The Catalogue and Principles of Adjudicating of Penal Measures in the Polish Petty Offences Law – *De lege lata* and *de lege ferenda* Comments[1]

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Abstract

In the Polish petty offences law penal measures constitute, in addition to the penalties, a main form of penal response to the perpetrator's committing a prohibited act. The role of penal measures in the petty offences law depends on the correct formulation of their catalogue, as well as on the correct determination of the principles concerning their adjudication.

The purpose of this article is to assess whether de lege lata shaping of the catalogue of penal measures and the rules concerning their adjudication is optimal, or whether it requires de lege ferenda certain changes.

Keywords*: the petty offences law, penal measures, principles of adjudicating.*

I. Introduction

In the Polish petty offences law penal measures provided in art. 28 of the act of 20 May 1971 – petty offences code[3] (quoted further as p.o.c.) constitute, in addition to the penalties specified in art. 18 p.o.c., a form of penal response to the perpetrator's committing a prohibited act. They may only be applied to a person legally recognized by the court as the petty offence perpetrator, and therefore may only be included in a conviction handed down by the court. The scope of penal measures in the petty offences law does not include not only penalties specified in art. 18 p.o.c., but also obligations which the court may impose on the offender by imposing a penalty of restriction of liberty under art. 22 points 1 and 2 p.o.c.[4]. Measures of social influence accompanying waiver of punishment (art. 39 § 4 p.o.c.) should also be distinguished

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[3] Journal of Laws of 1971, No 12, pos. 14; consolidated text in Journal of Laws of 2019, pos. 821 with changes.

[4] See Gensikowski, P. in Daniluk, P. (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2019, pp. 175-176; Lucarz, K., Muszynska, A., *Środki karne* in Daniluk, P. (ed.), *Reforma prawa wykroczeń*. Vol. I, Warsaw 2019, p. 266.

from punishment measures, as the implementation of the former is voluntary[5]. Similarly, the scope of penal measures does not refer to measures of social influence (art. 41 p.o.c.), which may be imposed by non-judicial bodies[6]. The doctrine rightly points out that repressive measures in the form of penalty points applied to vehicle drivers or wheel-locking devices do not constitute punitive measures[7]. The prerequisite for imposing the penalties provided for in art. 96 § 1 of the act of 07 July 1994 – Construction Law[8] is the commission of acts causing professional liability, therefore the doctrine rightly does not treat the said measures as penal measures for petty offences[9].

The catalogue of penal measures in the law of petty offences is regulated in art. 28 § 1 p.o.c., but it is not exhaustive. The rules for imposing these measures are laid down in art. 28 § 2 p.o.c. and the directives for their level in art. 33 p.o.c. and art. 34 p.o.c. In view of the current formulation of the catalogue and the principles of imposing penal measures, they fulfil the following functions[10]. Among these measures, we can distinguish those that have a preventive function, such as a driving ban. Some of these measures also have an educational function, such as making the judgment public[11].

There are also criminal measures in the law of petty offences which have a restitutionary function to compensate the victim for the damage caused by the petty offences committed. This function is primarily the obligation to remedy the damage.

Undoubtedly the role of penal measures in the petty offences law depends on the correct formulation of their catalogue, as well as on the correct determination of the principles concerning their adjudication. Therefore, the following study should present the current formulation of the catalogue of penal measures in the Polish petty offences law, as well as the applicable principles of their adjudication. The purpose of presenting these issues is to assess whether *de lege lata* shaping of the catalogue of penal measures and the rules concerning their adjudication is optimal, or whether it requires *de lege ferenda* certain changes.

II. The catalogue of penal measures

By classifying penal measures according to where they are regulated in the petty offences law, we can distinguish between codex or non-codex penal measures. The

[5] See Gubinski, A., *Odszkodowanie w kodeksie wykroczeń*, Zeszyty Wykroczeń, 1980, No 1, p. 33 and Lucarz, K., Muszynska, A., cited, p. 266.

[6] See Nowicka, I., Kupinski, R., *Stosowanie środków oddziaływania wychowawczego w sprawach o wykroczeni*a, Prokuratura i Prawo, 2004, No 7-8, p. 147.

[7] See Bojarski, T., in Bojarski, T., (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2015, p. 106.

[8] Consolidated text in Journal of Laws of 2020, pos. 1333 with changes.

[9] See Grzegorczyk, T., in Grzegorczyk, T., (ed.), *Kodeks wykroczeń. Komentarz,* Warsaw 2013, p. 133 and Lucarz, K., Muszynska, A., cited, p. 266.

[10] See further Gensikowski, P., cited, p. 176.

[11] See further Daniluk, P., *Podanie wyroku do publicznej wiadomości w polskim prawie karnym sensu largo,* Warsaw 2020, p. 325.

cited division is due to the fact that penal measures are regulated in the p.o.c. and in non-code law.

The catalogue of the first type of penal measures has been specified in art. 28 § 1 points 1-5 p.o.c. and includes driving bans, forfeiture of objects, punitive damage, obligation to compensate for damage and making the judgment public in a special way. However, due to the regulation provided for in art. 28 § 1 point 6 p.o.c., the catalogue of penal measures quoted herein is of an open nature. The catalogue of non-codex penal measures in the petty offences law is quite limited[12] and includes: the ban on entering mass events provided for in art. 65 section 1-2a of the act of 20 March 2009 on the safety of mass events[13], permanent withdrawal of angling or underwater angling license provided for in art. 27a section 4 point 3 of the inland fisheries act of 18 April 1985[14], prohibition to submit an offer to a call for tenders provided for in art. 27 section 3 of the cited act on inland fishing, disqualification from engaging in professional activities provided for in art. 15 § 4 of the decree of 05 July 1946 on the performance of technical-dental activities[15].

Current approach of the catalogue of penal measures in the petty offences law *de lege lata* raises doubts in doctrine. Firstly, it is pointed out in the literature[16] that this solution differs from the provisions provided for in art. 39 § 1 of the act of 6 June 1997 – penal code (quoted further as p.c.)[17], where the catalogue of penal measures is closed. Moreover, it is stressed that the solution currently provided for in art. 28 § 1 p.o.c. does not correspond to the meaning attributed to the general part of this code[18]. The cited reservations now lead to consequences that are difficult to accept. As an example, the doctrine points in this context to the prohibition of entry to a mass event, which, not being listed in the catalogue specified in art. 28 § 1 p.o.c., may be imposed not only for petty offences provided for in the above cited act on the safety of mass events, but also for acts included in the specific part of the code. As a result of this approach, perpetrators of certain petty offences from the special part of the p.o.c. may be subject to a penalty measure which is not provided for in the code itself[19]. The current solution provided for in the petty offences law regarding the ban on entering mass events is further complicated by the fact that in the criminal law concerning offences since 2009 the code catalogue of penal measures has been supplemented by the ban on entering mass events. As a result, since then another inconsistency has arisen in the legal system, as the same penal measure at one time acquires the status of a code penal measure and at another time it is treated as a non-code penal measure[20].

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12 In this way Lucarz, K., Muszynska, A., cited, p. 266.
13 Consolidated text in Journal of Laws of 2019, pos. 2171.
14 Consolidated text in Journal of Laws of 2019, pos. 2168 with changes.
15 Journal of Laws of 1947, No 27, pos. 104 with changes.
16 See Lucarz, K., Muszynska, A., cited, p. 267.
17 Consolidated text in Journal of Laws of 2020, pos. 1444 with changes.
18 See Lucarz, K., Muszynska, A., cited.
19 See Lucarz, K., Muszynska, A., cited.
20 See Lucarz, K., Muszynska, A., cited, p. 267.

For these reasons, *de lege ferenda* a postulate was put forward to standardize penal measures in the petty offences law, following the example of measures provided for in art. 39 p.c., in a closed catalogue[21]. In addition *de lege ferenda* it is proposed to amend the wording of art. 28 § 1 p.o.c. by regulating therein only those penal measures which show a connection with the petty offences provided for in the special part of the code[22]. This amendment should be accompanied by a solution supplementing the catalogue of penal measures in the code by a prohibition to attend a mass event[23].

The demands cited should be considered fully justified. In the case of their implementation, the standardization of the catalogue of penal measures in the petty offences law would correspond to the penal law concerning criminal offences. In the latter case, the catalogue of penal measures regulated in art. 39 p.c. is closed and their subject matter corresponds to provisions of the special part of this code, which does not stand in the way of regulation of other penal measures in non-code law. Not only the postulate to give a closed character to the catalogue of penal measures, but also the postulate to supplement this catalogue with the ban on entry to a mass event should be considered justified. In this case, the imposition of this measure would be permissible in the first instance in respect of certain petty offences provided for in the special part of the code. The inclusion of the above ban to the catalogue of penal measures provided for in art. 28 § 1 p.o.c. would not, of course, exclude the possibility to impose it on perpetrators of petty offences specified in the above mentioned act on the safety of mass events[24].

III. Principle of determinacy of penal measures

In addition to the above-mentioned changes concerning the inclusion of a catalogue of penal measures in the petty offences law requires revision the existence of the principle of determinacy of penal measures. *De lege lata* ruling on penal measures in the petty offences law depends on a specific legal basis. The lack of a specific legal basis provided for in the special part of the petty offence law makes it impossible to pronounce a penalty measure. This principle is reflected in the content of art. 28 § 2 of p.o.c., according to which the court may adjudicate such a measure if the act enables or requires making such an adjudication. The above-mentioned principle is in force not only on the grounds of p.o.c., but also in the non-code petty offences law.

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[21] See Bojarski, M., Plonska, A, *O większą elastyczność środków oddanych do dyspozycji sędziemu w prawie o wykroczeniach* in Jedrzejewski, Z., Krolikowski, M, Wiernikovski, Z., Żoltek, S. (ed.), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego*, Warsaw 2014, p. 18.

[22] See Lucarz, K., Muszynska, A., cited, p. 267; Wala, K., *Konieczność nowelizacji części ogólnej Kodeksu wykroczeń*, Prokuratura i Prawo, 2014, No 3, pp. 121-123.

[23] See Lucarz, K., Muszynska, A., cited, p. 268.

[24] See Lucarz, K., Muszynska, A., cited, p. 268.

This conclusion results from the content of art. 48 of p.o.c., according to which the provisions of the general part of p.o.c., and therefore also art. 28 § 2 p.o.c., apply to petty offences provided for in other acts, unless these acts contain provisions to the contrary. Having regard to the content of art. 28 § 2 p.o.c. penal measures under Polish petty offences law may be either optional or obligatory, which depends on the content of the expressions used by the legislator in the provision of a special part of p.o.c. or an extra-codex provision.

The first of the above situations occurs in the case of the use by the legislator of the expressions „may be adjudicated", e.g. the obligation to repair damage in the case of an intentional petty offence to damage someone else's property (art. 124 § 4 p.o.c.). On the other hand, an obligatory judgment of a criminal measure takes place when the legislature uses the expression „shall adjudicate" in the provision of a special part of p.o.c. or an extra-codex provision, for example a reference in the case of a tree theft petty offence (art. 120 § 3 p.o.c.).

As argued in the doctrine, the rationale for the introduction of this principle was based on guarantee considerations relating to the need to protect the perpetrator against undue interference by the sentencing authority. It has been stressed that the inconvenience of penal measures can be considerable and sometimes exceeds the inconvenience of penalties. Therefore, in order to prevent excessive use of such measures of penal repression, the legislator, according to its own judgement, has indicated cases of petty offences which, due to their nature or severity or preventive impact, deserve to be covered by the possibility or obligation to award such measures[25]. In view of these guarantee considerations, however, the doctrine rightly points out that, at present, the risk of unjustified imposition of punitive measures has been considerably reduced due to the fact that adjudication in petty offences cases has been entrusted to the courts[26].

In this context the adoption of principle provided for in art. 28 § 2 p.o.c. means that the court is deprived of full discretion in their application[27]. In the absence of a provision stipulating that a particular type of penalty measure may be imposed, the authority is bound by an absolute prohibition to rule on it, even if it considers it *in concreto* appropriate and expedient to do so[28]. It is rightly pointed out in the case law that ruling on a penal measure for the petty offences contrary to the rule under art. 28 § 2 p.o.c. is not admissible even if the perpetrator requests its ruling and the public accuser accepts the request[29]. Therefore, the doctrine *de lege ferenda* proposes to loosen the unnecessary rigors restricting the use of penal measures in the petty offences law so far, including the abandonment of the principle expressed in art. 28 § 2 p.o.c.[30].

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[25] See Marek, A., *Prawo wykroczeń (materialne i procesowe)*, Warsaw 2012, p. 85.

[26] See Lucarz, K., Muszynska, A., cited, p. 270.

[27] See Lucarz, K., Muszynska, A., cited, p. 269.

[28] *Ibidem*.

[29] See judgment of the Supreme Court of 28 August 2002, WK 28/2002, OSNKW 2002, No 11-12, pos. 108.

[30] See Lucarz, K., Muszynska, A., cited, p. 271.

IV. Absence of the possibility of extraordinary mitigation of penal measures

In addition to the above-mentioned comments it should be considered whether changes require the absence in the petty offences law of the possibility of extraordinary mitigation of penal measures. Having regard to the present citation of the catalogue of penal measures, it should be pointed out that they can be of indefinite, timely or one-off nature.

The permanent withdrawal of a fishing card or an underwater fishing card provided for in art. 27a section 4 point 3 of the cited act on inland fishing[31] is of unlimited duration. Penal measures adjudicated for petty offences may also be of a timely nature, and this is the case in the case of a driving ban, which is adjudged for a period from 6 months to 3 years (art. 29 § 1 p.o.c.). Other penal measures adjudicated for petty offences are of a one-off nature, and such a situation is present in the case of penal measures specified in art. 28 § 1 points 2-5 p.o.c., for example forfeiture of objects, punitive damage, obligation to compensate for damage, making the decision on punishment public. Bearing in mind the above division of penal measures, it should be noted that *de lege lata* there is no possibility of extraordinary mitigation of the term penal measure. The use of the expression „penalty" in art. 39 § 1 and art. 39 § 2 p.o.c. argues that the institution of extraordinary mitigation of punishment in the petty offences law does not refer to penal measures in the meaning of art. 28 p.o.c.[32]. In case law it is also aptly pointed out that the presented position is supported by the lack of a hierarchy of penal measures[33]. For these reasons, *de lege lata* it is not possible to impose a penalty measure of a driving ban for a period shorter than 6 months[34]. The regulation allowing for the application of the institution of extraordinary mitigation of punishment to criminal measures is not provided for in the criminal law on criminal offences either. For this reason, there seems to be no need for the regulation of extraordinary mitigation of punishment in the case of petty offences, and thus criminal acts with an inherently less negative social impact than criminal offences, the regulation of extraordinary mitigation of punishment was more far-reaching[35].

V. Penal measures and other reaction measures

In addition to the above considerations, it is important to consider the relevance of the rules for sentencing penal measures in relation to other reaction measures provided for in the petty offences law. In this regard the possibility provided for

[31] Consolidated text in Journal of Laws of 2015, pos. 652.

[32] See also Raglewski, J., *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (analiza dogmatyczna w ujęciu materialnoprawnym)*, Kraków 2008, p. 339.

[33] See judgment of the Supreme Court of 9 November 1992, II KRN 178/92, not published.

[34] See for example judgment of the Supreme Court of 26 September 2001, IV KKN 219/01, not published.

[35] See Gensikowski, P., *Zasady wymiaru kary i środków karnych,* in Daniluk, P. (ed.), *Reforma prawa wykroczeń.* Vol. I, Warsaw 2019, p. 361.

de lege lata of imposing penal measures alongside penalties does not need to be amended. In the petty offences law penal measures may be adjudicated in addition to the penalty listed in the catalogue specified in art. 18 p.o.c. However, there is no obstacle to a court ruling a criminal measure as an accompanying reaction to more than one sentence imposed on the perpetrator.

This may be the case if the criminal measure is passed in addition to a custodial sentence and a fine passed under art. 24 § 2 p.o.c. In the Petty offences law, the criminal measure may also be the only measure passed against the perpetrator, since the said measure may be passed in instead of punishment within the framework of the institution of withdrawal from punishment (art. 39 § 1 p.o.c.). In the latter case, the court, by issuing a negative decision on the penalty consisting in waiving it, shall impose on the perpetrator a penal measure provided for in the provisions of the special part of p.o.c. or the extra-codex regulations. The function of renouncing the imposition of a penalty combined with the imposition of a penal measure is to create the possibility to impose this measure in a situation where the court deems the imposition of only this measure to be appropriate and sufficient to achieve the objectives set forth in art. 33 p.o.c.[36].

The circumstances of a given case may, however, speak in favor of imposing only a penal measure on the perpetrator, in order to express the sense of justice (for example forfeiture) or to have a positive impact on the environment of the perpetrator (for example making the sentence public). Also, in the case of a complete refusal to impose a penalty, the directives provided for in art. 33 p.o.c. may speak in favor of imposing a penal measure on the perpetrator[37]. The waiving of a penalty may be accompanied by the imposition of an optional or mandatory penalty. There is no obstacle to imposing more than one penalty measure in addition to the waiver of the punishment[38]. The said measure may be imposed only if its prerequisites set forth in the provisions constituting the basis for their imposition are met. For this reason, the possibility of imposing, in addition to the waiver of punishment, a penal measure when the law does not allow it should be excluded. It seems that this refers to those cases, where the provisions of p.o.c. or non-code provisions of the petty offences law make adjudication of a penal measure conditional on punishing the perpetrator. The literature aptly points out that we are dealing with such a situation in the case of art. 27 section 2 of the cited above inland fisheries act, where the condition for the pronouncement of a penal measure of publicity is the punishment of the petty offence specified in art. 27 section 1 of that act. The waiver of punishment is not a punishment for a petty offence, and therefore, in the cited case, it is not possible to pronounce the said penal measure[39].

The literature has questioned the advisability of the existence of a variant of the institution provided for in art. 39 § 1 of the code consisting in the possibility of a

[36] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.
[37] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.
[38] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.
[39] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.

criminal measure coupled with waiver of punishment being imposed on its own. It has been argued that this solution leads to an internal contradiction in the sphere of the assessment of punishment, since on the one hand it gives grounds to treat the perpetrator more leniently, allowing for the complete abandonment of punishment, and on the other hand, on the basis of the same premises, it gives the possibility to impose a penal measure which may be more severe than the punishment. For these reasons, a proposal has been made in doctrine *de lege ferenda* to shape the waiver of punishment, as named, as a genuine alternative to punishment, consisting solely of the possibility of abandoning any repression against the perpetrator[40].

The proposal made does not merit consideration. It should not be forgotten, however, that the function of the waiver of the imposition of a penalty combined with the imposition of a measure is to provide for the possibility to impose this measure in a situation in which the court deems that the imposition of only this measure is appropriate and sufficient to achieve the objectives set out in art. 33 p.o.c. The circumstances of a particular case may, however, justify imposing a criminal measure on the offender solely in order to reflect the sense of justice (for example forfeiture) or to have a positive impact on the offender's environment (for example making the sentence public)[41].

Application of the penalty waiver provided for in art. 39 § 1 p.o.c. and the decision to impose a penalty measure is *de lege lata* conditional on a determination of whether there is „an accident deserving special consideration". In the light of the disposition of art. 39 § 1 p.o.c. the above-mentioned accident occurs, if it is supported by factors of a subjective (personal characteristics and conditions of the perpetrator) or objective nature (nature and circumstances of the act)[42].

The catalogue of circumstances which make it possible to accept the above-mentioned accident is closed. In the doctrine a correct view was expressed, according to which both groups of circumstances should be considered together when assessing whether an accident deserving special consideration is involved, and one group cannot be in contradiction with the other[43].

Acceptance of the above standpoint does not mean, however, that both groups of circumstances have to jointly support the fact that we deal with an accident deserving special consideration. The use of the alternative functor „or" in art. 39 § 1 p.o.c. argues that in order to assess whether the case is an accident deserving special consideration, the listed criteria do not have to occur jointly[44]. Thus, in order to assess whether there is a case deserving special consideration, it is sufficient that it is supported by one group of circumstances listed in art. 39 § 1 p.o.c. and the other group of circumstances

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[40] See Szumski, J., *Środki alternatywne wobec kary za wykroczenia (w związku z projektem kodeksu wykroczeń)*, Państwo i Prawo, 1992, No 12, p. 78.

[41] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 363.

[42] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 237.

[43] Bojarski, T., *Kodeks wykroczeń. Komentarz,* op. cit., p. 122.

[44] Radecki, W., in Bojarski, M., Radecki, W. (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2016, p. 398; Grzegorczyk, T., *Kodeks wykroczeń*, cited., p. 175; Raglewski, J., *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego*, cited, p. 331.

does not oppose it[45]. Making the possibility of waiving the imposition of a penalty combined with the imposition of a penalty measure conditional *de lege lata* on the existence of special circumstances is questionable in doctrine[46]. The above mentioned narrow definition of the aforementioned basis for a self-imposed penalty measure prevents an individualized response to the perpetrator, adapted to the type of petty offence committed and the personality of the perpetrator[47]. For this reason, it is *de lege ferenda* proposed to broaden the possibility of a self-imposed penalty measure, including the introduction into the petty offences law of the institution provided for in art. 59 p.c.[48].

However, the acceptance of the proposal is opposed to the scope of regulation of the institution of waiver of punishment in the petty offences law. Taking into account the linguistic interpretation of art. 39 p.o.c., there is no doubt that the said institution refers to any type of petty offences provided for in the provisions of the special part of the code, as well as in non-code provisions.

Therefore, due to such broad possibilities of application of the institution of waiving the punishment, it does not seem necessary to increase them further by resigning from the formula of „a case deserving special consideration" as a basis for this institution[49].

In addition to the above comments, it should be pointed out that the possibility to waive the imposition of a criminal measure, provided for in the current shape of art. 39 § 1 p.o.c., does not seem to need to be changed either. In the current form of the petty offences law, under the institution of waiver of punishment provided for in art. 39 § 1 p.o.c., the court may not only agree to impose a penalty measure, but also agree to impose a penalty combined with waiver of a penalty measure[50]. Such a solution should be regarded as fully justifiable, as it cannot be excluded that the circumstances of a given case will support the fact that in order to achieve the objectives set out in art. 33 p.o.c. it is not necessary to impose a penal measure on a perpetrator, as they will be achieved by imposing a penalty on him[51].

VI. Rules on sentencing penal measures

In addition to the above-mentioned comments it should be considered whether changes require rules on sentencing penal measures in the petty offences law. By virtue of the reference provided for in art. 33 § 5 p.o.c. the directives for the

[45] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 237.

[46] See Szumski, J., *Środki alternatywne wobec kary za wykroczenia*, cited, p. 78; Lucarz, K., Muszynska, A., cited, p. 271.

[47] Lucarz, K., Muszynska, A., cited, p. 271.

[48] Lucarz, K., Muszynska, A., cited, p. 271.

[49] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 364.

[50] See Grzegorczyk, T., *Nowela do prawa wykroczeń. Komentarz*, Kraków 1999, p. 33; Gensikowski, P., *Samoistne odstąpienie od orzeczenia środka karnego w prawie wykroczeń*, Przegląd Sądowy, 2008, No 5, p. 148.

[51] See Gensikowski, P., *Samoistne odstąpienie,* cited, p. 148-149.

assessment of penal measures in the petty offences law, as well as the circumstances to be taken into account in their assessment, are set out in art. 33 § 1-4 p.o.c. In art. 33 § 1 p.o.c. the legislator regulates three sentencing directives that apply accordingly when sentencing penal measures. According to this provision, the court, when imposing a penalty measure, must take into account the directive of justice, as well as the directives for individual and general prevention.

The first directive requires the court to take into account the degree of social harm caused by the petty offence when imposing a criminal measure. The second directive requires the court, when imposing a penalty measure, to take into account the preventive and educational aims that the measure is intended to achieve for the perpetrator.

The third directive makes it necessary to take into account the objectives of the criminal measure in terms of its social impact. The quoted inclusion in art. 33 p.o.c. of a catalogue of directives for the imposition of a penalty measure requires completion. The point is that in this provision reference to the culpability of the perpetrator as a directive for the assessment of penalty measure has been omitted. The doctrine expresses the view that such a solution was not necessary due to the petty nature of the petty offences, as well as the content of art. 33 § 2 p.o.c., which emphasizes the significance of the degree of perpetrator's guilt as one of the circumstances influencing the penalty measure imposed for the committed petty offence[52]. However, it is impossible to agree with this position. The lack of emphasis in art. 33 § 1 p.o.c. on the directive of proportionality of measure penalties to the degree of guilt of the perpetrator negates the fundamental principle of responsibility for the petty offences, namely responsibility on the basis of guilt provided for in art. 1 § 2 p.o.c.[53]. Moreover, the lack of reference in art. 33 § 1 p.o.c. to guilt as a directive for the assessment of penalty measure is in conflict with the content of art. 33 § 2 p.o.c., where it is indicated that the court, imposing the penalty measure, should take into consideration, *inter alia*, the degree of guilt of the perpetrator[54].

Finally, the court, while imposing a penalty measure, must take into consideration the degree of social harm caused by the act, and the determinants of such an assessment pursuant to art. 47 § 6 p.o.c. are also subjective circumstances, such as the form of intention, motivation of the perpetrator, type of infringed precautionary rules and the degree of their infringement[55].

The lack of prominence in art. 33 § 1 p.o.c. of the directive of proportionality of the penalty measure to the perpetrator`s fault is inconsistent with the solution functioning in penal law concerning crimes, where the aforementioned directive is expressed in art. 53 § 1 p.c. For these reasons it should be proposed *de lege ferenda* to amend art. 33 § 1 p.o.c. by emphasizing in this provision the directive of proportionality of the penalty measure to the degree of guilt of the perpetrator[56].

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[52] See Bojarski, T., *Kodeks wykroczeń*, cited, p. 113.
[53] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 344.
[54] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 344.
[55] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 215.
[56] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 345.

In addition to supplementing the catalogue of directives for the imposition of a penalty measure, the provisions of p.o.c. determining the catalogue of mitigating circumstances and aggravating circumstances to be taken into account in the assessment of a penalty measure should also be amended.

*De lege la*ta in art. 33 § 3 p.o.c. the legislator formulated a catalogue of mitigating circumstances while assessing the penalty measure and in art. 33 § 4 p.o.c. he formulated a catalogue of aggravating circumstances while assessing the penalty measure.

The introduction of such a solution was intended to facilitate adjudication by members of bodies adjudicating in petty offences cases[57]. In this context it should be recalled that since the entry into force of the 1971 codification of petty offences law, petty offences cases have been decided by petty offences boards, often by persons without higher legal education. However, since 17 October 2001, after the new procedural regulation of petty offences proceedings came into force, the situation has changed, as petty offences cases have been taken over by the courts. Therefore, a proposal to repeal provisions of art. 33 § 3 and 4 p.o.c. seems to be *de lege ferenda* justified.

The introduction of such a solution would be systemically consistent with the content of art. 53 p.c. If, however, in cases concerning offences with an assumedly large negative social impact legislator did not introduce solutions in art. 53 p.c. specifying a catalogue of mitigating and aggravating circumstances when assessing penalties measures, it seems that there is no need for such solutions in cases concerning petty offences with an assumedly smaller negative social impact than crimes[58]. The analyzed proposal to repeal the provisions of art. 33 § 3 and 4 p.o.c. was already envisaged in the draft of the Petty Offences Code of February 1991, prepared by the Team for the Unification of the Solutions of the Criminal Law and the Petty Offences Law, which – despite the positive assessment expressed in the doctrine[59] – did not become a binding law.

VII. Conclusions

The above considerations prove that, in the first place, changes are required in the formulation of the catalogue of penal measures in the petty offences law. In this context first of all *de lege ferenda* there is a need to standardize penal measures in the petty offences law, following the example of measures provided for in art. 39 p.c., in a closed catalogue. This amendment should be accompanied by a solution supplementing the recent catalogue of penal measures in m.c. by a prohibition to attend a mass event. Moreover, the doctrine *de lege ferenda* proposes to loosen the

[57] See Gubinski, A., *Okoliczności łagodzące i obciążające*, Zeszyty Wykroczeń, 1978, No 6, p. 38.

[58] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 346-347.

[59] See Gubinski, A., *Projekt kodeksu wykroczeń – wprowadzone zmiany, stosunek do zasad kodeksu karnego,* in Bojaarski, T., Mozgawa, M., Szumski, J. (ed.), *Rozwój polskiego prawa wykroczeń*, Lublin 1996, p. 41.

unnecessary rigors restricting the use of penal measures in the petty offences law so far, including the abandonment of the principle expressed in art. 28 § 2 p.o.c. The current formulation of this principle leads to unacceptable consequences. The adoption of principle provided for in art. 28 § 2 p.o.c. means that the court is deprived of full discretion in their application. In the absence of a provision stipulating that a particular type of penalty measure may be imposed, the authority is bound by an absolute prohibition to rule on it, even if it considers it *in concreto* appropriate and expedient to do so. In addition to these proposed changes the recent inclusion in art. 33 p.o.c. of a catalogue of directives for the imposition of a penalty measure requires completion. *De lege ferenda* art. 33 § 1 p.o.c. should be amended by emphasizing in this provision the directive of proportionality of the penalty measure to the degree of guilt of the perpetrator. In addition to this proposal the provisions of p.o.c. determining the catalogue of mitigating circumstances and aggravating circumstances to be taken into account in the assessment of a penalty measure should be *de lege ferenda* repealed.

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