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Penitentiary supervision — the Polish model of ensuring the legal and correct performance of imprisonment

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I

The purpose of this study is to present, in a theoretical and dogmatic perspective, penitentiary supervision authorities. The model of supervision of the legal and correct execution of measures of isolation adopted in our country is an original legal mechanism, developed specifically for enforcement proceedings[1]. Currently, it is governed by the

[1] Penitentiary supervision is an institution that in the Polish tradition has a long and well-established position. In our penitentiary history this type of surveillance already appeared in the nineteenth century (concepts mentioned by e.g. J.U. Niemcewicz, K. Potocki). The idea of penitentiary supervision was permanently established in the Polish legal system during the Interwar period (the prosecutor model). After World War II a significant moment in the development of particularly the judge model of penitentiary supervision was the adoption of the Act of 19 April 1969 Executive Penal Code (Journal of Laws No. 13, item 98), the regulations contained especially in Article 27–33. It must be clearly emphasized that this supervision in its permanent presence over subsequent years until today, has evolved considerably. More information on penitentiary supervision can be found in: J. Śliwowski, *Sądowy nadzór penitencjarny*, Warsaw 1965; S. Pawela, *Kodeks karny wykonawczy. Nadzór penitencjarny według k.k.w.*, Warszawa 1971; E. Hansen, *Problemy nadzoru penitencjarnego*, Warsaw 1976; T. Kalisz, *Sędziowski nadzór penitencjarny. Polski model nadzoru i kontroli nad legalnością i prawidłowością wykonywania środków o charakterze izolacyjnym*, Wrocław 2010.

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Executive Penal Code (Article 32–36 of the Executive Penal Code)[2] and the Regulation of the Minister of Justice on the manner, scope and mode of penitentiary supervision of 2003[3]. Penitentiary supervision in its legal structure is now exercised only by a penitentiary judge, and not by courts (Article 32 of the Executory Penal Code). To the extent permitted by the Executive Penal Code, the judge supervises, but does not adjudicate, and as a result of his or her findings, performs intervention measures specified by law[4].

The Executive Penal Law doctrine assumes that penitentiary supervision is an instrument of controlling and supervisory character, institut-

[2] The Act of 6 June 1997 Executive Penal Code (Journal of Laws No. 90, item 557, as amended).

[3] Regulation of the Minister of Justice of 26 August, 2003 on the method, scope and manner of penitentiary supervision performance (Journal of Laws No. 152, item 1496, as amended).

[4] In the teaching on penitentiary law, the origins of the idea of penitentiary supervision conducted by the judicial factor, are associated with the Theodosian Code (409) and The Code of Justinian (533). Also, Emperor Leo VI the Philosopher living in the tenth century ordered judges to visit prison once a week in order to conduct interviews with prisoners in connection with the desire to establish whether they are treated in accordance with the law. The Rules of the Parliament in Paris from 1425 can be cited as an example. The said Parliament required judges to visit prisoners, check their registry and supervise the maintenance of hygiene. Another example are the edicts of the Catholic Kings of Toledo (1480) and Medina (1489) requiring judges and prosecutors to visit prisons. A characteristic solution was an order of the French King Henry II, who in 1549 obliged judges to visit prisons three times a year. In many Italian countries in the eighteenth century a special judge was appointed, whose task was to maintain close contact with the prisoners and to stimulate their transformation processes. The English Goal Act of 1833 is also worth mentioning. It provided that judges should actively participate in organizing prisons and raised the need for drafting quarterly reports as to the conditions in these prisons. The participation of a (court) judge in the course of enforcement proceedings, especially in the context of control or supervision of the implementation of imprisonment is also clear in the contemporary doctrine and practice of the functioning of isolation institutions in Europe. A classic example of this is Italy and its institution of the supervisory judge (la Magistratura di sorveglianza) and France with its judge for the execution of penalty (juge de l'application des peines). Another supervision model functions in e.g. Great Britain which has its Chief Inspector of Prisons — an institution completely unrelated to enforcement proceedings, carrying out checks concerning the legal and factual situation of prisoners (or inmates).

ed in the course of executing isolation measures[5]. Currently, it is emphasized that isolation measures, as interfering with the rights and freedoms of citizens to the greatest extent, require appropriate legal guarantees protecting the prisoner. Solutions functioning in this field are thus intended to create a real environment for the controlling authorities directly responsible for penalty enforcement. The assumptions indicated may be realized in many ways which, with the development of the doctrine and Executive criminal law practice, have been developed or adapted particularly to its needs from other legal solutions. A specific example of such a deliberately developed institution is penitentiary supervision (Article 32 of the Executive Penal Code).

II

Penitentiary supervision is firmly rooted in the Polish legal system. Drawing on the French and Italian solutions, in the course of its evolution it has transformed into the original and clearly autonomous structure it is nowadays; a structure that is typical of our legal system. Taking into account the provisions building up the Polish model of this institution, it can be concluded that the primary function (purpose) of penitentiary supervision is the protection of law within the scope of controlling the legal performance of judgments in criminal proceedings, proceedings relating to tax crimes and offences and in proceedings in minor offence cases (in terms of enforcement of isolation), as well as supervision over the enforcement of so-called other measures indicated in the penitentiary supervision procedure (penalties for breach of order and coercive measures resulting in deprivation of liberty).

Alongside the basic function, three complementary functions can also be indicated: 1) the function of checking how the purposes of particular sanctions or other measures are realized in the process of enforcement of judgments, 2) the function of active development of measures

[5] S. Waltoś, *Model postępowania przygotowawczego na tle prawno-porównawczym*, Warsaw 1968, p. 331; M. Cieślak, *Pojęcie i rodzaje nadzoru w procedurze karnej na tle obowiązującego prawa*, Państwo i Prawo 1963, No. 8–9, p. 245; S. Pawela, *Kodeks karny wykonawczy. Praktyczny komentarz*, Warsaw 1999, p. 118.

and means used with convicted persons or other imprisoned persons, and 3) the function of control and influence on the modification of the process of enforcement of sanctions and other measures.

The basic element of each supervisory and controlling institution is called verification criteria. These criteria should be treated as legal reference points which are the basis for assessing the activity of bodies subjected to supervision. The provision of Art. 32 of the Executive Penal Code stipulates that penitentiary supervision is to be executed taking into account two criteria: legality and correctness.

Ensuring legality means ensuring lawful activities of the entities involved in the enforcement of judgments. The supervised activity must, therefore, comply with the law in terms of the existence and respect of the content of the legal basis (activity under the law and within the limits of the law)[6]. It should be assumed that these actions or states are legal which have arisen as a result of actions based on the law. A penitentiary judge, analyzing given activities as to their legality, should confront them with the law in force at a given time, which in turn leads to the conclusion that those actions or states are legal which are not inconsistent (which comply) with the law. The penitentiary supervision body examining specific actions in terms of their legality, must bear in mind the breadth and the level of material and formal complexity in the area of sources of Executive Penal Law. Thus, in supervisory activities, the very basic rule should always be remembered, i.e. the constitutional hierarchy in terms of sources of law (as defined in the Constitution of the Republic of Poland, Chapter III. Sources of Law, Article 87–94)[7]. What is also extremely important here are the so-called principles of statutory restriction, in terms of the rights and obligations of prisoners, as expressed in Article 4 § 2 of the Executive Penal Code. The said solution stipulates that a person who is convicted maintains civil rights and liberties, and their restriction can result only from a law and a judgment issued on the basis of the law. In accordance with this principle, prisoners retain all rights and freedoms under the Constitution which were not taken away from them under a law and a final judgment.

[6] S. Pawela, *Kodeks karny wykonawczy. Praktyczny komentarz*, Warsaw 1999, p. 118.

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

The correctness is the evaluation focusing on the activities of institutions enforcing isolation from the perspective of the degree to which objectives and tasks of a criminal penalty have been realized. The subject of evaluation, therefore, concerns activities necessary to achieve directly or indirectly the intended effect, both overall and partial. In this assessment it must be determined whether a given action is rational, useful and whether it leads to the implementation of the intended results. The correctness criterion is a means necessary for evaluation of the performance of political and criminal tasks. This criterion clearly extends the concept and scope of penitentiary supervision. Supervision which focuses on correctness is especially successful when assessing the effectiveness of social reintegration, active shaping of methods and measures of the penitentiary and the control and influence on modification of the process of enforcement of sanctions and other measures[8].

The Polish legislator decided on a very open formula of supervisory institutions within which it will be essential to monitor and assess not only the formal elements, but also the issues and problems of material nature, where the supervision enters the realm of strictly substantial issues[9].

A key issue in the dogmatic analysis is the question of determining the content and scope of the supervisory powers (i.e. legal surveillance measures). In the practical perspective a group of legal measures taken by the penitentiary judge has a direct impact on the subsidiary bodies. This influence is expressed through the test for compliance with legally

[8] The use by the legislator in constructing the penitentiary supervision of two different criteria in terms of their scope leads us to the problem of their separation. S. Lelental rightly pointed out that the strict distinction of tasks relating to the legality from the tasks relating to the correctness of the sentence execution or the measure used is perhaps sometimes difficult. As a general rule, what is illegal cannot be correct, however, one may imagine actions that are within the scope of the concept of legality and yet can be evaluated as incorrect. Looking at the problem slightly differently, we can say that all the supervisory criteria is subordinated to the criterion of legality. This means that the criterion of correctness may be regarded only within the scope of the law in force. What is incorrect, despite complying with the specific criteria of supervision, can never be contrary to the law. S. Lelental, *Kodeks karny wykonawczy. Komentarz*, 5th edition, Warsaw 2014, pp. 142–143.

[9] T. Kalisz, *Sędziowski nadzór penitencjarny. Polski model nadzoru i kontroli nad legalnością i prawidłowością wykonywania środków o charakterze izolacyjnym*, Wrocław 2010, pp. 135–137.

defined criteria of legality and correctness, of the functioning of the supervised entities. Competences create a relationship between the supervisory authority and the supervised entities. This relationship is of an intense and direct nature which involves the removal of irregularities and their prevention in the future. Legislation must set very precise limits, beyond which a judge's powers may not exceed. Sometimes the role of the judge in the area of supervisory activities must be limited to signaling their observations to the relevant bodies authorized to decide in particular matters.

Supervisory powers stipulated under Executive Penal Law (over 30 supervisory measures)[10] demonstrate the importance of this institution.

[10] Among the most important supervisory powers the ones worth mentioning include: Article 33 § 1 and 2 of the Executive Penal Code — the right to request information, Article 34 § 1 of the Executive Penal Code — revoking an unlawful decision of enforcement proceedings institutions, Article 34 § 4 of the Executive Penal Code — the *habeas corpus* type of an instrument in the event of unlawful deprivation of liberty (notification of the authorized body or decision to release), Article 35 § 1 and 2 of the Executive Penal Code — influence on the actions of another authority to issue a particular decision, Article 35 § 3 in primo Executive Penal Code — a motion to the body overseeing the administration of a given institution that performs isolation to remove within the specified date the existing faults, Article 35 § 3 in fine of the Executive Penal Code — a motion to the competent minister for suspension of activity in the whole or in a part of a given institution which performs confinement, Article 88a §1 of the Executive Penal Code (Article 212a of the Executive Penal Code in relation to the temporarily detained) — notification procedure of the penitentiary judge on the imprisonment of the so-called dangerous convict in a designated ward or a prison cell of a closed prison, Article 88d of the Executive Penal Code (Art. 212ba of the Executive Penal Code in relation to the temporarily detained) — the procedure for issuing opinions on inclusion in and exclusion from special protection of convicts, Article 89 § 3a of the Executive Penal Code — permission to change the classification decision with regard to the type of prison concerning a convicted person with sexual preference disorders, Article 105 § 4 of the Executive Penal Code (Article 217a § 2 of the Executive Penal Code in relation to the temporarily detained) — notification procedure of the penitentiary judge on detention or censorship of correspondence and controlling conversations during visitations and telephone calls, Article 105 § 6 of the Executive Penal Code — a procedure of notifying the penitentiary judge on confiscating packages received and sent by a convicted person, or destruction of such packages, Article 110 § 2c of the Executive Penal Code — consent to extend the period of placement of a prisoner in a cell in the conditions of under 3m2 per person. This competence replaced an earlier one classified as information means — Article 248 § 1 of the Executive Penal Code — the procedure of notifying the penitentiary judge on placing prisoners, for a specified period, in conditions where cell area per person is less

A wide range of competencies shows the space within which the penitentiary judge can, and is obliged to enter the sphere of independent operation of the supervised institutions. It should also be notes that the penitentiary judge, fulfilling their supervisory role, may use only those measures that have been granted to him by law.

Supervisory powers can be grouped into several categories taking for the classification criteria the legal nature and the extent of the interference of individual supervisory measures. In practice, we can distinguish: 1) own correction resources — verification of repressive measures, having the character of direct interference in the activities of the supervised entity; 2) suspension of the enforcement of a legal act; 3) the means of so-called indirect interference — supervisory instruments carried out by competent authorities of administrative-official supervision, or other authorities competent to take a position on a given matter; 4) approval — authorization — supervisory measures providing for the obligation to obtain consent before issuing a particular decision of the supervisory authority; 5) request for information and notification — information meas-

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than 3 m^2, Article 118 § 1 of the Executive Penal Code — a procedure of notifying the penitentiary judge about the situation in which the execution of a sentence of imprisonment may threaten the convict's life or pose a serious danger to their health, Article 139 § 6 and 6a of the Executive Penal Code — consent of the penitentiary judge for awards listed in Article 138 § 1 point 7 or 8 of the Executive Penal Code, Article 145 § 3 of the Executive Penal Code — consent of the penitentiary judge to the placement in solitary confinement for a period of over 14 days, Article 148 § 1 in primo of the Executive Penal Code — suspension of the execution of a disciplinary sanction, Article 148 § 1 in fine of the Executive Penal Code — revocation of the disciplinary penalty due to its failure to comply with the law, Article 148 § 1 in fine of the Executive Penal Code — referring the execution of disciplinary penalty to the head of prison for reconsideration, Article 223b § 3 of the Executive Penal Code — the consent of the penitentiary judge to the decision of the Chief Judge hearing the case on placing the convict in a separate room of the Police Station, Border Guard Unit, garrison detention unit in connection with participation of the convict in court proceedings. Article 247 § 2 in primo of the Executive Penal Code — the procedure of notifying a penitentiary judge on imposing restrictions or prohibitions related to the specific health or safety issues or to a serious safety threat, as referred to in Article 247 § 1 of the Executive Penal Code, for a period of up to 7 days, Article 247 § 2 in fine of the Executive Penal Code — consent of the penitentiary judge for the extension (more than 7 days) of the period of restrictions or prohibitions referred to in Article 247 § 1 of the Executive Penal Code.

ures; 6) advisory measures (counseling) — not formalized assistance and advice.

These measures clearly show the arrangement of a series of instruments built in the logical system. They allow for a systematic increase of the scope of the intervention, if needed. It does not, obviously, allow the situation where the prison's management is put in the hands of the judges. The aim is rather to provide greater control over the enforcement proceedings. Authorities directly responsible for the execution of imprisonment must not be denied or limited in performing their basic duties and powers. Only a supervision mechanism built in this way can constitute an effectively operating legal institution. The existing regulations concerning penitentiary supervision are characterized by a high level of complexity. These are modern structures of express practical use.

A slightly different problem of the Polish penitentiary supervision model is the so-called "true identity of persons" executing penitentiary supervision and issuing decisions as a penitentiary court. The indicated correlation is characteristic of our penal system. It involves a combination of adjudicating and supervisory competences (a penitentiary judge is also a judge of the penitentiary court ruling in key parts of the enforcement procedure — e.g. conditional release, prison leave, etc.). Each of the identified functions is clearly defined by law. It is characterized by completely different modes of action (the penitentiary court composed of one person ruling on matters reserved for its competence in the form of a decision, a penitentiary judge realizes its distinct competences in the form of an order). In practice, the judge of the penitentiary department can act in both roles. The knowledge and experience gained in the implementation of penitentiary supervision can be utilized in the course of adjudication, whereas the observations made at the hearing of cases may be discounted in the context of supervisory activities. Notwithstanding the so-called identity of persons indicated above it is worth noting another important aspect. Every time when in the course of enforcement proceedings a penitentiary court or penitentiary judge appears, we talk, in light of the regulations relating to the common judiciary body, about a regional court judge. This means in fact that to these specific tasks top experts are appointed who have considerable additional work and life experience.

III

In conclusion, the Polish penitentiary supervision model is based on knowledge and experience of penitentiary judges (it is a small group of approx. 140 people). The supervisory activities started by the judge mainly consist in checking, correcting, including revoking and changing, of penitentiary administration legal acts and concern the interference in the activities undertaken with relation to specific convicts. Penitentiary supervision is carried out in a well-defined area. It is a guarantee of legal and proper execution of the penalty of imprisonment.

The increasingly complex legal nature of a sentence, compels us to seek efficient mechanisms for its supervision. The administration of prisons cannot, though, be deprived or limited in meeting their basic duties and powers. Therefore, the provisions governing penitentiary supervision must set very precise limits beyond which decision-making (supervision) of the judge cannot reach. Sometimes his or her role in the area of supervisory activities must be limited to signaling their observations to the relevant bodies authorized to decide on a given matter.

Penitentiary supervision of judges is a complex legal and organizational issue. It is an institution strongly affecting the execution of imprisonment, having a direct impact on the actual functioning of the Polish prison system. It will not be an exaggeration if at this point one claims that the supervisory activity of penitentiary judges shapes prison policies (and at least it should be so).

Summary

This paper analyzes the Polish model of ensuring the legal and correct performance of imprisonment and other forms of detention as a response to crime. Key issues include indications of: supervision criteria, the range of supervisory powers and the role of the judge in the implementation of imprisonment. The analyzed solutions are very original in their character. They reflect many years of experience of the Polish penitentiary system and constitute a modern part of penitentiary law.

Keywords: imprisonment, penitentiary supervision, ensuring legal and correct performance.