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Classification of an individual with mental disorders as posing a threat to the life, health or sexual freedom of others in the process of applying the Act of 22 November 2013 and the risk of unjustified violation of human rights and freedoms

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The present article focuses on procedural issues related to placement in the National Centre for the Prevention of Antisocial Behaviour (KOZZD) under the Regulation of 22 November 2013. Particular attention was paid to the issues concerning the expert opinion on the mental state of an individual with regard to whom the head of the prison has applied to the competent court for being recognized as posing a threat to society. Numerous difficulties that arise while giving the aforementioned opinion are presented, and the problem of errors in the opinion is discussed. The ethical dilemmas faced by a medical or psychological expert are also addressed, and the importance of the opinion for the situation of the offender and his or her future life is highlighted. Western European civilisation has a disturbing tendency to overuse mechanisms that guarantee the safety of the public at the expense of excessively sacrificing the freedom of individuals. Although human rights and freedoms are not unlimited, it is unacceptable to restrict them to the extent that is unnecessary in a democratic state under the rule of law. Since declaring a person to be a threat deprives them of the chance to start a new life with a clean slate after serving their sentence, the final consideration is whether the procedure leading to such a decision meets the highest standards guaranteeing respect for human rights and freedoms and can be considered fair.

Key words: 'Law against beasts', expert opinions on the mental state, errors in expert opinions, ethical dilemmas, human rights and freedoms

Expert evidence is a familiar feature of both criminal and civil procedure. The necessity to use it in a situation where it is crucial to obtain expert knowledge is

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also non-negotiable. Despite this, court-psychiatric opinions invariably give rise to controversy and doubts, as the tendency to absolutise their content by the courts causes psychiatrists to become, in effect, the judgment makers (Piotrowska 2007, pp. 196-199). Moreover, the subject matter that is the subject of the opinion is so sensitive that there are justified concerns as to whether in some cases it is possible to straightforwardly determine the mental state of a given subject. Given the above, it is particularly important to provide the subject of the examination with the necessary guarantees in terms of the proper conduct of the opinion, the appropriate qualifications of the expert, as well as the highest quality of the expert report. In the course of this argumentation, reflections on this matter will be limited to the scope set by the subject, i.e. forensic-psychiatric opinions for the application of the Act of 22 November 2013 on proceedings against persons with mental disorders posing a threat to life, health or sexual freedom of others (Journal of Laws 2020, item 1346) (Regulation regarding Offenders Posing a Threat) (legal status as of 16 April 2021). However, the analysis will include statements of doctrine and jurisprudence concerning evidence in the form of an expert opinion both on civil and criminal grounds, as this will allow to more fully illustrate the issues discussed. Moreover, it is worth mentioning here that the matter regulated by the above-mentioned Act should be located in the criminal procedure, and placing it within the scope of civil proceedings is artificial and seems to be aimed only at counteracting the allegations concerning the unconstitutionality of the retroactive effect of criminal provisions. Therefore, it is all the more justified to refer to the issues related to opinions within the framework of both procedures.

The considerations should begin with a reference to the relevant provisions of the law regarding dangerous offenders. The court proceedings leading to the imposition of a post-penal measure against an individual are initiated as a result of an application filed with the competent court by the director of the penitentiary to consider the person subject to the application as an individual posing a risk. The application is complemented with an opinion, as well as information on the results of therapeutic programs applied so far and progress in rehabilitation. Subsequently, the court shall immediately take steps to determine whether the subject is a person posing a risk. To verify whether the requested individual exhibits a disorder referred to in Article 1, point 3, in the form of mental retardation, personality disorder, or sexual preference disorder, the court shall appoint two expert psychiatric doctors; in cases of persons with personality disorders, besides, an expert psychologist; and in cases of persons with sexual preference disorders, in addition, an expert sexologist or certified sexologist. Importantly, expert psychiatric doctors may report the need to combine a psychiatric examination with observation in a psychiatric institution. In such a situation, the court decides on the observation

within 7 days of receiving the experts' request, specifying the place and duration of the observation as well as the date on which it is to begin. The duration of the observation may not exceed 4 weeks. Finally, the court, when choosing whether to apply the preventive supervision measure or detention in the National Centre for the Prevention of Antisocial Behaviour (KOZZD), takes into account the overall circumstances of the case, including in particular the opinions of experts and the results of therapeutic proceedings conducted so far and the possibility of a given person to effectively undergo such proceedings at liberty. The court decides on the application of preventive supervision if the nature of diagnosed mental disorders or their severity indicates that there is a high probability that the person is going to commit a prohibited act with the use of violence or with the threat of its use against life, health or sexual freedom, threatened with the punishment of imprisonment of at least 10 years. The court decides also on the placement in a KOZZD, when the probability of committing a prohibited act by a given person is very high and there is a prerequisite for the necessity of isolation. Both preventive supervision and placement in the centre are ordered without an end date. It is also worth pointing out at this point that according to Article 286 of the Regulation of 22 November 2013 – the Code of Civil Procedure (k.p.c.) (Journal of Laws 2020, no 43, item 296) (legal status as of 16 April 2021), apart from a written opinion, the court may request an oral explanation from experts as well as a supplementary opinion.

There is no doubt that the decision on the application of a post-penal measure is always taken by the court itself. However, it must be based on findings as to the mental state of the offender, which requires special knowledge in specific areas. For this reason, the legislator obliges the trial authority to appoint experts and get acquainted with their expertise, which plays a primordial role when making a ruling. Consequently, a defective opinion may result in a specific content of the decision on the application of a post-penal measure, thus leading to an unjustified violation of individual rights and freedoms. It is, therefore, necessary to pay attention to issues related to the opinion to assess whether its course and outcome do not pose a threat to the rights and freedoms of the individual.

The reflections should start with determining the designations of the names used in Article 11 (1) and (2) of the Regulation regarding Offenders Posing a Threat. Firstly, one should reflect on the terms "doctor psychiatrist" and "doctor sexologist". Article 5(1) of the Act on professions of doctor and dentist (Journal of Laws 2020, item 514) (legal status as on 16 April 2021) sets out in detail the requirements to be met by a person to obtain the right to practice medicine, among which the legislator indicates, inter alia, the possession of a medical diploma issued by a university confirming the completion of at least six years of studies in the field of medicine. Subsequently, a medical graduate may apply for specialisation

training, which is preceded by a qualification procedure. The term "doctor of psychiatry" should therefore refer to a person who has completed specialisation in psychiatry or child and adolescent psychiatry, while a "doctor of sexology" is an individual who has completed specialisation in psychiatry, child and adolescent psychiatry, gynaecology, and obstetrics or internal medicine, followed by a specific specialisation in sexology, which results from Annexes 1-6 to the Regulation of the Minister of Health of 31 August 2020 on specialisation of doctors and dentists. The cited regulation regulates in detail matters related to postgraduate education of future psychiatrists. In the course of specialisation they are to acquire, among others, skills necessary to issue opinions in psychiatric court cases. The criteria necessary to practise as a psychologist, on the other hand, are stipulated in the Act of 8 June 2001 on the profession of psychologist and the professional association of psychologists (Journal of Laws 2019, item 1026) (legal status as of 16 April 2021). According to Article 7 and Article 8, the right to practise as a psychologist arises from the moment of entry in the list of psychologists of the Regional Chamber of Psychologists of a person who meets certain requirements, including a master's degree in psychology at a Polish university or an education abroad recognised as an equivalent in the Republic of Poland and a postgraduate professional internship, under the substantive supervision of a licensed psychologist. The term 'psychologist-sexologist' refers, in turn, to psychologists who have completed postgraduate studies in sexology. Without going into details, it should be noted that a sexologist can be both a doctor and a psychologist. For obvious reasons, the competencies of both will not be the same. What is unclear is the understanding of the term "certified sexologist psychologist" used by the legislator, as the details of this certification are not specified in any way, and the term has not appeared in any normative acts so far. Thus, it is difficult to determine the set of designations of the phrase used.

Having made terminological arrangements concerning to entities entitled to issue forensic psychiatric opinions, it is necessary to look at the very process of issuing an opinion by experts. As is known, the issuance of the opinion in question requires special knowledge in the field of psychology, psychiatry, sexology, or medicine in general. As a rule, the trial authority does not have any specialised education which would allow it to reliably examine the mental state of the perpetrator. It should be stressed, however, that even if the court knew the discussed area, it would still be obliged to appoint certain experts, which is clear from the categorical wording of the regulation of the Act on dangerous offenders. Therefore, the court may not refer either to its knowledge in the given field or to other evidence conducted in the case, so to speak, replacing the experts (Wysocki 2016, p. 13; decision of the Supreme Court from 29.08.2013, ref. no. I CSK 20/13, Lex no. 1375181; decision of the Supreme Court from 24.09.2014, ref. no. III UK 196/13,

Lex no. 1545137; decision of the Supreme Court from 12.06.2015, ref. no. II UK 145/14, Lex no. 1754049; decision of the Supreme Court from 18.02.2016, ref. no. II CSK 282/15, Lex no. 1977916; decision of the Supreme Court from 2.10.2015, ref. no. II CSK 622/14, Lex no. 1920175).

The legislator does not specify what is covered by the term "special knowledge". It is assumed in the doctrine that it refers to information of the type that exceeds the knowledge of a person with secondary education (Hofmanski et al. 2011, p. 912 et seq.). It is emphasised that these are knowledge beyond the common knowledge in the given conditions of social development (Doda, Gaberle 1995, pp. 79-80; Wrześniewska-Wal 2016, p. 105). It is easy to see that this term is usually negatively defined as something unknown to someone. Similarly, in the jurisprudence it is indicated that special knowledge is one that does not result from the life experience of an average person and also goes beyond normal practical skills (decision of the Supreme Court from 23.11.1982, ref. no. II KR 186/82, OSNPG 1983, no. 5, item 59, Lex no. 17479; decision of the Supreme Court from 26.10.2011, ref. no. III CSK 3/11, Lex no. 1110991). A contrario, such information which is available to an adult person of average education, life experience, and general knowledge shall not constitute special knowledge (decision of the Supreme Court from 15.04.1976, ref. no. II KR 48/76, OSNKW 1976, no. 10-11, item 133, Lex no. 19186). The judicature also cites exemplary situations, in which it is desirable to appoint experts, which also allows for inferring the scope of the term discussed. For example, the need to determine the disturbance of sexual desire in acts against sexual freedom (decision of the Supreme Court from 29.04.1982, ref. no. III KR 72/82, OSNPG 1982, no. 8, item 122, Lex no. 17423) or the ability to recognise the meaning of the act and direct one's conduct may be indicated (decision of the Supreme Court from 9.06.1986, ref. no. II KR 182/86, OSNKW 1987, no. 1-2, item 5, Lex no. 20178).

It is obvious that issues related to the mental state of an individual, relevant for the decision on the application of a postpenal measure, are within the scope of special knowledge, and the Act on Offenders Posing a Threat unambiguously implies the obligatory consultation of certain opinions by the court. In accordance with **to** Article 11(1) of the mentioned Act, the determination of a disorder in the form of mental retardation in a person subject to an application is always made by two psychiatrists. It appears from this provision that the participation of experts from other specialties, such as psychologists, sexologists, or neurologists, is excluded when assessing mental disability. This is because, in contrast to the regulations of the Act of 6 June 1997, the Code of Criminal Procedure (Journal of Laws 2021, item 534) k.p.k. (legal status as of 16 April 2021), the legislator does not indicate the admissibility of request by expert psychiatrists to appoint experts from other disciplines. Extension of the composition of the opinion is provided only in

cases of persons with personality disorders, where the court appoints additionally a psychologist, and in cases of persons with sexual preference disorders, when it is necessary to participate additionally of an expert sexologist or a certified sexologist.

As the legislator obliges the trial authority to appoint two expert psychiatrists, the question should be raised whether they issue one opinion jointly or each of them separately. In other words, it needs to be analysed, whether the formal requirement of appointing a minimum number of psychiatrists generates the necessity of carrying out joint examinations and issuing a team opinion, or whether they are obliged to issue separate opinions. Moreover, it is also controversial whether the activities preceding the issuance of an expert opinion should be carried out jointly or separately (Cioch, Mierzejewski 1999, pp. 72-73). Opposing positions are expressed on this issue in the doctrine. Some authors argue that each expert should conduct an individual psychiatric examination and draw up a separate opinion to somehow eliminate the risk of the second expert endorsing the opinion issued by the first (Rosengarten 1981, p. 57 et seq.). According to the supporters of the team opinion (Cieślak 1966, p. 370, Daszkiewicz 1975, pp. 113-114), the above-mentioned threat is caused precisely by the unevenness of the conduct of research. It also generates the risk of the second expert carrying out their duties in a simplified manner by limiting themselves to the methods used by the predecessor. Moreover, they point out that it is desirable to confront the positions of individual experts so that the final opinion is the result of a clash of often opposing views. Besides, it should not be forgotten that individual experts approach issues of interest to psychiatry differently. In the absence of uniform views on particular issues and the scarcity of objective research methods, joint participation in the research, an exchange of views, and a team approach to providing an opinion seem to be the most appropriate solution (Zgryzek 1990, p. 34). A similar standpoint was taken by the Supreme Court, which noted that team opinion-making enables the exchange of thoughts and experiences, mutual scientific support and control, which has a positive impact on the quality and accuracy of the final opinion on the state of mental health of the examined individual (decision of the Supreme Court from 22.01.1976, ref. no. VI KZP 17/75, OSNKW 1976, no. 3, item 37, Lex no. 19097; decision of the Supreme Court from 9.03.1995, ref. no. II KRN 255/94, Prok. i Pr., 1995, no. 12, item 13, Lex no. 24471). It is worth mentioning that in the literature there are also voices saying that the decision in this respect should be taken by the trial authority (Doda 1995, p. 34). This position cannot be considered fortunate, as it is devoid of any normative support. The abovementioned solution should be assessed critically also because the matter concerning the form of the opinion is undoubtedly within the scope of research methods, which are covered by the notion of special knowledge (decision of the Supreme Court from 14.01.1965, ref. no. I K

187/64, OSPG 1965, no. 2, item 12, Lex no. 170230; decision of the Supreme Court from 10.05.1982, ref. no. II KR 82/82, OSNKW 1982, no. 10-11, item 78, Lex no. 19801). It is difficult to require a trial authority to know how specialist examinations are to be carried out for their results to be the most authoritative. Accepting the correctness of the indicated view would therefore entail the risk of arbitrary reliance on individual and collective opinions. Consequently, the most correct conclusion seems to be that expert psychiatrists should draw up one joint team opinion after conducting a joint examination. This is because psychiatric opinions must be carried out under the mutual control of the subjects carrying them out in an atmosphere of unhindered discussion (Waltoś 1961, p. 1503). Thanks to this it will be possible to point to analogous advantages concerning it, which are cited arguing in favour of holding a medical consultation (Cieślak 1991, p. 456). It should be added that also in practice situations of issuing a single team opinion prevail (Zgryzek 1998, pp. 244-247).

In the literature on the subject, the term "comprehensive opinion" is also frequently used (Gaberle 2010; Tomaszewski 1998, p. 24 et seq.; Cieślak 1991, pp. 474-475), so it is worth mentioning it. It is an opinion issued by a team of experts, who after joint research formulate an opinion covering all the issues. The necessity of issuing a comprehensive opinion is determined by "the degree of coherence of a given complex problem against the background of the phenomenon it concerns". (Cieślak 1991, pp. 474-475). Thus, "if a given phenomenon and an issue arising against its background requiring special knowledge are, as regards their aspects involving various specializations, indivisible to such an extent that each of the separate opinions of these specialists could cover only a non-self-contained part of the given phenomenon and relevant issue, then the only rational solution is a collective mixed (combined, comprehensive) opinion that allows to cover the entirety of the phenomenon and the entirety of the issue taking into account all specialized points of view" (Cieślak 1991, p. 474-475). A comprehensive opinion will play a particularly important role in borderline situations, because "there are issues the comprehensive and thorough explanation of which requires not only an assessment by representatives of several specializations, but directly the cooperation and mutual consultation of these specialists in the course of conducting an expert opinion and forming an opinion" (Cieślak 1991, pp. 474-475). This is undoubtedly the case when psychiatric experts provide opinions on the state of mental health together with specialists from other disciplines. However, following the Supreme Court, it should be stressed that a joint opinion does not have to be tantamount to the concordance of the assessments made by its authors (decision of the Supreme Court from 8.04.1999, ref. no. IV KKN 653/98, Prok. i Pr., 1999, no. 10, item 12, Lex no. 37945). In the current legal status, in the situation referred to in Article 11 point

2 of the Act on offenders posing a threat, it is both possible and desirable to issue a comprehensive opinion by experts of various specialisations. The cooperation of several persons may indeed, give rise to certain practical complications; there is a risk of, for example, terminological problems since representatives of different science fields often define the same concepts differently, as well as methodological problems. However, it seems that in the current state of knowledge it is impossible to avoid interdisciplinary links between individual fields of science (Habzda-Siwek 1992, pp. 49-56), and therefore, in the name of the quality of the opinion, possible inconveniences should be faced. Unfortunately, in practice, the opinions issued for the Act on Offenders Posing a Threat are not complementary and do not represent the result of mutual consultation of all experts expressing their opinion on the case of a given person[1].

Given the subject of the present study, it is particularly important to discuss the issue of errors in forensic-psychiatric opinions, which are immanently associated with the threat to the rights and freedoms of the person against whom the post-penal measure will be decided. It is undeniable that an expert should be required to carry out reliable examinations and construct an opinion complying with basic diagnostic requirements. It should be stressed that this diagnosis must meet certain standards, which determine its clarity, completeness, and internal inconsistency. The issue of expert opinion evidence has been the subject of many studies (Knoppek 2016, pp. 383-464; Wiśniewski 2013; Wójcikiewicz 2000; Półtawska 1974; Czerederecka et al. 2007; Hajdukiewicz 2008; Rybicki 2015, pp. 35-44; Grabowska et al. 2014), which, however, did not lead to a solution of the perceived problems. However, the results of these analyses allow us to identify the main problems related to the functioning of the expert system. Many errors result from the inadequate manner of conducting examinations, which logically has a not insignificant impact on the quality of the opinions that conclude them. Most often these errors are the result of a violation of rules regarding the time, place and conditions of examination, the selection of appropriate testing methods, the course of this examination, the manner of formulating the expert opinion, or inadequate competence of the expert. The problems of ethical and moral nature are also important (Gierowski 2004, p.111-119). J. K. Gierowski has attempted to analyse the individual causes of errors in giving opinions. It is worth at this point to have a closer look at the problems signalled by the mentioned author.

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[1] Rojek-Socha 2019, To Gostynin easier through the incompetence of experts and gaps in opinions, https://sip-1lex-1pl-15d274stb0068.han.bg.us.edu.pl/#/external-news/1795658248?keyword=Maria%20Gordon%20biegłych&cm=STOP (accessed 29.04.2021 r.)

Firstly, it should be pointed out that many expert examinations are carried out in court, prosecution, or prison buildings. This type of place is not the most appropriate choice, because the atmosphere there has little in common with the intimacy and calm that should accompany the examination. The time constraints, on the other hand, make it impossible for the expert to thoroughly familiarise himself or herself with the files made available to him or her, as well as to establish contact with the examined person. It is also against the law to carry out any examinations in the places referred to, as according to Article 19 of the Act of 19 August 1994 on mental health protection (Journal of Laws 2020, item 685) u.o.z.p. (legal status as on 19 April 2021), the examination of a person's mental state provided for in other laws, carried out at the request of a court, prosecutor or other authorised body, should take place in medical entities providing health services in the field of mental health care. If necessary, the examination may be conducted in family diagnostic and consultation centres, and exceptionally also at the place of residence of the examined person. The lack of suitable conditions makes it impossible to carry out an appropriate diagnosis, which affects the status of the psychiatric examination and, consequently, generates the risk of issuing an erroneous and inadequately substantiated opinion. It should, therefore, be postulated that the analysis of an individual's mental state should always take place in health care premises or other premises intended for clinical examinations.

It is worth noting at this point that the regulations of the Act on offenders posing a threat indicate that the examination in question may take place both on an outpatient basis and in the form of observation in a closed treatment facility, while the latter solution should be applied only exceptionally. The initiative of reporting such a necessity belongs to experts, but ultimately the court decides about the need for observation in a medical facility, defining its place and duration, which is limited by law to 4 weeks. It is not difficult to see that subjecting the offender to a forensic-psychiatric observation under the Article 13 of the above-mentioned Act constitutes a serious restriction of the rights and freedoms of a given individual. Consequently, this form should only be applied in extreme situations when one cannot do without it. Importantly, the notification of the need to place the offender in a closed facility for the examination can only be made by expert psychiatrists. Thus, in a situation where experts of other specialties, such as psychologists or sexologists, participate in preparing an opinion on the state of mental health of a given person, they are not competent to file an appropriate motion. According to the literal wording of Article 13 point 1 and point 2, the court is also not entitled to order an observation in a closed therapeutic institution. This solution has to be considered reasonable because the choice of the form of examination should be

left to the expert, as well as the choice of the research method is within the expert's special knowledge.

The second problem is the selection of appropriate research techniques. The expert should use methods that are widely accepted in science, whose effectiveness has been empirically supported, and moreover, it is possible to verify their diagnostic value. Moreover, he or she must demonstrate care for uniformity and transparency of the research process. It should be added that in many situations it is not the method applied per se that is the problem, but the incompetent use of the method by the expert. This applies especially to relatively new testing techniques. As a rule, the examination should follow a pre-established plan. However, it is possible to introduce appropriate changes when the assumptions adopted initially do not promise satisfactory results. In practice, we can observe, unfortunately, routine and lack of diligence in the work of experts.

Further mistakes arise from the way the opinion is formulated, which on the one hand should be exhaustive, but on the other hand cannot contain too much unnecessary information, often presented in terminology incomprehensible for the addressee (a lawyer). The expert report cannot be limited only to a description of the research conducted and the conclusions drawn from them. It should also contain answers supported by arguments to the questions posed by the procedural authority. The expert, however, is not entitled to make moral value judgments about the behaviour of the perpetrator. In practice, however, some expert reports contain evaluative formulations which do not lend dignity to the judicial-psychiatric opinion. Exemplifying, Dr A. Depko points to the statement noticed in one of the opinions: "upon learning of the perpetrator's act, the Mother of God shed tears"[2]. In any case, making comments of this kind cannot be condoned.

The low level of expert knowledge is also causing concern. Opinions are issued by people who completed their studies or specialisation a dozen or so years ago and stopped their scientific development at that. As a result, the expertise carried out by such an expert contains archaic concepts and has no value. As a side note, it is worth mentioning that the crummy terminology is also close to the Polish legislator, who, while regulating the matter of providing opinions by psychologists in penitentiary institutions, recommends that the criminological-social prognosis should include information about "the path of social derailment" along with

[2] Rojek-Socha 2019, To Gostynin easier through the incompetence of experts and gaps in opinions, https://sip-1lex-1pl-15d274stb0068.han.bg.us.edu.pl/#/external-news/1795658248?keyword=Maria%20Gordon%20biegłych&cm=STOP

"determining the degree of demoralization"[3]. These notions are incompatible with modern medical knowledge.

It is expected that every expert opinion, regardless of its subject matter, should be characterized by quality and reliability. However, this is particularly important in such a sensitive area as adjudicating whether a given subject can be indefinitely isolated in National Centre for the Prevention of Antisocial Behaviour. The reality, however, deviates from the ideal. It is indicated that many opinions are flawed, and do not contain a comprehensive description of the patient's problems or information about attempts to correct the patient's attitudes. Moreover, some experts use the copy-and-paste method, not looking at individual cases at all[4].

The quality of opinions is also not favoured by the curricular expectations of courts. There are no statutory criteria that would determine the choice of a given person or institution, which means that in most cases the key factors are the speed of preparation of the opinion and the price. In practice, there are even circulars recommending that savings should be made on expert opinions (Widła 2002, pp. 64-65). As a result, people with appropriate education and experience are not interested in forensic-psychiatric opinions[5]. Time pressure, on the other hand, causes a negative effect in the form of issuing opinions characterised by sloppiness. As Dr A. Welento-Nowacka points out that some experts "submit two pages of opinion without any justification and so refer the patient to a closed ward"[6].

Every expert witness is obliged to perform his or her duties impartially, conscientiously, and reliably. Since at the centre of every opinion on disorders is the human being, we should also consider the ethical dilemmas faced by the medical or psychological expert. For example, it can be indicated that the use of certain methods, including projective ones, may raise doubts, thanks to which it is possible to reveal the motives of the perpetrator's actions, which he was not aware of and probably did not want to reveal (Gordon, Rutkowski 1989, p. 68-72). It is necessary to take a stand that in the situation of dissonance, the expert should listen to the voice of conscience and follow its indications with respect for ethical principles

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[3] Nowak 2019, Drama with court experts. They can break the life of a defendant, and no one checks them, https://oko.press/szybko-i-tanio-opinie-bieglych/ (accessed 29.04.2021 r.)

[4] Rojek-Socha 2019, To Gostynin easier through the incompetence of experts and gaps in opinions, https://sip-1lex-1pl-15d274stb0068.han.bg.us.edu.pl/#/external-news/1795658248?keyword=Maria%20Gordon%20biegłych&cm=STOP

[5] Rojek-Socha 2019, To Gostynin easier through the incompetence of experts and gaps in opinions, https://sip-1lex-1pl-15d274stb0068.han.bg.us.edu.pl/#/external-news/1795658248?keyword=Maria%20Gordon%20biegłych&cm=STOP

[6] Nowak 2019, Drama with court experts. They can break the life of a defendant, and no one checks them, https://oko.press/szybko-i-tanio-opinie-bieglych/

conducive to the pursuit of justice. At the same time, we must advocate increasing the ethical requirements for experts, and making the supervision of their activities more realistic in this regard. A good solution could be the introduction of disciplinary responsibility for experts for breach or violation of ethical standards. Such a system has been adopted, for example, in the United Kingdom, where the Academy of Forensic Experts exists, bringing together not only experts but also their organisations. If a member of the Academy becomes aware of a breach of ethical standards or of misconduct in court, the Academy has the power to initiate disciplinary proceedings. In such a situation, the case is heard by the appointed Tribunal, which may decide to admonish the expert, suspend them or even expel them from the Academy. It should be emphasised here that the register of disciplinary sanctions is public[7]. It should be strictly required that the expert, when issuing an opinion, should demonstrate respect for human dignity and concern for the welfare of the individual, methodological reliability and diligence at the substantive level, caution in the interpretation of research results, not going beyond the scope of their competence, as well as accuracy and communicativeness in the formulation of conclusions.

Staying within the topic of expert opinions, it is necessary to pay attention to issues of a prognostic nature. This is because the expert is expected to express a view as to the likelihood of the occurrence of a specific phenomenon, and more precisely as to the existence of a high or very high likelihood of the commission by the subject of an offense with violence or the threat of its use against life, health, or sexual freedom, punishable by imprisonment of up to at least 10 years. This is quite a challenge. The term "prognosis" means a prediction, a prospective assessment of some events, a forecast of something, e.g. a certain social behaviour (Sikorska-Michalak, 1998, p. 170). On the grounds of the Act on Offenders Posing a Threat, this term should be considered in relation with the system of criminal law. The prognostic evaluation will therefore concern the possible future behaviour of a given individual which is characterised by contradiction with the legal order. The question arises as to the relationship between the said prognosis and the expert's diagnosis of the offender's disorder. The term "diagnosis" includes in its scope recognition, identification of illness, its sources, course, as well as the result of the treatment itself (Sikorska-Michalak, 1998, p. 170). Therefore, it can be said that diagnosis is the final examination of the mental state of the offender and at the same time the basis for further prognosis of their behaviour. It should be stressed that even forecasting the probability of future behaviour of a healthy person is

[7] for more information see: http://www.academyofexperts.org/, (accessed 29.04.2021 r.)

considerably difficult, let alone making a statement on this matter concerning a disturbed individual. Moreover, one may wonder what degree of certainty must be hidden in the probability, which the legislator requires to be established. One might be tempted to say that this degree should be close to certainty, as suggested by the legislature's use of the adjectives "high" and "very high" in the provisions of Article 14(2) and (3). However, it is impossible to make a categorical demarcation between the two concepts referred to, which is all the more worrying because the choice of a particular post-penal measure depends on the classification of the probability in one of the categories.

From a technical point of view, the assessment of the risk of future behaviour of an individual is usually carried out by experts using one of three methods, i.e. direct clinical assessment, the safe prediction method, or the anamnestic approach (Modrzejewska-Wójcik, Mącznik 2010, pp. 275-286). Clinical assessment emphasises the individuality and uniqueness of human behaviour, and risk prediction criteria focus on the offender's disorder, the offense committed, the adaptive difficulties of the offender, and his or her environment (Malim et al. 1994, pp. 78-84). Moreover, clinicians take into account their entire knowledge, previous experience, and intuition (Modrzejewska-Wójcik, Mącznik 2010, p. 275-286). Supporters of the direct prediction method base their prognoses on the so-called hard factors, i.e. easily verifiable facts whose impact on criminogenic behaviour has been empirically confirmed. However, this method is not flawless. It can be accused of being too inflexible, focused on the past and thus ignoring the changes that have taken place in the offender as a result of the treatment or therapy undertaken as well as failing to take into account the intensity of individual factors and their mutual relations (Modrzejewska-Wójcik, Mącznik 2010, p. 275-286). The anamnestic approach is in a way the third way, as it draws on both methods discussed above. Thus, it combines objective, factually supported risk factors with the subjective interpretation of clinical criteria. The identification of risk factors is based on two assumptions. First, it is assumed that people with similar characteristics, living in similar environments, etc., tend to behave similarly. As a result, specific aspects of the personality of certain individuals also make them resistant to therapy (Banasik 2010, p. 231-244).

It is worrying that in the end the experts most often state that "it cannot be ruled out that there is at least a high probability" of the diagnosed person committing the act again and that the nature and level of this risk cannot be unambiguously assessed[8]. As it seems, this ploy is a kind of protection for the expert against

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[8] Rojek-Socha 2019, To Gostynin easier through the incompetence of experts and gaps in opinions, https://sip-1lex-1pl-15d274stb0068.han.bg.us.edu.pl/#/external-news/1795658248?keyword=Maria%20Gordon%20biegłych&cm=STOP

possible criminal liability for giving a false opinion. Under the Article 233 of the Penal Code, an expert for presenting a false opinion, expert opinion, or translation intended to be used as evidence in a proceeding is liable from one to ten years, and if he acts unintentionally, exposing the public interest to substantial damage – up to three years. The fear of liability results in the use of vague formulations and even in the preventive presentation of excessive conclusions.

Without losing sight of the comments made above, one more issue should be considered, namely the legitimacy of obliging experts to express their opinion on the threat to the legal order posed by a given individual. It should be remembered, however, that the basis for such prognosis is not only the mental state of the offender but also other circumstances of the act, its type, as well as data about the person of the offender, his/her environment, and previous criminal record. It does not seem acceptable to cede such findings to experts. Given the above, it should be opted for that the expert should only be obliged to determine, in a given case, the potential dangerousness of the offender's behaviour, while the assessment whether they will constitute a threat to the legal order, and if so, what will be its degree, should lie within the competence of the court (Fleszar-Szumigaj, Rutkowski 1981, p. 26).

It seems that the problem referred to can also be considered in the context of the risk of the expert exceeding his or her competence. There is no doubt that the task of the expert is to give an opinion on the mental state of the perpetrator. They should not, however, be obliged to determine the prerequisites and necessity of a particular type of post-penal measure, since, in this matter, the decision-making body should be the court alone. As it has already been mentioned, an expert is morally and legally responsible for his actions, so when he/she undertakes to prepare an opinion, he/she must be aware of his responsibility. It is impossible to undertake a specific task without taking into account the potential consequences associated with the activity undertaken, and going beyond the scope of one's professional competence is a morally questionable act. The culmination of the above considerations may be the words repeated by A. Słonimski "if you do not know how you should behave in some situation, by all means, behave decently"[9]. For decency, itself implies not to undertake actions about which one has no idea.

Therefore, we should criticise the *de lege lata* regulation, according to which experts are obliged not only to determine whether and which mental disorder an individual suffers from, but also whether it is of such a character or intensity that there is a high or very high probability of committing a prohibited act with violence or the threat of its use against life, health, or sexual freedom, punishable

[9] https://pl.wikiquote.org/wiki/Antoni_S%C5%82onimski, (accessed 29.04.2021 r.)

by imprisonment of at least 10 years. In essence, this results in a complete minimisation of the court's role in the decision-making process, as its task is limited merely to ascertaining whether the individual concerned was, at the time of submitting the application, serving a custodial sentence or a sentence of 25 years imprisonment in a therapeutic regime. Even the choice of a particular post-penal measure, although theoretically left to the discretion of the court, will depend on the content of the opinion. Since under Art. 11 of the Act on Offenders Posing a Threat, experts are obliged to express their opinion on the degree of probability that an individual will commit a criminal offense defined by law, and this, under Art. 14 of the Act, unambiguously determines the application of a specific measure, the court's freedom of choice between detention and preventive supervision is significantly restricted.

Given the above, it should be noted that the most important task of the court is to assess the expert opinion. Thus, the court should do so particularly carefully and thoroughly. The expert opinion, although it contains content covered by specialist knowledge, is one of the pieces of evidence, and thus should be considered as a subject to evaluation by the trial authority like any other evidence in the case (Jodłowski et al. 2016, p. 490). Thus, it is necessary to verify, among other things, whether the opinion meets the criterion of a complete and clear argument, whether it is logical, whether it explains the circumstances that are relevant to the resolution of the case (Wysocki 2016, p. 13; Strózik 2016, p. 14; Miroszewski 2016, p. 22; decision of the Supreme Court from 20.01.2015, ref. no. V CSK 254/14, Lex no. 1652706; decision of the Appeal Court in Katowice from 12.06.2015, ref. no. I ACa 210/15, Lex no. 1753988). In other words, the opinion is supposed to provide the court with knowledge constituting the basis for the inference necessary to decide the case, but the inference itself should be carried out by the judge himself (Strózik 2016, p. 14). As a result, the court is faced with a difficult challenge, as it is obliged to independently and properly assess the obtained opinion, and at the same time, it remains dependent on the expert's expertise contained therein (Zgryzek 1989 p. 182). The judge, although admittedly not required to demonstrate competence in drawing up the opinion, should already be able to skilfuly read the expert opinion to properly assess it.

It should be emphasised that literature and case law have developed several guidelines to assist in this assessment. The court should look at the expert's level of knowledge, the theoretical basis of the opinion, compliance with the principles of logic, uniformity, and universality of the method, certainty of results of scientific research, professionalism and reliability, completeness and completeness of the opinion (decision of the Supreme Court from 28.06.2005, ref. no. V KK 18/05, OSNwSK 2005, no. 1, item 1457, Lex no. 200017; decision of the Supreme Court from 12.11.2002, ref. no. V KKN 333/01, Lex no. 56854; decision of the Appeal Court in

Kraków from 26.10.2004, ref. no. II AKa 207/04, KZS 2004, no. 12, item 28, Lex no. 145529; decision of the Supreme Court from 6.11.2000, ref. no. IV KKN 477/99, Prok. i Pr, 2001, no. 4, item 9, Lex no. 51136; decision of the Supreme Court from 28.05.2001, ref. no. IV KKN 89/01, Lex no. 51839; decision of the Supreme Court from 26.06.2002, ref. no. III KK 207/02, Lex no. 53899; decision of the Supreme Court from 8.02.2007, ref. no. III KK 277/06, Lex no. 257859; decision of the Supreme Court from 6.11.2002, ref. no. IV KKN 308/99, Lex no. 56851; decision of the Supreme Court from 10.10.2007, ref. no. III KK 116/07, Lex no. 346227; decision of the Supreme Court from 29.01.2014, ref. no. II KK 216/13, Lex no. 1436071; decision of the Supreme Court from of 07.11.2000, ref. no. I CKN 1170/98, OSNC 2001, no. 4, item 64, Lex no. 46096; Bělohlávek, Hótová 2011, p. 90; Dzierżanowska, Studzińska 2015, pp. 25-35).

The cited standards of assessment, relating to the exemplification, are undoubted of subsidiary value and should be taken into account by trial authorities to the fullest extent possible. This will make it possible to prevent assigning an exceptional role to an opinion and accepting its content in an unreflective manner (Tomaszewski 1998, p. 114). In no way can one approve of the fetishisation of an expert opinion by regarding it as special, and consequently more powerful, evidence. The procedural body is obliged to critically and restrainedly assess the expert opinion presented to it in each case, as the resolution of a particular case falls within the exclusive competence of the court – not the expert (decision of the District Court in Łódź from 16.12.2016, ref. no. III Ca 1346/16, Lex no. 2199916). Only such an attitude of the court constitutes a dam against violation of human rights and freedoms by deciding on the application of a post-penal measure based on a defective opinion.

To recapitulate, the current model of functioning of experts and their opinions for proceedings for the application of a post-penal measure under the Act on Offenders Posing a Threat does not guarantee the appointment of the best experts providing substantive and reliable opinions. There is no effective procedure for verifying the competence of court experts, and even experts themselves, willing to undertake the issuance of an opinion in a relatively short period and for the lowest possible price. There are numerous defects in expert opinions, which determine their dubious quality. Tests of an individual's mental state are often carried out in inappropriate conditions, which makes proper diagnosis impossible and generates the risk of an erroneous opinion. A common phenomenon is routine and lack of diligence in the work of experts. Critical comments can also be raised concerning the level of knowledge of experts, which resonates in their use of inappropriate or outdated examination techniques and the use of archaic terminology. The sloppiness of opinions is intensified by acting under time pressure, which even

leads to abandoning the analysis of specific cases and just copying fragments of previously issued expert opinions. How opinions are formulated is also a cause for concern. Experts frequently usurp the right to make moral judgments or inappropriate comments about the individual examined and their actions.

Critical remarks can also be directed towards the legislator, who obliges experts not only to determine whether and what mental disorder a given individual suffers from, but also whether it is of such a character or intensity that there is a high or very high probability of committing a prohibited act with violence or the threat of its use against life, health, or sexual freedom, punishable by imprisonment of at least 10 years. Thus, experts are obliged, as it were, to exceed their competencies and express an opinion on the threat posed by the individual in question to the legal order, which should be the court's predominance. As a result, many experts resort to vague and even preventive overstatements to take the yoke of the responsibility off their shoulders.

Because of the fact that expert opinions, which play a fundamental role in proceedings under the law on dangerous offenders, are often subject to numerous defects, it must be concluded that there is a significant risk of unjustified infringement of human rights and freedoms through the application of a post-penal measure based on them.

Apart from the fact that post-penal mechanisms are in themselves questionable, allowing de facto deprivation or restriction of freedom of persons who have served their sentences and should have a chance for a new life, how the Offenders at Risk Act regulates the procedure for their application opens the door to further abuse. The forensic-psychiatric opinions determining the application of the post-penal measure are burdened with elementary deficiencies, which puts into question the legitimacy of the implementation of preventive supervision or detention in the OCCP. Consequently, adjudicating on the basis of such opinions of the measures referred to grossly violates the rights and freedoms of an individual and it constitutes a violation of standards that should be respected in a democratic state under the rule of law.

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Kwalifikacja jednostki z zaburzeniami psychicznymi jako stwarzającej zagrożenie życia, zdrowia lub wolności seksualnej innych osób w procesie stosowania ustawy z dnia 22 listopada 2013 roku a ryzyko nieuzasadnionego pogwałcenia praw i wolności człowieka

Niniejszy artykuł skoncentrowany jest wokół kwestii proceduralnych związanych z umieszczaniem w KOZZD w trybie ustawy z dnia 22 listopada 2013 r. W szczególności uwaga poświęcona została zagadnieniom dotyczącym opiniowania przez biegłych o stanie psychicznym jednostki, co do której dyrektor zakładu karnego wystąpił z wnioskiem do właściwego sądu o uznanie jej za stwarzającą zagrożenie dla społeczeństwa. Zaprezentowane zostały liczne trudności pojawiające się w toku opiniowania oraz omówiono zagadnienie błędów w opiniowaniu. Odniesiono się również do etycznych dylematów, przed którymi staje powołany biegły lekarz czy też psycholog oraz uwypuklono wagę wydanej opinii dla sytuacji sprawcy i jego dalszych losów. Cywilizacja zachodnioeuropejska niepokojąco skłania się ku nadużywaniu mechanizmów gwarantujących bezpieczeństwo ogółowi kosztem nadmiarowego poświęcania wolności poszczególnych jednostek. Chociaż prawa i wolności człowieka nie mają nieograniczonego charakteru, to niedopuszczalne jest ich limitowanie w stopniu, który nie jest niezbędny w demokratycznym państwie prawnym. Jako że uznanie danej osoby za stwarzającą zagrożenie przekreśla jej szansę na rozpoczęcie z czystą kartą nowego życia po odbyciu kary, zwieńczeniem rozważań jest refleksja, czy procedura do tego prowadząca, spełnia najwyższe standardy gwarancyjne i może być uznana za sprawiedliwą.

Słowa kluczowe: Ustawa o bestiach, opinie o stanie psychicznym, błędu w opiniowaniu, dylematy etyczne, prawa i wolności człowieka