"An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU"
JLS/D3/2007/01

Poland[1]

1. Introduction

The Polish population today comprises more than 38.1 million people.[2] The population is highly homogenous, with more than 98% Poles with Polish nationality. Most residents (ca. 90%) are Roman Catholic.[3] The Republic of Poland as a democratic nation is one of the so-called "countries in transition", because it has undergone enormous political, social and legal reforms in the aftermath of being a communist state. The transitional period began with the collapse of the socialist regime in 1989 (after the rise of political opposition in the 1980s); the entry into force of the new constitution in 1997 – which was approved in a referendum – marked the preliminary end.

Poland is a member of the United Nations since 1945 and of the Council of Europe since 1991. It is party to both International Covenants since 1977/1978 and to the Convention on the Rights of the Child since 1991. Poland ratified the European Convention on Human Rights on 19 January 1993 and Protocol No. 6 (on abolishing the death penalty) in 2000. It ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 10 October 1994.[4] In 1989, Poland had already ratified the United Nations Convention against torture and other cruel, inhuman or degrading punishment, and in 2005 – unlike many of its neighbours – also the Optional Protocol on the said UN Convention, which provides for an additional inspection and monitoring system for places of detention. Since May 2004, Poland is a member of the European Union.

Early criminal procedural law in Poland was influenced by the respective occupying forces (Prussia, Austria and Russia); the first genuinely Polish Code of Criminal Procedure came into force in 1928.[5] After World War II, criminal procedures underwent several reforms under the influence of Soviet legislation – especially the role of the public prosecutor was strengthened.[6] A comprehensive new Code of Criminal Procedure that incorporated all amendments and reforms of the post-war era came into force in 1970. Another important law was the Public Prosecutors ("Prokuratura") Act of 1985. The legislation led to a rather effectively working criminal justice system, which, however, lacked judicial control and respect for the rule of law and the individual's rights in the proceedings.[7] The penal policy in general was characterised by a high level of repressiveness resulting, *inter alia*, from relatively long sentences and the far-reaching application of "temporary detention".[8]

The years after the 1989 reforms of the criminal procedure aimed at eliminating the Soviet impact, strengthening the defendant's rights, and transforming the Prokuratura into a more independent prosecution service under the authority of the Ministry of Justice (instead of the Council of State). These reforms were incorporated in the Code of Criminal Procedure ("Kodeks

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2 Data from the Statistical Office of the European Communities (Eurostat) as of 1 January 2008 http://epp.eurostat.ec.europa.eu/guip/countryAction.do.

3 Main Statistical Office of the Republic of Poland 2005,www.stat.gov.pl.

4 Poland was visited by the Committee for the Prevention of Torture (CPT) in 1996, 2000 and 2004. All reports and government responses were published and are available at www.cpt.coe.int.

5 Hofmanski/Kunstek 2004, p. 219.

6 Marguery 2008, p. 178.

7 Hofmanski/Kunstek 2004, p. 219.

8 Stando-Kawecka 2001, p. 510.

postepowania karnego", the CCP) of 1997, in force since 1 September 1998.[9] Major amendments were deemed necessary in 2000 and 2003 to make the slow criminal procedure more efficient and to speed up the proceedings. According to experts, these amendments – with the overall goal of efficiency – brought with them restrictions in the procedural guarantees of the participants in the criminal procedure.[10]

Today, the criminal procedure finds its basic legal sources in the said Code and in the Polish Constitution (=PC) of April 1997.[11] The constitution lays down the rule of law (Art. 2 PC) and creates the justice system as well as the principles of judicial review of all inferences with the rights of citizens. This is finally guaranteed by the possibility to (individually) file a constitutional complaint to the Constitutional Court, Art. 79 (1) PC.[12] Human rights, divided up into personal freedoms and rights, political, economic, social and cultural rights etc. and secured by "means for the defence of freedoms and rights" are regulated in Chapter II of the Constitution. Basic rights that are relevant with regard to detention are, above all, Art. 30 PC, guaranteeing the inviolability of the human dignity, Art. 31 PC, with a comprehensive provision to protect the individual's freedom, and Art. 40 PC, with an absolute prohibition of torture or cruel, inhuman, or degrading punishment or treatment. Art. 41 PC, a *habeas corpus* norm, addresses the deprivation of liberty, laying down the need for "procedures specified by statute" whenever somebody shall be deprived of or restricted in his or her liberty. The provisions will be explained below.

The basic constitutional procedural rights in Art. 45 PC guarantee a fair and public hearing, and a speedy procedure before a competent, impartial and independent court. To safeguard and implement these rights, the provision of the independence of the judiciary (Art. 178 PC) as well as the institution of a Commissioner for Citizen's Rights (also called Ombudsman[13]) are important.

The Ombudsman's Office was established as early as 1988; its method of working is determined by Art. 208 of the Polish Constitution and the Ombudsman's Act from 1987. The Ombudsman and his deputies have far-reaching monitoring competences; for the subject of this report it is important to note that the Ombudsman can act for individuals in court, take action when he finds that an individual complaint is justified, and visit all places of detention. The Ombudsman's Office has a separate department for prisoners' petitions. Reports of general prison visits are made publicly available. In the year 2006, the Ombudsman received 1,400 complaints by pre-trial detainees, in 2007 1,600.[14]

In addition to the constitutionally guaranteed rights, the international human rights treaties, including the above-mentioned, were incorporated into domestic law by ratification. Especially before the new Constitution and CCP came into force, the European Convention on Human Rights and its interpretation by the European Court of Human Rights played an important role in the development of the modern Polish criminal procedure.[15] With regard to remand detention, in particular Art. 3 (Prohibition of Torture) and Art. 5 (Right to liberty and security) as well as Art. 6 (fair trial, presumption of innocence) are directly applicable in domestic law since 1993.

The substantive counterpart of the CCP, the Polish Criminal Code of 1997, also came into force on 1 September 1998. In the years after 1989, many changes to the former Criminal Code of 1969 were passed in order to adjust the penal law to international standards as well as to make it more humane, liberal and rational. The major changes introduced in 1990 and 1995 included, *inter alia*, the abolition of regulations on the obligatory aggravation of penalties imposed on recidivists, the (re)introduction or strengthening of alternative penalties to avoid imprisonment, the statutory moratorium on capital punishment etc. This happened despite a dramatic increase in reported crimes, in particular between 1989 and 1990, when the crime rate per 100,000

9 For this report, the author used the German translation of the CCP by Weigend 2004. If the text contains a direct quote, it originates from the translation that can be found at http://www.era.int/domains/corpus-juris/public/texts/legal_text.htm (last retrieved 19 November 2008). This site, created for an EU research project on fraud, provides for legal texts in "unofficial translations". The author tried to eliminate possible mistakes and misunderstandings in discussions with the country experts (see footnote 1).

10 Hofmanski/Kunstek 2004, op. cit., p. 220.

11 An overview is provided by Wasek 1999.

12 This right, however, is restricted with regard to asylum, Art. 78 (II), 56 PC.

13 Rzecznik Praw Obyatelskich, www.rpo.gov.pl, with some contents also in English (last retrieved 15 November 2008).

14 Statistics and reports are available in Polish at http://www.rpo.gov.pl/index.php?md=2931&s=1 (last retrieved 15 November 2008).

15 Renzikowski 2007, p. 313 pp.

inhabitants increased from 1,442 to 2,317 – a 60% rise in only one year.[16] Still, the Criminal Code of 1997 managed to implement principles of humanisation, liberalisation and rationalisation of criminal policy. Nevertheless, the "political consensus on the liberalisation of the criminal policy started to diminish due to increases in official crime rates as well as because of the growing fear of crime".[17] At first sight, this fear was justified, because the overall crime rates increased until 2003, when the peak was reached (3,840). However, it must be taken into account that, from 2000 onwards, for most types of offences the numbers dropped – the increase shown in the statistics is "almost exclusively connected with the criminalisation of drunken driving that had previously constituted a petty offence and was thus not included in offence statistics".[18] The criminalisation of the possession of small amounts of drugs for own consumption (also introduced in 2000) had its impact on crime rates as well.

Thus, the relevant legislation for remand detention is mainly found in the Constitution and in the CCP. Under the old CCP, remand detention could be imposed by the public prosecutor. Different time limits for detention evolved over the years.[19] With the reformed CCP of 1997, generally speaking, stricter rules for imposing pre-trial detention were introduced, as well as new statutory limits for pre-trial detention. In Part IV of the CCP, all coercive measures are regulated, among which arrest and the so-called preventive measures: detention, bail and police supervision. The execution of pre-trial detention is regulated by an Ordinance of the Ministry of Justice on Rules of Execution of Detention on Remand of August 2003.

2. Empirical background information

The prison population (including remand detainees) in Poland is still high compared to that in Western European countries. With respect to human rights, the situation remains problematic, in particular because of the resulting overcrowding. Among the prisoners, are many remand detainees, currently with a share of about 12%. This percentage was significantly higher in earlier years – according to the national statistics (Figure 1), it reached more than 30% in 1990 and 2000.

The current situation can be seen in Table 1. This table comprises data from different sources (which nevertheless all rely on official data from national authorities).[20] It must be noted, however, that the number of remand prisoners has decreased significantly over the last years (see Figure 1 and Table 1). Compared to the peak number (during the covered period) of 22,736 in 2001, the remand prison population decreased by more than 50% to 10,111 in May 2008 and – according to the latest available data – to 9,457 in November 2008. This development is contrary to the development of the overall prisoner rate, which rose by 23% between 2000 and 2008.[21] An

16 Sources: for the years 1980-2001: Siemaszko/Gruszczynska/Marczewski 2003, p. 14 and 141; for the years 2002-2007: data calculated on the basis of information published in the Statistical Yearbook of the Republic of Poland (yearly publication) as well as information available online at www.czsw.gov. pl and www.kgp.gov.pl.

17 Krajewski/Stando-Kawecka 2009 further state: "Especially during the years 2005-2007 such changes in criminal law were introduced. This happened in the period immediately preceding general elections in 2005 and under the conservative government of the Kaczyński twin brothers. Their political party 'Law and Justice' profiled itself always primarily as the 'law and order party' (as a matter of fact for many years it was practically a single issue party). Fortunately, due to electoral defeat of this party in earlier elections in autumn of 2007 it was unable to pass legislation containing comprehensive changes to the penal code aimed almost exclusively at rising statutory minima and maxima for most offences and introducing stiff restrictions on judicial discretion in sentencing. The last idea was based on the thesis that judges are notoriously lenient. The new government abandoned these ideas."

18 Krajewski/Stando-Kawecka 2009.

19 The relevant provisions can be found in older case-law of the ECtHR and the former European Commission of Human Rights, e. g. in the Kudla case (application No. 30210/96, decision of 10 April 1998).

20 The authors decided to use the latest available data provided by the three sources, because these are widely received and used for comparative research, and can be found in the literature very often. However, it must be noted that the latest data from SPACE dates from 2006. With regard to Poland, all three sources are generally quite consistent over time; smaller differences in numbers can usually be explained by different due dates in the same year.

21 However, it started to decrease, but more slowly, in the last two years; the number of prisoners on 30 November was 84,511 according to prison statistics.

explanation is not easy to find, because no dramatic new legal provisions came into force. Moreover, the length and general abuse of remand detention were widely scandalised[22] in recent years, and in many cases Poland lost its cases before the European Court of Human Rights because of that problem (see below). Next to overcrowding, the Ombudsman called the length of detention "the second most important problem relating to the deprivation of liberty in Poland".[23] However, the pressure of the negative decisions that used to come from Strasbourg seems to have had effect: The Polish government sent a letter to all the Presidents of Courts of Appeal together with an analysis of the case-law of the ECtHR in June 2004. In February 2006, it issued a guideline for prosecutors concerning the application of pre-trial detention.[24] Both might have helped to reduce – slowly but steadily – the remand detention population. Another reason might be the decrease of more serious crime as mentioned above.

With regard to remand prisoners, it is important to note that, according to Polish law, they may be transferred to institutions for sentenced prisoners during their appeals procedure if they so request (see also below). This means that possibly half of those in appeals procedure (mostly applying for a review not of the question of guilt but of the sentencing) are transferred to normal prisons and therefore counted as sentenced prisoners.[25]

22 (Internet) media recently reported e. g. the case of Jamrozy currently before the ECtHR (http://wiadomodci.gazeta.pl/Wiadomosci/1,80708,4808296.html (cited after Statewatch newsline, www.poptel.org.uk/statewatch/News/2008/jan/05poland-echr.htm., last retrieved 15 November 2008). Another example is the Garlicki case, currently pending in Strasbourg as well, http://www.statewatch.org/news/index.html (last retrieved 14 December 2008).

23 Dr. Jan Kochanowski, Ombudsman since 2006, in an interview with the newspaper Rzeczpospolita (December 2006): "I am most concerned about the excessive length of the detention period (while awaiting trial), which may indicate an incorrect or sluggish way of conducting preliminary and court proceedings. The issue has already been the subject of my previous speeches as well as speeches of my predecessors. However, I still receive letters from people who have been in custody for a couple of years without legal sentences; I receive individual (personal) statements of excessively long periods of detention while awaiting trial. The rights of detainees are being limited far more than the rights of the convicted." In a similar way, he expressed his concern in a speech ("Polish Ombudsman's Role in the Protection of Rights and Freedoms of Persons deprived of their Liberty") that can be downloaded from the Ombudman's Office's homepage (see footnote 12).

24 This information has been taken from Commissioner of Human Rights 2007, p. 8.

25 Personal communication from B. Stando-Kawecka (see footnote 1 above). As concrete data does not exist, her assessment is based on personal experience and interviews with the prison authorities in Cracow.

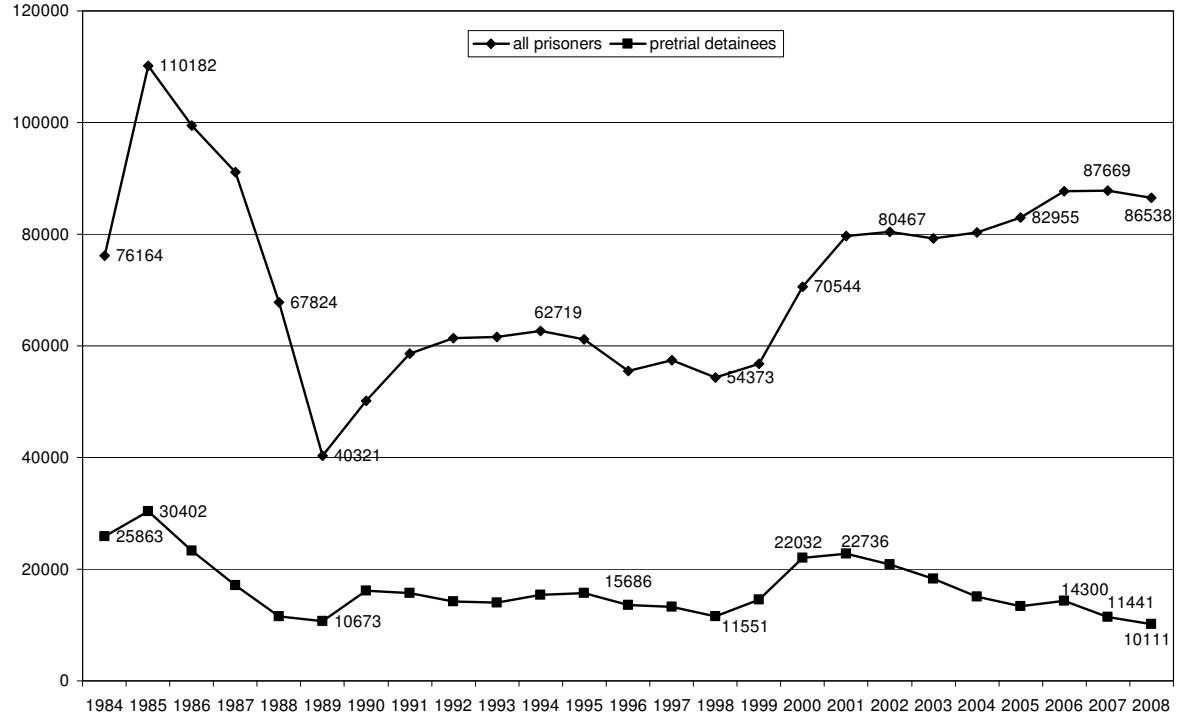
Table 1: Prison Population, different characteristics, latest data from different sources

Source	Date	Total prison population	Number of remand detainees[26]	Remand detainees as a percentage of the total prison population	Prison population rate per 100,000	Remand detention rate per 100,000	Foreigners in prison (numbers and percentage)[27]		Female prisoners (numbers and percentage)		Juvenile prisoners (15-16 years old) (numbers)[28]	
							All prisoners	Remand detainees	All prisoners	Remand detainees	All prisoners	Remand detainees
ICPS[29]	29 February 2008 31 May 2008[30]	88,497 86,538	10,111	12.3% *11.7%*	232 ---	--- 27	0.7%**	---	---	3 %**	1.3% (9.12. 04)	---
SPACE I [31]	30 September 2006	88,647	14,415	*16.3%*	230	39	659	0.7%**	2668	*3 %***	---	---
National Statistics[32]	31 December 2007	87,776	11,441	13%	230	30	646 0.7%*	368 3.2%**	2598 3%*	524 4.6%**	7	5

--- no data available; *: of all prisoners; ** of all remand detainees; data in italics represent own calculations

26 Remand detention rate including only part of those not serving a final sentence; see above for explanations.
27 For details regarding the citizenship of foreigners, see 8.3.
28 On 31 December 2007, the total number of prisoners aged 15-21 amounted to 6,012, including 1,787 in remand detention and 4,225 in prisons for sentenced prisoners. For details and more current data, see 8.1.
29 ICPS 2008.
30 ICPS/Roy Walmsley 2008; special evaluation for some of the Eastern European countries per e-mail communication. The author wishes to thank Roy Walmsley for all his help.
31 Aebi/Delgrande 2007.
32. Ministry of Justice, Central Prison Administration ("Central Zarzad Sluzby Wieziennej") 2008.

Figure 1: The prison population according to legal status (absolute numbers), 1991-2007[33]



3. Legal basis: scope and notion of pre-trial detention

3.1 Definition of pre-trial detention

According to the Polish CCP, detention is one of the preventive measures regulated in Art. 249-277 CCP. Therefore, the term used in the English translation of the CCP is "preventive detention". The scope becomes clear from Art. 249 (4) CCP, in accordance with which preventive detention may continue until the commencement of serving the sentence, thus until the final conviction. That means that detainees keep their status also during the appeals procedure and usually stay in remand prisons or the respective units. The latter, however, is not always the case: detainees may be transferred to prisons provided that they so request and the court does not object (in practice courts do not object). Detainees then fall under the Code on Execution of Criminal Sentences and receive the status of "sentenced prisoners", which means that they enjoy the same rights and obligations as sentenced prisoners and are counted as such (see also paragraph 2). As a matter of fact, Art. 249 (4) does not determine the status of the person detained after the first instance judgement in the meaning of provisions regulating the execution of detention on remand nor the place of staying (remand prison or prison). The respective provisions of the Code on the Execution of Criminal Sentences (Art. 223) state: "After the sentence of the court of the first instance, the person detained on remand may be transferred from remand prison to a prison for sentenced prisoners provided that the court at which disposal the person stays does not make another decision" (does not object). In such a case, the arrested person transferred to a prison for sentenced prisoners after the sentence given by the court of the first instance may express consent (in a written form) concerning applying to him/her provisions regulating the execution of a prison sentence; as a result he/she has the rights and obligations of a sentenced prisoner although his/her sentence is not final.

Another coercive measure laid down in the CCP as a second form of custody within the criminal proceedings prior to conviction is "arrest" (Art. 243 CCP), which is the period between the actual apprehension, the application for detention and, finally, the issuance of a detention

33 Source: Ministry of Justice and of the Central Prison Administration ("Central Zarzad Sluzby Wieziennej"), cited from Krajewski/Stando-Kawecka 2009.

order (for the time line, see below) or release. Thus, arrest, police custody and preliminary (or preventive detention) all describe detention during the different stages of the same proceedings.

There are four major types of arrest: procedural, preventive, penitentiary and administrative. As to procedural arrest, we can distinguish between initial arrest that is the subject of that report and arrest for the purpose of bringing a summoned person (not necessarily a suspect but also a witness) that did not appear before the court, the prosecutor etc. With respect to ordinary procedural arrest, arrest in case of offences and in case of contraventions (with some differences between them, see below) have to be distinguished. There are also a number of specific regulations of specific types of arrest (by the captain of a ship, by the captain of a plane etc).

A further distinction is necessary with regard to the deprivation of liberty by placement in police or Border Guard establishments: For juveniles under 17, the Juvenile Justice Act of 1982 generally does not provide for arrest or remand detention but for provisional accommodation for children to be placed in correctional establishments for juveniles.[34] Drunken or intoxicated people can be held in police detention for up to 24 hours[35], but as a rule they are placed in a medical facility. Only if such an option is not available, the person may be held in police custody.

Pursuant to Art. 101 of the Aliens Act of 2003, the police or Border Guard may detain foreign nationals for up to 48 hours if there are circumstances justifying their deportation. Under Art. 102, the persons concerned may be placed in a guarded centre for foreigners or, if there are grounds to fear that they will not respect the house rules, in a deportation jail. The placement decision is taken by the competent court, on a motion from the Governor of the Province ("Voïevod"), the police or Border Guard. The maximum period of detention is initially set to ninety days, but can be prolonged to a total of one year under certain circumstances.

3.2 Primary objective and underlying principles of pre-trial detention

The primary objective of all preventive measures is laid down in Art. 249 CCP: They may be applied in order to secure the proper conduct of the proceedings and, exceptionally, to prevent a new serious offence being committed by the accused. The aim of preventive detention does not differ in this regard. What the CCP means with a "proper conduct of the proceedings" is clarified in Art. 2 of the CCP. Art. 2 (1) refers to the aims of the rules of the CCP: relevant penal reaction (both in qualitative and in quantitative aspects), efficient proceedings and protection of the victim. In order to fully achieve this aim, proceedings have to be conducted in a proper manner, meaning a way in which "the perpetrator of a criminal offence shall be detected and called to penal responsibility (…)". Secondly, proceedings must be characterised "by a correct application of measures provided for by criminal law, and by the disclosure of the circumstances which favoured the commission of the offence (…)". Thirdly, the "legally protected interests of the injured party shall be secured" and, in the fourth place, the "determination of the case shall be achieved within a reasonable time". Furthermore: "The basis for any kind of determination shall be the established true fact situation."

Art. 257 and 259 (3) CCP bring the principle of proportionality into play by laying down that detention may only be ordered when less severe preventive measures cannot secure the above-mentioned purposes and only when an unsuspended sentence exceeding the time of detention is probable. For cases where the relevant offence according to the Penal Code carries a penalty of imprisonment of one year or less, or an unsuspended sentence is not to be expected, restrictions apply (see paragraph 4).

3.3 Beginning, end and duration of pre-trial detention according to law

First of all, the important provision with regard to time limits for arrest can be found in the Polish Constitution. According to Art. 41 (2) PC, the maximum term for provisional arrest without a valid court decision is 72 hours: The arrested person shall, within 48 hours of detention, be given over to a court for consideration of the case (the period between apprehension and the prosecutor's decision to apply for detention, Art. 243 CCP) or released. The detained person "shall

34 See below for details; Stando-Kawecka 2009.

35 Of course, these provisions do not refer to suspects, who can be held on general terms – up to 48 hours in case of a crime, 24 hours in case of contraventions/petty offences. In Polish law, there is no such crime or contravention as "public drunkenness". Grounds for "administrative" arrest are "being in a circumstances endangering life or health of such person or other persons" or "provoking a feeling of indignation / scandal in public place or a workplace". For an overview with regard to coercive measures, see Tylman 2002.

be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within 24 hours of the time of being given over to the court's disposal" (according to Art. 40 (2) PC and Art. 248 (2) CCP.[36]

The detention period that is basically regulated in Art. 263 CCP[37] starts with the judge's decision to make a detention order. Still, it is important to note that for counting the overall length of detention, the time from the actual apprehension has to be taken into account (Art. 265 CCP). The detained person keeps the status of "pre-trial" or "remand detainee" until the final sentence is executed ("until the commencement of serving the sentence", Art. 249 (4) CCP). This means that this status is also kept during an appeals procedure, any waiting periods, the transfer etc. (with the exception mentioned in paragraphs 2 and 3.1).

The time a suspect or accused person can spend in pre-trial detention (the law uses the wording "preparatory proceedings" and "while the investigation is pending") is, in principle, limited. The first designated period shall not exceed three months. If "special circumstances" make it necessary, under certain circumstances, the period can be extended by another prescribed period amounting to a maximum of twelve months (including the initial three months). The combined period of detention while the investigation is pending and the first trial phase may not exceed two years. Still, this is not the last word: The Court of Appeals may extend the period under certain circumstances enumerated by the law, among which "conducting evidentiary action in a particularly intricate case" and "other important obstacles whose removal has not been possible". This provision in Art. 263 (4) CCP (and the whole norm) was recently challenged by a constitutional complaint (see paragraph 6).

Furthermore, it has to be noted that the absolute time limits prescribed in the CCP are relevant only for the pre-trial and first trial stage, meaning that during an appeals procedure, the possibility of further extensions is not limited.

36 See Kruszynski 2007, p. 181-265 and 279 f. (timeline).

37 This provision has already been reformed in 2000, see. Weigend 2004, p. 156. The former version foresaw an intermediate decision necessary to extend the first period of three months by another three months. In this version, only a court of higher instance was able to prolong the detention period for up to twelve months.

Table 2: Timeline for arrest and remand detention (for adults) in Poland in case of offences (not in case of contraventions)

TIME max.	PROCEDURAL ACTION OR EVENT	LEGAL BASIS	WHO? (competent authority to decide/execute)	WHERE? (detention facility, competent authority for execution)
0.00 Immediately after arrest	Arrest *In flagrante delicto* or immediately after the offence Report to the police concerning the arrest	Art. 243 (2) CCP Art. 243 (1) CCP	Police Anyone (citizen's arrest) Other subjects (in particular regulations)	Police arrest cells under the authority of the Ministry of the Interior
As soon as possible As long as it is necessary, max. 48 hours	Informing the public prosecutor if the police deems the application for a detention order necessary, or release Application for a detention order by the public prosecutor; the detainee must be handed over to the court	Art. 244 (4) CCP Art. 248 (1) and (2) CCP	Police Public prosecutor	
24 hours; not more than 72 hours altogether	Informing the arrested person about the charges against him or her (acquiring the formal status of a suspect), Hearing by a competent judge Decision to order detention or not	Art. 313 para 1-4 CCP Art. 250 para 2 CCP		
Fixed term, max. 3 months	Initially ordered detention	Art. 263 (1) CCP	District Court competent for the place where the investigation is conducted	Remand Prisons under the Ministry of Justice
12 months	Extension of detention during the pre-trial investigation due to special circumstances	Art. 263 (2) CCP	Court of the first-instance trial	

24 months	Time limit including the trial phase until the first instance judgement, also if the sentence (in another case) is served at the same time, see CC case of Jarosław M.	Art. 263 (3) CCP		
Fixed term exceeding 24 months	Extension only in extraordinary circumstances enumerated in the provision	Art. 263 (4 and 4a) CCP	Appelate Court	

3.4 Competent authorities for arrest/ further detention etc.

An overview of competent authorities during the different stages from apprehension to detention can be seen in Table 2. A first arrest can be ordered and enforced by any person (including the police) if the person concerned is caught in the act (*in flagrante delicto*) and might abscond and/or if the person's identity cannot be established. If the person was not arrested by the police, he or she has to be brought to the police without delay (Art. 243 (2) CCP). Apart from the right to apprehend offenders that everyone is entitled to, the police can arrest a person if there is a "good reason to suppose" that he or she has committed an offence and further grounds for arrest exist (see below).

The police remain competent to take measures needed for collecting information essential to the proceedings (Art. 244 (4) CCP). The public prosecutor comes into play relatively late and only when the police are of the opinion that grounds for detention (see below) exist and a motion to the court should be filed by the public prosecutor to apply for such a detention. If this is not the case, the person has to be released as soon as the necessary procedural steps have been taken by the police (and therefore the grounds for arrest cease to exist, Art. 248 CCP). If a motion to apply for detention seems to be justified, the arrested person has to be brought before the competent judge (for the timeline, see above). Polish law does not know the institution of an "investigating judge". The law speaks of "the court" in Art. 250 (1) CCP, explaining that the competent court is the District Court where the proceedings are pending or, in cases where a decision has to be taken without delay, "another District Court". If an indictment had already been filed before, the court, before which the proceedings are pending, is competent. Competent is the court (and judge) that is responsible for the trial in first instance. The court of the district where the proceedings are pursued remains competent also for the decision to extend the initially ordered detention period for up to 24 months. Only then, the Court of Appeals has to decide whether another extraordinary extension can be granted. With regard to the competencies for the respective legal remedies, see paragraph 5.

3.5 Procedure and procedural rights of the accused at the time of arrest/during detention

According to Art. 41 (2) PC, a person is entitled to appeal to a court to immediately decide upon the lawfulness of the deprivation of liberty, as well as to immediate notification of his/her family or friends. Art. 41 (3) PC lays down that an arrested person shall be informed "immediately and in a manner comprehensible to him, of the reasons for such detention". These guarantees are specified in the CCP: After his/her arrest, a person shall be informed immediately about the reasons for the arrest and about his rights, and he/she shall be heard. It is important to note, however, that this is not the official charge and the hearing by the police is rather informal. At this stage, the arrested person officially does not have the status of a "suspect" but (merely) of a "suspected person".[38] Therefore, the person only has to be informed about the reasons for his or her arrest, and a record of the arrest and the statements by the arrested person has to be created. The person arrested shall also be given the opportunity to contact a lawyer upon demand and talk directly to him, although the police may be present during a conversation between arrestee and counsel (Art. 245 (1) CCP). Upon demand of the arrested person, relatives or friends also have to be notified of the arrest. The right to talk to them directly is not included in the law. Since 2002, it is laid down in a regulation of the Ministry of the Interior that a person apprehended also has the right to see a doctor when he or she bears visible injuries or requests medical assistance.[39]

In the last CPT report from 2004,[40] no particular problems with regard to notification were mentioned by the detainees interviewed. The Committee itself, however, expressed some doubts whether it is useful to let the police perform the notification of custody and not the detainees themselves. With regard to access to a lawyer, most detained interviewed indicated that they had received information on their right to contact a lawyer; however, they made no use of the possibility in practice. This can be explained by the fact that, at that stage of the proceedings, there is no provision in the law for the appointment of an *ex officio* lawyer and the persons concerned simply could not afford a lawyer. This was criticised by the CPT.[41] The CPT further explicitly

38 Kruszynski 2007, p. 184.
39 CPT 2006, § 24.
40 CPT 2006, § 20.
41 CPT 2006, § 21.

criticised the above-mentioned regulation in Art. 245 (1) CCP (allowing a police officer to be present during the conversation between detainee and lawyer) and argued that the right to access to a lawyer includes the right to talk to him in private.[42]

Once the public prosecutor has applied for detention, the person has to be officially charged and comprehensively informed about his or her rights, including the right to remain silent. The court has to hear the arrested person before taking a decision. The requirements for the order of detention are specified in Art. 251 CCP and include the initial time limit, the justification and evidence demonstrating that the accused has committed a certain offence as well as facts explaining the grounds for detention. Also, and this is important with regard to the principle of proportionality, the court has to explain, why no other (less restrictive) preventive measures can be taken.

Two more points are worth mentioning critically with regard to the procedure and rights of the detained persons (the legal remedies with respect to ordering and extending detention are explained in paragraph 5). First, the right to communicate with a defence counsel is restricted in the first two weeks of the investigations. According to Art. 73 CCP, the arrested person and his or her lawyer may only meet (in the presence of the prosecutor or a police officer) if this seems to be necessary to the prosecutor. During this period, the arrested person's correspondence with his/her lawyer may also be censored. According to experts,[43] this provision (that cannot be appealed against) contravenes the European Court of Human Rights' jurisprudence. It is obviously rarely applied; therefore, no problems are mentioned in the latest CPT or Commissioner of Human Rights Reports. The second point, a common problem in many European countries, refers to the restricted right to access to the files during the investigative process – access is only possible with the consent of the investigating authorities.

4. Grounds for pre-trial detention

4.1 Grounds for arrest within the criminal procedure

The justification for an initial arrest has to be distinguished from the justification for detention. According to Art. 243 CCP, persons can be arrested when they are caught red-handed. In cases where they are not arrested *in flagrante delicto* or immediately after the offence, the following prerequisites have to exist: a "good reason to suppose" that the arrested person has committed an offence, and the risk that he/she may go into hiding or that his/her identity cannot be established. Neither reference to the explicit grounds for detention nor a threshold with regard to the (petty) nature of the offence exist in the law with regard to the initial arrest period of 48 hours.

4.2 Grounds and other preconditions for detention

a) Preconditions

In the preparatory proceedings, preventive measures (and among them preventive detention) can only be ordered to a person to whom an order on the presentation of charges has been issued (Art. 249 (2) CCP).[44] For all preventive measures, according to Art. 249 (1) CCP, two requirements have to be fulfilled: a "high probability" that the detainee has committed the offence must exist and evidence has to be presented that substantiates that assumption. A further prerequisite is the observance of the principle of proportionality. As mentioned above, detention can only be ordered if other provisional measures do not suffice. According to Art. 249 (2) and (3) CCP, it *should* not be ordered, when the facts of the case permit the presumption that the court will sentence the accused to a custodial sanction that will be suspended, to a milder penalty like a fine, or to a short unconditional prison sentence, so that the preliminary detention would exceed the final sentence in length. Preliminary detention *may* not be ordered, when the offence carries a penalty of deprivation of liberty not exceeding one year. But both restrictions are irrelevant when the accused

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42 CPT 2006, § 22.

43 Kruszynski 2007, p. 195.

44 That means that the charges must be presented to the suspect. This is done by issuing a decision ("postanowienie") as mentioned in Art. 313 CCP. According to Art. 71 CCP, the suspected person then becomes a suspect ("podejrzany"). After the indictment or its equivalent has been brought to the court, the suspect acquires the status of an accused ("oskarżony"). It has to be noted, however, that the word "oskarżony" (accused) is often used in the CCP in a broad meaning, also referring to suspects.

has remained in hiding or failed to appear when summoned, or when his or her identity cannot be established (Art. 259 (4) CCP). Most crimes are punishable by a longer custodial sanction; still, there is some practical relevance to these provisions, because most of the fiscal crimes and part of the smaller crimes in the Criminal Code do not carry a sentence that would qualify for this prerequisite (e.g. some traffic offences under mitigating circumstances, some lesser offences against honour and personal inviolability, theft of "lesser significance", trespassing etc.). In certain cases of hardship (serious illness, excessive burden on the accused or his family), detention should also be an exception. Finally, it has to be underlined that there is no mandatory pre-trial detention (unlike in former times for recidivists: recidivism as such was a ground for arrest in the former CCP of 1969; mandatory detention was introduced after martial law).

b) Grounds

Art. 258 CCP mentions four grounds for issuing a detention order. These can be roughly labelled as: 1) (the risk of) escape; 2) the risk of obscuring evidence by the accused; 3) the severity of the possible sentence; and 4) the risk of the committal of new offences of a certain gravity. More specifically, detention may be ordered:

- if there is reasonable ground to assume that the accused will escape or hide, particularly if it is impossible to establish his identity or if he has no fixed abode in Poland;
- if there is reasonable ground to fear that the accused will attempt to falsify evidence, make false statements or impede the criminal prosecution in another unlawful manner;
- if the accused is charged for a crime carrying the statutory maximum penalty of deprivation of liberty of a minimum of eight years, or if the offender was already sentenced to a prison term of no less than three years in the first instance;
- if there is reasonable ground to fear that the accused, having been charged with a felony or intentional offence, may commit a further offence endangering life, health or public security, particularly if there is a threat to commit such an offence (these offences include any offence against the life, health or public security, according to the titles of the chapters of the Polish Criminal Code). Please note that the translation "public security" can be somewhat misleading – the crimes referred to are not offences against the peace and quiet of citizens, but terrorism, hijacking, piracy, provoking major disasters, aggravated arson etc.).

Besides these grounds, a separate ground for arrest in expedited proceedings was introduced in Art. 517c § 1 CCP on 12 March 2007. It was, however, recently declared unconstitutional.[45]

With regard to the first ground, it is questionable whether the law promotes an almost *automatic* connection between the status of a homeless person or a foreigner and the risk of absconding. With regard to the third ground, the Commissioner for Human Rights of the Council of Europe, in his 2007 report, stresses that the case-law of the European Court of Human Rights forbids keeping persons in pre-trail detention for a long time solely because of the risk of long-term imprisonment.[46] Such a practice would, according to scholars, be a misunderstanding of Art. 258 (2) CCP because it is clear that, according to the structure of the law, the level of the possible penalty is not a free-standing ground for arrest but must be seen in the context of Art. 258 (1) 1 as one example of a situation where detention might be expedient.

5. Grounds for review of pre-trial detention

To appeal arrest and/or detention, different possibilities exist in Polish law. According to Art. 41 (2) PC, a person is entitled to appeal to a court to decide upon the lawfulness of this deprivation. Thus, when a person is arrested, he or she immediately has the right to an interlocutory appeal with the court (Art. 246 CCP) to have the grounds and legality of the arrest examined. The appeal has to be transferred to the court without delay; the court has to examine the matter immediately. In the event that the court finds the arrest to be unjustified or illegal, it has to rule the immediate release of the arrested person.

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45 Constitutional Court, P 30/07 of 07 October 2008. All judgements of the Constitutional Court can be found (in Polish) at: http://www.trybunal.gov.pl/OTK/otk_dpr.htm.

46 Commissioner of Human Rights 2007, § 38.

The different review procedures with regard to the application of detention are regulated in Art. 252 (1) and 254 CCP, with regard to the extension of remand detention, a specific provision can be found in Art. 263 (5) CCP.

According to Art. 252 CCP, all preventive measures (among which pre-trial detention) can be appealed against by means of a regular interlocutory appeal (Art. 459 pp. CCP) within seven days. The court that issued the respective decision is also competent to decide on this appeal. The appeal has to be brought forward to the deciding court within 24 hours for making a decision (Art. 463 (2) CCP). The accused may also – at any time and without any time limits – move to have pre-trial detention revoked or amended according to Art. 254 CCP. As long as an indictment has not been filed, according to Art. 254 (1) CCP, the public prosecutor has to decide – he can also waive the pre-trial detention order. After an indictment has been filed, only the court is competent. This means that during the investigative stage, the public prosecutor remains master of the procedure.

Against this decision in pre-trial detention matters, another appeal is possible, but not before three months have passed since the negative decision (Art. 254 (2) CCP). The latter restriction was added in 2003 in order to protect the process from malicious obstruction (filing a motion every day etc.).

Another examination of the continued existence of the justification for detention has to be made by the court when deciding about the prolongation of detention after three months (Art. 263 (2) CCP). As far as can be seen, however, no further *ex-officio* examination of detention is foreseen by the law after these three months before it comes to the decision on extraordinary extension of detention after two years (Art. 263 (4) CCP) by the Court of Appeals. If such an extension is granted, this decision can be appealed against before the Court of Appeals (three-judge chamber) in accordance with Art. 263 (5), 254 (3) CCP.

6. Length of pre-trial detention

6.1 General remarks

The legal provisions in the current CCP with regard to the length of detention have been described above. Nevertheless, in the following part of the report, some problematic points in practice shall be reviewed, relying mainly on the reports of the CPT, reports of the Ombudsman and jurisdiction of the Polish Constitutional Court as well as the European Court of Human Rights. A very good overview of the problems can be found in a paper written by the most influential Polish NGO in that field, the Helsinki Foundation for Human Rights (HFHR) [47] with regard to a leave granted by the European Court of Human Rights under § 44 (2) of the Rules of the Court. The HFHR is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland. The HFHR has several times submitted its third-party interventions to the European Court of Human Rights. The said paper is meant to provide the court with an independent expert evaluation of the situation of remand detention in Poland to prepare the case of Jamrozy vs. Poland[48]. It can be said that, with regard to detention, the actual length of remand detention is the most discussed – in its report, the HFHR characterises it as a "structural problem".

6.2 Poland before the European Court of Human Rights

From May 2000 to March 2007, ninety judgements by the ECtHR against Poland relating to Art. 5 III ECHR can be found.[49] The applicants mainly complained about the length of pre-trial detention. 67 of the appeals were successful because Art. 5 III of the ECHR was violated. The problem has also been noted in the Council of Europe - Committee of Minister's Interim Resolution (CM/ResDH/(2007)75) concerning the judgements of the ECtHR in 44 cases against Poland relating to the excessive length of pre-trial detention. In the paper, the HFHR points out

47 English homepage: http://www.hfhrpol.waw.pl/index.php?lang=en

48 Application No. 6093/04, still pending. The paper can be found at www.hfhrpol.waw.pl/precedens/images/stories/**jamrozy**_amicus_final.pdf (last retrieved 15 December 2008). It dates from 4 March 2008.

49 http://cmiskp.echr.coe.int, search for "Poland" and "Art. 5-3" (last retrieved 15 December 2008).

several problems with regard to the application of detention and the reasons for its length, quoting the relevant case-law by the ECtHR. Three cases will be quoted here:

With regard to the precondition of "a reasonable suspicion" for detention, the HFHR states: "23. There is also a problem of non-sufficient knowledge of the standard that following lapse of certain time, persistence of reasonable suspicion no longer suffices to justify the prolongation of pre-trial detention. At the same time, it happens that courts do not examine whether there other grounds justifying the continuation of the deprivation of liberty. What is more, such grounds should be according to ECHR jurisprudence be 'relevant' and 'sufficient' and that it is expected that the national authorities display 'special diligence' in the conduct of the proceedings (Jabłoński vs. Poland, no. 33492/96, 21 December 2000, § 80)".

Examining the severity of the sentence as ground for detention, the HCHR remarks: "24. Another ground that is applicable as a justification of pre-trial detention –likelihood that a severe sentence might have been imposed, is abused. This ground is sometimes invoked in a hypothetical way, without giving specific reasons why in fact a severe sentence may be imposed. 25. Moreover, with the passage of time, this ground becomes less relevant. Furthermore, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (e.g. Drabek vs. Poland, no. 5270/04, § 47, 20 September 2006)." And finally, concerning the nature of the proceeding as a reason for prolonging detention, the HFHR explains:[50] "28. The reason for prolongation of pre-trial detention is often in fact a complicated nature of the case (so called 'rozwojowy charakter sprawy'). Prosecutors file motions for pre-trial detention expecting that in future - in the course of proceedings – they will obtain new evidence confirming the criminal responsibility of the suspect. In this way, pre-trial detention is becoming an instrument for prosecutors to 'convince' suspects to provide expected information. (…) The Court has in its jurisprudence called for reassessment of the grounds of pre-trial detention while prolongation of it is made in the light of evidence that was progressively obtained (Ilijkov vs. Bulgaria, no. 33977/96, §§ 80-81, 26 July 2001, Łatasiewicz vs. Poland, …). Polish courts sometimes act contrary to this rule – they prolong the pre-trial detention giving the same grounds as at the beginning."

6.3 The Polish Constitutional Court

As mentioned above, Art. 263 CCP was challenged before the Constitutional Court (decision of 10 June 2008) in the case of Jarosław M., who successfully filed a constitutional complaint:[51] He received a final sentence of four years in case A while he was in pre-trial detention in case B. The sentence in case A was due to be enforced, when in the pending case B, the court of first instance prolonged pre-trial detention by arguing that according to the Supreme Court's jurisprudence remand detention from other proceedings cannot be taken into account when the limit of the two-year period in Art. 263 § 3 is assessed. The Constitutional Court rejected this argument by arguing that the current jurisprudence of the Supreme Court made it possible to prolong this two-year-period without a decision of the Court of Appeal, and in fact prolong it as long as needed without the consent and the control of the competent Court of Appeal. In its decision, the Constitutional Court underlined that pre-trial detention is the most invasive preliminary measure that can be applied against a suspect (emphasizing the presumption of innocence). Its prerequisites have to be absolutely precise and unambiguous; Art. 263 as a whole, however, is unclear. The Polish CCP does not regulate the problem of the collision of an enforceable prison sentence and pre-trial detention. Thus, the courts used the opportunity to create an "extra-legal" judicial practice, which in fact contravened the regulation of competences concerning extended periods of pre-trial detention. This interpretation of Art. 263, enabling the courts to exclude the period of (parallel) execution of a penalty of imprisonment from the maximum period of provisional detention (two years) was, as a consequence, declared unconstitutional.

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50 Another, more recent, example for the court findings is the case of Kąkol vs. Poland (Application No. 3994/03, decision of 06 September 2007). The court accepted the complicated nature of the proceedings (with very many defendants) and also accepted that "certain delays during the trial were caused by the defendants' obstructiveness". Still, it considered a period of six years and six months of detention (still pending trial!) as too long.

51 http://www.trybunal.gov.pl/Rozprawy/2008/Dz_Ustaw/sk_17s07.htm (in Polish, last retrieved 15 December 2008).

7. Other relevant aspects

7.1 Consideration of pre-trial detention in the sentencing stage

According to Art. 63 of the Polish Criminal Code and Art. 417 CCP, pre-trial detention shall be counted as part of the sentence – one day of pre-trial detention corresponds to one day of deprivation of liberty. As mentioned in Art. 63 CC, "one day of actual deprivation of liberty" equals one day of the penalty of imprisonment, meaning that the deduction has to consider the time from the actual arrest on. No special regulations for the consideration of foreign pre-trial detention can be found in the law; this has to be considered as domestic pre-trial detention.

7.2 Mechanisms for compensation

According to Art. 42 (5) PC, "anyone who has been unlawfully deprived of liberty shall have a right to compensation". According to Art. 552 § 4 CCP, compensation has to be paid for the harm caused by "manifestly unjustified preliminary detention or arrest" (see also Art. 77 of the Constitution). As far as can be seen, for unjustifiable delays in proceedings where detention is involved, a compensation must also be paid: After the ECtHR judgement Kudla vs. Poland,[52] the Act on Complaints for Violation of a Party's Right to Trial within a Reasonable Time of 17 June 2004 was enacted as a measure to speed up procedures. According to media reports, the financial burden on the State Treasury resulting from compensation payments is significant and amounted to 1.3 million Euros in 2006,[53] even though the Commissioner for Human Rights of the Council of Europe, in his 2007 report, states that the level of compensation is "notoriously low or even symbolic".[54] However, it has to be noted that, in practice, this Act has a bigger importance for civil cases. The amount of compensation is not limited with regard to unlawful detention. It is, however, limited to 10,000 PLN (Polish Złoty) with regard to lengthy proceedings.[55]

7.3 Alternatives to pre-trial detention?

According to Art. 249 CCP, initially, several preventive measures exist to safeguard proper proceedings, detention being the *ultima ratio* (see above). Therefore, theoretically, the public prosecutor/court can choose between:

- bail (Art. 266 pp. CCP);
- police supervision (Art. 275 CCP);
- guarantee by a responsible person (Art. 271 CCP);
- guarantee by a social entity (Art. 271 CCP);
- temporary ban on engaging in a given activity (Art. 276 CCP);
- prohibition to leave the country (Art. 277 CCP).

Statistics, however, show that pre-trial detention is not used as *ultima ratio* but that it is the second most common preventive measure, police supervision being the most common one (see Table 3). In 90% of all applications by the public prosecutor, detention is granted by the court.[56] Even if the preconditions for detention are given, the court can amend the initial decision when an agreed bail is posted with the court within the prescribed time limit (see Art. 257 § 2 CCP). The fact that Polish Courts in the past have not been very open to alternatives to pre-trial detention has led to several critical remarks and decisions by the ECHR because the ultima ratio-character of this measure was not even considered.[57]

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52 Application No. 30210/96, decision of 26 October 2000.

53 This information was obtained by the country experts.

54 Commissioner of Human Rights 2007, § 15. See also Lendzion vs. Poland (Application No. 41587/05); the case was struck out of the list due to an agreement between the parties.

55 10.000 PLN are about 2.100 Euro. This maximum amount may be increased to 20.000 due to an amendment of the law currently drafted by the Polish Government (this information was received by the Polish Government via e-mail to the EU commission on 16 February 2009.

56 Source: Statistical Information of the Ministry of Justice and of the Central Prison Administration ("Central Zarzad Sluzby Wieziennej") 2007.

57 See, e. g. Jablonski vs. Poland, application No. 33492/96, decision of 12 December 2000, §§ 83, 84; Cabala vs. Poland, application No. 23042/02, decision of 8 August 2006, 337; for further details and references see Renzikowski 2007, p. 339.

7.4 Execution of pre-trial detention

Art. 41 (4) of the Polish Constitution stipulates that "anyone deprived of liberty shall be treated in a humane manner", thus deducing a positive content from the prohibition of torture and formulating a claim for the individual detainee to humane treatment. With regard to the execution of arrest, regulations by the Ministry of the Interior exist concerning the conditions that must be provided in police cells for detention.[58] The execution of remand detention is regulated in the Code of Execution of Criminal Sentences (ECC) of 6 June 1997. In a special chapter XV, entitled "Temporary arrest" ("Tymczasowe aresztowanie"), Art. 207-223a, regulations with regard to pre-trial detention can be found. In accordance with Art. 209, provisions concerning the execution of prison sentences are applied to the execution of remand detention accordingly, with the exceptions mentioned in this chapter. The main exceptions relate to contacts with the outside world (visits, correspondence, prison leave) and work (non-obligatory, except for unpaid domestic (maintenance) chores within the remand prison etc.).

According to Art. 32 ECC, the supervision of the legality and the proper execution of remand detention shall be exercised by the penitentiary judge. According to Art. 207 ECC, the purposes of preventive measures laid down in the CCP (to secure the proper course of criminal proceedings under conditions prescribed by law) shall also govern the execution of remand detention.

Places of detention are remand prisons under the authority of the Ministry of Justice (Art. 208 CC) and police detention cells (for up to 72 hours) under the authority of the Ministry of the Interior. At the moment, in Poland, seventy remand prisons are in operation.[59]

a) Overcrowding

During its 2004 visit, the CPT delegation reported that it found severe overcrowding with regard to the factual situation in the two visited remand prisons (Warsaw-Mokotow Remand Prison and Cracow Remand Prison). The prison in Warsaw (accommodating remand and sentenced prisoners) was operating at 120% of its official capacity, although the average living space per inmate was approximately 2.5 m^2. The institution in Cracow was slightly less overcrowded (115%), but also provided only 2.5 m^2 or even less living space per inmate. This clearly violated the standards of Polish legislation (even if the minimum space was reduced to 3 m^2 due to overcrowding by a decree in 2006[60]) and was even more unacceptable by CPT standards, which require at least 4 m^2 for prison systems in transition.[61] As indicated above, the numbers of inmates have gone down, so that the situation of overcrowding might be less pressing today. In the 2007 published Report of the Commissioner of Human Rights of the Council of Europe, it was acknowledged that the Polish government had taken steps against overcrowding but at the same time it was criticised that, in reality, these had not been effective.

b) Living conditions

With regard to arrest cells (police custody), in some cases, the CPT reports a poor state of repair and/or cleanliness, as well as problematic conditions with respect to the use of toilets. Although usually the duration of the stay is less than 72 hours, areas for outdoor exercise would be necessary; these areas were missed in all visited police custody facilities.[62]

With regard to overcrowding in remand prisons, in this context it is also important to note that, due to overcrowding, practical living conditions are often problematic and may sometimes even amount to inhuman or degrading treatment. Corresponding observations, however, have been not been made by the CPT. But it clearly disapproved of the fact that in many cells three tiers of bunk beds were used. It also criticised the fact that, due to overcrowding, the staff-prisoner ratio was bad and that particularly remand prisoners frequently "spent up to 23 hours a day languishing in their cells".[63]

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58 CPT 2006, § 31.
59 ICPS 2008.
60 "Decree on Overcrowding of 2006", cited in *Commissioner of Human Rights*, 2007 § 32,
61 CPT 2006, §§ 81 and 97.
62 CPT 2006, §§ 33-36.
63 CPT 2006, §§ 91 and 101.

c) Contacts with lawyers and the outside world, mail and censorship

Another particularly problematic point is the detainee's contact with lawyers, relatives and friends – with regard to receiving visits as well as parcels, making phone calls, and sending and receiving letters.

In his 2002 report, the Commissioner of Human Rights observed that officially appointed lawyers rarely visit detainees in prison. In the 2007 report, it was again underlined that direct contact with a lawyer is of crucial importance while being detained awaiting a possible prison sentence, and that the Polish government should therefore encourage personal contacts with adequately remunerated lawyers.[64]

With regard to contact with the outside world, the CPT reports of 2000 and 2004 contain critical remarks on the restrictive rules on visits and correspondence as well as the blanket ban on telephone calls for remand prisoners. During its 2004 visit, the delegation observed that the vast majority of inmates spent long periods without personal contacts and correspondence because they were not allowed to receive visits and letters/parcels.[65] Additionally, far-reaching and routine use of censorship was reported by the Commissioner of Human Rights, also referring to nine judgments where the ECtHR found a violation of Art. 8 ECHR.

Pursuant to Art. 217 ECC, a detainee is allowed to receive visitors, provided that he obtained permission from the investigating prosecutor (at the investigative stage) or from the trial court (once the trial has begun). Problems in that regard can be illustrated by the case of Ferla vs. Poland:[66] The applicant was allowed to have contact with his wife and young son only once in a period of almost one year. The court argued that the duration and the nature of the restriction on the applicant's contact with his close family went beyond what was necessary in a "democratic society to prevent disorder and crime" and to secure a proper criminal procedure. The measure in question reduced the applicant's family life to a degree that could not be accepted. A violation of Art. 8 of the ECHR was found.

d) Complaints and inspection procedures

As indicated above, Polish detention facilities are visited by different institutions to exercise monitoring functions. In this report, frequent use was made of the observations by the Polish Ombudsman, the CPT and the European Commissioner of Human Rights. The law also foresees the Penitentiary Judge as an institution that receives formal complaints from remand detainees (Art. 208 ECC) and performs inspections. According to the observations of the CPT, detainees are usually given the necessary information about complaints procedures, and make use of them. In particular the visits of the Penitentiary Judge to Cracow Remand Prison – which were announced to the prisoners in advance – and the fact that the detainees could talk to him in private were mentioned as example of good practice.[67]

8. Special groups

8.1 Juveniles[68]

As a rule, there are no detainees under 17 in Polish prisons. In Poland, juveniles – persons between 13 and 16 years of age – are generally not criminally responsible. However, in very exceptional cases, penalties provided for by the Criminal Code (including imprisonment) may be imposed on juveniles who have committed an extremely serious offence while being 15 or 16 years of age. The situation is much the same for pre-trial detention for juveniles – this is possible only in exceptional cases. According to prison statistics, in 2007 (as of 31 December), there were only five persons aged 15-16 detained on remand in detention facilities for adults.[69] With regard to young prisoners, statistics show that 19% of all remand prisoners were young detainees under the age of 21. (According to prison statistics, in 2007, there were 1,787 persons aged 15-21 in remand prisons. See also Table 1.)

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64 Commissioner for Human Rights 2007, § 41.
65 CPT 2006, §§ 132, 133.
66 Application No. 55470/00, decision of 20 May 2008.
67 CPT 2006, p. 138.
68 See for more details, Stando-Kawecka 2009.
69 Central Administration of the Prison Service 2007, data available online: www.czsw.gov.pl

Still, it is possible to detain children in police establishments according to Art. 40 of the JA for 1982. A juvenile suspected of committing a "punishable act" at the age of 13 or above may be detained in a special police institution for juveniles for a period not exceeding 72 hours. Detention of a juvenile in such an institution should be immediately notified to parents or guardians as well as to the family court. In practice, juveniles suspected of an offence tend to remain in the police institutions for a period exceeding 72 hours due to the lack of place in the youth educational institutions and youth detention facilities (placement there can be ordered by a family judge as a provisional measure). The CPT reports indicate that often juveniles are in police detention for lengthy periods because of the lack of adequate accommodation facilities in correctional establishments.[70] It criticises several points, among which the fact that children were not allowed to keep personal items, only very little constructive activities were offered (this was also true for physical education and outdoor exercise), and personal contact with the outside world was very limited. Visits required the permit of the public prosecutor or court and several children obviously have not had visits for over a month. They were not medically screened.

With respect to other preventive or preliminary measures, the possibilities range from supervision – by a probation officer, another trustworthy person, an employer or a youth organisation – to placement in a public health institution, a youth educational or socio-therapeutic centre, a school-educational centre for disabled children, or a special detention facility for juveniles. These measures have to be imposed by a family judge or a family court. In some cases, placement in a youth detention centre may be ordered as a provisional measure, if there is a risk of escape or of the destruction of evidence, or if it is impossible to establish the juvenile's identity.

8.2 Women

Out of the 11,441 remand detainees at the end of 2007, only 524 were women. This is a share of 4.6%, which is higher than the percentage of women in the overall prison population (approximately 3%).[71] In accordance with the Code on the Execution of Criminal Sentences, women must be separated from men. According to the assessment of the CPT, this is systematically done. The Constitutional Tribunal ruled out far-reaching restrictions on remand detention for pregnant women. As a reaction to this decision, an amendment to the CCP is being planned, which will totally exclude detention of pregnant women.[72]

8.3 Foreigners[73]

As in many other Eastern European countries, the share of foreigners in Polish prisons is small. It amounted to 0.8% at the end of 2005 (655 out of 82,955 prisoners) and to 0.7% on 30 November 2008.[74] The highest percentage could be found in 1995/1996: 2.4%. With regard to foreigners in remand detention, the percentage is slightly higher. According to prison statistics,[75] on 30 November 2008, there were 542 foreigners from 58 different countries (including eight persons without any citizenship) in prisons and remand prisons; among them, 254 were detained on remand (this is 2.6% of all remand prisoners; see also Table 1 with slightly older data). As for the EU countries, there were 183 persons deprived of their liberty from twenty different EU Member States, including 109 detained on remand and 74 sentenced. In recent years, the percentage of suspected foreigners was generally lower than the percentage of foreigners among the overall prison population: In 2005, 0.5% of all suspects were foreigners; the highest percentage dates from 1997 (2.0%). Obviously, this has changed over the last years, as the current data show: The share of foreign prisoners in the overall prison population is still only 0.7%, their share among the remand prisoner population is higher. It remains to be seen whether this marks a trend.

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70 CPT 2006, § 10.

71 ICPS 2008.

72 I would like to thank A. Swiatlowski for this information.

73 All data in this part of the report (if not indicated otherwise) from Stando-Kawecka (2007): "Poland". In: van Kalmthout, A., Hofstee-van der Meulen, F., Dünkel, F. (eds.): *Foreigners in European Prisons*. Wolf Legal Publisher 2007, p.661-687.

74 ICPS 2008.

75 Available at http://www.sw.gov.pl/index.php/statystyki/51 (in Polish). The countries of origin of the remand prisoners can be found in table 14.

8.4 Alleged terrorists

No specific regulations exist concerning the ordering and execution of remand detention with regard to alleged terrorists.

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