observations can naturally lead to the conclusion that the analyzed amendment to the Penal Code has not diminished in point of fact the real practical difficulties resulting from the lack of a worked out method and criteria that would allow "calculating over" the circumstances of a concrete act, perpetrator's personality traits and crime-generating characteristics of the environment and converting the outcome to a judicial sentence that is suitable as far as its type and severity are concerned, that is appropriate from the point of view of justice and prevention (Kaczmarek 1980: 164). A modification of the general directives of judicial sentencing, which consists in reformulation and changing the order of sentences, does not free from the concern that the process

[11] In the opinion of Tadeusz Bojarski: "The formulation contained in Article 53 § 1 of the Penal Code, that the affliction of the sentence should not exceed the degree of the guilt, cannot be translated into the language of practice. No one is able to prove that exceeding the degree of the guilt has occurred or not. This assumption is unrealistic and unworkable" (Bojarski 2004: 39).

of court sentencing will still be carried out in the conditions of peculiar relativity, finally making a resultant of a number of factors of *de facto* varied etiology.

5. Final remarks

The considerations presented in this work, incline – in the first place – to offering a more general conclusion that reminds that all assumptions about liberating humanity from the phenomenon of criminality, which are executed by means of increasingly intensified repressive settlements emphasizing sanctions, are founded on principles deriving from a totalitarian criminal law. It is impossible to objectively, contradict the fact that the excessive repressiveness stimulated with factors which are doubtful by nature – apart from subordinating criminal law to the state apparatus of authority and the entailed pure instrumentalization of it – constitute primary and, at the same time, easy to identify features of authoritarian criminal law (Osak 2021: 219). While perceiving this kind of threat, one must acknowledge that the proposed interpretation of the framework of the general directives of judicial sentencing, directed towards respecting values in a democratic state of law, ought to protect not only against the very preference for severity of the punishment, which is groundless anyway, over its unavoidability (including the stage of its sentencing – Schäfer, Sander, van Gemmeren 2017: 291), but also against investing the analyzed issues with the counter-constitutional character.

In turn, taking the stance on evaluation of practical usability of the framework of the general directives of judicial sentencing, which is in force, we can hardly avoid getting the impression that the amendment to the Penal Code of 7 July 2022 has not lessened the controversies concerning the issue, which have been voiced to date. For this reason, the opinion expressed by Tomasz Kaczmarek, who devoted a lot of space and attention in his scientific work to determiners of sentencing, including the general directives behind the process (see in particular: Kaczmarek 1972; Kaczmarek 1980; Kaczmarek *et al*. 1987), is only too valid. The researcher argued rightly that: "One should not overestimate the practical significance of the regulations formulating the general directives of judicial sentencing. The rules, irrespective of the manner in which they frame their content, constitute most often a mystification that serves to upkeep illusions that rationalization of punishment can follow strictly according to the paradigms accepted in the act, in a way completely independent of autonomous disposition of the judge to take into account other sets of values and preferences for them, resulting from their own evaluative attitudes" (Kaczmarek 2013: 102).

Irrespective of the comment presented here, which as a matter of fact is accompanied by a generally pessimistic vision with reference to the usefulness of the general directives of judicial sentencing, it seems that normatively constructed bases of sentencing do not deserve either being treated as having a merely decorative character nor getting completely negated. Despite the fact that application of the regulations under analysis poses a serious challenge to the court, it needs underlining that their being guaranteed in a relevant regulative act allows placing judicial sentencing in the concrete legal reality, thus preventing the above-mentioned process from being seen, in particular, in the category of judges' *licentia poetica* (Kania 2015: 36). In consequence, it is fairly legitimate to observe that indeed the lawmaker does not equip the court in reliable (even though auxiliary only) tools to sentence a just and deliberate legal reaction, yet simultaneously – including legal indications in the regulations of the Penal Code, according to which the court is obliged to proceed in this process – the former should give a vital axiological message to the latter, one that leaves "a broad space for reflexiveness, intellectual openness and moral sensitivity […] to read not only the letter of law, but also feel its spirit" (Kaczmarek 2015: 272). Looked at from the strictly normative perspective – *de lege lata* – the current framework of Article 53 § 1 does not satisfy this standard.

References

Legal acts

Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, Dz.U. 2022, poz. 1138, tekst jednolity [Act of 6 June 1997 – the Penal Code, consolidated text].

Ustawa z dnia 7 lipca 2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, Dz.U. 2022, poz. 2600 ze zm. [Act of 7 July 2022 on changing the Penal Code and some other acts, as amended].

Jurisprudence

Orzeczenie TK z dnia 18 października 1994 r., K 2/94. Dostęp: 21.06.2023. OTK 1994, poz. 36 [Decision of the Constitutional Tribunal of 18 October 1994. Accessed: 21.06.2023].

Wyrok TK z dnia 9 października 2001 r., SK 8/00. Dostęp: 21.06.2023. OTK 2001, nr 7, poz. 211 [Sentence of the Constitutional Tribunal of 9 October 2001. Accessed: 21.06.2003].

Wyrok TK z dnia 20 marca 2006 r., K 17/05. Dostęp: 21.06.2023. LEX nr 182494 [Sentence of the Constitutional Tribunal of 20 March 2006. Accessed: 21.06.2023].

Wyrok TK z dnia 19 września 2008 r., K 5/07. Dostęp: 21.06.2023. OTK-A 2008, nr 7, poz. 124 [Sentence of the Constitutional Tribunal of 19 September 2008. Accessed: 21.06.2023].

Wyrok TK z dnia 30 września 2008 r., K 44/07. Dostęp: 21.06.2023. OTK-A 2008, nr 7, poz. 126 [Sentence of the Constitutional Tribunal of 30 September 2008. Accessed: 21.06.2023].

Wyrok TK z dnia 6 lipca 2011 r., P 12/09. Dostęp: 21.06.2023. OTK-A 2011, nr 6, poz. 51 [Sentence of the Constitutional Tribunal of 6 July 2011. Accessed: 21.06.2023].

Wyrok SA we Wrocławiu z dnia 29 grudnia 2017 r., II AKa 388/17. Dostęp: 21.06.2023. LEX nr 2446569 [Sentence of the Administrative Court in Wrocław of 29 December 2017. Accessed: 21.06.2023].

Wyrok SA w Lublinie z dnia 12 sierpnia 2014 r., II AKa 163/14. Dostęp: 21.06.2023. LEX nr 1500827 [Sentence of the Administrative Court in Lublin of 12 August 2014. Accessed: 21.06.2023].

Wyrok SA w Gdańsku z dnia 2 września 2014 r., II AKa 325/14. Dostęp: 21.06.2023. LEX nr 1648834 [Sentence of the Administrative Court in Gdańsk of 2 September 2017. Accessed: 21.06.2023].

Wyrok SA we Wrocławiu z dnia 30 grudnia 2014 r., II AKa 397/14. Dostęp: 21.06.2023. LEX nr 1953220 [Sentence of the Administrative Court in Wrocław of 30 December 2014. Accessed: 21.06.2023].

Wyrok SN z dnia 29 sierpnia 1978 r., VI KRN 207/78. Dostęp: 21.06.2023. OSNKW 1978, nr 12, poz. 142 [Sentence of the Supreme Court of 29 August 1978. Accessed: 21.06.2023].

Postanowienie SN z dnia 14 listopada 2017 r., V KK 119/17. Dostęp: 21.06.2023. LEX nr 2418095 [Decision of the Supreme Court of 14 November 2017. Accessed: 21.06.2023].

Secondary sources

Achenbach, Hans. 1984. Individuelle Zurechnung, Verantwortlichkeit, Schuld. In: *Grundfragen des modernen Strafrechtssystems*, (ed.) Bernd Schünemann, 135–152. Berlin–New York: Walter de Gruyter.

Bauman, Jürgen. 1990. Kara jako zadanie społeczne. *Nowe Prawo* 10–12: 209–221.

Bojarski, Tadeusz. 1993. Społeczna szkodliwość czynu i wina w projekcie k.k. In: *Problemy kodyfikacji prawa karnego. Księga ku czci Profesora Mariana Cieślaka*, (ed.) Stanisław Waltoś, 71–82. Kraków: Uniwersytet Jagielloński.

Bojarski, Tadeusz. 2004. Uwagi o karach i ich orzekaniu na tle projektowych zmian kodeksu karnego. In: *Nauka wobec współczesnych zagadnień prawa karnego w Polsce. Księga pamiątkowa ofiarowana Profesorowi Aleksandrowi Tobisowi*, (ed.) Bogusław Janiszewski, 29–42. Poznań: Wydawnictwo Poznańskie.

Buchała, Kazimierz. 1993. System sądowego wymiaru kary w projekcie kodeksu karnego. In: *Problemy kodyfikacji prawa karnego. Księga ku czci Profesora Mariana Cieślaka*, (ed.) Stanisław Waltoś, 131–148. Kraków: Uniwersytet Jagielloński.

Citowicz, Rafał. 2006. Tradycyjna dogmatyka prawa karnego a nietradycyjne typy przestępstw (Ogólnopolska konferencja naukowa, Szklarska Poręba, 6–8 IV 2006). *Państwo i Prawo* 11: 109–111.

Giezek, Jacek. 2012. Komentarz do art. 53 k.k. In: *Kodeks karny. Część ogólna. Komentarz*, (ed.) Jacek Giezek, 380–385. Warszawa: Wolters Kluwer.

Heinichen, Christian. 2000. *Generalprävention im Lichte absoluter und relativer Straftheorien. Forschungsarbeit*. Norderstedt: GRIN Verlag.

Hassemer, Winfried. 2009. *Warum Strafe sein muss. Ein Plädoyer*. Berlin: Ullstein TB-Verlag.

Iwaniec, Jakub M. 2004. Kara celowa a kara sprawiedliwa. *Przegląd Sądowy* 1: 130–148.

Kaczmarek, Tomasz. 1972. *Sędziowski wymiar kary w Polskiej Rzeczypospolitej Ludowej w świetle badań ankietowych*. Wrocław: Zakład Narodowy im. Ossolińskich.

Kaczmarek, Tomasz. 1980. *Ogólne dyrektywy wymiaru kary w teorii i praktyce sądowej*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Kaczmarek, Tomasz *et al*. 1987. *Decyzja sędziego w sprawie wymiaru kary i jej psychospołeczne uwarunkowania*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Kaczmarek, Tomasz. 1995. O pozytywnej prewencji w ujęciu projektu kodeksu karnego z 1994 r. *Palestra* 3–4: 63–72.

Kaczmarek, Tomasz. 1998. Kryminalnopolityczne założenia nowego kodeksu karnego. *Nowa Kodyfikacja Prawa Karnego* I: 11–30.

Kaczmarek, Tomasz. 2001. Opinia o rządowym projekcie ustawy o zmianie ustawy Kodeks karny. *Czasopismo Prawa Karnego i Nauk Penalnych* 1: 61–101.

Kaczmarek, Tomasz. 2013. Z rozważań nad racjonalizacją sądowego wymiaru kary. In: *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, (eds.) Wojciech Cieślak, Sławomir Steinborn, 85–102. Warszawa: Wolters Kluwer.

Kaczmarek, Tomasz. 2015. Ogólne dyrektywy wymiaru kary. W: *System prawa karnego. Nauka o karze. Sądowy wymiar kary.* Vol. 5, (ed.) Tomasz Kaczmarek, 196–274. Warszawa: C.H. Beck.

Kaczor, Robert. 2010. Dane osobopoznawcze w kontekście ograniczeń prawa karnego. *Prokuratura i Prawo* 11: 46–61.

Kania, Agnieszka. 2015. About basic terms regarding judicial sentences. Remarks in the context of the Polish Penal Code. *Nowa Kodyfikacja Prawa Karnego* XXXVIII: 27–36.

Kania, Agnieszka. 2016. Dyrektywa pozytywnej prewencji ogólnej – wybrane problemy. Uwagi na tle kodeksu karnego. *Nowa Kodyfikacja Prawa Karnego* XXXIX: 55–71.

Kania, Agnieszka. 2019. Kierunki zmian w zakresie sądowego wymiaru kary (wybrane problemy w perspektywie najnowszych propozycji legislacyjnych). *Studia Prawnoustrojowe* 43: 155–162.

Kania-Chramęga, Agnieszka. 2020. Nowelizacja ustawowych wskazań sądowego wymiaru kary a (nie)racjonalna próba kształtowania polityki karnej. In: *Zmiany w prawie karnym materialnym i procesowym w latach 2013–2019. Zagadnienia wybrane.* Vol. III, (ed.) Hanna Paluszkiewicz, 18–33. Zielona Góra: Oficyna Wydawnicza Uniwersytetu Zielonogórskiego.

Kania-Chramęga, Agnieszka. 2022. *Tendencje w rozwoju prawa karnego oraz ich ocena (węzłowe problemy w perspektywie obowiązywania Kodeksu karnego z 1997 r.)*. Zielona Góra: Oficyna Wydawnicza Uniwersytetu Zielonogórskiego.

Kępiński, Marian, Michał Seweryński, Adam Zieliński. 2006. Rola kodyfikacji na przykładzie prawa prywatnego w procesie legislacyjnym. *Przegląd Legislacyjny* 1: 95–107.

Konarska-Wrzosek, Violetta. 2002. *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*. Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika w Toruniu.

Küper, Wilfried. 1992. Autobiographie oder Schattenbild? Zur „Selbstbeschreibung" P.J.A. Feuerbachs. In: *Festschrift für Günter Spendel zum 70. Geburtstag*, (ed.) Manfred Seebode, 153–172. Berlin-New York: Walter de Gruyter.

Lyons, David. 2000. *Etyka i rządy prawa*, tłum. Paweł Maciejko. Warszawa: Dom Wydawniczy ABC.

Nowe kodeksy karne z 1997 r. z uzasadnieniami 1997. Warszawa: Wydawnictwo Prawnicze.

Osak, Mikołaj. 2021. Cechy stalinowskiego prawa karnego na podstawie podręcznika Igora Andrejewa, Leszka Lernella i Jerzego Sawickiego „Prawo karne Polski Ludowej" z 1950 r. *Miscellanea Historico-Iuridica* XX: 219–238.

Schäfer, Gerhard and Günther M. Sander, Gerhard von Gemmeren. 2017. *Praxis der Strafzumessung*. München: C.H. Beck.

Skowroński, Krzysztof. 2003. Ogólne dyrektywy sądowego wymiaru kary w Kodeksie karnym z 1997 r. *Palestra* 7–8: 81–87.

Weitz, Karol. 2007. Czy nowa kodyfikacja postępowania cywilnego? *Państwo i Prawo* 3: 13–27.

Zieliński, Sebastian. 2019. Rozumienie godności człowieka i jej znaczenie w procesie stanowienia i stosowania prawa. Propozycja testu zgodności regulacji prawnych z zasadą godności człowieka. *Przegląd Sejmowy* 4: 107–127.

Internet sources

Barczak-Oplustil, Agnieszka *et al*. Populistyczna nowelizacja prawa karnego. Ustawa z dnia 7.07.2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762), https://kipk.pl/ekspertyzy/populistyczna-nowelizacja-prawa-karnego/. Last access 21.06.2023.

Giezek, Jacek *et al*. Opinia na temat ustawy z dnia 7 lipca 2022 r. o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk senacki nr 762), https://www.senat.gov.pl/prace/opinie-i-ekspertyzy/page,11.html?kadencja=10&rok=2022. Last access 21.06.2023.

Mącior, Władysław. Kara dostosowana do stopnia winy sprawcy, https://archiwum.rp.pl/artykul/436694-Kara-dostosowana-do-stopnia-winy-sprawcy.html. Last access 21.06.2023.

Rządowy projekt ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk sejmowy nr 2024), https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024. Last access 21.06.2023.

Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk sejmowy nr 2024), https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2024. Last access 21.06.2023.

Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw (druk sejmowy nr 3451), https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3451. Last access 21.06.2023.