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On the Limits of the *Ne Bis In Idem* and *Lex Retro Non Agit* Principles. Remarks in View of the Judgement of the Constitutional Tribunal Regarding the So-Called "Act on Beasts"

Abstract

The so-called "Beasts Act" is a legal regulation that deals with particularly dangerous offenders convicted by valid sentences for many years before the act's entry into force, and concerns the proceedings against such people after they serve their prison sentences. The act's enactment and entry into force was accompanied by a lot of legal controversy, which ultimately led to it being appealed against to the Constitutional Tribunal. The Constitutional Tribunal found that the confinement of persons regarded as particularly dangerous does not violate the constitutional guarantees of individual rights. The Constitutional Tribunal argued that one's placement in the Centre is not of a criminal but of an administrative nature, and it is not a second-time ruling in the same case. The article offers a critical commentary on this thesis and the argumentation proposed by the Constitutional Tribunal.

Keywords: dangereous offenders, the rule of *ne bis in idem*, "Act on Beasts"

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Introduction

On 23 November 2016, the Constitutional Tribunal (CT) passed a judgement,[2] where it found that the crucial aspects of the so-called "Act on Beasts"[3] conform to the constitution of the Republic of Poland. The CT questioned only one provision of the Act, according to which the court was to decide at least once per 6 months, on the basis of an opinion of a psychiatrist, if it was necessary for an individual posing a threat to the lives, health or sexual freedom of others (Article 46, section 1 of the Act) to remain further in the National Centre for the Prevention of Dissocial Behaviour (hereinafter referred to as: the Centre), determining that the questioned provision is inconsistent with Article 1, section 1 in relation to Article 31, section 3 of the Polish constitution in the scope in which it provided for the said opinion regarding the necessity for such an individual's further stay in the Centre being drawn up by only one psychiatrist. Therefore, the CT did not question the crucial solutions provided for by the act, the essence of which allows for a further isolation of a dangerous offender after they serve their prison time. The solution gives rise to reasonable doubts from the perspective of compliance of the act's provisions with constitutional patterns in the form of Article 31 and 42 of the Polish Constitution. The main issue related to the act being passed and assessed by the Constitutional Tribunal is the legal nature of placing an offender in the Centre. The CT's viewing the measure as non-penal in nature may not be considered correct in the light of the fundamental principles of the restriction of personal freedom, which will be covered in more detail in this article.

The scope of application of the act and the circumstances of its enactment

The act regulates the post-sentencing procedures applied in dealing with persons currently serving their prison time and who experience mental disturbances in the

[2] Constitutional Tribunal's judgement of 23 November 2016, ref. no. K 6/14, published in the Journal of Laws of the Republic of Poland of 2016, item 2205.

[3] Act of 22 November 2013 on the procedures for dealing with persons with mental disorders who pose a threat to the lives, health or sexual freedom of other persons, Journal of Laws of the Republic of Poland of 2014, item 24.

form of mental disability, personality disorders, or sexual preference disorders of such a nature or such an intensity during their prison sentence that there is at least a high probability of them committing a prohibited act involving violence or a threat of using violence against other people's life, health or sexual freedom, punishable by imprisonment, with its upper limit being at least 10 years (Article 1 of the Act). Persons posing a threat are subject to preventive supervision or placement in the National Centre for the Prevention of Dissocial Behaviour (Article 3 of the Act). The proceedings before the Tribunal were initiated by the President of the Republic of Poland, the Polish Commissioner for Human Rights, the District Court in Lublin, and the Court of Appeal in Wrocław, addressing the CT with a question if the provisions appealed against were in accordance with the constitutional provisions applied in the area of the protection of personal freedom, the principles of criminal liability, and the right to a fair trial. The main aspect where it is impossible to agree with the CT's thesis is accepting that post-sentencing isolation is not a punitive measure, which results in that it is not subject to the special regimen of penal regulations.

In the introduction to the justification of its judgement the Constitutional Tribunal argued that when analysing the constitutionality of the Act, it was necessary to consider two competing constitutional values – the personal freedom of every individual and the right to protect the life and health of every individual.[4] On the one hand, the Act harms the personal freedom of the persons it applies to, and on the other, its *ratio legis* and the grounds for its enactment boil down to the annihilation of the negative effects of the Act on Amnesty of 1989,[5] which transformed the death penalty into 25 years of imprisonment (Article 5, section 1, item 2 of the Act on Amnesty), resulting in the punishment of 25 years of prison time becoming the only possible sentence to be passed against dangerous offenders of crimes committed before 12 September 1989 (Article 15 of the Act on Amnesty).

Placement in the Centre and forced psychiatric treatment

Referring to the preliminary part of the justification of particular objections, the CT admits that placing an individual in the Centre is a form of deprivation of freedom, combining elements of forced psychiatric observation and post-penal pre-

[4] Judgement justification, [in:] *Orzecznictwo Trybunału Konstytucyjnego. Zbiór urzędowy*, volume/series A/2016, item 98, p. 27.

[5] Act of 7 December 1989 on amnesty, Journal of Laws of the Republic of Poland of 1989 No. 64, item 390.

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ventive measures,[6] arguing that the claim of placement in the Centre being a penal measure enforced in practice is invalid because it is subject to a decision of a civil court, not a criminal court, and civil – not criminal – procedures are applied in this case.[7] The CT claims that placement in the Centre is, by its nature, close to the construct of forced placement in a mental hospital on the grounds of Article 23 and 24 of the Act on the Protection of Mental Health.[8] To review this standpoint, it is necessary to examine the procedure of placement in a mental hospital and the procedure of being dismissed from such a hospital on the grounds of the said provisions in the context of the purpose of one's stay in such an institution. The decision to place an individual in a mental hospital is officially issued by a medical practitioner appointed to do it after examining the subject in person and consulting – to the extent possible – another psychiatrist or psychologist, and such a decision needs to be approved by a senior registrar (the doctor in charge of the ward) within 48 hours of the moment of the subject's admission, and the hospital's manager is to report it to the custody court having jurisdiction over the hospital's seat within 72 hours of the moment of the subject's admission. There is an apparent convergence between the reasons for forced placement of an individual in a mental hospital. The basis for treating a patient without their consent on the grounds of the Act on the Protection of Mental Health is the patient's current behaviour proving that the patient's condition makes them pose a direct threat to their own life or to other people's lives and health. Meanwhile, placing an individual in the Centre occurs in circumstances of a threat being posed, but the main emphasis is put on the very big likelihood of committing a prohibited act involving violence or a threat of using violence against other people's lives, health or sexual freedom, punishable by imprisonment, with its upper limit being at least 10 years (Article 14, section 3 of the Act). The main difference between the two institutions can be seen in the role and the significance of a court's adjudication made in the procedure of placement in a closed institution. Based on the Act on the Protection of Mental Health, a custody court, following a received notice, initiates proceedings regarding admitting an individual referred to in Article 22–24 to a mental hospital, and decides on the presence or absence of grounds for their admission. A decision on the dismissal of a person placed in a mental hospital without such person's consent is made by the senior registrar (the doctor in charge of the ward) if they find that the circumstances applicable to the admission and stay of an individual in a mental hospital without the individual's

6 Judgement justification, p. 31.

7 Ibidem, p. 37.

8 Act of 19 August 1994 on the Protection of Mental Health, uniform text in the Journal of Laws of the Republic of Poland of 2016, item 546.

consent, as provided for in the Act (Article 35, section 1), cease to exist, notifying the custody court of such a fact. However, when it comes to placing an individual in the Centre on the grounds of the so-called Act on Beasts, the role of the courts is essential and exclusive. A court makes a decision regarding the submission of a director of a prison, submitted on the basis of a psychiatrist's and psychologist's expert opinion (Article 9 of the Act), which is followed by appropriate proceedings held with the participation of three judges and – obligatorily – a prosecutor, resulting in a decision on recognising the case subject as a person posing a threat and imposing preventive supervision on them, on placing the case subject in the Centre, or on considering the case subject a person not posing a threat (Article 15, section 1 of the Act). An individual is dismissed from the Centre also by way of a court's decision, made following a submission of the detainee, of the Centre's manager, or *ex officio* if the effects of the therapy and the behaviour of the individual make it reasonable to assume that their further stay in the Centre is no longer necessary (Article 47, section 1 of the Act), but it is necessary to hear the opinions of experts in this area.

The model of dealing with a person placed in a mental hospital without their consent differs considerably from the procedure applied in the case of a stay in the Centre. A person staying in a mental hospital without their consent may be subject to relevant treatment activities aimed at removing the reasons for the person's admission to the hospital as provided for in the Act (Article 33, section 1 of the Act on the Protection of Mental Health). Applying direct coercion measures, in turn, is limited to cases provided for in the Act and to activities essential to the process of treatment (Article 34 and 18 of the Act on the Protection of Mental Health). A stay in the Centre, in turn, is subject to a special regimen. Throughout the duration of such a stay, the person placed in the Centre undergoes an appropriate therapy designed to improve their health and behaviour to the extent that makes the person able to function in the society in a way that does not pose a threat to the life, health or sexual freedom of others (Article 25 of the Act), which proves that the goal of the therapy is narrower than that of the process of mental treatment on the grounds of the Act on the Protection of Mental Health. The penal nature of a stay in the Centre is also manifested in the principles of rendering healthcare services since Article 26, section 2 of the Act makes it clear that the healthcare services which cannot be rendered in the Centre are provided to a person posing a threat placed in the Centre first by healthcare entities dealing with the detained, and then by other healthcare entities on the principles defined in the regulation of the Minister of Health in coordination with the Minister of Justice. The solution therefore corresponds to the principles of rendering medical services to the detained as provided for in Article 115 § 3–9 of the Executive Penal Code. The Constitutional Tribunal's

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key claim that placement in the Centre is a form of forced mental treatment is thus not substantiated.

Placement in the Centre and preventive measures

The CT's standpoint on the non-penal nature of the measures applied under the Act on Beasts is unconvincing either. The Constitutional Tribunal argues that the main reason behind placing an individual in the Centre is finding disorders in the individual's behaviour during serving one's sentence (Article 1, item 2 of the Act) and that the application of the Act is limited only to "those sentenced for an offence on life or health, punishable by imprisonment of over 10 years",[9] which is not true as the Act states clearly in Article 1, items 1 and 3, that it applies to persons serving prison time or 25 years served in a therapeutic system, in the case of whom the finding of disorders justifies at least a high probability of committing a prohibited act involving violence or a threat of using violence against other people's lives, health or sexual freedom, punishable by imprisonment, with its upper limit being at least 10 years. It is also impossible to agree that the disorder referred to in Article 1, item 2 of the Act is not related to the Act leading to the adjudicated punishment. Based on the arguments presented above, the Constitutional Tribunal has found that the post-penal isolation provided for under Article 19, section 3 of the Act is not a penal measure, although it is a severe form of imprisonment, and that placement in the Centre may come only after serving – always long-term – prison time, and not instead of it, which has made the CT argue that the said differences make the constitutional standards under Article 42, section 1 and Article 2 of the Polish Constitution (non-retroactivity and the *ne bis in idem principle*) unfit for the assessment of the constitutionality of these provisions in question.[10] The observation is especially surprising all the more because it does not stem from the presented arguments in any way whatsoever. The construct in question is similar to the preventive measures defined in the Criminal Code, amended[11] in February 2015. Article 93a § 1 of the Criminal Code states clearly that preventive measures include therapy, addiction treatment, and a stay in a mental institution. Moreover, Article 93b § 1 of the Criminal Code says that the court may decide to impose preventive measures when it is necessary to prevent an offender from committing a prohibited act again, and

9 Judgement justification, p. 32.

10 Ibidem.

11 Act of 20 February 2015 on the amendment of the Act – Penal Code and other acts, Journal of Laws of the Republic of Poland of 2015, item 396.

when other legal measures defined in the Code or adjudicated on the grounds of other acts are not sufficient, and that a preventive measure in the form of a stay in a mental hospital may be adjudicated only in order to prevent an offender from committing a prohibited act of major nuisance again. The similarity between the placement in the Centre and the placement in a mental institution on the grounds of the Criminal Code can be seen also in that it is possible to adjudicate both in the event of sentencing an offender to imprisonment without a conditional suspension thereof for a voluntarily committed crime defined in chapter XIX, XXIII, XXV or XXVI, committed in relation to personality disorders of such a nature or intensity that there is at least a high probability of committing a prohibited act involving violence or a threat of using violence (Article 93c, item 4 of the Criminal Code) and that the duration of application of the preventive measure is not determined in advance (Article 93d § 1 of the Criminal Code). In the case of an offender sentenced to imprisonment without a conditional suspension thereof, to 25 years of imprisonment, or to life imprisonment, the court decides on such a person's stay in a relevant mental institution if there is a high probability of the person committing a crime against other people's lives, health or sexual freedom in relation to sexual preference disorders, the decision on a stay in a mental institution is obligatory (Article 93g § 3 of the Criminal Code). It is therefore unacceptable not to acknowledge that deciding on placing an offender in the Centre is tantamount in its nature to applying the most severe preventive measure. It is also reasonable to add that the court determines the need and the means to execute an adjudicated preventive measure not earlier than 6 months before the expected parole or imprisonment (Article 93d § 3 of the Criminal Code).

The penal nature of the Centre

The CT's finding that there is no violation of the principle of *ne bis in idem* and no retroactive effect of the act in the light of no penal nature of placing offenders in the Centre is gravely wrong. The guarantee given under Article 42, section 1 of the Polish Constitution offers an autonomous meaning of the notion of "penalty" with respect to the meaning assigned to it in lower-tier acts, and this highest-tier meaning includes every legal measure performing a repressive function in a dominant or exclusive manner.[12] A measure is repressive if it involves an affliction directed at the offender of a negatively judged and condemned prohibited act, with the afflic-

[12] P. Karilk, T. Sroka, P. Wiliński, [in:] L. Bosek, M. Safjan (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, a commentary to Article 42, thesis no. 76.

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tion involving depriving the offender of their rights or freedom, aiming to satisfy the society's expectation of justice and to have a preventive effect.[13] The specificity of a given measure must therefore combine both retributive and preventive effects. This is since there is a convergence between placing an individual in the Centre and applying the protective measure provided for in Article 93a § 1, item 4 of the Criminal Code. It is reasonable to quote here the nature of preventive measures in the context of the above definition. These measures, varying in nature, are an element of penal reaction to a committed prohibited act, and are interpreted mainly as measures to protect the society against dangerous offenders.[14] But there is a point made regarding the conflict occurring on the grounds of the function of criminal law, which is to protect the legal order and serve a preventive purpose in the context of forced treatment of mentally disturbed offenders, which is especially noticeable in the light of the application of the "Act on Beasts". The point made is that "the threat related to taking advantage of psychiatry to pursue goals that have little or even no relationship with the fundamental, statutory purposes of psychiatric care in Poland is real and concrete. Psychiatric care is to treat, support, and help people in crisis, promote mental health, prevent social exclusion and stigmatisation, and not to isolate inconvenient, dangerous or "bad" individuals under the pretext of taking therapeutic measures".[15] The above leads to the conclusion that placing a particularly dangerous offender in the Centre pursuant to Article 14 of the Act is a form of penalty. The measure is, in fact, an affliction directed at an offender in relation to a crime they have committed earlier. A disorder forming the grounds of placing one in the Centre is, in fact, the same disorder that has "impelled" the offender to commit a prohibited act. And there is no need to convince anyone of the preventive nature of the measure in question.

The judicial decisions of the European Court of Human Rights issued in the matter of states-parties abiding by Article 5(1) of the European Convention on Human Rights play an important role in the area under consideration.[16] In the context of the violation of the right to personal freedom – or liberty – expressed in this standard, ECHR argues that the notion of the deprivation of liberty shall be understood as both an objective element of locking an individual in a specific enclosed space for a period of time, the length of which is not to be ignored, or as a subjective element

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13 Ibidem, thesis no. 77.

14 J.K. Gierowski, K. Krajewski, [in:] L. Paprzycki (ed.), *Środki zabezpieczające. System Prawa Karnego. Tom VII*, Warszawa 2015, pp. 3–4.

15 Ibidem, pp. 43–44.

16 Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, later amended by Protocols no. 3, 5, and 8, and supplemented by Protocol no. 2, Journal of Laws of the Republic of Poland of 1993 No. 61, item 284.

in the light of which the deprivation of liberty occurs also in a situation in which an individual has not expressed their consent to be isolated.[17] As for the isolation of persons of unsound mind, who have committed a punishable act, the ECHR argues that it is prohibited to deprive a person of unsound mind of their liberty if three essential conditions are not met, with these conditions being: presenting reliable proof that the person in question is of unsound mind, which shall be supported by proving the authenticity of mental disorders before a relevant authority on the basis of an objective medical examination; the mental disorders need to be of the type and the intensity that justify forced isolation; and the validity of the extension of isolation needs to depend on the duration of such disorders.[18] In the context of application of post-penal measures of imprisonment, the ECHR has also found that imprisonment may be justified if it is motivated by an intention to prevent an offence from being committed, with the basis for imprisonment not acting as a basis for pursuing a universal policy of prevention directed against persons posing a threat on account of their continued propensity for crime.[19] The basis in question is to serve only as a measure to prevent the occurrence of a specific and isolated offence, which results from both the functional interpretation of Article 5 of the Convention and from its literal interpretation, which utilises the singular form of the word "offence". Although Article 1, item 3 of the Polish regulation speaks of the high probability of committing a prohibited act involving violence or a threat of using violence against other people's lives, health or sexual freedom, punishable by imprisonment, with its upper limit being at least 10 years, among the reasons for applying the Act in practice, which formally satisfies the requirements set by the ECHR, given the circumstances of passing the Act, there may be reasonable doubts as to whether the application of the Act in the intended area does not become somewhat automated, causing the Act being applied to all persons who have had their death penalty conviction transformed into 25 years of imprisonment by way of amnesty, which would make the Act become repressive in abstract terms, i.e. detached from the occurrence of a real threat of an offence being committed by a given person.

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17 European Court of Human Rights' judgement of 16 October 2012, appeal no. 45026/07, Kędzior v. Poland, LEX no. 1219725.

18 European Court of Human Rights' judgement of 21 December 2010, appeal no. 13453/07, Witek v. Poland, LEX no. 672796.

19 European Court of Human Rights of Human Rights' judgement of 17 December 2009, appeal no. 19359/04, M. v. Germany, LEX no. 534824.

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Deciding on placement in the Centre and the prohibition of *ne bis in idem* and *lex retro non agit*

The penal nature of the placement of an individual in the Centre is also implied by the fact that the Act is unconstitutional in terms of its retroactivity. The principle of *lex retro non agit* derived from Article 2 of the Polish Constitution, states that the law, in principle, may not have a retroactive effect unless motivated by special cases, with no exceptions to this principle being accepted in the area of criminal law.[20] One of the ECHR's judgements quoted above was made in a German case, referred to by the CT, where the offender sentenced to imprisonment was subject to a measure in the form of placement in a prevention facility, and a later amendment of the applied regulations made it possible to apply it with no time restrictions, that is why the conclusions drawn from the case in question play a significant part in the perspective of the CT's decision. The ECHR decided that the acceptability of the application of such measures had to stem from the regulations in force at the moment in which the offender committed the act, which was at variance with the argumentation of the German constitutional court who claimed that changing the time of the adjudicated and applied measure was an instance of an acceptable – meaning wrong – retroactive effect of the Act, which made the amendment affect only those offenders who were already being subject to the measure applied, and the change itself did not target the essence of the judgement of conviction because the duration of the measure was not a part of the said judgement.[21] In the quoted judgement, the European Court of Human Rights expressed an autonomic understanding of the notion of "penalty" on the grounds of the Convention and found rightly that "for the purposes of Article 5(1)(a), the word "conviction" (...) has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving the deprivation of liberty", and further that "there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue". However, "with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong". Therefore, considering the application of post-penal measures of offender isolation as a form of imprisonment leads to a situation that the measure applied shall be subject to

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20 P. Krawczyk, *Problem konstytucyjności tzw. ustawy o bestiach*, „Zeszyty Naukowe Uniwersytetu Przyrodniczo-Humanistycznego w Siedlcach. Seria: Administracja i Zarządzanie" 2014, 100(27), p. 114.

21 M. Skowron, *Prawa człowieka a postpenalna izolacja sprawcy w Polsce – rozważania na tle wyroków ETPCz w sprawach niemieckich*, „Europejski Przegląd Sądowy" 2012, 8, p. 42; cf. also: J. Długosz, *Obligatoryjna postpenalna izolacja sprawców przestępstwa*, „Prokuratura i Prawo" 2013, 7–8, p. 260.

general principles of criminal law. Yet, the CT approves the argumentation offered by the German court, and goes on to add that the Act "is an example of a retrospective – not a retroactive – regulation. (...) In other words, the Act of 2013 does not apply to persons who finished their prison time before the day the Act came into force. The act does not directly link any legal consequences to acts for which an offender has been convicted and serves prison time".[22] The arguments made by the CT fail to match the standpoint of the ECHR, which claims that the application of post-penal isolation produces similar effects to those of a penalty already inflicted and served, and that its nature is repressive, which makes the application of a new isolation measure on the basis of the new wording of the applicable regulations means inflicting a new penalty.[23] Applying the new regulations making it possible to detain offenders already serving their sentences is a violation of Article 7 of the ECHR, especially if such isolation takes place in separate rooms of a prison;[24] which does not rule out that an analogous decision should be made in a situation in which isolation takes place not in a prison, but in a detention facility of similar features if the judgement of conviction has not mentioned any possibility to apply such types of measures after one's sentence is served.[25] The European Court of Human Right's decisions[26] clearly prove that there is a probability of serving a sentence of prison time and stay in a prevention facility, and that the stay in a prevention facility serves a punitive – and not only a preventive – purpose, that the purposes of penalty and preventive measures are similar, and that the same courts make decisions on their form.[27] The ECHR offers a different view in case of Bergmann vs.

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22 Judgement justification, p. 39.

23 M. Skowron, op. cit., p. 43.

24 § 127 of the European Court of Human Rights' judgement of 17 December 2009, appeal no. 19359/04 [as cited in] M. Skowron, op. cit., p. 43.

25 Ibidem, p. 44.

26 European Court of Human Rights' judgement of 13 January 2011, appeal no. 27360/04, Schummer v. Germany, LEX no. 676323; European Court of Human Rights' judgement of 13 January 2011, appeal no. 17792/07, Kallweit v. Germany, LEX no. 676318; European Court of Human Rights' judgement of 13 January 2011, appeal no. 20008/07, Mautes v. Germany, LEX no. 676320; European Court of Human Rights' judgement of 14 April 2011, appeal no. 30060/04, Jendrowiak v. Germany, LEX no. 784871; European Court of Human Rights' judgement of 24 November 2011, appeal no. 4646/08, O.H. v. Germany, LEX no. 1055712; European Court of Human Rights' judgement of 7 June 2012, appeal no. 65210/09, G. v. Germany, LEX no. 1164416; European Court of Human Rights' judgement of 07 November 2012, appeal no. 61827/09, K. v. Germany, LEX no. 1164413; European Court of Human Rights' judgement of 28 November 2013, appeal no. 7345/12, Glien v. Germany, LEX no. 1393878.

27 See also: I.C. Kamiński, *Zakaz karania bez podstawy prawnej – orzecznictwo Europejskiego Trybunału Praw Człowieka za lata 2011–2014*, „Europejski Przegląd Sądowy" 2015, 8, pp. 28–29.

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Germany,[28] where it acknowledges that "preventive detention implemented in accordance with the new legislative framework as a rule still constitutes a "penalty" for the purposes of Article 7(1) (...) [and that – J.K.'s note] the more preventive nature and purpose of the revised form of preventive detention do not suffice to eclipse the fact that the measure, which entails a deprivation of liberty without a maximum duration, was imposed following the conviction for a criminal offence and it is still determined by courts belonging to the criminal justice system", finding at the same time that in situations where "preventive detention is extended because of, and with a view to the need to treat [the applicant's – J.K.'s note] mental disorder, (...) [accepting that – J.K.'s note] both the nature and the purpose of his preventive detention substantially changed and that the punitive element, and its connection with his criminal conviction, is eclipsed to such an extent that the measure is no longer to be classified as a penalty within the meaning of Article 7(1)." The above does not affect earlier findings much on account of the fact that the ECHR based its decision on the principle of equity, acknowledging that the application of an isolation measure in that particular case served a therapeutic purpose first and foremost. This stems partially from substantially different factual circumstances underlying the appeal – earlier judgements of the ECHR were made on the grounds of the provisions that were not in force at the moment in which a given offence was committed, and where the penal nature of the applied measure prevailed over its therapeutic nature.[29] It is, however, necessary to highlight a certain inconsistency found in the justification of the judgement – on the one hand, the ECHR upholds its earlier views on the penal nature of post-penal isolation, and on the other, it argues that if the purpose of the applied measure is mainly therapeutic, it does not breach Article 7 of the Convention.[30]

Having civil – not criminal – courts decide on placing individuals in the Centre on the grounds of the Polish Act does not change the overall qualities of the measure in question. What is more, entrusting this matter to civil courts instead of criminal courts, in separation from the acts committed by the offenders, was to make it possible to avoid charges of breaching the *ne bis in idem* prohibition, but it is not the

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28 European Court of Human Rights' judgement of 7 January 2016, appeal no. 23279/14, Bergmann v. Germany, LEX no. 1947275.

29 K.I. Kobus-Ogrodniczak, *Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 7 stycznia 2016 r. w sprawie Bergmann przeciwko Niemcom*, „Prokuratura i Prawo" 2016, 11, pp. 161–162.

30 Ibidem, p. 162; cf. also: K. Holy, *Postpenalna detencja sprawcy niebezpiecznego przedłużana w sposób retrospektywny nie musi naruszać Europejskiej Konwencji Praw Człowieka – glosa do wyroku Europejskiego Trybunału Praw Człowieka z 7.01.2016 r. w sprawie Bergmann przeciwko Niemcom (skarga nr 23279/14)* „Europejski Przegląd Sądowy" 2016, 7, p. 47.

name but the content of the measure that decides on its nature,[31] which was raised by the Polish Commissioner for Human Rights in their official request[32] to examine the Act for its compliance with the Polish Constitution. There is therefore no doubt that the placement of an offender in the Centre is in line with the specificity of a repressive measure, as defined in the doctrine, with such a measure understood as "statutory proceedings conducted before a relevant authority, aiming at enforcing repressive liability, meaning a type of liability resulting in causing affliction to a given person in the personal sphere".[33] The CT's opinion on the retrospective effect of the Act may not be considered fair because the prohibition of the retroactive effect of the Act applies to all measures that are prevalently repressive, and the intertemporal scope of application of criminal regulations may come only from Article 4 of the Criminal Code,[34] which leads to a conclusion that an act more severe to the offender may never have a retroactive effect (*lex severior retro non agit*).[35] The term "retrospective" means "referring to the past, directed at the past", "based on retrospection",[36] which in legal terms denotes a situation of application of new regulations to situations taking place at the moment of these regulations coming into force.[37] Article 4 of the Criminal Code clearly indicates the scope in which it is permitted to have the act work with a retroactive effect in the area of criminal law, which may take place only in cases favourable to the offender. Moreover, it is hard to consider circumstances where a so-called dangerous offender commits a crime and serves their sentence as a permanent situation that justifies the application of the new act. Just like it is impossible to amend an adjudicated penalty by prolonging its duration on the basis of the new act, it is likewise impossible to inflict a new and so far unknown measure imitating a penalty on its grounds, as discussed above. The Constitutional Tribunal's opinion that such a solution is acceptable because it affects only those offenders who have not yet finished serving their sentences is wrong on account of the fact that a decision to place an individual in the Centre is a modification to the conviction judgement and aims to prolong the offender's isolation period. Also on the grounds of the Criminal Code, the protective measures

31 N. Daśko, *„Ustawa o bestiach" jako przykład populizmu penalnego*, [in:] eadem (ed.), *Wpływ interesów politycznych na stanowienie prawa*, Toruń 2014, p. 96.

32 Polish Commissioner for Human Right's submission of 23 December 2015, IX.517.72.2015.ED, p. 10.

33 K. Mamak *Konstytucyjne wyznaczniki postępowania represyjnego*, [in:] P. Czarnecki (ed.), *Postępowanie karne a inne postępowania represyjne*, Warszawa 2016, p. 4.

34 W. Wróbel, A. Zoll, *Polskie prawo karne – część ogólna*, Kraków 2013, p. 132.

35 A. Grześkowiak, *Prawo karne*, Warszawa 2009, p. 55.

36 B. Dunaj (ed.), *Słownik współczesnego języka polskiego*, Warszawa 1996, p. 945.

37 See: Constitutional Tribunal's judgement of 18 October 2006, ref. no. P 27/05, Journal of Laws of the Republic of Poland of 2006 No. 193, item 1430.

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defined in Chapter X are imposed in the conviction judgement, not after the penalty is carried out, with the area of application thereof stems from individual provisions. Hence, protective measures are subject to general rules and principles of the criminal law, which also includes non-retroaction.[38] A different view, offered e.g. by W. Wróbel, according to which the application of *lex retro non agit* with regard to such type of measures should be excluded on the grounds of the necessity for the court to determine the threat posed by the offender based on the new act, which is to ensure effective protection of the society,[39] is groundless. In such a case, there would be no need to enforce and apply the "Act of Beasts" against offenders considered dangerous on the grounds of this new Act because such persons could be subject to preventive measures either pursuant to the then-current Article 93 and 94 of the Criminal Code or, more appropriately, pursuant to Article 99 and 100 of the Criminal Code of 1969, in force when the Amnesty Act was passed. Yet, the legislator decided that it was necessary to develop a new separate measure for such situations. Facing criticism of the attempt to override the prohibition on retroaction, the legislator limited the application of the Act until the time the amended provisions on protective measures came into force.

The severity of the measures provided for in the Act is manifested in the extensive interference with the rights and freedoms of persons placed in the Centre, which involves e.g. a continuous monitoring of all rooms of the institution (including sanitary facilities), a ban on having dangerous items at one's disposal, room inspection, limitation of opportunities to contact third parties, and the application of means of physical coercion, which makes the therapeutic purpose of the application thereof fade into the background,[40] and as a result, placement in the Centre becomes similar to a stay in prison. M. Bocheński rightly notices that the real purpose of the act, contrary to what the legislator and the CT claim, is to continue the detention of a certain group of people after they serve their sentences.[41] This is especially visible if we take the atmosphere in which the regulations in question were passed into consideration.[42] Hence the great significance of the general principles of the criminal law in the process of application of the measures provided

38 P. Góralski, *Środki zabezpieczające a zasada lex severior retro non agit*, „Ius Novum" 2014, 1, p. 67–68.

39 W. Wróbel, *Z zagadnień retroaktywności prawa karnego*, „Przegląd Sądowy" 1993, 4, p. 12.

40 M. Bocheński, *Prawnokarna reakcja wobec sprawców przestępstw z art. 197 k.k. i art. 200 k.k. w świetle teorii i badań empirycznych*, Warszawa 2016, pp. 283–284.

41 Ibidem, p. 284; see also: idem, *Populizm penalny w polskim wydaniu – rzecz o kryminologicznej problematyce ustawy o postępowaniu wobec osób stwarzających zagrożenie*, „e-Czasopismo Prawa Karnego i Nauk Penalnych" 2014, 2, pp. 7–8.

42 See: K. Pierzchała, *Co Polacy mają wspólnego z „milczeniem owiec"? „Bestie" na wolności a ich „uczłowieczenie". Zarys analityczno-syntetyczny problemu*, „Krakowskie Studia Małopolskie" 2014, 19, pp. 63–73.

for in the Act, particularly of the principle of *ne bis in idem.*[43] The author believes that it is not necessary for the purposes of the applied measures to be identical in order to violate the said principle;[44] it is enough that there is a convergence with regard to the offender and the Act at issue. This is pointed to by the PCHR, who stresses that placing an individual in the Centre is a form of detention of a person who has not committed any new prohibited act, but has been regarded as a person posing a threat,[45] which is immanent to the act this person has been validly trialled and sentenced for. A separate issue that should be considered is whether placing people of a particular sort in the Centre is adequate and proportionate to the threat they pose. In the light of the *ultima ratio* principle applied to isolation measures, achieving the purpose intended by the Act is possible using much less drastic means.[46] The principle of proportionality derived from Article 31, section 3 of the Polish Constitution demands that the legislator establish criminal law regulations in a way that the form of interference with an individual's freedom and the reason for such interference are adequate.[47] Further, on the grounds of Article 41, section 1 of the Constitution, the limitation of personal inviolability and liberty may be imposed only if there are socially valid grounds for it.[48] In this measure, the penal nature of the provisions of the Act and the creation of a separate basis for the isolation of certain people both seem to be an exaggerated solution. It is necessary to add that the CT's judgement was passed by a majority vote, with one vote against. One CT judge, A. Wróbel, argued that it was unquestionable that placing certain persons considered dangerous in the National Centre for the Prevention of Dissocial Behaviour was an instance of the deprivation of liberty that was subject to protection pursuant to Article 41 of the Polish Constitution, regardless of the nature of the measure in question.[49]

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43 Cf.: P. Czarnecki, *Odpowiednie stosowanie przepisów prawa karnego w postępowaniach represyjnych*, [in:] idem (ed.), op. cit., p. 13 and following, and idem, *Zasada tożsamości czynu a reguła ne bis in idem*, [in:] ibidem, p. 61.

44 See: P. Szczepanek, *Zasada ne bis in idem w postępowaniu karnym i innych postępowaniach represyjnych*, [in:] P. Czarnecki (ed.), op. cit., p. 76.

45 Polish Commissioner for Human Right's submission of 23 December 2015, p. 10.

46 Cf.: K. Piech, *Konstytucyjność ustawy o „zaburzonych". Podstawa prawna izolacji postpenalnej i nadzoru prewencyjnego w polskim porządku prawnym*, „Ogrody Nauk i Sztuk" 2015, 5, p. 53.

47 A. Zoll, [in:] T. Bojarski (ed.), *Źródła prawa karnego. System Prawa Karnego*, Vol. 2, Warszawa 2011, p. 240.

48 W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2013, a commentary to Article 41.

49 Judgement justification, p. 88.

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Conclusion

It is hard not to accept that the CT's judgement was passed because of the fear of the effects that could follow if the Act was deemed unconstitutional in the social sphere and in the area of the citizens' sense of safety. In strictly legal terms, such an Act could not survive in a democratic state of law. Despite the abstract tone of the provisions of the Act, the circumstances surrounding its passing imply that the scope of its application was to include most of all several persons who would have finished their sentences of 25 years of imprisonment soon before the Act was to be adopted, which also questions the Act's compliance with the requirement of the abstract-general statutory standards. The isolated cases of applying the Act to other offenders, to whom the 1989 amnesty did not apply, does not change, in fact, the opinion on it because the entirety of its provisions implies that its nature is individual. It needs to be said that the Constitutional Tribunal's role is not to rectify the legislator's mistakes, and this is how the 1989 Amnesty Act should be definitely looked at. The somewhat ill-considered consequences of a decision made by the parliament of the time led to a situation in which the vision of media bashing and social pressure made it a priority to quickly adopt a solution to redress the damage made 25 years before. And the adopted solution is about protecting some values at the cost of others, with the CT's approval. It is especially dangerous on account of the present constitutional crisis in Poland, and hence the enforcement of criminal laws that are not in keeping with the constitutional principles of criminal liability shall be absolutely and fully condemned. The fact that the legislator decided to limit the application of the Act to the period until the 2015 amendment to the Criminal Code entered into force, remodelling the system of application of protective measures significantly, can be considered an attempt of rectifying the mistake made. It can be somewhat interpreted as the legislator admitting that the measures provided for in the act are identical to the protective measures defined in Chapter X of the Criminal Code, thus depriving the Constitutional Tribunal of its arguments at the same time.