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JURIDICAL CHARACTER OF CONDITIONAL SUSPENSION OF THE CARRYING OUT OF A SENTENCE

Abstract:
Conditional suspension of the carrying out of a sentence is the most commonly used law enforcement type of reaction to the criminal offense. As an example, in 2010 conditional suspension of the carrying out of a sentence was applied to 86% of custodial sentences, which accounted for 58% of all convictions. This fact alone is sufficient for undertaking research on the nature of this form of criminal-law response. Also in the doctrine and case law is a clear divergence in the way of undertaking the legal nature of conditional suspension. In this study a variety of views expressed in the doctrine of criminal law and jurisprudence has been analyzed, with particular emphasis on the sentences of the Supreme Court and the Courts of Appeal. Statistical analysis of judicial activity in the years 2002–2011 has been taken under consideration. In result the result of this study is a thesis that the most appropriate way of understanding the nature of conditional suspension of the carrying out of a sentence is the view, that this institution is an integral part of the decision of punishment, a particular form of sentence. Adoption of this thesis extends the circle explicitly expressed in the article 69 of the Penal Code conditions (not) use the conditional suspension of all directives of sentencing (including article 53 of the Penal Code). The decision about conditional stay of the carrying out of a sentence depends therefore not only on the positive criminological predictions accused, but also on the grounds of the social impact of the penalty. In this study has been developed a view that between those thesis feedback.

Keywords: *penalty, probation, suspension of sentence.*

Conditional suspense of the carrying out of a sentence (hereunder conditional suspension) has been for many years the most commonly used law en-

forcement type of reaction to the criminal offense. In 2010 on the number of 432 891 of all convictions, courts adjudicated 290 669 custodial sentences, of which 251 087 were conditionally suspended. It means that conditional suspension was applied to 86% custodial sentences, which accounted for 58% of all convictions. Also in previous years, imprisonment with conditional suspension was the most common form of reaction to the crime[1].This fact alone should be enough to undertake research on this topic, but in addition to this it can be easily seen, that the doctrine and the case law are far away from developing united view on the juridical character of conditional suspension.

In the literature devoted to the conditional suspension, very general statements are expressed, according to which "the conditional suspension of the sentence is (...) in fact a chance given to the offender so that he can avoid problems associated with the implementation of sanctions imposed against him if the trial period will meet the conditions specified in the judgment (...)"[2], more specific views calling conditional suspension (independent)[3] punitive measure[4], a particular form of penalty[5], an extraordinary form of a sentence[6], an integral part of the decision on penalty, specific criminal-law response to a criminal offense[7].

This study aims to show that the most appropriate way of understanding the juridical character of the conditional suspension is the view that this

[1] Statistical analysis of the judicial activity in the years 2002-2011, Warszawa 2012, p. 27; http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2011/ (19.5.2012).

[2] M. Kalitowski, *Prawo karne. Część ogólna, szczególna i wojskowa,* T. Dukiet-Nagórska (red.), LexisNexis, Warszawa 2008, ISBN 9788376200323, p. 216.

[3] J. Skupiński, [in:] *Kary i środki karne. Poddanie sprawcy próbie, System prawa Karnego*, tom. 6, M. Melezini (ed.), A. Marek (series ed.), C. H. Beck, Warszawa 2010, ISBN 978-83-255-1313-9, p. 1056.

[4] This author, however, points out that submission the offender to a particular program of probation is a type of penalty. A. Bałandynowicz, *Probacja. System sprawiedliwego karania*, Lex Utilis, Warszawa 2002, ISBN 83-89051-35-4, p. 81 and p. 338.

[5] A. Marek, *Kodeks karny: komentarz*, Lex a Wolters Kluwer Business, Warszawa 2010, ISBN 978-83-264-0275-3, p. 228.

[6] E. Krzymuski, *System prawa karnego, część ogólna,* Kraków 1921, p. 248, 249.

[7] A. Zoll (ed.) [in:] *Kodeks karny: część ogólna. Komentarz,* Wolters Kluwer Polska, Warszawa 2007, ISBN 978-83-7526-599-6, p. 850.

institution is an integral part of the decision on penalty, a particular form of sentence[8]. Arguments for and against this view will be presented below.

First of all, it should be noted that the conditional suspension is issued as a result of conviction. It expresses a negative reaction to a socially harmful act and involves for the offender a number of negative consequences such as offender's stigmatization[9], or being shown as having a criminal record. Conditional suspension can also be combined with the obligations imposed under Article 72 of the Penal Code (hereunder PC), and likewise with a fine imposed under Article 71 of the PC[10]. The mere threat of execution of suspend sentence also is for the offender some kind of ailment. The above-described circumstances are the result of a criminal sentence in which the penalty is conditionally held of. For the offender's these are really noticeable ailments. The obligations imposed on the offender pursuant to Article 71 of the PC and a fine imposed under Article 72 of the PC have a dual role to play. Firstly, they are designed to ensure the proper conduct of the trials, and secondly, they should be for the perpetrator of a crime *sui generis* penalty. The doctrine emphasizes that criminal conviction, in which conditional suspension is applied, combined with the obligations of Article 71 of the PC and fines imposed pursuant to Article 72 of the PC is to take the particular form of punishment as just and purposeful[11]. Considering indicated above ailments, that generally have (not) meet sanctioned conditionally suspended punishment, it appears advisable to view the conditional suspension as an integral part of the decision on penalty, or even a particular form of sentence[12].

It should be emphasized that the conditional suspension is in fact a conditional chance for an offender to avoid the absolute, much more painful pe-

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[8] See also M. Leonieni, *Warunkowe zawieszenie wykonania kary w polskim prawie karnym*, Wydawnictwo Prawnicze, Warszawa 1974, PB 2638/74, p. 12 and foll...

[9] M. Leonieni, *Warunkowe skazanie formą wykonania kary (warunkowe zawieszenie wykonania kary – częścią orzeczenia o karze)*, „Nowe Prawo", 1958, no. 7-8, p. 834.

[10] It should be noted that according to the content of Article. 71 § 1 of the PC, the court suspending execution of sentence of imprisonment may order a fine only if its imposition on a different basis was not possible.

[11] M. Leonieni*, O istocie warunkowego skazania*, „Państwo i Prawo", Warszawa 1958, numb. 5-6, p. 888.

[12] A. Zoll [in:] *Kodeks karny…, op. cit*., p. 850.

nalty if he will abide to the rules of probation. It is the court's decision on the (non) use of conditional suspension that largely determines what is actually felt by the convicted criminal as ailments of conviction. The view that the most decisive part of the predominantly real responsibility to the offender, that is actually felt by him, will not be part of the decision on punishment is difficult to accept.

The above thesis that the conditional suspension is an integral part of the decision on penalty, or even a particular form of sentence, entails very serious consequences for the practice of justice. It sets out the directive (principles) for the use of conditional suspension[13].

According to Article 69 § 1 of the PC, the court may conditionally suspend the sentence if it is sufficient to achieve the purposes of punishment against the perpetrator, and in particular to prevent recidivism. Article 69 § 2 of the PC provides that in suspending the sentence, court shall take into account above all the attitude of the perpetrator, his characteristics and personal conditions, the current way of life and behavior after the commission of crime. Described in the Article 69 § 1 and 2 of the PC, the conditions for applying the conditional suspension, clearly relate to the perpetrators criminological forecast. The thesis that the conditional suspension is an integral part of the sentence, expands the circle of reasons for and against the use of the conditional suspension for all principles of penalty (including Article 53 of the PC) provided in the penal code.

It should be noted that between the thesis that the conditional suspension is an integral part of the decision on penalty, and the thesis that decision on conditional suspension should be determined by every directives of the penal code, is a feedback loop.

If one accepts the view that the conditional suspension is a part of the decision on penalty, and of course for the sentence principles of penalty are applied (e.g. Art. 53 of the PC), *ipso facto* for the conditional suspension

[13] The term "directives for conditional suspension of the sentence" is a "working" term adopted for the purpose of this article, to indicate possible differences between the directives (principles) of the penalty and premises, which the court is obliged to take into consideration, when applying to the present institution.

should be applied the same principles. This relationship also occurs in the opposite direction. If we consider the right view, according to which, for the conditional suspension should be applied the principles of penalty expressed by the penal code (e.g. Article 53 of the PC), therefore it should be accepted that the conditional suspension is a part of the decision on penalty, because as the name suggests, the principles are applied to penalty. By analyzing the statistical data of justice activities in the years 2002-2011[14] there is no doubt that courts deciding on the conditional suspension, consider all principles of sentencing, not being limited to offenders criminological projections. Well, as was already pointed out above, in 2010, conditional suspension was applied to 86% of custodial sentences, while at a restriction of liberty only in 2.6%, and spontaneous fine only 1.8%. Limited use of conditional suspension considered in these cases cannot be explained by negative criminological projections. Firstly the imposition of a libertarian with a negative criminological forecast is contrary to the directives of sentence (*a contrario* art. 58 § 1 of the PC in conjunction of art. 53 of the PC) and secondly it is denied by the scale of this phenomenon. Courts use so rarely conditional suspension for penalty of restricted liberty, because of the principles of sentencing, in particular, because of the directive of general deterrence.

The above-described feedback is clearly visible in several provisions of the Criminal Code, the Executive Penal Code (hereunder EPC) and the Code of Criminal Procedure (hereunder CCP). In my opinion in favor of the position that the conditional suspension is an integral part of the decision on penalty, a particular form of penalty, seems to favor art. 69 § 4 of the PC. According to the content of this article, suspended sentences or fines limitation do not apply to the perpetrator of hooligan offenses[15]. Against the perpetrator of

[14] Statistical analysis of the judicial activity in the years 2002-2011, Warsaw 2012, p. 27; http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2011/ (19.05.2012).

[15] In passing it should be noted that the introduction of the penal law crime of hooliganism or at least the current form of Article 115 § 21, was criticized by most of the doctrines, e.g. J. Majewski [in:] *Kodeks karny…, op. cit.*, p. 1247-1248; O. Górniok, J. Bojarski [in:] *Kodeks karny: komentarz*, M. Filar (ed.), Lexis Nexis Polska, Warszawa 2010, ISBN 978-83-7620-391-1, p. 609; A. Szczekala, *Chuligański charakter czynu*, „Prokuratura i Prawo", 2008, no. 6, p. 79; A. Wądołowska, *Istota chuligańskiego czynu*, "Prokuratura i Prawo", 2010, no. 12,

a hooligan offense and the offender referred to in Article 178a of PC (driving by an intoxicated driver), the court may conditionally suspend the execution of a sentence of imprisonment in particularly justified cases (Article 69 § 4 of the PC last sentence). The legal nature of crime hooliganism raises in society negative feelings and the use of conditional suspension considering the perpetrator of such crimes, would cause a negative public response. It seems absolutely not necessary to prejudge negative criminological prognosis for the perpetrator of a hooligan offence based only on the type of his offence[16].

It should be emphasized that criminology prognosis is also affected by the circumstances after the offence is committed, but whatever the nature of the offence is, it is relevant only in the circumstances of the moment of committing a crime.

The idea that the decision on conditional suspension is an integral part of the decision on penalty, seems to favor the settlement provided for in Article 71 of the PC. As indicated above, this provision makes it possible to give effect to fines, applying the conditional suspension if its imposition on a different basis is not possible. There is a persuasive view that the sole purpose of

p. 134 and next; this position seems to be held by M. J. Lubelski: *Nierozłączność naczelnych zasad prawa karnego materialnego i procesowego (jednolitość prawa karnego)* [in:] *Współzależność prawa karnego materialnego i procesowego*, Z. Ćwiąkalski (ed.), Oficyna Wolters Kluwer Business, Warszawa 2009, ISBN 978-83-7601-452-4, p. 101. It is worth noting that the proposed changes to the Criminal Code provide for the deletion of the grounds for extraordinary tightening of sanctions for this offence. Comp. T. Bojarski, J. Piórkowska-Flieger [in:] *Kodeks karny: komentarz*, T. Bojarski (ed.), LexisNexis Polska, Warszawa 2011, ISBN 978-83-7620-514-4, p. 240.

[16] Differently T. Bojarski, *ibidem…,* p. 171; but J. Skupiński indicates that the relative placement of restricting the use of the conditional suspension of the sentence for the perpetrators of a hooligan offence points to the condition of the general prevention (*vide* J. Skupiński, [in:] *Kary i środki karne…, op. cit.,* p. 1054). This comment was made on the grounds previous to the current Penal Code, although it retains its relevance to current law. It is also worth noting that the causes of hooliganism A. Pawełczyńska saw in the society, recognizing that hooliganism is an unintended side effect of the necessary social transformation. She emphasized that the manifestations of hooliganism should be punished harshly, quickly and decisively. (see A. Pawełczyńska, *O niektórych przyczynach chuligaństwa*, [in:] *Chuligaństwo. Studia*, J. Sawicki (ed.), Wydawnictwo Prawnicze, Warszawa 1956, p. 105 and 126-127). It seems that this way of criminal law response was to eliminate this phenomenon(skipping the fact whether such a criminal law response is appropriate, worth of noticing is that it does not change the issue that imposing a penalty for an offense takes into account social considerations).

a fine under Article 71 of the PC is to ensure a proper trial period, which would be a consequence of the recognition that the decision on conditional suspension is an independent element of the criminal-law response, dependent only on the positive criminological prediction. In this approach there would be no justification for the rule of additional fines for previous penalties of restriction of liberty or imprisonment[17]. Such sentence could even be considered an exacerbation of the penalty. Deprivation of liberty or the penalty of restriction of freedom or the fine shall be decided upon the art 71 § 1 of the PC and is integrally connected, serves to fill the Directives provided for in Article 53 of the PC, in particular, emphasizing that the use of conditional suspension of punishment does not mean impunity for the perpetrators of the crime". It therefore seems reasonable to claim that "the institution of conditional suspension of a sentence of imprisonment or a penalty of restriction of freedom or the fine shall be decided upon the art. 71 § 1 of the Penal Code is integrally connected, serving to fill the Directives provided for in Article 53 of the Penal Code, in particular, emphasizing that the use of conditional suspension of punishment does not mean impunity for the perpetrators of crime"[18]. In this case the fine is applied to first achieve the objectives of prevention and education to the convicted but also should be taken into account in shaping the legal awareness of the public. G. Labuda argues that "the function of the fines used when applying conditional suspension is to make the offender feel the economic ailments treated in his case as a factor in the prevention in the social perception that he is not fully immune to punishment (social intuitions about conditional suspension equate it with impunity)"[19]. Also, case law indicates that the fine imposed on the basis of Article 71 of the PC is the only real ailment that allows offender and public as well, to feel, even if only

[17]Article 71 of the Penal Code explicitly provides that on the basis of this article a fine can be ordered only in a situation in which its judgment on a different basis is not possible. SN 26.08.2004 r., file reference IV KK 174/2004, Lex Polonica nr 393608.

[18]A. Zoll [in:] *Kodeks karny…*, *op. cit*., p. 861.

[19] G. Łabuda [in:] *Kodeks karny: część ogólna: komentarz*, J. Giezek (ed.), Lex Wolters Kluwer Business, Warszawa 2007, ISBN 978-83-7526-540-8, p. 514.

in economic area, his wrongdoings,[20] that no offense goes unpunished. In my opinion arguing that principles of sentencing shall not be used for the conditional suspension but they should be used for fine imposed on the basis of art. 71 of the PC is illogical, because it has "provided for in Article 71 § 1 of the PC that the fine is integrally connected with the decision on conditional suspension of sentence of imprisonment – without such a judgment it cannot exist by itself"[21]. Justification for adopting the view that the conditional suspension is an integral part of the decision on punishment, and to it shall be applied all principles of sentencing may be found also in the functional interpretation of this institution. J. Skupiński emphasizes that the institution is "(...) penal measure, which in general was to create not only an institution for a more rational and humane punishment, but also and above all, as an alternative to imprisonment. As such, the decision on its application by the decision of whether to punish the offender with an absolute deprivation of liberty, or means of liberation, and how to choose the shape of the latter measure"[22]. In a similar spirit speaks A. Bałandynowicz, who states that probation agents, being treated in fact as a variety of intermediate sanctions, must be considered independently, because they do not constitute a representation, but "(...) have an intrinsic disorder in accordance with the formal justice and retributive justice "[23]. The author points out that in this approach, the primary purpose of punishment is above all a man's rehabilitation and improvement of

[20] *Vide* SA w Katowicach 29.07.1999 r., file reference II AKa 134/99, „Prokuratura i Prawo" 2000, no. 1, pos. 19.

[21] SN 3.06.2004 r., file reference IV KK 133/2004, LexPolonica nr 395112; It should also be noted that R. Skarbek does not formulate clear position on this issue, because on one hand he clearly states that "the legislature has now resigned from the conditions of the measure (Article 69 of the Penal Code perm. Own) depending on the so-called. social impact of the penalty or general prevention conditions" and on the other hand, states that " financial ailment predicated on the basis of this provision (Article 71 of the Penal Code perm. own) also includes this penalty goal which is to create legal awareness of society (Article 53 § 1 in fine)". R. Skarbek [in:] *Kodeks karny: część ogólna. Vol. 2: komentarz,* M. Królikowski (ed.), R. Zawłocki (ed.), C.H.Beck, Warszawa 2010, ISBN 978-83-255-1325-2, p. 451 and 460.

[22] J. Skupiński [in:] *Kary i środki karne…, op. cit.,* p. 1056.

[23] A. Bałandynowicz, *Probacja. Resocjalizacja z udziałem społeczeństwa*, Prawo i Praktyka Gospodarcza, Warszawa 2006, ISBN 83-60201-19-6, p. 277.

the social, emotional and spiritual functioning, but "(...) probation sentence should be characterized by correspondence involving the matching of penalty for the committed offense and the effects which it evoked."[24]

Justification for the need of using all principles of sentencing to conditional suspense, including the need for the shaping of the legal awareness of society, i.e. taking into account the social impact of the penalty, can also be found in the punishment execution code. Article 152 of that act provides that court may conditionally suspend the execution of the sentence not exceeding two years imprisonment, if the postponement of punishment lasted for at least one year. In this context, note the upper limit of the dimension of the sentence in two years' imprisonment. One could argue that it is a simple and logical consequence of establishing the border by the Article 69 of the PC, and in Article 69 of the PC, and this limit was set arbitrarily by the legislator, who said that if the offender commits the act for which it was necessary to impose a penalty of deprivation of liberty for more than two years, it manifests the same perpetrator, so much negative prognosis criminology, that it should not *ipso jure* be possible to apply to the "benefits" provided by Article 69 of the PC.

However, pay attention to the specificity of the court's decision to use conditional suspension based on Article 69 of the PC in conjunction with Article 152 of the EPC. "The evaluation of a court adjudicating on the basis of Article 152 the Executive Penal Code can therefore be the only thing that happens after the judgment, especially during the deferment of the sentence. The court should therefore determine whether the way of life and behavior of the offender after the ruling, especially one's efforts to pay for damages or to compensate in another form of social sense of justice (Article 53 § 2 of the Penal Code and Article 69 § 2 of the Penal Code) allow for other, than at the time of sentencing, assessment of whether the conditional suspension of the sentence will be sufficient to achieve the purposes of punishment against the perpetrator, and in particular – to prevent recidivism (Article 69 § 1 of the Penal Code)"[25]. The court should therefore consider whether after the

Ibidem..., p. 277.

[25] Z. Hołda, K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Wydawnictwo ARCHE, Gdańsk 2007, ISBN 83-89-35-62-36, p. 506.

sentencing, during the one-year deferral period of imprisonment, there were grounds to justify conditional suspension of punishment[26].

In my view, it should be considered that if the intention of the legislature would be to condition the conditional suspension of deprivation of liberty only to a positive criminological prediction, then the limit of dimension of the sentence in Article 152 of EPC, relating to a particular conditional suspension of the sentence, should be different - raised in relation to Article 69 of the PC, because after all, the offender may not exhibit the same negative criminological prediction, which he did at the time of the offense. Lack of such a pattern indicates that the intent was to limit the application of Article 69 of the PC in conjunction of Article 152 EPC precisely due to the need for development of legal awareness of society, because, as noted above, in the upper limit of 2 years imprisonment, defined by Article 152 of the EPC a reason of particular prevention can only be detected.

As part of a fair research, at this point it seems reasonable to put forward the arguments that would justify to limit the directives of the conditional suspension only to the Article 69 of the PC, and therefore only to the offender's criminological forecast.

The Penal Code of 1969 in Article 73 § 3 in second sentence explicitly states that "the court also takes into account whether the social impact considerations do not appeal against the sentence of conditional suspension of its implementation "[27]. This provision does not appear in the current Penal Code of 1997. This omission made by the legislature in the current structure of the conditional suspension, led part of the doctrine to the view that the court deciding on the issue of conditional suspension, should not, in fact can not, take into account considerations of "social interaction", making a decision at this point based only on the positive or negative offender's criminological

[26] SA w Lublinie 3.12.1998 r., Sygn. akt, II AKz 88/98, LexPolonica nr 401756.

[27] Dz.U.1969.13.94 ze zm., art. 73 § 2 zd. ost.

forecast[28]. This position also has a relatively broad support in case law[29]. According to this view, the conditional suspension of penalty proceeds in two steps. Firstly the court following the directives of sentence determines type and size of the penalty. Secondly, if imposed penalty takes form of penalty of imprisonment not exceeding two years, the penalty of restriction of liberty or a fine, the court referring "only" to offender's criminology forecast decides whether the execution of the sentence is conditionally suspended[30].

In favor of the view presented above, about the two-step model of the conditional suspension , and thus of the juridical character of this institution, a literal interpretation of Article 69 of the PC seems to be favored. The use of the verb "sentence" perfectly suggests that the decision on conditional suspension of penalty shall be made after the judgment on the type and size of the punishment. It should be noted that Article 73 of the PC of 1969 (equivalent to the current Article 69 of the PC), provided that the court may conditionally suspend the execution of sentence of imprisonment for up to 2 years in case

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[28] *Vide i.a.*. R. Skarbek [in:], *Kodeks karny…, op. cit.*, p. 452; see also, A. Kordik, *Warunkowe zawieszenie wykonania kary w systemie środków probacyjnych i jego efektywność*, Kolonia Limited, Wrocław 1998, ISBN 83-908415-7-6, p. 57, although the author points to the complexity of the institution, and emphasizes that the essence of the conditional suspension of punishment is above all punishment. *Vide* A. Kordik, *Warunkowe…, op. cit.,* p. 40. In this capacity also seems to be, K. Daszkiewicz, stating: „in Article 69 § 1 of the Penal Code unduly limited purposes of punishment. They are to be achieved only to the perpetrator." (K. Daszkiewicz, *Warunkowe zawieszenie wykonania kary – propozycje zmian*, „Prokuratura i Prawo", 2000, no. 11, p. 20).

[29] *Vide* SA in Lublin, dated 16.06.2009 file reference II Aka 102/09, LEX nr 5131126; SA we Wrocławiu 12.06.2002, file reference II Aka 182/2002, OSA 2002, z. 11, poz. 77; SA in Kraków, 5.12.2001, file reference II Aka 279/2000, KZS 2002, no. 1, pos. 14. It seems that in this position stood also SA in Bialystok, where he stated that term of imprisonment with conditional suspension, by its nature is not effectively carried out, and the measures imposed under Articles 72 of the PC of probation are that the performance penalty under the provisions of Chapter 58 of the Criminal Procedure Code cannot be treated. If the SA were of the view that the conditional suspension of the sentence of imprisonment, is an element of penalty – that imprisonment is a specific form of criminal liability, it would be necessary to use the Code of Criminal Procedure Chapter 58 (expressed in Bialystok SA 26.1.2010, file reference II Aka 7/10, Bulletin 1/2010.

[30] SA in Krakow 5.12.2001, file reference II Aka 279/2000, KZS 2002, no. 1, pos. 14.

of a conviction for an offense, and up to 3 years in case of a conviction for an unintentional offense. It seems that the use of the term "sentence" in the current criminal code was to underline the two step decision making model on conditional suspension. However, it can be argued that the use of the expression "sentenced" by the legislature is solely the result of editorial style of rule, caused by extension, in relation to the Criminal Code of 1969 the benefit of the institutions provided for in Article 69 of the PC in relation to the penalties of imprisonment and a fine of spontaneous and not from a desire to separate the directives from the penalty of suspension of the conditional directives. It should be noted that in current Penal Code, there is the Article 56 of the PC, which did not have its equivalent in the previous Penal Code. It states that principles of sentencing shall be proportionately used to all measures provided in the Criminal Code.

According to a great part of the doctrine, this provision provides the basis for the appropriate use of directives to the conditional suspension[31]. According to the position presented in this paper, the decision on conditional suspension is not "just" a decision on the execution of a previous ruling on punishment but it is an integral part of the decision - a particular form of sentence[32]. Andrzej Marek points out that "(...) a suspended sentence (probation) is a particular form of punishment, we can say in response to a separate offense (and not, as it has been presented before, modality of the sentence)"[33]. Such an approach encourages a claim that the institutions set out in Article 69 of the PC in addition to evidence of a positive criminology forecast specified in the Article 69 § 1 and 2 of the PC shall be applied with all the principles of sentencing set out in Article 53 of the PC, and therefore the condition of the social impact of the penalty, which is housed in a more spacious semantically phrase "necessary in shaping the legal awareness of society"[34]. Linguistic in-

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[31] W. Wróbel [in:] *Kodeks Karny..., op. cit.,* p. 718, A. Marek [in:] *Kodeks karny..., op. cit.,* p. 186, M. Budyn-Kulik, M. Kulik [in:] *Kodeks karny: praktyczny komentarz,* M. Mozgawa (ed.), Oficyna Wolters Kluwer Business, Warszawa 2010, ISBN 978-83-264-0434-4, p. 144.

[32] A. Zoll, *Kodeks karny..., op. cit.*, p. 850.

[33] A. Marek, *Kodeks karny...,op. cit.,* p. 228.

[34] In such a position stands mainly the doctrine: A. Marek, *ibidem...,* p. 228; A. Zoll, *Kodeks*

terpretation permits such a solution, because "the content of Article 69 § 2 of the PC indicates that there are no conditions listed in all the circumstances, to be assessed when making the decision on conditional suspension of punishment; those factors are not "closed", and argues for such a determination to use the phrase "above all", and convinces in such a statement the use of the phrase "above all"[35].

Underlining the integral connection between the conditional suspension with the penalty sentence has also very strong support in the provisions of the Code of Criminal Procedure.

The very design of the criminal sentence speaks for adopting the thesis that the conditional suspension is part of the decision on punishment. The doctrine of criminal procedural law understands sentence as mandatory declaration of intent court adjudicating, through which rises the application of legal norms to a specific event and specific perpetrator of an offense, which is the essence of "settlement" as a necessary component of any decision Article 413 § 1 point 5 Code)[36]. The essence of the sentence is to recognize the accused to be guilty of the alleged offense and to impose on him appropriate penalties. Judgment is a multiple complex sentence, and thus a complex but singular decision. This does not change the fact that the sentence is divided into points, because it merely arises from the editorial style.

It should also be noted that according to Article 413 § 2 point 2 of the Criminal Procedure Code conviction in addition to the items indicated in Ar-

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karny…, op. cit., p. 849-850; G. Łabuda..., *op. cit.*, p. 509; M. Budyn-Kulik, M. Mozgawa, *Kodeks…,op. cit.,* p. 173-174; P. Hofmański, L. Paprzycki [in:] *Kodeks karny…, op. cit.,* M. Filar (ed.), Warszawa 2010, LexisNexis, ISBN 978-83-7620-391-1, p. 364; J. Skupiński [in:] *Kary i środki karne…, op. cit.*, p. 1056.; see also on the grounds of the previous Penal Code: S. Pawela, *Względne przyczyny odwoławcze*, Wydawnictwo Prawnicze, Warszawa 1970, p. 175; This view is also grounded in case law: SN 20.11.2008, file reference II KK 180/08, LEX nr 468656; SN 14.06.2006, file reference WA 19/06, OSNwSK 2006/1/1243; SA in Gdańsk 08.05.2002, file reference KZS 2002/10/67; SA in Łodz 23.11.2000., file reference II AKa 217/00, LEX 47745, SA in Kraków dated 30.06.1998, file reference II AKa 184/98, LEX 35261.

[35] SN 07.07.2010, file reference II KK 246/10, „Biuletyn Prawa Karnego" 2010/7/28.

[36] *Vide* R. Kmiecik, E. Skrętowicz, *Proces karny: część ogólna,* Zakamycze, Kraków 2004, ISBN 83-7444-090-2, p. 243 and next.

ticle 413 § 1 of the Code should also include a decision as to sanctions and punitive measures. It should also be noted that according to Article 413 § 2 point 2 of the Criminal Procedure Code conviction in addition to the items indicated in Art. 413 § 1 of the Code should also include a decision as to sanctions and punitive measures. Although the legislature has enumerated in detail the elements that must appear in a conviction, it did not mention the conditional suspension. Conviction, of course, must include a prominent decision in this regard. Since the legislature has considered it superfluous to mention explicitly between the conditional suspension of the Article 413 of Criminal Procedure Code, it should be recognized that it is a part of another item. There is no doubt that under the Polish Criminal Code conditional suspension cannot be treated as a criminal measure[37], and therefore it is safe to assume that the legislature sees in the Article 413 of Criminal Procedure Code that conditional suspension is a part of the sentence.

Also in other provisions of the Criminal Procedure Code, it is clear that the legislature combines the punishment with conditional suspension. According to Article 110 CPC deliberation and voting takes place separately as to the guilt and the legal action, the punishment for criminal measures and on the remaining issues. This provision does not explicitly indicate at what point a request for the issue of conditional suspension should be submitted to council. You can postulate that the issue of conditional suspension should be put to the council and to vote as the last, because it directly fits to the timeline, in the recipe it should be treated as "other issues"[38].

The doctrine of criminal procedural law indicates, however, that "other issues", are in fact the findings in relation to such judgment remedy, civil actions, damages granted *ex officio*, legal costs, credit detention on account of the sentence, judgment on the factual evidence[39], but not the conditional

[37] It should be noted that the classification of conditional suspension of the Penal Code as a criminal tax raises substantial doubts.

[38] Article 110 of the CPC last sentence.

[39] S. Steinborn [in:] *Kodeks postępowania karnego t. I: Komentarz do art. 1-424 K.P.K.*, J. Grajewski (ed.), Lex Wolters Kluwer Business, Warszawa 2010, ISBN 978-83-7601-466-1, p. 393-394.

suspension.

Taking a position on this matter E. Samborski simply indicates that the issue of conditional suspension should be put to the council and voted together with the nature and duration of the absolute penalty[40]. At the same position also appears to be Z. Gostyński[41].

In my opinion this view should be regarded as accurate. It should be pointed out that after all, the same authority (the court in the same composition) determines the dimension of the "absolute" punishment, and of the conditional suspension. It is therefore necessary to agree with M. Leonieni that in the real process of judging (where about the conditional suspension rules the same body), it is impossible to separate the dimension of a particular application of penalties from the conditional suspension "(...), both because of the psychology of the judge, and because the tasks performed by the court (goals) penalty"[42].

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[40] E. Samborski, *Zarys metodyki pracy sędziego w sprawach karnych,* LexisNexis, Warszawa 2008, ISBN 978-83-7334-983-4, p. 269. The same view, on the basis of previously existing codes expressed: S. Śliwiński (S. Śliwiński, *Proces karny. Zasady ogólne*, Warszawa 1948, Gebethner i Wolff, s. 501 and foll.), M. Leonieni (M. Leonieni, *O istocie ...*, *op.cit.,* p. 886 and foll.), H. Kempisty (H. Kempisty, *Metodyka pracy sędziego w sprawach karnych*, Wydawnictwo Prawnicze, Warszawa 1955, p. 145 and next). Current art. 110 Code of Criminal Procedure governs the course of the deliberation and voting is the equivalent of art. 97 Code of Criminal Procedure of 1969 and Articles. 359 § 1 of the Code of 19 March 1928 (Dz. U. pos. 313 nr. 33, 1928) In view of the very similar wording of those provisions in the speech remain relevant on the basis of existing regulations.

[41] Z. Gostyński (red.) [w:] *Kodeks postępowania karnego.* Vol I, DOM WYDAWNICZY ABC, Warszawa 1998, ISBN 83-87286-81-8, p. 401-402.

[42] M. Leonieni, *Warunkowe skazanie..., op. cit.,* p. 825. It should be noted that the doctrine of these voices is being raised. For example, W. Wróbel, A. Zoll, indicate that the court imposing penalty should not determine its value in applying the conditional suspension and wrong is the practice „(...) in which the size of the sentence is higher than would be in a situation where the court has not applied a conditional suspension." W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Znak, Kraków 2010, ISBN 978-83-240-1351-7, p. 483. This position appears to be a consequence of understanding conditional suspension as a form of enforcement of the sentence, not a form of sentencing. Accepting that conditional suspension is a form of of sentence, allows the formation of the sentence „absolute" for the conditional suspension. Interestingly, A. Zoll stating the nature of the institution of conditional suspension expressly states that the conditional suspension is an integral part of the decision on punishment, a particular form of

Also, the content of Article 335 Criminal Procedure Code in connection with Article 343 CPC, which governs the institution called conviction without a hearing, shows that the concept of punishment shall include conditional suspensions as an integral part of the decision on punishment. According to Article 335 of the CPC, if the circumstances of the offense are not in doubt, and the attitude of the accused indicates that the objectives of the proceeding will be achieved, the prosecutor can put in the indictment a request for a judgment of conviction and the defendant agrees with the sentence or punitive measure. The negotiations with the defendant are the prosecutor's sentence, including the issue of conditional suspension. However, Article 335 of the CPC does not mention an explicitly described institution of conditional suspension, and only uses the concept of punishment and penal measure. Since under the Criminal Code and Criminal Procedure Code conditional suspension is not a criminal measure, it must be concluded that the legislature has treated the conditional suspension, as part of the decision on the penalty.

It is true, that there are views of doctrine, ruling that the initiative of the conditional suspension of the rules specified in Article 343 § 2 point 2 of the CPC (more favorable to the offender than under Article 69 of the PC) may only occur at the initiative of the court seise[43], but they must be regarded as wrong[44]. S. Steinborn, says that such a position, "(...) leads to an almost ab-

punishment. A. Zoll [in:] *Kodeks karny…, op. cit.*, p. 850. See in this regard also M. Leonieni, *O istocie…, op. cit.*, p. 891. It should also be noted that W. Wróbel also takes the view that for conditional suspension principles of sentencing provided in art. 53 and 54 § 1 of the Penal Code through art. 56 of the Penal Code should be applied. See W. Wróbel [in:] *Kodeks karny…, op. cit., p*. 718.

[43]See for example D. Sosiński, *Skazanie podejrzanego bez przeprowadzenia rozprawy a zasady wymiaru kary i środków karnych*, „Prokurator", 2003, nr 3-4, p. 56. In such a position also stood R. Koper see the same author, *Formy i zakres odpowiedzialności karnej oskarżonego w trybie skazania bez rozprawy,* „Studia Prawnicze", Warszawa 2004, no. 3, p. 148. It should be noted, however, that the author also claims that „(...) there are no obstacles to both substantive penal institutions (emergency easing rules on the basis of Article. 1-4 60 pairs of the Penal Code and the conditional suspension of the rules on the basis of Article. Par 69 1-3 kk perm. author) can be used under Articles. 335 par 1 k.p.k. These are in fact closely related to the settlement of punishment. *Ibidem...*, p..147-148.

[44] The great criticism of this position presented D. Steinborn, see the same author, *Porozumienia w polskim procesie karnym*, Zakamycze, Kraków 2005, ISBN 83-7444-117-8, p. 130.

surd consequences. Parties, would file with a court application, which in no way reflect their real intentions and plans. A defendant may, after conviction, not want normal conditions, and one's consent to sentencing without trial is only to a condition that the institutions provided for in Article 343 § 1 and 2 of the CPC. Thus, guided by a prosecutor or a court request for the contents to which the accused did not consent, or the defendant would express agreement to the terms of conviction, which he did not really accept[45]".

What is more, the institution of voluntary submission to penalty (Article 387 of the CPC) indicates that the conditional suspension is a part of the decision on penalty. Article 387 of the CPC provides that a defendant may request a decision convicting and sentencing him to a particular sentence or punitive measure. There should be no doubt that the application of the accused should be possible to be included in the issue of conditional suspension to fully reflect conditions to which the convicted defendant agrees. The legislature also at this point has not expressed explicitly conditional suspension of treating the body as an integral part of the decision on punishment. The examples mentioned above clearly show that the legislature in the CPC takes the conditional suspension, as an integral part of the decision on penalty, which is most appropriate.

To summarize the above, the following position should be taken on the juridical character of conditional suspension and conditions of its application. A criminal sentence in which it comes to the conditional suspension is primarily a criminal conviction, which causes the prisoner a number of negative consequences. It cannot be forgotten that a conviction occurs as a reaction to the offenders culpable, social harmful act and the conditional suspension is just one of the possible responses to this act. (Not) used by the court conditional suspense affects the perceiving by the offender the ailment of conviction. Combined with conditional suspension legal means, such as those imposed on the offender during the trial (Article 72 of the PC or a fine imposed upon Article 71 of the PC, they are to ensure the proper conduct of the trial

In this position also stood E. Kruk. See this author, *Wyrok skazujący sądu pierwszej instancji w trybie art. 335 k.p.k.*, Wolters Kluwer, Kraków 2005, ISBN 83-7444-046-5, p. 82 and next.

[45] D. Steinborn, *Porozumienia…, op. cit.*, p. 130.

period as well as to provide a kind of substitute for the absolute punishment, which was conditionally suspended. They are also part of the settlement of the penalty, because the actual ailment determines that the offender will feel as committed for his offense. Itself the threat of the enforcement of the suspended sentence, is also a noticeable discomfort for the offender. In my opinion, the decision on punishment should be viewed as a whole, totally seeing all the negative consequences that will bear the perpetrator of an offense following the conviction. For these reasons, I believe that the decision on conditional suspension is a part of the decision on penalty, and is associated with the level, the principles and objectives of punishment[46], being in fact a form of sentencing. A conditional suspense should be a way to achieve a just and purposeful punishment[47].

For principles of the conditional suspension should be considered not only criteria set out explicitly in Article 69 PC but also other principles of sentencing set out by the Penal Code. Major part of the doctrine considers that other principles of sentencing shall be used adequately to conditional suspension due to Article of the 56 PC. However, it seems that if the conditional suspension is in fact part of the decision on punishment it can be concluded that the regulation of Article 56 of the PC does not apply to conditional suspension sentencing because of the principles of penalty which say that this provision should be applied directly, and not appropriatedly.

It should be noted that between the thesis that the conditional suspension is an integral part of the decision on punishment, and the proposition that for the conditional suspension all the principles of penalty shall be used is a feedback. If one accepts the view that the conditional suspension is a part of the decision on penalty, this relation also occurs in the opposite direction. If one considers the idea, according to which to the conditional suspension all the principles of penalty laid down in the Article 53 of the PC shall be applied, to be relevant thereby shall be accepted that the conditional suspension is part of the decision on penalty, because as the name suggests, we apply to

[46] And also M. Leonieni, *O istocie…, op. cit.*, p. 885.
[47] *Ibidem,* p. 888.

p.it principles of penalty.

The view that conditional suspension is a part of penalty will also be reflected in the appeal proceedings. D. Świecki expressed the view that during questioning the court's decision on the conditional suspension, appellant shall raise error of concerning offender's criminological forecast[48]. However, accepting the thesis that the conditional suspension is part of a decision on penalty allows to formulate the view that an Appeal can also be based on the premise of a gross incommensurability of penalty (Article 438 § 3 of the CPC).

As a conclusion it must again be emphasized that conditional suspension is regarded as an integral part of a decision on penalty, the form of penalty, the premise of social impact of the penalty should also be applied. It is worth noting that this condition should be used not only as it was under the Criminal Code of 1969 in the negative, *i.e.* that the court reaches a decision on the application of Article 69 of the PC but also takes into account whether the considerations of the social impact of the penalty do not militate against the application of this institution, but also in the positive, resulting from the conditions of general deterrence. Conditional suspension of the sentence shall not by any means raise in the society a belief that the offender will remain unpunished.

[48] D. Świecki, *Apelacja w postępowaniu karnym*, Lexis Nexis, Warszawa 2011, ISBN 978-83-762-060-59, p. 149.