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Contemporary challenges in the work of court probation officer for adults. Critical recognition from the perspective of the Polish experience

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In the Polish legal system the institution of the probation officer, whose duty entails working with adult perpetrators of criminal offenses, has a relatively short tradition[1]. Whilst it holds true that in 1932 the Criminal Code[2] provided for the use of probation in relation to offenders who were conditionally suspended from serving a sentence of imprisonment, the legislature did not precisely define the entity that would supervise this suspension and as a result the task was assigned to a so-called social factor. The concept of a separate system of probation for adults had to wait until the stabilization of the foundations of the new criminal justice system after World War II[3].

[1] In the Polish legal order court-appointed probation officers executing judgments in criminal cases are probation officers for adults whilst those executing judgments in family and juvenile cases are family probation officers.

[2] Regulation of the Polish President of 11th July, 1932. Penal Code, Journal of Laws No. 60, item 571.

[3] For more on the history of the birth and evolution of probation in Poland: M. Pawlicka, *Kuratela sądowa w Polsce, Europie i świecie — historia i stan obecny*, Warszawa 2007; S. Stępniak, *Funkcjonowanie kurateli sądowej. Teoria i rzeczywistość*, Poznań 1992; K. Gromek, *Probacja czy kuratela albo środki alternatywne — próba optymalizacji*

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In the case of probation officers for adults their emergence is to be associated with the Act of 1957 on conditional release of imprisoned persons serving their sentences[4]. Pursuant to its provisions, the Minister of Justice nominated probation officers as a social subsidiary body of the court, in each provincial court, to supervise the convicted conditionally released from prisons. Extending the scope of their activities with the protective supervision of persons who had their sentence suspended conditionally took place in 1965[5]. Then also the existence of a professional probation officer was sanctioned, as a full-time employee of the court, and forming the body with a strictly outlined scope of their authority. The growing importance of the adult probation officer in the Polish legal system came with the enactment of criminal codification in 1969. New, non-custodial forms of the treatment of offenders meant that its role as an important judicial body actively involved in the implementation of both, the aforementioned probation measures and a custodial sentence and probation service, had increased considerably[6].

Two legal acts issued in the mid-1980s were of fundamental importance for the development of probation in Poland[7]. The Act on Common Courts, in particular, and especially the Regulation on court probation officers issued on its basis meant that for the first time in the history of this institution comprehensive regulation of organizational and political issues were implemented, also the legal status and tasks of the probation service were established. Nevertheless, towards new solutions increasingly numerous allegations were directed largely regarding the socio-

systemu w ujęciu ewolucyjnym, [in:] *Probacyjne środki polityki karnej — stan i perspektywy*, Warszawa 2001.

[4] Act of 29th May, 1957 on conditional release of persons imprisoned, Journal of Laws No. 31, item 134. On the basis of its provisions, the Minister of Justice issued on 15th January, 1958 the Regulation on the supervision of persons conditionally released, Journal of Laws No. 10, item 35.

[5] Regulation of the Minister of Justice of 3rd March, 1965 on the protective supervision of persons conditionally suspended from performing imprisonment, and on the supervision of persons conditionally released, Journal of Laws No. 12, item 80.

[6] S. Walczak, *Prawo penitencjarne. Zarys systemu,* Warszawa 1972, p. 417.

[7] Act of 20th June, 1985 Act on Common Courts, Journal of Laws No. 31, item 137 and the Regulation of the Minister of Justice of 24th November, 1986 on court-appointed probation officers, Journal of Laws No. 43, item 212.

professional model of this service[8]. It took fifteen years for significant changes to take place in this area.

In the year 2001 the law on probation officers, in force until now, was adopted[9]. It is no is no exaggeration to say that, in the words of T. Jedynak, this act is a kind of "constitution for curatorial judicial service"[10]. Its adoption was possible after reaching a compromise in many key issues for the future of this service shape. In the period preceding the introduction of these provisions widely discussed, among others, were issues of division of the Probation Service into a family branch and one dealing with the affairs of adults, it was considered whether it would be optimal to locate probation officers in the structure of the judiciary service or outside (within the prison or social care divisions), it was sought to determine both the degree of their autonomy in enforcement proceedings, as well as the degree of their independence in the context of professional activities. An important element of this discussion was the issue of the target organizational model which was to be adopted by probation (advantage of a social or professional factor) and its rank expressed not only by the scope of tasks which were appointed to carry out by the legislature, but also the amount of salaries and position in relation to other organs of judicial proceedings.

A greater number of issues raised in the public forum were indeed resolved in line of probation officers' wishes. This was possible thanks to the active involvement of representatives of Polish probation officers in the works on the introduction of a new law[11]. Thus it enabled stable constitutional foundations for the operation of the service, recognizing the principles of its organization, the performance of the duties of probation officers and their socio-professional status. After adjustment of major political issues a scientific discussion on the issues of execution

[8] K. Gromek, *Kuratorzy sądowi. Komentarz*, Warszawa 2005, p. 26 and further. Also: *Kurator sądowy — nowe uregulowania prawne*, Szkoła Specjalna 1988, No. 2, p. 117 and further.

[9] Act of 27th July, 2001 on court-appointed probation officers, Journal of Laws No. 98, item 1071.

[10] T. Jedynak, K. Stasiak, *Zarys metodyki pracy kuratora sądowego*, Warszawa 2008, p. 65.

[11] More on this topic: K. Stasiak, *Prace legislacyjne nad ustawą o kuratorach*, [in:] *Zarys metodyki pracy kuratora sądowego*, ed. idem, Warsaw 2008, pp. 55–63.

of punishments and freedom measures with the participation of probation officers could move to another level, focusing on issues related to the implementation of the statutory duties of this formation. It was much needed, as the new Executive Penal Code greatly expanded the range of tasks for probation officers for adults, especially for professional ones, which was also the result of the fact that they had received the status of one of the principal organs of executive proceedings (Art. 2 paragraph 6 of the Executive Penal Code)[12].

Currently the tone for discourse is set by problems associated with the recently introduced changes in the regulations or the emergence of entirely new ones, previously unknown in the Polish legal institutions and legal solutions. It is significant that today the scale and complexity of the problems faced by probation officers in enforcement proceedings appears to be even greater than at the implementation of the new criminal codification in 1997, and the prospect of finding a suitable solution much more complex.

At the same time, one must be aware that challenges posed to the curatorial service by the development of criminal law have a fundamental impact on the effectiveness of judicial rulings in execution, and thus the degree of a return to crime of persons under curatorial supervision. Certainly, the source of these problems should be sought in pursued criminal policy, the positive effect of which would be a departure from the application of penalties for insulating in favor of freedom conditions. Unfortunately, at the same time a lack of consistency in the creation of a comprehensive system to support these changes in conjunction with a number of inconsistencies within the new rules contributes to achieving counterproductive effects.

Issues taken into consideration further on in this paper relate to the most current and crucial, according to the author, challenges faced by

[12] Regulations of tasks of court-appointed probation officers and problems arising on their basis in the first years of the new penal codification were presented by: L. Bogunia, *Kurator jako organ prawa karnego wykonawczego*, Nowa Kodyfikacja Prawa Karnego III, 1998; T. Szymanowski, *Kuratorzy sądowi i zadania przez nich wykonywane po dokonanej reformie*, Archiwum Kryminologii XXVII, 2003–2004; also T. Szymanowski, *Ustawa o kuratorach sądowych na tle innych przepisów normujących ich zadania i obowiązki*, Przegląd Więziennictwa Polskiego 2002, No. 34–35.

Polish probation officers carrying out tasks in the course of criminal proceedings for enforcement. Due to the framework customary for this type of publication, as well as the circle of potential readers, considerations relating to these institutions will be limited to matters of principle and at the same time universal in perception.

One of the main demands put forward towards Polish probation is a need for a system that would allow for the development of the space that is created when a convicted individual leaves prison. In recent years, the issue of institutional support for convicts both preparing for release, as well as those who have already regained their freedom, increases. Solutions do not meet changes in the law system. While the Polish legislature appointed a special period at the end of the penalty for preparation of the convicted to a life in freedom (Art. 164 § 1 of the Executive Penal Code) and declares that the probation officer is one of the key players supporting the convicted in this process (Art. 165 § 3 of the Executive Penal Code) the recently adopted rules are inadequate or even harmful for the implementation of these declarations.

The introduced Ordinance of the Minister of Justice of 26th February, 2013[13] must be considered a partial success, which grants the possibility of nominating prison probation officers who would implement basic assumptions of a re-adaptation program while a convict still serves the remaining sentence in prison. Such activity, thanks to the commitment of individual probation officers has already been carried out successfully in some regions of Poland under the provisions of the Executive Penal Code[14]. Today, it is clear that merely the 'opportunity' to conduct such interactions is far from sufficient. Therefore, comprehensive statutory regulation of the probation officer's position is strongly postulated,

[13] Regulation of the Minister of Justice of 26th February, 2013 on how to exercise the powers and duties of court-appointed probation officers in criminal enforcement, Journal of Laws 2013, item 335.

[14] More information: M. Kokorzecka-Piber, *Wprowadzenie do modelu kurateli penitencjarnej*, [in:] *Kurator penitencjarny-wstęp do probacji*, Białystok 1997; G. Szczygieł, *Instytucja kuratora penitencjarnego w opinii skazanych, wychowawców i kuratorów zawodowych*, [in:] *Więziennictwo, nowe wyzwania*, ed. B. Hołyst, W. Ambrozik, P. Stepniak, Warsaw-Poznan-Kalisz 2001.

as the system of obligatory preparations for the release of the convicted person.

In this area it would also be necessary to return to the abandoned in 2011[15] so called voluntary probation supervision (formerly Art. 167 Executive Penal Code). The importance of this institution, ruled for a maximum of two years, on the one hand was based on the assumption that the convicted would adopt certain obligations, on the other hand on the expected support for social re-integration, which was to be provided by court-appointed professional probation officer. However, to avoid the mistakes that would lead to the cancellation of this provision, there was the need to equip probation officers with the real ability to provide convicts with help to find a job or housing.

The amendment to the Executive Penal Code in 2009[16] meant that probation officers must meet the new role and tasks allocated to them by the legislature in the process of execution of the penalty of restriction of liberty[17]. This penalty, implemented in the form of community service, after the adoption of amendments designed to increase its effectiveness, bases itself primarily on a court-appointed professional probation officer as a body performing most of the work in the proceedings, while reducing to a minimum, activities reserved for the court. Such an increase in the rank of probation officer forces their multiplied activity during the implementation of the sanctions while at the same time raising the level of responsibility of probation officers for all enforcement proceedings in this matter.

A probation officer, within an assigned task of organizing and supervising the execution of the penalty of restriction of liberty (Art. 55 § 2 Executive Penal Code) is responsible, inter alia, for managing the execution of judgments (Art. 56 § 1 and 57 § 1 Executive Penal Code), decides upon the type, location and date of commencement of work and their possible changes (Art. 57 § 1 and 4 Executive Penal Code), is responsible for contacting entities in which work is performed within the

[15] Journal of Laws 2011, No. 240, item 1431.

[16] Journal of Laws 2009, No. 206, item 1589.

[17] More information on restriction of liberty after the changes J. Lachowski, *Kilka uwag o nowym modelu kary ograniczenia wolności na gruncie kodeksu karnego z 1997 r.*, [in:] *Nauki penalne wobec szybkich przemian socjokulturowych. Księga Jubileuszowa Prof. M. Filara*, ed. A. Adamski et al., Vol. I, Torun 2012, p. 222 and further.

adjudicated punishment, and also collects relevant information on the organization and supervision of work as well as its progress and behavior of the convicted person (Art. 58 § 1 and 2 Executive Penal Code). They also have the power to require the convicted person to answer questions about the course of their sentence (Art. 60 Executive Penal Code). A separate obligation of a professional probation officer, associated with the punishment, is to request to initiate court proceedings for incidental activities (Art. 57 § 2 and 3 Executive Penal Code, Art. 66 § 1 Executive Penal Code, Art. 173 § 2 point 7 Executive Penal Code) and to participate in certain court meetings for cases initiated at their request (Art. 65 § 2 Executive Penal Code and Art. 173 § 2 point 9 Executive Penal Code).

After the introduction of these changes the scope of their responsibilities became so broad that it raises the concern if professional probation officers are able to cope with their current responsibilities, which may jeopardize hopes for reform of this measure as a response to crime[18]. Therefore, the provision of adequate training in the introduced changes in recent years is as important as it is necessary to strengthen the full-time probation service.

Increasing the number of probation officers will be all the more necessary when taking into account the needs introduced in 2007[19], a new form of detention outside prison in the form of electronic supervision. Despite numerous criticisms formulated towards this bill[20] there had been noted a systematic increase in convicts under this regulation, and further projects of legislative changes forecast the normalization of the institution under the current criminal codification and the significant expansion of its scope. As an example, it should be noted that the latest draft amendment to the Criminal Codes[21] assumes that electronic supervision will be applied to the penalty of restriction of liberty, a penal measure

[18] K. Postulski, *Zmiany w wykonywaniu kary ograniczenia wolności*, Probacja 2011, No. 3, p. 140.

[19] Act of 7th September, 2007 on the enforcement of imprisonment outside prison in electronic supervision, Journal of Laws 2010 No. 142, item 960.

[20] S. Lelental, *Zakres podmiotowy i koszty stosowania dozoru elektronicznego*, [in:] *Prawo karne wykonawcze w systemie nauk kryminologicznych. Księga Pamiątkowa ku czci Prof. L. Boguni*, ed. T. Kalisz, Wroclaw 2011.

[21] A bill to amend the Act — Penal Code and some other laws as set out in the letter of 17th April, 2014 along with justifications. http://legislacja.rcl.gov.pl/lista/2/projekt/194900/katalog/194937 — reviewed on 10th May 2014.

of restraining order for selected persons or a preventive measure, while reserving the rights that in the future, this directory may be expanded.

Also in case of sentences carried out within electronic supervision it was decided on a significant involvement of probation officers in the process of their implementation. In accordance with Art. 56 of the Act of 2007 a number of tasks related to the organization and supervision of the conduct of punishment served in this system were imposed on curatorial service. The duties of probation officers included the submission to a penitentiary court of proposals on executive proceedings. Following this course of action a probation officer can initiate provisions crucial for the course of the proceedings (e.g. within the scope of granting the right to a convict of serving a sentence in this system and its repeal, early conditional discharge, ruling a restraining order to a convict towards a specific person, and others).

A probation officer may also file complaints to the penitentiary court to grant or refuse permission to serve a sentence under such system, provided that they put forward such proposals. In certain situations, the provisions of the before-mentioned Act entitle a professional probation officer to take independent decisions regarding serving a sentence (e.g. permission to leave the place in which the offender must be present). In the course of implementing this penal measure a probation officer can at the same time be the executive authority for enforcement proceedings as well as their principal[22]. This viewpoint, which signals certain selected activities among probation officers in the field, illustrates the scale of the involvement of the service in the electronic supervision of offenders. The literature increasingly expresses concerns that the scope of their competences in the case of the law was formulated too broadly and to the detriment of expeditious execution of basic tasks that would be performed within the framework of the institution, i .e. to organize and supervise the course of the sentence[23].

Last year, before Polish probation officers, a legislative body presented yet another problem of a serious nature. With the coming into

[22] More on this topic: R. Pelewicz, *Czynności sądowego kuratora zawodowego w wykonywaniu kary pozbawienia wolności w systemie dozoru elektronicznego*, Probacja 2011, No. 2, p. 87 and further.

[23] Ibid., p. 99.

force of the new Regulation of the Minister of Justice on ways to carry out the duties and powers of probation officers in criminal matters, on the agenda there turned up some identification of the so-called risk factors for recidivism in a convict. However, up to now, the diagnosis of a person under charge and formulation of charges on the basis of proposals as to their future conduct constituted an integral part of the work of probation officers. That said, the consequences of the transfer of this process to its new formula to the normative ground are serious. The existing flexibility in the selection and grading of information that may be relevant to these findings as well as discretion in assigning to them the results of specific consequences should give way to structured tools for estimating this risk and criminogenic needs of the offender and described within a basis of their performance objectives, areas and intensity of correction procedures used by the probation service. Such a procedure is developed in a successfully applied corrective interaction model in many countries, called RNR (Risk-Need-Responsivity Model)[24].

Within Polish solutions, what has significant importance is a division of perpetrators who remain under the supervision of a probation officer into the so-called risk groups. In the justification for this act it was argued that the separation of these groups and assignation of adequate operating procedures will increase the effectiveness of their interactions, particularly in cases of "difficult issues", assuming a reduction of involvement in other cases. Crystal clear criteria, with no discretion, and the creation of a mechanism of activities based on a cause-and-effect relationship was to be the success of this project.

Unfortunately, the determination of the conditions governing the classification of offenders into specific risk groups is hardly precise, whilst the criteria themselves are rightly described as arbitrary and controversial. In addition, the ability to change the group during supervision was significantly reduced. Contrary to initial assumptions regarding turning probation services professional, the possibility of exercising supervision to offenders from a high-risk group was made available to

[24] More on the development of the correction model B. Stańdo-Kawecka, *Badania osobopoznawcze skazanych i oddziaływania terapeutyczne w historii rozwoju więziennictwa*, [in:] *Psychologia i prawo. Miedzy teorią a praktyką*, ed. E. Habzda-Siwek, J. Kabzińska, Sopot 2014, p. 446 and further.

probation officers. To determine the consequences of the allocation of the perpetrator to a given category, raises doubts of the hazard of recidivism in the context of the formulation of further procedures for dealing with it. What cannot be accepted is the lack of proven instruments for estimating this risk.

As a result, it is difficult to assume that pursuant to provisions of this ordinance it shall be possible to build an efficient system of risk management and, in the longer term, a modern, organized and efficiently functioning probation service. B. Stańdo-Kawecka proves right, claiming that such a state can be achieved only on the assumption that this process — complex and long, will be conditioned by the provision of an adequate number of staff of the Probation Service, equipping them with a reliable tool for estimating the risk of recidivism, adequate training how to use such tools and guaranteeing the perpetrators, who remain in the community under the supervision of probation staff, access to corrective interventions oriented towards dynamic risk factors which occur[25].

Summary

The paper focuses on the issue of probation officer participation in the supervision exercised over offenders exhibiting mental health dysfunctions. The analysis included in the paper applies to both currently applicable law and the proposed legislative solutions. The author's critical remarks also include proposals *de lege lata* and *de lege ferenda.*

Keywords: probation officer, supervision, mental disorders, changes in the law.

[25] B. Stańdo-Kawecka, *Wybrane problemy profesjonalizacji organów probacyjnych i klasyfikacji sprawców oddanych pod dozór do grup ryzyka*, [in:] Nowa Kodyfikacja Prawa Karnego, Vol. XXXIII (in print).