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Prisoners During the Pandemic

Abstract: In connection with the COVID-19 pandemic, all countries of the world are taking actions to minimize the spread of the virus. These actions interfere with civil rights and liberties. They particularly affect convicts who serve prison sentences, as such sentences deprive them many of their rights or significantly restrict them. Recognizing the situation of prisoners at this difficult time, in March 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) issued the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19)¹, while the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment prepared Advice to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic. The purpose of this paper is to determine whether our country, while taking certain actions, takes into account the recommendations contained in both aforementioned documents.

Keywords: COVID-19 pandemic, prison, prisoner safety measures

Introduction

In December 2019, an infectious pathogen was identified in Wuhan, China. On 30 January 2020, the Director-General of the World Health Organization announced that the epidemic constituted a threat to public health on an international scale, and

1 Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic, CPT/Inf(2020)13, <https://rm.coe.int/16809cfa4b> Text in Polish on the website of the Commissioner for Human Rights. https://www.rpo.gov.pl/sites/default/files/Zbi%C3%B3r%20zasad%20dotycz%C4%85cych%20post%C4%99powania%20z%20osobami%20pozbawionymi%20wolno%C5%9Bci%20w%20kontek%C5%9Bcie%20pandemii%20choroby%20koronawirusowej%20%28COVID-19%29%20CoE-Statement_PL_0.pdf (20.06.2021).

on 12 March 2020, the COVID-19 epidemic was declared a pandemic. The high infection rates of the pathogen forced national governments to take steps to minimize the spread of the disease. Preventive measures that have been implemented, especially the obligation to isolate and maintain social distance, significantly interfere with various spheres of our lives, limiting contacts with other people, even with family members or relatives, depriving us of the possibility to enjoy culture, participate in various forms of social activity, change jobs, or start studies.

Appreciating the importance of preventive measures during the pandemic and recognizing that these measures interfere with civil rights and freedoms, in April 2020, the Secretary General of the Council of Europe circulated a document to all member states on respecting human rights, democracy, and the rule of law during the pandemic². The document formulates the principles that should guide authorities implementing emergency measures that result in restrictions on human rights and freedoms. Implementation of such measures should be justified, necessary, limited in time, and proportionate to the threat posed by the spread of the COVID-19 virus.

Of course, the extraordinary measures that have been implemented also apply to prisoners. It is obvious that prisons are places with a high risk of rapid spread of the virus. With a large population of convicts, as is the case in many countries of the world, including Poland, it is difficult to observe the basic rules of isolation, which may result in the spread of infections, not only in prisons, but also outside them. One must not forget about Prison Service officers who have regular contact with the world outside prison walls when they return to their homes and families every day.

The safety measures implemented included a ban on visits, participation of prisoners in religious services held in the penitentiary, and employment outside the penitentiary, a limitation of contacts between convicts by closing prison cells, a ban on participation in group educational and sports activities, workshops, and vocational training, especially those that involved the participation of persons not previously employed in the specific prison, limitation of walks in the company of other convicts, and a ban on permissions to temporarily leave the penal institution³.

2 Coronavirus: guidance to government on respecting human rights, democracy, and the rule of law, Information Documents SG/Inf(2020)11, 7 April 2020, <https://www.coe.int/en/web/portal/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law> (22.06.2021), Respecting democracy, rule of law, and human rights in the framework of the COVID-19 sanitary crisis <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40> See also: Omówienie dokumentu Przestrzeganie praw człowieka w dobie pandemii COVID- 19. Stanowisko Rady Europy. Opracowanie tematyczne OT-684 https://www.senat.gov.pl/gfx/senat/pl/senatopracowania/193/plik/ot_684.pdf (12.06.2021).

3 European Organization of Prison and Correctional Services (EuroPris) <https://www.europris.org/wp-content/uploads/2020/06/Overview-Commission-30-March-2020.pdf> (30.06.2021).

These measures affect various spheres of prisoners' lives and significantly restrict the exercise of prisoners' rights.

1. International Standards for the Prevention and Control COVID-19 in Prisons

However, when looking at the restrictions that have been implemented – which are, of course, fully justified – it should be noted that a prison is a unique place, as imprisonment results in significant restrictions of rights and freedoms. Recognizing the unique characteristics of penitentiary isolation, in March 2020, the World Health Organization's Regional Office for Europe prepared interim guidance concerning preparedness, prevention, and control of COVID-19 in prisons and other places of detention⁴. Of course, the WHO focused primarily on taking measures to prevent the spread of the virus in prisons, *i.e.*, supplying prisoners with masks and disinfectants, and preparing places for isolation. It was considered particularly important to allow prisoners to maintain adequate personal hygiene through access to hot water and soap, and the possibility to spend time outdoors for at least one hour. Attention was also drawn to the application of the standards of healthcare available to the general public in relation to prisoners. According to the WHO, “the basic guarantees of protection from ill-treatment enjoyed by persons deprived of their liberty – access to a lawyer, access to medical care, notification of detention – must be fully respected in all circumstances and at all times”.

In March 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) issued the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19)⁵, while the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (SPT) prepared

4 Przygotowanie, zapobieganie i kontrola COVID-19 w zakładach karnych i innych miejscach pozbawienia wolności. Tymczasowe wytyczne 15 Marca 2020 r. <https://www.rpo.gov.pl/sites/default/files/Przygotowanie%2C%20zapobieganie%20i%20kontrola%2%A0C0VID-19%20w%20zak%25%82adach%20karnych%20i%20innych%2%A0miejscach%20pozbawienia%20wolno%25%9Bci%20.pdf>. (15.06.2021).

5 Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (Covid-19) pandemic, CPT/Inf(2020)13, <https://rm.coe.int/16809cfa4b>. Text in Polish on the website of the Commissioner for Human Rights. https://www.rpo.gov.pl/sites/default/files/Zbi%20zasad%20dotycz%20C4%85cych%20post%20pow%C4%99powania%20z%20osobami%20pozbawionymi%20wolno%25%9Bci%20w%20kontek%25%9Bcie%20pandemii%20choroby%20koronawirusowej%20%28COVID-19%29%20CoE-Statement_PL_0.pdf (15.06.2021).

Advice to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic⁶.

Both documents draw attention to the obligation to take all possible measures to protect the health and safety of all prisoners. When implementing these measures, respect for human rights and human dignity was considered particularly important. In the opinion of the authors of those documents, any emergency measures introduced to prevent the spread of COVID-19 should have a legal basis, and their application should comply with the principles of necessity, proportionality to the threat, and limitation in time.

Both the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19), and Advice of the Subcommittee to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic, recommend compensating for any restrictions, especially to prisoners' contact with the world outside prison walls, by increasing alternative forms of contact such as telephone, Internet and e-mail, video communication, and other appropriate electronic means. Constant contacts of convicts with their families and relatives during the pandemic is essential as it provides emotional and psychological support to the convicts. Such support is particularly important because, as both documents point out, the response of prisoners to restrictions may be different from that of the society outside penitentiaries. This may be manifested not only in convicts' concern about their families, or families' concern about convicts, but may even lead to convicts' rebellion. In many prisons in Europe, restrictions on visits have been met by prisoners' protests, often violent⁷.

It is also no less important to provide convicts, their families, and the media with detailed information about the measures implemented, and their rationale.

Both the WHO Regional Office for Europe, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), as well as the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (SPT) have found it useful for national preventive mechanisms to include preventive visits, of course following the necessary recommendations on how to carry them out. Monitoring by independent bodies, such as the National Preventive Mechanisms (NPMs) and the CPT, of restrictions on the exercise of prisoners' rights is an important safeguard against the violation of

6 Advice of the Subcommittee to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic, United Nations CAT/OP/10, 7 April 2020, <https://undocs.org/CAT/OP/10> (15.06.2021).

7 Covid-19 pandemic: urgent steps are needed to protect the rights of prisoner in Europe – Pandemic and Human Rights – Commissioner for Human Rights (coe.int), COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe – Pandemic and Human Rights – Commissioner for Human Rights (coe.int) (15.06.2021)

prisoners' rights. The JUSTICIA European Rights Network⁸ also noted the importance of enabling national human rights institutions to check whether measures are being implemented in prisons during this unique period, to ensure that the right to life and health of both prisoners and prison staff are protected.

In view of the increased risk of infection among persons in prisons, particularly due to overcrowding, the aforementioned documents suggest reducing the prison population as much as possible. In the opinion of the authors of the Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19), and the Advice of the Subcommittee to States parties and national preventive mechanisms to the coronavirus disease (COVID-19) pandemic, a wider use of non-custodial measures is appropriate. At the stage of imprisonment, on the other hand, it is advisable to make more frequent use of the institution of conditional release. Reducing the prison population is important for the ability to ensure social distancing and to apply other measures to protect life and health for both prisoners and officers.

Information provided by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) on the situation of prisoners in the context of the ongoing Covid-19 pandemic⁹ and EuroPris¹⁰ data show that measures have been implemented in prisons to compensate for restrictions on the rights of prisoners, particularly the right to face-to-face contact with family and relatives. As a form of compensation, convicts most often were allowed contact in the form of video calls or more frequent and longer phone calls.

In many countries, in order to reduce the prison population, conditional release was introduced earlier for certain categories of prisoners (*e.g.*, Netherlands, Ireland, and France), house arrest was used more frequently (*e.g.*, Spain, and Italy), and the commencement of prison sentences was delayed (*e.g.*, Germany, and Czech Republic)¹¹. The prison population rates by mid-September were generally lower than at the beginning of the year. According to Marcelo F. Aebi and Mélanie M. Tiago's report entitled "Prisons and Prisoners in Europe in Pandemic Times: An evaluation

8 JUSTICIA European Rights Network's statement, 18 May 2020, https://www.hfhr.pl/wp-content/uploads/2020/05/Justicia_stanowiska_PL-2.pdf. (15.06.2021).

9 Follow-up statement regarding the situation of persons deprived of their liberty in the context of the ongoing Covid-19 pandemic issued on 9 July 2020, CPT/Inf (2020) 21, <https://rm.coe.int/16809ef566> (15.06.2021).

10 European organization of prison and correctional services (EuroPris) <https://www.europris.org/wp-content/uploads/2020/06/Overview-Commission-30-March-2020.pdf>. <https://www.europris.org/wp-content/uploads/2020/06/Overview-Commission-30-March-2020.pdf>. (15.06.2021).

11 JUSTICIA European Rights Network's statement, 18 May 2020, https://www.hfhr.pl/wp-content/uploads/2020/05/Justicia_stanowiska_PL-2.pdf. (15.06.2021).

of the medium-term impact of the COVID-19 on prison populations¹², the prison population rates on 15 April are compared to the ones on 1 January 2020, a decrease more than 4% in the number of inmates was observed in Albania, Bulgaria, Cyprus, Czech Republic, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Poland, Portugal, Serbia, Slovenia, Spain (State Administration), Spain (Catalonia), England and Wales, and Scotland (20 prison administrations). Stable (between – 4 and 4%): Azerbaijan, Belgium, Estonia, Hungary, Liechtenstein, Moldova, Monaco, Norway, Romania, Slovak Republic, Northern Ireland (11 prison administrations). Increase (more than 4%): Andorra, Denmark, Greece, and Sweden (4 prison administrations).

It should be noted that Sweden is the only country where no restrictions related to COVID-19 have been introduced.

According to another EuroPris report¹³, after several months of a persistent downward trend, the number of prisoners steadily increased from September to November 2020. According to Professor Marcelo F. Aebi¹⁴, these trends can be explained by several factors, in particular the decline in judicial activity due to the closure of courts, the increased use of conditional release of convicts as a measure to reduce the spread of Covid-19, and the decline in crime due to the restrictions, which may have reduced the opportunities to commit crimes. This explanation is supported by the opposite trend observed in Sweden and by the fact that the decline in the prison population stopped as soon as restrictions were lifted.

During the summer, the National Preventive Mechanisms and other national human rights monitoring bodies resumed visits to places of detention in many countries, while taking appropriate precautionary measures. Also, the CPT Committee resumed visits to monitor the measures implemented by countries to protect the rights of persons deprived of their liberty during the pandemic.

However, as early as in November 2020, due to the increase in the number of infected persons, many countries reinstated the suspension of visits of prisoners' families in prisons and the restrictions on the number of visitors (e.g. one adult and one child), the duration of the visit (one hour), obviously with the use of safety

12 M.F. Aebi, M.M. Tiago, Prisons and Prisoners in Europe in Pandemic Times: An evaluation of the medium-term impact of the COVID-19 on prison populations, http://www.antoniocasella.eu/nume/Aebi_Tiago_10nov20.pdf. See also: Prisons and Prisoners in Europe in the Pandemic Times, <https://wp.unil.ch/space/publications/2199-2/> (15.06.2021).

13 Overview of European prison services' responses to the COVID-19 crisis Period September-November 2020 Fourth edition – 16 November 2020, <https://www.europris.org/wp-content/uploads/2020/12/Overview-COVID-Commissioner-Reynders-update-November.pdf> (15.06.2021).

14 Mid-term impact of Covid-19 on European prison populations: new study, <https://www.coe.int/en/web/portal/-/mid-term-impact-of-covid-19-on-european-prison-populations-new-study> (15.06.2021).

measures such as masks, disinfectants, screens separating convicts from visitors, and adequate ventilation of rooms. Therapeutic programmes were also resumed; however, with a limit on the number of participants. After the summer, employment in the prison workshops resumed, but due to the obligation to keep a distance, the number of working prisoners significantly decreased.

2. COVID-19 Prevention and Control in Polish Prisons

In the initial period of the pandemic in Poland, as in many other countries, a number of restrictions were implemented. Depending on the epidemiological situation, visits of prisoners' family members were temporarily suspended or restricted. In exchange, inmates were allowed, among other things, to make longer and more frequent phone calls. Access to television, radio, and newspapers was also increased. Employment of inmates outside prisons, as well as worship and religious services were suspended. Also, the granting of leave permits, and group activities, were suspended. Prisoners' walks were done under a sanitary regime. All convicts admitted to penitentiaries were placed in temporary cells for 14 days and provided with personal protective equipment. Additional therapeutic, cultural, and educational activities were introduced, individually and in small groups¹⁵.

The basis for these restrictions is Article 247(1) of the Executive Penal Code which authorizes directors of prisons or remand prisons, in cases particularly justified by sanitary or health reasons, or a serious threat to security, to withhold or limit employment of convicts, contacts between them, visits and walks, collective activities, religious services, making purchases, receiving parcels and using payphones, as well as to order closing cells and other rooms where convicts stay or work, to forbid them to possess some objects, and to suspend the function of a prisoners' ombudsman. Restrictions may be imposed, and convicts may be deprived of certain rights for a definite period of time. If restrictions are imposed for a period of 7 days, the director of prisons notifies the penitentiary judge of the decision; an extension of the restrictions requires the penitentiary judge's consent, but lack of such consent does not stop the implementation of the director's decision. The list of restrictions and prohibitions provided for in Article 247(1) of the Executive Penal Code is closed. Thus, the director may impose only those restrictions and prohibitions that are included in the list, but he or she can change them depending on the situation¹⁶.

Pursuant to Article 110(2a) of the Executive Penal Code, the director of prisons may place a convict in a residential cell in which the surface area per one convict is

15 Skuteczna i bezpieczna praca Służby Więziennej w warunkach epidemii, www.sw.gov.pl (15.06.2021).

16 I. Zgoliński, (in:) E. Lachowski (ed.), *Kodeks karny wykonawczy, Komentarz*, 2nd edition, Warsaw 2016, p. 891.

less than 3 square meters when an epidemiological emergency or a state of epidemic has been announced or an epidemic has occurred in the prison's location. Such decisions make it possible to obtain empty cells to be used for as quarantine rooms or "sick rooms"¹⁷.

For the sake of sanitary safety in penal institutions, visits previously conducted as part of the National Mechanism for the Prevention of Torture (NMPT) were discontinued and replaced with video calls. In early May 2020, representatives of the NMPT began the first pilot video calls with inmates in remand centres in Łódź and Warsaw-Białoleka¹⁸. This innovative method makes it possible to obtain information not only from the Prison Service but, above all, from prisoners.

It should also be noted that penitentiary courts were enabled to hold their sessions by videoconference. Pursuant to Article 14f of the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them¹⁹, when a prisoner takes part in a penitentiary court's session, the session may be held with the use of technical devices, which makes it possible to hold it remotely with simultaneous direct transmission of video and sound material. In the convict's location, a representative of the institution's, or remand centre's, administration takes part in the session. Since the beginning of 2021, approximately 12,500 cases have been adjudicated in this manner²⁰.

In the context of the protection of prisoners' rights, the activities of the Commissioner for Human Rights must not be overlooked. Since the onset of the pandemic, the Commissioner's office has received complaints from prisoners and their families. The most frequent allegations concerned the medical staff's dismissal of symptoms such as coughs and fevers, and limitation of their actions to administration of painkillers, lack of personal hygiene products (one soap bar per month) and hot water in cells, failure to observe sanitary recommendations (e.g. walks in groups of fifty), failure to disinfect places with large concentrations of convicts (door handles, hallways, handrails), and officers' failure to use masks and gloves, especially during body searches. Prisoners also complained about frequent changes of cells and transportation without observance of hygiene standards, limited contact with

17 More information can be found in: M. Niełacna, *Funkcjonowanie zakładów karnych w czasie epidemii koronawirusa*, LEX/el. 2020, https://www.researchgate.net/publication/344287374_Nielacna-maria-funkcjonowanie-zakladow-karnych-w (15.06.2021).

18 Krajowy Mechanizm Prewencji Tortur rozpoczął cykl wideorozmów z pozbawionymi wolności, <https://www.rpo.gov.pl/pl/content/koronawirus-krajowy-mechanizm-prewencji-tortur-zaczal-cykl-wideorozmow-wiezniami> (20.06.2021).

19 Act of 2 March 2020 on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them (Journal of Laws of 2020, item 1842, as amended).

20 Skuteczna i bezpieczna praca Służby Więziennej w warunkach epidemii, <https://www.sw.gov.pl/aktualnosc/centralny-zarzad-sluzby-wieziennej-skuteczna-i-bezpieczna-praca-sluzby-wieziennej-w-warunkach-epidemii> (20.06.2021).

educators and directors (e.g., processing of applications and requests with a delay), lack of psychological tests and assistance, and lack of contact with a doctor, unavailability of specialists such as surgeons or psychiatrists²¹. Complaints were also made about contacts with families, particularly children²². Each complaint was investigated and many of them required the Commissioner's intervention. As an example, one can point to interventions concerning planned visits to prisons by immediate family or other relatives,²³ and limitation of visitors to the inmates' closest family members²⁴. The Commissioner paid particular attention to contacts of convicts with children, especially those staying in orphanages²⁵. On several occasions, the Commissioner asked the Minister of Justice to indicate the number of convicts, persons detained temporarily, and Prison Service officers infected with the coronavirus²⁶.

From the start of the pandemic through 20 April 2021, 1,660 detainees and prisoners tested positive for Covid-19. The number of officers and civilian employees of the Prison Service who tested positive was 5,968²⁷. In May 2021, 0.14% of inmates were infected in Poland, 0.85% – in the Czech Republic, 0.46% – in Slovakia, and 0.42% – in Hungary. This made it possible to reintroduce prison visits in compliance with the sanitary regime²⁸. With certain restrictions, an inmate may be visited by

- 21 Epidemia za kratami. Więźniowie w czasach koronawirusa [Epidemic behind bars. Prisoners in the times of the coronavirus epidemic], <https://krytykapolityczna.pl/kraj/epidemia-zakratkami-wiezniowie-w-czasach-koronawirusa/> (20.06.2021). See also: M. Niełacna, COVID-19 a funkcjonowanie polskiego więziennictwa "NKPK" 2020, vol. LVII, p. 99.
- 22 Koronawirus a więzienia. Skargi do RPO – na brak środków ochrony, nieprzestrzeganie zaleceń sanitarnych, dostęp do badań <https://www.rpo.gov.pl/pl/content/koronawirus-a-wiezienia-skargi-rpo-od-osadzonych-i-rodzin> (20.06.2021).
- 23 Letter dated 29 July 2020 from Deputy Commissioner for Human Rights, Hanna Machińska, to the Deputy Director-General of the Prison Service, Colonel Andrzej Leńczuk, <https://www.rpo.gov.pl/sites/default/files/Pismo%20do%20S%C5%82u%C5%BCby%20Wi%C4%99ziennej%20ws.%20wznowienia%20widze%C5%84%C2%29.07.2020.pdf> (20.06.2021).
- 24 Koronawirus. Wracają widzenia osadzonych – ale tylko z jednym członkiem rodziny i bez dzieci. Interwencja Rzecznika <https://www.rpo.gov.pl/pl/content/wracaja-widzenia-osadzonych-z-rodzinami-ale-nie-z-dziecmi-interwencja-rpo> (20.06.2021).
- 25 Koronawirus. Widzenia osadzonych z bliskimi wstrzymane. RPO: Mogą je zastąpić komunikatory typu Skype <https://bip.brpo.gov.pl/art-z-rpo/17708> (20.06.2021); RPO ponownie pisze do Służby Więziennej w sprawie widzeń osadzonych z dziećmi, <https://www.rpo.gov.pl/pl/content/rpo-dosluzby-wieziennej-widzenia-osadzonych-z-dziecmi> (20.06.2021).
- 26 Koronawirus. RPO pyta o zakażenia w więzieniach, aresztach, zakładach poprawczych, <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-pyta-o-zakazenia-wiezieniach-aresztach-zakladach-poprawczych> (20.06.2021).
- 27 Służba Więzienna podała statystyki kowidowe osadzonych i funkcjonariuszy <https://www.rpo.gov.pl/pl/content/rpo-sluzba-wiezien-statystyki-kowidowe-osadzonych-funkcjonariuszy> (15.05.2021).
- 28 Wznowienie widzeń w zakładach karnych i aresztach śledczych <https://www.sw.gov.pl/aktualnosc/centralny-zarzad-sluzby-wieziennej-wznowienie-widzen-w-zakladach-karnych-i-aresztach-sledczych> (15.05.2021).

one person, the duration of the visit cannot exceed one hour, and the visitors are required to wear masks covering their mouths and noses. From 1 July 2021, following an epidemiological analysis, the number of persons visiting an inmate, including underage persons, is to be increased.

It should be noted that measures have also been taken to reduce the population of prisoners serving custodial sentences.

The Act of 2 March 2020, on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them²⁹ provided for “the basis for application of a special temporary institution of a break in service of a sentence, adjudicated by penitentiary courts of competent jurisdiction for the place where the sentence is served, in relation to prisoners serving a sentence of imprisonment for so-called minor criminal acts, adjudicated for a term not exceeding 3 years”³⁰. Pursuant to Article 14c(1) of that Act, the director of prisons may file a request to grant the convict a break in the service of his or her sentence. The director may do so when, in his or her opinion, granting a break to the convict may contribute to a limitation or elimination of the epidemic (Article 14c(1)). The director encloses with the request an opinion on the prisoner by the administration of the penal institution concerning the circumstances that are the basis for granting the break. The request must be approved by the Director General of the Prison Service. The introduction of a requirement for approval of the request by the central authority may contribute to a more effective control of the number of prisoners to be released, thus making it easier to control the situation regarding safety³¹.

When deciding on the matter, the penitentiary court must take into account the prognosis as to the convict’s behaviour after he or she leaves the prison, namely that the convict will observe the legal order, in particular will not commit a crime, and will comply with the guidelines, instructions, and decisions of the competent authorities related to prevention of SARS-COV-2 infection or treatment of COVID-19.

The court grants the break for a specified period of time. The duration of the break may be prolonged at the request of the director of the prisons for a further specified period of time. That period may not extend beyond the cessation of an epidemic

29 Act of 2 March 2020 on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them (Journal of Laws of 2020, item 374).

30 Explanatory Memorandum to the government bill on amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts, Parliamentary print no. 299 of 26 March 2020 p. 10, <http://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299>.

31 P. Grzesiak, Wykonywanie kary pozbawienia wolności w czasie pandemii COVID-19 – uwagi dogmatycznoprawne i socjologicznoprawne, <https://palestra.pl/pl/e-palestra/49/2020/wykonywanie-kary-pozbawienia-wolnosci-w-czasie-pandemii-covid-19-uwagi-dogmatycznoprawne-i-socjologicznoprawne> (15.06.2021).

emergency, or a state of epidemic declared because of COVID-19. By law, a break ends on the day of announcement by the competent authorities of the cessation of the state of epidemic threat or the state of epidemic that constituted the basis for granting the convicted person a break in the service of the prison sentence. The convict is required to return to the penal institution within 3 days of such cessation, unless this is not possible due to the obligations imposed on him or her under the provisions on prevention and control of infections and infectious diseases in humans.

The possibility to take advantage of such a break in the service of a prison sentence is not offered to persons sentenced for an intentional crime punishable by imprisonment for more than 3 years; persons sentenced for an unintentional crime to imprisonment for more than 3 years; persons sentenced as multiple repeat offenders (Article 64(1 and 2) of the Penal Code); persons who have made crime a regular source of income; persons who committed a crime while acting as part of an organized group or association with the aim of committing a crime; and perpetrators of terrorist crimes.

In the case of prisoners to whom the court may not grant a break in the service of their prison sentences, and reduction or elimination of the risk that the prisoners infect other persons, is not possible as part of the measures implemented in the penal institution, the director of the penal institution may, pursuant to Article 14d(1), file a request to the penitentiary court for the service of the sentence in the form of placement of the prisoner in an appropriate medical facility. The approval of the Director General of the Prison Service is also required for such a request. The period of service of the sentence in the form of placement of the convict in an appropriate medical facility may not be longer than until the cessation of the state of epidemic emergency or the state of epidemic declared due to COVID-19. According to M. Niełaczná,³² “unfortunately, this is a token measure aimed at reducing the population of penal institutions, since all the medical facilities in question are outpatient clinics with sick rooms or hospitals at remand centres or prisons. However, there is no alternative.”

The Act of 31 March 2020 amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts³³ expanded the group of prisoners who can request to serve their prison sentences by way of electronic monitoring. Previously, only those sentenced to imprisonment for up to one year

32 M. Niełaczná, *Funkcjonowanie zakładów karnych w czasie epidemii koronawirusa*, LEX/el. 2020, https://www.researchgate.net/publication/344287374_Niełaczná-maria-funkcjonowanie-zakladow-karnych-w (20.06.2021). See also: M. Niełaczná, *COVID-19 a funkcjonowanie polskiego więziennictwa*, „NKPK” 2020, vol. LVII, p. 94.

33 Act of 31 March 2020 amending the Act of 2 March 2020 on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them and certain other acts (Journal of Laws of 2020, item 568).

could apply and after the law came into force, persons sentenced to imprisonment for up to one year and six months were also allowed to apply, provided they were not multiple repeat offenders (Article 64(2) of the Penal Code).

The explanatory memorandum³⁴ to the bill on amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts emphasized that the main goal of this amendment was to significantly reduce the current threat of COVID-19 caused by the SARS-CoV-2 virus. “The proposed amendment would make it possible to extend the possibility to serve prison sentences outside penal institutions under the electronic supervision system to an additional very large group (16,601) of convicts who currently have a valid sentence of imprisonment for up to one year and six months, and have not yet started serving their sentences in penal institutions.” “Currently 3,340 convicts are serving sentences of up to one year and six months in penal institutions and remand centres”.

According to information from the Central Board of the Prison Service, between January 2020 and May 2021, 7,333 persons were granted permits to serve their prison sentences under electronic monitoring.

January 2020	415	July 2020	456	January 2021	402
February 2020	433	August 2020	386	February 2021	473
March 2020	332	September 2020	474	March 2021	641
April 2020	452	October 2020	494	April 2021	576
May 2020	437	November 2020	442	May 2021	475
June 2020	506	December 2020	490		

The break in service of a prison sentence and the extension of the group of convicts who can apply for serving their prison sentences under the electronic supervision system did not have a significant impact on the prison population.

34 Government bill on amending the Act on special arrangements for preventing, countering, and combating COVID-19, other infectious diseases, and crisis situations caused by them, as well as certain other acts, dated 26 March 2020, print no. 299, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299>.

January 2020	93.2%	July 2020	86.3%	January 2021	85.2%
February 2021	93.9%	August 2021	85.8%	February 2021	86.3%
March 2020	91.6%	September 2020	85.4%	March 2021	87.3%
April 2020	88.4%	October 2020	85.5%	April 2021	87.6%
May 2021	87.2%	November 2020	84.9%	May 2021	87.6%
June 2020	86.9%	December 2020	84.2%		

One should keep in mind that in that period the number of persons who did not report at penal institutions to serve their sentences despite the expiry of the deadline to do so was in the range of 31,795 to 39,476 and the non-appearance of those convicts, to some extent, had an impact on the prison population rate.

Conclusion

From the standpoint of the recommendations of the WHO Regional Office for Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), and the Subcommittee on Prevention of Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (SPT), a number of measures have been taken in Poland that were aimed at limiting the spread of the COVID-19 virus in penal institutions while minimizing the restrictions on the rights of convicts. Particular emphasis should be put on measures that compensated for deprivation or significant limitation of the contacts of convicts with their families. Attention should also be drawn to measures aimed at limiting the population of convicts serving custodial sentences, the new type of break in service of a custodial sentence implemented until the state of pandemic is revoked, and the extension of the possibility of serving a sentence of deprivation of liberty under the electronic supervision system by enabling those sentenced to a custodial sentence not exceeding one year and six months, instead of not exceeding one year as was the case previously, to apply for serving their sentence under the electronic supervision system on a permanent basis. This change will be in effect after the state of pandemic is revoked, and it can be inferred that it will have a significant impact on a reduction of the prison population in the long term.

A certain incongruity in relation to these measures can be seen in the provisions of the Act on interest rate subsidies for bank loans granted to businesses affected by the effects of COVID-19 and on simplified proceedings for approval of an arrangement in connection with the³⁵ amendment to Article 37a of the Penal Code, which

³⁵ Act of 19 June 2020 on interest rate subsidies for bank loans granted to businesses affected by the effects of COVID-19 and on simplified proceedings for approval of an arrangement in connection

significantly limits the substitution of a penalty of restriction of liberty or a fine for the penalty of imprisonment. Following the amendment of Article 37a of the Penal Code, courts are obliged to determine whether, if it imposed a penalty of imprisonment for a given offence, the penalty would not be more severe than one year in prison. In the case of a decision to change the penalty from a penalty of imprisonment to a non-custodial penalty, the court may, instead of the former penalty, impose a penalty of restriction of liberty for not less than 3 months or a fine of not less than 100 daily rates if it simultaneously imposes a penal measure, a compensatory measure, or a forfeiture. The possibility provided by Article 37a(1) of the Penal Code may not be taken advantage of by perpetrators who have committed a crime acting as part of an organized group or association whose aim was to commit a crime, or who have committed a terrorist crime. The amended Article 37a of the Penal Code will remain in force also after the revocation of the state of pandemic.

It is worth noting that, after the amendment, the content of Article 37a of the Penal Code is similar to the content of the Act of 13 June 2019 amending the Penal Code Act and certain other acts³⁶, which the President referred to the Constitutional Tribunal in order to examine its compliance with the provisions of the Constitution of the Republic of Poland. The Constitutional Court found the Act of 13 June 2019 amending the Penal Code Act and certain other acts is in its entirety incompatible with Article 7 in connection with Article 112 and with Article 119(1) of the Constitution of the Republic of Poland³⁷.

As M. Małecki noted³⁸, these amendments “have nothing to do with anti-epidemic protection, especially since they were invented a year ago.

The authors of the Global Prison Trends report³⁹ were right when claiming that “[t]he political backing of alternatives to imprisonment as a response to the coronavirus pandemic need to be harnessed for longer-term reform”.

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