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The handling of individuals with a diagnosis of mental illness by the justice system

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Summary

The source literature points to the increasing number of crimes committed by people with mental diseases. Based on international data, it is estimated that the incidence of mental disorders among inmates is increasing at a disproportionate rate in prisons around the world. It is estimated that even every fourth convict may have a diagnosis of mental illness. It is worth noting that repeat offence rates among mentally ill people are also higher than in the general population of repeat offenders. The repeat offence rate among offenders with a diagnosis of mental illness ranges from 60% to 80%.

This paper is intended to describe the situation of people diagnosed with mental illness in Poland, with reference to the available statistical data and international research.

Key words: crimes, insanity, mental illness

Introduction

Crimes committed by people with mental illness are a very difficult issue. On the one hand, we are dealing with damage to property or interests, a harmful action, infliction of suffering or loss (physical, economic, moral) on the aggrieved parties (society). On the other hand, mentally ill individuals are treated slightly differently by the justice system, which means that they are not held responsible to the same extent and on the same terms as healthy people.

At this point, it is also worth mentioning the myths associated with mental diseases. According to popular public opinions, serious crimes, especially violent ones, are committed by mentally ill people. Without any doubt, this view is harmful and stigmatizing and hinders the process of recovery and re-adaptation of mentally ill people in their normal social environment. It should be noted that such attitudes also strengthen phobias of the public towards mentally ill individuals. Whenever informa-

tion about acts perpetrated by mentally ill people appears in the media, it gives rise to a sense of anxiety and threat in the public. Conversely, the public often perceives perpetrators of crimes as mentally ill, despite the lack of any evidence that would justify such perceptions [1, 2]. Therefore, a question arises — what is the scale of the phenomenon under discussion and what are the possibilities and actions taken as part of broadly-defined prophylaxis, prevention and therapy for these people.

This paper highlights two areas in which the justice system comes into contact with a person diagnosed with mental illness. The first one covers situations when a crime was committed by a mentally ill person, and here the provisions on sanity and criminal liability come into play. The second area covers enforcement proceedings and concerns situations when illness manifests itself during judicial or enforcement proceedings pending before a court.

As pointed out in the relevant source literature, penitentiary institutions have replaced psychiatric hospitals as institutions that provide care for the mentally ill [3]. It should be noted that not only the prison service, but also police officers and other assistance services constantly come into contact with people suffering from mental diseases. In the source literature, it is argued that these services are not fully prepared to interact with mentally ill people, they do not know how to talk to them or to interpret their behaviour. As a result, many misunderstandings and misinterpretations can arise [4].

It seems that the current approach to the problems of mentally ill individuals who are in trouble with the law is not based on a constructive discussion that is aimed to solve their problems, but on a blame game between the judiciary and psychiatric institutions. Psychiatric hospitals are overwhelmed with perpetrators of criminal offences who have been placed there under a court order recommending such a detention measure. Employees of psychiatric hospitals, for their part, blame law enforcement agencies for unnecessary arrests of people whose only "crime" is their mental illness [5-7]. On the other hand, employees of the judiciary system expect that care should be provided for the defendant/accused person due to his or her mental health condition. In contrast, the general public blames both the mental health systems and the criminal justice system for not ensuring protection from mentally ill persons, which is realistically perceived as a considerable threat [8].

Based on American data, approximately two million people suffering from schizophrenia, bipolar disorder or other disorders are arrested every year for various crimes or offenses [9]. According to the Report of the Bureau of Justice Statistics [10], every fourth person in cases processed by the US criminal justice system reports a serious mental disease. As stated in the same report, 1/3 of adult inmates and 44% of detainees admitted that they suffered from mental disorders. More than 60% of disorders were associated with the use of psychoactive substances [10]. People with mental disorders and substance abuse disorders are more likely to be arrested than people who do not face these challenges.

Responsibility for crimes committed by people diagnosed with mental illness

The issue of the impact of the defendant's sanity on criminal liability has been regulated by the legislator in Article 31 §1 of the Penal Code. It should be emphasized, however, that this provision does not exempt the court from the obligation to establish in criminal proceedings whether the accused committed the act that he or she is alleged to have committed [11, 12].

There is no definition of insanity in the Penal Code. It merely describes situations in which it occurs. It is assumed that an adult is usually able to recognize the significance of his or her actions and that he or she can control his or her behaviour, which means that he or she may be attributed guilt for committing a prohibited act and be held criminally responsible for it [11].

It is important to highlight that such a perpetrator is not punished for the committed act, but he or she may be subjected to appropriate preventive measures specified in Article 93a of the Penal Code, which are as follows:

- electronic tagging;
- therapy;
- addiction therapy;
- stay in a psychiatric institution.

Precautionary measures are of a different nature and have a different function than punishment for a perpetrated act. They can be used jointly, for example, electronic tagging and therapy, or separately. Above all, the court does not specify the duration of their application in advance. The assessment of the legitimacy and duration of the use of precautionary measures depends on the therapeutic progress of the perpetrator and the risk of danger posed by him or her, and therefore primarily on the psychiatric opinion and diagnosis. Moreover, when the precautionary measure is revoked, but the behaviour of the perpetrator justifies further use of that measure, the court (no later than within three years from the revocation of the measure) may re-order the precautionary measure.

The most far-reaching and the most controversial measure is placement in a psychiatric institution. It is used only when other measures are not sufficient to ensure safety, and there is a high probability that the perpetrator will commit a prohibited act again.

These precautionary measures are also applied with respect to other groups of perpetrators who, however, may at the same time be liable to punishment, such as in particular imprisonment. We are talking here about perpetrators whose sanity was limited at the time of committing the act, i.e., their ability to recognize the significance of the act was significantly but not completely reduced due to mental impairment. Precautionary measures are also used in the event of a conviction for serious crimes committed in connection with sexual orientation disorders, as well as in the event of imprisonment for certain crimes committed in connection with that type of personality disorder or when the disorder becomes severe, giving rise to at least a high degree of

probability that the person concerned will commit a violent prohibited act [12]. Finally, precautionary measures are used in the case of conviction for an offense committed by a person with substance abuse problems. In each case, the need to use a specific measure is evaluated by expert psychiatrists and psychologists.

Pursuant to Article 31 §2 of the Penal Code, if an offence was committed while the offender's ability to recognize the significance of the act or to control his or her actions was significantly diminished, the court may apply an extraordinary commutation of the sentence. Extraordinary commutation of the sentence consists in a reduction of the penalty provided for by law or substitution of a lesser penalty for that given after conviction for a crime. The above-mentioned provisions do not apply where the offender has caused his or her own insobriety or intoxication resulting in the exclusion or limitation of sanity, which he or she anticipated or may have anticipated.

It is argued that perpetrators are seldom found to be totally insane at the time of committing the act concerned. Such a finding must be confirmed by a psychiatric (performed by two expert psychiatrists) and psychological opinion, and it occurs in the case of extreme aggravation of disorders of mental functions such as consciousness or profound cognitive impairment: perception (e.g., illusions), thinking (e.g., delusions) or a mental state characterized by a lack of clear and orderly thought and behaviour (e.g., confusion). They also occur in deep emotional disorders (such as extreme anxiety, rage or terror) and in severe motor activity and movement disorders (e.g., in the case of extreme motor agitation in schizophrenia or epilepsy). The most common causes of exclusion of sanity are: schizophrenia, persistent delusional disorders, acute and transient psychotic disorders, schizoaffective disorders, psychotic forms of mood disorders, organic psychotic disorders and psychotic disorders caused by the use of psychoactive substances [14].

Moreover, in the case when the defendant/person accused of committing a crime is diagnosed with mental illness, prosecutors may decide to suspend or discontinue the proceedings [15]. It should be emphasized, however, that the suspension of the proceedings may only take place when the perpetrator became mentally ill after committing the criminal act [16]. In the case of a perpetrator who became ill when committing the offence, the criminal proceedings are discontinued pursuant to Article 17 § 1 (2) of the Code of Criminal Procedure in connection with Article 31 § 1 of the Code of Criminal Procedure or the accused is acquitted under the procedure provided for in Article 414 § 1 of the Code of Criminal Procedure [17].

The proceedings are suspended in a situation when there is a long-term obstacle that makes it impossible to carry out the enforcement proceedings, and in particular when the convict cannot be apprehended or the judgement cannot be enforced due to mental illness or other chronic and severe illness. The proceedings are suspended in whole or in part for the duration of the above-mentioned obstacle (pursuant to Article 15 §2 of the Executive Penal Code). The reason for temporary suspension of the proceedings are circumstances the duration of which cannot be predicted in advance but which have a temporary character [18]. The long-term nature of the obstacle means that the

procedure may be too lengthy to be rationally justifiable [19]. Stefański and Zabłocki [20], in their commentary to the Code of Criminal Procedure express an opinion that a "serious disease" is a disease that makes it unlikely for the accused to take part in procedural steps at later dates, because his or her chances of recovery are low. In those cases where recovery is impossible (incurable diseases), one may hope, however, that the severity of the disease will diminish or the health will improve.

In the event when the case is discontinued (Article 17 § 1 (2) of the Code of Criminal Procedure), the courts emphasize that the guilt of the insane person is excluded and therefore he or she cannot be deemed to have committed a crime. The proceedings are discontinued with no evidence being taken. As argued in the source literature, such a situation poses a threat to the freedom and civil liberties of mentally ill people [21]. It may happen that the criminal proceedings will be discontinued when in fact the accused person did not commit the crime that he or she is alleged to have committed. In order to confirm or rule it out, it would be necessary to carry out the entire proceedings, take evidence, analyze the collected evidence and decide whether the prohibited act was committed at all, and if so, to identify the perpetrator. It is important to note that acquittal is more positively perceived by the general public than discontinuation of the proceedings. The discontinuation of the proceedings should not deprive the defendant of the right to obtain an acquittal in a situation when there are no grounds for conviction. One can imagine a case where a mentally ill person is wrongly accused of having committed a crime, but the proceedings against him or her are discontinued. Without taking the evidence and subjecting it to court scrutiny (including appellate review), there is a risk that the defendant will not be able to defend himself or herself against the accusation and will be deemed to have committed a prohibited act (which may result in his or her placement in an isolation facility) although the criminal act has in fact been committed by somebody else [22].

The rates of crimes committed by mentally ill people

Based on international data, it is estimated that the incidence of mental disorders among inmates is increasing at a disproportionate rate in prisons around the world. Fazel and Seewald [23] conducted a meta-analysis of 81 publications from 24 countries and concerning about 33.5 thousand inmates. About 4% of inmates met the criteria for psychotic disorders, and 10% were diagnosed with depression. The incidence of psychosis ranged from 2% to 11%, and the percentage of inmates with depression ranged from 3% to even 62% [24]. The incidence of mental diseases other than psychosis and depression among inmates was very high too. Wilper et al. [25] found that approximately 15-25% of inmates had a diagnosis of mental illness. Furthermore, approximately 63% of inmates used psychiatric care at some point in their lives. Among female prisoners in the UK, 40% had received some form of mental health support before their entry to prison, and 20% had psychotic disorders [26]. Analyses show that 26% of male prisoners in Great Britain have been diagnosed with mental disorders [27].

According to the latest House of Commons report on the mental health of prisoners [28], the incidence of disorders was found to be high both among male and female inmates and was as follows: psychotic disorders (7% and 14%, respectively), anxiety disorders (21% and 32%), depressive disorders (33% and 51%) and personality disorders (64% and 50%). Moreover, nearly every fifth prisoner admitted that they had attempted to commit suicide in the past [29]. This indicates that in many cases the onset of mental health problems most probably occurred before their placement in the penitentiary institution. It can also be assumed that the mental health of inmates deteriorates further as a result of multiple forms of deprivation (social, psychological, sensory) experienced by them in all these institutions. The prison environment exacerbates existing problems and gives rise to new ones [30].

The rates of crimes committed by mentally ill people – Polish experience

In Poland, there are no comprehensive statistical data that would capture the incidence of crime among mentally ill people. According to the data of the Ministry of Justice, only an estimate-based analysis of this phenomenon can be carried out. The first source is data on people considered insane or those who committed a crime in a state of limited sanity. Of course, such data are insufficient to establish the real number of offenders with mental diseases. On the one hand, by definition, insanity may be caused by factors other than mental diseases, as has already been mentioned before. However, the collected statistical data do not take this into account. One should also point out that most perpetrators of crimes are not evaluated in terms of their sanity. An insight into the scale of this phenomenon can also be gained by an analysis of enforcement proceedings suspended under Article 15 § 2 of the Executive Penal Code, as well as of the execution of precautionary measures ordered under Article 93a of the Penal Code.

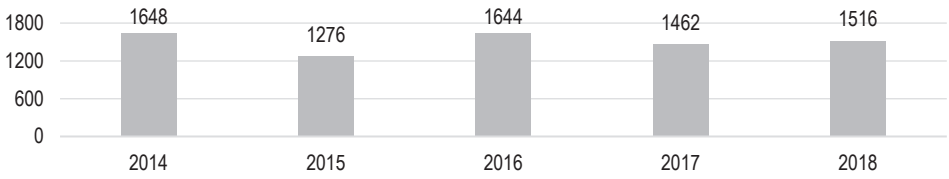

Figure 1. **Extraordinary commutation of the sentence under Article 31 (2) of the Penal Code**

After having analyzed the statistical data from 2014-2018 obtained from the Ministry of Justice, one can conclude that, in total, extraordinary commutation of the sentence due to the perpetrator's limited sanity was applied in approximately 1500-1600 cases every year.

A vast majority of judgements involved extraordinary commutation of the sentence in the case of deprivation of liberty (56%): respectively, 23% in the case of restriction

of liberty and 19% in the case of a solely-imposed fine. Other penalties accounted for about 3%.

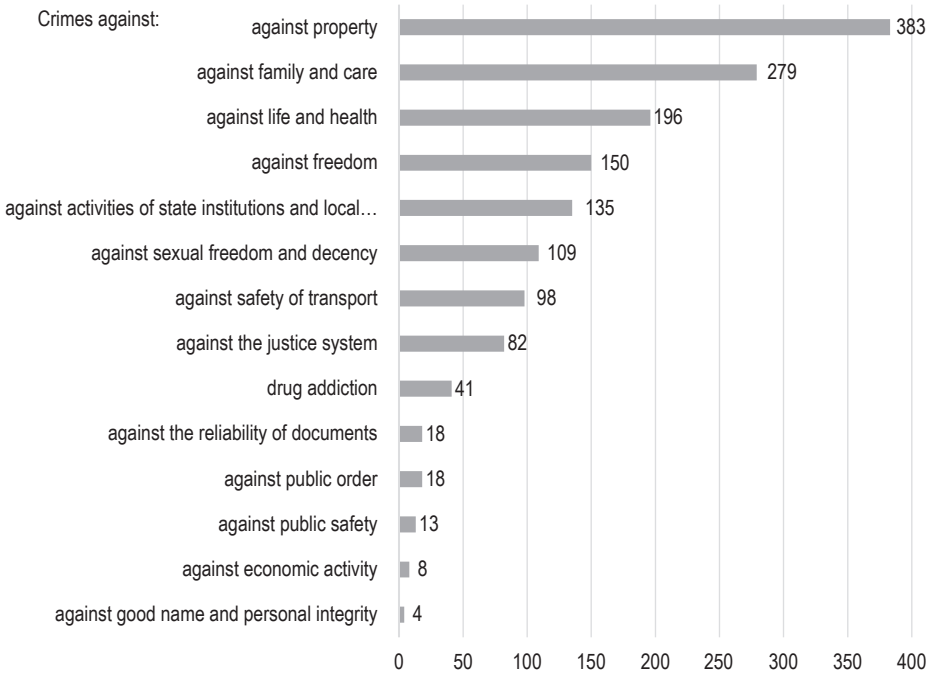

Figure 2. **Types of offenses with respect to which an extraordinary commutation of the sentence was applied**

As follows from the analysis of the data concerning crimes committed in a state of limited sanity, most of them were crimes against property. The next most numerous group of crimes were crimes against the family and care, followed closely by crimes against life and health. Crimes against freedom and sexual freedom and decency, as well as crimes against activities of state institutions and local government, were committed quite frequently. Detailed data in a breakdown by type of crime are presented in Figure 2.

Analyzing the above data, it should be borne in mind that, as has been mentioned before, they include not only mental diseases, but also mental retardation, addiction or other mental function disorders.

In 2020, district and regional courts suspended, in total, enforcement proceedings in 3,192 cases due to the health condition of the convict. As of the last day of the reporting period, there were 8,047 such persons in 2020 and 7,897 in 2019. Also in this case, the collected statistical data do not include information on the type of health problems.

Evaluating the incidence of crimes committed by people with a diagnosis of mental illness, one should take into account the data on the precautionary measures ordered under Article 93a of the Penal Code. In 2020, a precautionary measure was ordered against approximately 4,500 people, a vast majority of whom (79%) had committed a crime in a state of insanity or partial insanity (21%). As part of the precautionary measure, almost half of the perpetrators were placed in a psychiatric institution (47%), whereas 37% of perpetrators were ordered to undergo therapy in non-detention settings. As mentioned before, precautionary measures may be applied jointly and in different configurations.

The significance of this issue is evidenced by the following figures: as of the last day of the reporting period (i.e., December 2020), the number of perpetrators (in this case insane perpetrators or perpetrators with limited sanity) with respect to whom precautionary measures were to be enforced amounted to 8,195. One third of them were placed in detention facilities. Detailed information on the execution of particular types of precautionary measures is presented in Table 1.

Table 1. **Execution of particular types of precautionary measures ordered under Article 93 a of the Penal Code**

Data from 2020	Type of precautionary measure					
	In total	Electronic tagging	Therapy	Addiction therapy	Stay in a psychiatric institution	Other
Number of perpetrators against whom a precautionary measure was ordered	4503	56	1672	988	2111	106
with respect to whom the proceedings were discontinued on the grounds that the prohibited act had been committed in a state of insanity, as defined in Article 31 § 1 of the Penal Code	3545	16	1338	468	1966	83
convicted for a crime committed in a state of diminished sanity, as defined in Article 31 § 2 of the Penal Code	277	5	154	103	56	5
The number of perpetrators against whom measures are enforceable (as of December 2020)	8195	93	3830	2077	2707	246

table continued on the next page

with respect to whom the proceedings were discontinued on the grounds that the prohibited act had been committed in a state of insanity, as defined in Article 31 § 1 of the Penal Code	6406	31	3211	936	2570	198
convicted for a crime committed in a state of diminished sanity, as defined in Article 31 § 2 of the Penal Code	473	7	287	184	58	7

Data from 2020 are based on the Reports MS-S10R and MS-S10O of the Ministry of Justice.

As has already been mentioned in the introduction, the problem of mentally ill people in the justice system is much broader, because it does not only concern the area of criminal liability, but has likewise an effect on the executive part of the proceedings.

The issues under discussion reflect the global trend associated with a disproportionately high percentage of mentally ill people or people with other disorders in prisons. According to Canadian research, there are three times more people with serious mental problems in prisons as compared to general populations [31].

The data of the Central Board of the Prison Service for 2020 indicate that, as of December 31, 4,225 convicts (about 7% of the total prison population) were serving a sentence in the therapeutic system. More than half of them were repeat offenders [32]. Over 27,000 inmates are serving their sentence in the individual programming system (56% of convicts) [32]. Individual programming system is a kind of agreement between the convict and the detention facility in which he or she agrees to complete a re-socialization process and to work to improve himself or herself and undertakes to change and become involved in social re-adaptation activities. Individual Programming is initially prepared by the educator and then established and verified by the penitentiary commission every six months. Its content should not only be evaluated against the progress made by the convict, but also adapted to the changing situation, taking into account his or her work on his or her deficits [32].

The repeat offence rates among mentally ill people are also higher than in the overall population of repeat offenders. Among offenders diagnosed with a mental illness, the repeat offence rate ranges from 60-80%, and the risk of re-imprisonment increases by 80-140% as compared to repeat offenders with no diagnosis of mental illness [33, 34]. In the United States, approximately 50% of inmates diagnosed with mental illness had three or more criminal convictions, and 10% had as many as eleven or more convictions [35]. Repeat offence rates among people with psychosis amount to approximately 30% [36].

In the case of convicts who develop mental illness, penitentiary courts should suspend their sentence and refer such convicts for treatment in a psychiatric hospital. As

reported by the Ombudsman, who has looked into these issues, there is a legal loophole that makes this impossible, because it has not been specified to which institutions such persons could be sent [37].

The situation of mentally ill people is also worsened by a number of beliefs that often stem from the lack of knowledge about the consequences of the disease and its impact on the functioning of the patient. According to one of such beliefs, in most cases perpetrators feign mental disorders to avoid responsibility for what they did. In the opinion of Kudrelek [15], criminals who simulate insanity treat the hospital as a gateway to freedom. As the author points out, the problem is significant because about 2,000 perpetrators of serious crimes have been sent to psychiatric hospitals over the last decade, many of whom have obtained "yellow papers" relieving them from criminal liability. In addition, it was quite easy for defendants, who had previously been held in isolation, to leave psychiatric hospitals and commit further crimes, including murders. Afterwards, they returned to their wards [15].

Psychiatric wards often struggle with the task of preparing patients, who are involuntarily hospitalized there, for their return to freedom, all the more so because there is no specific date of their discharge, which also depends on the progress of therapy. The consequences of this vicious circle are borne by psychiatric hospitals themselves, because the hospital discharge decision is based on a presumption – a certain probability that the patient will cope well enough outside the hospital walls. The hospital is thus only partly responsible for the patient's future, despite having an impact in preparing him or her to function in freedom. Unfortunately, the lack of institutional support outside the walls of institutions may render rehabilitation and therapy ineffective. At the same time, one should be aware of the fact that mentally ill people receiving voluntary or involuntary treatment or as a result of a court decision commonly face problems associated with acceptance of pharmacological treatment, improvement of psychotic insight into their situation, therapeutic compliance and their ability to ask for and make use of community support. In addition, people with a stigma of mental illness and a criminal record encounter problems with their social re-acceptance.

Summary

The increase in the number of people with a diagnosis of a mental health condition in the criminal justice system is a serious problem. As pointed out in the source literature, such a situation is mainly caused by the lack of awareness about the needs of the mentally ill and insufficient support for them. People with difficult but potentially manageable diseases – such as schizophrenia, depression, mood and anxiety disorders – may engage in socially unacceptable or even criminal behaviour as a result of having been abused, neglected or ignored or having not received any systemic support [31].

One should emphasize that not all mentally ill people who commit crimes do it in a planned manner and with intention to cause harm [38]. For some, as Vandevelde and his team point out [38], criminal activity is a direct result of their mental illness, while

others come into contact with the criminal justice system because their symptoms are criminalized and no resources are available to provide treatment for them [39]. Moreover, not all mentally ill people in conflict with the law pose the same risk of re-offending in the future [40]. Accordingly, the response of the criminal justice system should be tailored to the specific offender on a case-by-case basis [40]. Where possible, people with symptoms of mental illness should be identified at an early stage of the criminal process, and people whose mental illness is the main cause of their crime should be referred to appropriate psychiatric treatment facilities outside the justice system [39].

Early identification of mental problems is important because penitentiary institutions offer limited diagnostic possibilities, e.g., due to the fact that they do not have professionals such as a sexologist, clinical psychologist or a psychiatrist among their staff. Early diagnosis will make it possible to refer such individuals to an appropriate facility where a proper re-socialization program can be chosen for them.

It is worth stressing that this paper has not been written with the aim to criticize the justice system or the psychiatric health system. We would only like to draw attention to an area that, in our opinion, is often criticized by the media, politicians, and society, but where no constructive steps are taken to improve the situation of mentally ill people with a criminal record.

It should be noted that justice facilities cannot and are not able to meet the clinical needs of patients or to identify them in a comprehensive manner. If we accept the assumption that serious diseases should be treated, the only question is where: in penitentiary or medical institutions, or maybe in consultation between them? It is worth considering solutions that seek to de-stigmatize mental illness, ensuring a comprehensive approach that takes into account both a treatment program, prevention and care focused on the specific person. A care system like that is in place in Canada.

To sum up, apart from implementing more modern solutions and eliminating legislative gaps, more focus should be given to systemic and inter-ministerial activities. Therefore, it is proposed that:

- For mentally ill people who have committed a crime, programs should be developed that concentrate on people and their individual needs and abilities, instead of relying exclusively on institutional care.
- The next step is to gain assistance and strong social support by making the public aware of these issues, so that specific plans can be developed and resources can be allocated for tackling this complex problem.
- In order to understand exactly what needs to be done, what the scale of the phenomenon is, accurate and comprehensive data should be collected on the incidence and consequences of mental health problems among inmates – to address not only their behavioural problems, but also the problem of mental diseases.
- Employees of the justice system (especially the police and prison service) need specialized, specially tailored training to learn how to interact with a mentally ill person. Such training should be provided for small police sta-

tions in rural areas and large district police stations alike. Both the police and the prison service need to know how to recognize symptoms so that they can quickly identify a distressed person who finds it difficult to control his or her mental health problems. If symptoms are not removed, they may escalate, destabilize procedures, cause frustration, irritate other prisoners or lead to serious confrontations.

– This is why it is so important to evaluate the short – and long-term effects of interventions (treatment, therapy, isolation), the results of which should be based on the success of treatment and social reintegration. The assessment should also take into account the cost-effectiveness of an evidence-based rather than ideology-based public policy.
– Some solutions exist beyond the justice system, so it is worth paying attention to the availability of preventive programs that deal with problems long before anyone comes into conflict with the law. Reintegration programs do not always prevent the return to a medical facility due to a relapse of mental illness, but they may slow it down. As mentioned before, 1/3 of convicts with a diagnosis of mental illness return to penitentiary institutions.

When referring to the crime rates among people diagnosed with mental illness, it is impossible to ignore the ethical issues related to their involuntary deprivation of liberty, resulting for example from the applied precautionary measures or psychiatric treatment. On the one hand, we have to bear in mind public safety and risks for the society. On the other hand, threats to individual freedoms must be considered too. It is worth highlighting that the duration of imprisonment is specified in advance; moreover, the convicted person may apply for conditional early release after serving half of the sentence. People placed in treatment facilities may leave the facility only after positive evaluation of the therapeutic process, which may take several years. The literature emphasizes that mentally ill detainees may spend more time in isolation than their counterparts in penitentiary institutions [40].

The perceived risk of releasing criminals diagnosed with mental illness or mental disorder takes precedence over the potential harm that the perpetrator may suffer during his or her extended stay in the mental treatment facility. The source literature indicates that concerns about the protection of the general public make it difficult to implement support programs for former inmates. One of the ways to solve this problem is to identify mentally ill prisoners who are at least highly likely to commit a crime again [42, 43].

Summing up, it is worth emphasizing that regardless of whether the risk of repeat offending is high or not, people diagnosed with mental illness and mental disorders require some form of support before and after their release both from penitentiary institutions and mental treatment facilities [44]. However, the issues under discussion have not been researched to any notable degree. Researchers most often focus on efforts to improve correctional programs in order to make them more beneficial for mental health [45, 46]. Programs aimed at social reintegration of mentally ill prisoners should be further developed and evaluated.

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