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PUNISHING JUVENILES HELD LIABLE UNDER THE PENAL CODE

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Summary. Characteristic traits of the juvenile delinquents – persons who do not have a fully shaped personality or much life experience, and are susceptible to negative influences – are viewed as a sufficient reason for adopting separate principle of liability towards this category of offenders. The Author underlines that among basic principles of the Penal Law a significant place is taken by the determination of the offender's minimum age at which a young person stops to be a juvenile and can incur criminal liability on general terms (when an offender turned 17). According to art. 10, par. 2 of the Penal Code, it is allowed to treat a juvenile as an adult offender and punish him for an offence, when juvenile turned 15 and committed one of the acts prohibited under the regulations of the Penal Code (an attempt on the President's life, plain and felony murder, inflicting grievous bodily injury, causing a commonly dangerous situation, hijacking of a ship or an aircraft, causing disaster, aggravated sexual assault, qualified active assault on a public functionary, taking hostage or armed robbery) and the circumstances of the case, juvenile offender's stage of development, his traits and personal conditions warrant this, and when the previously applied didactic and corrective measures proved ineffective.

Key words: juvenile delinquent, penal code, penalty, criminal liability

1. The problem of punishing juveniles for criminal acts has raised vivid discussions among lawyers for centuries. Present-day domestic models of juvenile delinquency proceedings result from a long-term development of legal regulations in which two opposing theories competed against each other. According to proponents of the first one (known as *juridical*), a juvenile was a 'little adult', that is a specific type of an adult offender. Proponents of the second theory (*therapeutic*) consider him a child – a person demanding, by reasons of age, special educational influence[1]. Characteristic traits of this category of offenders are commonly viewed as a sufficient reason for adopting separate principles of liability towards juveniles. Both official publications and judicature observe that the problem concerns persons who do not have a fully shaped personality or much life experience, and are susceptible to negative influences. Yet a long time ago, L. Peiper wrote: „On the one hand, a juvenile is more sensitive to influences from the external world, but on the other one – less immune to these in-

[1] Ref. to R. Hałas, *Odpowiedzialność karna nieletniego na tle Kodeksu karnego z 1997.* Lublin, 2006, p. 15.

fluences, because he does not have any scruples which religion, ethics or intellect imbue. He cannot restrain his desires"[2]. These features should then influence the assessment of his fault[3] and, consequently, the scope of liability.

Among basic principles of penal law a significant place is taken by the determination of the offender's minimum age at which a young person stops to be a juvenile and can incur criminal liability on general terms. According to all Polish penal codifications drawn up in 20th c., this moment occurred when an offender turned 17. Thus, the age of a person committing an illegal act determined when principles of liability relating to juveniles should be applied instead of those concerning adults. Such a regulation is included in art. 10, par. 1 of the Penal Code of June 6, 1997[4]. This regulation provides that criminal punishment can be meted out to a person who, at the moment of committing an offence, has already turned 17. As a rule, juveniles below this age cannot be held liable on terms of the Penal Code. There is, however, a possibility to implement didactic or corrective measures which are defined in the act on juvenile delinquency proceedings of October 26, 1982[5].

2. Yet, as an exception to the rule, Polish penal law allows to treat a juvenile as an adult offender and punish him for an offence. Pursuant to art. 10, par. 2 of the Penal Code, a juvenile who, having turned 15, committed one of the acts prohibited under the regulations of the Penal Code: article 134 (an attempt on the President's life), article 148, par. 1, 2 or 3 (plain and felony murder), article 156, par. 1 or 3 (inflicting grievous bodily injury), article 163, par. 1 or 3 (causing a commonly dangerous situation), article 166 (hijacking of a ship or an aircraft), art. 173, par. 1 or 3 (causing disaster), art. 197, par. 3 or 4 (aggravated sexual assault), art. 223, par. 2 (qualified active assault on a public functionary), art. 252, par. 1 or 2 (taking hostage) and art. 280 (armed robbery), can be held liable on terms defined in the Penal Code if the circumstances of the case, juvenile offender's stage of development, his traits and personal conditions warrant this, and when the previously applied educational and corrective measures proved ineffective.

To establish rules according to which a juvenile who, as an exception, is held liable on terms defined in art.10, par. 2 of the Penal Code should be punished, it is crucial to observe a generally accepted principle in the doctrine theory that unfinished biopsychosocial development has an influence on a generally lower degree of his fault than in case of an adult offender. Because of that, as

[2] L. Peiper, *Komentarz do Kodeksu karnego*. Kraków 1936, p. 190.

[3] Ref. to the decision of Court of Appeal in Kraków passed on January 15, 2003, II Aka 357/02. Krakowskie Zeszyty Sądowe, 2003, No. 3, item 39.

[4] The Act of June 6th, 1997 – the Penal Code (Journal of Laws, 1997, No. 88, item 553).

[5] Act on Juvenile Delinquency Proceedings of October 26, 1982 (Journal of Laws, 2010, No. 33, item 178).

well as for humanitarian reasons, art. 10, par. 3 of the Penal Code was complemented with a principle according to which punishment imposed on a juvenile cannot be higher than two thirds of the top limit of the statutory penalty envisaged for his offence[6]. Moreover, on the basis of the same regulation, court can apply an extraordinary mitigation of penalty towards a juvenile, i.e. below the minimum limit of statutory penalty envisaged for his offence, or a penalty of lesser severity.

3. As regards criminal liability of juveniles, it is important to define guidelines which court should follow when punishing a juvenile. For the reason of the juvenile's immaturity, in art. 54, par. 1 of the Penal Code, legislator set forth a directive which obliges courts to act „above all, to educate an offender". A belief that there is a need to establish a penal policy concerning juvenile delinquents upon the aim to educate them is widely accepted in the doctrine of Polish penal law. The opinion of A. Grześkowiak is not an exception in this respect: „In case of juvenile offenders, the main directive, whether statutory or judicial, should always have in perspective reaching educational goal of punishment"[7]. In view of comparative legal analysis, a similar interpretation of the problem can be discerned in penal systems of European countries[8].

The fact that in the Penal Code, art. 54, par. 1 legislator used the phrase „above all" gives preference for educational reasons upon inflicting penalty, but at the same time allows to pursue other aims. In view of the opinions presented in the literature on the subject and in judicial decisions, the aim indicated in the regulation is considered 'preferential'[9], testifying to its 'priority'[10], 'dominance'[11], 'pre-eminence'[12] (or even 'absolute pre-eminence'[13]) of educational goals of punish-

[6] See A. Grześkowiak, *Kodeks karny. Komentarz.* Ed. A. Grześkowiak, K. Wiak. Warszawa 2012, p. 110.

[7] A. Grześkowiak, *Kara pozbawienia wolności względem nieletnich w prawie karnym europejskich państw socjalistycznych.* Warszawa–Poznań–Toruń 1976, p. 105.

[8] See A. Grześkowiak's *Kara pozbawienia wolności,* p. 104–107 and R.G. Hałas's *Kara śmierci,* p. 67.

[9] Ref. to N. Kłączyńska, in: *Kodeks karny. Część ogólna. Komentarz.* Ed. J. Giezek. Warszawa 2007, p. 410–411; A. Marek, *Kodeks karny.* Warszawa 2005, p. 233; Z. Sienkiewicz, in: M. Kalitowski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz. Vol. II, art. 32–116.*Gdańsk 2001, p. 107.

[10] Ref. to G. Rejman, in: *Kodeks karny. Część ogólna. Komentarz.* Warszawa 1999, p. 929: the decision of Court of Appeal in Wroclaw of April 18, 2012 (AKa 99/12, Lex No. 1163713) and the decision of Court of Appeal in Katowice of July 12, 2012 (II Aka 225/12, Lex nr 1220214).

[11] K. Sienkiewicz, O dyrektywie wymiaru kary wobec nieletnich i młodocianych" (remarks in view of art. 54 par. 1 of the Penal Code), in: *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*. Warszawa 2009, The decision of Court of Appeal in Wrocław of July 13, 2012, II AKa 168/12, Lex nr 1213777.

[12] Go to page 410 in Kłączyńska's publication mentioned above, on the decision of the Supreme Court of December 6, 2012, IV KK 121/12, Lex nr 1277774.

ment. In other words, the directive in art. 54, par. 1 of the Penal Code, puts educational reasons „first"[14] or „in the first instance"[15], meaning that they cannot be regarded as circumstances of secondary importance. Surely, this directive does not exclude application of any general terms of punishment defined in art. 53 of the Penal Code[16], which require court to take into consideration offender's degree of guilt, level of social harmfulness of the act and preventive and educational measures towards the convict, as well as needs concerned with shaping legal awareness of the society.

4. From the aforementioned regulations more specified guidelines can be derived. The statement that most often appears in published judicial decisions of Polish courts boils down to a thesis that punishing juveniles does not mean that penalty must be mild or that they should be treated permissively[17]. Also, it has been stressed many times that on the one hand, too harsh punishment can bring a demoralising effect, and even deepen demoralization and arise a sense of wrong[18], wasting chances for educational influence. On the other hand, if punishment is too mild, does not entail any real pain of imprisonment or concerns an already demoralized juvenile offender, it neither reaches its educational aims nor makes him abide by legal order. On the contrary, it can instil or strengthen the feeling of impunity, form grounds or the conviction about inefficiency of the legal system and even lead to yet higher demoralization and depravity[19].

This observation is further discussed in the statement that the directive accepted in the Penal Code, art. 54, par. 1 does not form grounds for imposing punishment at the statutory minimum or applying extraordinary mitigations of penal-

[13] Ref. to K. Buchała, in: K. Buchała, A. Zoll. *Kodeks karny. Część ogólna. Komentarz do art. 1–116 Kodeksu karnego.* Kraków 1998, p. 418: the decision of Court of Appeal in Kraków of November 22, 2012, II AKa 184/12, Lex nr 12 64353.

[14] The decision of Court of Appeal in Lublin of January 16, 2007, II AKa 350/06, Lex nr 314617, the decision of Court of Appeal in Kraków of November 6, 2009, II Aka 191/09. Krakowskie Zeszyty Sądowe, 2010, No. 1, item 16.

[15] Ref. to P. Hofmański and L.K. Paprzycki in *Kodeks karny. Komentarz.* Ed. M. Filar. Warszawa 2010. 239. The decision of Court of Appeal in Katowice of July 26, 2007, II Aka 186/07. Krakowskie Zeszyty Sądowe, 2008, No. 6, item 52.

[16] Go to page 410 in Kłączyńska's publication mentioned above. The decision of Court of Appeal in Łódź of May 24, 2007, II Aka 70/07. Prokuratura i prawo, 2008, No. 5, item 24.

[17] Go to the decision of the Supreme Court of October 19, 2010, The Penal Code II 224/10, Orzecznictwo Sądu Najwyższego w Sprawach Karnych, 2010, No. 1, item 1978, the decision of Court of Appeal in Katowice of July 26, 2007, II Aka 186/07, Krakowskie Zeszyty Sądowe, 2008, No.6, item 53, the decision of Court of Appeal in Katowice of July 12, 2012, II Aka 225/12, Lex No. 1220214.

[18] See the decision of Court of Appeal in Katowice of June 24, 2004, II AKa 71/04, Lex No. 148546.

[19] See the decision of Court of Appeal in Wrocław of February 23, 2006, II Aka 17/06, Lex. No. 176531, the decision of Court of Appeal in Katowice of July 12, 2012, II AKa 225/12, Lex No. 1220214.

ties[20]. A more controversial conclusion states that in some cases consideration for the juvenile's upbringing and need to make him abide by legal order in the future demands a harsher punishment, which follows precisely from the aforementioned directive[21]. The decision passed by the Supreme Court on October 7th, 2003 states that educational aims at times indicate the need for longer rehabilitation, and thus – a harsher punishment[22]. Apart from a degree of depravity of a juvenile offender, upon inflicting a penalty court should also take into consideration such prerequisites as offender's lifestyle before committing an offence, his behaviour after, motives and modus operandi. According to the Supreme Court, these considerations „may prevail to such a degree that it will be justified to inflict upon a very young offender a punishment at the top limit of statutory penalty"[23], but to its two thirds upon a minor below 17 (art. 10, par. 3 of the Penal Code).

5. In judicial decisions, declaration of a high degree of demoralization (often co-occurring with ineffectiveness of the previously applied measures) functions as justification of departing from directives of educational influence of penalties in favour of general directives defined in art. 53 of the Penal Code[24]. In certain statements of judicature it is said that "priority of educational aims of penalty does not apply when there is no possibility to reach these aims due to a high degree of demoralization and ineffectiveness of the measures applied so far. In this case, real educational influence can be limited to a measure of penalty which, by means of its severity, makes an offender realize how reprehensible is his act and shows him that there are certain social values that must be observed[25]. In some other judicial decision it was stated that „interpretation of art. 54, par. 1 of the Penal Code does not form grounds for lenient and permissive treatment of every minor since, if a juvenile offender is highly demoralized (which is associated with an exceptionally reprehensible lifestyle, but manifests itself even in modus operandi of his offence), it will be necessary to subject him to long-term educational influence in the form of imprisonment exercised in such a way as to bring optimal effects"[26].

[20] See the decision of Court of Appeal in Lublin of April 27, 1999, II AKa 58/99, Lex No. 62561.

[21] See the decision of Court of Appeal in Gdańsk of May 8, 2002, II Aka 95/02, Krakowskie Zeszyty Sądowe, 2002, No. 10, item 68.

[22] The judgement of the Supreme Court of October 7, 2003, WA 45/03, Orzecznictwo Sądu Najwyższego w Sprawach Karnych, 2003, No. 1, item 2118.

[23] The decision of the Supreme Court of May 4, 2005, The II Penal Code 454/04, Lex No. 149647.

[24] See the decision of Court of Appeal in Katowice of August 16, 2011, II AKa 232/11, Orzecznictwo Sądów Apelacyjnych, 2013, No. 2–3, item 51.

[25] See the decision of Court of Appeal in Katowice of May 29, 2008, II AKa 120/08, Lex. No 466458, see also the decision of Court of Appeal in Katowice of November 10, 2009, II AKa 317/09, Lex No. 553879.

[26] The decision of Court of Appeal in Łódź of December 14, 2000, II AKa 236/00, Prokuratura i Prawo, 2002, No. 4, item 18.

6. A separate problem that arises with connection to principles of criminal liability of juveniles concerns a dubious character of the educational dimension of imprisonment. On the one hand, it is indicated that methods of rehabilitation in penal institutions bring little effects, and solitary confinement has destructive influence, especially on young convicts[27]. As J. Makarewicz writes, „the rule is that in case of juvenile offenders, though of sound mind, imprisonment (especially in the community) should be avoided"[28]. On the other hand, there are visible educational advantages of conditionally suspended sentence of imprisonment combined with the supervision of probation officer and obligations to commence education or rectify damages[29]. With connection to educational aims fulfilment in respect to a juvenile, an accurate opinion was expressed in the decision of Court of Appeal in Katowice[30] passed on May 31st, 2005 which stipulated that „an undoubtedly larger effect will be brought by a conditionally suspended sentence with the possibility of its execution 'looming over' the defendant for 5 years, as well as the supervision of the probation officer through this period than defendant's detachment from his environment and deprivation (probably forever) of the chance for a higher degree, and placing him among other, definitely more demoralized, convicted people".

The literature on the subject also points out a positive effect of short-time imprisonment, the „execution of which, coming as a shock, will lead to social re-adaptation of the offender"[31]. The defendant's shock stems not only from separation from the society, but also from his contact with a group of demoralized offenders. It is worth remembering though about a danger which Z. Sienkiewicz mentions: „In penal institution, young persons, who are not yet highly demoralized, can quite easily be subject to influence of more experienced offenders. Short stay in penal institutions may consolidate effective educational activities, it suffices (in many cases) however, to demoralize offender"[32].

7. In view of the directive on educational influence on minor defined in art. 54, par. 1 of the Penal Code, admissibility of long-term imprisonment of a juvenile, 25 years imprisonment including, raises serious doubts. In judicial decisions two lines of arguments accounting for this solution can be discerned. Firstly, it is observed that in many cases the educational aim can be fulfilled „only as

[27] N. Kłączyńska, p. 411–412.

[28] J. Makarewicz, *Prawo karne. Wykład porównawczy z uwzględnieniem prawa obowiązującego w Rzeczypospolitej Polskiej*. Lwów–Warszawa 1924, p. 110.

[29] K. Sienkiewicz, *O dyrektywie wymiaru kary.*

[30] The decision of Court of Appeal in Katowice of May 31, 2005, II AKa 156/05, Lex No. 164565.

[31] Refer to K. Buchała, in: K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz do art. 1–116 Kodeksu karnego.* Kraków 1998, p. 419.

[32] K. Sienkiewicz, *O dyrektywie wymiaru kary.*

a result of imposing adequately harsh punishment of isolation"[33]. Following this path of thinking, it can be assumed that even long-term imprisonment is not devoid of educational values since, in accordance with the sentence of Court of Appeal in Gdańsk, passed on December 28th, 2010 „due to its inevitability and feasibility, this penalty should induce abiding by legal order"[34]. Secondly, impossibility of fulfilling educational aims in a given case justifies long-term imprisonment, e.g. on account of a high degree of demoralization and ineffectiveness of the measures applied so far. In this case, as Court of Appeal in Katowice assumed, „real educational influence can be limited to punishment which, by means of its severity, will make an offender realize reprehensibility of his act and show him that there are certain social values that must be observed"[35]. In other decision of December 21st, 2001, Court of Appeal in Lublin declared that with regard to juvenile offenders who are yet highly demoralized „it is obligatory to impose harsh punishment which allows for long-term process of making him abide by legal order, leading to the positive effects of offender's formative process"[36].

Upon assessing the views on possibility to declare a harsh penalty of imprisonment as they were formulated in judicial decisions, it should be considered whether long-term punishment, i.e. 5, 10 or 15 years, can fulfil aims defined in art. 54, par. 1 of the Penal Code. It must be indicated that the literature on the subject has been recording some critical voices of this solution for quite a long time. According to L. Tyszkiewicz, an emphasis on educational function mentioned in this regulation „renders it impossible to inflict penalties of imprisonment exceeding 7–8 years upon minors because such long penalties may not fulfil the educational function, whereas severity of the crimes sometimes requires, as a form of just penalty, a penalty which would considerably exceed this limit"[37]. He also adds that various opinions suggest that susceptibility to the influence of penal institution expires after 7 years when a convict becomes indifferent to stimuli. What follows therefore is a conclusion that penalty with educational aims should not last longer[38].

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[33] The decision of Court of Appeal in Wrocław of June 6, 2012, II AKa 134/12, Lex No. 1213765.

[34] The decision of Court of Appeal in Gdańsk of December 28, 2010, II AKa 340/10, Przegląd Orzecznictwa Sądu Apelacyjnego w Gdańsku, 2012, No. 2, item 160–165.

[35] The decision of Court of Appeal in Katowice of May 29, 2008, II AKa 120/08, Lex No. 466458.

[36] The decision of Court of Appeal in Lublin of December 20, 2001, II AKa 290/01, Prokuratura i Prawo, 2002, No. 12, item 28.

[37] L. Tyszkiewicz, „Niektóre kwestie dyskusyjne w pracach nad reformą Kodeksu karnego z 1997 r." *Ius et Lex. Księga Jubileuszowa ku czci Profesora Adama Strzembosza.* Ed. A. Dębiński, A. Grześkowiak, K. Wiak. Lublin, 2002, p. 41–42.

[38] L. Tyszkiewicz, in: *Prawo karne.* Ed. T. Dukiet-Nagórska, Warszawa 2010, p. 253.

8. The very presence of the directive requiring court to act, by means of punishment, to educate an offender, but its provisions too, do not inspire serious disputes in the doctrine of penal law and judicial decisions of Polish courts. However, an issue to be discussed is associated with rehabilitation objectives of long-term imprisonment. It seems that infliction of such long-term punishment of incarceration is reasonably justified on the grounds that it is impossible to achieve educational aims. Then, such penalty becomes legitimate on account of other provisions of measure of penalty – consideration for social harmfulness of the act and degree of fault.

Implementation of the directive requiring courts to act, above all, with a view to educating an offender is not simple in a specific case either. It requires insightful recognition of a minor's circumstances, his traits and conditions in which he lives. In no case, however, can severity of punishment exceed the degree of offender's guilt which should be lower on account of a less advanced, in comparison with adults, stage of his development.

WYMIAR KARY NIELETNIM ODPOWIADAJĄCYM NA ZASADACH KODEKSU KARNEGO

Streszczenie. Charakterystyczne cechy nieletnich – osób, które nie mają w pełni ukształtowanej osobowości bądź doświadczenia życiowego, a także podatnych na negatywne wpływy – postrzegane są jako wystarczający powód dla przyjęcia odrębnych zasad odpowiedzialności wobec tej kategorii przestępców. Autor podkreśla, że wśród podstawowych zasad prawa karnego znaczące jest określenie minimalnego wieku sprawcy, gdy młody człowiek przestaje być nieletni i może ponosić odpowiedzialność karną na zasadach ogólnych (gdy sprawca skończył 17 lat). Zgodnie z art. 10 par. 2 kodeksu karnego, nieletni może być traktowany jak dorosły sprawca i ukarany za przestępstwo, gdy ukończył 15 lat i popełnił jeden z czynów zabronionych na podstawie przepisów kodeksu karnego (zamach na życie prezydenta, zabójstwo i zabójstwo kwalifikowane, spowodowanie ciężkiego uszczerbku na zdrowiu, spowodowanie zagrożenia powszechnego, piractwo w komunikacji wodnej lub powietrznej, spowodowanie katastrofy, zgwałcenie kwalifikowane, kwalifikowana napaść na funkcjonariusza publicznego, wzięcie zakładnika bądź rozbój) oraz okoliczności sprawy i stopień rozwoju sprawcy, jego właściwości i warunki osobiste za tym przemawiają, w szczególności, jeżeli poprzednio stosowane środki wychowawcze lub poprawcze okazały się bezskuteczne.

Słowa kluczowe: nieletni, kodeks karny, kara, odpowiedzialność karna