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**Certain independent forms of monitoring the execution of imprisonment**

Theses of the Doctoral Dissertation

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## **I. The subject, the objective and the buildup of the research**

The execution of imprisonment is the duty of the state. The respective institutions of the state are responsible for its organization as well as for its monitoring. This, together with the closed world that is characteristic of the penitentiary might lead to a situation in which no one other than the organs of the state are given access to the execution of imprisonment. However, this is not the case. The state has considerable experience in monitoring the execution of imprisonment. Nevertheless, the actors that are independent from the state also have centuries of experience in carrying out monitoring functions.

It can be established that both the state organs that are carrying out a self-control as well as the control mechanisms that are independent from the state have a role to play in the execution of imprisonment. The control system is therefore complex and diverse. In this system, the scope and operation of state control mechanisms have been constant since the change of regime. The legislator have defined clearly the framework of the state control in the law. But what are the elements of the control that can be considered independent? And what are the characteristics of the operations and actions of these independent actors? Who establishes and what types of frameworks are established for the control mechanisms that are independent to a greater or lesser extent from either the state or the prison system? What opportunities are provided by the state for the independent control mechanisms to monitor as well as to assess the execution of imprisonment, an exclusive function of the state? To what extent is the state willing to consider the observation and proposals of the control mechanisms?

I was seeking to find answers to these and similar other questions in my thesis. My objective was to reveal the functions of the control mechanisms and actors that are – in the reading of Chapter One of the thesis – independent from the state. I also intended to expose their operations, to summarize their accomplishments, to assess their effectiveness and their role in shaping the circumstances of the execution of the imprisonment.

In Chapter One of the thesis I attempted to define the notion and the general concept of monitoring as well as the definition of control system. Subsequently, I took

into consideration the major characteristics of each element of the control system that was required to oversee the penitentiary. I then showed the various methods and aspects of the classification of these elements that are known in the scientific literature along with frameworks of the control system and its elements provided in the regulation. Thereafter, I outlined the general requirements from different perspectives against the control system as whole.

After having summarized the general features of the control mechanism as a whole, I defined those types of mechanisms that became subject to further examination. In presenting the topic I regarded as a benchmark that the elements of the control system that are under state control have been previously analyzed and assessed by others from various perspectives in the scientific literature on the prison system. To this day, however, no evaluation has attached significance to the dual independence from state as well as from the prison system in the course of the classification of control mechanisms. In this vein, no thesis assessed the control mechanisms from this perspective so far. Therefore, I attempted to do so in the subsequent chapters of my thesis.

Accordingly, Chapter II – IV present in detail the scope and elements of independent control mechanisms along with the assessment and evaluation of their operations. Chapter II examines the execution of imprisonment from the perspectives of three international organizations, the United Nations, the Council of Europe as well as the European Union. It takes into account on the one hand the international documents that serve the basis of control and on the other hand the control mechanisms that monitor the execution of imprisonment. Chapter III outlines the theoretical background of the social control as well as its domestic and international history and then it summarizes the practical execution of domestic experiences. Chapter IV evaluates the control function of the science and it raises the possibility of scientific control as autonomous element of the control system.

Subsequently, I assessed the individual elements of the independent control mechanism and I summarized the results in a separate chapter. I revealed its general characteristics, the factors that either facilitate or hinder its efficient operation along with its most important results. Against this backdrop, I drew the conclusions in regards

to their characteristics, their achievements, their efficiencies and furthermore their roles in the buildup and operation of the control system.

Instead of every criminal sanction, the PhD thesis only looked into the system, operation, evaluation and practice of the control mechanisms that monitor imprisonment as the most serious criminal punishment provided in the domestic sanction system. Furthermore, the examination will focus on the execution of imprisonment in Hungary according to the provisions of the Hungarian law. Hence, I did not examine the processes of institutions and organs that do not have operations in Hungary nor in regards to imprisonment that are executed here.

## **II. The methods applied throughout the research**

The research methods of the thesis were determined by the subject, the diversity and complexity of the sources. Consequently, multiple methods were necessary in the individual chapters and different research methods became dominant in the different chapters.

As primary sources of the research, I relied on various legal documents that regulate the individual forms of control. As a secondary source, I used the relevant foreign scientific literature, the soft law documents of international and national organizations as well as the results of Hungarian scientific studies and research. In the examination of the control functions of international organizations, the foreign language international legal documents have played a primary role. In contrast, in the examination of the domestic social control, besides the domestic and foreign legal provisions, both Hungarian and foreign languages soft law sources became dominant. The scientific control is primarily based on domestic scientific sources while the foreign language sources has a minor role.

In the course of analyzing the topic, my starting approach was theoretical and I used another method analyzing the conceptual framework. I conserved necessary to define the relevant notions before defining the scope of the topic. I systematized the elements of the execution of imprisonment according to a method that has not been used in the scientific literature before. In addition to the already known and recognized

elements of the control mechanism, I raised the possibility of a new element, the application of social control.

The dogmatic method did make possible to process the normative legal sources. In the course of the examination – where it was necessary – I resort to the grammatical, logical, historical and systematical interpretation method of the legal texts. To assess the relevant legal institutions, I recalled the functionalism since I did not only focus on the individual institutions but also on the roles they play or aspire to play in the control system.

To the extent possible, I sought to examine the individual elements of the control system based on a unified criteria. After having outlined the historical precedents, I explored the theoretical basis and then I presented the relevant positive legal provisions. Finally, I described practice of the law enforcement. To this end, the historical approach was indispensable. In addition to this, it is also worth mentioning the inductive method, in other words, the case-law approach that played a significant role in the assessment of the international control.

Even though the thesis is not a comparative legal study, the comparative methodology played a role in each of its parts to the possible extent. Besides the consistent application of the descriptive, comparative method serves the successful realization of the research objective effectively. Finally, I managed to explore the anomalies, the shortcomings and the advantages through the application of the critical method.

### **III. The summary of the research results**

Based on the systemization according to the aspect of independence, I sought to fulfill the detailed examination in my thesis of those control mechanisms that are compatible to this criteria. Therefore I assessed the independent control through its three major forms namely:

- the control operation of international organizations,
- social control,
- scientific control based on the hypothesis of the thesis.

The individual chapters present each type of independent control along with their pertaining control elements in historical context and in the actual state of their development evaluating their results along with their efficiency and their role in the control system. Hence, the ultimate objective of the thesis is to present in detail as well as to assess the independent control of the domestic execution of imprisonment.

#### 1. The evaluation of the international control mechanism

The significance of the monitoring that is carried out by international organizations is that they can offer an adequate forum to the governments for the exchange of views and information. Thus they provide an opportunity for them to work out universally recognized instruments. According to the views of some of the experts, the expert commissions that are established based on human rights treaties or some of the elements of the human rights system created according to the UN Charter are considered to be between “judicial decisions” and “teachings of the most highly qualified publicists” based on their role in shaping customary international law. On the one hand, they tend to embrace a wider area than law and their decisions have rarely binding effects on the states. On the other hand, they generally have a mandate to assess individual cases, and to use the language of their charters in the course of the periodic review. Taking into consideration these characteristics, the European prison policy have three principles according to the domestic legal experts: a) the imprisonment shall consist of the deprivation of liberty without any additional coercion or suffering; b) the execution of the punishment should serve the reintegration of the convicted person; c) it shall guarantee the fundamental rights of the convicted person.

However, the implementation of the international requirements does not mean unification. Hence, the application of all these rules cannot lead to the standardization of the control system. The outside, independent control that satisfy the international requirements can take various forms and thus make the individualized rules and methods of control possible that adjust to national specificities. The enforcement of the national requirements thus theoretically leads to the emergence of a diverse control system that takes into account the characteristics of the penitentiary systems of individual states.

However, the international requirements forge a uniform system on the national level. The opinions of scientific literature is mixed on how efficiently such a system is able to operate on the national level and to what extent it can serve the interests of the internationally recognized objectives of the independent control. There is no doubt that the concrete observations and indications of the international control have an effect both on the domestic law enforcement as well as on the legislation.

Based on the evaluation of the imprisonment monitoring activities of the three international organizations that are examined in the thesis, it could be established that both the documents that serve the basis of their monitoring activities as well as their control mechanisms developed in parallel and in regards to each other.

As a consequence of this integral development process they well complete each other. It is especially true in the case of the European Union whose imprisonment control mechanism is not yet as well developed as that of the United Nations and of the Council of Europe. The backbone of the judicial cooperation in criminal matters is the fight against the threats to the European Union as well as against the criminal activities in a more efficient way while the area of penitentiary fall short of these objectives. Nevertheless, the basis for the integration processes necessary for the imprisonment control were laid down by the United Nations as well as by the Council of Europe. Therefore, the operation of these international organizations in regards to the control of the law enforcement including the control of imprisonment does not only serve as a basis but also define the framework for the cooperation in the Union.

Bridging the temporal and sometimes historical differences, the control mechanisms of the United Nations, of the Council of Europe as well as of the European Union are interconnected on many points. In light of the results of my research, these common points can be recognized in both the documents defined the development of the control system of the execution of imprisonment as well as in the control mechanisms.

## 2. The evaluation of the social control

With regards to the methods of social control in Europe and thus in Hungary too, two basic solutions have been developed. The social control can be either official in

nature or it could embody an external control in the classic sense of the term. The civil society groups that are exercising authority are typically mixed committees whose members consist of civilians and experts as well. They generally have the authority to decide cases concerning the inmates such as their eligibility for parole, while in other instances, they only have consultative functions. On the other hand, the civil society groups who fulfill external control functions typically consist of civil personnel who are sharing their experiences with the leaders of the organizations responsible for the penitentiary about the visits on the places of detention. In the case when they are not able to effectuate their expectations through these channels, they make their observations public hoping for the public pressure.

According to the approach of the scientific literature, there are a wide variety of persons, organizations and organs who are contributing to the monitoring activities. Regardless of their organizational forms, the significance of the control mechanisms can be interpreted from more than one angle. The social reintegration objective that is expressed in the modern criminal policy built on and embedded in social policy cannot be fulfilled without societal relations and societal openness. The penitentiary system besides fulfilling reintegration objectives, embodies the most important symbol of the legitimate force of the state against their own citizens. The importance of the control mechanisms is therefore to exercise social control – even without specific authorization – against the abuse of legitimate power of the state to use force. In this way, they are the cornerstone of maintaining the public trust in the institutions of the criminal justice system. They are also key players in reducing the lack of confidence as well as in preserving the credibility around the guarantees of the rule of law. The necessity of the social control is justified by a further, quite obvious factor: people do not lose their humanity in the penitentiary institutions. As human beings, they remain members of the society even if their citizens' rights are temporarily restricted.

The experts' opinions are somewhat divided on the efficiency of social control. Despite of this divisiveness, the Hungarian representatives of the penitentiary profession formulate a requirement from time to time for the legislature to make the social control possible and adopt its legal background in adequate detail.

There is an urgent need for this since – as Chapter III explains it in detail – this type of social control is currently not functioning in Hungary. The legislature has not brought about the legal framework of the institutionalized social control since its demolition some decades ago and there is no aspiration or idea to do so. Even though the social control of the execution of imprisonment – based on the possibility provided in the Prison Act – has been functioning for two decades, the practical experiences show the difficulty of realizing social control in such a way. Thus, the Hungarian society cannot participate in an institutionalized form in the control of the execution of punishments. The social control cannot fulfill its indispensable role in maintaining the faith in the guarantees of the rule of law.

### 3. The scientific control

The domestic empirical research and their results demonstrated in the thesis well confirm what insights the representatives of science can get into the closed world of the prison system. It also seems to be justified that in the course of their research activities, they examine the processes of the execution of imprisonment as well as they assess the experiences in light of the requirements against the penitentiary system. This allows us to conclude that their activities are the control of the execution of imprisonment.

However, it is fair to ask whether the scientific activity can and should be separated from the other control mechanisms that are also characterized as independent. Can the scientific control be considered as an independent control mechanism? The scientific opinions do not justify this approach. Therefore, the scientific activity cannot be considered and identified as an autonomous control mechanism.

Nevertheless, in light of my research results, it is undisputable that science also plays a role in the implementation of the requirements that are relevant in the execution of the imprisonment as well as in the recognition of their results and deficiencies along with its evaluations and conclusions. There are numerous scientific studies on the results of research carried out in regards to imprisonment. These research are available for those who apply the law as well as for the legislator. However, according to the actual legal approach, neither the effects of these research nor the role of the scientific activities have a control function. The science rather has a supportive role in the execution of

imprisonment with regards to objectives and processes of the state. The primary role of the scientific efforts is to prepare the decisions concerning the imprisonment, to summarize and to systemize the knowledge for the decision-making and the evaluation of the execution of the decisions. In my opinion, a further unique characteristic of the scientific efforts is that it relates both to the international control as well as to the social control.

In light of all this, I took the position in my thesis that those scientific studies that include empirical research in regards to the execution of imprisonment also fulfill a control function. However, the scientific works that process the experience of such examinations can be considered as the results of a control activity. The scientific activity therefore amounts to a monitoring activity over the execution of imprisonment. This type of control could be distinguished from the other forms of independent control even though its current assessment is not as straightforward to be considered as an autonomous element of the independent control mechanisms.

The expansion in the research possibilities along with the subjects of the scientific activities and the growth of the results and their usage in the scientific activity might result that science vindicate an autonomous role among the control mechanisms.

4. The major conclusions that can be drawn from the evaluation of the various forms of independent control

A domestic and international review of the independent control mechanisms well illustrate that they have played a role since the 16<sup>th</sup> century in the course of the operation of the penitentiary institutions, especially among the organs and organizations that are contributing to the control of the execution of imprisonment. Their operations, roles and instruments have changed a lot over the course of the history, usually expanded and strengthened. However, there were time periods during which the development were slowed down. A dramatic change – in terms of the growth in the number and instruments of the control mechanism – only occurred afterwards the Second World War when the international relations began to flourish and when a strong humanization process started.

After the centuries-long presence of independent control mechanism, it is natural that not only state organs are participating in the monitoring of the execution of

imprisonment. The summary report of their operations show how each type of the independent mechanism is characterized and to what extent they can contribute to the efficient operation of a control system. Beyond demonstrating the factors that increase the efficiency of their activities and those that reduce it, it can be established as a conclusion that the independent control organizations are indispensable elements of the system and they are important guarantees of the legality of the execution of imprisonment.

The state can expect from the presence of non-state actors to take up those roles for which the political institutional system cannot provide financing or those in which they cannot intervene. Also, they can utilize their social embeddedness, local knowledge, expertise and up-to date information. One of the major advantages of the independent control mechanisms is the distance they have from the executive power. Thus, the unique viewpoint they have can also be put to use in order to recognize as well as to eliminate abuses. Finally, it is also remarkable that the independent organs are characterized by financial independence and thus they can offer their expertise in a cost efficient way in the penitentiary system.

Through the participation of the independent organs, a complex control system can be launched to monitor the execution of imprisonment which is in compliance with the expectations of today's rule of law concept. Generally positive and acknowledging opinions can be read in the scientific literature about the current state of the domestic control system especially about the role of independent control mechanism. Based on the results of my research along with the conclusions I drew in the thesis, I have the same evaluation in regards to the actual system of the control of the imprisonment focusing on its independent elements. In general terms, it can be said that there is a role for the independent actors in the domestic control system of the imprisonment.

In my view, however, there are some deficiencies which have arisen from the complex nature of the control system and thus they go against the expectations rolling out of the guarantees of the rule of law. The lack of legal basis amounts to such a deficiency which clearly prevents the centuries-long independent form of control from becoming an integral part of the control system again in Hungary. In my opinion, to

supplement the elements of the independent control with the science or at least to seriously consider this possibility is a reasonable expectation from the legislature.

The operation of the independent control as well as the development of its current forms require the assistance of the state and especially the legislature. As a result, the practical deficiencies and lacunas can be remedied to make the independent control of the imprisonment complete. In addition, it is worth considering the proposals of both the legal literature and the law enforcement practise in the course of the legislation. This provides an opportunity to the legislator to regulate the control system with the most ideal instrument as much as possible.

#### IV. List of Publications

1. *A fogva tartottak kapcsolattartása.* In: Kriminológiai Közlemények különkiadás, Bizalom-társadalom-bűnözés, V. Országos Kriminológiai Vándorgyűlés anyaga; Bíbor Kiadó, Miskolc, 2006. 141-151. p.
2. *Bebörtönzött nők.* In: Miskolci Egyetem Doktoranduszok Fóruma, Miskolc 2005. november 9., Az Állam- és Jogtudományi Kar szekciókiadványa; Miskolci Egyetem Innovációs és Technológia Transzfer Centruma, 2006. 141-146. p.
3. *A rácsok mögött – fogda- és börtönviszonyok Magyarországon.* In: A jogtudomány aktuális kérdései Bíbor Kiadó, Miskolc 2006. 213-244. p.
4. *A rendszerváltás hatása a magyar büntetés-végrehajtási jogra – az Európa Tanács elvárásai.* In: Publicationes Universitatis Miskolciensis. Sectio Juridica et Politica, Tomus XXIV., Miskolc University Press, 2006. 99-116. p.
5. *Fogva tartás Magyarországon – a hatályos hazai szabályozás és az Egyesült Nemzetek Szervezetének elvárásai.* In: Studia Iurisprudentiae Doctorandorum Miskolciensium - Miskolci doktoranduszok jogtudományi tanulmányai 7. kötet; Bíbor Kiadó, Miskolc 2006. 337-358. p.
6. *Női sorsok a börtönön innen és túl. (Könyvismertetés)* Börtönügyi Szemle 2006/3. szám 20-24 p.
7. *Aktuális tapasztalatok egy hazai börtön életéből.* In: Miskolci Egyetem Doktoranduszok Fóruma, Miskolc, 2006. november 9., Az Állam- és Jogtudományi

- Kar szekciókiadványa; Miskolci Egyetem Innovációs és Technológia Transzfer Centruma, 2007. 139-144. p.
8. *III. pilléres együttműködés – A Hágai Program múltja, jelen és jövője egy büntetőjogász szemszögéből.* In: Bűnügyi Tudományi Közlemének 8. Bíbor Kiadó, Miskolc, 2007. 509-533. p.
  9. *Kártalanítás az ártatlanul elszennvedett büntetésekért és intézkedésekért.* *Advocat* 2007/1-2. szám 20-24. p.
  10. *CPT-látogatások Magyarországon.* *Collega* 2007/3-4. szám 91-99. p.
  11. *Kártalanítás az ártatlanul elszennvedett kényszerintézkedésekért és büntetésekért.* In: *Studia Iurisprudentiae Doctorandorum Miskolciensium - Miskolci doktoranduszok jogtudományi tanulmányai* 8. kötet, Bíbor Kiadó, Miskolc, 2007. 231-252. p.
  12. *Criminal Policy and Law Enforcement in Hungary from the 1960's.* In: Miskolci Egyetem Doktoranduszok Fóruma, Miskolc, 2007. november 13., *Az Állam- és Jogtudományi Kar szekciókiadványa; Miskolci Egyetem Innovációs és Technológia Transzfer Centruma*, 2008. 119-125. p.
  13. *Új elem a büntetés-végrehajtás jogállami kontrollrendszerében. Gondolatok a hazai nemzeti megelőző mechanizmusról.* *Fundamentum* 2016/2-4. szám 159-166. p.
  14. *A szabadságvesztés büntetés kontrolljának modelljei és az alkotmányossági kontroll.* In: Miskolci Egyetem Doktoranduszok Fóruma, Miskolc, 2016. november 17., *Állam- és Jogtudományi Kar szekciókiadványa; Miskolci Egyetem Tudományos és Nemzetközi Rektorhelyettesi Titkárság*, 2017. 193-198. p.
  15. *Lőrincz József – Koósné Mohácsi Barbara – Lukács Krisztina – Pallo József: Büntetés-végrehajtási jog.* ELTE Eötvös Kiadó Kft., Budapest 2017.; Lukács Krisztina: IV. rész 9. fejezet: *A büntetés-végrehajtás jogállami kontrollrendszere.* 251-264. p.
  16. *A jogállami szabadságvesztés végrehajtás legújabb biztosítéka – Gondolatok a Nemzeti Megelőző Mechanizmusról.* *Börtönügyi Szemle* 2018/4. szám 65-75. p.
  17. *Az ENSZ szabadságvesztést ellenőrző mechanizmusai.* *Alkotmánybírósági Szemle* 2019/2. 36-44. p.



