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Prison overcrowding in Poland and Hungary

ABSTRACT: The aim of the article is to describe and discuss current problem in prisons' system - overcrowding in prisons in Hungary and Poland. It is an essential problem which deserves an attention, prisons' overcrowding has been especially visible in these two countries, so it is eminently important to rise this problem in the dispute of doctrine and to try to solve it. This study contains both previous and present information, statistics, and position of international bodies on currently overcrowding of prison facilities. The legal regulations of these two countries are pretty similar, but there are still far away from perfection, that is why this article shows their advantages and drawbacks. The authors try to emphasize that overcrowding is a significant problem, they also offer some *de lege ferenda* ideas to resolve this alarming situation.

KEYWORDS: imprisonment, prison overcrowding, prison facilities.

1. Introduction

Polish and Hungarian prisons comprise 194 and 180 individuals of every 100,000 people, respectively. At first glance, the numbers might not seem significant; however, compared to other European countries, these rates are among the highest.

Imprisonment is the most severe punishment currently. However, as seen in both countries, it is often imposed on perpetrators. If a state imposes this penalty upon an individual, it must satisfy some basic conditions. However, this is not always ideal. Imprisonment must always comply with the requirements of respect for human dignity and treating a sentence as a human. Therefore, an inmate's legal status must always be regulated to

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show basic human respect.⁴⁴¹ This status consists of two basic elements: the status at a prison and as a party in enforcement proceedings. Each of them is characterized by certain rights and obligations. Among these is the right to a living space.⁴⁴² Noteworthy, prison overcrowding is related to security problems, violence, and pathologizing of the goals of imprisonment.⁴⁴³ It is one of the obstacles to progressive development because it makes adequate cultural or educational activities for prisoners harder to organize.⁴⁴⁴

2. Expectations versus reality of the prisons' situation in Poland

According to the European Committee for the Prevention of Torture (CPT), the minimum standard for one person in prison is 6 m² for a single room and 4 m² per person in multi-occupancy cells.⁴⁴⁵ Moreover, there should be a sanitary annex (excluded from the minimum space required for each prisoner)⁴⁴⁶. The CPT noted this problem more than once in government reports, which indicated that despite its repeated previous recommendations, the official minimum standard of living space per prisoner remains unchanged⁴⁴⁷.

In Poland, regulations on living spaces in prisons have changed several times. First, cubature standards were enforced until 1998; living quarters were provided, the size of which varies between 6 m³ and 13 m³ for multi-person cells, depending on the period of the validity of the regulations. However, this regulation was criticized because it was not precise, and it often led to poor conditions when the rooms in which the

⁴⁴¹ Hołda, 1988, p. 110–112; Nawój-Śleszyński, 2013, p. 46. The same statements can be found in the judicature. Check f.e.: Judgement of the Supreme Court (17 March 2010, II CSK 486/09; of 28 February 2007, V CSK 431/06).

⁴⁴² Nawój-Śleszyński, 2013, p. 47.

⁴⁴³ Nawój-Śleszyński, 2019, p. 140.

⁴⁴⁴ Zybert, 2011, p. 424.

⁴⁴⁵ Raffaelli, 2017, p. 3.

⁴⁴⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Living space per prisoner in prison establishments: CPT standards, 2015, p. 3–4. Available at: <https://rm.coe.int/16806cc449> (Accessed: 8 August 2022).

⁴⁴⁷ Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017, p. 31. Available at: <https://rm.coe.int/16808c7a91> (Accessed: 8 August 2022).

convicts were detained were very high.⁴⁴⁸ In addition, between 1989 and 1998, the conditions were distinguished depending on gender; the minimum standard size was 3 m² for men and 4 m² for women.⁴⁴⁹

According to Art. 102.1 of the Executive Criminal Code, a convicted person has the right to adequate food, clothing, living conditions, accommodation, health services, and hygiene conditions. Moreover, in Art. 110 of the ECC, a multi- or single-person cell should have at least 3 m² per person; inmates should have separate sleeping places, appropriate hygiene conditions, sufficient air supply, temperature, and lighting for reading and work.

Notably, in exceptional cases, such as in the event of a war, epidemic, or threat to the safety of prisoners or prisons, the director may place inmates in a cell with an area of at least 2 m² per person; the period of staying in such small cells may not exceed 90 days. Prison overcrowding is also allowed when there are no vacancies, especially since it is necessary to immediately detain the most dangerous prisoners (e.g., those sentenced to imprisonment for more than two years, recidivists, members of an organized crime group, convicted of crimes against sexual freedom, and convicts who have escaped prison). However, in these cases, the period of stay in such small cells may not exceed 14 days (28 days if a penitentiary judge agrees). The inmate may dispute each decision in a penitentiary court, which examines such dispute within seven days. However, it is questionable whether penitentiary courts have a real influence on the director's decision. It is uncertain whether they have the means to challenge such a restriction. Moreover, it is unclear if the director makes this decision only exceptionally. Placing an inmate in a cell of less than 3 m² is possible 180 days after the end of the previous limitation on his or her right to a decent surface.

The problem of prison overcrowding was not significant a few years ago. According to Polish prison officers' data, the population of prisons comprise 87.46% of all places for them⁴⁵⁰. This number was consistent in

⁴⁴⁸ Szymanowski, 2007, p. 284–285.

⁴⁴⁹ Nawój –Śleszyński, 2013, p. 53–55.

⁴⁵⁰ Population in Polish prisons from 29 April 2022. Available at: <https://www.sw.gov.pl/strona/statystyka--komunikat> (Accessed: 29 June 2022).

Check: Prisons and Prisoners in Europe 2021: Key findings of the SPECE I Report, p. 10. Available at: https://wp.unil.ch/space/files/2022/05/Aebi-Cocco-Molnar-Tiago_2022_Prisons-and-Prisoners-in-Europe-2021_Key-Findings-SPACE-I_-220404.pdf (Accessed: 8 August 2022).

the last five years, with a slight decrease⁴⁵¹. However, there persists a problem with a significant number of people in prisons. Moreover, cells smaller than 3 m² are associated with unfavourable living conditions; the standard of 3 m² per person is already one of the lowest in European countries. For example, the standard in France is 4.7 m² to 9 m² per prisoner⁴⁵², 9 m² to 10 m² in Spain⁴⁵³; and 7 m² to 9 m² in Italy.⁴⁵⁴

The problem of prison overcrowding in Poland has repeatedly been the subject of research by the European Court of Human Rights (ECHR). It was found that the conditions did not meet the minimum standards, indicating a violation of Art. 3 of the European Convention on Human Rights. According to the ECHR, some inmates stayed in cells between 2 and 2.4 m² for several years⁴⁵⁵. This is not ideal because the ECHR indicates that basic objective conditions of humane treatment must be satisfied and severe levels of ill-treatment must be strictly avoided. The basic conditions pertain to the size of the living space; the duration of degrading conditions; the psycho-physical effects; the inmates' characteristics (e.g., gender and health) and their access to the toilet with privacy, air supply, natural light, heating, and proper hygiene; and the authorities' attitude and steps taken to improve such conditions⁴⁵⁶.

3. Solutions

The solution to prison overcrowding involves a variety of strategies. First, new prisons must be made, or existing ones must be expanded; however, this is very difficult and expensive⁴⁵⁷. Second, society must take preventive action through supervision and control, activity, and cooperation with law enforcement agencies. Third, non-custodial penalties, such as fines or

⁴⁵¹ Data from Eurostat. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics#Overcrowding_and_empty_cells (Accessed: 25 June 2022).

⁴⁵² Cretenot and Liaras, 2013, p. 10.

⁴⁵³ Aranda Ocaña, 2013, p. 10.

⁴⁵⁴ Marietti, 2013, p. 10.

⁴⁵⁵ *Wenerski v. Poland*, No. 44369/02, 20 January 2009; *Musiłek and Baczyński v. Poland*, No. 32798/02, 26 July 2011.

⁴⁵⁶ *Sikorski v. Poland*, No. 17599/05, 22 October 2009; *Orchowski v. Poland*, No. 17885/04, 22 October 2009.

⁴⁵⁷ Moreover, although building new prisons is the way to limit the overcrowding, it does not limit the criminality – Check: Hough, Allen and Solomon, 2008, p. 25 and following.

restrictions on liberty, may be imposed as a criminal policy of the state and judicial authorities. Moreover, it is possible to suspend the execution of imprisonment⁴⁵⁸ or release a sentence after serving at least half of the sentence⁴⁵⁹ or under certain conditions, which may allow the convict to serve a sentence of imprisonment in the electronic supervision system.

An ordinance on the procedure to be followed by authorities if the number of inmates in prisons or pre-trial detention centers exceeds the total capacity on a national scale was passed on November 25 2009. However, this ordinance does not solve the problem of prison overcrowding. It is laconic, and it contains only one order: after receiving information about prison overcrowding, authorities should organize additional cells while courts should verify whether it is possible to postpone some convicts' sentence execution.

In our opinion, non-custodial penalties and an electronic supervision system (ESS) may be the most effective solution for prison overcrowding. Last year's data show that until 2015, courts' sentences mostly involved imprisonment; however, these sentences decreased yearly. For example, while there was more than 64% imprisonment between 2011 and 2015, this kind of punishment accounted for only 37%. A significant change has been observed since 2016; there are more non-custodial sentences and this number keeps increasing. However, this phenomenon requires further approval.

⁴⁵⁸ According to Art. 69 § 1 Criminal Code, suspension of the execution of imprisonment is possible when (1) the punishment is under 1 year, (2) the perpetrator has not been sentenced before to the imprisonment, and (3) this kind of punishment is sufficient to achieve the goals of punishment, especially a return to crime.

⁴⁵⁹ According to Art. 77, § 1 CC early release is possible when attitude and personal conditions of sentenced, their behavior after crime and in prison and all other circumstances indicate that they will obey the legal order and not commit the crime once again. If the person has previously served a sentence of imprisonment, it is possible after they served at least 2/3 years; after 15 years if the sentence was 25 years; and after 25 years if the sentence was life imprisonment.

Table 1: The number of penalties⁴⁶⁰

Year	Percentage of imprisonment sentences	Number of imprisonment sentences	Non-custodial		
			Total	Restriction of liberty	Fines
2011	66%	280,023	143,182	49,611	93,571
2012	65%	265,876	142,026	50,730	91,296
2013	67%	235,032	118,046	41,287	76,759
2014	67%	199,167	96,087	33,009	63,078
2015	64%	167,028	92,557	31,096	61,461
2016	43%	125,368	160,496	61,720	98,776
2017	41%	99,346	138,575	53,854	84,721
2018	37%	103,814	168,663	78,172	90,491
2019	37%	105,841	178,835	84,992	93,843

The number of applications from convicts for a non-custodial sentence under the ESS in Poland has been slowly increasing.⁴⁶¹ However, such requests are automatically approved by the penitentiary court. The table below shows that only 1/3 of proposals were accepted each year.

⁴⁶⁰ Source: Statistics from the judicial system. Available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (Accessed: 1 July 2022).

⁴⁶¹ Przesławski and Stachowska, 2021, p. 49–50.

Table 2: Number of accepted applications for a non-custodial sentence under the Electronic Supervision System⁴⁶²

Year	Number of accepted applications	Number of submitted and examined applications	Percentage of accepted applications
2011	3,577	11,979	30%
2012	10,438	29,262	36%
2013	13,289	34,827	38%
2014	11,820	30,980	38%
2015	10,065	29,723	34%
2016	8,252	25,832	32%
2017	12,072	34,651	35%
2018	12,559	36,919	34%
2019	12,427	38,673	32%

Despite being desirable among those sentenced to imprisonment, the ESS is not as commonly used as it could be. The percentage of accepted applications oscillates between 30% and 38%, showing that approximately one out of three sentences sentenced to imprisonment is under the ESS. Notably, according to Art. 431a § 1 ECC, the ESS is only possible under these specific circumstances: 1) the punishment is not stricter than a one-and-a-half-year imprisonment, and the sentenced is not recidivist; 2) this punishment is enough for a perpetrator to resocialize; 3) the sentenced has a permanent residence; 4) flatmates have agreed for serving a sentence in the ESS in a particular place; and 5) other technical conditions.

To conclude, it is also worth emphasizing that according to the Follow-up covid-19 related statement by the Council for Penological Cooperation Working Group, most countries coped well with the coronavirus pandemic⁴⁶³. In some early release schemes, postponing the execution of prison sentences or replacing them with community sanctions or measures were implemented to stop the spread of the virus. Evidently,

⁴⁶² Source: Information collected from Przesławski and Stachowska, 2021.

⁴⁶³ Follow-up Covid-19-related statement by the Council for Penological Co-operation Working Group, 2020. Available at: <https://rm.coe.int/pc-cp-2020-10-e-rev-follow-up-to-pc-cp-wg-statement-covid-19/16809ff484> (Accessed: 17 July 2022).

this solution is possible in a short time; therefore, in the case of prison overcrowding in the future, we might have the best-known measures.

4. Hungarian legal regulation

Hungary's national legislation declares that the dignity of people is respected in prison facilities. Therefore, cruel, inhumane, or degrading treatments or punishments may not be used. This is the general treatment clause.

With regard to prison overcrowding, the ECHR first addressed the decision of *Varga et al.* on 10 March 2015⁴⁶⁴, establishing that Hungarian prisons' conditions violated Art. 3 of the European Convention on Human Rights, the prohibition of torture. ECHR's decision was leveraged to examine the conditions of Hungarian prisons according to a pilot procedure, suggesting that this is not an isolated case, but a systemic problem.

The main problem is inadequate access to air space and hygiene in prisons. The Council of Europe and the Committee for the Prevention of Torture and Inhuman Treatment (CPT), based on its position and judgment per room for maneuver in many cases, did not even reach 1 nm². Inadequate hygienic conditions meant inadequate separation of the living space and toilet, lack of sufficient washrooms, and actual obstruction of the open-air law for a certain period. The Constitutional Court examined freedom and the 6/1996 IM Decree on the rules for the execution of pre-trial detention (VII. 12. of the IM).

In the meantime, the legislator should repeal the abovementioned 6/1996 IM Decree effective from 1 January 2015, and replace it with Decree 16/2014 (XII. 19). The IM decree came into force. However, impugned provisions with the same content are included in Section 121 of the IM Decree. According to this, the number of people that can be accommodated in a cell or living quarters should be determined such that each convict has as much as 6 m³ of air space, with 3 m² for male convicts and 3.5 m² for women.

For the often-treated problem of current prisons, it is possible to name the current capacity of Hungarian prisons associated with their gradual overcrowding. A slight decrease in the total number of inmates in recent years is observed; however, the exact decrease is unclear. The prison

⁴⁶⁴ *Varga and Others v. Hungary*, Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 June 2015.

population was 17,944 in 2017; 17,251 in 2018; and 16,664 in 2019. Thus, a slight decrease was expected in 2020.

5. Compensation procedure

The ECHR ruled on March 10 2015 that prison overcrowding is a mass structural problem in the Hungarian penitentiary system. Therefore, Hungary was obliged to produce a plan within six months (on or before December 10 2015) to reduce it significantly and permanently. Notably, building new prisons is not the solution because it is expensive, and international data show that increasing the system's capacity is accompanied by a growth in the number of detainees. On its last visit, the CPT confirmed that the facilities complied with the minimum standard of 4 m² per prisoner in multi-seat cells (excluding toilets and other sanitary areas). Thus, the official prison capacities were recalculated accordingly. Therefore, a compensation procedure was introduced to breach CPT's principles.

6. Conclusions

There are several ways to effectively reduce the prison population, such as effective and efficient systems for alternative sentences, electronic monitoring, and conditional releases. Reintegration surveillance is regulated by Art. 61/A of the abovementioned code. According to this, the correctional institution proposes to command reintegration surveillance to the court. Thus, reintegration surveillance is not implemented by the correctional institution, but the judge of the second-instance criminal court. In such cases, the court decides through the submitted documents; however, it may also hold a hearing based on the request submitted by the sentenced person or their defender.

Reintegration surveillance⁴⁶⁵ may be initiated once during the punishment's completion term by a sentenced person or defender. The correctional institute brings the request to the criminal court within 15 days. The emphasis on 'once' is important because the sentenced receives a significant change in their lifestyle conditions. Therefore, it is only accessible to those sentenced who are judged as less dangerous to society, and who can be reasonably expected to successfully reintegrate into civil society. Although those who are sentenced under the reintegration

⁴⁶⁵ Nagy and Menyhért, 2018, pp. 227-239.

surveillance may leave prison before the punishment is actually completed, they can only stay at their house or apartment designated by the law enforcement judge, and leave the designated property for strictly defined reasons (e.g., for daily needs, work, education, and medical treatment).

Art. 187/A (1) of the above-mentioned code regulates the conditions under which reintegration surveillance can be ordered. If the purpose of liberty deprivation can be achieved in this manner, the sentence may be placed under reintegration surveillance before the estimated date of release from punishment. The agreement of sentenced is needed and the following conditions need to be met:

- Sentenced to imprisonment for the crime committed with negligence.
- Sentenced to imprisonment for an intentional crime.
- Not convicted of an offense concerning violence against a person (as defined in Art. 459 (1) 26 of the Criminal Code).
- Convicted for the first time for a non-custodial sentence or as a non-recidivous criminal
- Maximum term of detention of five years.

Moreover, the durations of reintegration surveillance is:

- Up to one year if the person is sentenced to imprisonment for a negligent crime
- Up to ten months otherwise.

Juvenile reintegration surveillance is also available to minors according to the code with additional specifications:

- Family therapy or counseling at least once during the deprivation of liberty
- Consent of the legal representative for the installation of electronic monitoring equipment and a declaration of accommodation with a statement to escort the detainee.

The code also implements a multidirectional extension of the reintegration surveillance to reduce the saturation of institutions. On the one hand, it allows a wider range of offenders to benefit from this, as the amendment would extend to those who are sentenced for the first time and are convicted of negligent offenses. On the other hand, it determines the length of time spent in reintegration surveillance depending on the degree of guilt over a longer period (ten months for intentionality and one year for negligence).

Another way to combat prison overcrowding is through the effective legal regulation of conditional release from imprisonment and the ‘back-

end' home prison penalty. In Hungary, this means that after serving 2/3 of the imprisonment time, a prisoner can be released according to the general rule of the Criminal Code of Hungary.

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