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THE LAW OF EXECUTING CRIMINAL PENALTIES IN THE FUNCTION OF PREVENTION OF CRIME

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Abstract: The law of executing criminal penalties is a third constitutive part of the criminal law which logically follows the substantive criminal law and criminal procedural law. The purpose of the stated penal sanctions is being accomplished in the process of execution with the aim to protect most important social goods, values and crime prevention.

The law of executing criminal penalties – executive criminal law, as a branch of positive law system and a part of law is a system of legal regulations (of legal and sublegal kind) which determines the proceedings, method and conditions of the execution of stated criminal penalties as well as non-institutional sanctions. Elementary and general principles of execution of criminal penalties or some specific issues related to execution of sanctions which are closely related to regulations of criminal sanctions in the criminal law are in the criminal legislation.

This paper analyses normative regulations and compliance with international standards, organisations, principles, method and execution process, execution of non-institutional sanctions, as well as effects in the prevention of crime. It includes experiences and practice of execution of punishment of deprivation of liberty and execution of non-institutional sanctions in Serbia as well as other countries with rich tradition of criminal law.

Keywords: law, execution of penal sanctions, prison sentence, non-institutional sanctions, crime, prevention.

INTRODUCTION

Preventive function of criminal legislation focuses on the purpose of punishing along with the necessity of determining conditions under which the criminal law is being used. Even though preventive effect of criminal law is its key application, this doesn't mean that it is justifiable to aim towards applying criminal sanctions on everyone who has done (any) criminal offence. It is enough to do this to the extent that threatening with punishment is serious[1]. Criminal legislator today cares more about very wide and very austere criminal repression which generally leads to serious and damaging consequences for an individual as well as the society. Repressive penal politics don't provide significant effects in the field of prevention, but lead to further weakening of the system of the criminal law. The more severe the punishment, the less is likely for it to be applicable and vice versa. This is why there is no justification for giving up on the idea of criminal law based on general and special prevention. Even though retribution today cannot be a legitimate goal of the criminal law (at least not the main and the only one), it has one advantage over prevention: it contains a self-restricting mechanism. Retribution (or revenge) as a goal of criminal law establishes proportionality as a measure of repression. Prevention, on the other hand, doesn't include a mechanism which would limit the repression of the criminal law. From the aspect of prevention, this could be a success achieved regarding battling the crime. Since there is a huge dissatisfaction today regarding results achieved by the criminal law while doing its major task, there is a constant expansion and strengthening of repression of criminal law which endangers the criminal law itself[2]. Criminal law is a system of all the regulations which are determining which actions can be called criminal offence in a specific country and which punishments and criminal sanctions and under which conditions can be applied on offenders. Criminal law is comprised of substantial law, procedural law and executive law – the law of executing criminal penalties.

The law of executing criminal penalties is a system of legal regulations which are determining the procedure, method and conditions of execution of criminal penalties. Executive criminal law is in the function of application of criminal (substantial) law, i.e. it enables the final analysis of its application. The elementary and general principles of execution of criminal penalties or some specific issues related to the execution of

1 Stojanović, Z. (2011) Preventivna funkcija krivičnog prava, CRIMEN (II) br. 1. pp. 3
2 Stojanović, Z. (2011), Ibid, str. 5.

sanctions which are closely related to the regulations of criminal law are in substantial criminal law. In order for criminal penalty established in criminal law to fully realise its purpose set by the criminal code (function – protection and security of the most important social goods and values), it should be adequately executed by the appointed governmental institutions (institution for penalty administration). This points to the utilitarian character of the executive criminal law which finds its justification and *ratio legis* in social usefulness. Executive criminal law is therefore a part of a unified legal system of the country, but the one which in that sense has a special purpose. Its purpose is to provide protection, maintenance and development of social and economic relations as well as social and political regulation of the country.[3]

The expression law of executing criminal penalties originates from the main source of this branch of law – Law on Execution of Criminal Penalties. In literature several names have been used: law of executing criminal sanctions, executive criminal law as well as penal law, but the use of word penology is often used in the field of science. As a discipline of science, penology studies all criminal sanctions, method and procedures of their execution, i.e. the relations between them and effects of re-socialisation of the punished individuals. The efficiency of the prescribed and executed criminal penalties is directly manifested on the scale of criminality and relapse within a specific country. Stated criminal penalty functions as a preventive measure in the sense of disabling perpetrators to commit new criminal offences during the time of serving their sentence of deprivation of liberty, or while the certain security measures are in action. In that sense, sanctions which make perpetrators "visible" also have certain effect, or they pose a threat of turning into a heavier punishment in the event of committing a new crime. Nevertheless, special-preventive effect with regard to the sentenced individual doesn't lead to any significant global effect even during the time of serving the sentence of deprivation of liberty. Even the argument that the small number of people is committing a big number of crimes doesn't contribute a lot. Many researches show that crime rate isn't correlated with the rate of perpetrators sentenced to prison and that it can remain unchanged regardless of how many perpetrators are serving the sentence of deprivation of liberty[4]. According to a rule, their place is being taken by the new perpetrators and the number of them often overrides the number of those who were disempowered and prevented from committing crimes by the means of the prison sentence[5]. Even though this points towards the inefficiency of general prevention, the fact remains that preventing sentenced perpetrators from committing more crimes does not influence the scale and dynamics of criminality. It is widely understood today that special prevention, and not just the one which stems from the idea of re-socialisation, cannot give serious contribution to achieving protective function of criminal law. This doesn't reduce the importance of application of criminal penalties on accomplishing protective function of criminal law, but not so much because of special as because of its general prevention.

SOURCES OF LAW OF EXECUTING CRIMINAL PENALTIES IN SERBIA

The division of sources of the law of executing criminal penalties can be achieved according to several criteria. One of the basic criteria in dividing sources stems from the hierarchy of legal acts, and it is primarily applicable to the internal legal system of a certain country. The biggest lawful power certainly has a constitutional norm which obliges that every law and other legal acts must be in line with the Constitution, followed by legal acts related to the field of execution of criminal penalties and sub-legal acts which are further expanding the norms from the law which regulates this specific field. The Constitution of the Republic of Serbia[6] contains norms which are significant for execution of criminal penalties. They are contained in the part that deals with human rights, in the second chapter which is called "Human Rights and Freedoms" and some of them are: non-existence of the death penalty, forbidding torture, inhuman or degrading behaviour or punishment, subjecting to medical or other scientific experiments without consent, ban of slavery, treatment similar to slavery and forced labour, contrary to the right to freedom and security[7]. The part of the constitution that deals with treating of persons deprived of their liberty contains special rules: persons deprived of their liberty must be treated with respect and dignity and every violence or use of force is strictly forbidden. When we speak about rights regarding deprivation of liberty without the decision of the court, it is especially underlined that such person must be urgently handed to the appointed court within 48 hours or otherwise set free. This part of the Constitution also speaks about custody, its length, the right to just trial, special rights of the offender, legal security in penal law, the right to rehabilitation and restitution, the

3 Jovašević, D.& Stevanović, Z. (2007) Osnovne karakteristike izvršnog krivičnog prava, Revija za krivično pravo i kriminologiju, Institut za kriminološka i sociološka istraživanja, Srpsko udruženje za krivičnopravnu teoriju i praksu, br. 2. Beograd, str. 101.

4 Ch. Silberman claims that even in the event that all the perpetrators would be inprisoned, at least some of the new perpetrators will try to use economic advantages of commiting crime. J. Senna, L. Siegel, *Introduction to Criminal Justice*, New York, Los Angeles, S. Francisco,1984, p. 33.

5 J. Senna, L. Siegel, *Introduction to Criminal Justice*, New York, Los Angeles, S. Francisco, 1984, p. 33

6 Sl. glasnik Republike Srbije br. 83/2006.

7 Ignjatović, Đ. (2006) Pravo izvršenja krivičnih sankcija, Pravni fakultet Univerziteta u Beogradu, Beograd, str.80.

right to appeal or using other legal remedy against the decision which decides about his or her custody, and about the person's rights, obligations or legally founded interests. The Constitution also speaks about the specific state institution explicated in the Ombudsman as the independent state institution which protects the rights of citizens and controls the work of administrative bodies, including the bodies that deal with the execution of criminal penalties, among others. Constitution in this way protects basic human rights of the persons deprived of their freedom and they are very important for accomplishing the principle of legality in the work of governmental institutions competent for the execution of criminal penalties.

Substance related to criminal penalties is regulated in the Criminal Code[8] and in the Law on Juvenile Criminal Offenders and Legal Protection of Minors[9]. These norms define the system of criminal penalties which can be applied to adult and juvenile offenders. Criminal law in Serbia recognises four types of criminal penalties: punishments, precautions, security measures and education measures. Punishments can be: imprisonment, a fine, work in the public interest and deprivation of the drivers licence. Law on Juvenile Criminal Offenders and Legal Protection of Minors contains a sequence of norms which are important for the execution of criminal penalties for juvenile criminal offenders.

One of the main sources of the executional criminal law is the Criminal Procedure Code[10] which more specifically defines criminal penalties and states that the crucial element of criminal penalties is the fact that they can be proscribed only the court in charge in the procedure which is started and executed according to the Code. Moreover, the Criminal Procedure Code also emphasises the rights of individuals deprived of their freedom: they should be informed on the reasons for their deprivation of freedom and other details of the accusation, the right to get a lawyer, the right to use their native language, the right to healthcare, the right to get a reimbursement for the unauthorised deprivation of freedom etc.

The main source of executional criminal law in the Republic of Serbia which is based on the principle of legality is the Law on Execution of Criminal Penalties[11] (ZIKS). It regulates execution of criminal penalties, custody and other measures stated by the court, as well as labour organisations of the appropriate institutions within the Bureau for Execution of Criminal Penalties[12]. This Law regulates, unless specific law doesn't suggest differently, the procedure of execution of criminal penalties for adult individuals, rights and duties of these individuals, organisation for Administration of Execution of Criminal Penalties, supervision of its work, execution of penalties proscribed for economic crimes, deprivation of properties gained by means of criminal offence or economic crime and application of custody measures. In the procedure of execution of criminal penalties towards juvenile offenders, just like in the procedure of execution of imprisonment sentence, provisions of this law are being applied unless other special law doesn't suggest differently[13]. By executing criminal penalties their general and main purpose is being fulfilled with the aim of successful re-integration of convicted perpetrators in the society[14].

Second important source of this branch of law is the Law on Juvenile Criminal Offenders and Legal Protection of Minors (ZOMUKD)[15]. This Law regulates the field of execution of criminal penalties for juvenile offenders (educational measures and juvenile custody). The Law of Executing Punishments for Criminal Offences of Organised Crime[16] regulates the procedure for executing imprisonment punishment for criminal offences which are, in relation to the Law on Organising and Jurisdiction of Governmental Administration in Supressing Organised Crime, Corruption, and other Hard Crimes[17], consider organised crime, organisation and jurisdiction of governmental administration in the procedure of executing the punishment, the status of the convicted and supervision of execution of imprisonment sentence. Regulations of this Law are also applied on execution of imprisonment sentence for other criminal offences (terrorism, serious violations of international humanitarian law on the territory of former Yugoslavia since January 1991 etc.).

The next source of execution of criminal penalties law is the Law on Execution of Non-institutional Penalties[18] which regulates procedure of execution of non-institutional penalties prescribed in the criminal, misdemeanour or other legal procedure, which are being executed in the community, there is a purpose, content, method of execution, the status of the individual in the procedure as well as supervision of execution is being proscribed. Regulations of the Law on Execution of Criminal Penalties are applied to execution of criminal penalties thereby, unless this law suggests otherwise. The purpose of the execution of non-insti-

8 „Sl. glasnik" RS. Br. 85/2005,88/2005- ispr., 107/2005- ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.
9 „Sl. glasnik" RS. Br. 85/2005.
10 „Sl. glasnik" RS. Br 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014.
11 „Sl. glasnik RS. Br. 55/2014
12 Jovašević, D& Stevanović, Z. (2007) Osnovne karakteristike izvršnog krivičnog prava, Revija za krivično pravo i kriminologiju, Institute for Criminological and Sociological Research Belgrade, Serbian Association for Criminal and Legal Theory and Practise, pp. 107.
13 Čl. 1. ZIKS-a (Sl. glasnik RS. Br. 55/2014.)
14 Čl. 2 . ZIKS-a (Sl. glasnik RS. Br. 55/2014.)
15 SL. glasnik RS Br. 85/ 2005
16 „Sl. glasnik" RS Br. 72/2009 i 101/2010.
17 „Sl. glasnik" RS Br. 42/2002, 27/2003, 67/2003, 29/2004, 58/2004, 45/2005,61/2005, 72/2009, 72/2011-dr. akon, 101/2011-dr. zakon i 32/2013.
18 „Sl. glasnik" RS. Br. 55/2014.

tutional sanctions is a protection of society from crime with the aim of re-socialisation and re-integration of convicted individuals.

Sources of executional criminal law are also the Law on Economic Crimes and the Law on Misdemeanour as these laws proscribe the notion, types, purpose and the length of sanctions which are imposed on perpetrators of economic crimes which are being executed under the same conditions and in the same procedure as well as the sanctions which are aimed at perpetrators of criminal offences. Finally, sources of the law on execution of criminal penalties are also sub-legal acts in the form of rule books and regulations.

International regulations are very important sources of the law on execution of criminal penalties. Literature contains several divisions of international sources of executional law and one of them is made according to the nature of the source. The first group includes normative sources which are sources in the narrow sense and it comprises all international regulations – bilateral or multilateral agreements, conventions, declarations etc. and their contents affects conditions of living for the perpetrators of criminal offences while they are being sanctioned. Apart from these sources, there may also be decisions of regulatory bodies which are controlling application of adopted and ratified regulations internationally. As such, these institutions usually are: international bodies which are not judicial – various committees (for human rights, elimination of racial discrimination against torture, etc.); international judicial bodies such as the European Court of Human Rights etc.[19] Standards and decisions of mentioned committees, commissions and other international bodies and institutions are sources of binding principles for work of national judiciaries and in the wider sense they can be categorised as sources of law on execution of the criminal penalties.

NORMATIVE AND ORGANISATIONAL REGULATION OF THE SYSTEM OF EXECUTION OF CRIMINAL PENALTIES IN SERBIA AND COMPLIANCE WITH INTERNATIONAL STANDARDS

The field of execution of criminal penalties is a very important and very delicate phase of the process of control and prevention of crimes. The process of execution of criminal penalties over adult individuals in the Republic of Serbia is regulated by the Law on Execution of Criminal Penalties. Execution of criminal penalties which are imposed on juvenile perpetrators of criminal offenses is regulated by the Law on Juvenile Perpetrators of Criminal Offences and Legal Protection of the Minor, and execution of non-institutional sanctions is regulated by the Law on the Execution of Non-institutional Sanctions.

Regulations of the Law on Execution of Criminal Penalties refer to the substance of execution of criminal penalties of the institutional character, types of bureau, internal organisation of the penitentiary system, method of management, work of economic units within the bureau, position of individual deprived of their freedom, working and legal status of the administration in prison, the purpose of criminal penalties, organisational form within the state administration, affiliation etc.

The Law on Juvenile Perpetrators of Criminal Offences and Legal Protection of Minors contains regulations which are being applied on juvenile perpetrators and are related to substantial criminal law, bodies which are applying it, criminal procedure and execution of criminal penalties on these criminal offenders.

The Law on Execution of Non-institutional Sanctions is regulated by the procedure of execution of non-institutional sanctions prescribed in the criminal or misdemeanour proceedings or other judicial proceedings in the community is prescribing purpose, content, method of execution, position of individuals in the procedure and supervision of the executor.

The Law on Execution of Criminal Penalties, Law on Juvenile Perpetrators and Law on Execution of Non-institutional Sanctions determines goals of execution of sanctions, determines the method of treating convicts and are also actively including perpetrators in the realtisation of the program. From this aspect, solutions from the law are contemporary and surely provide a frame for the concept of re-integration of perpetrators into social environment which legislator chooses.

Sublegal acts further develop concrete and operational solutions given by the law, certain procedures and conditions for the realisation of some of the solutions provided by the law, but other issues important for the functioning of penitentiary system i.e. the system of execution of criminal penalties as a whole as well as execution of non-institutional sanctions are also being regulated.

Modern-day international standards for the execution of the punishment of deprivation of freedom were established by the sequence of universal and regional documents. Among documents established on the universal level the most important ones are: Standard minimal rules of the UN on treatment of prisoners (1955), UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984), Body of Principles for the Protection of All Persons under Any Form of Custody or

19 Ignjatović, Đ. (2006) *Pravo izvršenja krivičnih sankcija*, Belgrade: Faculty of Law of the University of Belgrade, pp.21-22.

Imprisonment (1988), UN Rules on Protection of Juveniles Deprived of their Liberty (1990) to name a few. Some regional documents are of utmost importance for European countries and they include European Prison Rules (2006), European Convention on Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), European Convention on the Transfer of Sentenced Persons (1983) and European Convention on Human Rights (1950).[20]

After adopting new European prison rules, further development of European standards of protection of rights of persons deprived of liberty was primarily focused on protection of juveniles, namely, on making of standards which would be the equivalent to those established on the universal level with the rules set by the UN for protection of the juvenile deprived of freedom. Recommendation of the Committee of Ministers of the Council of Europe[21] on European regulations for juveniles who were sanctioned or punished[22] establishes among other things standards of protection of rights of juveniles deprived of their freedom. The exclusivity of deprivation of liberty of juveniles as well as the principles of legality, the principle of social integration, education and prevention of recidivism, the length of sanctions, principle of the best interest of juveniles, principle of proportionality, principle of individuality, principle of minimal intervention, principle of non-discrimination are some of the of the general principles.[23]

Sanctions in the community as alternative punishments of deprivation of liberty are becoming more and more important on the European continent over the past few decades. Standards of their execution are included in several recommendations of the Committee of Ministers of the Council of Europe such as the recommendation on European rules and sanctions in the community which suggests that there is a need for the member countries to consider the possibility of replacing short prison sentences with alternative for certain criminal offences or criminal offences to which the non-institutional punishments or sanctions can be applied. This is why the majority of European legislation introduced modified institutional sanctions[24] which are being executed within the community.

The law of execution of criminal penalties is being reformed in Serbia over the past few decades with the aim of the alignment of all contemporary solutions which are accepted in this field by the members of the community of scientists and experts and through relevant international documents. Almost all European solutions were therefore implemented into the Law on Execution of Criminal Penalties, Law on Juveniles, Law on Execution of Non-institutional Sanctions and all other regulations which are regulating this field.

The body appointed for the execution of both institutional and non-institutional criminal penalties is the Administration for the Execution of Criminal Penalties within the Ministry of Justice. The Administration organises, proceeds and monitors execution of the imprisonment, juvenile custody, the punishment of work in the public interest, conditional sentence with protective surveillance, measures of security of the obligatory psychiatric treatment and care within a medical institution, obligatory care of drug addicts and alcoholics, as well as disciplinary measures of sending perpetrators to the correctional institution (further named as criminal penalties). The Administration carries out custody and other measures for securing the presence of accused persons during the criminal proceedings in alignment with the law and carries out other duties prescribed by the law. The Administration is included in the processes of social re-integration and acceptance of convicts[25]. The Administration also organises and conducts programs of continuous professional training of the staff and internal organisation and competence of organisational units within the Administration is prescribed by the government. Bureaus and the Centre for the Training of Employees is being stablished by the government which also determines the type, departments and the centre of the bureau, i.e. the headquarters of the Training Centre through the founding act. The bureaus are structured so that they can organise five services depending on the capacity: the treatment service, security service, service for training and employment, service for protection of health and service for general affairs.

The competence over execution of criminal penalties and consequently prison system in Serbia is dedicated to the department of justice – the Ministry of Justice which is conducting the services of the public administration which are related to the "execution of criminal penalties".[26] The Ministry of Justice realises its competence over the prison system through the Administration of Execution of Criminal Penalties as the internal organisational unit of the Ministry of Justice. Mechanisms which are controlling the Administration are under the jurisdiction of the Ministry of Justice, i.e. the Minister. Department of justice has a general jurisdiction over the execution of criminal penalties, but other departments have certain jurisdictions over specific criminal penalties. In this way disciplinary measure of the bureau type, referral to the

20 Simeunović-Patić, B. & Stevanović, Z. (2009),Evropski standardi u izvršenju kazni, Kontrola kriminaliteta i evropski standardi: stanje u Srbiji, Institut za kriminološka i sociološka istraživanja,Beograd, pp.177-178.
21 CM/Rec (2008) 11
22 Adopted on 5th November 2008.
23 Simeunović-Patić, B. & Stevanović, Z. (2009),Evropski standardi u izvršenju kazni, Kontrola kriminaliteta i evropski standardi: stanje u Srbiji, Institut za kriminološka i sociološka istraživanja,Beograd, str.185.
24 Stevanović, Z. & Igrački, J. (2013) Usklađenost primene alternativnih krivičnih sankcija u srbiji sa Evropskim standardima, Kriminal, državna reakcija i harmonizacija sa evropskim standardima, Institut za kriminološka i sociološka istraživanja, Beograd, str.300.
25 Čl. 12 ZIKS-a
26 Član 9. Zakona o ministarstvima (Službeni glasnik RS. Br. 44/2014.)

correctional institution is under the jurisdiction of the department for work and social affairs, execution of security measures, in part which is related to adoption of legislation that regulates execution of the measure and expert monitoring is under the jurisdiction of the Ministry of Health.[27] Apart from the departmental ministry which has full jurisdiction over prison system, there are important jurisdictions regarding control and inspection duties which belong to courts, violation bodies, inspections dedicated for special fields, in alignment with the Law on state governance as well as with the Law on Inspectional Surveillance and other positive regulations which are regulating supervision of the work of the bodies and organisations.

The efficiency in the prevention of crime is shown, from the position of the Law on Execution of Criminal Penalties, by the scope of reintegrated offenders into the community after the execution of the penalty, but also by the level of recidivism, the scope of accomplished treatment etc. The treatment is efficient if it leads to: reduction of the percentage of return, desired changes in behaviour, desired changes in personality and desired changes in the environment of the treated individual.[28] Špadijer-Džidić and the group of authors are stressing out that the success of re-socialisation of juveniles can be assessed on the basis of: recidivism, alcoholism, vagrancy, begging, gambling, loitering, rude behaviour, external appearance, success in school, taking part in deviant groups etc.[29] With the ambition to find more efficient method of fight against crime, new forms of punishment are being sought for more intensively (more financial punishments, alternative sanctions etc.), so as to personalise the punishment, unload prisons and economically rationalise the punishment system. It is obvious that institutional re-socialisation isn't affecting the change of behaviour pattern of offenders in the desired scope and they are quickly returning of the criminal pattern of behaviour, often with significantly more brutal criminal offences.

CONCLUSION

The Law on the Execution of Criminal Penalties is a relatively independent branch of the positive legal system and a part of criminal law which is a system of legal regulations which are determining the prosecution, method and ways of execution of institutional or non-institutional criminal penalties. Executive criminal law is the final stadium of its application and it is a part of penology – science which approaches the execution of criminal penalties in a multidisciplinary way. It studies legal and non-legal aspects which are related to the execution of criminal penalties. When the preventive function of this law is being discussed the focus is mainly on the accomplishment of general and individual purposes of sanctions with the aim of a successful re-integration of the convicts into the society. Over the last decade, opinion that institutional execution of criminal penalties does not affect prevention of crime in the desired scope is being prevalent and it shows the high level of recidivism.[30] Such situation cannot be explained by the unsuccessful re-socialisation, dominant influence of negative informal structure of prisoners in prisons, but also incapability of prisons as institutions to change patterns of behaviour of convicted individuals. Complex situation is becoming even more intricate considering the fact that the "criminal infection" in prisons becomes more and more present, formal system becomes increasingly weaker and less efficient, which questions realisation of the basic functions of prison. Harsh penal policy and disproportionate use of prisons are not helping prevention of crime.

Inefficiency of the concept of re-socialisation and a large percentage of recidivism as well as the increasingly widespread criminality of various types on a global level brings about changes in sentencing and consequently more and more alternative sanctions are being used. These alternative measures include: mediation or reconciliation of victims and perpetrators which is often being followed by restitution, restitution or compensation which is being manifested through paying for the damage, reparation of destroyed buildings, working for victims as a corrective measure, work in the society, referral to the day centres, increased supervision, electronic surveillance (electronic bracelet or telephone calls), intensive programs of supervision etc.

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