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Security measures in Polish penal law in the context of international human rights standards

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Abstract

The subject of the article is the relation of security measures in Polish penal law to internationally protected human rights standards, especially to the guarantees provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the case-law elaborated by European Court of Human Rights on the basis of the Convention. The main focus of the article is on preventive detention in a psychiatric institution as a security measure, which is prone to be the most invasive in the context of individual rights such as the right to liberty, right to privacy or prohibition of torture. Initially, the author attempts to define the notion of a „security measure" and present the main legal concepts regarding it. Subsequently, she moves on to present the current legal regulation of security measures in Polish penal law. Finally, the provisions of the Polish The Criminal Code regulating preventive detention in a psychiatric institution are being analyzed in the context of human rights standards provided by the Convention and elaborated in the case-law of the ECHR.

Keywords: security measures; preventive detention; the right to liberty and personal security; European Court of Human Rights

1. Introduction

The subject of this paper is the relation of security measures in Polish penal law to internationally protected human rights standards, especially to the guarantees provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter: the Convention) and the case-law elaborated by European Court of Human Rights on the basis of the Convention. (hereinafter: ECHR).

I will concentrate on preventive detention in a psychiatric institution as a security measure, which is prone to be the most invasive in the context of individual rights such as the right to liberty, right to privacy or prohibition of torture. Preventive detention is combined with therapy so also the problem of consent for medical treatment comes into question along with the standards of European Bioethical Convention |of 1997.

To begin with, I will attempt to define the notion of „security measure" and present the main concepts regarding it .Subsequently, I will move on to present the current legal regulation of security measures in Polish penal law. Finally, the provisions of the Polish The Criminal Code regulating preventive detention in a psychiatric institution will be analyzed in the context of human rights standards provided by the Convention and elaborated in the case -law of the ECHR.

2. The notion of „security measures"

Preventive measures as part of the repertoire of means of formal social response to acts prohibited by law are a relatively new institution in criminal law. They are instruments of penal law used complementary with punishment and penal measures. Punishment, understood primarily as retribution for evil caused by the crime, has been present in human societies from the beginning of time. Preventive measures understood as a means of protecting the public from a dangerous perpetrator began to be the subject of animated discussion only in the second half of the nineteenth century. They have been introduced to European penal legislation on a larger scale at the turn of the 19th and 20th centuries (Paprzycki, 2015).

Whereas punishment is mainly focused retrospectively, security measures in penal law are primarily prospective, Punishment is aimed at retribution for what is already done, security measures are supposed to prevent possible acts from happening in the future. Nevertheless, the source of legitimacy of security measures in a specific case derives from the criminal act that has taken place.

Primarily, preventive measures are supposed to remedy the problem of the impossibility of bringing to justice those, who, due to various circumstances, can not be charged, and therefore can not be found guilty or who can be found guilty only to a limited extent. Criminal law is often confronted with situations in which the perpetrator of a prohibited act cannot be held criminally liable due to the impossibility of finding him guilty or his guilt reduced to a certain extent. Sometimes it is related to personality disorders, addiction to alcohol or other intoxicants, emotional or social immaturity, or mental illness. Often these disorders cause a high probability of committing the offence again.

Insanity defence or diminished capacity defence means that there is no basis for imposing a penalty. This regards situations of complete or partial insanity, as well as situations that do not exclude the perpetrator's guilt but are not irrelevant to the assessment of his ability to recognize the meaning of the act or to control his behaviour. The latter regards perpetrators who are addicted to alcohol, as well as other intoxicants and psychotropic substances.

The threat that such perpetrators create for society is the main reason for introducing preventive measures in criminal law. The threat is primarily measured by the probability of recommitting the offences. In other words, in the case of people affected by mental disorders as well as those with an addiction problem, it is assumed that there is a high probability of committing the same acts again although this issue always requires a more accurate assessment in the context of each individual case. The need to protect the society from such threats justifies the isolation of the perpetrators with the use of preventive detention instead of or alongside a penalty. The period of this isolation may not be in any proportion to the gravity or nature of the offence committed but to the actual threat to the social and legal order created by the perpetrator.

The purpose of such isolation is not limited only to physically preventing the perpetrator from repeating the prohibited acts. Usually, it also has a therapeutic goal, insofar as therapy is possible in a given case. If therefore, during the isolation period, as a result of appropriate therapeutic procedures, the threat of recommitting the crime can be eliminated or at least significantly reduced, it may lead to the cessation of the implementation of preventive measures. Hence in this understanding of preventive measures, they serve primarily isolation and therapy.

In the context of the history of penal law and criminology, the understanding of preventive measures presented above can be defined as a narrow one. The discussion on security measures in the penal and criminological literature of the last 150 years went far beyond the problem of securing the society against insane perpetrators or those with diminished

capacity. Actually, the problem of such perpetrators had a marginal significance for the initial discussion on security measures that took place on the turn of the 19th and 20th centuries. It resulted from the fact that the sources of the threat posed by the perpetrator of a prohibited act may have a much broader character than only mental disorders or addictions. The likelihood of reoffending or returning to crime may also result from other factors than insanity or substance dependence. These factors became of particular interest to the new scientific discipline, which emerged in the second half of the nineteenth century, later referred to as criminology. The offender and his special biological, psychological and social features became the main subject of its interest. Criminological research revealed the existence of a group of perpetrators who were defined by various concepts as „born criminals', habitual offenders or recidivists (Zalewski, 2010). Although these concepts do not necessarily coincide, all of them regard perpetrators, who may not necessarily be considered *non compos mentis*, but who also pose a threat to the legal order due to the high probability of repeating criminal behaviour. This gave rise to a discussion about the need to protect the society against such perpetrators, through applying the security measures instead of or beside penalties.

In this light, the discussion about security measures ceases to be a problem regarding a relatively small group of perpetrators affected by certain serious psychiatric defects or other related problems. It becomes the basic problem of the criminal-political discussion regarding the role of guilt on the one hand and the perpetrator's threat to society on the other, and consequently the relationship between the concepts of punishment and security measures and their role in the system of formal social response to crime. So here we are dealing with a broad understanding of the concept of a security measure. It is related to the concept of the so-called duality of criminal law, where the penalties and security measures are recognized as two equal instruments of criminal policy, fulfilling various criminal-political functions depending on certain characteristics of the perpetrator to whom they are applied (Warylewski, 2009; Bojarski, 2003).

In addition to the above-mentioned security measures, criminal law also distinguishes a particular group of security measures called administrative measures. They include the possibility of adjudicating prohibitions of performing certain professions or deprivation of certain rights in some situations (e.g. a prohibition to take part in mass events, or a driving ban). They constitute a specific form of punishment for the perpetrator but they also clearly have preventive functions. However, when they are used as a security measure they are intended, first and foremost, to protect the public from the possibility of the perpetrator committing a crime again.

3. Security measures in the Polish penal law and their relation to the standards of ECHR case-law

Security measures are adjudicated by the Polish courts on the basis of article 93a-g of the Polish The Criminal Code of 1997. These provisions contain a closed catalogue of security measures as well as general and specific grounds for their adjudication.

According to the Criminal Code under the amendment passed on 20th February 2015, the security measures are electronic supervision, therapy, addiction treatment and detention in a psychiatric institution (Crminal Code, 93, 1).

Also other administrative security measures can be applied: prohibition of occupying a specific position, performing a particular profession or conducting a specific business activity; a ban on conducting activities related to the upbringing, treatment or education of minors; a ban on staying in certain environments or places, contacting certain people, approaching certain

people or leaving the place of residence without the court's consent; prohibition to take part in mass events; prohibition of access to game centres and participation in gambling; an obligation to periodically leave the premises occupied jointly with the victim of offence; driving ban) (The Criminal Code, 93 a-g , 93 a § 2, in relation to 39 § 2-3)

Security measures are applied not only to insane perpetrators and those with diminished mental capacity, but also to those who remain fully sane, but create a serious threat of performing further acts which violate legally protected rights. After changes in Polish penal law which came into force 1 July, 2015 security measures can also be applied to offenders with personality disorders and sexual offenders who committed crimes against life, health and sexual freedom (Criminal Code, 93c §3, 4) . Also, as it had been before the amendment, security measures can be adjudicated in the case of perpetrators addicted to intoxicants, who committed a crime in the state of intoxication (Criminal Code, 93c § 5).

Not all of the security measures, however, can be applied to every category of offenders distinguished above. According to the provisions of the Criminal Code the security measure in the form of detention in a psychiatric institution, which will be the subject of our special attention, can be applied only to three categories of perpetrators. Firstly it's applicable to those that cannot be held liable for their actions for the reason of insanity and to those convicted of an offence committed in a state of diminished mental competence without conditioned suspension of execution, sentenced to 25 years of prison or life imprisonment. Finally, it can also be adjudicated to those convicted of the crimes of murder, grievous bodily injury, rape, sexual abuse of disabled persons or sexual abuse of minors committed due to paraphilia (The Criminal Code, 93 g).

Additional conditions are required to adjudicate detention in a psychiatric institution. As far as the insane perpetrators and those with diminished mental capacity are concerned the court must determine that there exists a high probability of committing an offence of significant social harmfulness in due to the perpetrator's mental illness or mental disability. In the case of sexual offenders, there must exist a high probability of committing an offence against life, health or sexual freedom due to paraphilia (Criminal Code, 93g, 1, 2, 3). The court rules on the basis of psychiatric opinions and its own analysis of probability with regard to the previous lifestyle of the offender, his criminal record and his current life situation. The analysis should be combined with the prognosis of circumstances favourable for abjuration of therapy or committing an offence again. Adjudicating the measure of psychiatric detention the court must make sure that the security measure applied is proportional to the extent of social harmfulness of the criminal act the offender may commit in the future and the probability of committing the act, with regard to the progress the offender has made in therapy or addiction treatment. The court should also consider if the likelihood of committing an offence again can be reduced in another way than detention in a psychiatric institution. This principle is intended to impose restraint on applying the measure of detention to offenders who committed minor offences, however onerous for the society they might be (Decision of the Supreme Court, 2002).

Detention combined with compulsory treatment interferes in the sphere of basic human rights protected by the Constitution and international law such as the right to liberty and personal security, right to privacy including the right to consent to treatment, the prohibition of torture and potentially other rights. For this reason, the provisions of domestic law and their implementation should be strictly compliant with these standards. That is why the relation of the analyzed provisions of the Criminal Code to the international human rights standards, especially those contained in the European Convention and interpreted by the ECHR in its case-law is so significant.

The Polish judge is not directly bound by ECHR judgments, but he should take into

consideration the provisions of the Convention which pursuant to the Constitution of the Republic of Poland of 1997 (Journal of Laws no. 78, item 483) is part of the Polish legal order and is directly applicable. Interpretation of the provisions of the Convention and other regulations of Polish law should, therefore, refer to ECHR judicature. As indicated by the Polish Supreme Court "since Poland's accession to the Council of Europe, the ECHR's judicature can and should be taken into account when interpreting the provisions of Polish law" (Decision of the Supreme Court, 1995).

Hence, the interpretation of the premises regulated in the Criminal Code. Should be based, inter alia, on the standards contained in the Convention and the ECHR case-law. They supplement the judicature of Polish courts and the legal doctrine in the process of interpreting the provisions of the statute.

Article 5 paragraph 1 of the Convention stipulates safeguards of the right to liberty and security of person. „No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". Letter e) of paragraph 1 regards situations of detention of persons with mental disorders and is applicable to the security measure of detention in a psychiatric institution.

On the basis of selected ECHR judgments, the following principles which apply to deprivation of liberty under article 5 paragraph 1 letter e of the Convention can be recognized: the principle of legal certainty, prohibition of arbitrariness, the principle of adjudication by a judicial authority, the principle of necessity and proportionality, finally – the requirement of obligatory impartial expert opinions at the time of adjudication and enforcement of the isolation measure (Srogosz, 2018).

As for the first of the principles mentioned above, it means that the conditions for deprivation of liberty provided for by domestic legislation must meet the minimum standard of legal certainty, resulting in their predictability. Thus, decisions of the judicial authorities regarding deprivation of liberty should be based on criteria, which are clear, precise and comprehensible for the average citizen. This rule should prevent arbitrariness when adjudicating detention (see, for example, Medvedyev and others v. France, Steel and others v. the United Kingdom).

With regard to this principle, the provisions of the Criminal Code have been questioned by the Polish Ombudsman in his complaint to the Constitutional Tribunal. He pointed out that the criteria of the probability of committing an offense of significant social harmfulness are vague and ambiguous and do not comply with the rule of legal certainty as they leave a vast field of interpretation to the court. This argument has been refuted, however, as prognostic and evaluating statements are generally being made by the courts in the implementation of criminal law The following examples of terms open to interpretation and evaluation can be given: "particular cruelty" (Criminal Code, 148 § 2, 1), "strong commotion justified by circumstances" (Criminal Code, 148 § 4) or "persistent harassment" (Criminal Code, 190 a § 1). All of these are ambiguous terms which need interpretation of the court in every given case.

It is worth noting that in the cases examined by the ECHR the prerequisite for the probability of committing an offence has never been perceived in terms of an alleged violation of the principle of legal certainty. In particular, in cases against Poland, in which these provisions have been repealed so far no objection of violating this principle has been raised (Srogosz, 2018).

As for the criteria of the high probability of committing an offence of significant social harmfulness in connection to mental disorder layed down in the provisions of the Criminal Code, the ECHR has acknowledged them stating at the same time that the mental disorder must be of the kind and intensity that justifies forced hospitalization (see: Biziuk v. Poland, Nawrot

v. Poland, Witek v. Poland).

The second principle mentioned above - the prohibition of arbitrariness - with regard to preventive detention is tantamount to the constitutional principle of the rule of law contained in Article 7 of the Constitution of the Republic of Poland of 1997. Article. 5 of the Convention, in turn, stressed that deprivation of liberty should be "lawful". Thus, the detention of the perpetrator of an offense committed in a state of insanity, diminished mental capacity or in connection with a disorder of sexual preferences in a psychiatric institution can be adjudicated only on the basis of the relevant provisions of the Criminal Code. The principle of legality protects individuals against deprivation of liberty by the state without the basis of domestic law. This principle constitutes the prohibition of arbitrariness in the formal legal sense. It emerges *expressis verbis* from articles 7 and 41 par. 1 of the Constitution of the Republic of Poland ("deprivation or restriction of liberty may be enforced only according to the principles specified in the statute").

Nevertheless, deprivation of liberty can be considered arbitrary even if it is implemented in accordance with domestic law when it is at the same time contrary to the purpose of the restrictions contained in art. 5 paragraph 1 letter e of the Convention. In the opinion of the Tribunal the essential purpose of this provision is to allow the deprivation of liberty of the mentally ill, not only in order to prevent a threat to public safety, but also to protect the interest of the detained (see, for example, Enhorn v. Sweden,). In the previous legal situation in Poland (before the amendment of 2015) the provisions providing for the detention of the perpetrator in a psychiatric institution were aimed first of all at securing the society against the offender and it was actually the only purpose of the isolation measure. Currently, the provisions of the Criminal Code contain a new premise determining the choice of a security measure (apart from the criteria of the degree of social harmfulness of the act) Additionally the court now has to "take into account the needs and advances in therapy" (Criminal Code, 93b § 3).

As for the condition of adjudication by a judicial authority the Convention and Strasbourg judicature do not require that the decision on the isolation of a person with mental disorder should be made by a court. This conclusion results from the comparison of article 5 paragraph 1 letter a) with article 5 paragraph 1 letter e) of the Convention. This first provision refers to a "conviction by a competent court", and the latter to "lawful detention". Nevertheless, the legality of isolation is subject to the court's control at every stage of enforcement of the security measure. Article 5 paragraph 4 of the Convention, confirms the right of appeal to court "for anyone who has been deprived of liberty by arrest or detention". In the case of Winterwerp v. The Netherlands in 1979 the Strasbourg Tribunal confirmed, that the deprivation of liberty of a person with mental disorders requires regular judicial control of legality. Even if the decision on isolation is made by an administrative body, the detained person has the right of access to the court personally or through his representative at any time. Court proceedings controlling the legality of detention should guarantee the protection of the interests of persons with mental disorders.

In accordance with the ECHR judicature, the criminal proceedings in Poland guarantee the participation of the accused (personally or represented by a proxy). According to the provisions of the Polish Code of Criminal Procedure. The accused must have an attorney if there is justified doubt whether the accused's mental health allows to participate in the proceedings or conduct the defence in an independent and reasonable manner. Participation of the defence attorney is obligatory at meetings in the subject of isolation and at the hearings with the participation of the accused (Code of Criminal Procedure, 79 § 1 it. 3, 4, 339).

The principle of necessity of applying a security measure (which can also be defined by a Latin term *ultima ratio*) has been regulated *expressis verbis* by article 93b § 1 of the Criminal

Code. The court may adjudicate a security measure when it is necessary to prevent the perpetrator from committing an offence but only if other measures prescribed by the law are insufficient.to achieve that purpose. The premise of necessity was further specified by an additional guarantee arising from the specific preventive function of the measure of detention. Namely, detention in a closed psychiatric institution should be necessary for "preventing the perpetrator from committing a prohibited act of significant social harmfulness". The necessity of detention must also result from the high probability of committing this kind of act in the future (Criminal Code, 93 g).

The Strasbourg Tribunal has considered the *ultima ratio* principle and the requirement of proportionality of deprivation of liberty in the judgments regarding the application of art. 5 paragraph 1 letter. e) of the Convention (e.g. Lithuania v. Poland, 2000, 78). For instance, in the recent case of Nawrot v. Poland, the ECHR stated that the grounds justifying the deprivation of liberty referred to in the article 5 paragraph 1 of the Convention should be given a narrow interpretation. The ECHR referring to its previous case-law stated that the mental disorder of the offender should be real and serious enough to justify the necessity of isolation in a psychiatric institution (Nawrot v. Poland, 64). On the basis of a specific factual situation, the Strasbourg court also expressed doubt that dissocial personality, or psychopathy, can be treated as "real" and serious enough to deprive a person of liberty within the meaning of art. 5 paragraph 1 letter e) of the Convention (Plesó v. Hungary, 2012; Stanev v. Bulgaria, 2012). The ECHR also referred to the premise of "imminent danger to others or to himself" .In the above-cited case of Nawrot v. Poland, the Tribunal accepted the Polish regulation stipulating that potential threat of recommitting the act should be associated with significant harmfulness of the act (Nawrot v. Poland, 75).

The assessment of the premises of applying an isolation measure should be analyzed by the court on the basis of reliable evidence in an objective manner. According to the ECHR the essential prerequisite for the isolation of a person with a mental disorder is the necessary evidence of the experts' opinion (Ruiz Rivera v. Switzerland, 2014, 59).The ECHR expressed its position on the subject of experts' opinions in the case of Witek v. Poland, stating that the opinion should be based on the current state of mental health and not only on past events. The opinion cannot be considered sufficient for deprivation of liberty if a longer period has elapsed since its issue.

An overview of recent Strasbourg cases against Poland allows an assertion that as for the application of the above-mentioned principles in the Polish law the Tribunal generally finds the provisions of the Criminal Code concerning preventive detention compliant with the Convention.

There is however one issue, which remains controversial. Namely the issue of preventive post-penal deprivation of liberty, which was introduced to Polish law by the Act of 22 November 2013 on the treatment of persons with mental disorders posing a threat to life, health or sexual freedom of others (the so-called *Beast Act*) (Journal od Laws, 2014). The amendment of 2015 has introduced a possibility of postpenal detention also to the Criminal Code.

This regulation arouses voices of criticism, accusing the adopted solutions of being in breach of Constitution and the Convention. The Polish Ombudsman has brought a complaint to the Constitutional Tribunal deeming the provisions providing that the prescribed protective measure shall be applied after serving the sentence as contradictory to *inter alia* the *nullum crimen sine lege* principle (article 42 paragraph 1 of the Constitution) and *ne bis in idem* principle (as part of the principle of the rule of law). However, these arguments have been eventually refuted by the Constitutional Tribunal (Judgment of the Constitutional Tribunal 2016 r., K 6/14).

The institution of post-penal detention has also been introduced to the legal systems of other States Parties to the Convention, raising a lot of controversies (see i.a, Kulik, 2013). Strasbourg judicature on the matter evolved. In the case of M. vs Germany (2009), recognizing the violation of art. 7 paragraph. 1 of the Convention the Tribunal pointed out that in fact, the preventive detention in its current form did not differ from the execution of the penalty of deprivation of liberty, even though German law defined it as a security measure. The Court has criticized the conditions of the detention the applicants had been subject to, which put them in a similar situation to those detained on the basis of criminal sentences. The implementation of the therapeutic goal of the detention was difficult due to the fact that the detained did not have sufficient access to the necessary therapy. The impact of this measure was primarily focused on separating individuals deemed to be dangerous from society. The assessment of the above-mentioned arguments prompted the Court to recognize that preventive isolation violated the principle of *nullum crimen nulla poena sine lege* (M v. Germany 2009).

However, in a similar case of Bergmann v. Germany (2016), the ECHR found that the applicant's detention was in line with the European Convention on Human Rights. In the Bergmann the Court did not find a violation of Article 7 of the ECHR, recognizing that a relationship with an earlier conviction does not play a significant role, and detention is adjudicated due to the necessity of therapy of mental disorders, with its repressive element being significantly limited. In the context of the above facts, the Tribunal considered that post-penal preventive deprivation of liberty can only be imposed on persons who suffer from mental disorders constituting an independent cause for detention, which is unrelated to the previous conviction. ECHR recognized that isolation can be ruled without specifying its duration in advance, which undoubtedly constitutes an interference with the rights of the individual; however, it also pointed out that the detained person will be released when the danger of committing a prohibited act is minimized. Therefore, the situation of the detainee is constantly monitored by the court which, after consulting the experts, may decide to release the applicant. Consequently, there can be no question of a deterioration of the applicant's position when the isolation is to serve a therapeutic purpose and is aimed at returning him to normal functioning in society. The Court concluded that the applicant's preventive isolation does not infringe art. 7 of the Convention (Bergmann v. Germany, 2016). The Court came to similar conclusions in the case of Ilnseher v. Germany of (2017) where it has ruled that preventive deprivation of liberty applied retroactively to a convicted killer does not violate fundamental rights if the convicted person is placed in a special therapeutic centre (Ilnseher v. Germany, 2017).

It seems that the European Court of Human Rights allows post-penal preventive detention, even though it does not only regard persons of "unsound mind" in the meaning of mental illness or mental disability (as stipulated by article 5 paragraph 1 letter e) of the Convention) but also it applies to convicted criminals of sound mind with personality disorders and disorders of sexual preferences (paraphilia). The question arises: if the mind of those offenders was sound enough to bear liability for their actions, how is it possible to apply a security measure of non-penal character allowed by article 5 paragraph 1 letter e of the Convention after they have served their sentence (provided that the mental disorder did not appear in prison)?

Of course the need to protect the society prevails, but it would be more honest to admit that in fact, it is a breach of the principles of n*ulla poena sine lege* and *ne bis in idem*, but one justified by the necessity to protect life, health and sexual freedom of innocent individuals.

The Polish "Beast Act" has not yet been put to trial before the ECHR but as follows from the above-cited German cases the Tribunal has determined its position on the matter of post-penal detention for the present moment.

4. Conclusion

Extrapolating from the legal situation described above, the Polish penal law, alike penal systems of many other European countries seems to implement the concept of duality of criminal law, where the penalties and security measures are recognized as two equal instruments of criminal policy, fulfilling various functions of criminal policy depending on certain characteristics of the perpetrator to whom they are applied. The situation is accepted by the ECHR provided certain standards elaborated by the Court in its case-law concerning preventive detention under article 5 paragraph 1 letter e of the Convention are met. A matter, which remains controversial in my opinion, is the issue of post-penal detention, which potentially constitutes a breach of the prohibition of retroactivity of law and other essential standards of the principle of the rule of law.

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