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Measures associated with the subjection of the perpetrator to the probation in Polish penal law.

The penal code of 1997 provides three legal institutions strictly associated with the subjection of the perpetrator to the trial period. These includes: the conditional discontinuance of criminal proceedings, the conditional suspension of the execution of the sentence of deprivation of liberty and the conditional early release of a person sentenced to the penalty of deprivation of liberty from serving the balance of the penalty.

They differ fundamentally by addressees towards whom they can be applicable. Conditional discontinuance of criminal proceedings is applied to the suspect of a crime, the conditional suspension of the execution of the sentence of deprivation of liberty is applied respectively to perpetrator sentenced to such a punishment for committing a crime, and the conditional early release of a person sentenced to the penalty of deprivation of liberty from serving the balance of the penalty may relate to the prisoner in penitentiary facility, convicted of a crime.

Restriction of liberty or electronically monitored punishment may sometimes be classified as the institution of a probation. It's hard to entirely agree with this statement, because the last two institutions differ from the previous ones, however the fundamental assumptions underlying the application of all these measures are based on the same basic principles: firstly, it enables offender to avoid the negative effects of being in penitentiary, secondly, it allows to punish him but without elimination from society, especially from the family, local or labour market environment.

„One of the American penal law experts - Stanford Bates - said that probation may be considered as an investment. It encourages instead of bringing bitterness. It builds and does not degrade. It is an investment in protection of the society. According to another expert, Penakl, just as the modern medicine emphasizes the importance of health care as a means of disease prevention, also probation emphasis on preventing unlawful behaviour by promoting the lawful one. Favouring rehabilitation instead of prison, probation protects the society and at the same time prevents crimes. Finally probation allows to avoid the devastating effects on the human personality, which are often the result of incarceration. Probation enables to preserve the personality without any particular changes, it does not cause sudden and rapid changes in habits, it does not destroy family relationships, contact with friends and economic independence. It allows to preserve all the previous habits, which were good, every contact, interest, emotions. Automatically come into play habits, which can be used to maintain

relationships with the society in expected regulations and which become an important factor that enables to put a person on the right track. (Tennerbaum)”¹.

A number of definitions of probation has developed also in Polish literature. Andrew Baładynowicz claims that the essence of this institution is to fulfil three basic functions: to the perpetrator under custody of social services, to exercise social control, to lead to social change² and that „Probation as a means of rehabilitation based on the society relies on the theory, that the best way to achieve the objective is to serve a sentence in a society when it is justified by its functions. It is assumed that the offender will learn successfully live in the society and not in an artificial and detached environment, which is the institution of prison. Probation as a means of rehabilitation, based on the society, combined with the sensible social commitment, provides appropriate social impact, giving personal and economic benefits”³. Stanislaw Pawela considers the probation as a way of dealing with offenders who were subjected to the trial period during which they were bound to certain conditions, placed under the supervision of a probation officer or under the rehabilitation program applied to them⁴. On the basis of criminology, methods considered as probation measures are those „which consist in conditional lack of jurisdiction or in complete, relatively partial suspension of execution of the sentence in order to put the perpetrator to the trial period consisting in imposing on him certain obligations and often associated with the submission to the supervision of a probation officer”⁵. One of the most common and most complete definitions recognizes that „Probation is a subjection of the offender to the trial period at liberty. The development of the idea of probation is related to the disappointment resulting from the lack of rehabilitation of offenders in a prison isolation. It is assumed that the subjection of the offender to the probation period, of which the negative result is associated with taking responsibility for committed crime, which the offender would avoid if he respected the conditions of the probation period, may more effectively prevent the offender from another crime than the prison isolation. On the other hand, probation may be some kind of benefit to the defendant, who skilfully using a chance that was given to him, can avoid repression or limit its extent”⁶.

Therefore, let's try to describe how the institutions of probation, or in other words, alternatives to incarceration are formed in contemporary Polish criminal justice system.

The conditional discontinuance of criminal proceedings was stated in art. 66 – 68 of the Penal Code. Currently only the court may use the institution, also at the request of the prosecutor who in the course of the preparatory proceeding comes to the conclusion that there are prerequisites for taking a decision on this issue as stated in art. 336 of the Code of Criminal Procedure. On the basis of established regulations the court may conditionally discontinue the criminal proceedings if the guilt and social consequences of the act are not significant, the circumstances of its commission do not raise doubts, and the attitude of the perpetrator not previously penalised for an intentional offence, his personal characteristics and his way of life to date provide reasonable grounds for the assumption that even in the event of the discontinuance of the proceedings, he will observe the legal order and particularly that he

¹ A. Baładynowicz: *Probacja. System sprawiedliwego karania*, Warsaw 2002, p.12.

² A. Baładynowicz: *Probacja. Wychowanie do wolności*, Grodzisk Mazowiecki 1996, p. 85.

³ A. Baładynowicz: *Probacja – system sprawiedliwego karania*, Warsaw 2002, p.12.

⁴ S. Pawela: *Środki probacyjne w kodeksie karnym*, „Nowe Prawo” 1974, nr 1, p.133.

⁵ J. Błachut, A. Gaberle, K. Krajewski: *Kryminologia*, Gdansk 1999, p. 482.

⁶ P. Hofmanski: *Wielka Encyklopedia Prawa*, ed E. Smoktunowicz, Białystok- Warsaw 2000, p. 758.

will not commit an offence. Conditional discontinuance shall not be applied to the perpetrator of an offence for which the statutory penalty exceeds 3 years deprivation of liberty.

In the event that the injured party has been reconciled with the perpetrator, the perpetrator has redressed the damage or the injured party and the perpetrator have agreed on the method of redressing the damage, the conditional discontinuance may be applied to a perpetrator of an offence for which the statutory penalty does not exceed 5 years deprivation of liberty. The conditional discontinuance shall be made for the term of probation which is between one and two years, which shall run from the date the judgement becomes valid and final. In discontinuing conditionally the criminal proceedings, the court may, in the probation period, place the perpetrator under the supervision of a probation officer or a person of public trust, association, or community organisation whose activities include educational care, preventing the demoralisation of or providing assistance to sentenced persons. Furthermore, in discontinuing conditionally the criminal proceedings, the court shall require the perpetrator to redress in whole or in part the damage, and may impose on him the obligation specified in Article 72 §1 sections 1-3 or 5 e.g. to inform the court of the probation officer about the progress of the probation period, to apologise to the injured person, to carry out a duty incumbent upon him in order to provide support for another person, to refrain from abusing alcohol or using narcotics as well as to refrain from contacting the injured person or any other person in a specific way. The court is also entitled to adjudicate a pecuniary consideration as specified in Article 39 section 7, and an interdiction on driving a vehicle as specified in Article 39 section 3, for a period of up to 2 years. The time and manner of executing of imposed duties is determined by the court after hearing from the sentenced person.

The court shall resume the criminal proceedings, if the perpetrator has during the probation period committed an intentional offence, for which he has been validly and finally sentenced. However, the court may resume the criminal proceedings at its discretion if the perpetrator during the probation period flagrantly breaches the legal order, and in particular if he committed an offence other than intentional offence for which he has been validly and finally sentenced and also when he evades supervision, does not perform the obligations or penal measure imposed or if he does not fulfil the settlement concluded with the injured person.

The court may resume the criminal proceedings if, after the decision on the conditional discontinuance was rendered but before it became valid and final, the perpetrator flagrantly breached the legal order, and in particular if he committed an offence within that time. The criminal proceedings conditionally discontinued may not be resumed any later than 6 months after the expiration of the probation period.

Another institution of probation in Polish penal law is the conditional suspension of the execution of the sentence of deprivation of liberty. The conditional suspension distinguishes two forms of the institution; the conditional suspension without placing under supervision and without imposing of obligations and the conditional suspension with simultaneous imposition of the probational obligations or placing under supervision. The essential difference between the so-shaped forms of this measure is that the first type of the conditional suspension applies to fine, the penalty of restriction or deprivation of liberty while the second one applies only to the penalty of deprivation of liberty.

The conditional suspension of the execution of the sentence of deprivation of liberty was stated in art. 69 – 76 of the Penal Code. The court may conditionally suspend the

execution of a penalty of deprivation of liberty of up to 2 years or execution of a fine adjudicated as a one-off penalty, if it is regarded as sufficient to attain the objectives of the penalty with respect to the perpetrator, and particularly to prevent him from relapsing into crime. In suspending the execution of a penalty, the court shall primarily take into consideration the attitude of the perpetrator, his personal characteristics and conditions, his way of life to-date and his conduct after the commission of the offence. According to the general rules, suspension of the execution of the penalty shall not be applied to the perpetrator who committed offence against property, with the use of violence or the threat of violence. The court may however conditionally suspend the execution of the penalty in exceptional, justified cases.

Suspension of the execution of a penalty is granted for a probation period, which runs from the time the sentence becomes valid and final and is for:

- from 2 to 5 years - in the case of a conditional suspension of the execution of a penalty of deprivation of liberty,
- from one year to 3 years - in the case of a conditional suspension of the execution of a fine or a penalty of restriction of liberty.
- in the case of the conditional suspension of the execution of a penalty with respect to a perpetrator who is a young offender or an old offender, the probation period is from 3 to 5 years.

While suspending the execution of a penalty of deprivation of liberty, the court may impose a fine of up to 270 times the daily rate, if its imposition is not provided for on another basis, however while suspending a penalty of restriction of liberty, the court may impose a fine of up to 135 times of daily rate. In the event of ordering the execution of the penalty of the deprivation or restriction of liberty, the fine adjudicated on this ground shall not be subject to execution and the penalty of deprivation or restriction of liberty shall be reduced by the number of days equal to the number of daily fines paid, rounded up to the full day. While suspending the execution of a penalty, the court may obligate the sentenced person: to inform the court or the probation officer about the progress of the probation period, to apologize to the injured person, to carry out a duty incumbent upon him in order to provide support for another person, to perform remunerated work, to pursue an educational activity or train himself for an occupation, to refrain from abusing alcohol or using narcotics, to submit to medical treatment, particularly drug withdrawal or rehabilitation programs, to therapy or correctional education programs, to refrain from frequenting specified community circles or places, to refrain from contacting the injured person or any other person in a specific way, to leave the premises jointly occupied with the injured person, to engage in other appropriate conduct in the probation period, if it may prevent the commission of a further offence.

The court may obligate the perpetrator to redress the damage in whole or in part. While suspending the execution of a penalty, the court may, in the probation period, place the perpetrator under the supervision of a probation officer or a person of public trust, association, or community organization whose activities include educational care, preventing the demoralization or providing assistance to sentenced persons. The placing under supervision is mandatory with respect to a young perpetrator of an intentional offence, perpetrator convicted in circumstances of recidivism and also the perpetrator of a crime committed in relation to disorders of sexual preferences. The time and manner of execution of the imposed obligations listed above, shall be determined by the court after hearing from the sentenced person; the

imposition of the obligation to submit to medical treatment, particularly drug withdrawal or rehabilitation programs, therapy or correctional education programs, shall require consent from the sentenced person.

If educational considerations warrant this, the court may, during the probation period of a person sentenced to a deprivation of liberty with a conditional suspension of its execution, institute, extend, modify the obligations imposed on such person or release him from these obligations, except for the obligation to apologize to the injured person. The court may also place the sentenced person under supervision or release him from the aforesaid. The court shall order the execution of the penalty, if the sentenced person during the probation period, committed an intentional offence similar to the previous one for which he has been validly and finally sentenced to a penalty of deprivation of liberty.

The court may order, at its discretion, the execution of the penalty, if the sentenced person in the probation period flagrantly breached the legal order, and, in particular, if he committed an offence other than a similar intentional offence for which he has been validly and finally sentenced to a penalty of deprivation of liberty, or if he has not paid the fine, has evaded supervision, or failed to fulfill the obligations or penal measures imposed. The order to execute the penalty may not be issued any later than 6 months after the end of the probation period, the sentence itself shall be expunged by virtue of law 6 months from the termination of the probation period. If a fine or a penal measure were imposed upon the sentenced person, the expunction of the sentence may not occur before the execution, remission or prescription thereof.

In the literature in the field of legal dogmatics, criminology and social psychology there are elaborate and supported by many empirical studies theories concerning the negative impact of prison isolation on the human psyche. The degree of convicts' prisonization is determined by phenomena such as stigmatization, standardization, degradation, and depersonalization⁷. All these factors lead to the phenomenon of depersonalization, which is a subjective sensation of a strong internal change experienced as a sense of alienation or even of unreality of oneself what may, among other things, result in the total loss of the sense of responsibility⁸. First of all, the rapid progress in depersonalization in penal institution is favored by the consequences of isolation such as: suspension of plans concerning personal and professional life, deprivation of capabilities of autonomous decision-making and of planning a current schedule of daily activities. The prisoners and especially those who serve long-term prison sentences, are forced to accept the isolation and its painful consequences. Therefore, the use of the third of the current Polish law institutions of probation, that is conditional early release of a person sentenced to the penalty of deprivation of liberty from serving the balance of the penalty, should be approached with great caution and accuracy. Poland, as a Member State of the Council of Europe, is obliged to take legal regulations consistent with recommendations issued in this regard. Fundamental to the issue in question is *Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole)*⁹, which defines parole as follows: „conditional release means the early

⁷ M. Ciosek: *Psychologia sądowa i penitencjarna*, Warsaw 2001, p. 216–217; J.D. Niedźwiecka, *Cechy temperamentalne, poczucie bezpieczeństwa, koherencji i sensu życia a pozycja osadzonych w nieformalnej strukturze zakładu karnego*, University of Lodz 1994, s. 2011 i nast.

⁸ S. Steuden: *Współczesne koncepcje depersonalizacji*, „Zdrowie Psychiczne” 1983, p. 30 – 36.

⁹ The text of the document available on the website: <www.coe.int>.

release of sentenced prisoners under individualized post-release conditions. Conditional release is a community measure. Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community”.

On the ground of Art. 77 of the Polish Penal Code the court may release a person convicted of the penalty of deprivation of liberty from serving the balance of the penalty, if the analysis of the amount of following premises provides a basis for the collective valuation of the criminological forecast of sentenced person: his attitude, personal characteristics and situation, his way of life prior to the commission of the offence, the circumstances attendant upon the commission of the offence, his conduct after the commission of the offence and his conduct while serving the penalty. The evaluation of these conditions must justify the assumption that the perpetrator will respect the legal order, and in particular that he will not re-offend. The Art.78 of the Penal Code also enumerates formal conditions for the application of conditional release. In order that sentenced person may apply for aforementioned before court, he has to serve certain part of the penalty so as to his criminological forecast could undergo evaluation and verification. As a rule, the sentenced person may be conditionally released after serving at least half of the sentence, however, it cannot occur earlier than after having served at least 6 months of the penalty. The perpetrator previously sentenced can apply for conditional release after serving two-thirds of the adjudicated penalty while the multiple offender, person acting in an organized criminal group or the one that has made of crime his source of income, after serving three-quarters. These perpetrators cannot leave the penal institution earlier than after serving a year of the sentence. The person sentenced to 25 years of deprivation of liberty may be conditionally released after serving 15 years of the sentence, and the person sentenced to deprivation of liberty for life, after serving 25 years of the sentence what , in each case, is subjected to the court's decision.

The length of the probation period depends on the specific circumstances and is differentiated in the Art. 80 of the Penal Code. In general the portion of the penalty which remains to be served constitutes a probation period, which may not, however, be less than 2 (and for the perpetrator previously sentenced may not be shorter than 3 years) or longer than 5 years and in a case of the conditional release of a person sentenced to deprivation of liberty

Recommendation contains the entire regulation of the institution of conditional release, relying also on other European documents issued in this regard, which include:

- Resolution (65) 1 on suspended sentence, probation and other alternatives to imprisonment;
- Resolution (70) 1 on the practical organization of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders;
- Resolution (76) 2 on the treatment of long-term prisoners;
- Resolution (76) 10 on certain alternative penal measures to imprisonment;
- Recommendation No R (82) 16 on prison leave;
- Recommendation No. R (87) 3 on the European Prison Rules;
- Recommendation No R (89) 12 on education in prison;
- Recommendation No. R (92) 16 on the European rules on community sanctions and measures;
- Recommendation No. R (92) 17 concerning consistency in sentencing;
- Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures;
- Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation;
- *Recommendation Rec(2000)22 on improving the implementation of the European Rules on community sanctions and measures.*

for life, the probation period shall be 10 years. If the probation period was progressing successfully and if all along its duration and in the course of the following 6 months the conditional release has not been revoked, the sentence shall be considered to have been served at the time of the conditional release. During the probation period the sentenced person may be placed under the supervision of a probation officer (the young offender and the perpetrator previously sentenced obligatorily) and the same obligations, inflicted on a person sentenced to deprivation of liberty with conditional suspension of its execution, may be imposed upon him. In case of non-compliance with conditions of conditional release the court may revoke it and if the perpetrator commits an offence similar to the one for which he had been sentenced, the court has to revoke the conditional release. In that case, a sentenced person returns to the penal institution and serve the rest of the sentence not including in it the period spent at liberty. The consequence of revocation of early conditional release is also the prohibition of further conditional release before the lapse of one year from the date of return to the penal institution, and in the case of the penalty of deprivation of liberty for life, before the lapse of 5 years.

The first two probation measures, that is the conditional discontinuance of proceedings and the conditional suspension of the execution of the penalty of deprivation of liberty shall be adjudicated by the Criminal Court Of First Instance suitable for a given case (the ruling court). While on the conditional early release from serving of the balance of the sentence adjudicates a *special penitentiary court. It is a district court which has a territorial jurisdiction over the district, where the sentenced person is serving the penalty of deprivation of liberty. In general, it is the court appointed to oversee the legality and the fairness of the execution of the penalty of depravation of liberty. There are 24 such courts in Poland. Their verdicts are subjected to the inspection of higher instance, of the courts of appeal and the Supreme Court.*

It is also worth mentioning in what consists the penalty of restriction of liberty and the penalty served in a system of electronic supervision, but in my opinion, these are alternative measures to the penalty of deprivation of liberty and not strictly probation measures because of the fact that they lack the essential characteristic of probation, that is the conditionality or the probation period. The penalty of restriction of liberty is inflicted during the period from 1 to 12 months, its conditions are as follows: the sentenced person without the permission of the court cannot change the place of residence, he is obliged to perform a work for community purposes and to provide explanations regarding the progress of terms of serving the penalty. The obligation of community service may consist either in performing remunerated work for up to 20 to 40 hours per month, or in the deduction from 10 to 25% of the remuneration due to the performance of paid work. While imposing the penalty of restriction of liberty, the court may decide to impose the same obligations as those inflicted when suspending the execution of penalty of depravation of liberty.

The last three years in Polish policy of combating criminality by penal measures are the period of institution of novelty well-known in other European countries, that is the Supervision With Electronic Technology¹⁰. The electronic supervision remains the penalty of depravation of liberty however executed outside the penal institution. The Electronic

¹⁰ Act of 7 September 2007 on the implementation of a custodial sentence outside prison in electronic supervision system (Journal of Laws of 2010, No. 142, item. 960).

Monitoring Office, attached to the Central Board of Prison Service, is responsible for proper functioning of this system. The conduct of sentenced persons is being monitored round the clock by using special electronic equipment and bracelets worn by the convicts. This system allows, despite considerable limitations to lead a quite normal life, to maintain family ties, to continue learning and working in liberal society. This is a humanitarian system which does not disorganize the life and does not stigmatize prisoners and their families. In this system sentence may be served by offenders convicted to deprivation of liberty for up to 1 year. The assent is given by the penitentiary court if it considers that it is sufficient to achieve the purpose of punishment; sentenced person has a specified place of residence; the adult persons living with the convicted gave their consent; technical and organizational capabilities related to performance of supervision by the person operating the electronic monitoring office and the authorized supervising person and housing conditions are not an obstacle to the execution of the penalty of deprivation of liberty with the use of electronic supervision.