

The scope of the rights to life and health of prisoners serving sentences in Polish prisons and the influence exerted in the field by the judgments of the ECHR

Małgorzata Szwejkowska

University of Warmia and Mazury in Olsztyn

Abstract

In each year as far as since 1999 the global prison population is growing. In 2015 it certainly exceeds 10,3 million. In many countries, including European, in the last decades there has been a record of overcrowding in penitentiary units, which certainly has negative implications for the welfare of prisoners. Ways of dealing with those incarcerated who are kept in penitentiary isolation might vary between countries, but it is enough to say that the axis of the division of penitentiary systems runs across the belief or disbelief in the social reintegration of prisoners. The process of achieving rehabilitative goals by be hinder by prison's worsening conditions.

This articles discusses the right of the incarcerated people to maintain their health and well-being, taking into account the impact on the interpretations that have been exerted in this area by the judgments of the European Court of Human Rights.

Keywords: *imprisonment, human rights, prisoners rights, ECHR, Polish Enforcement Code, international law provisions.*

Introduction

Although a slight decrease in the global population of convicted inmates was recorded for the first time in many years in 2015 (J. Gutter, R. Harding, 2016), the number of convicts in the world's prisons is still significant, and certainly exceeds 10 million (EUROSTAT 2016). Among the countries where populations are by far the largest, in the first place there is a need to distinguish the United States (about 1/5 of the world's prison population are serving their prison sentence in U.S. prisons, jails and detention centers).

Second place in the rating belongs to China (approx. 1.6 million sentenced inmates according to official statistics), then Russia and Brazil, with a similar number of incarcerated persons, oscillating in the range of 400–450 thousand (EUROSTAT, 2013). Poland ranks in 20th place in the ratings, with a population of approx. 80 thousand (Reports of the Prison Service from 2014 and 2015). In many countries, including European, in the last decades there has been a record of overcrowding in penitentiary units, which certainly has negative implications for the welfare of prisoners. Ways of dealing with those incarcerated who are kept in penitentiary isolation might vary between countries, but it is enough to say that the axis of the division of penitentiary systems runs across the belief or disbelief in the social reintegration of prisoners. In countries where the penitentiary systems tend to aim at the rehabilitation of prisoners (including the United States, Australia and most of the European countries), there is a perception that convicted persons must exercise certain rights, but the scope of these rights varies among the penal systems. As already mentioned above, overcrowding in prisons can greatly hinder achieving the goals of social reintegration, and call into question the actual implementation of the rights of prisoners.

The purpose of this article is to analyze the provisions of Polish penal codes with regard to the rights of prisoners to life and health, taking into account the impact on the interpretations that have been exerted in this area by the judgments of the European Court of Human Rights.

Fundamental rights of prisoners

The fundamental rights of incarcerated persons serving prison sentences in Poland are guaranteed by the provisions of the Constitution, Penal Codes and other regulations, and, last but not least, by a number of international agreements.

Among these it is enough to mention:

- the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966, and opened for signature in New York on 19 December 1966;
- the Convention of the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950; the European Convention for the Prevention of Torture and Inhuman or

Degrading Treatment or Punishment, opened for signature in Strasbourg on 26 November 1987;

- the European Agreement relating to persons participating in proceedings of the European Court of Human Rights, opened for signature in London on 6 May 1969.

In Europe, particularly important provisions are those of the above-mentioned European Convention on Human Rights, since there have been countless complaints from prisoners based on them before the European Court of Human Rights (the basis of complaints is art. 34 of the ECHR). It should be stressed that the standards contained in the Convention were not specifically developed to protect the rights of prisoners. Therefore, the Court decides on matters concerning them based on general standards. This interpretation, which is nowadays followed by the Court, has its roots in the case *Golder v. United Kingdom*, 1975 (considered to be a milestone ruling and a major contribution to the legal protection of prisoners' rights).

The Polish legislator *expressis verbis* provided the need to respect the rights of prisoners in the Penal Enforcement Code of 1997. All prisoners must be considered as human beings who have inherent dignity, which means that they should be treated humanely, and that there is a prohibition of torture, and inhumane and degrading treatment and punishment. The literature emphasizes that the distinctive feature of the Polish Enforcement Penal Code of 1997 is that this act in the first place mentions the rights of those who are convicted, and then their duties. This is exactly the opposite situation compared to that of the Enforcement Penal Code of 1969, in which the duties of the convicted were followed by the regulations of their rights – those rights were mentioned in general terms, without specifying any mechanism for sanctioning violations of them (Szymanowski, Migdał, 2014).

The catalog of rights belonging to a convicted person is vast, and in this area art. 102 of the Penal Enforcement Code has special significance. Some of the rights are explicitly indicated in the text of the Code, while some must be derived from the spirit of that Act and other laws. Amongst the latter category of rights – according to a view that is established in the literature and in the case law of Polish courts – one can indicate the right of every prisoner to personal safety (Szczygieł, 2009).

It is important to stress that every convicted person, right after being settled in prison, should be immediately informed of his/her rights and his/her duties. In particular there is an obligation to enable him/her to familiarize himself/herself with the provisions of the Penal Enforcement Code and other legal norms, for instance the Rules on the organization of the enforcement of imprisonment (hereinafter RegWykKPW), and to undergo appropriate medical examinations and sanitary practices (art. 101 of the Penal Enforcement Code). In this regard, § 2 RegWykKPW is of particular importance, indicating that any convict admitted to prison should be informed of the possibility of the occurrence (while in prison) of threats to his/her personal safety, and that they may also experience some manifestations of negative behaviors characteristic for the prison setting. In any such case the prisoner should be aware of the need to notify prison authorities of any such incidents if it threatens his/her well-being, or that of other inmates. This basic information must be given to the convicted person immediately upon his/her placement in the so-called cell of transition.

The main aim of this article is to synthetically discuss the rights of prisoners to life, health and well-being, in accordance with their human dignity, while placed in correctional facilities.

The scope of the rights of prisoners to life and health – the most important issues

In the light of art. 3 of the Convention on Human Rights, any State which is a Party to the Convention is obliged to ensure such conditions of prison isolation which do not violate the human dignity of an incarcerated person, and also that the penalty does not cause excessive physical suffering or psychical distress inevitably associated with the fact of being deprived of his/her liberty as a punishment. In particular, the life and health of the incarcerated person must be protected by all adequate measures. However, not all of the possible risks to the life or health of the person that is held in custody may provide a basis for a claim for compensation before the ECHR. The ECHR has repeatedly stated that such a claim can be made only in cases when the competent authorities (first of all the prison's administration) were aware of the existence of immediate and real threats towards the life

or health of one or more persons, and did not undertake any attempts to eliminate or at least to reduce such risks.

The right to life and health, as well as to the well-being of inmates, consists of many particular legal guarantees. Some of them are listed and described below.

Inmates' medical care

All adequate medical services are provided for incarcerated persons free of charge, as well as medicines and sanitary articles (art. 115 of Penal Enforcement Act). However, unlike non-convicts, inmates cannot choose their doctor or nurse of primary care, or their dentist, ambulatory health care institution or hospital. Prostheses, orthopedic aids and other similar supplies are also delivered free of charge in cases when they are necessary to allow an inmate to adjust to prison conditions. In other cases this medical equipment is provided but needs to be paid for. All medical support is provided by public correctional healthcare facilities. Other non-correctional medical institutions are obliged to cooperate when necessary.

Only in exceptional cases can the director of the prison – after consulting a doctor that is a staff member of a correctional healthcare facility – allow an inmate (at his/her own expense) to choose a doctor other than a correctional facility staff member for treatment, or to use some additional medicines or other medical products. The daily and weekly schedule of medical practice is formulated by the director of the correctional institution (§ 14 and § 15 RegWykKPW). Inmates receive medical care every day according to the predetermined schedule. In an emergency situation every convict can seek immediate off-schedule treatment.

In practice, the main source of concern is no longer legal provisions, but rather their implementation, which indicates, in particular, a lack of proper information flow between all the medical facilities involved in the protection of the health of inmates, correctional authorities and the courts (which are also involved in the decision-making process). Another main issues to focus on is the assessment of the proper technical conditions of medical facilities' buildings and infrastructure, and also of equipment, which is often much used and outdated (Ejchart, Wiśniewska, 2013; NIK report 2013, also see: Dzieciak v. Poland 2008; Kaprykowski v. Poland 2009).

Inmates' diet

Proper nutrition is an important factor in maintaining good health and well-being while in prison. In this regard, the provision of art. 109 of the Penal Enforcement Act has a central role. According to this article, each convict in prison or in jail receives 3 times daily a drink (usually it is water, a cup of tea, or coffee made from roasted wheat bran) and a food portion that meets the Dietary Reference Intakes (normally about 2,600 cal per day). Inmates working in particularly burdensome conditions are served with additional food portions during the working week.

At least one of the daily meals must be served hot. Nutrition must be appropriate to age, health status and type of work. Religious diets should also be available to inmates. A convict that is involved in actions outside the prison's setting (for example being escorted to court for trial) must be provided with a suitable amount of dry food supplies and drinks (also appropriate to his/her age, health status and religious beliefs). Types of meals and drinks, and their nutritional values are described by the ordinance of the Ministry of Justice of 19 February 2016 (Official Journal 2016, pos. 302).

To consume their meals the inmates may use their own metal cutlery, with the exception of those held in maximum security prisons, who are allowed to use only plastic cutlery.

Most claims to the ECHR regarding food relate to hunger strikes by those held in custody. Incarcerated persons claimed that they were forced fed, or that prisons authorities used other forms of coercion toward them (for instance *Nevmerzhtsky v. Ukraine*, 2005, application no. 54825/00).

Accommodation conditions

Amongst the obstacles that hinder the correct reintegration of inmates, the one that is most often mentioned in the literature is overcrowding in prisons (S. Leleń 2009). This phenomenon is defined as an excessive number of inmates relative to the general capacity of the correctional institution. In Poland 2/3 of the prison infrastructure was built before the 1st or 2nd World War. Currently, the penitentiary system is facing serious problems in terms of modernization (some of the buildings are considered to be historical monuments). Inmates' health and well-being is to a great degree affected by his/her accommodation conditions. The right to proper living conditions is

provided by art. 110 of the Penal Enforcement Act, which states that a convict should be placed in a one-person cell or in a multiple occupancy cell. An average of 3 m² of living space must be provided per prisoner. It is, however, allowed to place an inmate for a fixed term period of 14 or up to 90 days in a cell where living space is between 2m² and 3m². This may happen only in strictly defined cases (see art. 110 § 2a and 2b of the Penal Enforcement Code).

All cells are equipped with adequate pieces of furniture (bed, cabinets, stools, and so on), so as to ensure that the convicted persons have: a separate place for each inmate to sleep, adequate conditions of hygiene, an adequate supply of air, and appropriate temperature (depending on the season), as well as lighting adequate for reading or working. Everything should be in accordance with the legal standards laid down, for instance, in § 28 sec. 1 of RegWykKPW. A particular issue in this field is the right location and technical conditions of sanitary equipment. The complaints of imprisoned persons that have been made to the national courts and the ECHR concern in particular the conditions of a so called “bathroom corner”, usually partitioned only by wooden panels or plastic curtains. In the opinion of the applicants, this does not provide any level of privacy (the requirement to respect their privacy is not met by this – see for example *Szafrański v. Poland*, 2015).

Within the cell the convicted persons may have documents relating to the criminal proceedings of which they are a participant, some food supplies – the total weight of this must not exceed 6 kg, tobacco, personal hygiene requisites, personal items, watches, letters and photographs of family members and other loved ones, religious objects, stationery, personal notes, books, newspapers and board games (art. 110 of the Penal Enforcement Code). The director of the prison may allow a convicted person to have in his/her cell audiovisual equipment, a computer and other items, including objects that may enhance the aesthetics of the cell or be an expression of the cultural interests of the convict, on condition that the possession of these items does not violate the principles of order and safety within the prison setting. Inmates cannot have in a cell (or transmit to the deposit) any objects whose dimensions or quantity infringe the existing order or impede the convoy. The number and dimensions of items that the convicted person may have in his/her cell, and how it must be stored, and also, if necessary, the rules of use, is defined by the director of the prison in internal regulations.

Personal hygiene and the hygiene of the cell

All inmates are obliged to maintain adequate personal cleanliness (art. 116 of the Penal Enforcement Code). In order to obtain this aim legal standards are set out in Annex 1 tab. 4 of the ordinance of the Minister of Justice of 28 January 2014 on the living conditions of prisoners in prisons and detention centers (Official Journal of Law of 2014, pos. 200).

Hygiene items are delivered to the convicts by the prison administration. They can be sent in a package from outside, or purchased by inmates in the prison's shops. Penitentiary authorities also provide bed linen, which is changed at least once every two weeks, or more often depending on needs. The authorities are also obligated to deliver any other items that help to maintain proper sanitary standards in cells. (art. 111 of the Executive Penal Code). To maintain personal hygiene, inmates are offered a haircut at least once a month, and may go to the shower at least once a week (in the case of incarcerated women it is at least twice a week, and once a day women in prison can use hot water – § 30 sec. 2 and 3 of RegWykKPW). The schedule of using the shower is specified in internal prison regulations (§ 14 sec 2 of RegWykKPW).

Each incarcerated person receives clothes that are appropriate to the season, and also underwear and shoes, unless the inmate uses his/her own. Replacing underwear occurs every week, or more frequently if it is needed. Depending on needs, outer clothing and footwear is also changed (§ 6 sec. 1 of the ordinance of the Minister of Justice of 28 January 2014). When taking part in criminal procedural activities, during transportation, and in other justified cases, the convicted person uses his/her own clothing, underwear and shoes, unless they are inappropriate for the time of year, or using them is against safety considerations (art. 11 of the Penal Enforcement Code). Persons convicted of an offense motivated by political, religious or ideological beliefs (so called prisoners of conscience) have the right to use their own clothing, underwear and footwear (art. 107 § 1 of the Penal Enforcement Code).

Inmates' right to rest

Rest is essential to maintain the health and well-being of the convicted person. Each incarcerated person has the right to necessary rest. In particular, he/she has the right to walk for one hour per day, and is entitled to an

8-hour period for sleep during the night (art. 112 of the Penal Enforcement Code). Convicted women who are pregnant or taking care of their babies are entitled to a longer walk. The walk takes place under the direct supervision of an officer of the Prison Service in a designated place in the open air.

The schedule of walks, as well as hours dedicated to night rest, are determined by the director of the prison in internal legal regulations (§ 14 sec. 2 of RegWykKPW). At the request of the inmate's doctor, the prison director can change the duration of the walk exercised by the convicted patient (§ 31 of RegWykKPW). The walk of so-called "dangerous inmates" takes place only in designated areas under the strict supervision of Prison Service Staff Members, and separately from other inmates (art. 88b § 6 of the Penal Enforcement Code).

However, all of the above-mentioned rules apply only to offenders that serve their sentences within prisons of the maximum security type. Others, who are serving their sentences in prisons that are half-open or open, can move around the place without any previous permission, but according to the schedule given in an internal legal regulation (art. 91 and art. 92 of the Penal Enforcement Code), and because they can move freely, for these convicts there are no organized walks.

Inmates' right to safety

The prison administration has an obligation to take appropriate measures to ensure the personal safety of all offenders while serving their sentences. Each incarcerated person is obliged to immediately inform his/her supervisor about risks to his/her personal safety, and must be told how to avoid these risks (art. 108 of the Penal Enforcement Code). The concept of "security" is broad, and primarily includes the inviolability of the human body (this forbids any physical violence like beating, kicking, jabbing) on the part of both inmates and prison staff. However, in practice it has to be underlined that the main source of threats to prisoners' life, health and well-being is the behavior of other inmates, which is the negative effect of the so-called "second life" in prison. Therefore, the administration of the prison should arrange the serving of a sentence in such a way as to ensure full protection of the rights and safety of inmates, and which avoids suffering caused by inmates committing abuses.

Inmates' right to maintain contact with the outside world

Imprisonment, of course, severely restricts the inmates' contact with the outside world, in particular with relatives and friends. Limiting the right of a convicted person to private life is mainly due to: the limited number of visits that are allowed to the family member; the supervision of all of visits; as well as to the monitoring of telephone calls and to the censorship of the correspondence. The right of offenders to stay in contact with other people, in particular family members and other people close to him/her, is regulated by art. 105 of the Penal Enforcement Code. This act provides that a convicted person should be capable of maintaining relationships primarily through visits, correspondence, telephone calls, parcels and money orders. In justified cases, with the consent of the director of the prison, the offender may use some other means of communication with the outside world. In the case of a convicted foreigner, it is also envisaged that he/she may correspond with a competent consular or diplomatic representative, as well as have the right to be visited by them.

All of the above-mentioned is a clear reference to the provisions of art. 67 § 3 of the Penal Enforcement Code, which states *expressis verbis* "maintaining contacts with family and the outside world is the one of the means of interaction that all convicted persons are allowed in order to help them to achieve the goals of imprisonment". These rights may, however, be limited to some degree by the director of the prison if limitations in this particular area are required for reasons of prison safety or for maintaining public order. These limitations must be notified to the penitentiary judge and the convict. The provisions of Articles 105 and 105b of the Penal Enforcement Code define the conditions under which visits and telephone calls by convicts are conducted. Visits may not last more than 60 minutes, and on any one day the convict is granted only one such visit. In the visit no more than two adults may participate at the same time. There are no limits considering minors, but they may participate in the visit only when supervised by adult visitors. In justified cases the director of a prison may grant a convicted person permission to receive more than two adult visitors at the same time. Any inmate that has the permanent custody of a child under the age of 15 is entitled to an additional visit of the child/children. When a convicted person expresses the willingness to meet with a person who is not a family

member or another person close to him/her, this visit should be authorized by the director of the prison. Each visit in a maximum security prison is held under the supervision of an officer of the Prison Service. Direct contact between the convicted person and a visiting person are allowed that they sit together at a separate table in the visiting room.

The number of visits, the control of telephone calls, and the presence or not of the censorship of correspondence depends on the type of prison in which the convicted person is serving punishment. Inmates in a maximum security prison setting are entitled to two visits a month, and with the permission of the director of the prison may use them at the same time. All visits are under the control of Prison Service staff members, and the correspondence of inmates is subject to censorship. In semi-open prisons convicts can have three visits a month, which, with the permission of the director of the prison, can be combined. Visits to convicts are supervised by the prison administration, and conversations that take place between inmates and visitors may be monitored by the prison administration. The correspondence of those convicted may be subject to censorship. In the open-type prison regime convicts can have an unlimited number of visits, and these take place within the control of the prison administration. Correspondence is not subject to censorship. It has to be underlined that according to the ECHR a blanket system of censorship of correspondence in prison and extensive control is usually not necessary in a democratic society (see, for instance, *Savenkovas v. Lithuania*, 2008).

The schedule of visits in prison is defined by internal legal regulations, a copy of which should be made available to each offender. In the light of art. 105B of the Penal Enforcement Code, every convicted person has the right to use a telephone at their own expense or at the expense of the caller. In justified cases, the director of the correctional facility may allow a convicted person to use some other means to communicate at the expense of the caller or of the convict, and if the convicted person has no financial resources, at the expense of the prison. Depending on the type of prison where convicts are serving their sentence, their phone calls are under the control of the prison administration (as in the maximum security prison type); they may be monitored at semi-open correctional facilities; or controls are not allowed, as in open-type prisons.

The rights of inmates to religious practices

The right to exercise religious practices (art. 106 of the Penal Enforcement Code) is undoubtedly important for the well-being of the prisoner, and it is included in the more general category of the right to health. According to article 53 sec. 2 of the Constitution of the Republic of Poland, religious freedom includes the freedom to profess, or to accept, a religion by personal choice, and the freedom, either individually or collectively, publicly or privately, to worship, pray, participate in ceremonies, perform rites, or participate in teaching. The inmate's right to practice religion in prison includes the right to religious practices, to join in religious services and to participate in masses celebrated in prison, to listen to church services broadcast by the mass media, and to possess in the cell the necessary religious items, like books, magazines, leaflets and religious objects. The convicted person has the right to participate in prison religion classes, to participate in charitable activities and social activities performed by the church or other religious organizations, as well as the right to individual meetings with priests or members of the religious association to which he or she belongs. Priests may visit convicted persons in their cells. The schedule of the worship celebrations, religious meetings and religion classes are defined in the internal prison regulations (§ 14 sec. 2 of RegWykKPW). The opportunity for so-called dangerous offenders to participate in religious services, religious meetings and religion classes is allowed only within the wing in which they are serving their imprisonment (art. 88b § 3 of the Penal Enforcement Code).

Summary

In comparison to the previously existing regulations, the Penal Enforcement Code that is currently in force explicitly guarantees that the enforcement of the penalty of imprisonment may afflict inmates' rights only in a degree necessary for the implementation of the objectives of this penalty. The rights of a convicted person shall be restricted only when the use of them would undermine the rights of other inmates and would disturb the established order in the prison.

In this area, the right to life and health is especially strongly established, and any violation in this regard means the possibility for an inmate to seek legal action, not only national, but also international. In this context the

particularly important role of the European Court of Human Rights must be emphasized. The ECHR has repeatedly condemned such phenomena – characteristic of the Polish penitentiary system – as overcrowding, inadequate equipment and housing, and automatic (and based on the same premise) extensions of so-called dangerous offender status. The quality of imprisonment in practice depends not only on legal regulations and their enforcement, but also on economic funding for the prison system, which has been under funded for many years. However, it should be noted that in Poland the budget expenditure has increased – average expenditure per year allocated for one convict or detainee is 36 443 zł. Thanks to that, some attempts have been made to counteract the phenomenon of overcrowding, improve the living conditions of prisoners, and improve and expand the range of therapeutic approaches – just to emphasize the most important achievements of the past few years.

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