Studia Iuridica 100
ISSN 0137-4346; e-ISSN 2544-3135
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https://doi.org/10.31338/2544-3135.si.2024-100.14

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GENERAL DIRECTIVES OF JUDICIAL SENTENCING FOR A CRIMINAL OFFENCE FOLLOWING THEIR LATEST REVISION

Abstract

The provision of Article 53(1) of the Polish Criminal Code sets out directives that guide the court in deciding on the severity of the penalty in each individual act of sentencing. These directives are referred to as "general directives of judicial sentencing". Four such directives are generally derived from this provision: the directive of the degree of culpability, the directive of the degree of social harm, the directive of individual (specific) prevention and the directive of general positive prevention. The amending act of 7 July 2022 introduced new wording to Article 53(1) of the Criminal Code. Changes were also made to Article 85a of the Criminal Code, which sets out general directives of judicial sentencing in the case of aggregate penalties. The author takes a critical look at the changes introduced in the respective provisions. The aim of this examination is to determine the extent to which the content of the general directives of judicial sentencing, as defined in the amending act of 7 July 2022, differs from their previous formulation, and to what extent the introduced amendments can be considered justified.

KEYWORDS

criminal law, Polish Criminal Code, directives of sentencing, degree of culpability, social harm of the committed act, specific prevention, general prevention

SŁOWA KLUCZOWE

prawo karne, polski kodeks karny, dyrektywy wymiaru kary, stopień winy, społeczna szkodliwość popełnionego czynu, prewencja szczególna, prewencja ogólna

The expression "general directives of judicial sentencing" in the title of this article is used in a number of ways in publications on criminal law. Therefore, I will begin by explaining that in this article the term is used to designate directives that guide the court in deciding on the severity of the penalty for a criminal offence in each individual act of sentencing, as stipulated in Article 53(1) of the 1997 Polish Criminal Code[1]. While the cited provision applies directly only to the imposition of penalties[2], Article 56 CC extends its application onto the imposition of other measures provided for in the Code, except for the obligation to redress damage caused by a criminal offence, or the obligation to compensate for the damage suffered (which is a non-penal measure).

From the date when the currently applicable 1997 Polish Criminal Code entered into force (1 January 1998) until the date when the amending legislation of 7 July 2022[3] became binding law (1 October 2023), and thus for more than a quarter of a century, the provision of Article 53(1) CC has continuously stipulated that the court should impose a penalty at its discretion, within the limits prescribed by the statute, bearing in mind that the severity of the penalty cannot exceed the degree of culpability, considering the degree of social harm of the committed act and taking into account the preventive and educational purposes that the imposed penalty should achieve in relation to the sentenced person, as well as the needs with regard to shaping the legal awareness of society. During the period when Article 53(1) CC in its original wording was in effect, four general directives of judicial sentencing were generally derived from this provision, referring to its

[1] Hereinafter also "CC".

[2] See the legal definition of the term "penalty" provided for in Article 32 and Article 322(1) CC.

[3] See Article 1(15) of the Act Amending the Polish Criminal Code and Certain Other Acts (Dz. U. (Journal of Laws) of 2022, item 2600).

relevant passages, namely: the directive of the degree of culpability[4], the directive of the degree of social harm[5], the directive of individual (specific) prevention[6] and the directive of general positive prevention[7].

The amending act of 7 July 2022 modified the wording of Article 53(1) CC, which now reads as follows: "The court shall impose the penalty at its discretion, within the limits prescribed by the statute, taking into account the degree of social harm of the committed act, any aggravating or any mitigating circumstances, the purposes of the penalty in the scope of its social impact, as well as preventive purposes that the penalty should achieve in relation to the sentenced person. The severity of the penalty must not exceed the degree of culpability". It is worth considering the consequences of this amendment as regards the regulation of the general directives of judicial sentencing by the code.

There is no need to recall here the heated disputes among legal writers that preceded the entry into force of the 1997 Polish Criminal Code, especially when the regulations of the 1969 Polish Criminal Code and Article 50(1) of that code were in effect, as to which of the directives of judicial sentencing should be considered as prevailing, and whether the directive could be identified *in abstracto*. Sceptics maintained that this was impossible and that any meaningful determination as to which of the directives of judicial sentencing should be given priority can be made only *in concreto.* This issue is by no means purely theoretical. Its practical importance can be seen in all those factual circumstances, which are not exceptional by any means, where the indications resulting from the particular directives of sentencing applicable to a specific case are divergent or even contradictory. The entry into force of the 1997 Polish Criminal Code undoubtedly improved the situation within the scope discussed here. An analysis of Article 53(1) CC in its original wording, already at the level of linguistic interpretation guidelines, shows a fundamental difference between the status of the directive of the degree of culpability and the status of three other general directives of judicial sentencing expressed there[8]. In this provision, the result of applying a specific directive was defined in express terms only in relation to the directive of the degree of culpability. The court needed to be mindful that the severity of the pen-

[4] See the following (cited above) passage of Article 53(1) CC in its original wording: "...bearing in mind that its severity cannot exceed the degree of culpability...".

[5] See the following passage of Article 53(1) CC in its original wording: "...considering the degree of social harm of the committed act...".

[6] See the following passage of Article 53(1) CC in its original wording: "...taking into account the preventive and educational purposes that the imposed penalty should achieve in relation to the sentenced person...".

[7] See the following passage Article 53(1) CC in its original wording: "...taking into account (...) the needs with regard to shaping the legal awareness of society".

[8] For more on the function of the degree of culpability under Article 53(1) CC in its original wording see J. Majewski, *Stopień winy jako podstawowy wyznacznik dolegliwości reakcji karnej*, (in:) J. Majewski (ed.), *Dyrektywy sądowego wymiaru kary*, Warsaw 2014, p. 89 ff.

alty must not exceed the degree of culpability. This prohibition reflects the constitutional principle of respect for human dignity (Article 30 of the Constitution of the Republic of Poland), and compliance with this principle is an elementary prerequisite of fairness of the penal response to the committed criminal offence[9]. As regards the other directives, Article 53(1) CC in its original wording merely indicated that – to use the terminology from the code – certain parameters (the degree of social harm of the committed act, the specific preventive purposes and the general preventive purposes) should be "considered" or "taken into account". The provision did not require that the severity of the penalty ideally match the level of social harm of the perpetrator's act or enable preventive or educational purposes to be achieved in relation to the sentenced person, or ensure that the needs with regard to shaping the legal awareness of society were fully satisfied. Additionally, the original wording of Article 53(1) CC did not provide, at least on the level of its language, any grounds for deducing from it any prohibition on imposing penalties the severity of which did not meet such demanding criteria. It did not contain such a prohibition, beyond any doubt, it merely established the requirement that these parameters be "taken into account", "considered" by the court in the sentencing process. Expressions of this kind allow for a certain "gradation" – something may be taken into account to a greater or lesser extent. As a result, the "measures" of the degree to which the level of social harm of the committed act, the individual (specific) preventive purposes and the general preventive purposes are taken into consideration may have various values in specific cases of sentencing, which may be higher or lower depending on the case – and it does not necessarily have to be zero or the maximum value. A specific imposed penalty may – depending on the circumstances – for example, either enable the full achievement of preventive and educational purposes in relation to the sentenced person, facilitate the achievement of such purposes to a greater or lesser extent, or not facilitate the achievement of such purposes at all. It is only in the last eventuality that it would be possible to conclude that, when imposing the penalty, the court failed to take into account, in contravention of Article 53(1) CC in its original wording, the individual (specific) preventive purposes of the punishment. The directive of the degree of culpability, in its form contemplated in Article 53(1) CC in its original wording, strictly restricts the possible severity of the penalty *in concreto*, by subjecting it to a "ceiling", and does not allow for any similar "gradation". The severity of a specific penalty either exceeds the degree of culpability or does not. *Tertium non datur.* There is no place here for any intermediary stages. Following Dworkin's theory of law, we could say that the difference between the status of the directive of the degree of culpability and the status of the remaining three general directives of judicial sentencing, as derived from Article

[9] A. Barczak-Oplustil, *Sporne zagadnienia istoty winy w prawie karnym. Zarys problemu*, 'Czasopismo Prawa Karnego i Nauk Penalnych' 2005, No. 2, p. 89 ff.

53(1) CC in its original wording, would be the same as the difference between a legal rule and a legal principle.

It is a view widely held among criminal law scholars and judicial decisions that the function attributed in Article 53(1) CC in its original wording to the degree of culpability does not differ in any way from the functions assigned in this regulation to the degree of social harm of the committed act or to individual (specific) and general preventive objectives. In light of what has already been said, it should be noted that this view is not correct, and that placing all those functions within the same category (referred to as "general directives of judicial sentencing") makes it significantly harder to appreciate the very important difference between them. The directive of the degree of culpability (to keep its traditional name) operates in fact at a completely different level than the directives relating to the degree of social harm, individual (specific) prevention and general positive prevention[10]. The degree of culpability, together with the "limits of penalty prescribed by the statute"[11], determines *in concreto* the framework in which the court may exercise its discretion when selecting the severity of the penalty. It is only within that framework, once it has been delineated, namely after the degree of culpability has already performed its proper function of limiting the severity of the penalty, that the function of the *sensu stricto* general directives of judicial sentencing, which under Article 53(1) CC in its original wording were: the directive of the degree of social harm, the directive of individual (specific) prevention and the directive of general positive prevention, is activated. These directives, along with what are known as the special directives of judicial sentencing, guide the court in determining which specific penalty and how severe a penalty it should choose and impose on the perpetrator within the delineated framework, i.e. within the range of its allowed discretion. In this sense, while Article 53(1) CC in its original wording remained applicable, the degree of culpability appeared to be the fundamental determinant of the severity of the penal response. It was absolutely inadmissible to impose a penalty the severity of which would exceed the degree of culpability. If such a situation were to occur, it would always constitute an infringement of Article 53(1) CC in its original wording.

The fact that Article 53(1) CC expressly "assigned" to culpability its function of limiting the severity of the penalty constituted an undoubted advantage of the 1997 Polish Criminal Code and was certainly justified and desirable. Additionally, the provision has been successfully formulated in a way that clearly supports the argument that the indications regarding the degree of culpability are abso-

[10] For a similar argument, see W. Wróbel, (in:) A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, 4th edition, Warsaw 2012, p. 743.

[11] For further information on the concept of "limits of penalty prescribed by the statute", as used in Article 53(1) CC – see J. Majewski, *O ustawowym zagrożeniu i innych pojęciach związanych z nadzwyczajnym wymiarem kary (w języku kodeksu karnego)*, (in:) J. Majewski (ed.), *Nadzwyczajny wymiar kary*, Toruń 2009, p. 21.

lutely binding in the relevant scope and cannot be defeated by the indications of any of the *sensu stricto* directives of judicial sentencing.

A comparison between the two versions of Article 53(1) CC – the original and the current one – leads to the conclusion that the changes brought by the amending act of 7 July 2022 have not affected the status of the rule of the degree of culpability in any way. It is still absolutely prohibited to impose penalties the severity of which would exceed the degree of culpability. It could even be claimed that the new wording of Article 53(1) CC further emphasizes the importance and strictness of that prohibition, given that the passage encoding the prohibition was extracted into a separate sentence and that the expression "shall not" was used.

The amendment of Article 53(1) CC, introduced by the amending legislation of 7 July 2022, did not affect in any way the existing function of the directive of the degree of social harm. Just as before, the court needed to "consider" the degree of social harm of the committed act. Incidentally, it so happens that some significant change would be justified and necessary in this instance. Specifically, in the new version of Article 53(1) CC, the reference to the degree of social harm of the committed act should have been removed altogether. It is difficult to explain rationally the decision to keep a separate obligation to consider the degree of social harm of the committed act under a sentencing model such as the Polish one, where the rule of the degree of culpability imposes an absolute limit on the severity of the state's response to a specific offence, understood as the maximum severity of the aggregate of penalties and other penal measures that may be imposed when sentencing the perpetrator of such an offence.[12] This is not only unnecessary, but may also be confusing. "The degree of culpability" mentioned both in the previous and in the current versions of Article 53(1) CC is, after all, the product of, among other things, the degree of social harm of the committed act[13]. The degree of culpability cannot be established – as is necessary in every sentencing process – without having first determined and then considered the degree of social harm of the committed act. Establishing the degree of culpability implies that the degree of social harm of the committed act has already been taken into account.

The directive of individual (specific) prevention is expressed differently in the new version of Article 53(1) CC. The listing of the purposes that are to guide the determination of the severity of the penalty under this directive was abridged by omitting "educational purposes". The explanation of this change provided by the authors of the government's amending bill of 7 July 2022 in the explanatory memorandum to that bill[14] is not entirely coherent. It is argued, on the one hand,

[12] See, for example, J. Majewski, P. Kardas, *O dwóch znaczeniach winy w prawie karnym*, 'Państwo i Prawo' 1993, No. 10, p. 69.

[13] *Ibidem*, p. 75 ff.

[14] The explanatory memorandum to the government bill amending the Act – Polish Criminal Code and certain other Acts, parliamentary print No. IX/2024 (hereinafter: explanatory memorandum) p. 19: "Abandoning the use of the concept of 'educational purposes of punishment' follows

that the educational purposes of punishment with respect to the sentenced person are encompassed by the concept of the individual (specific) preventive purposes of the penalty, and are a subcategory of the latter, while, on the other hand, an excerpt of a study is cited in which the "implementation of educational programs" seems to be treated as an activity unrelated to the "fulfilment of preventive purposes by the penalty"[15].

In my opinion, it is correct to assume that the educational purposes of a penalty constitute a subcategory of its individual (specific) preventive purposes. It seems undeniable that carefully chosen educational efforts directed at the sentenced person can be, provided they are met with a receptive attitude, one of the most effective methods of preventing the perpetrator from relapsing into the ways of crime. The internalization of social norms by the sentenced person, which is the focus of such educational efforts, considerably reduces the risk of their recidivism. Nevertheless, I do not think that it was necessary to omit the former express reference to the educational purposes of the penalty in the new version of Article 53(1) CC. That legislative solution has a long tradition in Poland, going back as far as Article 50 of the 1969 Criminal Code, and there were no sufficient reasons to justify breaking that. The amended Article 53(1) CC should have clearly indicated, at most, that educational purposes form part of the penalty's individual (specific) preventive purposes[16].

Based on the analysis of the government's explanatory memorandum to the government act of the amending act of 7 July 2022, it may appear that the bill's authors also intended to reduce the role of educational purposes in the sentencing process[17]. If that was in fact the case, they did not succeed. Since the educational purposes of a penalty are a part of its individual (specific) preventive pur-

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from the fact that the concept of the penalty's 'preventive purpose' is broader in scope that the concept of 'educational purposes' of the penalty."

[15] See the explanatory memorandum, p. 19: "The philosophy of punishment adopted by the 1997 Criminal Code was subjected to repeated criticism in the literature. It was argued that 'it seems appropriate to guide the scholarship of criminal law, as well as that of the administration of justice, not only towards the pursuit of educational and personality change programs for perpetrators of crimes, but also towards a greater fulfilment of preventive purposes by the penalty' (R. Kaczor in *ibidem*, p. 92)" (the quoted fragment refers to R. Kaczor's paper *Kontrowersje wokół modelu dyrektywy prewencji indywidualnej*, 'Prokuratura i Prawo' 2007, No. 11).

[16] This can easily be achieved by, for example, the following wording of the relevant passage of Article 53(1) of the Criminal Code: "and also the preventive purposes, including educational ones, which it should achieve in relation to the sentenced person" or "and also the educational purposes and other preventive purposes, which it should achieve in relation to the sentenced person."

[17] See the explanatory memorandum, p. 19: "It is the drafter's view that any special singling out of the educational purpose of punishment is warranted only in relation to juvenile perpetrators (Article 54(1) of the Criminal Code), whereas in the case of other perpetrators, it is not appropriate to attribute special importance to that purpose by accentuating it directly. Nevertheless, it can be taken into account as an element of the preventive purpose of punishment, but not as a particular purpose of a penalty."

poses, they should be taken into account to the same extent and degree under the amended Article 53(1) CC as was the case before.

The most notable change in relation to the previous *status quo*, at least *prima facie*, concerns the formulation of the directive of general prevention. The authors of the explanatory memorandum to the government bill of amending act of 7 July 2022 are forthright that abandoning the formula centered on "the needs with regard to the shaping of the legal awareness of the society" and replacing it with the expression "the purposes of the penalty in the scope of its social impact" is intended to convey a substantive modification of that directive of judicial sentencing[18]. The direction of that change is underscored by the use (somewhat symbolic) of the expression ("the purposes of the penalty in the scope of its social impact"), borrowed from Article 50(1) of the 1969 Criminal Code. At the drafting stage of the 1997 Criminal Code, that expression was abandoned in favor of "the needs with regard to shaping the legal awareness of society" precisely because, during the period when Article 50(1) of the 1969 Criminal Code remained in force, "the social impact of the penalty" was understood to imply that the purpose of the penalty imposed on the perpetrator of a criminal offence also included deterring other members of society from committing crimes. This was typically accompanied by the assumption that the more severe the penalty, the better it performs its deterrent function. The previous wording of Article 53(1) CC reflected a deliberate rejection of the idea of negative general prevention (deterrence through the severity of punishment) and an affirmation of the idea of positive general prevention (strengthening the belief of the members of the society that legal norms are binding, the compliance with them is enforced by the state, and that crime does not pay). The authors of the explanatory memorandum to the government bill of the amending act of 7 July 2022 criticize that decision and call it "a manifestation of purely idealistic axiology, not corresponding to reality"[19].

In analyzing closely the explanation for amending Article 53(1) CC within the scope of the directive of general prevention, provided in the explanatory memorandum to the government bill of the amending act of 7 July 2022, it is hard to resist the impression that the change in question was based on the assumption that the former expression of that directive under the provision hindered or even prevented the imposition of fair penalties having a preventive impact on members of society other than the sentenced person (other potential perpetrators)[20]. However,

[18] See the explanatory memorandum, pp. 17–18.

[19] *Ibidem*, p. 17.

[20] See, in particular, the following passage of the explanatory memorandum, p. 17: "Without denying the impact of the certainty of punishment on the motivational processes of potential perpetrators of crimes, one should not deprecate the fact that, at least in relation to some of them, the shaping of the legal awareness also occurs as a result of the severity of punishment, thus affecting "unprofitability" of committing a specific category of offences."

this assumption is obviously misguided[21]. The obligation to take the needs with regard to shaping the legal awareness of society into account in the process of sentencing in no way protected perpetrators of criminal offences against more severe penalties, provided that such penalties were fair *in concreto* (representing an appropriate response to the crime attributed to the sentenced person). While it is true that the former conceptualization of the directive of general prevention under Article 53(1) CC hindered the imposition of a punishment more severe than a fair penalty (excessively severe *in concreto*) on the grounds that only such severe penalties can effectively deter other potential perpetrators from committing crimes, but this can hardly be considered a defect of that conceptualization. Deterrence through the severity of punishment is a rather primitive and, as history teaches us, ineffective method of impacting society[22]. Using that method usually sets into motion the mechanism whereby ever more severe penalties are imposed, resulting in an increasing frequency of excessively severe, and hence unfair sentencing. The imposition of penalties that are incommensurately severe, rather than strengthening society's respect for legal norms in force, undermines trust in the law and law administration authorities, as well as provoking sympathy for the sentenced person. However, this issue does not only involve pragmatic aspects. The imposition of severe penalties with a view to deterring members of society other than those being sentenced from committing crimes would be hardly compatible with the axiology proper to a democratic state ruled by law, such as Poland (Article 2 of the Constitution of the Republic of Poland). The method in question entails an objectification of the sentenced perpetrator of a crime, which is prohibited by the constitutional principle of respecting the inherent and inalienable dignity of every human being (Article 30 of the Constitution of the Republic of Poland)[23].

A critical assessment of the modified formulation of the directive of general prevention in the new version of Article 53(1) CC does not relieve one from the obligation to examine how that provision should be properly construed in this regard. Can and should the expression "the purposes of the penalty in the scope of its social impact" be in fact interpreted within the limits of the amended Article 53(1) CC as the authors of the amending act of 7 July 2022 expect it to be, or in the same manner as it was understood under Article 50(1) of the 1969 Criminal Code? This question should be answered in the negative, given a fundamentally different systemic context. The constitutional principle of respecting the inherent and inalienable dignity of every human being (Article 30 of the Constitution of

[21] See, for example, A. Zoll, *Zasady wymiaru kary w projekcie zmiany kodeksu karnego*, 'Państwo i Prawo' 2001, No. 1, p. 5.

[22] For more on the weaknesses of the negative general prevention idea see for example A. Zoll, *Wymiar kary a prawa jednostki*, 'Palestra' 1986, Nos 5-6; J. Kulesza, *Negatywna prewencja generalna*, 'Państwo i Prawo' 2011, No. 1.

[23] See, for example, W. Wróbel, (in:) W. Wróbel, A. Zoll (eds), *Kodeks karny. Część ogólna.* Vol I. Part II. *Komentarz do art. 53-116*, 5th edition, Warsaw 2016, thesis 69 to Article 53.

the Republic of Poland), prohibiting the treatment of human beings (here: the sentenced person) as objects makes it clearly inadmissible to accept that the scope of the expression "the purposes of the penalty in the scope of its social impact", as used in the amended Article 53(1) CC, includes deterring members of society from committing crimes (deterrent function of punishment). Neither could this be reconciled with the obligation to apply penalties and other measures prescribed in the code while being mindful of the principle of humanitarianism, as established in Article 3 CC[24]. Ultimately, "the purposes of the penalty in the scope of its social impact" in the amended Article 53(1) CC must be understood in accordance with the spirit of the idea of positive general prevention[25].

In the new version of Article 53(1) CC, the order of the prevention directives is reversed: the general prevention purposes are mentioned first, and only then those of individual (specific) prevention. This change in the sequence should be considered a purely editorial modification, not causing any change in the legal situation. In particular, it does not follow from that change that the consideration of general prevention takes precedence over individual (specific) prevention in the process of sentencing – just as the reverse did not follow from Article 53(1) CC in its former wording. In any case, in the explanatory memorandum to the government bill of amending act of 7 July 2022, its authors expressly admit that the aim of the change in question was exclusively "to underscore (…) the equivalent nature" of the directive of general prevention and the directive of individual (specific) prevention and "to eliminate the possibility of an interpretation attributing to the directive of individual prevention the decisive importance in determining the primacy of prerequisites for the imposition of a penalty (in the current wording of Article 53(1) CC, the legislator lists the directive of individual prevention before that of general prevention)"[26].

The new version of Article 53(1) CC differs from its former version also by stipulating that the court, when imposing the penalty, needs to take into account any aggravating or mitigating circumstances, an illustrative list of which is provided in the provisions of Article 53(2a) and (2b) CC, which were added by the amending act of 7 July 2022. However, that fragment of Article 53(1) CC does not establish any directive of judicial sentencing, and therefore, it will not be analyzed here in greater detail.

Article 85a CC was also amended by the amending act of 7 July 2022. This provision sets out the general directives for the imposition of an aggregate penalty. It was added to the 1997 Criminal Code by the amending legislation of 20 Feb-

[24] Aptly, for example, K. Buchała, (in:) A. Zoll, K. Buchała (eds), *Kodeks karny. Część ogólna. Komentarz. Tom I*, Kraków 1998, thesis 62 to Article 53.

[25] In this article I do not focus on difficulties the courts may face when applying the directive in the course of the procedure. For more see, for example, T. Kaczmarek, *O pozytywnej prewencji ogólnej w ujęciu kodeksu karnego*, 'Palestra' 1995, Nos 3-4, pp. 66–67.

[26] The explanatory memorandum, pp. 17–18.

ruary 2015[27]. A separate provision dealing expressly with the issue of general directives for the imposition of aggregate punishment appeared then in the Polish legislation for the first time. It was not included either in the original version of the 1997 Criminal Code, or in the Criminal Codes of 1932 and 1969, previously in effect. Prior to Article 85a CC coming into effect, in the absence of a better alternative in this regard, it was generally assumed that, since the imposition of an aggregate penalty is a form of sentencing, albeit a special one, the directives of sentencing provided for in Chapter VI, and in particular the general directives of sentencing set out in Article 53(1) CC[28], are also applicable. Unfortunately, that did not solve the difficulties, and merely gave rise to additional problems. It was easy to see that, from among the four general sentencing directives traditionally derived from Article 53(1) CC prior to the above-mentioned 2022 amendment of that provision – namely the directive to bear in mind that the severity of the penalty cannot exceed the degree of culpability[29], the directive to consider the degree of social harm of the committed act, the directive to take into account the preventive and educational purposes which the imposed penalty should achieve in relation to the sentenced person, and the directive to take into account the needs with regard to shaping the legal awareness of society – in fact, the first two cannot be sensibly applied in the process of imposing an aggregate penalty[30]. In addition, the demand that, in the process of imposing an aggregate sentence, the court should also be guided by the directives of the degree of culpability and of the degree of social harm of the committed act due to the points of reference of these directives, was clearly inconsistent with another, widely accepted, and, incidentally, completely correct in principle, claim that the circumstances on which the sanctioning of particular criminal offences was based should not be taken into account while imposing an aggregate penalty[31].

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[27] The Act of 20 February 2015 on amending the Polish Criminal Code and certain other Acts (Dz. U. (Journal of Laws) of 2015, item 396).

[28] See for example, A. Zoll, (in:) K. Buchała, A. Zoll (eds), *Kodeks karny. Część ogólna. Komentarz,* Kraków 1998, p. 562; L. Tyszkiewicz, *Glosa do postanowienia SN z dnia 4 listopada 2003 r., V KK 233/03*, 'Prokuratura i Prawo' 2005, Nos 7–8, pp. 194–195; P. Kardas, (in:) A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz.* Vol. I. *Komentarz do art. 1-116 k.k.,* 4th edition, Warsaw 2012, Thesis 16 to Article 85; S. Żółtek, (in:) M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2010, p. 626 ff.; thus also under the regulation of Article 66 of the 1969 Criminal Code, which was the equivalent of Article 85 CC in its original wording, W. Wolter, (in:) I. Andrejew, W. Świda, W. Wolter (eds), *Kodeks karny z komentarzem*, Warsaw 1973, p. 290.

[29] In fact, this is not a sentencing directive *sensu stricto* but rather a rule establishing a specific prohibition – see point 3 above.

[30] For further discussion of this topic see J. Giezek, *Dyrektywy wymiaru kary łącznej*, (in:) J. Majewski (ed.), *Dyrektywy sądowego wymiaru kary*, Warsaw 2014, pp. 54–59.

[31] With regard to this claim see P. Kardas, (in:) A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz.* Vol. I. *Komentarz do art. 1-116 k.k.*, 4th edition, Warsaw 2012, thesis 34 to Article 85 and judicial decisions cited therein.

Under Article 85a CC in its original wording, while issuing an aggregate penalty the court was obliged to take into account "primarily the preventive and educational purposes that the imposed penalty should achieve in relation to the sentenced person, and also the needs with regard to shaping the legal awareness of society". These sentencing directives provided guidance for selecting a specific severity of the aggregate penalty within the limits of sentencing prescribed by applicable laws, in particular the provisions of Article 86 CC. Both of the general directives of aggregate sentencing, established in Article 85a CC in its original wording, were carbon copies of the relevant directives set out in Article 53(1) CC; namely, the directive of individual (specific) prevention and the directive of general prevention.

By using the directives of linguistic interpretation, it was difficult to establish unambiguously the "range" of the particle "primarily" (in the original: *przede wszystkim*) used in Article 85a CC in its original wording. That particle serves to emphasize the detail deemed to be the most important in the utterance and means the same as "in particular", "especially" or "mainly." Specifically, it was not clear whether it accentuates only "the preventive and educational purposes that the imposed penalty should achieve in relation to the sentenced person" or whether it emphasizes to an equal extent those purposes as well as "the needs with regard to shaping the legal awareness of society"[32]. Resolving this interpretational dilemma[33] was in no way facilitated by reference to the syntactic function and meaning of the conjunctive phrase "as well as", which joins "the purposes" and "the needs", since these elements are completely neutral in the scope considered here. Yet, with regard to the function of Article 85a CC in its original wording, a great deal depended on a resolution of this dilemma in a certain direction. Namely, if the particle "primarily" accentuated only "the preventive and educational purposes that the imposed penalty should achieve in relation to the sentenced person", then it would single them out in relation to "the need with regard to shaping the legal awareness of society". In this case, one would have to conclude that Article 85a CC in its original wording established a separate, exhaustive list of general directives for imposing aggregate penalties, comprising two directives: the directive of individual (specific) prevention and the directive of general prevention, while specifying at the same time that the first one should be considered the leading one. If, on the other hand, under Article 85a CC in its original wording, the particle "primarily" accentuated to an equal extent both "the preventive and educational purposes that the imposed

[32] The first of these two interpretations that are acceptable under the linguistic construction directives appears to have been totally overlooked by the Supreme Court in its judgment of 2 February 2021, IV KK 426/20, LEX No. 3182899.

[33] Below I use the analysis of this interpretation dilemma, which I presented in one of my earlier publications – see J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Warsaw 2015, thesis 3 to Article 85a.

penalty should achieve in relation to the sentenced person" and "the needs with regard to shaping the legal awareness of society", then the provision in question would provide no indication at all in relation to what purposes and needs are singled out. In such an event, it should be concluded that the provision did not establish any separate catalogue of general directives for the imposition of aggregate penalties, but merely set out two equivalent leading directives with regard to the imposition of such punishment. At the same time, the question would arise as to what the other general directives for imposing an aggregate penalty are (some "non-leading" directives would need to exist, otherwise the whole effort to single out leading directives in Article 85a CC in its original wording would be devoid of any meaning). In the absence of better options, it would mostly likely be concluded that the directives in question are the other two general directives set out in Article 53(1) CC, i.e. the directive to bear in mind that the severity of the penalty cannot exceed the degree of culpability and the directive to consider the degree of social harm of the committed act. Note that, according to this interpretative variant, the function of Article 85a CC in its original wording would be similar to the function of Article 54(1) CC; namely, the provision would modify to a certain extent the order of priority of the general directives of judicial sentencing as set out in Article 53(1) CC.

Fortunately, the doubts that are being discussed regarding the interpretation of Article 85a CC in its original wording were resolved with the help of the directives of non-linguistic interpretation. These directives clearly favored the choice of the first of the described interpretative options, since the latter ultimately assumed that all the general directives of sentencing set out in Article 53(1) CC (subject to a minor change in emphasis only) must guide the process of imposing an aggregate penalty. As has already been mentioned, one cannot meaningfully apply to the process of imposing an aggregate penalty either the directive to bear in mind that the severity of the penalty cannot exceed the degree of culpability, or the directive to take into account the degree of social harm of the committed act. Even if it were possible, in applying them it would be necessary to take into account once again the circumstances already considered in the process of sentencing for individual concurrent criminal offences, and consequently to depart from the generally accepted and completely sound assumption that this should not be done. It can be added that the interpretation of Article 85a CC in its original wording, which is recommended here, is consistent with the purposes for which that provision was introduced into the 1997 Criminal Code. It appears from the explanatory memorandum to the government's amending bill of 20 February 2015 that the point was precisely to establish an exhaustive list of general directives for the imposition of an aggregate sentence in Article 85a CC in its original wording. The bill explicitly mentions "a proposal to limit the directives of sentencing" in relation to the imposition of an aggregate sentence

to the directives listed in that provision[34]. In short, it should be concluded that Article 85a CC, in its original wording, established a separate, exhaustive list of general directives for the imposition of an aggregate penalty, comprising two such directives: the directive of individual (specific) prevention and the directive of general prevention, and specified at the same time that the former is to be the leading directive.

The practical consequences of stipulating in Article 85a CC in its original wording the primacy of the directive of individual prevention over the directive of general prevention became apparent when the indications of these directives came into conflict, i.e. in a situation where the full (more complete) implementation of one of them would reduce the degree of fulfilment of the other. In the reviewed cases, the court would be obliged to accept that the considerations of individual prevention take precedence over the purposes of general prevention, giving them priority in the process of imposing an aggregate penalty.

The amending act of 7 July 2022 changed the wording of Article 85a CC, which now reads as follows: "When imposing an aggregate penalty, the court takes into account primarily the purposes of the imposed penalty in the scope of its social impact, and also the preventive purposes that it should achieve in relation to the sentenced person". It appears from the brief explanation of this change, as provided by the authors of the government bill of the amending act of 7 July 2022, that its objective was to "align the directives of the imposition of an aggregate penalty with the system of directives of sentencing for a criminal offence, provided for in the draft Article 53(1) CC"[35].

A comparison between the two versions of Article 85a 1 CC – the original and the current one – leads to the following conclusions. First, in the amended Article 85a 1 CC, the directives of individual (specific) prevention and general prevention were in fact expressed in a different manner – in the same manner as in the amended Article 53(1) CC; this is consistent with the official reason provided for that change. In this respect, the change was purely adaptive in nature. Second, it is striking that, apart from that adjustment, the former roles of both these directives were reversed – currently, the court is to take into account "primarily the purposes of the imposed penalty in the scope of its social impact," which makes the directive of general prevention the leading directive in the process of imposing an aggregate sentence. It is not possible to figure out whether that change in the order of priority of the preventive directives in favor of the directive of general prevention was intentional or not; the explanatory memorandum for the government amending bill of 7 July 2022 does not mention that consequence of the amendment in Article 85a CC, which may suggest that the change was accidental. In any event, this change must be assessed utterly negatively. It cannot be defended

[34] See Explanatory memorandum of the government bill amending the Act – Polish Criminal Code and certain other acts, parliamentary print No. VII/2981, para. II.6.

[35] The explanatory memorandum, p. 41.

even in relation to cases where an aggregate penalty is imposed already at the stage of conviction[36], in which the process of imposing aggregate punishment probably often becomes *de facto* similar, even though it should not be the case, to the sentencing in the matters where only one offence is attributed to the sentenced person. This is because no primacy of the directive of general prevention over that of individual prevention is found in the amended Article 53(1) CC, which regulates the process of setting a penalty in such cases. Even less comprehensible is giving the directive of general prevention the status of the leading directive for the imposition of an aggregate penalty in relation to cases where the aggregate penalty is imposed in a cumulative judgment, once the judgments imposing individual penalties subject to aggregation into a single aggregate penalty become final[37]. In those cases, the institution of aggregate penalty comes to resemble the institutions of sentence enforcement, where the primacy of individual (specific) prevention purposes can be hardly questioned.

The change made to Article 85a CC was not in the direction it should have taken. Admittedly, a certain modification of the previous regulation was required. What was needed, however, was not a revision but rather a kind of extension. Specifically, this regulation should have been supplemented with a provision obligating the court to be mindful that the severity of the aggregate penalty should not exceed the combined severity of the individual penalties subject to aggregation[38]. The introduction of such a provision is needed to neutralize the risk of interference with the limiting function of culpability, which is still inseparably inscribed in certain applicable provisions on an aggregate penalty, in particular in Article 86(3) CC and Article 88 CC following the semi-colon. It is regrettable that the amending act of 7 July 2022 did not introduce such an amendment.

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[36] See Article 568a(1)(1) of the Polish Code of Criminal Procedure.

[37] See Article 568a(1)(2) of the Polish Code of Criminal Procedure.

[38] I presented such a proposal in one of my earlier studies: J. Majewski, *Stopień winy jako podstawowy wyznacznik dolegliwości reakcji karnej*, (in:) J. Majewski (ed.), *Dyrektywy sądowego wymiaru kary*, Warsaw 2014, p. 38.

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