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About basic terms regarding judicial sentences. Remarks in the context of the Polish Penal Code

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This study deals with basic conceptual issues regarding judicial sentences. It would be useful to start this analysis with explaining the most general term in this respect, i.e. "sentence". The lexical origin of this term illustrates that its wording seems to suggest a need for some calculation — in other words — some quantification. However, the origin of the term "sentence" in criminal law disregards the above findings. It could even be said that it deprives the discussed term of its "original", strictly arithmetic nature. In the light of academic interpretations the term "sentence" became abstract from its "mathematical origin" and is deemed to be either a decision including not only quantitative but also qualitative assessment or a limit provided for by a certain legal norm[1]. Consequently, some academics associate the discussed term with a deserved penal reaction which is within the limits provided for by the law[2]. On the other hand, an alternative approach opts for distinguishing between a narrowly interpreted "sentence" and a broadly interpreted "sentence". The former was equal to imposing upon a perpetrator a sanction "offered" by the law

[1] Cf. L. Lernell, *Współczesne zagadnienia polityki kryminalnej. Problemy kryminologiczne i penologiczne*, Warszawa 1978, pp. 157–160; idem, *Wykład prawa karnego. Część ogólna*, vol. II, Warszawa 1971, p. 95.

[2] Cf. S. Glaser, *Polskie prawo karne w zarysie*, Kraków 1933, pp. 270–271.

maker within the limits provided for by the law. On the other hand, the broadly interpreted "sentence" was augmented by "corrective solutions" which modify the narrowly interpreted "sentence" as mentioned above[3]. As may be presumed, the latter two-fold approach decreased the scope of the term "sentence", directly making it equal to a judicial sentence with its sense consisting in making the sanction appropriate in the terms of its "type, measure and level"[4].

Thus, a judicial sentence which actually is one of the basic terms of criminal law, involves a decision on the type and severity of the penal reaction provided for by the law[5]. It is worthy of note that it is a con-

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[3] Cf. T. Lappi–Seppälä, 'Zasada proporcjonalności w systemie karnym Finlandii', *Ius et Lex*, IV, 2006, pp. 167–168. Among Polish academics, this view was presented, among others, by M. Tarnawski; compare also idem, 'Nadzwyczajne złagodzenie kary a nadzwyczajne obostrzenie kary', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2, 1976, pp. 22–23.

[4] Cf. B. Wróblewski, W. Świda, *Sędziowski wymiar kary w Rzeczypospolitej Polskiej. Ankieta*, Wilno 1939, p. 9. The narrow interpretation of the term "sentence" was also presented by B. Wróblewski who submitted that a sentence means: "…any qualitative and quantitative issues regarding thereof. It does not include a pardon or a suspended sentence. These decisions are separate from imposition of punishment and therefore from its severity". Compare also B. Wróblewski, *Ustawowy a sędziowski wymiar kary. (Referat sprawozdawczy)*, Warszawa 1936, p. 3.

[5] K. Buchała, *Dyrektywy sądowego wymiaru kary*, Warszawa 1964, pp. 1–11; idem, 'System sądowego wymiaru kary w nowym kodeksie karnym', *Palestra*, 7, 1969, pp. 22ff.; W. Wolter, 'Uwagi o łagodzeniu i zaostrzaniu kary', *Państwo i Prawo*, 1, 1973, pp. 50–51; Cf. A. Tobis, 'Spory o koncepcję wymiaru kary', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 4, 1976, pp. 71ff.; T. Kaczmarek, *Ogólne dyrektywy wymiaru kary w teorii i praktyce sądowej*, Wrocław 1980, pp. 70–71; W. Świda, *Prawo karne*, Warszawa 1989, pp 280ff.; Z. Ćwiąkalski, 'O niektórych pojęciach związanych z wymiarem kary', *Nowe Prawo*, 4, 1989, p. 55; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1995, pp. 448ff.; K. Buchała, A. Zoll, *Polskie prawo karne*, Warszawa 1997, pp. 434ff.; V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, p. 46; Z. Ćwiąkalski, 'Nadzwyczajny wymiar kary w kodeksie karnym z 1997 roku po nowelizacji — próba oceny', [in:] *Zmiany w polskim prawie karnym po wejściu w życie kodeksu karnego z 1997 roku*, ed. T. Bojarski et al., Lublin 2006, pp. 106–107; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2007, p. 329; Z. Sienkiewicz [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna*, ed. M. Bojarski, Warszawa 2012, p. 389. L. Gardocki, *Prawo karne*, Warszawa 2008, p. 184; R.A. Stefański, 'Granice sądowego wymiaru kary przy zmodyfikowanych progach ustawowego zagrożenia', *Prokuratura i Prawo*, 12, 2002,

sequence[6] of the statutory maximum sentence and therefore needs to be within its limits[7]. In accordance with the proposed view, a judicial sentence is a specialization of the statutory maximum sentence[8], which results from applying a set of substantive law norms to the facts of a certain case[9] and includes applying the penal consequences provided for by the law[10].

Any attempts to classify "components" of a judicial sentence need to take into account that Polish authors specialising in criminal law are not unanimous on agreeing with the view that every decision on the type and severity of punishment as well as pardoning the sentence or imposing penal measures, preventive or probation measures constitutes a judicial sentence[11]. Particularly controversial is the issue of proper classification of criminal law measures connected with extraordinary sentence. There are differences of opinion in this regard between Polish criminal law academics. Some authors prove that applying any other criminal reaction than that which is within the limits of the maximum statutory sentence — refraining from imposing a punishment or modifying its limits is a part of

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pp. 135–138; J. Majewski, 'O ustawowym zagrożeniu i innych pojęciach związanych z nadzwyczajnym wymiarem kary (w języku kodeksu karnego)', [in:] *Nadzwyczajny wymiar kary*, ed. J. Majewski, Toruń 2009, p. 24.

[6] This view was presented by, among others,W. Wolter; cf. idem, op. cit., pp. 50–51.

[7] A. Marek, op. cit., p. 329.

[8] The below analysis aims to show that depending on the conception presented, the term "statutory sentence" would have different meanings — a narrower (including statutory maximum sentence and any possible modifications affecting the final severity of punishment) or a broader (limits within which a punishment may be imposed in accordance with all provisions of the Penal Code). It is also worth mentioning a pertinent remark made by Z. Ćwiąkalski, who while stressing the perversity and inadequacy of the articulation cited, recapitulated that in fact: '…an act of law itself does not impose anything', Cf. Z. Ćwiąkalski, 'O niektórych…', p. 52.

[9] Ibid., pp. 55–56.

[10] Z. Sienkiewicz, op. cit., p. 389; V. Konarska-Wrzosek, op. cit., pp. 46–48; A. Marek, op. cit., pp. 138–139; L. Lernell, *Współczesne zagadnienia polityki...*, pp. 144–146.

[11] This view was presented by, among others, Z Sienkiewicz and V. Konarska-Wrzosek; cf. Z. Sienkiewicz, op. cit., pp. 389–390; V. Konarska–Wrzosek, op. cit., p. 46. A different interpretation was offered by Z. Ćwiąkalski who claims that it is the sentence provided for the law rather than the judicial sentence which includes all institutions connected with sentencing which apply in a certain case; cf. idem, op. cit., pp. 106–107.

a statutory sentence[12]. In contrast, other academics believe that this type of modification fully reflects the nature of a judicial sentence[13]. Furthermore, a compromise view was also presented. A kind of "compromise" in this respect assumes that discretionary modifications of a sentence are deemed to be within the scope of judicial sentence while mandatory modifications in this regard are a part of a statutory sentence[14]. However, the rationality of this division may be — on the one hand — called into question. It was criticised as an "artificial construction", mostly due to the fact that the above-mentioned grounds for extraordinary sentence (both in an abstract and general sense) are actually a part of a statutory sentence. Such an approach to the problem would prevent them from becoming a part of a judicial sentence which is an embodiment of a retribution imposed upon a perpetrator by an authorised government authority. On the other hand, accuracy of the discussed division may be "saved" by treating adoption of the above criminal law institutions (connected with extraordinary sentence) as the final result of a decision made by a judge[15]. If accepted, this view would only confirm a "symbiotic" rather than competitive relation between a statutory sentence and a judicial sentence[16].

While discussing factors which directly influence a judicial sentence, it is worthy of note that the judicial discretion in this respect is being distinctly restricted. Signalling thereby the most important issues related to

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[12] This view was presented by, among others: W. Świda, M. Cieślak and Z. Ćwiąkalski; cf. M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1995, pp. 448ff.; Z. Ćwiąkalski, op. cit., p. 107; compare also W. Świda, *Prawo karne*, Warszawa 1989, pp. 280ff.

[13] This view was presented by, among others: W. Wolter, op. cit., p. 50–51; and K. Buchała, A. Zoll, *Polskie prawo karne*, Warszawa 1997, pp. 434ff.; K. Buchała, 'System sądowego wymiaru kary…', pp. 22ff.; R.A. Stefański, op. cit., pp. 135–138.

[14] For example, see: A. Marek, *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1997, p. 321; cf. Z. Sienkiewicz, op. cit., p. 390; V. Konarska-Wrzosek, op. cit., p. 42.

[15] Cf. R. Kokot, 'Nadzwyczajny wymiar kary — kilka uwag i kontrowersji', *Nowa Kodyfikacja Prawa Karnego*, XXV, 2010, p. 122.

[16] T. Kaczmarek, op. cit., pp. 70–71. A different view on this issue was presented by L. Gardocki. According to this author, a judicial sentence should be contrasted with a statutory sentence; cf. idem, op. cit., p. 184; compare also W. Wolter, op. cit., p. 50.

restrictions on judicial discretion provided for by the law — Article 53 § 1 of the Polish Penal Code, it must be made clear that the discussed statutory regulation is much more complex because it authorises a court to impose a sentence and at the same time it obliges the said body to make use of this competence[17]. This interpretation is confirmed by the obligatory wording of the act whereby: "the court shall impose a sentence"[18]. Nevertheless, it needs to be noted that the above-mentioned obligation to make use of the competence does not preclude the expressly stated judicial discretion, which is inherent in the manner in which the court makes use of the competence. There is no doubt that the law maker — despite using "shall" in the provision cited above — wants a judge to have some discretion when imposing a sentence. The relative discretion described here remains in the "restriction zone" defined by principles, guidelines and circumstances, which affect a judicial sentence.

The principles binding a judge when imposing a sentence which are mentioned first are usually described as: "…ideas shaping a certain system which are legally relevant in that they regulate the manner in which issues related to application of provisions governing imposition of punishment and penal measures are decided on"[19]. Some of them are contained in the basic law and others in ratified international agreements. Among the principles contained in the constitution the following should be mentioned: the principle of respect for the inherent and indispensable human dignity (Article 30 of the Constitution of the Republic of Poland), the principle banning torture and cruel treatment (Article 40 of the Constitution of the Republic of Poland), the principle of equal treatment by public authorities (Article 32(2) of the Constitution of the Republic of Poland), the principle of proportionality in restricting exercise of constitutional rights and freedoms (Article 31(3) of the Constitution of the Republic of Poland). Undoubtedly, the high importance of these consti-

[17] Cf. K. Świrydowicz et al., 'O nieporozumieniach dotyczących tzw. "norm zezwalających"', *Państwo i Prawo*, 7, 1975, p. 60.

[18] Cf. Z. Ćwiąkalski, T. Gizbert–Studnicki, 'Glosa do Wyroku Sądu Najwyższego z dn. 26 czerwca 1975 r., III KR 354/74, OSNKW 1975, no. 10–11, poz. 142', *Państwo i Prawo*, 10, 1976, pp. 169ff.

[19] Cf. A. Marek, *Prawo karne. Zagadnienia*…, p. 322.

tutional principles mentioned above demonstrates their influence on the final sentence[20].

As far as the sentencing principles laid down in or inferred from the provisions of the Code are concerned, the vast majority of criminal law authors list among them: the principle of relative judicial sentencing discretion, the principle of humanity, the principle of individualisation of punishment, the principle of crediting a term of actual imprisonment towards a sentence imposed, the principle of imposing punishment and penal measures which are precisely defined[21]. The names of these principles were reconstructed on the basis of the applicable provisions of the Code which serve as a measure to achieve their fundamental purpose[22].

Besides the principles of judicial sentencing, the second important group of factors restricting judicial discretion are guidelines which have much to do with the objectives of sentencing. They reflect an imagined situation to which the authority applying the law should aspire. It is worthy of note that the judicial sentencing guidelines contained in the Code differ as to their nature. Taking these differences into account, criminal law academics opted for dividing the judicial sentencing guidelines into general and special[23].

With respect to classification of general judicial sentencing guidelines, according to most criminal law academics under the applicable provisions of the Code there are the following: degree of culpability guidelines, degree of social harm guidelines, special prevention guide-

[20] J. Giezek [in:] J. Giezek, N. Kłączyńska, G. Łabuda, *Kodeks karny. Część ogólna. Komentarz*, ed. J. Giezek, Warszawa 2007, pp. 387–388.

[21] Z. Sienkiewicz, op. cit., p. 390; and V. Konarska-Wrzosek, op. cit., pp. 51–52; J. Wojciechowska [in:] E. Bieńkowska et al., *Kodeks karny. Część ogólna. Komentarz*, ed. G. Rejman, Warszawa 1999, pp. 915–917.

[22] Another list was suggested by, among others: K. Buchała [in:] K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz do art. 1–116 Kodeksu karnego*, Kraków 2001, pp. 381–382; compare also W. Wróbel [in:] G. Bogdan et al., *Kodeks karny. Część ogólna*, vol. I. *Komentarz do art. 1–116 K.K.*, ed. A. Zoll, Warszawa 2007, p. 692; Z. Sienkiewicz [in:] M. Kalitowski et al., *Kodeks karny. Komentarz*, vol. II, Gdańsk 1999, p. 90; W. Wolter, 'Zasady wymiaru kary w kodeksie karnym z 1969 r.', *Państwo i Prawo*, 10, 1969, pp. 513–514; W. Mącior, 'Założenia polityki karnej w projekcie kodeksu karnego z 1995 r.', *Przegląd Sądowy*, 9, 1996, pp. 71–72.

[23] Cf. especially V. Konarska-Wrzosek, op. cit., pp. 105–113; Z. Sienkiewicz [in:] M. Bojarski, J. Giezek, Z. Sienkiewicz, op. cit., pp. 393, 402.

lines and general prevention guidelines[24]. This classification of the general guidelines was not unanimously accepted by criminal law authors. The difference of opinions is illustrated, for example by the systematics in literature whose authors opted for listing only two judicial sentencing guidelines — special and general prevention guidelines[25]. It is also worthy of note that there are some views which promote extension of the list of general judicial sentencing guidelines. According to some authors, the principle of humanity provided for in Article 3 of the Penal Code not only deserves to be put on the above list but also should be considered to be "the most important" (in theoretical terms) judicial sentencing guideline[26]. Some other authors submitted that compensation and restitution to the victim should be added to the list of general guidelines[27].

On the other hand, the above-mentioned special guidelines include those which have been legislated in order to punish: 1) certain types of perpetrators, 2) by imposing certain types of punishments or variances thereof, as well as 3) for prohibited acts of certain gravity[28]. There are some controversies whether new solutions provided for in the Code (Article 37a of the Penal Code, Article 37b of the Penal Code, Article 59a of the Penal Code) should be considered to be the above-mentioned special guidelines. With respect to the first two provisions, both their allocation and lack of any directions therein for the court to follow when imposing upon a perpetrator a punishment of a certain type and severity provide an argument against such a conclusion[29]. With respect to Article 59a of the Penal Code it needs to be stressed that although this provision is located among institutions regarding sentencing, this location does not neutralize many controversies as to its status as a guideline. These controversies are caused mostly by the procedural rather than substantive nature of the discussed provision.

[24] Ibid.

[25] Cf. K. Buchała, 'Ogólne dyrektywy sądowego wymiaru kary w projekcie k.k.', *Państwo i Prawo*, 2, 1969, p. 310.

[26] L. Gardocki, op. cit., p. 187.

[27] J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2007, p. 481.

[28] V. Konarska-Wrzosek [in:] Z. Ćwiąkalski et al., *System prawa karnego. Nauka o karze. Sądowy wymiar kary*, vol. 5, ed. T. Kaczmarek, Warszawa 2015, pp. 287–289.

[29] J. Giezek, 'O sankcjach alternatywnych oraz możliwości wyboru rodzaju wymierzanej kary', *Palestra*, 7–8, 2015, pp. 28, 35.

Analysis of determinants of judicial sentences should also take into account the institutions specified in Article 53 § 2 and § 3 of the Penal Code which are most often referred to as circumstances affecting a judicial sentence[30]. The former provision is deemed to complement general sentencing guidelines (Article 53 § 1 of the Penal Code)[31], which in consequence should make it easier for the court to apply the law at this stage[32]. More doubts are raised by the legal nature of the latter provision. It is worthy of note that in the light of some views the regulation specified in Article 53 § 3 of the Penal Code was considered to be another circumstance provided for in the Code which affects a sentence[33]. A completely different conclusion was reached by an interpretation whereby Article 53 § 3 of the Penal Code was deemed to be a guideline[34]. Additionally, the latter view is internally varied because some authors believe that Article 53 § 3 of the Penal Code is a general guideline[35] while others believe it to be a special judicial sentencing guideline[36]. Agreeing with the latter, the wording of Article 53 § 3 of the Penal Code leaves no doubt that the discussed provision can be used only in certain situations, namely when it is possible to take into account the consequences of consensual neutralization of the effects caused by an offence[37]. The above feature would therefore correlate with the previously mentioned essence of special judicial sentencing guidelines.

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[30] Z. Sienkiewicz [in:] M. Kalitowski et al., op. cit., p. 94; J. Giezek [in:] J. Giezek, N. Kłączyńska, G. Łabuda, op. cit., p. 404; P. Hofmański, L.K. Paprzycki [in:] M. Bernet et al., *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2014, p. 245; M. Królikowski, S. Żółtek [in:] M. Błaszczyk et al., *Kodeks karny. Część ogólna. Komentarz do art. 32–116*, vol. II, ed. M. Królikowski, R. Zawłocki, Warszawa 2010, p. 282.

[31] A. Marek, *Kodeks karny…*, p. 143.

[32] Cf. notes of K. Maksymowicz and T. Szewioła; iidem, 'Okoliczności obciążające w ujęciu teorii i orzecznictwa Sądu Najwyższego', *Nowe Prawo*, 3–4, 1982, pp. 54–55.

[33] Z. Sienkiewicz [in:] M. Kalitowski et al., op. cit., p. 94; J. Giezek [in:] J. Giezek, N. Kłączyńska, G. Łabuda, op. cit., p. 404; R.G. Hałas [in:] F. Ciepły et al., *Kodeks karny. Komentarz*, ed. A. Grześkowiak, K. Wiak, Warszawa 2014, p. 340.

[34] M. Królikowski, S. Żółtek, op. cit., p. 280; W. Wróbel, op. cit., p. 690.

[35] W. Wróbel, op. cit., p. 690.

[36] M. Dąbrowska-Kardas, *Analiza dyrektywalna przepisów części ogólnej kodeksu karnego*, Warszawa 2012, p. 256.

[37] Cf. Wyrok Sądu Apelacyjnego w Krakowie z dn. 11 października 2007 r., II AKa 191/07, Legalis no. 96359.

While discussing this problem it is worthy of note that also Article 56 of the Penal Code should be taken into account, especially insofar as it excludes applying most of the provisions related to sentencing (i.e. Articles 53, 54 § 1 and Article 55 of the Penal Code) with respect to the obligation to remedy the damage caused by an offence or special damages for personal injury. The current wording of Article 46 of the Penal Code and Article 56 of the Penal Code caused this measure — in accordance with the intention of the authors of the last amendment — to lose its criminal character and in consequence it became an institution of civil law[38].

To conclude the above analysis, I need to stress that a judicial sentence has a special place in the works of criminal law academics. However, it is worthy of note that the discussed elements affecting its final result do not ensure that decisions made by the court are at all times accurate both in general and abstract terms. Therefore when T. Kaczmarek warned against giving too much meaning in practice to the importance of the provisions containing general judicial sentencing guidelines, he was not wrong. Taking into account the role of the "non-legal factors" the author submitted that the analysed provisions of the Code: "…are usually a mystification serving the purpose of upholding the misbelief according to which rationalization of punishment may be effected in accordance with strictly-defined statutory paradigms, in a manner which is completely independent of autonomic inclinations of a judge to take into account other sets of values and their preferences resulting from his or her own assessment"[39]. Despite the reservations presented above, it seems that the generality of grounds for judicial sentencing makes it *per excellence* a humanistic task of the court[40], but they cannot be completely negated. Due to their inclusion in an act of law, the judicial sentencing

[38] *Uzasadnienie do rządowego projektu ustawy o zmianie ustawy — Kodeks karny i niektórych innych ustaw druk sejmowy nr 2393 z 15.05.2014 r.*, http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2393, p. 28, access: 10.07.2015.

[39] Cf. T. Kaczmarek, 'O pozytywnej prewencji ogólnej w ujęciu projektu kodeksu karnego', *Palestra*, 3–4, 1995, pp. 63ff.

[40] B. Janiszewski, '"Sprawiedliwość" kary. Rozważania w świetle prawnych podstaw jej wymiaru', [in:] *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, ed. A.J. Szwarc, Poznań 1999, pp. 168–169.

can be placed in concrete legal background, preventing thereby the above process from being treated as the judicial *licentia poetica*.

Summary

This article discusses chosen terms regarding issues of judicial sentencing. This analysis pays attention not only to the term "sentencing", but also the role of factors which directly affect its results, i.e. importance of the principles, guidelines and circumstances affecting the process of judicial decisions on applying a certain penal reaction. The conclusion indicates the importance of non-legal factors which play a part in the process of judicial sentencing.

Keywords: judicial sentencing, penal reaction, sentencing principles, judicial sentencing guidelines.