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COMBATING DANGEROUS PEOPLE UNDER THE ACT ON MENTAL HEALTH PROTECTION AND “THE BEAST ACT”¹

1. INTRODUCTION

Criminal law is a kind of moral and political philosophy. Its central question relates to justifying the use of coercive state power. The law is regarded as a means to regulate the relationship between the state and the autonomous individual. Commonly, the law is expected to be both, an instrument of modern government and a barrier between the state and a citizen². One of the main goals of the criminal law is protecting the society from offenders committing crimes and, consequently, protecting people from dangerous individuals. To fulfil that special function, the state can react in two ways regulated by the criminal law: adjudicate a penalty or apply preventive measures. The latter is an attempt to countervail foreseen harmful actions which could be undertaken by an individual showing special characteristics of a perpetrator³.

In order to bear guilt, however, the individual has to conform with all the premises set out by a criminal statute. This criterion is not fulfilled by people who are not mentally sane, in other words those who are insane or suffer from a mental disorder. Yet the fact that they are dangerous for the society imposes the necessity of an adequate state reaction. The World Health Organization has defined mental health as “a state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively

¹ The Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People’s Life, Health or Sexual Freedom of November 22, 2013 (Journal of Laws of the Republic of Poland from 2014, item 24; Journal of Laws from 2015, item 396).

² L. Farmer, *Criminal law, tradition and legal order. Crime and the genius of Scots law, 1747 to the present*, Cambridge 1997, p. 6.

³ L. K. Paprzycki (ed.), *System Prawa Karnego. Tom 7. Środki zabezpieczające*, Warszawa 2012, pp. 8–12.

and is able to make a contribution to his or her community”⁴. It is deduced that mental health is more than the absence of mental disorders and it is determined by a range of socioeconomic, biological and environmental factors. Nowadays, some common mental disorders (including depression and anxiety disorders) are on the rise. They are affecting nearly 10% of the world’s population⁵. The connection between mental disability and the criminal justice system is complex, and it can be treated as a scene upon which the society projects different attitudes, emotions and feelings about responsibility, free will, autonomy, public safety and the meaning and purpose of punishment⁶.

Not all mental disorders are potentially dangerous for other people. But there is a border where people affected by mental disorders are considered to be highly likely to commit a forbidden act. The Polish law differentiates two categories: mentally ill people and individuals with mental disorders in the form of mental retardation and personality or sexual preference disorders. As a result of that differentiation the Polish Parliament has implemented two statutes: the the Act on Mental Health Protection of August 19, 1994 and the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People’s Life, Health or Sexual Freedom of November 22, 2013.

Combating people posing a threat to others who are not in full senses is a serious problem for the state. It is hard to recognize the border between a real and a fictive hazard as well as between a necessary interference and abuse of power. The aim of this article is to show just a few views about this issue and present how Polish authorities try to keep the balance between needed treatment and purposeful isolation.

2. INTERNATIONAL REGULATIONS

Dignity protection of mentally disordered people has its roots in natural human rights. Mindful of the provisions of the Universal Declaration of Human Rights, it finds confirmation in the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (“MI Principles”) which were adopted by the United Nations General Assembly in 1991. They provide some agreed, albeit not legally-binding, basic standards that mental health systems

⁴ *Mental health: strengthening our response*, April 2016, available at <http://www.who.int/mediacentre/factsheets/fs220/en/> (visited June 29, 2016).

⁵ *Out of the shadows: making mental health a global priority*, April 13, 2016, available at <http://www.who.int/dg/speeches/2016/mental-health-spring-meetings/en/> (visited June 29, 2016).

⁶ M. L. Perlin, *A Prescription for Dignity. Rethinking Criminal Justice and Mental Disability Law*, New York 2013.

should satisfy and rights that people diagnosed with mental disorder should have. The most important principles concern: fundamental freedoms and basic rights (the right to the best available mental health care, to be treated with humanity and respect for the inherent dignity of the human being), life in the community (to the possible extent), determination of the mental illness (in accordance with internationally accepted medical standards), medical examination, confidentiality, standards of care (protection from harm, including unjustified medication, abuse from other patients, staff or others or other acts causing mental disorder or physical discomfort), treatment (in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others), medication (it shall never be administered as a punishment), consent to treatment, rights and conditions in mental health facilities, admission principles, involuntary admission, review body (a judicial or other independent and impartial body established by domestic law and functioning in accordance with the procedures laid down by the domestic law) and implementation (through appropriate legislative, judicial, administrative, educational and other measures)⁷. Although these principles involve the mentally ill who are not criminals, it should be highlighted that one may derive a principle related to criminal offenders therefrom. It sets out that an assurance of the best available mental health care should be delivered to individuals serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who are believed to have such an illness⁸.

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine⁹ is a fundamental international instrument aiming at the regulation of the situation of individuals in medical law. Poland, as a member of the Council of Europe, signed it in 1999, but still has not ratified it. There is no doubt that this Convention created rules which have some impact on the Polish law system, even if the Parliament has yet to implement it directly¹⁰. The Convention sets out rules aiming at respecting the human being both as an individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being. Article 7 states the principle protecting persons who suffer from a mental disorder of a seri-

⁷ *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, United Nations Assembly Resolution 119, 46th Session, December 17, 1991. Meeting: 75. Report: A/46/721.

⁸ *Ibidem*, principle 20.

⁹ T. Jasudowicz (translator), *Europejskie standardy bioetyczne. Wybór materiałów*, Toruń 1998, pp. 3–16

¹⁰ M. Safjan, *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998, p. 33.

ous nature. In that case, treatment without their consent may be carried out only if lack of such treatment may produce serious harm to their health.

On 3 January 2000, the Steering Committee on Bioethics (CDBI) of the Council of Europe published the “White paper – on the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment”. The White Paper serves as a basis for public consultation purposes with the caveat that its content does not necessarily reflect the final position of the CDBI. The fundamental statements of White Paper point that: not a court should decide about forced commitment, but a relevant independent authority (authorized doctor, social worker or hospital manager – it depends on the domestic regulations); only a psychiatrist should decide whether to treat by force or not and that in emergency cases medically necessary intervention may be carried out immediately¹¹.

But the first document to make the rights stated in the Universal Declaration of Human Rights binding was the Convention for the Protection of Human Rights and Fundamental Freedoms from 1950. Article 5 states that everyone has the right to freedom and safety and cannot be deprived of that fundamental right except six cases enumerated in the Convention. The list includes *the lawful detention (...) of persons of unsound mind (...)*¹². Due to this article the issue of deprivation of freedom justified by mental illness should be regulated by statute. Moreover, every person has a right to appeal to a court to contest the legality of the deprivation. There are four minimal standards referring to the procedure connected with the detention of the mentally ill. Due to these rules, educed by the European Court of Human Rights, every person who is subjected to compulsory treatment has the right: 1) to be informed about reasons of the compulsory treatment, 2) to contact with the judge, 3) to stand trial, 4) to a periodic review of validity of staying in the hospital¹³. The interpretations of art. 5 in the context of “persons of unsound mind” derive from the decision of the European Court in the case of *Winterwerp v the Netherlands*¹⁴. The Court indicated that the following minimum criteria must be satisfied: 1) except in emergency cases, no one can be deprived of liberty unless he or she can be reliably proved to be of unsound mind on the basis of objective medical expertise; 2) the mental disorder must be of a kind or degree warranting compulsory confinement, 3) the validity of continued confinement depends on the persistence of the disorder¹⁵. Another judgment of the European

¹¹ White Paper on the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment, Strasbourg, January 3, 2000, DI R/JUR (2000)2.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5 point e.

¹³ M. Balicki, *Przymus w psychiatrii – regulacje i praktyka*, “Prawo i Medycyna” 1999, Vol. 1, p. 43.

¹⁴ *Winterwerp v Netherlands*, ECHR, Application no 6301/73, October 24, 1979.

¹⁵ See <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1120014/> (visited May 3, 2016).

Court of Human Rights claims that the term of “a person of unsound mind” cannot be defined as psychiatry changes and develops novel evaluations regarding medical advances and social conditions¹⁶. Moreover, the European Court of Human Rights considered that a patient no longer suffering from mental illness did not require to be immediately and unconditionally discharged for example on account of a possible risk of recurrence of mental illness or because of procedures required by domestic law¹⁷.

3. THE ACT ON MENTAL HEALTH PROTECTION OF AUGUST 19, 1994¹⁸

The statute stands on a mixed medical law model which balances therapeutic requirements and psychiatrists’ discretion against the protection of patients’ personal interests¹⁹. The preamble of the statute recognizes mental health as a fundamental personal interest and includes its protection into the essential duties of the state.

It is worth mentioning that the Polish Act on Mental Health Protection is commonly known for its coherence, sensible solutions and non-complex character. It clarifies rights belonging to the mentally ill, sets boundaries of applying means of coercion and emphasizes the dignity of people of unsound mind²⁰.

The statute adopted a division of the term “mentally disordered” into three elements – it refers to people with a mental disease, retardation or any other disorder of mental faculties who need special medical treatment and help to live in society. It is coherent with the IX version of the International Classification of Diseases and Related Health Problems and refers to the term of insanity as defined in the Polish Criminal Code²¹.

There is no definition of any of the three categories. The legislator claims that the meaning of these terms cannot be defined in positive law as they are a medical matter. Classifying an individual into one category requires a medical diagno-

¹⁶ *Rakevich v Russia* (2003), ECHR, October 28, 2003.

¹⁷ *Johnson v The United Kingdom*, ECHR, October 24, 1997.

¹⁸ Act on Mental Health Protection of August 19, 1994 (Journal of Laws of the Republic of Poland from 1994, No. 111, item 535).

¹⁹ S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego. Komentarz*, Warszawa 1997, pp. 25–26.

²⁰ J. K. Gierowski, L. K. Paprzycki, *Kontrowersje związane z ustawą z dnia 22 listopada 2013 r. o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób – perspektywa prawna i psychiatryczno-psychologiczna*, “Palestra”, No. 9, Warszawa 2014, pp. 144–161.

²¹ Polish Criminal Code, art. 31.

sis and consequently should be part of a doctor's examination and be controlled by medical criteria which require expertise²².

3.1. THE STATUTE'S INSTRUMENTS DEALING WITH AN INDIVIDUAL WHO COULD BE CONSIDERED DANGEROUS FOR OTHER PEOPLE

Coercive means could be used when a patient perpetrates an attempt endangering others' life or health. It refers to acts of direct aggression causing a threat to public safety, for instance when a patient intends to inflict damage or cause harm to another. Applying coercive means is also justified if a patient rapidly destroys objects, when he or she is being transported to hospital without consent or tries to leave a psychiatric unit without doctor's approval. In most cases, the decision to apply coercive means is sudden and is made by a nurse, who should then inform a doctor. Coercive measures are the most far-reaching form of violation of bodily integrity²³. Applying means of coercion is defined in a Minister of Health's regulation²⁴ as 1) apprehension with physical force in order to prevent aggressive acting or an unacceptable leave of a unit, 2) compulsory treatment, 3) immobilization (for example tying to a bed) and 4) seclusion (isolating in a closed room). There are not any other acceptable means of coercion²⁵. When it comes to evaluating the degree of danger to the life and health of others which an individual creates, one should consider aggressive actions from the past, especially those which have taken place recently and repeatedly. Also, one should take into consideration that young men are more inclined to engage in aggressive behaviour. Other key factors are alcohol or drug addiction and mental disorders.

Compulsory examination – similarly to coercive measures – is not monitored by the court but by the director of a hospital or an authorized psychiatrist. A psychiatrist or another doctor should decide whether to treat a patient without consent or not. In contrast to medical rules governing applying coercive measures and compulsory examination, a person who is mentally ill may be admitted involuntarily to a mental health facility or, having already been admitted voluntarily as a patient, be retained as an involuntary patient, only if a qualified mental health practitioner authorized by law for that purpose (a psychiatrist who should contact a second such mental health practitioner, independent of the first) recognizes a justified reason for such detention. But mental illness cannot be the sole reason for admitting one to a psychiatric unit. Pursuant to the act, hospitalization

²² S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego...*, pp. 56–57.

²³ L. Ciszewski, *Niebezpieczne dla otoczenia zachowania pacjentów hospitalizowanych na zasadzie środka zabezpieczającego*, "Postępy Psychiatrii i Neurologii" 1996, Vol. 5, issue 4, pp. 421–428.

²⁴ Regulation of the Minister Health of June 28, 2012 on the methods of application and documentation of the use of means of physical coercion and the assessment of its justifiability.

²⁵ S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego...*, pp. 111–115.

is admissible only if there is a serious likelihood of immediate or imminent harm to that person or to others. If there is a justified reason to state that an individual is both mentally ill and poses a danger to others' life and health, that person could be located in a psychiatric unit for up to 10 days in order to diagnose their mental disorders²⁶.

3.2. TREATMENT OF INDIVIDUALS INVOLUNTARILY PLACED IN A PSYCHIATRIC HOSPITAL

The law differentiates three categories of patients who are unable to agree to medical treatment: juveniles, the incapacitated, and people who are not aware of their behaviour.

A patient located in a psychiatric hospital without their consent cannot refuse medical treatment as far as it is necessary to remove the cause of that mandatory location. In case of a direct danger of life and health of others, the bases for compulsory treatment are questionable, because the doctor's decision is motivated not only by the patient's good, but also the interest of others²⁷. There is a debate whether compulsory treatment without the patient's consent is necessary and sensible²⁸.

4. THE ACT ON THE PROCEDURES APPLICABLE TO PEOPLE WITH MENTAL DISORDERS POSING THREAT TO OTHER PEOPLE'S LIFE, HEALTH OR SEXUAL FREEDOM OF NOVEMBER 22, 2013²⁹

The second enacted statute points out special measures to deal with people affected by mental disorders who put other people's lives, health or sexual freedom in danger.

The term "dangerous individuals" is peculiarly understood on the grounds of the act as:

- 1) individuals that are serving a validly adjudged prison sentence or a sentence of 25-year imprisonment in the therapeutic system,
- 2) individuals that revealed mental disorders in the form of mental retardation, personality or sexual preference disorders,

²⁶ *Ibidem*, pp. 122–137.

²⁷ R. Rutkowski, *Wybrane aspekty przymusu bezpośredniego w szpitalach psychiatrycznych*, "Postępy Psychiatrii i Neurologii" 1996, Vol. 5, No. 4, pp. 407–420.

²⁸ S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego...*, p. 169.

²⁹ The Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom of November 22, 2013 (Journal of Laws of the Republic of Poland from 2014, item 24; Journal of Laws from 2015, item 396).

3) individuals that reveal mental disorders with such a character or degree that there is at least a great risk they will commit a forbidden violent act or threat violence against life, health and sexual freedom, punishable by imprisonment, of which the upper limit is at least 10 years.

There is a justification for that specific definition – it was enacted in special circumstances as a response to the forthcoming release of criminals who were guilty of murders and paedophilia and were sentenced to death before 1989 under the regime of the Polish People's Republic. The transformation of the political system brought amnesty which changed their sentence into 25-year-imprisonment as lifelong imprisonment was no longer in the catalogue of possible punishments. In 2013, when these offenders were to be released, the Parliament passed a law describing the procedures to be employed towards people affected by mental disorders who put other people's lives, health or sexual freedom in danger. It is publicly known as "the Beast Act". The problem is crucial as social apprehension and jeopardy of lynch cannot be ignored.

Individuals who are subjected to the law are not diagnosed as mentally ill but they are considered as mentally disordered according to the International Statistical Classification of Diseases and Related Health Problems (ICD-10). It relates to mental disorders as unspecified psychoses that do not appear due to a substance application or a known physiological condition, schizophrenia, schizotypal disorders (personality disorders characterized by eccentric thoughts and appearance, inappropriate affect and behaviour, extreme social anxiety, and limited interpersonal interaction³⁰). It also relates to delusional disorders (mental disorders in which a person suffers from extreme fear and distrust of others; a paranoid person may have delusions that people are trying to harm them³¹). These individuals cannot be treated under the Act on Mental Health Protection or, if they were not insane during the action, they could not be subject to isolating preventive measures under the Polish Criminal Code³². This regulation raised a lively discussion about its consistency with the constitutional requirements because the statute creates a new legal basis for the deprivation of freedom, mindful of medical and criminological criteria. People who fulfil the requirements mentioned above could be subjected to preventive supervision or located in the National Unit for the Prevention of Antisocial Behaviour.

Preventive supervision is conducted by County Police Commanders and is grounded in the Police Commander's duty to report on changes of an individual's place of permanent residence, the place of employment, name or surname.

³⁰ See <http://www.icd10data.com/ICD10CM/Codes/F01-F99/F20-F29/F21-/F21> (visited July 2, 2016).

³¹ See <http://www.icd10data.com/ICD10CM/Codes/F01-F99/F20-F29/F22-/F22> (visited July 2, 2016).

³² M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji sprawców niebezpiecznych*, "Forum Prawnicze" 2013, issue 5(19), p. 21.

If a Police Commander requires this, the individual is obliged to provide information about their current and intended place of staying and about dates and places of departure. The Police can carry out a preliminary investigation and verify, collect and process the information given by the person under supervision.

An individual placed in the Unit has to be located under conditions allowing for the provision of adequate therapeutic treatment with a view to improving their health and making their return to society possible (art. 25).

5. TEST OF CONSTITUTIONALITY

Firstly, there is a possibility that this Act can be applied to those who have already served their sentence and this may lead to the violation of the ban on punishing offenders more than once for the same crime³³. The possibility of postpenal detention creates peculiar preventive measures (regulated outside of the Criminal Code). This contradicts the Criminal Code's rule stating that the offender can be punished or be under a specified preventive measure³⁴. Mindful of this line of thought, the abovementioned regulation could be regarded as contrary to the *ne bis in idem* rule. Also, when it comes to the attitude of the European Court of Human Rights, it seems that by reference to the "penal" character of the sanction the Court considers the individual's action, the kind and the seriousness of the penalty and the goal which it should result in. In the view of the ECHR, there is no need to examine the seriousness of the penalty at stake as even a lack thereof cannot deprive an offence of its inherently criminal character (*Kadubec v Slovakia*, September 2, 1998, Application Number 27061/95). This proves that applying a preventive measure after served imprisonment may be regarded as a violation of the *ne bis in idem* rule.

However, the opposite opinion maintains that the legality of these measures is based on that they are not connected with the punitive character of the served imprisonment³⁵. It is argued that the statute detaches the justification for isolation from punishment.

One can pose a question whether the statute complies with the constitutional rule of the non-retroactive character of the criminal law. It indicates that "dangerous people" should be placed in the National Unit for the Prevention of Antisocial Behaviour or be subjected to special prevention supervision. We can see that this widens the list of preventive measures compared to the Criminal Code. Never-

³³ Motion of the Ombudsman addressed to the President of Polish Tribunal Court, May 16, 2014.

³⁴ Statement of the Helsinki Foundation for Human Rights, November 27, 2013.

³⁵ M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji...*

theless, our legislator framed it into a civil procedure. It seems to be an intentional elision as this rule is not so strictly followed in the civil law³⁶. The Polish Constitutional Court maintains that retroactive regulations can exceptionally be recognized as constitutional only if, *inter alia*, they are not criminal regulations (P 66/07 from May 12, 2009).

Although the Polish Constitutional Court has started proceedings against the 2013 Act³⁷, the German Federal Constitutional Court acknowledged that a similar German act met constitutional standards (2 BvR 2302/11 from July 7, 2013). This is because it did not extend the scope of the elements of the specified offence committed, but constitutes a different response to legally relevant actions taking place before the publication of the act. We should take into consideration that German postpenal detention is adjudicated simultaneously to the sentence. The European Court of Human Rights did not accept the stance, and it declared that such regulations are dissonant with the European Convention on Human Rights³⁸. It particularly stressed that the regulations which are in force at the moment of committing the crime decide about applying any preventive measure. Besides, the Court acknowledged the similarity between placing in the Unit and imprisonment, which, as a means of punishment and a part of criminal law, is subject to an absolute ban on retroaction.

To begin with the issue of the vague criteria, limits of state power must be specified, according to the standard of the autonomy of the individual which is derived from the constitutional concept of dignity; then the criminal law, using the same standard, can try to specify the exact conditions under which individuals may be held responsible for their actions by the law. It has come from this that the sphere of responsibility under the criminal law is reasonably well defined. It is to be regarded as a relatively neutral conceptual exercise that must define, in turn, the grounds of an individual's liability, the actions that are prescribed by the law and the socially important values (such as bodily autonomy and property) that must be protected by the law³⁹. Moreover, these regulations make it possible to place persons in the Unit only on the basis that a further crime is forecast to occur. The Act requires a high or very high degree of probability that a convicted offender will commit another violation. However, it does not accurately define the criteria to be used for the purposes of evaluation. The Polish Psychological Association shows that the current level of science does not allow one to formulate

³⁶ The opinion of dr Ryszard Piotrowski on the compatibility of the project of the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom with the Polish Constitution, June 26, 2013.

³⁷ Add the annotation 37: The Polish Constitutional Court delivered its judgement on November 23, 2016 (K 6/14) and stated that the Act, predominantly, is not inconsistent with the Constitution.

³⁸ *M. v Germany*, ECHR, Application No. 19359/04, December 17, 2009.

³⁹ L. Farmer, *Criminal law, tradition and legal order. Crime and the genius of Scots law, 1747 to the present*, Cambridge 1997, p. 6.

objective standards of such evaluation. Consequently, it is the court experts that will bear the most responsibility for the relevant decisions⁴⁰ and their reliability may be called into question⁴¹.

Last but not least, psychiatrists disapproved of the solutions applied by the legislator in order to help these dangerous perpetrators. They underlined that enforced therapy is not possible. Treatment of individuals being in full possession of senses, but revealing personality or sexual preference disorders, demands different treatment than treatment of the mentally ill. This is because the latter demand wider drug treatment. Psychotherapy without the patient's consent is ineffectual, which undermines the pledged purpose of the Act. The legislator mandated treating people, who are, on the grounds of psychiatry, healthy. This leads to a dissonance between some medical possibilities and the reality of fulfilling the projected legislative goals⁴².

6. CONCLUSION

Taking the dispute between politicians, lawyers and psychiatrists into consideration, we need to remember that psychiatry should treat, support and help shape positive attitudes towards the mentally handicapped amongst society. It should shield from stigmatization and social exclusion but should not substitute judicature in its basic aims such as securing the legal system and isolating dangerous people from society. The main goal of criminal law is to protect the legal system, especially by preventive actions. It is partially fulfilled by preventive measures, which refer to situations when the law is infringed by mentally disordered people. The paramount function of medical-preventive measures is protecting society from dangerous people by isolating and treating them. Under the Act on Mental Health Protection of August 19, 1994, mental health is proclaimed to be a fundamental personal interest and applying involuntary treatment is only an exception from the rule of voluntary treatment⁴³. The help declared by the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom of November 22, 2013, seems to be a fiction.

⁴⁰ The *amicus curiae* opinion of the Helsinki Foundation for Human Rights addressed to the President of the Constitutional Court on the compatibility of the regulations of the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom with the Polish Constitution, November 4, 2015, p. 41.

⁴¹ Opinion of the National Consultant for Psychiatry, April 24, 2013.

⁴² Opinion of the Helsinki Foundation for Human Rights, November 27, 2013.

⁴³ J. K. Gierowski, L. K. Paprzycki, *Kontrowersje związane z ustawą z dnia 22 listopada 2013 r. o postępowaniu wobec osób z zaburzeniami psychicznymi...*, pp. 144–161.

The procedures are considered as measures subsequent to the penalty, and enable gaining influence over dangerous people by isolating them⁴⁴.

Instrumental treatment of psychiatry for the purposes concerning public order protection is a basic objection. Next one is the disproportional restriction of personal freedom that appears to come into play here. The Constitutional Court is going to decide whether the legislator circumvented the criminal law-abiding ban on retroactive actions by using civil procedures. All these circumstances indicate that there is no coherent view on how the state should fulfil the requirements of preventive justice.

Comparing the Act on Mental Health Protection and the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom, the former shows the standard of procedures towards people of *unsound mind*. In contrast, the latter act comes hazardously close to isolation outpacing the treatment. The thesis that, in the context of the second act, treating human rights and resocialization as absolute criteria is misleading and would make us helpless in the face of the real danger of people who are the subjects of the act⁴⁵, seems partially true. Certainly, we have to react to the risk such people constitute for the society, but the legislator missed some very important issues pointed to by, *inter alia*, the Helsinki Foundation of Human Rights and the Polish Psychological Association. The law should be precise and equally protect basic rights of every human being. The particular circumstances of enacting this statute (media hype, the brutality of perpetrators who were to be released) made it vulnerable to emotional statements and, unfortunately, haphazardly enacted provisions.

Summary

The aim of the article is presenting two ways of the state's response to the danger caused by individuals with mental disorders pursuant to the Act on Mental Health Protection and the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom. There is a need to provide safety to society which justifies applying measures which often interfere with human freedom. The connection between mental sanity and the criminal justice system is complex, and it can be treated as a scene upon which the society projects different attitudes, emotions and feelings about responsibility, free will, autonomy, public safety and the meaning and purpose of punishment. Not every kind of mental disorder creates a danger for others – yet, the fact that there is a high probability of committing a crime imposes the necessity of an adequate state reaction. Mindful of the level of an individual's

⁴⁴ *Ibidem*, p. 155.

⁴⁵ M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji...*, p. 34.

sanity, mental and physical health, behaviour and hitherto served punishment, the Polish criminal law distinguishes three legal approaches towards people with certain disorders: preventive measures applied on the ground of the Criminal Code, measures regulated in the Act on Mental Health Protection as well as in the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom.

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KEYWORDS

mental disease, mental disorder, postpenal detention, mental health, Act on Mental Health Protection, Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom

SŁOWA KLUCZOWE

choroba psychiczna, zaburzenie psychiczne, izolacja postpenalna, zdrowie psychiczne, ustawa o ochronie zdrowia psychicznego, ustawa o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób