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Research Article

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Non-Punitive Reaction Measures in Polish Petty Offences Law

Polonya Hafif Suçlar Kanunu'nda Cezalandırıcı Olmayan Tedbirler

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ABSTRACT
The subject of this article is non-punitive reaction measures (non-punitive means of reaction) existing in Polish petty offences law. The Polish Code of Petty Offences, in addition to penalties and penal measures, provides for non-punitive measures of reaction to petty offences. These are the means of educational influence and the means of social influence. The means of educational influence are used by public prosecutors and entities having the powers of a public prosecutor in petty offence cases. The means of social influence may be applied by the court in the event of waiving the penalty for the offence committed. The author analyses selected issues relating to both categories of non-punitive reaction measures. As a result of the analysis, the author concludes that statutory catalogues of non-punitive reaction measures should be closed, i.e. both the means of social influence and the means of educational influence should be enumerated exhaustively in the Code of Petty Offences, and the application of a means of educational influence should constitute a negative premise for proceedings before the court. Therefore the author supports the *de lege ferenda* postulates in these aspects expressed in the literature. The author proposes to introduce a new provision into the Code of Petty Offences, namely a provision according to which educational influence measures are not applied if a penal measure should be imposed for a given petty offence.

Keywords: Non-punitive reaction measures, means of educational influence, means of social influence, petty offences law, Polish criminal law

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1. Introduction

At the outset, it should be clarified that in Polish law, acts prohibited under a criminal penalty (as opposed to, for example, disciplinary penalties or administrative fines) are divided into crimes and petty offences. The crimes are defined in the Penal Code and in other acts regulating particular areas of life. Petty offences are specified in the Code of Petty Offences and in other acts regulating certain spheres of life. Fiscal crimes and fiscal petty offences are a separate group of prohibited acts. They are penalised in the Fiscal Penal Code. This article deals with the law of petty offences, that is, petty offences law set out in the Code of Petty Offences and other laws that regulate some spheres of life. The general part of petty offences law is contained in the Code of Petty Offences. This Code defines, *inter alia*, the means of reaction to petty offences. The most serious means of reaction are punishments. The Code of Petty Offences[1] provides in Art. 18 the following penalties: arrest, restriction of liberty, fine, and reprimand.[2] In addition to penalties, penal measures are punitive measures of reaction. Article 28 § 1 of the Code of Petty Offences provides that the following are the penal measures: driving ban; forfeiture of items; supplementary payment; obligation to redress the damage; making the ruling on the punishment public in a specific manner; other penal measures provided for by law. Penal measures may be imposed if they are provided for in a special provision, and they are adjudicated if the special provision so provides (Article 18 § 2 of the Code of Petty Offences).

The Code of Petty Offences also provides for non-punitive measures to respond to petty offences. These include the means of educational influence and the means of social influence. These measures are not penalties or penal measures, but are a separate category of measures that can be applied to the offender. These measures have long existed in Polish petty offences law and have long caused much controversy.

This article focuses on selected key issues related to non-punitive reaction measures. The purpose of the analysis is to clarify the contentious issues and possibly formulate *de lege ferenda* postulates. The author will mainly use the formal-dogmatic (linguistic-logical) method. The author will analyse the legal provisions and research the literature on the subject. She will also cite relevant court decisions. First, the means of educational

1 Act dated 20 May 1971 – The Code of Petty Offences, Journal of Laws 1971 no. 12 item 114 as amended.

2 The penalties for petty offences imposed by the court are criminal penalties. A fine imposed for petty offences in the mandate proceedings has a different character. It is a penalty-administrative measure (see J. Jakubowska-Hara [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2016, p. 128.

influence will be analysed, and then the means of social influence. Next, the procedural significance of the application of the means of educational influence will be analysed. At the end, final conclusions will be presented.

2. Discussion

The means of educational influence are specified in Art. 41, in Chapter III of the Code of Petty Offences, entitled 'Application of the means of educational influence' (Article 41 is the only provision in this chapter). This provision states: 'In relation to the perpetrator of the act, one can limit himself to applying an instruction, getting someone's attention, warning or to applying other means of educational influence.' At this point, it should be mentioned that in proceedings in petty offence cases, the principle of opportunism applies, i.e. the principle of purposefulness (an authorized body pursues the perpetrator of a given offence, if it considers it purposeful)[3] – in contrast to criminal proceedings, which are governed by the principle of legality, according to which the body established to prosecute crimes shall have the duty to institute and conduct preparatory proceedings, and the public prosecutor shall have also the obligation to bring and support accusation - for an act prosecuted *ex officio* (Art. 10 § 1 of the Code of Criminal Procedure[4]). According to Art. 41 of the Code of Petty Offences, the doctrine expresses the view that the law of petty offences is governed by the principle of opportunism, however, it is not pure opportunism, but rather *quasi* opportunism, involving not prosecuting a given offence due to inexpedience but in reacting to the offence committed in a manner prescribed by law, by applying a non-punitive measure which is, *in concreto*, a sufficient response to the offence.[5] In other words, the authorized body may not bring an application to the court to punish the perpetrator of the offence or impose a fine on the perpetrator by way of a penalty notice (a penal mandate), but instead apply a means of educational influence to the perpetrator. There is a widespread view in the literature that Art. 41 of the Code of Petty Offences follows the principle of preference for non-punitive means of reaction.[6] In the opinion of the author of this

3 H. Skwarczyński, *Prokurator w postępowaniu w sprawach o wykroczenia*, Prokuratura i Prawo 2003, no. 11, p. 83; I. Nowicka, R. Kupiński, *Stosowanie środków oddziaływania wychowawczego w sprawach o wykroczenia*, Prokuratura i Prawo 2004, no. 7-8, p. 145; J. Jakubowska-Hara, *op. cit.*, p. 236.

4 Act dated 6 June 1997 – The Code of Criminal Procedure, Journal of Laws 1997 no. 89 item 555 as amended.

5 T. Grzegorczyk [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2013, p. 180; M. Grudecki, *Kara nagany i środki oddziaływania społecznego oraz środki oddziaływania wychowawczego w prawie wykroczeń*, Prokuratura i Prawo 2018, no 7-8, p. 180.

6 See, e.g., T. Grzegorczyk, *op. cit.*, p. 180; M. Grudecki, *op. cit.*, p. 180; W. Radecki [in:] M. Bojarski (ed.), W. Radecki (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2013, p. 357; H. Skwarczyński, *op. cit.*, p. 83. Differently J. Jakubowska-Hara, *op. cit.*, p. 239.

study, this view is not correct. In Art. 41 of the Code of Petty Offences there is no rule, and in particular there is no rule of preference for non-punitive reaction measures in this provision. In the law of petty offences, there would be a preference for non-punitive measures, if the legislator foresaw it, more or less clearly, in the provisions of the Code of Petty Offences or in procedural regulations. Meanwhile, from the wording of Art. 41 of the Code of Petty Offences there is no preference for non-punitive measures at all. It should be noted that this provision states 'one can limit himself to applying'. Such a preference could be stated if the provision of Art. 41 read, for example, as follows: 'In relation to the perpetrator of the act, one should limit himself to applying an instruction, getting someone's attention, warning or to applying other means of educational influence, if these means are a sufficient reaction to the offence'. Moreover, the systematics of the provisions of the Code of Petty Offences speak against interpreting from Art. 41 preference for non-punitive measures, because this provision is included in the Code after the provisions specifying penalties and the rules of their imposition, in a separate chapter, as a separate institution. Moreover, in practice, the perpetrators of most offences are fined under a penalty notice (a penal mandate). In practice, educational influence measures do not dominate among the means of reacting to petty offences, and the authorities imposing a fine by way of a penalty notice are not accused of violating the law by not preferring the means of educational influence. *Ergo*, *de lege lata*, Polish petty offences law does not give preference to non-punitive measures. *De lege ferenda*, in the opinion of the author, there should be no such preference in the Code of Petty Offences. The principle of preference for non-punitive measures would mean that the competent authority would have to justify, with each request for punishment and with each penalty notice, why it did not apply the educational influence measure. It is right to believe that educational influence measures should be treated as an alternative to punishment.[7] The above does not mean that, in the author's opinion, educational influence measures should not be applied to a large extent, if *in concreto* they are a sufficient reaction to the committed offence.

The Code of Petty Offences does not define the premises for the application of the means of educational influence. The current regulations do not imply any limitation in the use of these measures. There is a view in the literature that they can be applied in response to any petty offence and against any offender.[8] The question therefore arises

7 See J. Jakubowska-Hara, *op. cit.*, p. 239.

8 See, e.g., W. Radecki, *op. cit.*, p. 359; J. Jakubowska-Hara, *op. cit.*, p. 240.

as to what should be followed when applying these measures, rather than imposing a fine by way of a penalty notice or applying to a court for punishment. The literature expresses the right view that a small degree of social harmfulness of the act should be the basic criterion.[9] It was also emphasized in the jurisprudence that the legal reaction may be limited to the means of educational influence when the harmfulness of the act is little (negligible).[10] The literature expresses a correct view that one should be guided by the prerequisites for the imposition of a penalty (specified in Art. 33 of the Code of Petty Offences), that is, one should check whether the objectives of the penalty will be met by applying these measures.[11] A question arises as to the purpose of punishing petty offences. The literature states that the purposes to be achieved by the punishment for petty offences are indicated in Art. 33 § 1 of the Code of Petty Offences defining general directives on the imposition of a penalty.[12] According to this provision, the adjudicating body shall impose a penalty at its discretion, within the limits provided for by the legal act for a given offence, assessing the degree of social harmfulness of the act and taking into account the purposes of the penalty in terms of social impact as well as the preventive and educational purposes that are to be achieved in relation to the offender. Thus, when deciding on the application of educational influence measures, one should take into account, *inter alia*, general preventive purposes and special prevention purposes of punishment. The above thesis that one should check whether the objectives of the penalty will be met by applying educational influence measures does not, of course, solve the problem. It can be stated with full conviction that it is impossible to obtain uniformity as to the application of educational influence measures, taking into account, in particular, the diversity of entities authorized to use them.

At this point, it should be clarified which entities are entitled to apply educational influence measures. It is rightly assumed that these entities are public prosecutors in petty offence cases and entities having the powers of a public prosecutor in petty offence cases.[13] According to Art. 17 § 1 of the Petty Offences Procedure Code[14], the

9 T. Grzegorczyk, *op. cit.*, p. 181; J. Jakubowska-Hara, *op. cit.*, p. 240.

10 Verdict of the District Court in Gliwice dated 19 June 2018, V Ka 258/18, LEX no. 2507950. It should be explained that *district court* is the court of second instance and *regional court* is the court of first instance.

11 M. Budyn-Kulik [in:] M. Mozgawa (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2009, p. 134-135; R. Krajewski, *Środki oddziaływania wychowawczego w prawie wykroczeń*, Palestra 2013, no. 7-8, p. 14.

12 J. Jakubowska-Hara, *op. cit.*, p. 128.

13 See, e.g., R. Krajewski, *op. cit.*, p. 15-16; O. Włodkowski, *Środki oddziaływania wychowawczego w prawie wykroczeń (uwagi de lege lata i postulaty de lege ferenda)*, Monitor Prawniczy 2019, no. 14, p. 770.

14 Act dated 24 August 2001 – The Petty Offences Procedure Code, Journal of Laws 2001 no. 106 item 1148 as amended.

public prosecutor in all petty offence cases is the Police, unless the law provides otherwise. A labour inspector is a public prosecutor in cases concerning petty offences against employee rights (Art. 17 § 2 of the Petty Offences Procedure Code). Article 18 § 1 of the Petty Offences Procedure Code states that in any case of a petty offence, a motion for punishment may be filed by a procurator, becoming a public prosecutor. The participation of the procurator excludes the participation of another public prosecutor (Art. 18 § 3 of the Petty Offences Procedure Code). Article 17 § 3 of the Petty Offences Procedure Code states: State and local government administration bodies, state control bodies and local government control bodies as well as municipal (city) guards shall be entitled to the rights of a public prosecutor only if, within the scope of their activities, including in the course of investigative activities, they have revealed petty offences and applied for punishment. The authorities concerned are, for example: directors of district mining offices, district veterinarians, the Main Pharmaceutical Inspector and the Chief Inspector of Environmental Protection.[15] According to other acts, the powers of public prosecutors - as regards petty offences they disclosed within the scope of their activities - may be exercised, for example, by guards of the State Fisheries Guard, guards of the State Hunting Guard and consumer ombudsman. Therefore, the scope of entities authorized to apply educational influence measures is wide. It should be emphasized that educational influence measures may not be applied by the court.[16] This view is also dominant in the jurisprudence.[17] However, it happened that the court applied a measure of educational influence in the form of an instruction under Art. 41 of the Code of Petty Offences.[18]

The scope of educational influence measures was broadly defined in the Code of Petty Offences. The catalogue of these measures is open. This is evidenced by the word *other* in the provision of Art. 41 of the Code of Petty Offences. Such formulation of the provision by the legislator is a source of controversy with regard to these *other* measures of educational influence. The literature expresses the view that other means

15 For more, see R. A. Stefański, *Oskarżyciel publiczny w sprawach o wykroczenia*, Prokuratura i Prawo 2002, no. 1, p. 51-64.

16 See, e.g., J. Jakubowska-Hara, *op. cit.*, p. 241; O. Włodkowski, *op. cit.*, p. 765. Differently T. Bojarski [in:] T. Bojarski (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2009, p. 98; I. Kosierb [in:] J. Lachowski (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2021, LEX, Commentary to Art. 41, point 5.

17 See, e.g., Verdict of the District Court in Piotrków Trybunalski dated 2 October 2018, IV Ka 635/18, Legalis no. 2087714.

18 See Verdict of the District Court in Wrocław dated 6 February 2014, IV Ka 1311/13, LEX no. 1882476; Verdict of the District Court in Piotrków Trybunalski dated 2 February 2016, IV Ka 753/15, LEX no. 2125235.

of educational influence include those provided for in the provisions on disciplinary liability or order liability (employees' liability for maintaining order).[19] This view is questionable. The provisions on disciplinary liability provide for disciplinary penalties and bodies empowered to impose them. For example, in the case of disciplinary liability of academic teachers, such a body is, *inter alia*, the university disciplinary commission (Article 278 of the Act - Law on Higher Education and Science[20]). No authority other than the authorities listed in the provisions determining the disciplinary liability of a given category of persons may impose a disciplinary penalty on a given person. For example, a policeman may not, applying an educational influence measure pursuant to Art. 41 of the Code of Petty Offences, impose a disciplinary penalty of admonition or reprimand on an academic teacher, not to mention more severe disciplinary penalties, such as, for example, deprivation of the right to perform managerial functions at universities (Article 276 (1) of the Act - Law on Higher Education and Science). It is obvious. In this context, it could be argued that a policeman could apply an educational influence measure in the form of an admonition, but not a disciplinary penalty of admonition. Another issue is the validity of the application of such a measure and its distinction from getting someone's attention, which is referred to in Art. 41 of the Code of Petty Offences. It seems that the essence of the admonition and getting someone's attention is identical. This is also indicated by the linguistic meaning of both phrases.[21] Even greater doubts arise about the reprimand, as it is one of the penalties for petty offences. A reprimand as punishment for a petty offence may only be imposed by a court. It should be firmly stated that the public prosecutor in petty offence cases could not use a reprimand as a means of educational influence. Therefore, from the measures provided for in the disciplinary regulations for academic teachers, only an admonition can come into play, with the above-mentioned doubts. It should be noted that the same applies to measures provided for in the disciplinary rules for other persons. The Labour Code[22] regulating the order liability of employees in Art. 108 provides for a penalty of admonition, a penalty of reprimand, and a financial penalty. The above-mentioned remarks regarding the admonition and reprimand also

19 W. Kotowski, *Kodeks wykroczeń. Komentarz*, Warsaw 2009, p. 180. Similarly T. Grzegorczyk, *op. cit.*, p. 182.

20 Act dated 20 July 2018 – Law on Higher Education and Science, Journal of Laws 2018 item 1668 as amended.

21 *To admonish* means, *inter alia*, 'To get someone's attention' – see https://sjp.pwn.pl/slowniki/upomnienie.html (accessed 12 June 2021).

22 Act dated 26 June 1974 – The Labour Code, Journal of Laws 1974 no. 24 item 141 as amended.

apply to this type of ordinal penalties. The problem of using a financial penalty as a means of educational influence will be discussed below.

The literature raises the question of whether the organs authorized to apply educational influence measures may transfer the case to another entity in order to apply the educational influence measure. This is a controversial issue in the doctrine. Some authors find this unacceptable.[23] However, most authors allow the possibility of transferring the case to another entity for the purpose of applying the measures provided for in the provisions governing disciplinary or order liability.[24] According to the author, the error lies in the question itself, because it is obvious that no entities other than public prosecutors in petty offence cases and entities having the powers of a public prosecutor in petty offence cases are entitled to apply the means of educational influence. No provision provides a legal basis for the use of educational influence measures by other entities, for example by the employer, if the employee's misconduct is also a breach of employee duties. If the employer imposes a penalty on the employee for this violation, it will simply be an ordinal penalty in the field of labour law, and not a measure of educational influence under Art. 41 of the Code of Petty Offences. In the literature, the opinion was expressed that the *other* means of educational influence may be notifying the workplace or social organization of which the perpetrator is a member.[25] This view would be acceptable. The means of educational influence would be *notification*, and a separate issue would be the imposition of a disciplinary or ordinal penalty. However, the literature expresses the right view that authorized bodies should apply the means of educational influence themselves, without involving other institutions in it.[26] It was rightly noted in the literature that such a notification is stigmatizing.[27] Notifying the university or the employer about the petty offence committed is much more painful for the perpetrator than punishing him with a fine by way of a penalty notice, and the educational influence measures are supposed to be a milder form of reaction to the offence than punishments.

23 See, e.g., O. Włodkowski, *op. cit.*, p. 770.

24 On this topic see J. Jakubowska-Hara, *op. cit.*, p. 241.

25 W. Kotowski, *op. cit.*, p. 178.

26 See, e.g., R. Krajewski, *op. cit.*, p. 18; J. Jakubowska-Hara, *op. cit.*, Warsaw 2016, p. 237; I. Kosierb, *op. cit.*, Commentary to Art. 41, point 2.

27 J. Jakubowska-Hara, *op. cit.*, p. 237.

As an example of a *different* means of educational influence, the literature indicates a measure in the form of paying a certain amount of money for a specific social goal.[28] Such a measure was used by the State Fisheries Guard. Many guards of the State Fisheries Guard made refraining from submitting an application for punishment dependent on the voluntary payment by the perpetrator of the offence (in the case of so-called fishing petty offences) of a certain amount for restocking. This practice was met with both approval and criticism. The criticism was that such a practice was considered to be usurping by the State Fisheries Guard the right to independently decide on the application of the provisions of the law of petty offences and to perform the functions of accusing and adjudicating at the same time. Those approving found that such a measure fell under Art. 41 of the Code of Petty Offences, emphasizing that the catalogue of educational influence measures is open. It was also explained that the guard of the State Fisheries Guard, when making such a proposal to the angler, by no means 'adjudicates in the case of an offence'. It is only an offer on his part that the angler may or may not accept. If the guard can limit himself to getting someone's attention, then he can also arrange the matter through a payment for a social goal.[29] The above view was criticized. It was found that educational influence measures should not rely on financial ailments, as this may raise doubts as to possible abuses on the part of officers.[30] The dispute over the measure in the form of paying a specific amount of money for a specific social goal for fishing petty offences well illustrates the problem related to *other* means of educational influence. Moreover, it should be stated that the open catalogue of educational influence measures violates the guarantee function of the law of petty offences.[31] The literature expresses the right view that the best solution would be to use Art. 41 of the Code of Petty Offences with a closed catalogue of educational influence measures.[32]

The means of social influence are provided for in Art. 39 § 4 of the Code of Petty Offences. This provision reads as follows: 'In the event of refraining from the imposition of a penalty, a measure of social influence may be applied to the perpetrator, aimed at restoring the violated legal order or redressing the harm caused, in particular by apologizing to the aggrieved party, solemnly ensuring that no more such act is committed

28 W. Radecki, *op. cit.*, p. 363-365.

29 W. Radecki, *op. cit.*, p. 363-365.

30 R. Krajewski, *op. cit.*, p. 19.

31 Similarly M. Grudecki, *op. cit.*, p. 181; O. Włodkowski, *op. cit.*, p. 768.

32 See O. Włodkowski, *op. cit.*, p. 769.

or obliging the perpetrator to restore the previous state.' According to Art. 39 § 1 of the Code of Petty Offences, in cases that deserve special consideration, taking into account the nature and circumstances of the act or the characteristics and personal conditions of the perpetrator, the court may refrain from imposing a penalty or penal measure. There is a correct view in the literature that a measure of social influence may also be applied when the court, refraining from imposing a penalty, decides to impose a penal measure, but it cannot be applied when the court imposes a penalty and refrains from the imposition of a penal measure.[33] It results clearly from the wording of Art. 39 § 4 of the Code of Petty Offences. It should be emphasized that social influence measures may only be used by the court. There is a dispute in the literature whether only one measure of social influence can be applied to the perpetrator, as indicated by the grammatical interpretation of Art. 39 § 4 of the Code of Petty Offences, whether several measures of social influence can be applied simultaneously. Most of the authors support the first option, arguing that it is indicated by the grammatical interpretation of Art. 39 § 4 of the Code of Petty Offences.[34] Some authors argue that the purpose of using social influence measures supports their combination, and the use of the singular in the provision results only from a certain stylistic convention.[35] In the opinion of the author of this study, the result of the grammatical interpretation, which generally takes precedence, should be considered, and in the analysed case does not lead to absurdity and gives an unambiguous result.

The catalogue of social influence measures is open, as indicated by the word *especially* in the provision of Art. 39 § 4 of the Code of Petty Offences. This provision mentions three measures of social influence by name. Each measure of social influence must be aimed at restoring the violated legal order or at redressing the harm done. This should be borne in mind when creating other means of social influence. The question arises as to what else - apart from apologizing to the aggrieved party, solemnly ensuring that no more such an act is committed, or obliging the perpetrator to restore the previous state - the means of social influence may involve. Examples of other measures of social influence are very few in the literature. The measure in the form of an obligation of the perpetrator of the petty offence involving the inadvertent destruction of the breeding

33 See, e.g., T. Grzegorczyk, *op. cit.*, p. 177. Differently P. Gensikowski [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2016, p. 233.

34 W. Radecki, *op. cit.*, p. 351; I. Nowicka, R. Kupiński, *op. cit.*, p. 146; T. Grzegorczyk, *op. cit.*, p. 177; P. Gensikowski, *op. cit.*, p. 233.

35 See, e.g., M. Grudecki, *op. cit.*, p. 178-179.

ground or nest to participate in feeding forest animals deserves attention and approval.[36] It is not easy to find examples of other measures of social influence in the jurisprudence, either. When applying a measure of social influence the courts adjudicated, for instance, a written apology to the employees of a given petrol station and the return of the bench and four chairs to the aggrieved party within two months of the judgment becoming final.[37] There are cases where the court, when refraining from the imposition of a penalty, did not adjudicate a measure of social influence, arguing that the accused had independently taken steps to restore the violated legal order or to remedy the damage caused by the offence.[38] It should be noted that the restoration of the violated legal order could involve redressing the damage, and redressing the harm done could involve paying the supplementary payment to the injured party.[39] However, the supplementary payment and the obligation to redress the damage belong to the penal measures (Art. 28 § 1 of the Code of Petty Offences), and pursuant to Art. 28 § 2 of the Code of Petty Offences penal measures can be ordered if they are provided for in a special provision, and they are adjudicated if the special provision so provides. It is obvious that the court should not use, for example, the supplementary payment as a penal measure and the supplementary payment as a means of social influence. On the other hand, it is not clear whether the court could use, for example, the supplementary payment as a measure of social influence, if the provision does not provide for a penal measure in the form of supplementary payment for a given offence. Would it not be a circumvention of Art. 28 § 2 of the Code of Petty Offences? In the current state of the law, it should be considered that the application by the court of the supplementary payment or the obligation to redress damage as a measure of social influence does not constitute a violation of the law.[40] Another issue is the legitimacy and appropriateness of introducing an open catalogue of the means of social influence by the legislator. The question arises as to whether such a solution complies with the guarantee function of the law of petty offences. Admittedly, social influence measures are not penalties or penal measures, but they are used by a court, i.e. a state body, in formalized proceedings. Therefore, they should be enumerated in the Code of Petty Offences.[41]

36 Example given by T. Grzegorczyk, *op. cit.*, p. 177.

37 Verdict of the District Court in Świdnica dated 16 May 2018, IV Ka 256/18, Legalis no. 2165868; Verdict of the Regional Court in Toruń dated 29 August 2016, II K 296/16, Legalis no. 2026304.

38 See, for example, Verdict of the Regional Court Gdańsk-Północ in Gdańsk dated 30 November 2015, II W 493/15, Legalis no. 2009892; Verdict of the Regional Court Gdańsk-Północ in Gdańsk dated 13 April 2016, II W 2268/15, Legalis no. 2013889.

39 Similarly M. Grudecki, *op. cit.*, p. 179.

40 Similarly M. Grudecki, *op. cit.*, p. 179.

41 The view in favour of closing the catalog of the means of social influence was already expressed by M. Grudecki, *op. cit.*, p. 189.

With regard to both categories of non-punitive reaction measures, it should be clarified that they cannot be enforced through state coercion.[42] The perpetrator of a petty offence is not subject to any criminal sanction in the event of failure to comply with the educational or social influence measure applied to him. It is not possible to force the perpetrator of a petty offence to perform a social influence measure involving, for example, apologizing to the aggrieved party. For this reason, the means of social influence should be applied only to those perpetrators for whom the court becomes convinced that they will voluntarily implement the applied measure of social influence. With regard to the educational influence measures listed in the Code of Petty Offences, it should be noted that they are not feasible and do not require the offender to take any action. An educational influence measure in the form of, for example, an instruction is realized at the moment of its application.

In the Polish literature, the question has been discussed for years whether, after applying a measure of educational influence, a competent authority, for example the Police, may apply to the court for punishment for this offence for which this authority has already applied a measure of educational influence.[43] This question concerns the problem of the principle *ne bis in idem*, which is a fundamental legal principle, also known as the prohibition of double jeopardy.[44] According to this principle, a person cannot be prosecuted more than once for the same criminal behaviour.[45] In other words, this principle 'restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence, act, or facts'.[46] It can be said that this principle consists of the following two principles: *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (no one should be punished twice for the same offence).[47]

42 T. Grzegorczyk, *op. cit.*, p. 178; P. Gensikowski, *op. cit.*, p. 234; W. Radecki, *op. cit.*, p. 351.

43 On this topic see, *inter alia*, I. Nowicka, R. Kupiński, *op. cit.*, p. 148-152; R. Krajewski, *op. cit.*, p. 17-18.

44 M. Wasmeier, *The principle of ne bis in idem*, Revue internationale de droit pénal 2006, no. 1-2 (Vol. 77), https://www.cairn.info/revue-internationale-de-droit-penal-2006-1-page-121.htm#no16 (accessed on 25.11.2021), point 1.

45 See M. Wasmeier, *op. cit.*, point 1.

46 W. B. van Bockel, *The Ne Bis in Idem Principle in EU Law*, Kluwer Law International, Alphen aan de Rinn 2010, Abstract, https://cadmus.eui.eu/handle/1814/14641 (accessed on 25.11.2021).

47 Compare J. Vervaele, *The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights*, Utrecht Law Review, Vol. 1, Issue 2 (December) 2005, p. 100 ('Concerning the substance of the principle, traditionally a distinction is made between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (no one should be punished twice for the same offence).').

The principle of *ne bis in idem* is a key principle of EU criminal law[48], laid down in Art. 50 of the Charter of Fundamental Rights of the European Union[49]. This provision, entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', states: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. The *ne bis in idem* principle is also one of the guiding principles of criminal proceedings in Polish law.[50] *Prima vista* the answer for the above question seems obvious and the association immediately arises that if punished by the court, the principle of *ne bis in idem* would be violated. However, doubts arise in connection with the provision of Art. 61 § 1 point 2) of the Petty Offences Procedure Code. This provision stipulates, *inter alia*, that the initiation of the proceedings may be refused and the initiated may be discontinued if the perpetrator has been subjected to a measure of influence in the form of an instruction, getting someone's attention or warning, and this measure is a sufficient response to the offence. Incidentally, it is worth noting that this provision uses the term *measure of influence* and not *measure of educational influence*, which is probably due to the lack of legislative care. Of greater importance is the note that this provision *explicitly* mentions only three means of educational influence, excluding *others*. This proves that these *other* measures are not equal to those listed in the Code. This also calls into question the legitimacy of the existence and significance of these *other* measures, and at the same time constitutes an argument for closing the catalogue of educational influence measures in Art. 41 of the Code of Petty Offences. Returning to the procedural issue, it should be stated that the provision of Art. 61 § 1 point 2) of the Petty Offences Procedure Code only provides for an optional ground for refusing to initiate or to discontinue proceedings. The doctrine is of the opinion that it does not provide for a negative premise of proceedings.[51] Negative premises of proceedings in cases of petty offences are specified in Art. 5 of the Petty Offences Procedure Code. The occurrence of any of the conditions under Art. 5 of the Petty Offences Procedure Code causes that the

48 M. Wasmeier, *op. cit.*, point 6.

49 The Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2012/C 326/02, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (accessed on 25.11.2021).

50 This principle is contained in Art. 17 § 1 point 7) of the Code of Criminal Procedure (Article 17 provides for the negative premises for the proceedings). According to this provision, criminal proceedings are not initiated, and those initiated are discontinued, when the criminal proceedings for the same act by the same person have been legally terminated or if previously initiated, are pending.

51 See, e.g., J. Paśkiewicz [in:] M. Rogalski (ed.), *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warsaw 2009, LEX, Commentary to Art. 61, point 1.

proceedings are not initiated and the instituted proceedings are discontinued (obligatorily). In the event of prior application of an educational influence measure, the court may (but does not have to) refuse to initiate proceedings and discontinue the initiated proceedings if it deems that this measure is a sufficient reaction to the offence. From the provision of Art. 61 § 1 point 2) of the Petty Offences Procedure Code it is clear that the court has the power to impose a penalty on the perpetrator of a petty offence against whom an educational influence measure was previously applied for the same petty offence, even if it considers that this measure is a sufficient response to this petty offence. If the court finds that the educational influence measure applied is not a sufficient reaction to the petty offence, it may not refuse to initiate or discontinue proceedings due to the earlier application of this measure. *Ergo*, only a measure of educational influence which, in the opinion of the court, is a sufficient reaction to the petty offence committed may be the basis for a refusal to initiate or discontinue proceedings. There have been criticisms of the current regulation under Art. 61 § 1 point 2) of the Petty Offences Procedure Code, as it leads to the accumulation of ailments resulting from punishment and the use of an educational influence measure. There was also an opinion that the criticism of the applicable regulation is not fully justified. At the same time, the opinion was expressed that the discomfort resulting from the use of an educational influence measure is generally not significant.[52] In the opinion of the author of this study, the first view is correct. It should be emphasized that although the educational influence measures are not penal measures, but non-punitive, they are repressive measures. At this point, it is necessary to address the problem of the concurrence of different regimes of repressive responsibility. Polish doctrine commonly accepts the concurrence of different liability regimes for the same act, for example criminal liability and disciplinary liability, the factual basis of which is one and the same act. In other words, the perpetrator for one and the same act may be punished in two different proceedings: in criminal proceedings (criminal penalty) and in disciplinary proceedings (disciplinary penalty). It is commonly believed that in this case there is no breach of the principle of *ne bis in idem*, as the penalties are imposed in two different liability regimes. It should be considered that this interpretation is compatible with Art. 4 of Protocol No. 7 to the European Convention on Human

52 M. Grudecki, *op. cit.*, p. 183-184.

Rights[53], which states in Paragraph 1 that no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. Article 4 only applies to *criminal proceedings* and does not prevent the person from being subject, for the same act, to action of a different character, for example, disciplinary action.[54] This has been confirmed by the European Commission of Human Rights.[55] However, in the case analysed in this study, the situation is different. Educational influence measures are applied within the scope of the law of petty offences, i.e. within the framework of the liability for petty offences. Therefore, there is undoubtedly a breach of the prohibition of *ne bis in idem*, if, after applying, for example, an instruction to the perpetrator of a petty offence, he is punished by the court for the same petty offence. This state of affairs is unacceptable. The provision of Art. 61 § 1 point 2) of the Petty Offences Procedure Code needs to change. Prior application of an educational influence measure should constitute a negative premise of the proceedings.[56]

The proposed solution is not perfect, but its advantages outweigh its disadvantages. The disadvantage of the proposed solution is the lack of any control over the officer applying educational influence measures. There is a fear that, for example, a policeman will use a measure of educational influence wrongly, for example, only an instruction for some more serious petty offence. In extreme cases, such a policeman may face disciplinary liability or even criminal liability under Art. 231 of the Criminal Code (for an offence involving exceeding powers or failing to fulfil obligations and thus acting to the detriment of public or private interest). It should be taken into account that there will be cases of overly nice treatment of perpetrators of petty offences by applying only educational influence measures to them. However, such cases certainly also occur in the current state of the law. A solution to this problem may be the

53 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg 22.11.1984, as amended by Protocol No. 11, https://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETS117E_ENG.pdf (accessed on 25.11.2021).

54 *Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights. Right not to be tried or punished twice*, updated on 30 September 2021, p. 7, https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf (accessed on 25.11.2021).

55 See, e.g., Decision of the European Commission of Human Rights of 7 November 1990 in Kremzow v. Austria, https://hudoc.echr.coe.int/eng#{"itemid":["001-772"]} KREMZOW v. AUSTRIA (coe.int) (accessed on 25.11.2021) and Decision of the European Commission of Human Rights (First Chamber) of 16 April 1998 in Demel v. Austria, https://hudoc.echr.coe.int/eng#{"itemid":["001-4210"]} DEMEL v. AUSTRIA (coe.int) (accessed on 25.11.2021).

56 Similarly R. Krajewski, *op. cit.*, p. 18; O. Włodkowski, *op. cit.*, p. 771.

introduction of some limitation in the application of educational influence measures in relation to certain petty offences. In the literature, it has been proposed to exclude the use of educational influence measures in several cases, *inter alia*, in the case where the perpetrator fulfils the statutory elements of a petty offence and a crime with one act, in the case of petty offences of criminal character (as opposed to petty offences involving violations of order regulations) and when a petty offence is subject to the obligatory application of a penal measure.[57] The exclusion of educational influence measures has been also proposed in relation to the perpetrator under aggravating circumstances specified in Art. 33 § 4 of the Code of Petty Offences. This provision exemplarily enumerates aggravating circumstances when imposing a penalty. These circumstances include, for example, actions of the perpetrator in order to obtain an unlawful financial gain; acting in a way that deserves special condemnation; previous punishing of the perpetrator for a similar crime or petty offence; hooligan nature of the offence; acting under the influence of alcohol, intoxicants or other similarly acting substance or agent; committing an offence to the detriment of a helpless person or a person to whom the perpetrator should show special considerations; committing an offence in cooperation with a minor.[58] The opinion was also expressed that it did not seem right to apply educational influence measures in those cases where the legislator provided for an optional basis for the imposition of a penal measure.[59] According to the author of this study it is not necessary to expressly exclude the application of educational influence measures in most of the above-mentioned cases since in these cases the degree of social harmfulness of a petty offence is usually not small. Therefore, the means of educational influence should not be applied since the basic criterion for their application is not met. However, one should remember that the degree of social harmfulness is assessed *in concreto*. It may happen that a petty offence is formally classified as one of the above-mentioned cases and is socially harmful in a small degree and the application of educational influence measures will be sufficient reaction in relation to its perpetrator (the purposes of punishment will be met by the application of these measures). This may be in a situation where, for example, a 17-year-old boy commits a small petty offence when cooperating with a 16-year-old. Here it should be clarified that the age limit for liability for petty offences is 17 years (Art. 8 of the Code of Petty Offences). Having the above in mind, it seems not right to create a

57 More see O. Włodkowski, *op. cit.*, p. 767.

58 See O. Włodkowski, *op. cit.*, p. 767.

59 See O. Włodkowski, *op. cit.*, p. 767.

provision definitely excluding the application of educational influence measures in all of the proposed cases in the literature.

The author of this article proposes to introduce a new provision into the Code of Petty Offences, namely a provision according to which educational influence measures are not applied if a penal measure should be imposed for a given petty offence. The proposed regulation is modelled on the regulation of Art. 96 § 2 of the Petty Offences Procedure Code, according to which no fines are imposed by way of a penalty notice for petty offences for which a penal measure should be adjudicated. If a petty offence is so serious that a penal measure should be adjudicated for it, and therefore the imposition of a fine in the form of a penalty notice is not allowed (but an application for punishment should be filed with the court), then the application of an educational influence measure should not be allowed. After all, an educational influence measure is, by definition, a milder form of reaction to a petty offence than a fine, including a fine imposed in the penalty notice proceedings (the mandate proceedings).

3. Final Conclusions

The analysis carried out above led the author to the formulation of the following final conclusions. Above all, statutory catalogues of non-punitive reaction measures should be closed. Therefore, the author, with full conviction, supports the *de lege ferenda* postulates in these aspects expressed in the literature. Both the means of social influence and the means of educational influence should be enumerated exhaustively in the Code of Petty Offences. It is required, first of all, by the guarantee function of the law of petty offences, which is a repressive law. An additional argument is the problem of indicating non-punitive measures other than those listed in the Code of Petty Offences - such measures that would not raise doubts and would gain universal approval in the doctrine and practice. Moreover, the author fully supports the view that the application of a means of educational influence should constitute a negative premise for proceedings before the court, i.e. if the authorized body applied a means of educational influence to the perpetrator, and then applied to the court to punish the perpetrator for this offence, the court should refuse to initiate proceedings. Referring to the proposition expressed in the literature to exclude the use of educational influence measures in several cases, the author of this study proposes to exclude the use of the means of educational influence only for these petty offences for which a penal measure should be imposed. This proposal in no way implies a general postulate of limiting the use of the means of educational influence. On the contrary, according to the author, the means of

educational influence are in many cases a sufficient response to an offence, especially in the case of very petty offences committed by incidental perpetrators. The author also positively assesses the possibility of applying a means of social influence by the court. Both categories of non-punitive reaction measures are institutions that are characteristic of Polish petty offences law and should remain there after the above-proposed changes are introduced.

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