Prohibitions and Orders as Instruments of Rational Criminal Policy

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Sanctions in Polish Criminal Code 1997

- penalties: fine, restriction of liberty, imprisonment, imprisonment for 25 years and life imprisonment;
- penal measures: prohibitions and orders.

Penal measures were called „additional penalty” under the Criminal Code which was in force from 1969 – 1997. The name was criticised as unjustified, because they could be imposed not only as an addition to penalty, but also an an exclusive penalty.
The Role of penal measures as an exclusive penalty

- More frequently imposing prohibitions and orders as autonomous measures may shift the center of severity of imposed criminal penalties and in consequence have an impact on imposing measures which are alternatives to imprisonment.

When fines, restriction of liberty or suspended sentence of imprisonment meet a perpetrator of the crime with very low degree of social consequences of the act, they may not be treated as fair reaction for crimes with higher degree/level of social consequences of the act;

- Counterreacting depreciation of suspended sentences of imprisonment (the share of them without any kind of obligations or duties to fulfill by the offender – 40-45% in the structure of all penalties imposed)
Penal measures are stipulated in Art. 39 CC:

- deprivation of public rights; disqualification from specific posts, the exercise of specific professions or engagement in specific economic activities;
- disqualification from activities involving raising, treating and educating minors, and taking care of them;
- a prohibition on being in a certain communities and locations;
- a prohibitions on contacting certain individuals and approaching certain individuals or on leaving a specific place of residence without the court's consent;
- a ban on participation at mass events;
Penal measures – continued...

- a ban on entering gaming centers or participating in games of chance;
- an order to leave premises jointly occupied with aggrieved party;
- disqualification from driving; forfeiture;
- an obligation to remedy damage caused or compensate for harm done;
- exemplary damages;
- monetary performance;
- announcement of the sentence publicly.
Some the aforementioned penal measures may be imposed, if the legal grounds for them exist, at court's discretion. The legislator prescribed also situations when imposing some concrete penal measure is obligatory. Between them may be also made division into those which execution has character of one act and those which execution has character of performance of some duties or tolerating some restrictions during some period of time (1-10, 1-15, 2-6 years, forever)
Legal grounds of imposing the penal measures.

The legislator regulated the grounds with reference to every penal measure and separately legal grounds for imposing them as an exclusive penalty.

The Art. 59 CC is treated as a general rule for imposing penal measure as the only penalty: “If the offence is subject only to imprisonment for up to three years, or to a lesser penalty, and the social impact of the act is not significant, the court may grant an absolute discharge and decide to impose a penal measure instead of the penalty, where the aim of the penalty is performed by the measure.”

The penal measure may be also imposed as an exclusive penalty according to the art. 60 par 7 CC, Art. 61 CC, Art. 343 par. 2 p. 3 Code of Criminal Proceedings (CCP).
According to the **Art. 58 § 1** of the Criminal Code „*If the law provides for an option of the type of penalty, the court will only impose an unsuspended sentence of imprisonment where no other penalty or penal measure would serve to the purpose thereof*”. 

Therefore according to the Criminal Code 1997 penal measures should be treat as the first possible „answer” for a crime. 

The legislator created more possibilities in Criminal Code 1997 for imposition penal measures as an exclusive penalty.
Have the changes of law resulted in increase of the number of imposition of penal measures as an exclusive penalty?

• Comparison of the shares of penal measures imposed as the only/exclusive penalty in relation to all convictions and sentences of conditional discontinuance of criminal proceedings in 1993 (29) and 2009 (1508)
  – an increase 1700%

The reason of the increase is not putting into force the new Criminal Code in 1997. The changes took place between 2003 and 2004.

The reason: - the change of Art. 343 CCP.

The provision regards plea bargain - it is called in polish law as the request to be sentenced without a hearing. The Art. 343 CCP started being a material basis for imposing them.
The next conclusion is that the increase was not connected with the change of judges' attitude to the penal measures imposed as the only/exclusive penalty.

Requesting to be sentenced without a hearing and applying for penal measure reflects the policy of prosecutors, not courts. When the request is placed, the court can not impose other kind of penalty than it is the effect off the agreement between prosecutor and the accused.
The structure of the penal measures imposed shows that they are underestimated:

- monetary performance – beyond 90 %;
- disqualification from driving;
- imposition of other measures did not exceed 10 in every year from 1997-2009.

The structure of the imposed penal measures is strictly connected with the kinds of offences. These are offences stipulated in the Act against drug addiction and in art. 178 a CC – driving a motor vehicle being drunk or under influence of narcotics.
The reasons:
- the imposition of penal measures as an exclusive penalty is sometimes treated as an extraordinary mitigation. The source of the problem is formulation by the legislator the decision on imposition penal measure as granting an absolute discharge.

Postulates:
- not to differentiate penalties nad penal measures in the system of criminal sanctions (The source of separation them is rather the tradition than substantive differences);
- resignation from describing it as granting an absolute discharge.