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POST-PENAL DETENTION OF «DANGEROUS» OFFENDERS IN SELECTED EUROPEAN COUNTRIES*

Problem statement. Preventive deprivation of liberty is an institution that can be highly questionable due to its potential for abuse. Hence, in most countries of the so-called former Eastern Bloc, its application has been treated with great caution. An example of such deprivation of liberty is post-penal protective measures. This is an institution provided for in the legal orders of many European countries, where criminal responsibility is based on the principle of fault. Although the categories of persons against whom they may be imposed and the grounds for their application differ, they have in common that they are imposed after the sentense has been served. They aim to protect the public from the threat posed by the offender, which still persists after the sentence is served. Even in countries where, due to historical experience, application of post-penal preventive measures has been treated with caution, they are slowly being introduced into the legal systems. Sometimes, the threat posed by offenders after serving their sentence is too high for them to remain at liberty. In such a situation, post-penal protective measures must be imposed, as there are no other tools that can protect citizens' legal assets equally effectively.

Analysis of the latest research and publications. The issue of post-penal precautionary measures has attracted increasing interest in recent years, particularly after the European Court of Human Rights issued its judgment in the case of M. v. Germany[1]. Although there are publications analysing in detail the solutions adopted in individual countries, little comparative research has been done, without which it is difficult to find an optimal solution to the problem analysed in this paper.

The aim of the article is to analyse the regulation of post-penal protective measures in selected European countries and discuss the need for their introduction into the legal order as well as the boundary conditions which must be met in order to ensure that human rights are respected.

Presentation of the main research material. In German law, the post-penal protective measure – *Sicherungsverwahrung* – has been known to legislation since 1933[2], and in its current form is provided for in § 66 of the German Criminal Code (dStGB[3]). This

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[1] Judgment ECHR in case of M. v. Germany 17 December 2009, final 10/05/2010 (App no 19359/04) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–96389%22]} (last accessed: 25.12.2022).

[2] On the development of the institution of Sicherungsverwahrung in German law see: Pyhr J., *Sicherungsverwahrung – auf dem Weg in ruhigeres Fahrwasser? Bundesrecht, Landessicherungsverwahrungsvollzugsgesetze und Behandlungskonzepte für Sicherungsverwahrte in Folge der Entscheidungen von EGMR und BVerfG* (2015), 3–9, Wagner-Kern M., *Präventive Sicherheitsordnung. Zur Historisierung der Scicherungsverwahrung* (2015), 37.

[3] German Criminal Code (StGB) in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322) as lars amended by Article 2 of Act of 22 November 2021 (Federal Law Gazette I, p. 4906), URL: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (last accessed: 25.12.2022).

measure is applied after the sentence has been served. Its purpose is to continue the deprivation of liberty of offenders who have already served their sentences according to their degree of fault, but who still pose a threat to society and for whom other measures provided for in criminal law would not be effective. It is a measure that is generally imposed in addition to a sentence of imprisonment on the so-called «incorrigible offenders». These are offenders who have already been sentenced to imprisonment on several occasions or on whom custodial preventive measures have been imposed previously[1]. The prerequisite for applying this measure is not the presence of a mental disorder in the offender. A *Sicherungsverwahrung* may be imposed whether an overall assessment of both the offender and his or her acts indicates that he or she poses a threat to society as a result of a propensity to commit serious offences, i.e. offences which cause the victim serious emotional trauma or physical injury[2]. This measure is imposed for an indefinite period of time, but the legislation indicates an upper limit after which the offender should, as a principle, be discharged. As a rule, the duration of the *Sicherungsverwahrung* shall not exceed 10 years and its further extension shall only be possible in exceptional situations where there is a negative criminological prognosis, i.e. there is still danger of committing a serious criminal act causing serious damage to the mental or physical health of the victim[3].

Austrian law also provides for the admissibility of post-penal protective measures. According to § 23 of the Austrian Criminal Code (StGB[4]), a placement in an institution for dangerous recidivists can only be applied to perpetrators of the most serious offences, primarily against life or health, against freedom, sexual liberty, or property involving the use of force. A prerequisite for the application of this measure is, in addition to having been sentenced to a custodial sentence for the period provided for in the law at least twice, the risk of reoffending for serious offences. It is justified either by an indication of the offender's propensity to commit them or by the offender's adopting commission of such crimes as a regular source of income[5]. Detention in this institution may not last longer than 10 years, and at least every 6 months the court is required to verify whether a further stay in the institution is necessary. The regulation of this institution is criticised in Austrian doctrine because of its similarity to imprisonment. Some regarded it as a type of criminal sanction to protect society against dangerous offenders in a situation where fault-based criminal law cannot effectively do so.

In the Netherlands, a measure of a post-penal nature is the so-called TBS-order adjudicated on the basis of Article 37a of the Dutch Criminal Code (WbSt[6]). The unconditionally adjudicated TBS-order consists of the placement of the offender in the Forensic Psychiatric Clinic (FPC), which is a therapeutic facility. The TBS-order can only be imposed in the case of offenders with mental disorders who have committed an offence punishable by a prison term of at least 5 years or other offences expressly mentioned in the legislation. Previous convictions and the personality of the offender are also taken into account in the adjudication of this measure, but there are no specific requirements for offences that the offender might commit in the future. As in other jurisdictions, Dutch law also bases the application of the post-penal measure on the principle of necessity, i.e. it can be ordered when it is necessary to ensure the safety of other persons, public security, or property. The offender is most often placed in the FPC center after he has served 2/3 of his custodial sentence. Initially, the TBS-order is adjudicated for two years, but later, at the request of the public prosecutor, it can be extended by one or two years. In the case of violent offenders, there is no maximum time limit for extending the measure – it can even

[1] Barczak-Oplustil A., *Środki zabezpieczające w prawie karnym Niemiec*. In A. Barczak-Oplustil, M. Pyrcak-Górowska, A. Zoll (Eds.), *Środki zabezpieczające. Ujęcie systemowe* (2021), 144.

[2] § 66 ust. 1 dStGB: The court orders preventive detention in addition to a sentence of imprisonment where (…) pkt 4 an overall evaluation of the offender and the offences committed leads to the conclusion that, on account of the propensity to commit serious crimes, in particular of a type which results in severe emotional trauma or physical injury to the victim, the offender poses a danger to the general public at the time of the conviction.

[3] § 67d ust. 3 dStGB: Where 10 years of preventive detention have been served, the court declares the measure disposed of if there is no danger that the preventive detainee will commit further serious crimes resulting in severe emotional trauma or physical injury to the victims.

[4] Bundesgesetz vom 23 Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen ((Strafgesetzbuch – StGB), StF BGBl Nr. 60/1974. Fassung vom 01.01.2023; URL: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296 (last accessed: 25.12.2022).

[5] Mayr S., *Vorbeugende Maßnahmen in Österreich*. In A. Barczak-Oplustil, M. Pyrcak-Górowska, A. Zoll (Eds.), *Środki zabezpieczające. Ujęcie systemowe* (2021), 114–117.

[6] Dutch Criminal Code of 3 March 1881 – BWBR0001854. Text valid on: 27.08.2014 URL: https://sherloc.unodc.org/cld/uploads/res/document/nld/1881/penal-code-of-the-netherlands_html/Netherlands_Penal_Code_1881_as_amd_2014.pdf (in Dutch)

be applied for life[1]. If a person placed for at least 6 years in an FPC does not improve, he or she can be transferred to an LFPC (Long Term Forensic Psychiatric Care) facility, which aims at isolation and long-term care rather than treatment[2].

Post-penal measures of a custodial nature are not provided for in Spanish law, due to historical experience. For a long time in Spain – especially during the time of General Franco – it was possible to apply post-penal security measures to a very wide extent, which led to a number of abuses. They were even applied to people who had not committed a crime at all, but showed a potential propensity to commit one[3]. The democratisation of Spain that took place after 1975, the entry into force of the 1978 Constitution and the very firm pronouncements of the Spanish Constitutional Court, eliminated the possibility of adjudicating post-penal precautionary measures as violating the principle of legalism[4].

Post-penal protective measures of custodial nature are mostly not provided for in the legislation of eastern European countries, including Ukrainian law. In the case of Eastern European countries, one possible reason for this may be the fear of abuse of forensic psychiatry. After all, protective measures and psychiatry were instrumentally used in the former Soviet Union as an instrument of repression against perpetrators of so-called political crimes[5]. Poland is to some extent free from this burden, as forensic psychiatry did not become a repressive psychiatry on a wider scale during the People's Republic of Poland (until 1989). However, also in Poland before 1989, the 1969 Penal Code[6] provided for a post-penal measure in the form of a placement in a social adjustment center (abolished in 1990), referring to the protective measure provided for in the 1932 Penal Code[7], which was a placement in an institution for incorrigible recidivists.

The current widening of the scope of application of post-penal security measures seems to be a developmental trend in contemporary criminal law. This is evident in Poland and even in Spain, which has allowed for the possibility of applying to fully sane offenders a non-custodial security measure in the form of supervision served after the end of a custodial sentence. On the one hand, members of society increasingly expect the state to ensure their safety, including from the threat posed by persons with broadly defined mental disorders. In the case of perpetrators of serious crimes (against life, health, sexual liberty) with personality disorders, sexual preference disorders, or mental retardation, it can be very difficult to achieve a lasting change in their behaviour and reduce the risk of recidivism, as such disorders cannot be effectively treated with pharmacotherapy. On the other hand, interventions of a psychotherapeutic nature may not be effective, e.g. due to lack of cooperation (offenders with personality disorders[8]) or intellectual deficits (offenders mentally retarted). Consequently, these offenders can continue to pose a threat, despite the imposition and execution of a custodial sentence against them. This is particularly noticeable in the case of offenders with personality disorders. Numerous studies confirm the correlation between serious violent crimes and certain types of personality disorders (antisocial, borderline, narcissistic, and paranoid personality disorders[9]).

The introduction of post-penal preventive measures into the legal order enables to make the penalty appropriate to the degree of fault of the offender. Although perpetrators with personality disorders and sexual preference disorders are most often considered fully responsible in Polish or German legal orders, it is not excluded that these types of disorders will be of such a type or intensity that they will lead to committing

[1] Jehle J.-M., Lewis C., Nagtegaal M., Palmowski N., Pyrcak-Górowska M., van der Wolf M., Zila J., *Dealing with dangerous offenders in Europe. A comparative study of provisions in England and Wales, Germany, the Netherlands, Poland and Sweden*, *Criminal Law Forum* (2021), 211–212.

[2] Markiewicz I., *System środków zabezpieczających w Holandii – aspekty teoretyczne i praktyczne*. In A. Barczak-Oplustil, M. Pyrcak-Górowska, A. Zoll (Eds.), *Środki zabezpieczające. Ujęcie systemowe* (2021), 371–372.

[3] Artymiak G. J., *Las medidas de seguridad – o środkach zabezpieczających w prawie hiszpańskim*. In A. Barczak-Oplustil, M. Pyrcak-Górowska, A. Zoll (Eds.), *Środki zabezpieczające. Ujęcie systemowe* (2021), 242.

[4] Artymiak G. J., *Las medidas de seguridad – o środkach zabezpieczających w prawie hiszpańskim*. In A. Barczak-Oplustil, M. Pyrcak-Górowska, A. Zoll (Eds.), *Środki zabezpieczające. Ujęcie systemowe* (2021), 245–250.

[5] Szwejkowska M., *Geneza i ewolucja leczniczych środków zabezpieczających*. In: S. Pikulski, M. Romańczuk-Grącka, B. Orłowska-Zielińska (Eds.), *Tożsamość polskiego prawa karnego* (2011), 156.

[6] Act of 19 April 1969 – the Penal Code, Journal of Laws of 1969, issue 13, item 94. URL https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19690130094/U/D19690094Lj.pdf (in Polish).

[7] Regulation of the President of Poland of 11 July 1932 – the Penal Code, Journal of Laws of 1932, issue 60, item 2203. URL: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19320600571/O/D19320571.pdf (in Polish).

[8] Blackburn R., *Treatment or incapacitation? Implications of research on personality disorders for the management of dangerous offenders*, *Legal and Criminological Psychology* (2000), 11–17.

[9] Pastwa-Wojciechowska B., *Personality disorders and the risk of violating legal norms – what we know about the complex nature of humans*, *Current issues in personality psychology* (2007), 187–192.

a crime in a state of limited mental capacity[1]. For perpetrators who have committed a serious crime on the grounds of diminished responsibility, there may be a temptation to impose a punishment that exceeds the degree of fault in order to protect society against them. However, in accordance with the provisions of the German and Polish Criminal Codes, which are anchored in the constitutional principle of human dignity, punishment must not exceed the degree of fault. In such a case, post-penal preventive measures enable to reconcile, on the one hand, the interests of society (safeguarding against a dangerous offender by placing him in detention) and respect for the principle of human dignity (imposing a punishment not exceeding the degree of fault). In Poland, after the repeal of the provisions on social adaptation centers in 1990, there were no custodial post-penal preventive measures in the legal system that could be imposed on the offender. After 1989 Poland became a democratic state under the rule of law, emphasising respect for human dignity, as well as the need to protect fundamental constitutional rights and freedoms. Further deprivation of liberty of the perpetrator of a criminal act, due to the potential possibility of committing even a very serious prohibited act, appeared to be contrary to fundamental constitutional principles, as well as violating human dignity, as a manifestation of objectifying treatment.

On a broader level, the discussion on the limits of the legality of post-penal detention of dangerous offenders returned in Poland in 2013. Its cause was the imminent release from prisons of perpetrators of very serious crimes, including sexually motivated multiple murderers. Their release from prisons was the result of gradual changes in Polish criminal law, which took place as a result of the transformation of the regime into a democratic one. These perpetrators were sentenced to death under communism. However, death sentences were not executed and in December 1989, under an amnesty, the death sentences imposed were converted into sentences of 25 years imprisonment, which ended in 2014. In 1989, it was not possible to convert death sentences into life imprisonment, as at that time the law did not provide for such a punishment (it was only introduced into the legal order by the provisions of the 1997 Criminal Code[2]).

The Act of 22 November 2013 on the procedure applicable to the persons with mental disorders posing a threat to the life, health or sexual liberty of other persons[3] was then passed. Under its provisions, a custodial post-penal measure consisting of placement in a specially created National Centre for the Prevention of Dissocial Behaviour was introduced into the legal order. It may be applied to persons who are serving a sentence of imprisonment, have mental disorders in the form of mental retardation, personality disorders or disorders of sexual preferences and these disorders are of such a character or intensity that there is a very high probability of committing a prohibited act with the use of violence or the threat of its use against life, health or sexual liberty punishable by a prison term of at least 10 years. Placement in the Center is decided by a civil court, in a civil procedure, at the request of the director of the prison by the end of the prison sentence. The stay in the Center itself is of indefinite duration.

The introduction of the new law was accompanied by several controversies. Most of the law's provisions were challenged before the Constitutional Tribunal, including by the President, the Commissioner for Human Rights, and the courts. The allegations raised concerned the violation of the *ne bis in idem* prohibition. It was pointed out that the provisions of the Act are in fact punitive in nature and that indefinite isolation of the offender after serving a prison sentence leads to double punishment for the same act. It has also been argued that the Act is retroactive as it provides for the possibility of imposing isolation on persons who were convicted before the Act came into force. In a 2016 judgment[4], the Constitutional Court ruled that the provisions of the Act were, for the most part, consistent with the Constitution. The predominant argument was the nature of the placement in the Centre, which, in the opinion of the Constitutional Court, is hybrid in nature; although it constitutes a deprivation of liberty, it is therapeutic in nature and is similar to a compulsory admission to a psychiatric facility.

The provisions concerning the German *Sicherungsverwahrung* have also been challenged

[1] Sparr L. F., *Personality Disorders and Criminal Law: An International Perspective*, *The Journal of the American Academy of Psychiatry and the Law* (2009), 176–177.

[2] Act of 6 June 1997 – Criminal Code (Journal of Laws 2022, item 1138, consolidated text as amended). URL https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf Text valid on 1.12.2022 r. (last accessed: 25.12.2022).

[3] i.e. Journal of Laws 2022, item 1689 (consolidated text as amended). Text valid on 1.12.2022 r. URL: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001689/T/D20221689L.pdf (last accessed: 25.12.2022).

[4] Constitutional Tribunal of Poland, judgment of 23 November 2016, case no. K 6/14. https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%206/14, (last accessed: 25.12.2022).

before the German *Bundesverfassungsgericht* (BVerfG). What is noteworthy is that until the European Court of Human Rights issued a ground-breaking judgement – from the perspective of the German regulations – on 17 December 2009 in the case of M. v. Germany[1], the German Constitutional Court did not see any grounds for assuming the unconstitutionality of the challenged regulations. In the justification of its judgment of 5 February 2004[2], it emphasised above all the fact that protective measures do not constitute penalties within the meaning of the constitution. The change in the assessment criteria can be seen in the judgments of the Constitutional Tribunal rendered after the above-mentioned judgments of the European Court of Human Rights[3]. In subsequent judgments, the *Bundesverfassungsgericht* has either ruled that those of the challenged provisions that did not meet the standards set by the European Court of Human Rights were not consistent with the German constitution[4], or have interpreted them in such a way that these standards were not violated[5].

Indeed, in addition to the aspect of compliance with the provisions of national constitutions, the post-penal isolation of dangerous offenders must be in compliance with the provisions of the European Convention on Human Rights[6]. The basis for preventive deprivation of liberty in this case is Article 5(1)(e) of the Convention, which allows for the isolation of «persons of unsound mind». This is a term that must be understood autonomously under the European Convention on Human Rights, as it includes both mental illness in the sense of psychosis (such as schizophrenia) and, under certain conditions, persons with sexual preference disorders or personality disorders[7]. The latter may constitute grounds for isolation when three conditions are met together: «First, on the basis of objective medical expertise, the individual must be reliably shown to be of unsound mind. Second, the individual's mental disorder must be of a kind that warrants compulsory confinement, and third, the mental disorder must persist throughout the period of detention»[8].

In the cases in which the European Court of Human Rights has so far reviewed national legislation on post-penal isolation, attention has been drawn to – in principle – two boundary conditions for the legality of this institution. First, on the basis of the German cases[9], it can be pointed out that the post-penal detention of a 'dangerous' offender must be qualitatively different from an imprisonment. The conditions under which it is executed must be different; post-penal detention cannot be executed

[1] Judgment ECHR in case of M. v. Germany 17 December 2009, final 10/05/2010 (App no 19359/04) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–96389%22]} (last accessed: 25.12.2022).

[2] Federal Constitutional Court of Germany, judgement of 5 February 2004, file no. BvR 2 2029/01. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/02/rs20040205_2bvr202901.html (last accessed: 25.12.2022).

[3] On these judgements see Ebner K., *Die Vereinbarkeit der Sicherungsverwahrung mit deutschem Verfassungsrecht und der Europäischen Menschenrechtskonvention* (2015), 67 et seq.

[4] Federal Constitutional Court of Germany, judgement of 4 May 2011, file no. BvR 2365/09. 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html (last accessed: 25.12.2022).

[5] Federal Constitutional Court of Germany, judgment of 20 June 2012, file no. 2. BvR 1048/11. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/06/rs20120620_2bvr104811.html (last accessed: 25.12.2022).

Federal Constitutional Court of Germany, judgement of 11 July 2013, file no. 2. BvR 2302/11. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/07/rs20130711_2bvr230211.html (last accessed: 25.12.2022).

[6] 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 and 8 and supplemented by Protocol No. 2. https://www.echr.coe.int/Documents/Convention_ENG.pdf Text valid on 1.01.2023 r. (in English)

[7] Szwed M., *The notion of 'a person of unsound mind' under Article 5 § 1(e) of the European Convention on Human Rights*, *Netherlands Quarterly of Human Rights* (2021), 293–294.

[8] Szwed M., *The notion of 'a person of unsound mind' under Article 5 § 1(e) of the European Convention on Human Rights*, *Netherlands Quarterly of Human Rights* (2021), 291.

[9] Judgment ECHR in case of Haidn v. Germany 13 January 2011, final 13/04/2011 (App no 6587/04) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–102621%22]}, (last accessed: 25.12.2022); Judgment ECHR in case of Jendrowiak v. Germany 13 January 2011, final 14/07/2011(App no 30060/04) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–104490%22]} (last accessed: 25.12.2022); Judgment ECHR in case of Kallweit v. Germany 13 January 2011, final 13/04/2011 (App no 17792/07) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–102799%22]} (last accessed: 25.12.2022) Judgment ECHR in case of Mautes v. Germany 13 January 2011, final 13/04/2011 (App no 20008/07) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–102795%22]} (last accessed: 25.12.2022) Judgment ECHR in case of Schummer v. Germany 13 January 2011, final 13/04/2011, (App no 27360/04 and 42225/07.33834/03) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–102787%22]} (last accessed: 25.12.2022) Judgment ECHR in case of O. H. v. Germany 24 November 2011, final 24/02/2012 (App no 4646/08) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–107556%22]} (last accessed: 25.12.2022) Judgment ECHR in case of Glien v. Germany 28 November 2013, final 28/02/2014 (App no 7345/12) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–138580%22]}, (last accessed: 25.12.2022).

in prison or prison-like conditions. Second, there must be a specialized therapeutic treatment of the offender subject to post-penal detention in order to minimise the risk of further offences[1]. If these conditions are not met, post-penal detention becomes a punishment. Following the judgments of the European Court of Human Rights, Germany made significant changes to the *Sicherungsverwahrung* legislation. Currently, this measure is carried out in special wards, separate from the penitentiary wards, and the detainees can benefit from a wide and individually adapted therapeutic offer. Following the amendments, the European Court of Human Rights found no violation of the Convention in subsequent complaints by persons subjected to *Sicherungsverwahrung*[2].

When introducing post-penal detention into the Polish legal order, inadequate care was taken to ensure that the conditions of its implementation in the National Centre for the Prevention of Dissocial Behaviour corresponded to the Dutch (e.g. Zeeland) or German (e.g. Rosdorf) centers. Overcrowding in the Polish Center, overly intrusive and arbitrary ways of restricting personal liberty, as well as the lack of an adequate therapeutic offer[3], have led the European Court of Human Rights to already communicate to the Polish government five complaints from persons who were placed in the Center under the 2013 Act.

Another change in post-penal protective measures was introduced into Polish law in July 2015[4]. With the amendment introduced at that time, the temporal scope of application of a post-penal measure in the form of a placement in the National Center for the Prevention of Dissocial Behaviour was limited (it can only be ordered against persons who were convicted of a crime committed before 1 July 2015). In addition to this, provisions were introduced into the Penal Code that provide for the possibility of a post-penal isolation in the form of a placement in a psychiatric facility for offenders who have committed a crime in a state of limited mental capacity, as well as for offenders of serious offences against life, health, and sexual liberty, committed in relations with a disorder of sexual preferences of such a nature or severity that there is at least a high probability that the convicted person will commit such an offence against. The introduction of these measures into the Criminal Code no longer provoked much opposition in publications by criminal law scholars. The changes introduced in July 2015 result in the fact that currently (for offenders who committed crime after 1 July 2015) there is no post-penal measure in Polish law available that allows for the detention whether the offence committed was related solely to personality disorders.

Conclusions. The history of the development of post-penal security measures in Western European countries and in Poland may lead to the conclusion that the weight of the discussion on this topic has shifted from doubts about the necessity for the institution of post-penal detention in the legal system for certain categories of offenders who continue to pose a threat despite having served a custodial sentence, to under what conditions this detention should be executed and what should be its purpose. Rather, it is no longer in doubt that the absence of such an institution in the legal system may be problematic. Indeed, the state has not only a duty to ensure the protection of goods that are important for the functioning of society, but also a sense of security among the citizens, the lack of which can significantly destabilise the functioning of the state. At the same time, the standard of treatment of persons subject to these measures developed in the European Court on Human Rights jurisprudence justifies the thesis that their application does not have to constitute a violation of human dignity or be a manifestation of their objectifying treatment.

When the post-penal measure was introduced in Poland in 2013, the discussion focused on criticism of the introduced solution itself, as being in breach of the principles of *ne bis in idem* and *lex retro non agit*. Time has shown, however, that with the fulfilment of the relevant requirements, post-penal detention is not treated as a punishment in the Convention standards and therefore violates neither the prohibition of double punishment for the same act nor the prohibition of retroactive application of criminal law. If, however, isolation under the guise of post-penal detention is in fact a punishment, its introduction may violate both Article 7(1) European Convention

[1] Weigend E., Długosz J., *Stosowanie środka zabezpieczającego określonego w art. 95a § 1a k.k. w świetle standardów europejskich. Rozważania na tle wyroku ETPC z 17 grudnia 2009 r. w sprawie M. v. Niemcy*, *Czasopismo Prawa Karnego i Nauk Penalnych* (2010), 72.

[2] Judgment ECHR in case of Bergmann v. Germany 7 January 2016, final 07/04/2016 (App no 23279/14) URL; https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–159782%22]} (last accessed: 25.12.2022).

[3] Szwed M., *The Polish model of civil post-conviction preventive detention in the light of the European Convention on Human Rights*, *The International Journal of Human Rights* (2021), 1768–1792.

[4] Act of 20 February 2015 amending the Criminal Code and some other laws (Journal of Laws item 396); URL: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20150000396/T/D20150396L.pdf Text valid on 1.12.2022 (last accessed: 25.12.2022).

on Human Rights and Article 3 ECHR prohibiting inhuman or degrading treatment[1]. Therefore, further discussion should be directed at under what conditions post-penal measures should be executed to ensure a reasonably satisfactory quality of life for those placed therein. In the Dutch system, which can be considered a model in Europe, the treatment of persons placed in LTPCs is based on the concept of the 'good life model', emphasis is not on treatment, but on optimizing the quality of life in isolation[2]. At the same time, an offender placed in post-penal detention must not be deprived of the 'right to hope' and should be given the chance to return to society, including through the right to undertake appropriate treatment whenever he or she chooses to do so.

[1] Judgment ECHR in case of Riviere v. France 11 July 2006, final 11/10/2006 (App no 33834/03) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–76287%22]} (last accessed: 25.12.2022).

[2] On LFPC principles in the Netherlands see Smeekens M. V., Braun P., *Long-Term Forensic Psychiatric Care: The Dutch Perspective*. In: B. Völlm, P. Braun (Eds.), *Long-Term Forensic Psychiatric Care. Clinical, Ethical and Legal Challenges* (2019), 240–242.

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Barczak-Oplustil A., Pyrcak-Górowska M.
Post-penal detention of «dangerous» offenders in selected European countries.

The paper discusses regulations concerning post-penal security measures in selected European countries. On the example of German (Sicherungsverwahrung), Austrian, Spanish, and Polish legislation the need for such measures is indicated. The regulation of Spanish law is also discussed as an example of a country that, initially rejecting categorically the possibility of introducing these measures into the legal system, now recognises their necessity. In the opinion of the authors, this is due to the fact that a certain group of offenders (in particular those with the type of mental disorders that are very difficult to correct), even after serving a custodial sentence, may pose a threat to the substantial legal rights of others, and there are no other means to prevent such a danger. The article also discusses the history of the application of post-penal measures in Polish law and the circumstances under which such measures were introduced into Polish law in 2013 and 2015. Concerns accompanying the introduction of these measures, mainly related to respect for human dignity and the need to protect fundamental constitutional rights and freedoms in a democratic state, are also indicated. The judgments that the Constitutional Courts of Poland and Germany have issued in cases of post-penal protective measures are presented. The standard that such measures must meet in order to be in compliance with the European Convention on Human Rights is also discussed. It was pointed out that such measures may be applied on the basis of Article 5(1)(e) of the Convention. The Convention requirement is that these measures must be carried out under conditions substantially different from a custodial sentence and that adequate therapy must be guaranteed while the offender is in detention. In the opinion of the authors of the article, the development of post-penal security measures is one of the current developmental trends in criminal law. In countries where such measures are only just being introduced, the discussion about them should focus on the manner in which they are carried out so that they do not violate Article 3 of the European Convention on Human Rights.

Key words: *preventive measures, post-penal detention, 'dangerous' offender, offender with mental disorders, personality disorders*

Барчак-Оплюстіл А., Пирцак-Ґуровська М.
Постпенальне позбавлення волі «небезпечних» злочинців у законодавстві деяких європейських країн.

У статті йдеться про особливості регулювання постпенальних запобіжних заходів у окремих європейських державах. Необхідність застосування подібних заходів продемонстровано на прикладі німецького (Sicherungsverwahrung), австрійського і нідерландського законодавств. У статті також проаналізовано іспанське правове регулювання. Іспанія з міркувань захисту прав людини спочатку категорично відкидала можливість впровадження таких заходів до системи права, а тепер відзначає їхню необхідність. На думку авторок дослідження, це випливає з факту, що певна група злочинців (особливо з такими психічними розладами, які дуже важко піддаються коригуванню) навіть після відбування покарання у вигляді позбавлення волі, може становити загрозу для охоронюваних інтересів інших осіб, і немає інших заходів, які б дозволили запобігти такій загрозі.

У статті розкрито також історію застосування заходів постпенального характеру в польському праві, а також обставини, за яких такі заходи було запроваджено до польського права у 2013 і 2015 роках. Водночас, у праці йдеться про побоювання щодо запровадження цих заходів, які переважно пов'язані із повагою до людської гідності, а також із необхідністю охорони основних конституційних прав і свобод у демократичній державі. У публікації наведені судові рішення присуди, які у справах запобіжних постпенальних заходів винесли Конституційні суди Польщі й Німеччини. У статті розглянуто також стандарт, якому повинні відповідати такого типу заходи, аби не порушувати норм Європейської конвенції з прав людини та основоположних свобод (ЄКПЛ). У статті вказано, що такі заходи можуть бути застосовані на підставі пункту «е» частини 1 статті 5 ЄКПЛ. Водночас, Конвенція вимагає, щоб вони були застосовані в умовах, які значно відрізняються від покарання у вигляді позбавлення волі, а злочинцю, який перебуває у місці позбавлення волі, повинна бути гарантована адекватна терапія. На думку авторок статті, розвиток постпенальних запобіжних заходів – це одна з актуальних тенденцій розвитку кримінального права. У тих державах, які нещодавно запровадили подібні заходи, дискусія щодо їх виконання повинна зосереджуватися на способі їх виконання, щоб він не порушував статті 3 ЄКПЛ.

***Ключові слова**: превентивне позбавлення волі, постпенальні запобіжні заходи, постпенальне позбавлення волі, «небезпечний» злочинець, злочинець з психічними розладами, розлади особистості.*

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