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Judicial sentencing of minor and juvenile offenders. Remarks in the context of the Polish Criminal Code

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I

The special position of minors and juvenile offenders, stressed in the Polish legal system, has been reflected in several institutions of criminal law, especially those related to the issues of sentencing and other measures of penal sanctions. It is beyond a dispute that a proper selection of criminal law sanction for young offenders constitutes an example of one of the most complex issues to progress through. By virtue of being a result of several elements, it requires to take into account — on the one hand — a statutorily determined sanction for committing the act prohibited by law, and, on the other hand, the rules limiting the so-called judges' discretionary power in the decision-making process regarding the realization of such sanction. According to judicial decisions, it is of particular importance in regard to sentencing of that category of perpetrators to diagnose those perpetrators' personality thoroughly and accurately, not limiting the scope of such an examination to basic biographical information, such as enjoying a good reputation or having a previous criminal record. The assessment of the juvenile offender's motivation turns out to be of significance as well as his or her conduct during and after the com-

mitment of an offence[1]. In other words — the particular age of the perpetrator remains, therefore, the point of departure, and must be confronted with other subjective and objective circumstances relevant to the imposition of a sentence[2]. This means that the very issue of "youthfulness" does not constitute an independent element shaping the sentence to be rendered with respect to the above-mentioned category of perpetrators.

II

Referring to the provisions of the Criminal Code being in force, it seems that a meaningful exemplification of a de facto penal status of a minor, is contained in Article 10 § 3 of the Criminal Code, providing not only for the reduction of the sentence imposed on minor offenders to 2/3 of the upper limit of the statutory penalty range[3], but also the possibility to apply the extraordinary mitigation measures with respect to them[4]. This regulation constitutes an exception to the general rule laid down in Article 10 § 1 of the Criminal Code which, as a general principle, assumes that the criminal liability and consequences related to it refer to the perpetrators who at the time of committing an offence attained 17 years of age. Therefore a presumption that only the person of this age can bear full criminal responsibility is subject to some limitations. The exceptions, which however must not be broadly construed, are introduced by Arti-

[1] Judgment of the Appellate Court in Wrocław of 6 November 2012, II AKa 207/12, LEX no. 1238633; Judgment of the Appellate Court in Kraków of 25 September 2012, II AKa 133/12, KZS 2012, no. 10, item 36.

[2] Judgment of the Appellate Court in Szczecin of 27 February 2015, II AKa 43/14, Legalis no. 1241882.

[3] "[…] In accordance with the settled view of the Supreme Court — when it comes to juvenile offenders, the obligation contained in Article 10 § 3 of the Criminal Code providing that the punishment must not exceed two-thirds of the upper limit of the statutory penalty range, needs to be referred, in case of the crime of murder to life imprisonment rather than the penalty of 25 years imprisonment". Decision of the Supreme Court of 18 December 2012, III KK 289/12, Legalis no. 551028; Decision of the Supreme Court of 11 October 2006, IV KK 164/06, LEX no. 324583.

[4] Further reaching solution has been contained in Article 10 § 4 of the Criminal Code. Cf. Judgment of the Appellate Court in Lublin of 15 May 2014, II AKa 74/14, Legalis no. 1062343.

cle 10 § 2 of the Criminal Code. Under this provision, a perpetrator that is already a fifteen-year-old may incur criminal liability in case of committing one of the offences exhaustively listed in this article[5] or if there are circumstances justifying the application of the article. It should be noted at this point that under Article 10 § 2 of the Criminal Code minors may be criminally liable pursuant to the rules set out in the Criminal Code provided the circumstances of the case and the degree of the perpetrator's development as well as his or her personal characteristics and conditions require it, in particular, if the previously applied educational or corrective measures have turned out to be unsuccessful. Pursuant to the case-law, the circumstances of the case should be construed as those among them which relate particularly to the causes and the way the offence has been committed. On the one hand, the personal characteristics of the perpetrators include age, mental development, health, personality traits, attitude towards important social values and a level of their reinforcement, interests of a minor, as well as the degree of his or her demoralization[6]. On the other, personal conditions should be understood as the minor's environment, i.e. the place where he resides, as well as his or her family relationships. Moreover, the living conditions of the minor, his or her housing and economic situation as well as the degree of satisfaction of his or her legitimate existential needs constitute important factors which should be taken into consideration in making this assessment[7]. One cannot also say that the information regarding the minor's state of health, the degree of

[5] Judgment of the Appellate Court in Kraków, 4 July 2002, II Aka 163/02, LEX no 57016.

[6] In the jurisprudence it has been emphasized that: "[…] Individual reprehensible or very reprehensible actions undertaken by a minor do not yet prove a high degree of demoralization. Demoralization is in fact a permanent tendency for a particular behaviour — violation of norms that are socially accepted, these are repeated acts, not a single one, deviating from the accepted moral rules. Only the whole picture of the juvenile behaviour may indicate the degree of its demoralization. It should also be stressed that even the nature and type of the act committed is only one of the indicators of the degree of demoralization of a minor". Judgment of the Appellate Court in Katowice of 18 March 2004, II AKa 531/03, LEX no. 142829.

[7] Judgment of the Appellate Court in Wrocław of 21 October 2015, II AKa 262/15, Legalis no. 1360978; Judgment of the Appellate Court in Kraków of 5 November 2008, II AKa 87/08, Legalis no. 175049.

his or her mental and physical development, intelligence quotient (IQ)[8] or personality traits[9] bear no significance. The fact that the previously applied educational or corrective measures turned out to be ineffective should remain strictly the auxiliary criterion for assessing the criminal liability of the minor. According to the Supreme Court, the occurrence of this prerequisite is not a condition sine qua non to determine the criminal liability of the juvenile. As it has been noted in one of the decisions of the Court, "the term 'especially' indicates it, as it implies that the application of educational and corrective measures is of an auxiliary and supplementary character in assessing the juvenile"[10].

As it follows from the above, the exceptional liability of the minor set forth in the Criminal Code[11] implies not only the obligation of a thorough examination of the circumstances of the act itself, but also the need of careful consideration of the personal background details. Only the material gathered in such a way will allow for the proper determination whether the minor may be liable under the rules specified in the Criminal Code[12]. In addition, it should be highlighted that considering the overall conditions laid down in the cited provision also plays an important role

[8] Judgment of the Appellate Court in Gdańsk of 27 September 2012, II AKa 245/12, LEX no. 1246618; Judgment of the Appellate Court in Katowice of 27 September 2006, II AKa 224/06, LEX no. 217115.

[9] "Determining all the details regarding a minor in the course of preparatory proceedings, especially the ones concerning his health, the degree of his mental and physical development, personal traits and behaviour as well as the reasons for and the degree of his demoralization, the nature of the environment and the conditions of his upbringing constitutes one of the basic obligations of the authority conducting the proceedings, since the lack of such details makes it impossible to issue a correct judgment as to the choice of the appropriate educational or reformatory measures or the proper imposition of penalties in case of a judgment on the basis of […] the Criminal Code". Decision of the Supreme Court of 24 June 1983, III KZ 87/83, OSNKW 1983, no. 12, item 97.

[10] Judgment of the Supreme Court of 8 May 1972, III KR 45/72, OSNKW 1972, no. 10, item 156; Judgment of the Appellate Court in Gdańsk of 15 June 2000, II AKa 149/00, LEX no. 1680963.

[11] Judgment of the Supreme Court of 6 May 1974, I KR 460/73, OSNPG, 1974, no. 11, item 122.

[12] Judgment of the Supreme Court of 9 August 1971, I KR 125/71, OSNPG 1971, no. 11, item 196.

in the process of the judicial imposition of the sentence[13]. According to the judicial decisions, the possibility of the extraordinary mitigation of the sentence towards the minor as set out in Article 10 § 3 of the Criminal Code should not be applied "automatically". In each case it must be assessed whether justified reasons referred to in Article 54 § 1 of the Criminal Code demand so, however, they do not eliminate the principles of sentence imposition set out in Article 53 of the Criminal Code. They only give priority to those directives set out in this provision which are of an educational character. The significant prerequisite in determining correct penalty for the minor or juvenile perpetrators must be the degree of their demoralization, their living conditions and conduct before and after the commitment of the offence, along with the motives and modus operandi[14].

The special status of young offenders has been also confirmed by Article 54 of the Criminal Code containing two specific directives which should constitute the guidelines for the court in the penalty imposition process. The first one expressed in Article 54 of the Criminal Code indicates that it should be borne in mind that the main purpose the sentence serves is the educational one[15]. On the other hand, the specific directive contained in Article 54 § 2 of the Criminal Code refers to the most severe punishment which may be imposed, i.e. life imprisonment, the selection of which is subject to a statutory ban of application of this type of punishment to offenders who are under the age of 18[16].

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[13] Judgment of the Appellate Court in Kraków of 5 November 2008, II AKa 87/08, Legalis no. 175049.

[14] Judgment of the Appellate Court in Katowice of 21 April 2005, II AKa114/05, LEX no. 165180; Judgment of the Supreme Court of 17 April 1973, I KR 29/73, OSNKW 1973, no. 11, item 137.

[15] Cf. Judgment of the Appellate Court in Katowice of 27 September 2012, II AKa 366/12, LEX no. 1223177; Judgment of the Appellate Court in Katowice of 30 January 2014, II AKa 488/13, LEX no. 1430713.

[16] It has been emphasized in the jurisprudence that: "A ban to impose a life imprisonment sentence on a minor who has not attained the age of 18 contained in Article 54 § 2 of the Criminal Code does not preclude the imposition on a minor, being liable under the conditions contained in Article 10 § 2 of the Criminal Code, the penalty of 25 years of imprisonment". Decision of the Supreme Court of 18 December 2012, III KK289/12, LEX no. 1232290.

Taking into consideration the above provisions and the primacy of the individual prevention[17] which follows from them, it could be noted that the juvenile as a person who has not fully developed his or her intellectual, emotional and social skills is much more susceptible to the influence of education[18] than other adults[19]. His or her conflict with the law often results from malfunctioning of the socialization process, lack of opportunities "to behave differently". This would justify the assumption that personality changes could be achieved in such cases due to the application of specific educational methods[20]. The above assumption neither claims to be of a universal character, determining the characteristics of a certain age group, nor does it support the idea of a complete withdrawal from the belief that the susceptibility of juveniles to changes in their current behaviour may be in fact greater than in case of the others, "fully grown-up" perpetrators[21]. The educational process already initiated in the course of sentencing should therefore serve pro-social development of their attitudes, as well as the internalization of legalistic behavioural patterns. The presented direction of interpretation does not finally deter-

[17] This view has been also expressed in the context of the provisions contained in Article 54 § 2 of the Criminal Code. See, among others Decision of the Supreme Court of 6 December 2012, IV KK 121/12, LEX no. 1277774, where it has been noted that: "The provision contained in Article 54 § 2 of the Criminal Code merely establishes the primacy of the individual prevention in relation to the juvenile, but does not contain any restrictions as to the imposition of the penalty within its statutory penalty range".

[18] "During the period of adolescence personality is very flexible, and the lapse of three years within this period can mean very big changes as far as the socializing norms and modes of behaviour are concerned. It is therefore difficult in this situation to determine the degree of demoralization of a person who at the time of sentencing is 18 years old, while at the time of committing a crime was 15 years old". Judgment of the Supreme Court of 8 October 2015, V KK 158/15, Legalis no. 1358765.

[19] R.G. Hałas, *Odpowiedzialność karna nieletniego na tle kodeksu karnego z 1997 r.*, Lublin 2006, p. 154 and literature cited therein.

[20] W. Szkotnicki, "Stanowisko doktryny i Sądu Najwyższego co do niektórych kwestii związanych z wymiarem kary wobec młodocianych przestępców", *Palestra* 1982, no. 8, p. 59.

[21] Cf. Judgment of the Supreme Court of 8 October 1981, IV KR 193/81, OSNKW 1981, no. 11, item 64; compare also A. Grześkowiak, "Glosa do wyroku Sądu Najwyższego z dn. 8 października 1981 r., IV KR 193/81", *Państwo i Prawo* 1983, no. 7, pp. 141–142.

mine the recognition of the full and absolute preponderance of educational aspects in the imposition of the penalty on juvenile offenders.

The practice of the administration of justice proves that it is unacceptable to make an a priori assumption that it is practicable (sometimes necessary) to educate all juvenile offenders and to raise them to abide by law. It would be difficult to assume success of the educational objective in case of highly demoralized persons as well as persons whose psycho-physical state does not allow for undertaking actions of such nature. It appears that making references to the above-mentioned objective is also not justified in case of the juveniles whose personal characteristics and conditions are such that they should not be covered by the processes of re-socialization and re-adaptation to lead an honest life in the society[22]. It may be assumed that this kind of "coercive rehabilitation" would go against the essence of rational penal policy. Consequently, it should be concluded that: "The normative sense of Article 54 of the Criminal Code implies that the primacy of educational objective of the penalty should be established in case of a possible conflict with other directives regarding imposition of the punishment […]. One may not therefore conclude effectively that under the idea expressed in Article 54 of the Criminal Code the other objectives of the penalty should be disregarded[23]". It follows from the above that the very obligatory nature of the wording of this provision does not preclude the discretionary power of a judge (Article 53 § 1 of the Criminal Code), but remains only the editorial treatment of the legislator, wherein the assumptions of the given system of values were expressed[24]. The obligation which follows from Article 54 § 1 of the Criminal Code to exercise the granted power does not preclude automatically, therefore, the judges' discretion which consists in choos-

[22] H. Kołakowska-Przełomiec [in:] *Kryminologia*, ed. W. Świda, Warszawa 1977, p. 224ff.

[23] Judgment of the Appellate Court in Katowice of 29 May 2008, II AKa 120/08, LEX no. 466458.

[24] "Young age cannot justify imposition of a sentence which is disproportionate to the degree of culpability and social harm of the act committed, as compliance with the directives of fair penalty should be applied in each case, and take priority. Consideration of the educational impact requires, while sentencing, the selection of such penalty, which in the fullest possible way, will allow to achieve the educational objectives". Judgment of the Appellate Court in Białystok of 31 January 2013, II AKa 254/12, Legalis no. 715070.

ing a way of exercising the power granted. There is no doubt that the legislator — despite the "obligatory nature" of the wording of the cited provision — left the judge a specified discretionary framework regarding the decision on the penalty imposition. Moreover, according to the legal doctrine it should be emphasized that the preferential nature of individual and preventive indication under Article 54 § 1 of the Criminal Code is weakened by the confrontation with a statutory duty to respect the limits of sentencing which must not be exceeded and which are set by the directive of the degree of culpability[25].

In consideration of the above-mentioned question regarding the relation between Article 54 § 1 and Article 53 § 1 of the Criminal Code it is required to draw attention to another significant problem. Assuming that the application of the first provision mentioned referring to the educational objective of the punishment does not exclude taking into account the general directives of judicial imposition of the sentence, wherein the legislator also refers to the mentioned objectives, one should consider whether the double consideration of the same facts which are decisive for sentencing the juvenile is acceptable as well as necessary. It seems that giving an unequivocally affirmative answer would indeed be possible if the regulations contained in Article 54 § 1 of the Criminal Code would be denied the nature of the directive in the strict sense. Under the proposed construction the norm resulting from this provision would remain only a certain, normative guideline which — stressing the importance of educational objectives — would be co-applied along with other directives and principles of judicial sentencing[26]. The presented interpretation would not constitute an obstacle for the "insertion" of the said penal objective while adjudicating towards the juveniles other criminal law institutions, which are not penalties in the strict sense. It follows, therefore, from the above that the recognition of the primacy of the special directive contained in Article 54 § 1 of the Criminal Code requires exercising a certain degree of caution in the interpretation process. The preference of special prevention postulates, therefore, does not eliminate the general

[25] M. Dąbrowska–Kardas, *Analiza dyrektywalna przepisów części ogólnej kodeksu karnego*, Warszawa 2012, pp. 288–289.

[26] M.J. Lubelski, *Odpowiedzialność karna młodocianych. Studium nad kryteriami karania*, Katowice 1988, pp. 84–85.

requirement addressed to the court, under which the punishment imposed on the juvenile should be adequate to the degree of his or her culpability and the social harm of the act, as well as it should comply with the individual and general prevention objectives understood as the development of the legal awareness of the society.

The reflections should also be supplemented by a statement that making reference to the educational objectives does not mean the imposition of lenient or symbolic sanctions on the juvenile[27]; it requires, however, a fair assessment of a number of factors related not only to the alleged crime, but also to the current lifestyle of the accused proving the level of his or her demoralization[28].

Therefore, the postulate of the educational impact on a juvenile offender is not met if the use of such penal response does not shape in him or her a sense of the respect for the law. The imposition of the excessively mitigated sentence would therefore mean a lack of feeling of any

[27] "It is not about imposing the penalties on young offenders which are lenient or symbolic, but the imposition of the penalty, avoiding making of the crimes committed by young people examples of deterrent impact of penalties, should take into account first of all as its goal prevention of the process of demoralization and an attempt to adjust the perpetrators to the life in a society. Although imposing a punishment on relatively young offenders indicates a preference of the special prevention postulate, it does not eliminate a requirement of the imposition of such a sentence, which corresponds to the degree of the fault of the perpetrator and the degree of social harm of the acts assigned to it and would be capable to achieve the objectives in terms of individual and general prevention understood as the development of legal awareness of the society. Consideration that should be given to the educational role of the sentence does not mean a lenient treatment of such offenders, but may sometimes indicate the need of a longer process for their rehabilitation (including the imposition of sentences without the suspension of their execution), thus imposing a more severe imprisonment sentence to enable the achievement of this goal. 2. Young age with respect to the crime of robbery does not constitute an exception, and the social impact of the penalty must be addressed to just young people, who should be aware of both the social harm of such acts, as well as the consequences in the form of criminal liability, serving the punishment that meets the educational objectives, a convict should comply with the legal order. Sometimes, only the penalty imposed in such a way, i.e. the absolute imprisonment can only fulfil the conditions for the rehabilitation of young offenders". Cf. Judgment of the Appellate Court in Gdańsk of 14 May 2014, II AKa 112/14, LEX no. 1477030.

[28] Judgment of the Appellate Court in Katowice of 26 July 2007, II AKa 186/07, LEX no. 370429.

discomfort on the part of the offender, which in turn would deepen the process of demoralization and depravity. It follows, therefore, that in case of the overlap of "negative characteristics" of juvenile offenders, the lack of sufficiently severe punishment would, instead of adjusting their personality, not only result in the belief of impunity and inefficiency of punishment, but would also reinforce their anti-social attitudes. It has been noted, therefore, quite rightly that implementation of the educational objective first of all requires choosing the appropriate criminal measures, including the severe ones, if it is necessary to prevent further violation of the legal order being in force[29]. The jurisprudence explicitly indicates that: "The educational objectives of the punishment do not exclude its repressive function. Equally important premises in determining the penalty for a juvenile offender are also a degree of his or her demoralization, his or her life before committing the offence, his or her behaviour after committing it, motives and modus operandi; these factors may outweigh in favour of the imposition of the sentence on the offender even within the upper limits of the statutory sentencing range"[30].

[29] "[…] Having in view the content of Article 54 § 1 of the Criminal Code, it should be noted that the primacy of the educational role of the punishment with respect to the juvenile offender does not necessarily mean an imperative of a lenient treatment and imposition of a lenient punishment. In some cases, especially in case of crimes with a high degree of social harm, the educational needs may require harsher treatment of a juvenile in order to show a young offender, at the beginning of his adult life, that committing crimes will result, without leniency, in the criminal repression which in turn will lead to the proper future conduct of the perpetrator". Judgment of the Appellate Court in Katowice of 29 June 2015, II AKa 175/15, Legalis no. 1326289; compare also Judgment of the Appellate Court in Kraków of 14 February 1991, II Akr 3/91, KZS 1991, no. 3, item 8.

[30] Judgment of the Appellate Court in Wrocław of 6 November 2012, II AKa 207/12, LEX no. 1238633. Compare also M.J. Lubelski, "Zagadnienia stykowe KK i ustawy o postępowaniu w sprawach nieletnich (art. 10 § 2, art. 10 § 3, art. 10 § 4, art. 38 § 3, art. 1 § 3 KK)", [in:] *Teoretyczne i praktyczne problemy stosowania ustawy o postępowaniu w sprawach nieletnich*, ed. T. Bojarski, E. Skrętowicz, Lublin 2001, p. 55; Z. Sienkiewicz [in:] Z. Ćwiąkalski et al., *Nauka o karze. Sądowy wymiar kary. System prawa karnego. Tom 5*, ed. T. Kaczmarek, Warszawa 2014, p. 388.

III

The conducted research shows, therefore, that the specific circumstances related to the imposition of a sentence on the young offenders require a reliable assessment of a number of factors related not only to the alleged crime, but also to the current lifestyle of the accused, jointly serving as proof for the level of their demoralization. Moreover, it should be noted that either too lenient or too severe punishment imposed on the young offenders could produce the opposite effect to the desired one, by deepening demoralization and a sense of perceived injustice, being a consequence of a too long isolation from the family and friends. The statutory educational purpose therefore requires that the court should exercise special care in assessing the behaviour of such perpetrators and gather any possible information that will allow for the imposition of the penalty appropriate and necessary for their re-education and rehabilitation[31].

Summary

This article addresses selected issues related to the status of the minor and the juvenile from the perspective of criminal liability. While analyzing the issues indicated in the title references have been made not only to Article 10 § 2 and 3 of the Criminal Code, but also to Article 54 of the Criminal Code, which contains two specific directives of the judicial imposition of a sentence on juvenile offenders.

Keywords: judicial sentencing, rehabilitating the offender, sentencing minors or juveniles.

[31] Judgment of the Appellate Court in Lublin of 27 April 1999, II AKa 58/99, LEX no. 62561; the same in the older case-law cf. Judgment of the Appellate Court in Białystok of 30 October 1997, II AKa 92/97, Legalis no. 41777; Judgment of the Appellate Court in Białystok of 23 January 1997, II Aka 181/96, OSA 1997, no. 9, item 36.