

# The penalty of restriction of liberty — The Polish model of intermediate punishments

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## I

One of the main challenges of contemporary criminal policy is to find procedures and measures that would be effective in terms of reducing crime and, at the same time, economical from the point of view of combating the phenomenon. Such actions are also determined by cultural and social changes as well as technological progress, and, especially our experience so far with criminal sentencing. What is also important is taking into account the changing kinds, forms and manifestations of crime. The daily practice of the justice system as well as the knowledge acquired in the course of imposition and enforcement of criminal sentences are permanent elements of the discussion about the desirable model of the so-called formalised response of the state to criminal behaviour.

Traditionally, an important place in this complex process is occupied by criminal law treated as a set of substantive, procedural and enforcement-related regulations. In such a holistic approach criminal law uses a variety of paths in the pursuit of its goal, i.e. combating crime, with its norms seeking to protect the state as well as the social and economic re-

lations within it, and to protect human rights and freedoms against violations defined as criminal offences. At the same time it should clearly be noted that what makes criminal law stand out are elements like its mandatory and evaluative nature, universalism and subsidiarity<sup>1</sup>. A unique position among the norms of criminal law is occupied by provisions regulating the objectives, substance and components of penal sanctions. Today criminal law attaches great weight to indicating objectives to be achieved as a result of sentence enforcement. What also matters is pointing to the forms of the various punishments and measures responding to offences as well as rules of their enforcement. In this perspective punishment becomes an instrument of influencing the perpetrators, and not only them, in a variety of ways. A sanction, seen as a conscious response of constitutionally authorised state bodies, is to achieve a range of objectives, beginning with just retribution, through compensation, general prevention and ending with individual prevention. The development of criminal law and, within its framework, changes to the substance and rules of sanction enforcement, make up a process of improvement of the existing measures, especially on the basis of an assessment of their practical utility. As the foundation of the fight against crime, criminal law naturally seeks to be effective, both organisationally (efficient operation of the justice system) and when it comes to applying and developing the legal norm.

Given the perspective outlined above, the aim of the present study is to analyse normative solutions with regard to the changing substance of the penalty of restriction of liberty. The sanction in question occupies a unique position in the Polish catalogue of principal punishments as the so-called intermediate punishment, between a fine and a custodial sentence. Over the last forty years or more the punishment has changed considerably, mainly as a result of difficulties with its application and enforcement as well as its still modest share in the sentencing structure. From its very beginning, i.e. the criminal codification of 1969, restriction of liberty has been regarded in principle as an important element

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<sup>1</sup> A. Marek, Chapter I. 'Pojęcie prawa karnego, jego funkcje i podział', [in:] *System prawa karnego. Zagadnienia ogólne*, vol. I, ed. A. Marek, Warszawa 2010, p. 7.

of criminal policy. It was meant as one of the main measures of responding to petty and medium-severity crimes. Unfortunately, throughout this period, despite clear political-criminal declarations as well as regulatory solutions intended to favour this sanction, its share in the sentencing structure has been disappointing<sup>2</sup>. The substance of the sanction became the subject of a major reorganisation in the most recent amendment to the criminal law introduced in the Act of 20 February 2015 amending the Criminal Code and some other acts<sup>3</sup>. The scope of changes introduced by the new legislation is so vast that it could even be said that restriction of liberty has been substantially remodelled as a punishment. It is worth taking a closer look at these changes and evaluate them with reference to the assumptions adopted by the legislator and our experience with the previous variants of restriction of liberty. The task is all the more interesting given the fact that the authors of the new legislation, in explaining the rationale behind the changes relating to the substance of the penalty of restriction of liberty, clearly state that the objective was to:

intensify the severity of the penalty of restriction of liberty and reduce the attractiveness of probation associated with a suspended custodial sentence. Alongside fines, restriction of liberty should become the basic punishment in the case of offences the social harm of which is not particularly high. There are also plans for the period for which the sentence can be imposed to be extended up to 2 years. The substance of restriction of liberty has undergone a major revision, with the penalty becoming more flexible and given concrete form on a case by case basis. It now includes electronic supervision as well as other obligations limiting specific human freedoms<sup>4</sup>.

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<sup>2</sup> Restriction of liberty amounted to, at best, a dozen or so per cent of the sentencing structure, e.g. in 1970 — 6.2%, in 1984 — 8.2%, 1997 — 5.2%, 1999 — 7.5%, 2005 — 13.4% and in 2014 — 11.2%. The data come from a study entitled *Prawomocne skazania osób dorosłych w latach 1946–2014* [Final Sentences for Adult Offenders in 1946–2014], Warszawa 2015, <http://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/> (access: 15 December 2015).

<sup>3</sup> Journal of Laws of 2015, item 396.

<sup>4</sup> Statement of reasons behind the government bill amending the Criminal Code and some other acts. Parliamentary Document No. 2393, p. 9, <http://www.sejm.gov.pl/sejm7> (access: 15 December 2015).

## II

Before proceeding to an analysis of the details concerning the substance of restriction of liberty in the light of the amendments introduced by the Act of 20 February, it is worth going back to two earlier forms of this punishment: the variant from the 1969 Criminal Code<sup>5</sup> and the original regulation from the 1997 Criminal Code<sup>6</sup>. The 1969 Criminal Code (1969 CC) regulated restriction of liberty in Articles 33–35. The sentence period in this case was between 3 months and 2 years. When serving the restriction of liberty sentence, the offender: 1) could not change his or her habitual residence without permission of the court; 2) was obliged to do the work ordered by the court; 3) was deprived of the right to perform functions in community organisations; 4) was obliged to provide explanations concerning the progress of the sentence. These four elements were obligatory components of every restriction of liberty sentence imposed on the basis of these regulations. At the same time the court could expand the sanction to include two additional obligations. Under Article 35 of the 1969 CC, when handing down a restriction of liberty sentence, the court could order the offender to make good some or the whole damage caused by the offence or to apologise to the victim. The most important element of the punishment was the obligation to work, which had no fewer than three variants. The basic form was unpaid supervised community work lasting between 20 to 50 hours a month. Under that act, instead of sentencing the offender to community work the court could, in the case of people employed by a public employer, order that between 10 and 25% of the offender's remuneration be deducted for the benefit of the State Treasury or community cause indicated by the court. In such a case the offender could not terminate his or her employment without permission of the court. Moreover, when serving the sentence of restriction of liberty, the offender was not entitled to a rise or promotion. The third variant could apply to people who were not employed. It involved referring the offender, if educational considerations justified

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<sup>5</sup> Act of 19 April 1969 — the Criminal Code (Journal of Laws No. 13, item 94).

<sup>6</sup> Act of 6 June 1997 — the Criminal Code (Journal of Laws No. 88, item 553).

this, to an appropriate public employer in order for the offender to work there for a specific period with the provisions concerning deduction from remuneration applying as appropriate<sup>7</sup>.

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<sup>7</sup> The introduction of the penalty of restriction of liberty was generally warmly welcomed by scholars and commentators. As S. Pawela stressed, "...the introduction into criminal legislation of restriction of liberty was a response to the demand of the Polish justice system for a penal measure that would not only be an alternative to short-term custodial sentences in some cases, but would also make it possible to individualise and rationalise penal measures to a greater extent. On the one hand it will replace the too widely used suspension of custodial sentences and on the other it will introduce a separate degree of sanction severity, between such principal punishments as custodial sentence and fine". S. Pawela, 'Formy resocjalizacji skazanych bez pozbawienia wolności', *Przegląd Penitencjarny*, 2, 1970, p. 32. J. Śliwowski was even more enthusiastic. According to him, "Restriction of liberty is a new penal measure worldwide, based on a unique, progressive idea of penal economy whereby we should be as economical as possible with the greatest treasure we have — human liberty. It is a great achievement of the Polish penal law and penal policy. Its success lies in finding a way for a careful and harmonious transition between deprivation of liberty and a severe sanction which does not involve 'integral' deprivation". J. Śliwowski, 'Kara ograniczenia wolności', *Gazeta Sądowa i Penitencjarna*, 12, 1968; idem, *Kara ograniczenia wolności. Studium penalistyczne*, Warszawa 1973. Critical remarks concerned the problem of a conflict between the new sanction and the international ban on forced labour (J. Skupiński, 'Kara ograniczenia wolności w prawie karnym powszechnym', *Studia Prawnicze*, 4, 1992, p. 68), the relative originality of this measure in comparison with the previous punishment in the form of corrective work as well as a lack of an in-depth concept of this type of punishment (L. Kubicki, 'Kara ograniczenia wolności w świetle doświadczeń pierwszego trzylecia', *Palestra*, 3, 1974, p. 56). For more on the discussion about restriction of liberty, see Z. Sienkiewicz, 'Od kary pracy poprawczej do kary ograniczenia wolności', *Acta Universitatis Wratislaviensis. Prawo*, 36, 1972, pp. 74ff; J. Kamiński, S. Linek, A. Sraczyńska, *Zasady orzekania kary ograniczenia wolności*, Warszawa 1974, pp. 13–15; L. Kubicki, J. Skupiński, J. Wojciechowska, *Kara ograniczenia wolności w praktyce sądowej*, Warszawa 1973, pp. 88ff; C. Łukaszewicz, B. Nizieński, W. Wychowski, *Orzekanie i wykonywanie kary ograniczenia wolności*, Warszawa 1980, pp. 12ff; K. Maksymowicz, *Obowiązek pracy w karze ograniczenia wolności*, unpublished doctoral thesis, Wrocław 1987; A. Tobias, *Kara ograniczenia wolności za przestępstwa przeciwko rodzinie*, Warszawa 1987, pp. 32–33; J. Zagórski, *Orzekanie i wykonywanie kary ograniczenia wolności oraz pracy społecznie użytecznej w Polsce w świetle analizy przepisów i wyników badań*, Warszawa 2003, pp. 44–49; R. Giętkowski, *Kara ograniczenia wolności w polskim prawie karnym*, Warszawa 2007, pp. 32–40; M. Szewczyk, Chapter I. § 6 'Kara ograniczenia wolności',

In its original version the 1997 Criminal Code provided for a major modification of the substance of restriction of liberty. The authors of the government draft of the 1997 Criminal Code stressed that although the penalty had been taken over from the previous Code, its substance had nevertheless been thoroughly revised. The changes introduced by the new legislation and relating to the organisation of work under this penal measure as well as the possibility of imposing more obligations on the offenders and placing them under the supervision of probation officers made the sanction similar to the community service known in other parts of the world<sup>8</sup>. Under the new legislation (Articles 34–36), restriction of liberty would last no less than one month and no more than twelve months and in the case of extraordinary enhancement, it could last up to eighteen months (Article 38(3) of the Criminal Code). When it comes to obligatory elements making up the substance of the punishment, under the original measures adopted in 1997, the offender: 1) could not change his or her habitual residence without permission of the court; 2) was obliged to do the work ordered by the court; 3) was obliged to provide explanations concerning the progress of his or her sentence. This time the legislator decided that there would be two alternative variants to the obligation to work. The first, basic variant, consisted in unpaid supervised work for the benefit of the community lasting between 20 and 40 hours a month in a suitable enterprise designated by the court, in a health care or social welfare facility, organisation or institution doing charity work or work for the benefit of the local community. Under the second variant between 10 and 25% of the offender's remuneration was to be deducted for the benefit of the State Treasury or community cause indicated by the court. There was another condition in such a case — while serving the sentence the offender could not terminate his or her employment without permission of the court (this condition was not binding on the employers).

Trying to undermine the charge, levelled against the 1969 regulation and concerning the violation of the international ban on forced labour, the legislator decided that the place, time, kind and way of performing the unpaid supervised work for the benefit of the local community would

[in:] *System prawa karnego. Kary i środki karne. Poddanie sprawcy próbie*, Volume VI, ed. M. Melezini, Warszawa 2010, pp. 236–240.

<sup>8</sup> *New Criminal Codes of 1997 with statements of reasons*, Warszawa 1997, pp. 139ff.

be determined by the court after hearing the offender. A crucial change was associated with the so-called optional elements of the punishment allowing for individualised enhancement of the substance of restriction of liberty. Under Article 36 of the Criminal Code, when sentencing the offender to restriction of liberty, the court could place the offender under the supervision of a probation officer or a trustworthy individual, community association, institution or organisation the statutory tasks of which included education, prevention of moral corruption and assistance to convicts. Moreover, the court could impose additional obligations on the sentenced offender, including apology to the victim, provision of maintenance of another person, refraining from alcohol abuse or use of narcotics. In addition, the court could impose on the offender an obligation to redress the damage in its entirety or in part, or to provide a cash benefit under Article 39(7) of the Criminal Code. Under Article 69 restriction of liberty could also be conditionally suspended for a trial period lasting between one and three years.

The changes introduced by the 1997 Criminal Code were intended, as R. Giętkowski rightly points out, to adapt restriction of liberty to the task of being an alternative not only to a short-term custodial sentence but also to a fine. At the same time it was about bringing this sanction closer to the so-called community service, a penal measure applied increasingly across the world and involving unpaid work performed by offenders with their consent<sup>9</sup>. Critics focused on the fact that the legislator in fact had abandoned the concept of transforming restriction of liberty into a uniform punishment similar to community service and had instead created a combination of older corrective work and community service<sup>10</sup>.

### III

The new structure of restriction of liberty (in force since 1 July 2015) denotes in practice a considerable enhancement of the substance of the sanction. There is a clear increase of elements that can be applied very

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<sup>9</sup> R. Giętkowski, *op. cit.*, pp. 21–22.

<sup>10</sup> J. Szumski, 'Kara ograniczenia wolności w nowym kodeksie karnym', *Prokuratura i Prawo*, 10, 1997, pp. 22–23.

flexibly depending on specific needs, possibilities and conditions, associated both with individualisation principles and general prevention. The court can now mete out very different variants of restriction of liberty. At the moment a restriction of liberty can be imposed for a period of no less than a month and no more than two years. It is meted out in months and years. When it comes to the nature of the various components of the substance of the sanction, we can divide them into two categories: obligatory and relatively obligatory elements. In addition to restriction of liberty, the court, in line with Article 34 of the Criminal Code, can order the offender to provide a cash benefit, to apologise to the victim or to provide maintenance for another person. These additional elements are not part of the substance of the punishment, but are an option that can supplement (enhance) it.

The obligatory substantive elements include: 1) ban on changing habitual residence without permission of the court; 2) obligation imposed on the offender to report on the progress of the sentence. Historically speaking, these components have been permanent features of restriction of liberty. They could be found in all previous variants of the punishment. By operation of law, the obligations make up each restriction of liberty. They may not be reduced or modified by the court in the course of the sentence period. When sentencing the offender to restriction of liberty, the court does not have to indicate these elements in its judgement, because they are in force under Article 34(2) of the Criminal Code irrespective of whether they are indicated by the court.

The other group, of the so-called relatively obligatory substantive elements of restriction of liberty, comprises four categories referred to in Article 34(1)(a) of the Criminal Code: 1) obligation to perform unpaid supervised work for the community; 2) obligation to remain in the place of habitual residence or another place designated for the offender with electronic supervision in place; 3) obligation referred to in Article 72(1) (4)–(7)(a) of the Criminal Code<sup>11</sup> and 4) deduction of between 10 and

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<sup>11</sup> The obligations are as follows: 1) to perform paid work, be in education or vocational training; 2) to refrain from abusing alcohol or using narcotics; 3) to submit to addiction treatment; 4) to submit to treatment, in particular psychotherapy or psychoeducation; 5) to participate in corrective and educational activities; 6) to refrain from spending



25% from the offender's monthly remuneration for the benefit of a community cause indicated by the court. The elements in question can be described as the main substantive components of restriction of liberty. They, in fact, determine the severity of the sanction<sup>12</sup>. In addition, their configuration can be shaped with regard to an individual assessment of the offender's needs and reactivity associated with his or her diagnosed dysfunctions, personal characteristics and conditions or degree of dependence on alcohol or narcotics. The structural change concerning the relatively obligatory elements is of crucial importance not only by virtue of the enhancement of the substantive elements of restriction of liberty from among which the court has to choose at least one. What matters more is the fact that today the court may use several or even all of these elements at the same time. As a result, the modality (presence of variants) of restriction of liberty becomes its characteristic feature. The sanction must be seen as one of the most flexible forms of responding to a criminal offence.

The possibility of shaping the punishment in a very individual manner is what makes the current construct different from the previous models. J. Majewski is not entirely precise in asserting that, subject to Article 58(2a) of the Criminal Code, the court can freely choose the form of restriction of liberty<sup>13</sup>. In addition to the limitation in question what should also be pointed out is the limitation stemming from Article 37a of the Criminal Code as well as the logical and legal limitations concerning the obligations of Article 72(1)(4)–(7a) of the Criminal Code and the deduction from remuneration.

If we take into account the directive of Article 58(2a) of the Criminal Code, restriction of liberty in the form of an obligation to perform unpaid supervised work for the community cannot be imposed if the offender's health status or his or her personal characteristics and conditions justifiably suggest that the offender will fail to fulfil this obligation. Another

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time in specific milieus or places; 7) to refrain from contacting the victims or other individuals in a specific manner or refrain from approaching the victims or other individuals.

<sup>12</sup> T. Sroka, 'Koncepcja jedności kary ograniczenia wolności w nowym modelu tej kary po nowelizacji z 20 lutego 2015 r.', *Palestra*, 7–8, 2015, p. 48.

<sup>13</sup> J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Warszawa 2015, p. 60.

limitation stems from the substance of Article 37a of the Criminal Code, which is a modification of statutory punishment of prohibited acts carrying a custodial sentence of no more than 8 years. By making the statutory punishment more specific wherever the legislator has failed to do so directly, the construct adds non-custodial sentences — fine and restriction of liberty — often transforming uniform sanctions into alternative sanctions<sup>14</sup>. In the case in question the legislator has introduced a limitation by stating that restriction of liberty in this case is to involve an obligation to perform unpaid supervised work for the community or an obligation to remain in the place of habitual residence or another place designated for the offender with electronic supervision in place, or a deduction of between 10 and 25% from the offender's monthly remuneration for his or her work. The catalogue does not include Article 34(1a)(3) of the Criminal Code (obligations from Article 72(1)(4)–(7a) of the Criminal Code). This construct raises some serious doubts. A grammatical interpretation suggests that the legislator has excluded the possibility for this variant of the punishment to occur in circumstances associated with the application of Article 37a of the Criminal Code. Although this conforms to the literal meaning of the provision, a logical problem arises as a result. Firstly, why can the court not impose these obligations despite the fact that it can freely choose additional obligations from Article 34(3) of the Criminal Code? Secondly, can the court indeed impose the obligations indicated in Article 34(1a)(3) of the Criminal Code provided they are not the only relatively obligatory elements of the substance of the restriction of liberty? Scholars seem to be accepting that last position<sup>15</sup>. It appears that in view of systemic and praxeological considerations such a possibility should be accepted, although we do not know yet what the case-law will be in this respect. It is worth calling for an amendment to Article 37a of the Criminal Code. The relevant provision should state that in this case restriction of liberty cannot consist solely of obligations indicated in Article 34(1a)(3) of the Criminal Code.

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<sup>14</sup> J. Giezek, 'O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzanej kary', *Palestra*, 7–8, 2015, p. 28.

<sup>15</sup> J. Majewski, op. cit., p. 93.

Restriction of liberty involving a deduction from the offender's remuneration may not be imposed on an unemployed individual (Article 35(2) of the Criminal Code). Nor would it be sensible and practical to impose on the offender the obligations of Article 72(1)(4)–(7a) of the Criminal Code, if they did not apply to the offender (e.g. obligation to be in education in the case of an individual over the mandatory school age, obligation to undergo treatment in the case of an individual who does not need it etc.). A significant doubt arises also in the context of Article 35(4) of the Criminal Code. Under this provision, Article 74 is applicable with regard to the obligations referred to in Article 72(1)(2)–(5) of the Criminal Code. Such a reference means that in the case of restriction of liberty involving treatment, including treatment for addiction, psychotherapy or psychoeducation, the convicted offender's consent is not required. At the same time such consent is required with regard to the same obligations if they are applied within the framework of a suspended custodial sentence. This difference is hard to justify. It is worth stressing at this point that the indicated forms of treatment, as enforcement practice shows, make sense only when the offender accepts them and voluntarily participates in the therapeutic process. It seems that Article 35(4) should be modified as quickly as possible in order for consent to become a mandatory requirement of imposition of these obligations in this case as well. Were this requirement to be abandoned, this might lead to sentences which might have to be replaced with alternative sanctions, which would thus unnecessarily involve enforcement agencies and generate additional costs.

The current structure of the relatively obligatory elements of restriction of liberty indicated in Article 34(1a)(1), (2), (3) and (4) of the Criminal Code allows for their further so-called internal individualisation, both when it comes to their duration — different from the duration of the sentence — and when it comes to the intensity of their impact. Unpaid supervised community work may be performed between 20 and 40 hours a month. The deduction ranges from 10 to 25% of the monthly remuneration and today may be only for the benefit of a community cause indicated by the court. The structure of restriction of liberty involving the obligations referred to in Article 72(1)(4)–(7a) of the Criminal Code gives ample opportunity for individual composition of the substance of

the punishment. The various obligations the court can resort to in any configuration (the condition being that at least one obligation from the catalogue in question must be used) makes it possible to launch varied mechanisms of influencing and controlling the sentenced offender, assuming that the level of intensity of these factors can be modified as well. The most recent element of restriction of liberty, i.e. obligation to remain at the place of habitual residence or other place designated for the offender with electronic supervision in place (the so-called on-site supervision), creates an equally broad range of possibilities for varying the punishment. Supervision means controlling the conduct of the convicted offender using technical means and involving controlling whether the offender is to be found in a place designated by the court on specific days of the week and times of the day. In this respect the court, taking into account the conditions of the offender's employment and other obligations imposed on him or her, may decide that the supervision will last between 1 month and 12 months at most. The maximum weekly duration is 70 hours and maximum daily duration is 12 hours.

An important change to the substance of restriction of liberty, as J. Majewski rightly points out, is that the duration of the punishment does not have to overlap with the period in which the various obligations are performed and deductions from remunerations are made, as specified in Article 34(1a) of the Criminal Code<sup>16</sup>. Given the form and legal nature of the obligatory and relatively obligatory components of restriction of liberty, it is possible under the current legislation that the period during which the obligations of Article 34(1a) of the Criminal Code are performed may be shorter than the entire sentence period. Moreover, these obligations may be imposed jointly, in a configuration whereby they are performed concurrently or consecutively, and the duration of the various components may vary<sup>17</sup>. The only limitation is that none of these components on its own or all the components combined into a sequence can

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<sup>16</sup> J. Majewski, *op. cit.*, p. 63.

<sup>17</sup> The view that currently restriction of liberty can be structured as a compilation and that its various components do not have to overlap with the entire sentence period is shared also by M. Mozgawa. See: M. Mozgawa, 'Komentarz do art. 34 Kodeksu karnego', <http://lex.online.wolterskluwer.pl/wKPLOnline/content.rpc>, access: 1 September 2015.

last longer than the period for which the sentence has been handed down. When setting different durations and different moments for the commencement of the various components, the court must bear in mind the final period for which restriction of liberty is imposed so that all the elements could be fitted in the substance of the sentence provided that correct enforcement proceedings are in place. Theoretically, all the elements must fit within the duration of the sentence. Whether this will indeed happen in practice is a different matter. In this respect of crucial importance is the role of the court seized of the case in enforcement proceedings — under Article 64(1) of the Criminal Enforcement Code, if work is not performed in its entirety or the deduction from the offender's remuneration is not complete or if some other obligations are not fulfilled, the court will decide whether and to what extent the punishment should be deemed complete on account of its objectives having been achieved.

This interpretation corresponds to the regulations of the Criminal Code and the Criminal Enforcement Code, as well as views presented in the literature, and is a consequence of the argumentation cited by the author of the bill. At the beginning it is worth emphasising the fact that when it comes to electronic supervision and obligations of Article 72(1)(4)–(7a) of the Criminal Code the legislator clearly differentiates their duration. Electronic supervision is limited explicitly to a maximum of 12 months, and there is no exception under which the punishment imposed with this particular variant would have to fit within the same period. It is, therefore, possible for restriction of liberty to continue after the end of electronic supervision. When it comes to the obligations of Article 72(1)(4)–(7a) of the Criminal Code, the Code refers to an appropriate application of Article 74, which means that the period and manner in which these obligations are fulfilled are determined by the court after hearing the offender. What goes even further is Article 61(1) of the Criminal Enforcement Code under which if educational considerations warrant it, the court may impose, expand or change the obligations referred to in Article 34(1a)(3) of the Criminal Code during the restriction of liberty period, or may release the offender from these obligations, unless only one obligation has been imposed.

Another argument supporting the position presented here is the provision of Article 63b(1) of the Criminal Enforcement Code. Under this

regulation, owing to important considerations, in particular those justified by the offender's paid work or health status, the court, following a motion by the sentenced offender, may decide that the hours of unpaid supervised community service will be calculated for a period other than a month, without exceeding the period of the sentence and the total number of hours of work to be performed in this period. Thus the legislator provides for a possibility whereby the community service will be performed over a period other than the period of the sentence. This means that the community service may be much shorter than the sentence itself. At the same time this will not mean that the sentence will be shortened, because other elements of the punishment, especially obligatory elements, will continue, in accordance with the sentence, until the end of the sentence period.

The view that the period of the restriction of liberty does not have to overlap with the period in which various obligations are fulfilled and deductions from remuneration are made is clearly confirmed by the statements of reasons behind the government bill, where we can read that

The period for which the court imposed the community service obligation or the deduction from remuneration obligation does not have to overlap with the period for which the penalty of restriction of liberty has been imposed. The composition of the penalty may be eclectic and its nature may become complex. In other words, under the new bill, it will be possible to impose a restriction of liberty for a specific period and to add to it one or more obligations or deduction referred to in the draft Article 34(1a). In addition, the court will be able to specify the duration of the obligation to remain at the place of habitual residence or other place designated for the offender with electronic supervision in place both on a daily and monthly basis. This will also enable the court, should the obligation in question be imposed, to compile the substance of the sentence involving a restriction of liberty with its nature changing over time<sup>18</sup>.

It is also worth referring to arguments presented by J. Majewski, according to whom the provisions of the Code lack a regulation that would limit the possibility of varying the duration of the various elements of this type of punishment. Nor is there any directive making it mandatory for these elements to be imposed always for the same and equal periods.

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<sup>18</sup> Statement of reasons behind the government bill amending the Criminal Code and some other acts. Parliamentary Document No. 2393, p. 10, available on: <http://www.sejm.gov.pl/sejm7> (access: 15 December 2015).

In this author's view, the term "łącznie" [together] used in Article 34(1b) means "together with" and not "together, for the same period"<sup>19</sup>.

When deciding on a compound restriction of liberty, the court seized of the case, in order to differentiate the periods of the various elements of the sentence or in order for these elements to be launched consecutively in the course of enforcement proceedings, must clearly indicate this in the substance of the sentence. It must decide how long the various elements will last and, if it so wishes, it may indicate different periods of their commencement or early finish. Decisions in this respect must be unequivocal, because otherwise the combination of different components will lead to a situation in which they will run for maximum periods allowed by the law and the moment of their commencement will be determined by the relevant provisions of the Criminal Enforcement Code (Articles 57a and 43k(6)).

#### IV

Restriction of liberty analysed in the context of the recent changes appears as a very complex sanction with a considerable degree of modality. It is a measure that makes far-reaching individualisation possible already at the sentencing stage. As it stands now, it enables the court to clearly vary the severity of the punishment, making it, at least in principle, very flexible. As provided for in the provisions of the Criminal Code, the sanction interferes with a range of variously defined spheres of the sentenced offender's freedom. This affects the freedom of movement, and of choosing the time and place of work. It limits the freedom to autonomously choose one's actions in the course of the day as well as the autonomy in spending one's remuneration. The obligations imposed on the offender impose a specific mode of conduct and force the offender to take specific actions.

The present study focuses mainly on aspects relating to the substance of restriction of liberty; it should be said at this point that it is only the tip of an iceberg. When analysing restriction of liberty, we cannot forget that the sanction is primarily very demanding at the enforcement stage.

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<sup>19</sup> J. Majewski, *op. cit.*, p. 63.

The range of enforcement modalities and possibilities of reorganising this punishment is even more evident in the Criminal Enforcement Code (Articles 43a–43zf and 53–66a). This state of affairs does not have to be, in principle, regarded as a failing of the existing constructs, provided that there is a clearly formulated and consciously pursued criminal policy, within the framework of the various variants of this punishment.

### Summary

The study examines the penalty of restriction of liberty. The sanction in question occupies a unique position in the Polish catalogue of principal penalties as the so-called intermediate punishment, between a fine and a custodial sentence. Over the last forty years or more the penalty has changed considerably, mainly as a result of difficulties with its application and enforcement as well as its still modest share in the sentencing structure. The aim of the study is to present changes in the substance of the penalty, beginning with the criminal codification of 1969 and ending with the major amendment to the Criminal Code of 1997, which entered into force on 1 July 2015.

**Keywords:** criminal sentence, community work, criminal policy.