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How Does Polish Law Respond to the Threat Posed by a Person with Mental Disorders? The Polish System of Preventive Measures[2]

Jak polski system prawny reaguje na zagrożenie stwarzane przez osobę z zaburzeniami psychicznymi? Polski system środków zabezpieczających

1. Introductory remarks

One of the important areas of interest to modern criminal law is the problem of how to deal with „dangerous" perpetrators who pose a significant threat to the legal interests of others due to their broadly defined mental disorders. Frequently, they are persons who committed serious, often high-profile, criminal acts and their court proceedings are subjects of intense public interest. On the one hand, the State is responsible for protecting the public from these persons. On the other hand, the State is also obliged to respect human rights. Any measures applied to „dangerous" perpetrators must comply with the standards of the Polish Constitution[3] and the applicable international laws, including the European Convention on Human Rights[4]. Under Polish law, the objective

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[3] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483, as amended).

[4] The Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as subsequently amended by Protocols No. 3, 5

of protecting the public from persons „dangerous" due to their mental disorders is satisfied by a system called „protective measures". This term is used in Polish criminal law to specify the measures applicable to the perpetrator who, given the broadly defined mental disorders, poses a risk of committing the criminal act again[5]. However, the Polish Criminal Code[6] does not provide for preventive measures which could be applied to persons with no mental disorders diagnosed but „dangerous" for other reasons, such as multiple-offence perpetrators or particularly violent offenders.

By way of introduction, it should be noted that Polish criminal law is based on the principle of fault. A fault is an allegation presented to the perpetrators that in a specific situation they did not comply with the legal standard, although they could have been expected to respect it[7]. Attribution of fault is a prerequisite for the attribution of criminal liability. If the perpetrators cannot be attributed with a fault, they cannot be punished under the provisions of the Criminal Code (Article 1 § 3 CC). For the perpetrators to be attributed a fault, certain initial conditions must be met. For example, they must be sufficiently mature and, in addition – which is particularly important in the discussed context – must be able to recognize the meaning of their actions and be able to control their conduct[8]. The ability to recognize the meaning of the committed act means the perpetrators are aware of what they are doing (in particular, they can link their actions with the specific consequences) and of the negative perception of their behaviour in the light of law and morality. The ability to control their actions means, in turn, that the perpetrators can refrain from conduct they identify as reprehensible[9].

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and 8 and supplemented by Protocol No. 2, Journal of Laws 1993, No. 61, item 284, as amended.

5 This paper does not discuss the measures applicable to persons with mental illness that form a response to the danger posed by that person to themselves or others (e.g. placing in a psychiatric hospital following civil proceedings under the Act on Mental Health Protection).

6 Act of 6 June 1997 – Criminal Code (Journal of Laws 2020, item 1444, consolidated text as amended, hereinafter: CC. Text available at < https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970900557/U/D19970557Lj.pdf >.

7 A. Zoll, in: *Kodeks...*, comment on Article 1, thesis 42.

8 W. Wróbel, A. Zoll, *Polskie...*, p. 332.

9 J. Giezek, in: D. Gruszecka, K. Lipiński, G. Łabuda, J. Giezek, *Kodeks...*, comment on Article 31, thesis 9.

The principle is that mature persons have mental competence. A fault can be attributed to them and they can be held liable for actions that meet the characteristics of a crime. For this reason, the CC does not define sanity but rather sets out the reasons for an exception to the rule, i.e. the state of insanity[10] which – if present at the time of the criminal act – excludes the perpetrator from being held legally responsible. Under the CC, insanity is determined using a mixed, psychiatric and psychological, method. This means that the state of insanity must be rooted in the perpetrator's specific mental illness (the psychiatric aspect of insanity). However, the perpetrators will not be considered insane whenever they are diagnosed with these disorders, but only if the disorders lead to the inability to recognize the meaning of one's actions or to control them (the psychological aspect of insanity).

2. Insanity

Under Article 31 § 1 CC, the state of insanity may originate from mental illness, mental impairment, or other disturbance of mental functions. Mental illness here is defined narrowly, and it is linked to the occurrence of psychotic disorders in perpetrators. This category includes mainly schizophrenia and delusional disorders. Mental impairment means intellectual disability. The category of „other disturbance of mental functions" is very broad and may include sexual preference disorders (paraphilias), personality disorders (psychopathy), disorders due to the use of psychoactive substances (alcoholism), but also those resulting from somatic diseases (epilepsy, Alzheimer's disease)[11]. Although in theory each of these disorders may lead to insanity, in practice, insanity is most often due to mental illness or deep mental impairment. It is assumed that sexual preference disorders and personality disorders alone will not result in the perpetrator being insane, although this does not result from the definition of insanity in the CC but practice. However, insanity and full sanity are not just two points in space. They mark the beginning and endpoint, encompassing a whole spectrum of the states of limited mental competence. From the criminal law perspective, in addition to

[10] A. Zoll, in: *Kodeks...*, comment on Article 31, thesis 4.

[11] See M. Cieślak, K. Spett, A. Szymusik, W. Wolter, *Psychiatria...*, p. 199–201.

the state of sanity, the state of limited sanity is also relevant (Article 31 § 2 CC). It does not result in the exclusion of criminal liability, but it translates into the degree of the penalty imposed. The sentence imposed on the perpetrator who committed an offence in a state of much-reduced sanity must be mitigated due to the lesser degree of attributable fault. In practice, it is assumed that sexual preference and personality disorders can sometimes lead to a state of severely limited sanity.

The insanity needs to be diagnosed as present at the time of the perpetrator's actions. The state of insanity has a bearing on the possibility of being held criminally liable when, due to mental illness, the perpetrator committed the crime in a state of limited mental capacity. This means that under Polish criminal law – in contrast to some other legal systems[12] – preventive measures are not provided for persons whose mental illness was manifested or exacerbated after the crime if the prohibited act (crime) was not linked to that illness. The occurrence of mental disorders after the crime has been committed does not preclude the perpetrator from being convicted and sentenced. At the most, it may result in the suspension of criminal proceedings or prison leave. Therefore, the Polish criminal law system does not provide for preventive measures as a response to the threat posed by the perpetrators due to their mental illness developed after the crime and not linked to the crime committed.

Since, as a rule, an adult is assumed to be sane and the state of insanity is exceptional, this means, from the criminal proceedings perspective, that sanity during the crime does not have to be proved. It must be demonstrated that the perpetrator acted in a state of insanity or limited sanity. In such a case, the primary evidence is an expert witness report provided by psychiatrists. Expert psychiatrists are appointed when it is necessary to consult them on the mental health of the accused (Article 202 § 1 of the Code of Criminal Procedure[13]), including when circumstances arise during the proceedings which prompt justified doubts as to the sanity of the accused. At the expert psychiatrists' request, the

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12 For example, for Russia, Ukraine or Slovakia, see: A. Budziak, *Środki...*, p. 233–234; A. Wróbel, *Środki...*, p. 164–165; A. Wróbel, *Lecznicze...*, p. 196.

13 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 2021, item 534, as amended), hereinafter: CCP. Text available at < http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970890555/U/D19970555Lj.pdf >.

mental health examination of the accused may be combined with observation in a medical facility (Article 203 § 1 CCP). As a minimum, the opinion should be drawn up by two expert psychiatrists. However, other expert witnesses (such as psychologists, sexologists, neurologists, Article 202 § 2 CCP) may also be appointed to take part in the opinion in addition to psychiatrists.

3. Two-track code

In the event of a criminal act being committed, the CC provides for two possible ways of reaction: a penalty and/or a protective measure. Therefore, the CC belongs to the group of „two-track" codes. The most important feature of the preventive measures, which distinguishes them from penalties, is that they are justified not because of the perpetrators' actions but the threat they pose to legal interests in the future. Preventive measures, unlike the penalty, do not require attributing fault to the perpetrators and are not intended to cause them hardship. This, at the most, may form a side effect of the protective measures. They aim to protect society and, in the long term, also to cure the perpetrators to the possible extent to restore them to normal functioning in society. For this reason, they are imposed indefinitely and implemented until the threat posed by the perpetrator to the legal interests ceases (for example, due to improved mental health). For this reason, the relationship: „committed criminal act – preventive measure" is significantly different from the relationship „committed crime – penalty".

The decision to impose a protective measure provided for in the CC always requires a prior criminal act. It is therefore not possible to impose such a measure before a person with mental illness has committed the prohibited act (criminal law does not provide for pre-tort measures). However, preventive measures are not a reaction to the act itself, but to the threat posed by the perpetrator that has revealed itself in the form of the offence committed. Preventive measures may be imposed instead of penalty or along with it (together with the penalty). Instead of a penalty, the non-accountable perpetrators are subject to preventive measures. This is because a penalty cannot be imposed and the only possible measure is to apply the preventive measure. It is imposed, in addition to a penalty, on the accountable perpetrators or those who committed the

offence in a state of severely limited sanity. If such perpetrators suffer from mental disorders which are a source of threat to the legal interests of other persons, a preventive measure rather than a penalty is the appropriate way of responding to that threat.

In principle, the CC provides for four different preventive measures:

1) electronic monitoring of a person's location,
2) therapy,
3) addiction therapy,
4) placement in a psychiatric facility (Article 93a § 1 CC).

The first three of the above measures are non-custodial (non-isolation), while the placement in a psychiatric facility is related to the stay in a secure forensic mental health unit. Electronic monitoring of a person's location intends to subject the perpetrators to uninterrupted control of their whereabouts using technical devices, including a body-worn transmitter (Article 93e CC). Therefore, electronic monitoring of a person's location is not a therapeutic measure in itself, it is a type of electronic surveillance intended to reduce the risk of an offence being committed by controlling the location of the person on whom the measure is imposed[14]. Therapy and addiction therapy means an obligation to appear regularly at an outpatient medical facility designated by the court and to undergo, as appropriate, a pharmacological treatment intended to impair sexual drive, psychotherapy or psychoeducation (in the case of therapy), or detox treatment (in the case of addiction therapy, Article 93a § 1 and 2 CC).

The protective measure may be imposed on the perpetrator who:

1) committed a prohibited act in a state of insanity,
2) has been sentenced for a crime committed in a state of limited mental capacity,
3) has been sentenced for a specific crime (murder, grievous bodily injury, rape, paedophilia) committed due to the deviation of sexual preferences,
4) has been sentenced to the penalty of deprivation of liberty without the conditional suspension of its enforcement for an intentional crime against life and health, freedom, family and guardianship, and sexual liberty committed due to the personality disorder of such

[14] P. Zakrzewski, in: *Nowelizacja...*, thesis 14.63.

character or intensity that there is at least high probability that the perpetrator will commit a prohibited act involving the use of force or the threat of its use, or

5) has been sentenced for a crime committed due to the addiction to alcohol, abusive substance or another similarly effective substance (Article 93 CC).

Because the imposition of the measures that are applied for drug-related crimes (abusive substance, psychoactive substances) is governed by a separate legal act (the Act on Prevention of Drug Abuse[15]), the addiction treatment provided for in the Criminal Code is, broadly speaking, mainly applied to alcohol-dependent persons[16].

As results from the above, non-custodial preventive measures can be imposed on both insane and sane perpetrators. In the case of sane perpetrators, the measures may be imposed in addition to any penalty, including non-custodial penalty (fine, limitation of liberty, imprisonment with suspended custodial sentence). A perpetrator with a personality disorder is the exception; in such a case, deprivation of liberty must be imposed to apply a preventive measure (Article 93c § 4 CC). Various non-custodial preventive measures may be imposed at the same time (Article 93b § 4 CC); for example, to prevent a perpetrator with a deviation of sexual preferences from committing an offence, it is possible to impose both electronic monitoring and therapy[17]. The requirement for a decision to impose a non-custodial preventive measure is that the perpetrators are likely to repeat the prohibited act due to their mental illness. However, this probability does not have to be high.

Since a stay in a psychiatric facility is a custodial measure, the reasons for imposing such a sentence are stricter than the conditions for outpatient preventive measures. The court decides to place the perpetrators in a psychiatric facility if:

1) there is a high probability that they will commit another socially harmful prohibited act due to their mental illness or mental impairment,

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15 Act of 29 July 2005 on Prevention of Drug Abuse, Journal of Laws 2020, item 2050, consolidated text as amended.

16 For more information on the relationship between addiction treatment and the measures provided for in the Act on Prevention of Drug Abuse, see M. Pyrcak-Górowska, in: *Przestępstwa...*, comment to Article 74, thesis 3–6.

17 M. Pyrcak-Górowska, in: *Kodeks...*, comment on Article 93e, thesis 4.

2) they committed a prohibited act in a state of limited mental capacity and have been imposed the penalty of deprivation of liberty without the conditional suspension of its enforcement, the penalty of deprivation of liberty for 25 years, and there is a high probability that they will commit another socially harmful prohibited act,
3) they suffer from sexual preferences disorders and have been imposed the penalty of deprivation of liberty without the conditional suspension of its enforcement, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life, if there is a high probability that they will commit a crime against life, health or sexual liberty due to the deviation of sexual preferences (Article 93g § 1 to 3 CC).

Polish criminal law does not provide for the possibility of placing perpetrators diagnosed with solely addiction or personality disorders in a psychiatric facility. Placement in a psychiatric facility requires committing a serious criminal act and a high probability of its repetition each time.

4. Preventive measures – necessity and last resort

All preventive measures provided for in the CC (both of a non-custodial nature and the placement in a psychiatric facility) are based on the principles of necessity and last resort. This means that they can be imposed only when they are absolutely necessary, when no other means can achieve the intended purpose, i.e. reduce the risk of repeated criminal behaviour (Article 93b § 1 CC). The principle of necessity has two main practical dimensions: it implies an obligation to consider in the first instance the use of an outpatient preventive measure, and only when it is not sufficient to prevent another criminal act, the court may decide to place the perpetrator in a psychiatric facility. Secondly, the preventive measure provided for in the CC cannot be imposed when another legal institution is sufficient. The preventive measures provided for in the CC are not the only possible responses of the State to the threat posed to the public by a person with broadly defined mental disorders. Several other institutions in the legal system are protective (preventive) in nature and can be imposed down by courts as part of civil proceedings.

For example, the Act on Mental Health Protection[18] allows persons with a mental illness to be compulsorily admitted to a psychiatric facility if their previous behaviour indicates that because of that illness they directly endanger the life or health of others (Article 23 of the Act on Mental Health Protection). The Act on Education in Sobriety and Counteracting Alcoholism[19] allows imposition of a compulsory detox treatment (including in-house treatment) on persons who, due to alcohol abuse, cause family life to be broken, minors to be demoralized, evade their obligation to meet the needs of their family, or systematically disturb the peace or public order (Article 26 of the Act on Education in Sobriety and Counteracting Alcoholism). It is only when the court decides that other measures (including those provided for in civil law) are insufficient to prevent the threat of a repeated criminal act it may impose the protective measure provided for in the CC. This means, in the case of insane perpetrators, that the criminal act does not always translate into the application of the preventive measures provided for in criminal law. If preventive measures are not necessary (for example, because after the crime the perpetrators underwent effective treatment and their health improved to the extent that they are no longer likely to commit another criminal act), the criminal proceedings could be discontinued without any measures being taken.

If the preventive measures are imposed in addition to a custodial sentence, the rule is to apply them after the sentence has been served. The preventive measure is then post-penal in nature (Article 93d § 5 CC). The sequence of executing the preventive measure and penalty means that the duration of stay in a closed establishment (psychiatric facility) is not counted as part of the custodial sentence imposed. The non-custodial preventive measure can be imposed by a judgement of conviction or during the custody period, six months before the end of the penalty (Article 93d § 4 CC). The isolation measure (stay in a psychiatric facility) must be imposed by a judgement discontinuing the proceedings or in a judgement of conviction. It cannot be imposed later, during the custody period. If the preventive measure (regardless of its nature: non-custodial

[18] Act of 19 August 1994 on Mental Health Protection, Journal of Laws 2020, item 685, consolidated text.

[19] Act of 26 October 1982 on Education in Sobriety and Counteracting Alcoholism, Journal of Laws 2021, item 1119, consolidated text.

or isolation) has been imposed by a judgement of conviction in addition to an immediate custodial sentence, the court is required to verify, six months before the end of the penalty, if it is necessary to apply the measure after the custody period (Article 93d § 3 CC). Otherwise (for example, when the perpetrator was treated in prison while serving the sentence), the court is required to revoke the measure.

The application of a preventive measure is decided by the criminal court during criminal proceedings. It is likely that the most difficult element of the decision to apply a preventive measure is the assessment of the likelihood of repeated offence, both in terms of the degree of probability (i.e. whether it is high or very high) and the type of offence which may be committed (i.e. whether it may be a serious criminal act). Although it is assumed that it is the court's responsibility to assess this probability and the perpetrator's entire life should be taken into account, the assessment is most often based on the opinions of psychiatric expert witnesses. The experts must therefore determine both the perpetrator's sanity during the act (as already mentioned above) and the reasons for the use of a preventive measure (i.e. whether, because of the perpetrator's mental disturbance, it is probable for the prohibited act to be committed again, what is the degree of that probability and whether the preventive measure is necessary to prevent such an act being repeated, and, if so, which one, see Article 202 § 5 CCP). The law does not specify what methods the experts are to use when drawing up their opinions – the choice of method is at the experts' discretion only. The court can only assess the opinions through the prism of, for example, the manner of justifying the expressed conclusions or complying with the principles of logic, general knowledge, or life experience[20]. Methods based on the so-called structured risk assessment are not commonly used. When drawing up the opinions for the criminal proceedings, psychiatric experts use the so-called clinical method, in which conclusions are based on the experts' knowledge, experience, and intuition[21].

When deciding on the use of a preventive measure, its duration is not predetermined in advance (Article 93d § 1 CC). The possible duration of a preventive measure is not in any way limited by law. It also

[20] See R.A. Stefański, S. Zabłocki, *Kodeks…*, comment on Article 201, thesis 3.
[21] A. Welento-Nowacka, *Praktyczne…*, p. 88.

does not depend on the seriousness of the criminal act; theoretically, for each perpetrator, the preventive measure can be applied for life if only the reasons for which the measure has been imposed still exist. Because of this solution that consists in a permanent application of a preventive measure, it is necessary to introduce a mechanism that would ensure that the measure is applied no longer than necessary. In Polish law, the court must exercise regular periodic control over the further application of the preventive measure. In the case of a stay in a psychiatric facility, this verification takes place at least every 6 months (Article 204 § 1 of the Penal Enforcement Code[22]) and in the case of ambulatory measures at least every 12 months (Article 204 § 4 PEC). The decision of the court is based on the opinion drawn up by the head of the medical facility (psychiatric hospital, clinic) where the perpetrator is being treated (Article 203 § 1 PEC). Thus, the decision to continue applying the preventive measures is based, each time, on the current medical opinion. However, it is not the opinion of external experts (although such opinion may be sought, if necessary) but the opinion drawn up by experts (psychiatrists, therapists) involved in the perpetrator's treatment as part of the preventive measures. The preventive measures are revoked when they are no longer necessary. However, doctors do not decide to terminate the execution of the preventive measure on their own. It requires the court's decision following proceedings during which doctors are consulted. It does not require for the perpetrator to be fully treated (which would in many cases be unrealistic). It is enough to achieve a sufficient level of remission or such a change in external circumstances (e.g. a significant deterioration in the perpetrator's somatic health causing an inability to move independently) leading to the conclusion that it is no longer probable for another criminal act to be committed by the perpetrator[23]. Each of the preventive measures is revoked conditionally. If within three years after the measure is revoked, it is required again (for example because of the deterioration in the perpetrator's health), the court may reapply any preventive measure, even if the perpetrator has not committed another criminal act (Article 93d § 6 CC). The revocation

[22] Act of 6 June 1997 – Penal Enforcement Code, Journal of Laws 2021, item 53, as amended, hereinafter: PEC. Text available at < https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970900557/U/D19970557Lj.pdf >.

[23] K. Dąbkiewicz, *Kodeks...*, comment on Article 203, thesis 4.

of the preventive measure is thus, in a way, „for a test period", but this „test period" (3 years when the preventive measure can be used again) does not entail any probation obligations.

The treatment of persons to whom a protective measure is applied takes place in health care facilities. No network of special forensic medical facilities has been set up for persons undergoing therapy or drug therapy. Their treatment, based on the criminal court's order, may take place in any treatment facility offering adequate psychiatric services. This means that perpetrators sentenced to receive treatment can do the therapy, for example, in a mental health clinic closest to their place of residence. However, the facility is indicated by the court. The perpetrator cannot freely decide where to go for treatment.

Individuals ordered to be admitted to a psychiatric hospital are placed in closed forensic mental health units in hospitals that also treat „regular" patients in their other units. The system of forensic mental health unit consists of units with 3 degrees of security: basic, high, or maximum (Article 200 § 2 PEC). These units vary, among others, by the number of staff per patient, the type of technical security designed to protect against patient's escape[24], or the possibility of taking leave by the patient (passes are only possible in units with basic security, Article 204d PEC). There are only 2 maximum-security units in Poland. They are intended for the most dangerous perpetrators and act as separate forensic psychiatry centres (they do not accept „ordinary" patients). The court decides to which security unit the perpetrator will go based on the opinion of a special body – the Psychiatric Committee for Preventive Measures. There is only one such committee in Poland. It provides opinions on the place of hospitalization of each forensic patient (Article 201 § 1, 1a, and 2 PEC). During the execution of the preventive measure, the degree of security can be changed, both to a higher and a lower level, if this is justified by a change in health status. The decision to change the level of security is taken each time by the court. The discharge from a psychiatric hospital, although not explicitly provided for by law, is possible in practice in the case of the basic security unit. Such

[24] The conditions for securing psychiatric facilities intended to implement a preventive measure are laid down in the Ordinance of the Minister of Health of 16 January 2017 on the Psychiatric Committee on Protective Measures and the Execution of Protective Measures in Psychiatric Institutions, Journal of Laws of 2020, item 1780.

design of the forensic psychiatry system results in a dual status of persons to whom medicinal preventive measures are applied: the enforcement of the preventive measure is supervised by a criminal court which decides whether to revoke the measure or not. At the same time, they are also patients of public medical facilities. Although their treatment is compulsory, they are entitled to the patients' rights and the treatment itself should be carried out in line with current therapeutic methods[25].

5. Problematic gradation of preventive measures

Although Polish law provides for both non-custodial and isolation preventive measures, there are not too many mechanisms that would allow for, if necessary, a smooth and gradual transition between non-custodial treatment and isolation. There are no intermediate stages between a stay in a closed psychiatric institution and a non-custodial therapy; for example, treatment in psychiatric hospital settings, but not in a closed unit.

If the perpetrator is discharged from a psychiatric hospital, it is possible to impose a non-custodial preventive measure, including therapy, rather than psychiatric detention (Article 93d § 2 CC). This means that a perpetrator discharged from a psychiatric hospital may be obliged to continue treatment in non-custodial settings. However, when imposing the obligation to undertake treatment, the court cannot order the perpetrator to be supervised, for example, by a court-appointed guardian. There are no legal mechanisms in place to support the perpetrators discharged from the psychiatric hospital in their treatment by entrusting them under the supervision of a person who could control whether the perpetrator actually continues the treatment. If perpetrators stop their treatment, their health deteriorates and, given their behaviour, there is a risk that they may commit another serious criminal act; the court may decide to place the perpetrator in a psychiatric hospital, however, no later than 3 years after they were discharged from the hospital (Article 93d § 6 CC). After that time, it is not possible to place the perpetrators back in the hospital (unless they commit another offence and new criminal proceedings are launched).

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[25] J.K. Gierowski, L.K. Paprzycki, *Niepoczytalność...*, p. 8.

Even more difficult is the case when the criminal court imposed outpatient therapy on perpetrators, and they fail to respect that judgement and do not undergo the treatment imposed. In such a case, the criminal court is not allowed to change the preventive measure to an isolation measure and place the perpetrator in a psychiatric hospital. The criminal law only provides that failure to undergo treatment established as a preventive measure constitutes a criminal act punishable by a penalty of limitation of liberty or imprisonment of up to 2 years (Article 244b § 1 CC).

There are currently 35 forensic mental health units with basic security in Poland, with 1979 beds in total. There are 17 high-security forensic psychiatry units (916 beds) and 2 maximum-security units (145 beds). There are therefore 54 units in the forensic psychiatry system offering a total of 3,040 beds[26]. In terms of population, this gives 8 beds per 100,000 inhabitants.

As regards the number of preventive measures imposed: a stay in a psychiatric facility was imposed 559 times in 2016 and 625 times in 2017[27]. Over the years, the number of psychiatric detentions imposed per year has remained relatively constant. Due to the often long-term duration of stay at the forensic mental health unit, the number of beds available in the system is not always sufficient. It happens that a person placed in a psychiatric hospital under the criminal court's judgement has to wait to be admitted (entered in the hospital waiting list)[28].

Outpatient therapy is a relatively new preventive measure. The provisions which allow to impose it were introduced into the CC in July 2015[29]. Previously, the system of preventive measures was even less flexible – an insane perpetrator could be placed only in the psychiatric hospital.

[26] The number of beds was established for 15 August 2021 based on the Notice of the Minister of Health of 30 August 2020 on the Lists of Psychiatric Facilities Intended for the Application of the Preventive Measure Referred to in Article 93c § 1 to 3 of the Criminal Code and of Therapeutic Facilities Intended to Treat Perpetrators Specified in Article 93c of the Criminal Code as Part of Inpatient Services, Monitor Polski 2020, item 794.

[27] Data source: public information provided by the Ministry of Justice on the application of intrinsic protective measures.

[28] On the problem of the lack of free beds in the forensic psychiatry system over the years, see M. Pyrcak-Górowska, *Detencja…*, passim.

[29] A broad reform of the provisions of the CC relating to preventive measures took place under the Act of 20 February 2015 amending the Criminal Code and some other laws, Journal of Laws 2015, item 396, which entered into force on 1 July 2015.

If there were no indications to apply an isolation measure, the criminal proceedings were discontinued without imposing any medical measures as the court was unable to impose the obligation to treat the perpetrator in outpatient conditions. In 2016, the first full calendar year of application of the provisions enabling to impose the outpatient therapy, the measure was applied 182 times, one year later (in 2017) – 417 times and the numbers increase[30].

An important problem in the Polish system of preventive measures, despite the introduction of an alternative to the psychiatric detention measure, is the persistence of the number of custody cases and the structure of the types of offences that form the basis for placement in a psychiatric hospital. It would appear that the change of law that took place in 2015 should lead to a reduction in the number of psychiatric detentions ordered and, as a consequence, a reduction in the number of persons in the forensic mental health units. The revision of the rules was designed to emphasize the assumption that the use of outpatient measures is a priority. It could therefore reasonably be expected that outpatient therapy would outperform psychiatric detentions in cases where less serious offences have been committed and only the perpetrators of the most serious acts (e.g. homicide, violence, or rape offenders) would be placed in psychiatric hospitals.

6. Detention in psychiatric facilities – statistics

Unfortunately, the new rules have not produced the expected results. The analysis of the statistics available after 2015 leads to the conclusion that, following the reform of the preventive measures listed in the CC, the number of decisions to place a perpetrator in a psychiatric hospital has not decreased significantly, while the number of protective measures imposed in total has almost doubled. This probably results from the fact that outpatient therapy has not replaced psychiatric detention, but it has been applied in cases where the criminal proceedings would have been discontinued without any preventive measure being imposed before 2015[31].

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[30] Data source: public information provided by the Ministry of Justice on the application of intrinsic preventive measures, whereas the most up-to-date statistics, due to the difficulties associated with the COVID-19 pandemic, are not yet available.

[31] See M. Pyrcak-Górowska, *Czy nowelizacja...*, p. 44–45.

Based on the statistics provided by the Ministry of Justice and own studies of the court files[32], it is possible to indicate the types of offences that most often formed the basis for a decision to place a perpetrator in a psychiatric hospital. When taking into account the criterion of an infringed or threatened legal interest (understood as an interest referred to in the title of the CC chapter covering the types of offences committed by the perpetrators), the most often basis for placing the perpetrator in a forensic mental health unit is committing a crime against family and guardianship (approx. 27–28% of cases), then against freedom (approx. 20–21% of cases), life and health (approx. 18–20% of cases), property (approx. 16–19% of cases) and the functioning of state and local government institutions (approx. 5–6% of cases). The exact percentages vary from year to year, so they are approximate and in certain ranges, but the general trend is constant. In total, the offences against the abovementioned legal interests form the basis for detention in around 90% of cases. It is worth noticing that the above summary does not consider offences against sexual freedom[33].

As regards the specific types of offences that are the basis for the placement in a closed psychiatric institution, it can be pointed out that in 2016 the most serious prohibited act, namely murder, was the basis for less than 10% of all such decisions. The most common types of offences for which detention was imposed included abuse (domestic violence, Article 207 CC), criminal threat (Article 190 CC), and the damage of someone else's property (Article 288 CC). Relatively often, detention was also imposed in the event of theft, theft with battery, stalking, and violation of bodily integrity or insulting a public officer (e.g. a police officer during an intervention – this act falls within the category of the aforementioned offences against the functioning of state and local government)[34].

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[32] Court files were examined to determine the practice of the application of preventive measures. The studies were carried out in a total of 24 Polish courts: 16 district and 8 regional. The scope of the study covered the cases filed in the courts in 2016-2017. Access was granted to 165 cases (120 in district and 45 in regional courts) which legally ended in the discontinuation of the proceedings and the application of a preventive measure for the insane perpetrator. For more information on the methodology of the study, see M. Pyrcak-Górowska, *Założenia…*, p. 554–555.

[33] Data source: public information provided by the Ministry of Justice on the application of intrinsic protective measures and the file research conducted. Author's calculations.

[34] Data source: public information provided by the Ministry of Justice on the application of intrinsic protective measures and the file research conducted. Author's calculations.

Therefore, perpetrators of particularly serious and violent acts are not often placed in the psychiatric hospital, but rather nuisance perpetrators who committed relatively few serious acts against property, not linked to violence or threats against a person. An important problem is that these people often spend more time in psychiatric institutions, sometimes longer than the penalty that would have been imposed on them if they were healthy and considered being accountable. This is the consequence of applying preventive measures without setting any maximum time limits for their implementation.

Therefore, it is necessary to ask about the reasons for such a situation. They may appear to include: no sufficiently flexible mechanisms for switching between non-custodial and isolation measures, no possibility of converting the original outpatient measure into isolation (if this is necessary at the time, the preventive measure is applied), no possibility of imposing supervision in a form of a probation officer or other person that would control treatment in non-custodial conditions on the person subject to undergo such treatment. It may also be so that the rationale for imposing isolation protective measures is poorly shaped, i.e. it is too wide; placement in a psychiatric hospital can be imposed when the perpetrator commits a serious criminal act and there is a high likelihood that such an act might be repeated. However, the regulations specify neither a positive nor a negative category of conduct for which hospital admission may be decided, i.e. they do not require the act to involve the use of violence or threat of violence or to harm specific legal interests.

7. Conclusion

Finally, to complete the picture of the application of preventive measures in Poland, own studies of court files were conducted. The studies, covering cases from 2016 to 2017 in several different courts across the country, revealed data on mental disorders diagnosed in insane perpetrators referred to a psychiatric hospital. In 60% of cases, insane perpetrators were diagnosed with a mental illness only (mainly schizophrenia and delusional disorders). In 37% of cases, mental illness was combined with other mental disorders (most often addiction – around 22% of cases, plus mental illness with mental retardation, mental illness with personality disorders – around 4% of cases, but also, for example, illness, addiction,

and mental impairment). Only 3% of the perpetrators placed in a psychiatric hospital were not diagnosed with mental illness, but mental impairment (sometimes combined mental impairment and personality impairment)[35].

It follows from the above that the vast majority of cases of persons with mental disorders in psychiatric hospitals under a criminal court ruling are the perpetrators with mental illness – psychosis. Persons with personality disorders are admitted to hospitals only when personality disorders are diagnosed together with mental illness or mental disability, which may constitute a significant difference that distinguishes Poland from some other countries. This is due to the circumstances already mentioned above, i.e. the absence of an isolation preventive measure that would provide for such a category of perpetrators in the provisions of the CC. Polish law used to provide for a preventive measure similar to the post-penal detention of perpetrators with, among others, personality disorders. It was introduced to the legal system in 2013 by the provisions of a separate law[36]. The application of the measure was imposed by the civil, not a criminal court, based on the civil law provisions. In general, the procedure for the application of the measure was that before the perpetrator with, among others, personality disorder completed the imprisonment sentence, the head of the penal institution, based on the opinions drawn up during the execution of the penalty, applied to the civil court to impose post-penal measures not provided for in the judgement of conviction. One of the measures that could be imposed was the placement in a specially established centre for persons presenting a risk. The provisions of the law raised (and continue to raise) several controversies regarding both the conflict of the regulations with the constitution and their catastrophic practical application, including inadequate living conditions in the centre and the lack of an adequate offer for the individuals placed there, which effectively prevents them from leaving the centre[37]. However, those provisions may only be applied to persons convicted of offences committed before July 2015. The measures provided

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35 Data source: study of court files.

36 Act of 22 November 2013 on Dealing With Persons With Mental Disorders Threatening the Life, Health or Sexual Freedom of Others, Journal of Laws 2020, item 1346, as amended.

37 See E. Dawidziuk, *Izolacja…*, p. 219 ff; M. Płatek, *Negatywne*…, p. 93 ff.

for in the CC should apply to persons who committed an offence after that date. However, this does not provide for any form of post-penal isolation after having served the entire custodial sentence for the perpetrators of the most serious crimes with personality disorders.

Summary

The paper presents the Polish system of preventive measures, which are measures applied to „dangerous" perpetrators who pose danger to society due to their broadly understood mental disorders. It discusses the substantive prerequisites for the application of preventive measures, as well as the procedure of their application and implementation. Some differences between the Polish system and other European systems are also shown. In addition to discussing the provisions of law, the article presents statistics on the use of preventive measures in Poland, as well as information, based on the conducted research, on the prohibited acts which are bases for application of preventive measures, and on mental disorders diagnosed in people against whom these measures have been implemented.

Keywords

preventive measures, „dangerous" perpetrator, mental disorders, insanity, placement in a psychiatric facility

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