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General directives of judicial sentencing. Remarks in the context of the Polish Criminal Code

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Normative considerations of judicial sentencing possess a distinctly non-uniform character. Such a belief is supported by a — generally accepted — basic division of statutory indications for judicial sentencing, which allows for distinguishing its principles and particular directives. The principles, on the one hand having a veritable criminal law heritage, yet also constitutional and international on the other,[1] are usually defined as: "ideas shaping a given system, which have normative importance in

[1] Some principles that are relevant from the point of view of the issue of sentencing directly follow from the stipulations of the basic law, while others do so from ratified international agreements. Among principles that possess constitutional legitimisation, it would be prudent to indicate in particular: the principle of respecting the inherent and inalienable human dignity (Article 30 of the Constitution of the Republic of Poland), the principle forbidding the use of torture and cruel treatment (Article 40 of the Constitution of the Republic of Poland), the principle of equal treatment by public authorities (Article 32 (2) of the Constitution of the Republic of Poland), the principle of proportionality in regard to restricting constitutional rights and freedoms (Article 31 (3) of the Constitution of Poland). Undoubtedly, the high rank of the indicated general constitutional principles advocated for correctness of a view that promoted devoting attention to their specifying influence on a final sentence.

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the sense that they regulate the manner in which issues related to applying provisions on penalties and penal measures are to be resolved."[2] In turn, by "directives of judicial sentencing" one should understand indications contained in the statute, which the court has a duty to follow while applying measures of criminal law stipulated under the Code[3] in response to a crime. In accordance with the settled view in the doctrine, the said directives are divided into general directives and specific directives. The former refer to: "all perpetrators being judged, all kinds of offences, and, moreover, […] all penalties and penal measures prescribed under a given system of law."[4] In turn, specific directives possess a *de facto* limited area of application. Taking account thereof becomes possible only when specific prerequisites are present. A distinctly varied character of those indications allows one to reflect that some of them were established with a view to penalising 1) specific categories of perpetrators, 2) through using certain types of penalties or variants thereof, or 3) due to criminally prohibited acts that possess a certain gravity in mind.

In the context of the above findings it is important to highlight that while, for the purposes of distinguishing principles from directives it is pointed out that principles of judicial sentencing constitute general rules that are normative in their character on which every singular act of sentencing should be based, taking account of directives may not deviate from a number of circumstances related to the criminally prohibited act and the perpetrator. In the light of such construction, principles of judicial sentencing therefore focus on delineating approaches to adopt certain solutions, while directives relate to a choice of a norm that was interpreted and which directly follows from the respective regulations of the Polish Criminal Code.[5] Furthermore, another, strictly procedural

[2] A. Marek, *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1997, p. 322; V. Konarska-Wrzosek, *Dyrektywy wyboru kary w polskim ustawodawstwie karnym*, Toruń 2002, pp. 50–51.

[3] V. Konarska-Wrzosek, op. cit., p. 73.

[4] Ibidem, pp. 73–74.

[5] J. Wróblewski, "Dwugłos — pod wspólnym tytułem. Recenzja pracy T. Kaczmarka — Ogólne dyrektywy sądowego wymiaru kary w teorii i praktyce sądowej", *Zeszyty Naukowe Instytutu Badania Prawa Sądowego* 1983, no. 16, pp. 275–277; P. Góralski, "Ogólne dyrektywy sądowego wymiaru kary w kodeksie karnym z 1997 r. na tle polskich kodyfikacji karnych z 1932 i 1969 r.", *Nowa Kodyfikacja Prawa Karnego* 2001, vol. VIII, p. 14.

criterion distinguishing principles from directives was proposed in the doctrine on the subject. According to M. Lubelski, an infringement of principles results in raising an allegation — in the context of appellate judicial review — of a breach of substantive law. In turn, infringement of the stipulations of directives might only be impugned within the bounds of an allegation of a manifest incommensurateness of a sentence.[6]

Moreover, statutory indications that shape judicial sentencing, listed herein, complement circumstances under the Polish Criminal Code that are listed under Article 53 § 2 of said Code. Their distinctive trait is not only their open-ended list, but also — in general — their Janus's faces, which causes that they *in casu* may either be in favour or to the detriment of the perpetrator. It is vital to add that the regulation mentioned above highlights the most typical and repeated factors that "manifest themselves almost in their entirety in all of criminal law cases."[7]

While focussing attention on general directives of judicial sentencing within the framework of the present paper, it must be stated first that the normative contents thereof are reflected by the regulation under Article 53 § 1 of the Polish Criminal Code. That provision formulates four general directives of judicial sentencing — highlighting the directive of the degree of culpability, the directive of the degree of social harm, the directive of individual prevention and that of general prevention.[8] Directives referred to under that provision do not remain in a hierarchic relationship of supremacy and inferiority, which as a result means that none of them aspires to the role of a dominant directive.[9] Anyhow, the view voiced herein on the equal character of general directives of judicial

[6] M.J. Lubelski, "Od kary celowej do słusznej lub zastosowania środka karnego wyznaczonego zasadami słusznej represji karnej — uwagi w przedmiocie ideologii karania, w 80-lecie pierwszej kodyfikacji karnej Polski Odrodzonej", [in:] *Idee nowelizacji kodeksu karnego*, ed. M. Lubelski, R. Pawlik, A. Strzelec, Kraków 2014, p. 31.

[7] V. Konarska-Wrzosek, [in:] *Kodeks karny. Komentarz*, ed. R.A. Stefański, Warszawa 2017, pp. 421–422.

[8] Judgement of the Appellate Court in Lublin of 5 June 2003, II AKa 122/03, Legalis no. 64672.

[9] Cf. T. Kaczmarek, "Teoretyczne i praktyczne aspekty sporu co do hierarchii ogólnych dyrektyw sądowego wymiaru kary", *Zeszyty Naukowe Instytutu Badania Prawa Sądowego* 1980, no. 13, p. 26 ff.; J. Giezek, [in:] J. Giezek, N. Kłączyńska, G. Łabuda, *Kodeks karny. Część ogólna. Komentarz*, ed. J. Giezek, Warszawa 2012, pp. 389–390; compare also Z. Sien-

meting out finds its affirmation in the very wording of Article 53 § 1 of the Polish Criminal Code. It must be recalled that the system of the Polish language does not foresee — while making an 'ordinary' list of elements — a possibility of according priority to any of them, following only from the sheer order of their listing. The position adopted in the judiciary, in which it was advocated that there are no substantive grounds to state that any of the general directives of sentencing is "primary and supreme in regard to others. Each of those directives — as it was posited — is equal", remains therefore relevant. In the context of those words it would then be prudent to underline that a leading role may be, as a result, attributed to each of the general directives of sentencing that would gain such a status in a given case.[10] It also follows from the above that "a choice of the most appropriate directive rests with the assessment of the court."[11]

According to the systematic of Article 53 § 1 of the Polish Criminal Code, deliberations on general indications of judicial sentencing are commenced by the analysis of — brought to the pages of the Code for the first time — the directive of the degree of culpability. Renouncing a legislative tradition foreseen under previous codifications, the framers of the criminal Act that is now in force endorsed the introduction of the directive of the degree of culpability into its provisions. It followed directly from the *Grounds for the bill of the Polish Criminal Code* that the codified phrase commented on — 'mindful that the hindrance is not to exceed the degree of culpability' — contains an unconditional duty to take the limiting function of culpability into account for the purposes of an individual act of sentencing, thereby stroking out a possibility of gradation thereof in regard to the upper limit of a sentence. The framers assumed in that regard, that

> the lower limit of a concrete sentence is indicated in principle by those [arising out of the assumptions of general prevention — A.K.] needs of stabilisation [of the legal order —

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kiewicz, *Społeczne niebezpieczeństwo czynu jako dyrektywa sądowego wymiaru kary (na tle teorii i praktyki sądowej)*, Wrocław 1977, pp. 95–96 and quoted literature.

[10] Judgement of the Supreme Court of 11 May 1972, Rw 331/71, OSNKW 1972, no. 9, item 145.

[11] Judgement of the Supreme Court of 9 October 1973, V KRN 281/73, OSNKW 1974, no. 3, item 45; compare also Judgement of the Supreme Court of 20 June 1972, V KRN 215/72, OSNKW 1972, no. 11, item 173.

A.K.], while the upper limit is indicated (limited) by the principle of culpability. Within those bounds the court may mete out a sentence in accordance with the needs of individual prevention.12

A limiting construction of culpability proposed herein was to contribute to maintain, to the fullest extent, a link joining a criminally prohibited act of the perpetrator with the sentence imposed on him or her.[13] In light of the proposed interpretation, culpability then should, on one hand, constitute a circumstance limiting the sentencing dictated by former considerations of negative prevention, and, on the other, its extent should not be deemed an obstacle to mitigating the sentence where considerations of individual prevention would suggest so. Statutory framing of the directive at issue is not without a number of controversies in its interpretation, however. The doubts indicated above follow not only from the absence of taking a stance on what is supposed to be understood by the concept of a limiting construction of culpability by the legislator, but also due to the lack of indication of a list of circumstances which would serve a role of units of measurement, allowing for its gradation.[14]

The next of general directives of judicial sentencing, requiring the court entering a judgement to take the degree of social harm into account is not also free from doubts in regard to practical application, referred to above. It was posited in the literature that said directive accentuates the gravity of the offence having been committed, thus constituting, as it was posited, a point of departure for "judicial scrutiny of a given case in the aspect of sentencing."[15] Gradable nature of the directive at issue should — at least as a theoretical assumption — impose fewer difficulties, compared to those which present themselves while assessing the aforementioned degree of culpability. An appropriate advantage, in re-

[12] *Nowe kodeksy karne z 1997 r. z uzasadnieniem*, Warszawa 1997, p. 153.

[13] A. Zoll, "Aksjologiczne podstawy prawa karnego", [in:] *Filozofia prawa a tworzenie i stosowanie prawa. Materiały Ogólnopolskiej Konferencji Naukowej zorganizowanej w dniach 11 i 12 czerwca 1991 roku w Katowicach*, ed. B. Czech, Katowice 1992, p. 308.

[14] P. Jakubski, "Wina i jej stopniowalność na tle kodeksu karnego", *Prokuratura i Prawo* 1999, no. 4, pp. 56–57.

[15] T. Bojarski, "Problemy wymiaru kary w świetle nowego kodeksu karnego", [in:] *Polska lat dziewięćdziesiątych. Przemiany państwa i prawa*, vol. 2, ed. L. Antonowicz et al., Lublin 1998, p. 279.

gard to the former codification, was to be supplied by circumstances — exhaustively listed under Article 115 § 2 of the Polish Criminal Code — allowing for establishing a degree of social harm of a given criminally prohibited act.

A catalogue of general directives of sentencing is supplemented by the directive of individual prevention, the purpose of which was linked to preventive and educational objectives which the penalty meted out should achieve in regard to the perpetrator. It is stressed in the case law that

> placing a greater emphasis on fulfilling the objective of a penalty in regard to fulfilment of preventive and educational tasks in regard to the perpetrator of an offence may occur in particular when the commission of that offence is not the result of a grave demoralisation of the perpetrator, but a certain deviation from hitherto conduct, which is the quality of a person who conforms to the principles of social conduct.[16]

Many more controversies are in turn elicited by an attempt to describe mutual relations between indicated objectives of individual prevention. On the one hand, it is underscored that the objectives mentioned above constitute two different qualitative categories, while others invoke that there is a relationship of encompassing.[17] In a wholly different argument, it was advocated that the distinguished objectives of specific prevention do not possess a contradictory character, as against one another.

According to the adherents of that view, the fulfilment of educational and preventive objectives occurs essentially in parallel, and their simultaneous assessment would allow for meting out a proper sentence.[18] The main element that joins the above objectives is striving to minimise the probability of relapse of the perpetrator into the ways of crime, which, as a consequence, would authorise one to state that the expected effect for the influence of individual prevention should be either a deliberate abstention from committing another contravention by the perpetrator, or devoting more diligence for the purposes of avoiding a commission of an unintentional

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[16] Judgement of the Supreme Court of 21 July 1976, III KR 164/76, Legalis no. 19546.

[17] R. Kaczor, *Prewencja indywidualna jako dyrektywa sądowego wymiaru kary*, unpublished doctoral dissertation, Wrocław 2006, p. 84.

[18] Z. Sienkiewicz, [in:] *Kodeks karny. Komentarz*, vol. 2, Gdańsk 1999, p. 91.

criminally prohibited act.[19] One may, on the basis of the above findings, infer a conclusion that the differences occurring between the objectives considered herein are found within an attempt to achieve more or less ambitious results by virtue of them. While the educational objective presupposes a lofty task of moral betterment of the perpetrator, the preventive objective expresses, in its essence, rather more modest requirements.[20]

From the statutory wording of Article 53 § 1 of the Polish Criminal Code it also follows that the hindrance of the sentence meted out unto the perpetrator should take "needs in regard of shaping the legal awareness of the society" into account. The cited statutory formula reflects the essence of the directive of general prevention, the sense of which was joined by the framers of the Code currently in force with the aspiration to achieve a stabilisation of the legal order, and not with the formerly promoted idea of deterrence,[21] carried out via severe hindrances under criminal law, exceeding the degree of culpability of the perpetrator.[22] In the *Grounds of the bill of the Polish Criminal Code* it was invoked that a sentence fulfilling the above objective of general prevention should not be "lower than the level of tolerance under which a belief emerges that the values protected by the

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[19] Cf. Judgement of the Appellate Court in Rzeszów of 8 January 2013, II AKa 110/12, Legalis no. 1092687.

[20] J. Giezek, op. cit., p. 400.

[21] While not entirely questioning the deterrent effect of a criminal punishment, it is appropriately invoked in case-law that "the essence of preventive influence of a sentence consists of an impact — also through its indispensable, i.e., necessary severity — on shaping moral attitudes that organise societies, faith in them and trust in purposefulness of conformity to norms that create such systems. A sentence meted out should then also have an impact on anyone, who in any way took notice of the offence and the ruling entered into. A penalty is also one of the important measures of combating crime, both in the sense of deterrent function and to the extent of shaping socially expected attitudes. The purpose of that is to render even convicted persons accustomed to conformity with principles of social conduct and to adherence to the legal order, and therefore counteract relapse into crime". Judgement of the Appellate Court in Gdańsk of 22 August 2012, II AKa 246/12, Legalis no. 748826.

[22] "[…] creation of legal awareness of the society may not be brought down only to the negative general prevention, understood solely as deterring the society". Judgement of the Appellate Court in Wrocław of 13 March 2003, II AKa 47/03, LEX no. 81391; compare also Judgement of the Appellate Court in Gdańsk of 28 October 2015, II AKa 334/15, LEX no. 2034120.

norm at issue do not actually find protection due to too liberal treatment of offenders infringing legal rights."[23] A high percentage of crime detection, inevitability of incurring liability, as well as applying penalties (or other measures of criminal law response), which would be deemed by the assessment of the society as examples of just response were considered important factors allowing for shaping the legal awareness of the society.[24] In the light of the construction above, the objective of general prevention was in essence linked not only with the belief of the society on the inevitability of punishment, but also with corroborating a conviction that the rule of law triumphs over crime, and the perpetrators are justly punished.[25] It was in that regard invoked in the case-law that the referral to the mentioned considerations of general prevention is

> dictated by the need of persuading the society that the punishment is inevitable for infringement of rights protected by law and that attempts at such rights do not pay off, strengthening the sense of responsibility, rooting the respect for the law and the creation of a proper sense of justice and security. These are not equivalent with the requirement of meting out only severe penalties. They, above all, denote a need to mete out such penalties which would correspond to the society's understanding of justice, which would give a guarantee of effectively combating crime and would create a climate of trust in regard to the system of law in force.[26]

The importance of the directive of general prevention in the process of judicial sentencing is not free from a number of difficulties, however. Such difficulties pertain not only to its statutory framing, but reach much deeper, even questioning its 'directival' status. According to the Grounds of the bill to the Polish Criminal Code, as well as according to the hitherto acquis of the doctrine and its jurisprudence, one can hardly not agree to

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[23] *Nowe kodeksy karne*…, Warszawa 1997, p. 153; A. Zoll, "Założenia polityki karnej w projekcie kodeksu karnego", *Państwo i Prawo* 1994, no. 5, p. 7.

[24] *Nowe kodeksy karne*…, p. 153.

[25] Judgement of the Appellate Court in Gdańsk of 7 November 2013, II AKa 349/13, Legalis no. 747044; Judgement of the Appellate Court in Gdańsk of 16 December 2015, II AKa 365/15, LEX no. 2031191; Judgement of the District Court in Bydgoszcz of 22 October 2014, IV Ka 724/14, LEX no. 1870576; Judgement of the District Court in Wrocław of 15 March 2016, IV Ka 112/16, LEX no. 2032057.

[26] Judgement of the Appellate Court in Lublin of 12 January 2006, II AKa 290/05, Legalis no. 77466; compare also Judgement of the Appellate Court in Szczecin of 29 January 2015, II AKa 245/14, LEX no. 2041901.

the view that the directive commented on does provide, in essence, any guidance in regard to the type or the extent of a sentence.[27] It even appears that the said directive of general prevention turns out to be *de facto* not self-standing, for "the shaping of the legal awareness of the society" by way of a response under criminal law is in actuality supported by a just sentence, which should be a result of a diligent consideration of all circumstances of a given case by the court, through the lens of statutory indications for sentencing. It therefore appears that only such a sentence may have a positive influence on the society, while at the same time inviting praise of the general public for penalties meted out thereby, and simultaneously create conditions to strengthen and shape the legal awareness of the society.[28]

On the basis of the above findings one needs to state that the process of judicial sentencing constitutes one of the more difficult tasks in the practice of applying the law, which certainly may not be equated to simple arithmetic. Assuming that sentencing constitutes an outcome for many factors, it would be prudent to add, as a result, that the court which undertakes a decision on application of a penalty of a certain type and extent should act schematically, template-like, but it should diligently consider all circumstances for it to be subsequently able to convince, through the grounds for its standpoint, that an activity contrary to a norm of criminal was met with a just response.[29] An appropriate guidance therefor should be constituted by the statutory indications of judicial sentencing, among whose particular role is vested in 'directival' solutions, pointing to objectives which are set for a criminal penalty. While the normative

[27] Judgement of the Appellate Court in Lublin of 19 December 2000, II AKa 242/00, LEX no. 47636.

[28] It was, and not without merit, pointed out in case-law that the directive of general prevention "construed as shaping the legal awareness of the society, is closely linked to the directive of the social harm of the criminally prohibited act and to the directive of the degree of culpability. For it is stressed in the doctrine that the fulfilment of those two directives constitutes one of the requirements of effective shaping of the legal awareness of the society. Thus, only a just sentence, corresponding to the degree of social harm of a given criminally prohibited act, and at the same time meted out within the bounds of culpability of the perpetrator, may have a positive influence on the society […]". Judgement of the Appellate Court in Wroclaw of 28 October 2004, II AKa 305/04, LEX no. 151250.

[29] Judgement of the District Court in Łódź of 8 March 2016, V Ka 1409/15, LEX no. 2130673.

presence of the mentioned regulations undoubtedly counteracts an open transgression of the boundaries of discretion on the part of the court, its practical usefulness is sometimes called into question. An attempt to translate the sense of the mentioned 'directival' provisions into a precise type and extent of a sentence[30] turns out to be an incredibly complicated process, which as a result would corroborate a conclusion that — despite the 'interpretative tissue' grown over the highlighted group of statutory indications — it would be hard to dispel a suspicion that another (history-wise) Criminal Code, regardless of any draping in 'new clothes' "did not escape the prosaic statements that the emperor (sentencing) — isn't wearing anything at all."[31] An unduly rash overstatement of practical importance of statutory indications for judicial sentencing is further corroborated by 'non-normative factors' present in that process, which, as T. Kaczmarek stressed, cause the provisions commented on to

> usually constitute a hoax serving to sustain delusions that the rationalisation of a penalty may be carried out strictly in accordance with the paradigms approved by a statute, in a manner wholly independent of autonomous dispositions of a judge to take account of other groups of values and preferences therefor, following from personal standpoints for assessment.[32]

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[30] P. Albrecht, "Aktualne kierunki rozwoju wymiaru kar w prawie szwajcarskim", *Czasopismo Prawa Karnego i Nauk Penalnych* 1999, no. 2, p. 89.

[31] A. Krukowski, "Dwugłos — pod wspólnym tytułem. Recenzja pracy T. Kaczmarka — Ogólne dyrektywy sądowego wymiaru kary w teorii i praktyce sądowej", *Zeszyty Naukowe Instytutu Badania Prawa Sądowego* 1983, no. 16, p. 286.

[32] T. Kaczmarek, "O pozytywnej prewencji ogólnej w ujęciu projektu kodeksu karnego", *Palestra* 1995, no. 3–4, p. 63 ff.; idem, *Ogólne dyrektywy wymiaru kary w teorii i praktyce sądowej*, Wrocław, pp. 13–14; J. Giezek, *Okoliczności wpływające na sędziowski wymiar kary*, Wrocław 1989, p. 40; B. Wróblewski, *Sprawność i prawnicza kultura umysłowa sędziów karnych*, Wilno 1939, p. 16; B. Wróblewski, W. Świda, *Sędziowski wymiar kary w Rzeczypospolitej Polskiej. Ankieta*, Wilno 1939, p. 467; T. Kaczmarek, "Sądowy wymiar kary wobec kobiet (uwagi na marginesie książki Janiny Błachut)", *Państwo i Prawo* 1989, no. 10, p. 125 ff.; I. Hayduk-Hawrylak, "Karzący miecz Temidy. Rozważania o roli sędziego w procesie karnym", [in:] *Współczesne tendencje w rozwoju procesu karnego z perspektywy dogmatyki oraz teorii i filozofii prawa*, ed. J. Skorupka, I. Hayduk-Hawrylak, Warszawa 2011, p. 162 and quoted literature; see also H.J. Albrecht, "Wymiar kary za ciężkie przestępstwa", *Annales Universitatis Mariae Curie-Skłodowska* 1989, Sectio G, vol. XXXVI, p. 88.

Difficulties accentuated herein, integrally linked with a transposition of certain 'directival' indications onto an area of practice in regard to applying the law, therefore do not completely exclude a situation in which the court meting out a sentence would refer to an informal tariff, in the form of its own knowledge, as well as personal and professional experience.[33]

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[33] Judgement of the Appellate Court in Rzeszów of 20 December 2012, II AKa 110/12, http://orzeczenia.rzeszow.sa.gov.pl/content/$N/154000000001006_II_AKa_000110_2012_Uz_2013-01-08_001 (access: 12.12.2016).

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Summary

The present paper was devoted to the issue of general directives of judicial sentencing. Assuming that such a status is held by the indications enumerated under Article 53 § 1 of the Polish Criminal Code (i.e., the degree of culpability, the degree of social harm of a criminally prohibited act, individual prevention and general prevention), in the present paper attention was devoted not only to the essence of the mentioned indications of judicial sentencing, but also to their actual role in that process. The performed analyses allowed for formulating a conclusion that extra-legal factors, following from knowledge and experience of the adjudicating body, do not remain without importance.

Keywords: judicial sentencing, sentencing principles, judicial sentencing guidelines.