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***Nullum crimen sine lege certa* and the disciplinary offences of Prison Service officers**

The disciplinary liability¹ of the officers of Prison Service is of significant importance in terms of functioning of the Polish penitentiary system². The substantive aspects relating to this category of officers undoubtedly deserve closer look by the executive criminal law academics. The legal literature lacks analysis of the issues related to adjudication of disciplinary penalties. At the same time, the average annual number of disciplinary cases of officers of the Prison Service in the twenty-first century exceeds two hundred and fifty, which should be considered significant.

The central subject of consideration in this article will be substantive and legal issues³ related to the characteristics of disciplinary offences of Prison Service officers. The entire article will be heterogeneous in such sense that the arguments contained in it will relate to both theoretical and practical aspects. The adopted methodological formula will allow for comprehensive presentation of the issue of disciplinary offences in the context of *nullum crimen sine lege certa* principle. In its axiological and normative assumptions, it requires a detailed specification of the characteristics of prohibited acts. *Lege non distinguente*, it applies also to disciplinary offences. In this respect, it sets out the basic standard for proper legislation in a democratic state of law.

According to the classical Aristotelian approach⁴, the ideal is commutative justice (*iustitia commutativa*), which means rewarding merits and punishing offences. With regard to

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¹ See the general remarks on the disciplinary liability in: J. Supernata, O odpowiedzialności dyscyplinarnej służby publicznej, a zwłaszcza odpowiedzialności subiektywnej, czyli poczuciu odpowiedzialności [*Disciplinary liability of the public service, in particular subjective responsibility and the sense of responsibility*] (in:) Służba publiczna. Stan obecny, wyzwania i oczekiwania [*Public service. Current situation, challenges and expectations*], ed. M. Stec, S. Płażek, Warsaw 2013, p. 243 ff.

² See: T. Szymanowski (in:) T. Szymanowski, J. Migdał, Prawo karne wykonawcze i polityka penitencjarna [*Executive criminal law and penitentiary policy*], Warsaw 2014, p. 24.

³ See: R. Giętkowski, Odpowiedzialność dyscyplinarna w prawie polskim [*Disciplinary liability under Polish laws*], Gdańsk 2013, p. 182 ff.

⁴ See: Oniszczyk, Koncepcje prawa [*Law concepts*], Warsaw 2004, p. 62.

repressive norms, such as the provisions of disciplinary law, also those of the Act on Prison Service, the latter is of great importance. In material and legal terms⁵, the foundation of any disciplinary liability is the principle of adequate repression. In the formula adjusted to disciplinary law, it is reasonable to adopt an axiological assumption that only the officer who is guilty of disciplinary offence should be duly punished as prescribed by law⁶. The phrase “only” used twice emphasises the dual meaning of this principle, namely punishing the guilty officer and not punishing the innocent one.

The starting point for deliberations on disciplinary penalties imposed on officers of the Prison Service is the statement that they can only be imposed for committing a disciplinary offence⁷ which consists in violating official discipline or for acts contrary to the official oath. At this point, it should be emphasised that disciplinary liability does not apply to civil employees employed in the Prison Service. In accordance with *nulla poena sine lege stricta* principle, article 230 (1) of the Act on Prison Service, as a repressive norm, cannot be interpreted broadly in any respect.

In the Polish penitentiary law system disciplinary liability covers all categories of officers of Prison Service. Pursuant to the provisions of article 40 (1)(2) of the Act on Prison Service the officers are divided into those remaining in preparatory service and those in permanent service. Due to the fact that article 230 (1) of the analysed Act does not introduce any differences between these two categories of officers based on the *lege non distinguente* arguments, I believe that all of them are subject to disciplinary liability, and therefore the same penalties can be imposed on them. Moving on to strictly substantive considerations on the disciplinary offences of Prison Service officers, I will start the analysis with statutory premises.

According to general theoretical approach prevailing among the disciplinary law theorists in Poland⁸, the basis of this liability is an act defined as a disciplinary offence, considered unlawful, negatively affecting the good of service, socially harmful, i.e., violating a specific legal interest and at the same time culpable. In the latter dimension, this applies to both wilful misconduct and negligence⁹. Under article 230 (1), a disciplinary offence is either a violation of official discipline or an act contrary to the oath of a Prison Service officer. In

⁵ See: J. Skorupka, O sprawiedliwości procesu karnego [*Fairness of a criminal trial*], Warsaw 2013, p. 52 ff.

⁶ See: M. Cieślak, Polska procedura karna. Podstawowe założenia teoretyczne [*Polish criminal procedure. Basic theoretical assumptions*], Warsaw 1971, p. 221.

⁷ In the following part of this article, the terms disciplinary offence and disciplinary tort may be used interchangeably.

⁸ See: R. Giętkowski, Odpowiedzialność dyscyplinarna w prawie polskim [*Disciplinary liability under Polish laws*], Gdańsk 2013, p. 182 ff. and the literature referenced there

⁹ See article 230 (2) of the Act of Prison Service and F. Radoniewicz (in:) Służba Więzienna. Komentarz [*Prison Service. Commentary*], ed. A. Sobczyk, Warsaw 2013, p. 520.

practice, both of these categories are often in a statutory concurrence with respect to specific behaviours. A similar legal concurrence may occur with crimes - including fiscal crimes and offences.

I will start the analysis of the disciplinary offence (tort) with a case of violation of the official discipline. Article 230 (3) of the Act on Prison Service names particular acts that constitute such violation. The list, however, includes only examples as the provision uses the term “in particular”. I take a critical view of such type of normative regulation, because it violates the universal principle *nullum crimen sine lege certa*, leaving an unspecified area as regards the material scope of disciplinary liability. As a result, this normative mechanism violates the standards characteristic of the rule of law, thereby violating article 2 of the Constitution of the Republic of Poland.

Turning to the specific acts that *de lege lata* are classified as disciplinary offences, I will begin with the characteristics of such an offence specified in article 230 (3)(1) of the Act of Prison Service. This provision recognises as a disciplinary offence a refusal to comply with an instruction or failure to comply with an instruction or order of the superior or the authority authorised under the Act to give instructions to Prison Service officers.¹⁰ This means that any serious omissions in this regard may result in disciplinary penalty. At this point, however, it is worth emphasising that acts that cannot be classified as disciplinary offences include a refusal to comply with an order not related to the service or an order contrary to the law (e.g. to draw up a false document as instructed by immediate superior), or the principles of social coexistence (e.g. to denounce other officers).

Pursuant to article 230 (3)(2) of the Act on Prison Service, a disciplinary offence is also a failure to perform an official duty or its improper performance. In practice, this mechanism applies to all official activities (e.g. failure to provide assistance to a prisoner in a situation posing risk to his life or health). The characteristics specified in this provision also include improper exercise of professional rights (e.g. unprofessional use of equipment or means of direct coercion).

Article 230 (3)(3) of the Act on Prison Service sanctions, as a disciplinary offence, inhumane treatment offensive to the dignity of persons deprived of their liberty. The intention of this provision is for officers to respect the dignity of prisoners, especially not to torture them¹¹, and to limit the use of coercive measures to situations resulting from functional and

¹⁰ See: J. Paśnik, *Prawo dyscyplinarne w Polsce [Disciplinary law in Poland]*, Warsaw 2000, pp. 257-258.

¹¹ See article 5 of the Universal Declaration of Human Rights, article 3 of the European Convention on Human Rights and article 7 of the UN International Covenant on Civil and Political Rights.

legal necessity. In particular, inflicting pain or physical or mental suffering on those deprived of their liberty should be classified as inhumane. This applies not only to persons sentenced to imprisonment, but also to third parties.

Under article 230 (3)(4), acts that are penalised as disciplinary offences include failure to perform official duties or exceeding the powers specified in legal provisions - not only penitentiary - by an officer, resulting from the fact that the action taken by him did not fall within the scope of official competence or was inconsistent with legal (regulatory) conditions of the performed official activity (e.g. imposing on a convicted person an obligation to perform work in the conditions posing risk to his life or health). On the other hand, failure to comply with an obligation will consist in failure to perform an act which was obligatory under applicable penitentiary law or regulations on the execution of a custodial sentence (e.g. failure to search the cell). Non-compliance with an obligation may also include failure to provide information to the superior about the pathological or illegal behaviour of other persons at the prison premises. This provision does not fully implement the *nullum crimen sine lege certa* principle.

A disciplinary offence under article 230 (3)(5) of the Act on Prison Service is misleading a superior or other officer if it caused or could have caused harm to the service or other person¹². This includes provision of false or manipulated facts or other information (e.g. assessments) to a service superior or other officer in oral or written form (e.g. by e-mail), as a result of which the actual state of affairs is concealed.

Another type of disciplinary offence under article 230 (3)(6) of the Act on Prison Service is the conduct of a superior contributing to the loosening of official discipline. The textual interpretation of this provision clearly supports the understanding that such an offence can only be committed by Prison Service officer who manages other officers. The essence of loosening discipline¹³ is lowering legal or ethical standards implemented in the service. Thus, examples of loosening discipline may include tolerance of unlawful behaviour of subordinates, in particular towards persons deprived of liberty, or undermining the penitentiary procedures and good practices in relation to subordinates. Ignoring the activities of subordinates which consist in breaching official duties or disregarding public property can also be classified as loosening of official discipline. This provision does not fully implement the *nullum crimen sine lege certa* principle.

¹² See more: F. Radoniewicz, (in:) Służba Więzienna [*Prison Service*], op.cit., p. 523.

¹³ See also: S. Hoc, P. Szustakiewicz, Komentarz do art. 107 ustawy o Centralnym Biurze Antykorupcyjnym [*Commentary on article 107 of the Act on the Central Anti-Corruption Bureau*], LEX/el. 2012.

A disciplinary offence within the meaning of article 230 (3)(7) is committed also when an officer arrives at work intoxicated or under an influence of similar substances and consumes alcohol or uses similar substances during work¹⁴. The said provision requires absolute sobriety by officers of Prison Service while on duty. The same applies to the use of psychoactive substances. An act is always classified as a disciplinary offence in the case of consumption of alcohol, even with the knowledge or approval of superiors. It does not matter that the alcohol was consumed outside the time of service, if it took place at the premises of the prison.

Under article 230 (3)(8) of the Act on Prison Service, a disciplinary offence is the loss of official firearms, ammunition or official identity card¹⁵.

In terms of the discussed provision, it does not matter in what circumstances these events occurred. It can therefore be caused both by intentional and unintentional fault. The former may involve *dolus eventualis*, in which case the officer does not anticipate committing any disciplinary offence, but he allows such possibility. In the latter case, it means failure to exercise due caution in specific circumstances, despite the fact that the officer had or could have foreseen the possibility of losing firearm, ammunition or official identity card. In practice, an example of a disciplinary offence is the loss of firearm as a result of unlawful storage at the place of residence or in a manner contrary to applicable regulations. With the precisely specified characteristics of disciplinary offences, this provision complies with the *nullum crimen sine lege certa* directive. Essentially, similar disciplinary offences are provided for in article 230 (3)(9) of the Act on Prison Service. This provision sanctions the loss (e.g. sale or voluntary hand over) of an item constituting official equipment, the use of which by unauthorised persons has caused harm to a citizen or has created a threat to public policy or public security. In the case of such disciplinary offence, the findings made under article 230 (3)(8) of the Act of Prison Service should apply *mutatis mutandis*. A practical example illustrating the offence described in paragraph 9 is the loss of handcuffs by the officer, which were then used to deprive a third party of their liberty.

Pursuant to article 230 (3)(10) of the Act on Prison Service, the loss of a document containing information constituting a state or professional secret is subject to sanction. This offence applies to all categories of documents¹⁶ - *lege non distinguente* - not just those related directly to the service. However, they must contain a state or professional secrecy clause. Both

¹⁴ See: F. Radoniewicz (in:) Służba Więzienna, op.cit., pp. 524-525

¹⁵ See also: F. Radoniewicz (in:) Służba Więzienna, op.cit., pp. 525-526

¹⁶ See article 2 (3) of the act of 5 August 2010 on the protection of classified information [*ustawa z dnia 5 sierpnia 2010 o ochronie informacji niejawnych*]

categories of secrets should be defined *a completudine* in the context of the Act on the protection of classified information. Due to the lack of coherence between these two acts, we are dealing here with a breach of the *nullum crimen sine lege certa* principle.

Under article 230 (3)(12) of the Act on Prison Service, a disciplinary offence is also an abuse of official position or service for financial or personal gain. In the context of this specific legal norm, abuse of a position or service means an intended use by a Prison Service officer of his powers resulting from official authority over persons deprived of liberty, subordinates or third parties (e.g. families of convicted persons). It usually involves the exercise of rights or even their usurpation in order to achieve financial or personal gain. The former consists in misappropriation of property for himself or for other persons. It may involve not only obtaining monetary values, but also obtaining valuable items, and even reducing financial liabilities. In turn, a personal gain relates to a non-pecuniary benefit improving the legal or actual situation of the officer.

The last category of disciplinary offences listed in article 230 (3)(12) of the Act on Prison Service is an arbitrary departure of an officer from the area of accommodation, if he is quartered in barracks, as well as unjustified departure from the place of work or failure to report for service. In the former case, it involves leaving the barracks area without the consent of the service superior disrupting the operations of the penitentiary unit. In the latter case, culpable abandonment of service without valid reason. Also, failure to arrive at the place of service without a valid reason may be classified as a disciplinary offence.

Under article 230 (1) of the Act on Prison Service, a disciplinary offence includes acts contrary to the oath of the officer. In accordance with article 41 (1) of the discussed Act on Prison Service¹⁷, an officer undertakes to diligently perform official duties, orders from superiors, to care for the good of the service, to comply with the constitution of the Republic of Poland and other laws and professional ethics. In practice, this means that all acts violating the above standards may be classified as misconduct. This mechanism undoubtedly violates the universal directive *nullum crimen sine lege certa*. In particular, violation of ethical and moral standards is difficult to define in practice.

To sum up the deliberations on compliance of the provisions of the Act on Prison Service regarding the disciplinary offences with the principle *nullum crimen sine lege certa*, I find that certain norms of article 230 (3) of this Act do not always precisely define the characteristics of individual disciplinary offences. Thus, they violate the legislative standards

¹⁷ See: M. Mazuryk, (in:) *Służba Więzienna [Prison Service]*, op.cit., p. 128-129 and the literature referenced there.

in force in the rule of law. As a consequence, in practice this may lead to the extensive interpretation to the detriment of the accused officer. In addition, it is worth emphasising that references made in article 230 to other statutory provisions, and even references to ethical and moral standards, also violate the principle *nullum crimen sine lege certa*, which undermines the constitutional principle of the rule of law.

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Szymanowski T. (in:) T. Szymanowski, J. Migdał, Prawo karne wykonawcze i polityka penitencjarna [*Executive criminal law and penitentiary policy*], Warsaw 2014,

Summary: The article is devoted to the subject of substantive and legal issues related to the characteristics of disciplinary offences of Prison Service officers. It will relate to both theoretical and practical aspects. The author will analyse the compliance of the provisions of

the Act on Prison Service regarding the disciplinary offences with the principle *nullum crimen sine lege certa*.

Key words: *Prison Service, officer, disciplinary proceedings, disciplinary penalties, disciplinary offences*

Zasada *nullum crimen sine lege certa* i przewinienia dyscyplinarne funkcjonariuszy Służby Więziennej

Streszczenie: W niniejszym artykule autorka przedstawia zagadnienie charakterystyki przewinień dyscyplinarnych funkcjonariuszy Służby Więziennej, zarówno w aspekcie teoretycznym, jak i praktycznym. Autorka poddaje analizie zgodność norm Ustawy o Służbie Więziennej z zasadą *nullum crimen sine lege certa*.

Słowa kluczowe: Służba Więzienna, funkcjonariusz, postępowanie dyscyplinarne, kary dyscyplinarne, przewinienia dyscyplinarne