

Kamil Mamak

Should we put our faith in electronic surveillance? The Polish attempts of usage electronic surveillance in criminal law acts.

Criminal law in the face of changes.

The Polish criminal law is standing on the verge of great change. In some respects, more revolutionary than those that occurred after the fall of communism in 1989. Basic legal acts regulating criminal matter – the Criminal Code, the Code of Criminal Proceedings, and the Executive Criminal Code, which were enacted in 1997, are to be thoroughly revised. Although during ten years of their validity the Polish legislature altered them several times, the upcoming changes are much more revolutionary – not only specific regulations, but also the philosophy on which the systems are founded, change. The bills to amend these acts are prepared by the Criminal Law Codification Commission operating with the Minister of Justice¹, as well as by the government. The prior one is that on the Code of Criminal Proceedings, where preparatory and jurisdiction proceedings have been thoroughly remodeled. The inter part principle in the criminal process will be more emphasized and one of the reasons for this direction of changes is the penetration of solutions specific for legal systems such as *common law* and *civil law* into the continental systems². The act embracing this bill was accepted on 27 September 2013 and will come into force on 1 July 2015³.

The second of the proposed amendments is not less revolutionary and concerns the Criminal Code, the Code of Criminal Proceedings, the Executive Criminal Code and other acts⁴. It has been presented as a government draft, although it is largely based on solutions proposed by the Criminal Law Codification Commission⁵, what has been pointed out by the Commission itself in an opinion regarding an earlier version of this draft amendment⁶.

¹ Operating under the Council of Ministers of 16 December 2003 on the establishment, organization and functioning of the Criminal Law Codification Commission (Journal of Laws No. 232, item. 2319, as amended.).

² Paweł Wiliński, Introduction, [in:] Paweł Wiliński (ed.) Inter part principle in the Polish criminal trial, Warsaw 2014, p 15

³ The Act of 27 September 2013 amending the Act - Code of Criminal Procedure and other acts (Journal of Laws No. 1247).

⁴ On 15 May 2014, the Prime Minister directed the project to the Sejm (RM-10-42-14), hereinafter referred to as the project; <http://legislacja.rcl.gov.pl/docs//2/194900/194942/dokument112267.pdf> access of 10 June 2014

⁵ The draft act amending the Criminal Code, developed by the Criminal Law Codification Commission (editorial dated 5 November 2013), Journal of Criminal Law and Penal Sciences, 4/2013, pp. 5-42; Justification of the draft act amending the Criminal Code, Journal of Criminal Law and Penal Sciences 4/2013 rs 43 – 116.

⁶ Opinion of CLCC on the government draft act amending the Criminal Code and several other acts (hereinafter - opinion) <http://bip.ms.gov.pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/opinie-komisji-kodyfikacyjnej-prawa-karnego/>, access of 7 June 2014, s 1

One of the aims of this amendment is to reduce the aspect of repression in the Polish penal system by creating an efficient alternative to the currently abused penalty of imprisonment⁷. Although the current code catalogue of penalties includes, next to the penalty of imprisonment⁸, a penalty of restriction of liberty and fine, judges are reluctant to use them, due to their ineffectiveness. This is to change under the amendment to the Criminal Code, which "strengthens" freedom penalties and can become a serious alternative for the strictest one – the imprisonment. One of the factors that are to reinforce the penalty of restriction of liberty is the application of an electronic surveillance system. The use of electronic surveillance in the future Criminal Code is not, however, limited to the penalty of restriction of liberty, but could also be applied in other institutions of criminal law.

This paper will present an assessment of the aforementioned alterations in the context of studies on the functioning of electronic surveillance as a system for enforcement of imprisonment. However, prior to that, the use of electronic surveillance in the current legal status will be briefly discussed.

Introduction of electronic surveillance in Poland

In the study of criminal law postulates regarding the introduction of something like electronic surveillance dates back to the year 1993, when J. Jasinski pointing to the ineffectiveness of imprisonment called for the use of house arrest enhanced with electronic devices⁹. It took relatively long before this idea, already functioning in other countries, was approved by the government.

Electronic Surveillance has become an element of the Polish jurisdiction relatively recently. The act which introduced the possibility of its use was enacted in 2007¹⁰. However, it was not until 2009 that electronic surveillance was applied in the cases of first convicts, since the Act came into force on September 1, 2009¹¹. Initially, it was only applicable in a part of the country and one can only speak of its complete validity throughout Poland since 1 January 2012.

⁷ According to research of the International Centre for Prison Studies, Poland is ranked 4th in terms of imprisonment rate among the countries of the European Union, <http://www.prisonstudies.org/highest-to-lowest> access of 7 June 2014

⁸ A penalty of 1 month to 15 years imprisonment, a penalty of 25 years imprisonment and life imprisonment.

⁹ J. Jasiński, House Arrest (The proposal to consider), [in:] Problems with codification of the criminal law. Book in honor of Professor Marian Cieslak, Cracow, 1993, p 194

¹⁰ Act of 7 September 2007 on the enforcement of sentences of imprisonment outside the penal institution in the system of electronic surveillance (Journal of Laws of 2010 No. 142, item. 960 consolidated. text., As amended), hereinafter SES.

¹¹ Pursuant to Art. 89 of SES.

Electronic surveillance as an element of the penalty system

Electronic Surveillance in its original form was a way of enforcing the penalty of imprisonment outside a penitentiary. The current wording of the act also allows the use of monitoring equipment to control a restraining order or an obligation to refrain from entering certain places issued by a criminal court. However, the main use of this system concerns the enforcement of imprisonment¹², further discussion in this paper will thus be limited to this aspect.

In order to explain the role of electronic surveillance, one must briefly describe its current use in the penal system.

One should begin with the fact that electronic surveillance is not a separate punishment. It functions as a way of enforcement of the punishment of imprisonment. The court cannot therefore impose a penalty of electronic surveillance as an independent sentence. The use of supervision may occur exclusively when the convicted was sentenced to imprisonment. This may be dealt with by a different court than the one that issued the verdict of guilty – it is a special Penitentiary Court responsible for enforcement of sentences in criminal matters.

The most important conditions related to the enforcement of the penalty of imprisonment using the electronic surveillance system are contained in Art. 6 of SES. Among others, it mentions that the system does not only apply to short-term sentences, defined as such that do not exceed 12 months. Certain conditions regard the location itself – the convict must have a permanent place of residence, where technical conditions allowing the installation of the system exist, and all adult residents give their written consent to the installation of the required equipment.

The convicted person does not have to stay permanently within the transmitter range – for example they may perform work, walk a child to school or attend religious practices. Even a need to go shopping can be a circumstance which relieves the offender from the obligation to stay at a certain place¹³.

The decision to execute the sentence with the use of electronic surveillance always occurs on request (the convicted cannot be forced to it¹⁴). Once the request is submitted, the

¹²By 31 March 2014 the penalty of imprisonment with the use of electronic surveillance system took place in over 25,000 convicts: Number sentenced in SES from September 2009, <http://www.dozorelektroniczny.gov.pl/statystyka/> access of 7 June 2014,

¹³ Catalog of all the circumstances is contained in Art. 10 SES.

¹⁴ Art. 39 SES.

court has 14 days to issue a decision¹⁵. It is an instructional time limit, not binding for the court. The requests may be submitted prior to, as well as after the beginning of the sentence, when the person is already in prison.

Simplifying, the technical aspect is as follows; the convicted person permanently wears a so called bracelet and at certain times they must find themselves within the range of a stationary electronic transmitter, placed in the convict's place of residence. The information whether the obligation to stay in this location is fulfilled or not are continuously sent to a monitoring center controlling the proper execution of the punishment.

The act regulating this matter also contains a number of further provisions, but from the point of view of this dissertation, it is important to capture the essence of the currently valid system of electronic surveillance, in order to understand the direction of the planned alterations.

Electronic Surveillance in the draft amendment to the Criminal Code and the Executive Criminal Code.

Electronic Surveillance included in the government draft amendments differs fundamentally from the currently accepted model of use of electronic surveillance. As has previously been mentioned, electronic monitoring is now used mainly as a way of carrying out the punishment of imprisonment. The project aims to change this. Electronic surveillance will be available to be used in three institutions as follows:

- a) a way to enforce the punishment of restriction of liberty,
- b) a way to enforce certain penal measures,
- c) a safety measure.

The first change consisting in a wider use of electronic surveillance is to concern the penalty of restriction of liberty. The draft contains a provision saying that the penalty of restriction of liberty lies in the "obligation to remain in one's place of residence or another designated location, using a system of electronic surveillance."^{16,17}. When deciding on this obligation, the court must take into account "the convict's working conditions and the dimension of other obligations, and it may not be longer than 12 months and exceed 12 hours on a daily basis."¹⁸.

¹⁵ Art. 40 ust. 5 SES.

¹⁶ From this point on the amended provisions of the Criminal Code and the Executive Criminal Code (hereinafter the ECC) will be given (hereinafter C.C.) and the Executive Penal Code (hereinafter the Executive Penal Code).

¹⁷ Article 34 § 1a paragraph. 2 C. C.

¹⁸ Article 35 § 3 C. C.

The authors of the draft also decided to use the advantages of electronic surveillance when changing the catalog of criminal measures. The measures complement the palette of a penal response less profound in character than penalties, which allow to meet set objectives of criminal sanctions¹⁹.

Electronic Surveillance in the code catalog of measures is to improve the performance of its functions. It is to concern two measures:

a) prohibition from entering certain environments or locations, contacting certain persons, approaching certain persons or leaving a particular place of residence without the consent of the court²⁰;

b) the prohibition from entering a mass event²¹;

The prohibition from approaching certain people, can be combined with controlling by the system of electronic surveillance²².

Another significant change is the extension of the catalog of safety measures to include, among others, an "electronic control of location"²³. To clarify, it should be noted that in the Polish legal system safety measures are not intended to bring justice for the committed crime, they do not contain the element of condemnation of the act or its perpetrator, and their sole function is to protect the public from dangers presented by the persons violating criminal law²⁴. They are therefore to reduce the possibility of re-violation of law by the offender²⁵. It shall apply to persons who cannot be attributed with criminal liability or in the case of conviction for certain types of crimes²⁶.

The electronic control of location (as a safety measure) is associated with an obligation to undergo a continuous control of one's location by the means of technical devices, including carrying a transmitter, by the person concerned by the verdict²⁷.

The changes in penalties, penal measures and safety measures described above are to be included in the revised criminal code. The technical aspect of the use of electronic surveillance is to be found in Chapter VIIa of the Executive Criminal Code entitled "The

¹⁹ Włodzimierz Wróbel, Andrzej Zoll, Polish criminal law. General Part, Cracow 2013, p 439

²⁰ Article 39, paragraph 2b C. C.

²¹ Article 41b § 3 C. C.

²² Article 41a § 1 and 2.

²³ Article 93a, § 1. 2 C. C.

²⁴ Lecha Gardocki, Criminal Law, Warsaw 2010, p 207.

²⁵ Jerzy Lachowski, Andrzej Marek, Criminal Law. Outline of issues, Warsaw 2013, p 228

²⁶ Art. 93 § 1 C. C.

²⁷ Art. 93e § 3.

system of electronic surveillance²⁷. These provisions are to annul the current SES act and will become the only ones that regulate the matter of electronic surveillance use²⁸.

These provisions include the definition of electronic surveillance, which is to control the behavior of the convicted person using technical means²⁹. It distinguishes three types of surveillance³⁰:

a) stationary – controlling the location of the convicted person on certain days of the week and times at a location indicated by the court;

b) mobile - controlling the current location of the convicted person regardless of where they stay;

c) proximity – maintaining, by the convicted person, a certain distance to a person designated by the court.

The penalty of restriction of liberty in the system of electronic surveillance is carried out as a stationary control. The criminal and security measures in the system of electronic surveillance are carried out as proximity or mobile surveillance³¹.

The indicated Executive Criminal Code section contains a number of detailed solutions, the discussion of which here would be senseless. I will only point out the solutions that I find significant when comparing with the currently valid legal status.

What is worth a mention in regard to the penalty of restriction of liberty, is that it may be executed with the use of electronic surveillance on condition that technical means allow it, including particularly the number and range of available transmitters and recorders, as well as the organizational possibility of their control³².

Similarly to the current situation, the installation of devices in the place of residence of the convict depend on a prior consent of adult persons who live together with the convict. A novelty is the possibility of the court to waive this requirement in exceptional cases justified by special circumstances³³.

An important solution is also the possibility of postponing the execution of a sentence for a specified period, not exceeding one year, in the case where it is impossible to begin the enforcement of the penalty immediately³⁴.

²⁸ Art. 26 of the draft act.

²⁹ Art. 43b § 1 E.C.C.

³⁰ Art. 43b § 3 E.C.C.

³¹ Art. 43c § 1 E.C.C.

³² Art. 43h § 1 E.C.C.

³³ Art. 43h § 3 and 4 E.C.C.

³⁴ Art. 43j § 2 E.C.C..

An attempt to evaluate the proposed changes

The evaluation of the proposed changes will be based on the research I have conducted on the basis of the current act. I examined the fate of applications submitted to the court in Cracow between 1 June 2010 and 31 December 2011. A description of the research, methods, as well as detailed results have been published in an article entitled "The functioning of electronic surveillance in the light of file research"³⁵. In this paper, I will refer only to results of these studies, and only insofar as may be useful in the evaluation of the proposed changes to the Criminal Code.

The evaluation should begin with the fact that the research concerned applications in cases of penalty of imprisonment. After the introduction of the amendments, electronic surveillance will no longer concern only imprisonment. One could be under the impression, that the legislator found the system did not meet the requirements that had been set. The explanation filed together with the bill states, however, that electronic surveillance had proven to be a success³⁶.

This contradiction may be due to the fact that as far as technical functioning of the system was concerned, it did not raise any objections, but calling the necessity of staying in the place of residence „imprisonment” may have seemed to be an abuse. The Criminal Law Codification Commission, when referring to the current system, stated explicitly that "the punishment executed within this system, refers to deprivation of liberty only by name, whereas in reality it is only a form of restriction of liberty, it can be stated that for many of the convicts who benefited or continue to benefit from this form of punishment it is more corrupting than reformatory"³⁷.

When referring to the results of the research, it should be noted that one of the most significant problems associated with the functioning of the current act was the time in which courts issued decisions to agree to the use of electronic surveillance system. In spite of the 14 day period, in which the court should deal with the case, some decisions were issued within a few months³⁸.

The protraction of the waiting time for a decision was particularly dangerous when convicts submitted applications in conditions of detention. Each day of delay caused that they

³⁵ Kamil Mamak, The functioning of electronic surveillance in the light of file research, e-Journal of Criminal Law and Penal Sciences, 3/2014, www.czpk.pl.

³⁶ Draft, p 169.

³⁷ Opinion, p 20.

³⁸ Kamil Mamak, The functioning of electronic surveillance in the light file research, e-Journal of Criminal Law and Penal Sciences, 3/2014, www.czpk.pl.p 37.

remained in prison longer than necessary. Although after the changes electronic surveillance will no longer concern the sentence of imprisonment, efficiency in the functioning of justice in the aspect of using this system would still be indicated. It seems to be especially important in the case of dangerous offenders, when a safety measure is applied.

Despite the fact that in the 25 years since the fall of communism technological development has made large progress, there are still locations where problems with GSM/GPRS network are encountered. In a relatively significant number of cases the lack of technical conditions did not allow the use of the system³⁹. The lack of possibility to use the system may raise doubts as to equality before the law. The state should systematically mitigate the inequalities in the accessibility of the system. Electronic surveillance is in some aspects a more „convenient” solution for the court, the victim, and the perpetrator, whereas the lack of proper technical conditions may exclude a part of the citizens from this form of serving the sentence, penal measure or safety measure.

Quite significant differences in the application of electronic surveillance as a system of enforcing imprisonment regarded the person of the judge, some of them applied it less often than others⁴⁰. This issue may concern the amended law as well. For this reason, it is crucial that the penalty of restriction of liberty should replace the penalty of conditional suspended imprisonment. Judges ought to be educated and their attention should be drawn to the benefits of ruling restriction of liberty (with the use of electronic surveillance). If this penalty does not receive proper approval from the judges, the aims of the reform may fail and the Polish penal system may become even stricter.

One of the biggest problems on the basis of the current electronic supervision act were errors in applications for the use of electronic surveillance⁴¹. This problem will cease to exist in the new law. In each case the court will decide on applying the system. This may significantly increase the use of the system.

Constitutional uncertainties may arise due to the introduced possibility of a disagreement from the adult residents, who did not consent to the installation of the system in their home. So far the lack of such consent did not allow the use of the system. Under the amendment the court will gain an ability to object to this will. The functioning of the system leads to a number of inconveniences for the residents. Equipment servicing, control over the

³⁹ Kamil Mamak, The functioning of electronic surveillance in the light file research, e-Journal of Criminal Law and Penal Sciences, 3/2014, www.czipk.pl. p 38.

⁴⁰ Kamil Mamak, The functioning of electronic surveillance in the light file research, e-Journal of Criminal Law and Penal Sciences, 3/2014, www.czipk.pl.p 39.

⁴¹ Kamil Mamak, The functioning of electronic surveillance in the light file research, e-Journal of Criminal Law and Penal Sciences, 3/2014, www.czipk.pl. p 37-38.

convict requires that the place of residence is entered by competent officials, sometimes regardless of the time of day. The nature of safety measures is such that at the time of ruling the date of its completion is unknown. It should be noted that the convict does not always live with his family and the application of the system may cause an inconvenience for other residents, especially when they clearly opposed to it.

It seems that a positive change will be the introduction of a mobile monitoring based on GPS technology. It will allow an actual control over the convicted person's location, what is crucial in cases of dangerous offenders. However, a question of technical possibilities to apply this method of control in the case of all convicts arises.

Summary

As shown earlier, the Polish legislation concerning criminal law is standing on the verge of revolutionary changes. A part of these changes applies to a possibility of using electronic surveillance.

The changes regarding the philosophy are heading in a good direction. A decrease in the trend to adjudicate the penalty of imprisonment seems growingly probable, which could lead to a reduction of prison populations. What is also a positive aspect is that criminal law is opening to technical achievements and their application at various points within the system.

As long as a comprehensive assessment of the proposed changes is concerned, one will have to wait at least a few years, but it seems that there is hope the changes will be beneficial for the Polish criminal justice system, although it must be emphasized, that some of the specific provisions require reconsideration.