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Remarks on alternative solutions to punishment in petty offences law

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Abstract

Given the need for the state to respond to low-level acts such as petty offences, there is still a noticeable search for an optimal model of punishment for these acts. It is known that penal means of punishment do not always fulfil their purpose. Therefore, the petty offences law, which is closer to the principle of opportunism, apart from the inconvenience of penal solutions towards the perpetrator of the offence, assumes the possibility of applying non-penal measures in the form of educational influence measures. The article presents the essence of the measures included in Article 41 of the Code of Petty Offences and draws attention to the legislative imperfections in this respect and many interpellation-related doubts. The analysis of educational measures indicates that they could play an important role in changing the hierarchy of the model of punishment for offences. However, it is necessary for the legislator to consider changes, including those indicated in this study, in order to prioritize this form of punishment for minor prohibited acts in the form of petty offences.

Keywords: offence, punishment, educational purpose, educational influence means, alternative to punishment.

Liability for petty offences, as opposed to liability for crimes, should be based on a slightly milder response from the state, given that these acts are of lower social harmfulness and reprehensibility. Therefore, one of

the basic assumptions of the 1966 reform of the petty offences law[1] was a departure from the purely repressive direction of criminal-administrative jurisprudence and a restoration of the disturbed proportions between the repressive and educational purpose of punishment. The consequence of this was the adoption of the principle of using non-penal measures as a form of response to petty offences, which should, as indicated in the original assumption, take precedence over penal measures included in the Code of Petty Offences.[2] The abandonment of the obligation to prosecute in favour of a legal obligation to respond to a prohibited act by means of non-penal measures was also closely linked to the subject of the regulation of petty offences law, which essentially covered behaviours characterized in general by lower social harmfulness. It was assumed that in the case of some of them, the potential for punishment in a specific case could be reduced to such an extent that there would be no reason to punish at all (it would become either completely pointless or, at best, excessive). Means of educational influence appeared which, as a form of non-penal reaction, have survived to this day. Although they have been criticized as being too general, vague, and broad, giving rise to the temptation to abuse, they may still constitute a statutory response to an offence committed. The literature on the subject assumes that the means of educational influence include: "all kinds of activities whose main or secondary goal is educational influence, if they are objectively capable of (to a broader or narrower extent) carrying out this task."[3] J. Jakubowska-Hara indicates that replacing the concept of "educational influence measures" with the concepts of "non-penal influence measures," "non-penal response measures," "corrective and disciplinary measures," or "other measures" is justified and more convincing.[4] Whatever name we adopt, when considering the liability

[1] Act of 17 June 1966 on the Transfer of Certain Minor Crimes as Petty Offences to Penal-Administrative Jurisdiction, Journal of Laws of 1966, no. 23, item 149.

[2] As written by W. Radecki in M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warszawa 2019, p. 431.

[3] A. Gubiński, *Prawo wykroczeń*, Warszawa 1980, p. 223.

[4] J. Jakubowska-Hara, "Kilka uwag w kwestii alternatywnych form reakcji na wykroczenia (w kontekście reformy prawa wykroczeń)," [in:] *Na styku prawa karnego i prawa o wykroczeniach. Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu*, eds. J. Sawicki, K. Łucarz, Wrocław 2016, pp. 180–181. Same in: J. Jakubowska-Hara, "Środki oddziaływania

towards the perpetrator of an offence, the first step should be to consider the possibility of applying non-penal measures—educational influence, and if this turns out to be inappropriate—impose a fine in the form of a ticket, in the absence of negative premises for applying the ticket procedure, and only when, in the opinion of the body, such a reaction is insufficient, submit a motion to the court for punishment, which means the possibility of applying a penal reaction.[5] Many authors would see educational measures as a priority response to misconduct—an alternative to punishment. It should not be forgotten that one of the directives of imposing a penalty is the educational goal, in which the most strongly emphasized factor is the improvement of the punished person, his moral improvement—a thorough change in the personality of the perpetrator towards obtaining a socially positive attitude. Regardless of the name used, these measures should remain in the petty offences law as one of the forms of response to a petty offence.

Until 1998, educational measures in the Code of Petty Offences were based on two provisions—Articles 40 and 41.[6] According to Article 40 § 1 of the Code of Petty Offences, repealed in 1998, in relation to the perpetrator of an act, it was possible to limit oneself to applying the measures provided for in the work regulations, in disciplinary proceedings, in proceedings before social courts or other educational measures sufficient to introduce the perpetrator to respect the law and observe the principles of social coexistence, and not to refer the case to the adjudicating body. However, if justified by a legitimate social interest, the prosecutor could refer the case to the adjudicating body, in which it was limited to applying the above-mentioned measures to the perpetrator (Article 40 § 2 of the Code of Petty Offences). Article 41 of the Code of Petty Offences, in its original wording allowed, even without initiating proceedings, to refer the case to the manager of the workplace where the perpetrator was employed, if the

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wychowawczego," [in:] Reforma prawa wykroczeń, ed. P. Daniluk, vol. I, Warszawa 2019, p. 311.

[5] J. Jakubowska-Hara, "Środki oddziaływania wychowawczego," p. 309.

[6] Article 40 was repealed by the Act of 28 August 1998 amending the Code of Petty Offences, the PAetty Offences Procedure Code, the Act on the Structure of Petty Offences Boards, the Labour Code, and certain other acts, Journal of Laws of 1998, no. 113, item 717, and the rule in Article 41 of the Code of Petty Offences was changed.

nature of the act committed indicated that it constituted a breach of the employee's duty, or to a social court or social organization,[7] to which the perpetrator belonged, with a request to apply the measures provided for in the work regulations, in disciplinary proceedings, or other educational measures, if it was considered sufficient to encourage the perpetrator of the offence to respect the law and the principles of social coexistence. Due to the varied nature of educational measures, these solutions have been criticized. It was pointed out that some of them were more severe than those formally considered penal and that the persons against whom they were applied enjoyed limited procedural guarantees because the cases were transferred to different entities operating based on different procedures.[8]

In its current wording, the basis for the application of educational measures is Article 41 of the Code of Petty Offences, which in fact has become the equivalent of Article 40 of the Code of Petty Offences. According to this provision, the body authorized to submit a motion to penalize or to impose a fine or penalty notice may limit itself to applying:

1) instruction,
2) drawing attention,
3) warning,
4) other means of educational influence.

The Code of Petty Offences does not provide a definition of educational measures. A. Gubiński considers all activities whose main or secondary goal is educational influence to be such means, provided they are objectively capable of (to a broader or narrower extent) fulfilling this task.[9] Therefore, the disciplinary, order, and organizational penalties previously indicated in the repealed Article 40 of the Code of Petty Offences will apply here, as the catalogue of these measures remains open in accordance with the legislator's intention. It should be emphasized that even currently, educational

[7] The social courts mentioned in this provision were provided for in the Act of 30 March 1965 on Social Courts (Journal of Laws of 1965, no. 13, item 92 including changes). The social courts that were to operate at workplaces indicated in the act were not introduced into force, but based on this act, social conciliation commissions were established, which operated at local self-government units (estate and commune councils) under the patronage of the National Unity Front.

[8] As written by (among others) J. Szumski in J. Szumski, *Środki penalne w polskim prawie wykroczeń na tle doświadczeń praktyki*, Lublin 1995, pp. 197 ff.

[9] A. Gubiński, *Prawo wykroczeń*, Warszawa 1980, p. 223.

measures may have a minor negative impact, such as when a police officer admonishes a driver, or a significant negative impact, such as when they result in, for example, expulsion from an organization.[10] A. Marek argues that the means of educational influence may involve measures used at the school attended by the perpetrator, at the workplace where he is employed, or in the association of which he is a member.[11]

Therefore, the normative approach to educational measures refers to those that were permissible before the amendment and which even then raised justified doubts due to the stigmatizing nature of such measures and, in the case of pupils or students, due to the disproportionately negative consequences in the form of disciplinary penalties available to schools and universities.[12] W. Radecki lists among the educational measures the instruction of the perpetrator of the offence on the justification for paying a certain amount for a social purpose as a reaction to the angling offence under the Inland Fishing Act.[13] In this situation, the State Fisheries Guard officer does not "rule in the petty offence case." It is just a proposal on his part, which the angler will either accept or not.[14] Order No. 323 of the Chief Commander of the Police of 26 March 2008 on the methodology of performing administrative and order activities by the Police in the field of detecting offences and prosecuting their perpetrators[15] clearly indicates that the following can be used as educational measures in particular: 1) admonishing the perpetrator of the offence by indicating the non-compliance of his conduct with the applicable provisions, indicating these provisions; 2) drawing attention to or warning the perpetrator, with a simultaneous threat of punishment if he commits the offence again; 3) providing written information to the employer or social organization to which the perpetrator belongs if the nature of the act indicates that it also constitutes a breach of professional discipline, the organization's statute, membership regulations, etc. It should be assumed that the reliance on the application of "other" measures than those listed in

[10] W. Kotowski, *Kodeks wykroczeń. Komentarz*, Warszawa 2009, p. 178.
[11] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warszawa 2012, p. 94.
[12] J. Jakubowska-Hara, "Środki oddziaływania wychowawczego," p. 312.
[13] M. Bojarski, W. Radecki, *Kodeks wykroczeń…*, p. 437.
[14] Ibid., p. 438.
[15] *Dziennik Urzędowy Komendy Głównej Policji* of 2008, issue 9, item 48.

Article 41 of the Code of Petty Offences should be determined by the circumstances of a given case and the purpose they are to serve, namely their educational impact. There is also no statutory prohibition against using several educational measures at the same time, e.g., instructing and warning.[16] R. Krajewski rightly points out that applying too many forms of educational measures to the perpetrator is not justified. After all, it would be difficult to consider the behaviour of a police officer or other authority who would simultaneously instruct, warn, and draw the perpetrator's attention to it as having any value. This would be a kind of excess, which could lead to unnecessary conflicts between perpetrators of offences and officers.[17]

As stated above, the catalogue of educational measures is not closed. The legislator did not introduce any criteria for applying these measures as a response to an offence, which indicates the possibility of their arbitrary application based on a subjective, rather than an objective, assessment. This is another doubt that should be eliminated *de lege ferenda*. Educational measures may be applied to the perpetrator of any offence. M. Budyn-Kulik argues that the purposive and systemic interpretation of Article 41 of the Code of Petty Offences speaks in favour of viewing the grounds for applying educational measures through the prism of Article 33 of the Code of Petty Offences. However, do the entities using educational measures always analyse the justification for the use of these response measures in such a precise manner? The answer seems to be negative. It is therefore necessary to postulate changes to clarify the criteria for imposing educational measures. It should be assumed, and the entities should refer to this when considering the justification for the use of these response measures, that it is possible to limit oneself to using educational measures if the objectives of the penalty are met, primarily in the area of special prevention, and they should not be used when it would not be appropriate due to the social impact of the penalty.[18] The grounds

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[16] I. Nowicka, R. Kupiński, "Stosowanie środków oddziaływania wychowawczego w sprawach o wykroczenia," *Prokuratura i Prawo* 7–8, 2004, pp. 145–154.

[17] R. Krajewski, "Środki oddziaływania wychowawczego w prawie wykroczeń," *Palestra* 7–8, 2013, p. 19.

[18] As written by M. Budyn-Kulik in M. Budyn-Kulik et al., *Kodeks wykroczeń. Komentarz*, ed. M. Mozgawa, Warszawa 2009, pp. 134–135.

for mitigating the penalty listed by the legislator in Article 33 § 3 of the Code of Petty Offences seem to be of no small importance for the criteria for assessing when to apply an educational measure. The following are listed as mitigating circumstances in particular:

1) the perpetrator's acted under the influence of difficult family or personal circumstances;

2) the perpetrator acted under the influence of strong agitation caused by an unfair attitude towards him or other people;

3) the perpetrator acted for reasons that deserve consideration;

4) before committing the offence, the perpetrator led an impeccable life and distinguished himself by fulfilling his duties, especially in the field of work;

5) the perpetrator's contribution or attempt to contribute to the removal of the harmful consequences of his act.

The existence of these premises should be a signal to the competent authorities as to whether, in the given circumstances, punishing the perpetrator is necessary or whether the use of other extra-penal response measures will be sufficient. M. Bojarski indicates that educational measures may be applied if they are sufficient to encourage the perpetrator to respect the law and observe the rules of social coexistence.[19] There is no doubt that an extra-penal measure, not punishment, should be applied to the perpetrator of an act of minor social harm. Therefore, in accordance with Article 47 § 6 of the Code of Petty Offences, the following will have an impact here: the type and nature of the violated goods, the extent of the damage caused or threatened, the manner and circumstances of committing the act, the gravity of the obligation violated by the perpetrator, as well as the form of the perpetrator's intention, motivation, the type of violated rules of prudence and the degree of their violation. When rationalizing the punishment of perpetrators of minor offences, it seems justified that the basis for the application of educational measures will be

[19] M. Bojarski, A. Płońska, Z. Świda, *Podstawy materialnego i procesowego prawa o wykroczeniach*, Wrocław 2012, p. 105. Such a criterion is also assumed in the above-mentioned Order no. 323 of the Chief Police Commander of 26 March 2008, which in § 9 directly indicates the possibility of limiting itself to the application of educational influence measures if this is sufficient to introduce the perpetrator to respect the principles and social coexistence.

a positive criminological prognosis and minor social harmfulness of the act committed. If a positive criminological prognosis speaks in favour of the use of extra-penal measures, the authorized body should apply educational measures towards the perpetrator of the offence. However, these criteria are not clear and remain subject to the discretion of the officers of the authorities responsible for prosecuting minor offences, which results in non-uniformity in this respect, in the sense that in the case of the same behaviour of different perpetrators, one officer will limit themselves to applying the measures in question and another will not, and it is also possible that the same representative of the authority authorized to proceed in minor offence cases will consider it appropriate to limit themselves to said measures on one occasion and not on another, even if the minor offences are similar in all the details.[20]

The specification of the premises allowing for the application of educational measures can be found in the above-mentioned Order no. 323 of the Chief Commander of the Police of 26 March 2008, in which in § 10 Section 2 the circumstances justifying the application of educational measures, thus influencing a positive criminological prognosis of the perpetrator, are listed, in particular:

1) restoring the previous condition (e.g., cleaning up items thrown away by the perpetrator that litter a public place);

2) repair the damage caused;

3) an apology to the injured party;

4) an assurance from the perpetrator not to commit a similar prohibited act in the future;

5) a fulfilment of an omitted obligation (e.g., providing the building with the required fire-fighting equipment, a sign with the property number, cleaning the premises, etc.).

The catalogue of these circumstances is not closed. Z. Kozicki emphasizes that the same circumstances are listed by the legislator in Article 39 § 4 of the Code of Petty Offences, and while in the statutory provision they are measures of social influence, in the cited Order they are exemplary circumstances enabling the application of educational measures. In the light of the provisions of the Order, the voluntary performance

[20] R. Krajewski, "Środki oddziaływania wychowawczego…," p. 15.

by the perpetrator of the activities indicated as examples may justify the application of educational measures.[21] It should be noted, however, that the police are only one of the entities authorized to apply these measures, while other entities may be guided by separate criteria for the application of educational measures.

Apart from the necessity to establish a positive prognosis regarding the perpetrator when deciding on the application of educational measures, the provision of § 10 Section 4 of the Order introduces a circumstance that prevents their application.[22] According to the cited provision, educational measures are not applied in the case of offences for which a penal measure is imposed. This therefore applies to situations where the imposition of a penal measure is mandatory. Thus, when a statutory provision only allows for the possibility of imposing a penal measure, an educational measure may be applied.

The specific nature of the provision of Article 41 of the Code of Petty Offences indicates that educational measures may be applied only before the initiation of court proceedings by the body that disclosed the offence. As J. Jakubowska-Hara rightly points out, "since the circle of these entities is not specified in Article 41 of the Code of Petty Offences, it is not entirely obvious which entities should be considered entitled."[23] It seems that these should be the entities that may act as public prosecutors before the courts, as indicated by the legislator in the Petty Offences Procedure Code. Another problem that arises in practice is the possibility of transferring a case from one body to another for the purpose of having this subsequent body applying educational measures. This does not follow from the literal wording of the provision. However, part of the doctrine allows for such a possibility, taking into account the previous regulations from Article 40 of the Code of Petty Offences, as well as the practice and justification for replacing a penalty for an offence with an extra-penal measure.

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[21] Z. Kozicki, *Kilka uwag na temat stosowania przez Policję środków oddziaływania wychowawczego po zakończeniu czynności wyjaśniających*, https://docplayer.pl/210248-Kilka-uwag-na-temat-stosowania-przez-policje-srodkow-oddzialywania-wychowawczego-po-zakonczeniu-czynnosci-wyjasniajacych.html (accessed: 6.02.2020), p. 3.

[22] M. Lis-Walewska, A. Mańko-Czajka, *Środki oddziaływania wychowawczego stosowane wobec sprawcy wykroczenia*, Legionowo 2013, p. 9.

[23] J. Jakubowska-Hara, *Kilka uwag w kwestii alternatywnych*…, p. 182.

The current wording of Article 41 of the Code of Petty Offences does not directly indicate that the application of educational measures is an alternative to filing a motion for a penalty with the court. Although it was explained in the doctrine that the application of these measures should involve refraining from submitting a motion for punishment to the court, the Act does not contain such a regulation.[24] Article 61 § 1 Item 2 of the Petty Offences Procedure Code allows for the possibility of refusing to initiate proceedings in a petty offence case; it should be concluded that the proceedings may also be discontinued if an educational influence measure has been applied to the perpetrator and this measure is a sufficient response to the petty offence. However, this is only the court's right, not its obligation. In accordance with Article 5 of the Petty Offences Procedure Code, the prior application of educational measures does not constitute an absolute reason preventing the conduct of court proceedings, and as a result, the perpetrator of the offence may be paradoxically punished for the same act twice—once by applying educational measures and then by applying penal measures. It should be noted that Article 41 of the Code of Petty Offences only gives the authorized entity the possibility of limiting itself to applying educational measures towards the perpetrator of the offence and does not make the application of non-criminal measures obligatory in the event of a positive criminological prognosis for the perpetrators of minor offences with minor social harmfulness. It would be appropriate to postulate changes in this regard. As R. Krajewski rightly notes, perhaps "prioritizing educational measures would constitute a specific remedy for the excessively rigorous use of the petty offences law formula to punish perpetrators of certain categories, and could also contribute to increasing the authority of some institutions responsible for public safety and order, which are undoubtedly violated by many petty offences, but not always to the extent requiring punishment, but only to the extent that it is possible to limit themselves to the use of educational influence measures, which in particular seems to apply to municipal guards, which sometimes seem to forget about their subservient role towards local communities, for whose benefit they should function."[25]

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[24] J. Jakubowska-Hara, "Środki oddziaływania wychowawczego," p. 313.

[25] R. Krajewski, "Środki oddziaływania wychowawczego…," p. 14.

However, if we wanted to make it a rule to give priority to educational influence measures over punishment for petty offences, this should be clearly articulated in the provisions of the Code of Petty Offences by, for example, indicating that the bodies conducting proceedings in petty offence cases may conduct proceedings aimed at punishing the perpetrator of the offence only when educational measures proved insufficient to make the perpetrator respect the law.[26]

There are many doubts about the use of educational influence measures. The framework of this study only allows to highlight the problem. To conclude, one should support the justification for maintaining educational measures in the Code of Petty Offences, because, given the sometimes low level of social harmfulness of an act, these measures should constitute an alternative to punishment as a response to an offence. However, the limited scope of application of these measures by authorized entities results from the imprecision of this provision. Efforts should be made to unify the criteria for applying educational measures so that the bodies apply them not on the basis of subjective feelings but based on objective criteria. Failure to meet the statutory requirement of specificity and completeness certainly hinders the proper use of this institution and calls into question its function as an alternative to punishment for petty offences.[27] It is therefore necessary to change the regulations relating to these measures to eliminate doubts as to their interpretation, both in terms of personal and material purview.

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[26] Ibid., p. 13.

[27] As written by J. Jakubowska-Hara, "Środki oddziaływania wychowawczego," p. 317.

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