The Role of the ECtHR in the Polish Legal Order

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Abstract

In this article, the impact of the ECtHR's judgments on Polish law is presented through examination of chosen case law. The discussion starts by depicting the influence of the ECHR and ECtHR's rulings on Polish constitutional law and the judicial interpretation of Polish law. An analysis of chosen measures implemented in Poland to abide by rulings of the Court follows. These are presented on example of cases involving criminal proceedings and post-communist issues. The subsequent section addresses issues that arose due to misuse of discretion by public servants, including the right to marry of a detainee or a prisoner and the refusal to terminate of a pregnancy in spite of conditions permitting pregnancy termination. The source of these difficulties is not the law itself, but its enforcement and the way in which human rights are balanced against other rights protected by the legislation.

I. Introduction

Poland signed the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention of Human Rights, hereinafter as the ECHR or the Convention) on 26 November 1991 and ratified it on 1 January 1993.[1] Since 1 May 1993, the European Court of Human

1 <conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=POL&MA=999&SI=2&DF=&CM=3&CL=ENG> accessed 25 September 2017; Dz. U. z 1994 r. Nr 118, poz. 565. See also T Astramowicz-Leyk, *Międzynarodowe systemy ochrony praw i wolności człowieka* (Olsztyn, OSW, 2009) 44.

Rights in Strasbourg (the ECtHR or the Court) has had jurisdiction over Poland.[2]

Within the first 12 years of the ECtHR's jurisdiction over Poland, 1099 judgments concerned claims against Poland. Of those judgments, in 925 cases at least one violation was found. At the end of 2015, about 39 % of the violations found in judgments against Poland by the ECtHR infringed Art. 6 of the Convention due to excessive and lengthy proceedings. Breaches against the right to liberty and security (Art. 5 of the Convention) made up 27 % and infringement of the right to a a fair trial (Art. 6 of the Convention) constituted another 9 % of all the violations. Almost 10 % of the violations were based on disregard of the right to respect private and family life (Art. 8 of the Convention); while the remaining 15% transgress other provisions of the ECHR.

Both the number of judgments made against Poland and the number of cases which include at least one violation, have decreased in recent years. For example, in 2015 there were only 29 judgments against Poland and in only 20 of them was a violation identified. This might be a result of Poland adopting general measures to implement the rulings of the Court. However, as will be shown, prevention of future violations requires not only amending currently binding law, but also educating authorities about exercising their discretion in a manner that respects human rights. Providing effective mechanisms that will allow balancing rights of involved individuals might be especially important in cases concerning sensitive issues, such as a termination of a pregnancy and a doctor's right to adduce the conscious clause.

In this article, the impact of the ECtHR's judgments on Polish law is presented through examination of chosen case law. The discussion starts by depicting the influence of the ECHR and ECtHR's rulings on Polish constitutional law and the judicial interpretation of Polish law. An analysis of chosen measures implemented in Poland to abide by rulings of the Court follows. These are presented on example of cases involving criminal proceedings and post-communist issues. The subsequent section addresses issues that arose due to misuse of discretion by public servants, including the right to marry of a detainee or a prisoner and the refusal to terminate a pregnancy in spite of conditions permitting abortion. The source of these

2 Dz. U. z 1993 r. Nr 61, poz. 286. See also M Matysiak, 'Polska w systemie ochrony praw człowieka Rady Europy' in L Koba, W Wacławczyk (eds), *Prawa człowieka, Wybrane zagadnienia i problemy* (Warszawa, Wolters Kluwer Polska, 2009) 90.

difficulties is not the law itself, but its enforcement and the way in which human rights are balanced against other rights protected by the legislation.

II. Impact of the ECtHR's Judgments on Polish Constitutional Law and Judicial Interpretation of Polish Law

The number of violations identified by the ECtHR might be surprising if one considers the impact the ECHR has had on constitutional law and judicial interpretation of law in Poland.

The Polish Constitution is relatively young as it came into force on 2 April 1997.[3] It adopted international standards of human rights provided under *inter alia* the ECHR, Universal Declaration of Human Rights, International Convention on Civil and Political Rights and International Convention on Economic, Social and Cultural Rights.[4] Chapter II of the Constitution (containing a total of 56 articles) regulates freedoms, rights and obligations of persons and citizens. Human rights provided under the Convention are reflected, e.g. under Art. 38 of the Polish Constitution providing the protection of human life, Art. 45(1) guaranteeing the right to a fair trial, and Art. 47 protecting private and family life.

Furthermore, the Polish Constitutional Tribunal is obliged to take into account the entire ECtHR's case law when considering the conformity of law with the Polish Constitution and international conventions ratified by Poland. The Tribunal confirmed this on 11 December 2011 by stating that:

> the necessity to take into consideration the existence of the ECtHR's judgments in the course of actions of internal authorities obligates also the Constitutional Tribunal to apply – within the frame of constitutional control – the principles and methods of interpretation leading to mitigation of possible collisions between the standards resulting from applied Polish law and those shaped by the ECtHR (…) and adopting such evaluation so as to take into account the standards developed in the ECtHR's judgments, on the grounds of

3 Dz.U. z 1997 r., Nr 78 poz. 483 with changes.

4 M Masternak-Kubiak, 'Konstytucyjna zasada ochrony praw jednostki a odpowiedzialność państwa za prawa człowieka w stosunkach międzynarodowych' in Z Kędzia, A Rost (eds), *Współczesne wyzwania wobec Praw Człowieka w świetle polskiego prawa konstytucyjnego* (Poznań, Wydawnictwo Naukowe UAM, 2009) 227; W Skrzydło, 'Konstytucyjny katalog wolności i praw jednostki' in M Chmaj, L Leszczyński i inni (eds) *Konstytucyjne wolności i prawa w Polsce*, *Zasady ogólne*, *Tom I* (Krakow, Zakamyczek, 2002) 42, 46.

> the Convention for the Protection of Human Rights and Fundamental Freedoms (…) in their fullest scope.[5]

In addition, the ECHR and the rulings of the ECtHR have a significant impact on the interpretation of Polish law in creating standards of human rights protection. In 1994, three years after ratifying the Convention and a year after Poland was placed under the jurisdiction of the ECtHR, the Polish Supreme Court stated that 'since the Polish accession to the European Council, case law of the ECtHR in Strasbourg can and should be considered during the interpretation of Polish law.'[6] Under Polish law the ECHR is 'an international agreement ratified upon prior consent granted by statute' which has 'precedence over statutes if [*it*] cannot be reconciled with the provisions of such statutes' and as such, can serve as legal grounds for starting a legal procedure in front of a Polish court (Polish Constitution, Art. 91(1) and (2)).[7]

The analysis of the influence of the Convention and the judgments of the ECtHR on Polish constitutional law shows that, at least theoretically, the Polish legal system is built on the same values that are protected under the ECHR and by the ECtHR. Therefore, the number of violations found in judgments against Poland may surprise. These violations indicate that norms adopted in specific statutes disregard not only the international human rights standards but also the Constitution – the supreme law of the Republic of Poland (Art. 8 of the Polish Constitution). Enforcement of these norms proves significant discrepancies existing within the Polish legal system.

III. Measures Taken by Poland

Art. 46(1) of the Convention obliges Poland to undertake and abide by the final judgment of the ECtHR in any case to which Poland is a party.[8]

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5 Wyrok Trybunału Konstytucyjnego z dnia 11 grudnia 2012 r., sygn. akt K 37/11, Dz. Ust. z 2012 r. poz. 1447 pkt III 3.1.3. See also Wyrok Trybunału Konstytucyjnego z dnia 18 października 2004 r., sygn. P 8/04, OTK ZU nr 9/A/2004, poz. 92, pkt III 2.4; Wyrok Trybunału Konstytucyjnego z dnia 19 lipca 2011 r., sygn. K 11/10, OTK ZU nr 6/A/2011, poz. 60, pkt III 3.3.

6 Orzeczenie Sądu Najwyższego z dnia 11 stycznia 1995 r., sygn. akt III ARN 75/94.

7 See also Masternak-Kubiak, 'Konstytucyjna zasada' 228-229.

8 Only chosen legal aspects of the hereinafter discussed ECtHR's cases are presented. To see all the legal issues raised by the Court, see the particular rulings.

Therefore, judgments of the Court and violations identified in them have forced the Polish legislature to adopt measures that prevent future infringement of the ECHR. Most violations identified by the ECtHR were in cases involving law of criminal procedure and penitentiary law. Therefore, legislation in these areas of law underwent the most change. However, the rulings of the ECtHR also influenced other areas of Polish law, e.g. assisting regulation of post-communist issues. Notably, some standards clarified by the ECtHR, such as legal termination of a pregnancy under particular circumstances, have encountered significant opposition in the Polish Parliament and society.

A. Criminal Procedure

The ECtHR's judgments inspired the Polish Parliament to modify the Code of Criminal Procedure.[9] The initial cases brought to the ECtHR were decided by Polish courts under the Code of Criminal Procedures adopted on 19 April 1969.[10] This Code was replaced by the Code of Criminal Procedure (in Polish: 'Kodeks Postępowania Karnego' translated and abbreviated as KPK or the Code) on 1 September 1998.[11] Although, the new Code implemented some of the ECtHR's judgments, it has since been systematically amended to comply with the ECHR.

The first violations identified under Polish criminal law were delays in bringing Polish criminal law and the law of criminal procedure to the ECHR's standards. However, most of these laws were already amended in the 1990 s.[12] Throughout the next decade, most of the judgments imposing further changes to Poland's human rights legislation concerned pre-trial detention and its duration.[13] These legal issues, as well as problems with

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9 The changes have been often simultaneously required by the Polish Constitutional Tribunal; see also P Hofmański, S Zabłocki, 'Pozbawienie wolności w toku procesu karnego. Wybrane aspekty konstytucyjne i prawnomiędzynarodowe' in J Skorupka (ed), *Rzetelny Proces Karny. Księga jubileuszowa Zofii Świdy* (Warszawa, Wolters Kluwer, 2009) 513.

10 Dz.U. 1969 nr 13 poz. 96 with changes.

11 Dz.U. 1997 nr 89 poz. 555 with changes.

12 P Hofmański/L Garlicki (ed), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności Komentarz do Artykułów 1-18*, *Tom I* (Warszawa, Beck, 2010) 157.

13 Ibid 157, 234.

unreasonably lengthy criminal proceedings, still recur in the ECtHR's judgments against Poland today.[14] Therefore, the cases chosen for the analysis highlight these difficulties but also describe some changes made to Polish law in the first decade.

A number of cases heard by the ECtHR consider violations of liberty and security of persons under Art. 5 of the Convention, especially for pre-trial detention. A violation of Art. 5(1) of the Convention was found in e.g. *Ambruszkiewicz v Poland*[15] due to insufficient grounds for applying detention on remand and failure to adopt any other, less intrusive, preventive measures available under Polish criminal law.[16] Mr Ambruszkiewicz was held in custody for over two months 'to guarantee the proper conduct of the criminal proceedings' and to prevent him from absconding,[17] as he had left the courtroom without the court's authorization. The ECtHR found 'neither the complexity of the case nor [*Mr Ambruszkiewicz's*] potential sentence would have made him more likely to abscond' and 'nothing in [*Mr Ambruszkiewicz's*] background (…) might suggest that he had been likely to obstruct the proper course of the proceedings.'[18]

The current Code stipulates that pre-trial detention can be ordered only when no other preventive measure is sufficient (Art. 257 § 1 KPK)[19] and requires an explanation as to why other preventive measures were insufficient (Art. 251 § 3 KPK). The recent amendments of the Code of Criminal Procedure, which came into force on 1 July 2015, further clarify the grounds for detention on remand to comply with the ECtHR's rulings. For example, a pre-trial detention will not be enforced if an accused is charged with a crime for the commission of which he may be liable to a statutory maximum sentence of two years imprisonment; rather than, as it was before 2015, one year of imprisonment.[20] Moreover, Art. 258 KPK, which regulates conditions for applying preventive measures, changed its mean-

14 Ibid 222.

15 *Ambruszkiewicz v Poland* App no 38797/03 (ECtHR, 4 May 2006).

16 Ibid, paras 32-33.

17 Ibid, paras 7, 29.

18 Ibid, para 30.

19 See also A Kiełtyka, 'Środki zapobiegawcze w polskim procesie karnym a ochrona praw człowieka' in E Dyni, C P Kłaka (eds), *Europejskie Standardy Ochrony Praw Człowieka a Ustawodawstwo Polskie* (Rzeszów, Wydawca Mitel, 2005) 245-246.

20 *Ustawa z dnia 27 września 2013 o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw* (Dz.U. z 2013 r. poz. 1247), Art. 1 pkt 75. That is

ing to emphasize that detention on remand is only one of many preventive measures; instead of, as it was earlier, the main measure applied if the conditions for applying preventive measures are met.[21] Further, the motion's content and the grounds for detention on remand during preparation proceedings were tightened (Art. 250 § 2 a KPK).[22]

Another provision of the Convention namely, Art. 5(4) provides that a person deprived of liberty 'by arrest or detention' has a right to 'take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.' This right was violated in e.g. *Włoch v Poland*,[23] where the Court identified the lack of 'fundamental guarantees of procedure applied in matters of deprivation of liberty' and failure to provide a speedy review of the lawfulness of detention on remand.[24] The first finding was based on a violation of the principle of equality of arms.[25] In this case, neither the accused nor his lawyer was entitled to attend a court session during which the appeal from detention on remand order was considered[26] and neither he nor his lawyer could access the case file while advancing arguments against the detention order.[27] Further, the judicial decision concerning the lawfulness of continued detention of Mr Włoch was not 'speedy' as it was given by the Włocławek Regional Court some three months after a prosecutor ordered the detention.[28]

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with the exception of when a person was caught committing a crime (Art. 259 § 3 KPK).

21 Ibid.

22 Ibid, Art. 1 pkt 70.

23 *Wloch v Poland* App no 27785/95 (ECtHR, 10 May 2011) [*Wloch*].

24 Ibid, paras 131, 136.

25 Ibid, para 124; see also *Klamecki v Poland* App no 31583/96 (ECtHR, 3 April 2003) [*Klamecki*]; *Niedbała v Poland* App no 27915/95 (ECtHR, 4 July 2000) [*Niedbała*].

26 *Wloch*, para 129; however, in this case, by way of exception, the Cracow Regional Court allowed the accused's lawyers to address the court, but asked him to leave before the prosecution made further submissions.

27 Ibid, para 130.

28 Ibid, paras 129, 133, 135; in an earlier case, *Klamecki*, ECtHR stated that 'a prosecutor did not offer these necessary guarantees because the prosecution authorities not only belonged to the executive branch of the State but also concurrently performed investigative and prosecution functions in criminal proceedings and were a party to such proceedings. Furthermore, it has considered that the fact that the prosecutors in addition acted as guardian of the public interest could not by itself confer on them the status of "officer[*s*] authorised by law to exercise judicial pow-

The current Code provides, *inter alia*, the accused and his defender with access to case files during a court proceedings (Art. 156 § 1 KPK). However, the regulation concerning the right to access and copy case files by a defender during the preparation procedure was criticized because the secrecy of files was given priority over the right of a defender to a defense. Hence, when considering the presentation of arguments, the defender was put in a situation apparently worse than the prosecution.[29] Further, before 28 August 2009, the Code did not explicitly require providing reasons for limiting this right during the preparation proceedings and provided the person leading the investigation with unlimited discretion to grant or refuse access to the case files.[30] Directed by the ECtHR's case law, the Polish Constitutional Tribunal found these regulations contradictory to Polish law.[31] Therefore, an amendment that came into force on 2 June 2014, provides equality of arms by guaranteeing, *inter alia*, the accused and his defenders the right to access case files during the preparation proceedings. An exception is allowed where there is a need to secure the correct track of the proceedings or to protect an important state interest (Art. 156 § 5 KPK).[32] Further, since 2 June 2014, if there is a motion to detain or to extend the pre-detention, the case files, in the part relating to the motion, are speedily made accessible to the accused and his defender(s) (Art. 156 § 5 a KPK). The lack of this privilege for the detainee was earlier criticized both by Polish scholars and by the ECtHR.[33] Additionally, since 1 July 2003, rights of a detainee during appeal hearings have been increased. For instance, a court of appeal, on the motion of the accused that is detained, orders bringing the accused to the appeal hearing unless

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er"' (para 105). See also *Niedbała*; *Dacewicz v Poland* App no 34611/97 (ECtHR, 2 July 2002); M Wąsek-Wiaderek, 'Dostęp do Akt Sprawy Oskarżonego Tymczasowo Aresztowanego i Jego Obrońcy w Postępowaniu Przygotowawczym – Standard Europejski a Prawo Polskie' (2003) 3-4 *Palestra* 55, 58.

29 Ibid, 65; J Skorupka, 'Stosowanie i przedłużanie tymczasowego aresztowania w postępowaniu przygotowawczym' (2006) 12 *Prokuratura i Prawo* 109, 119-121; M A Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka* (Warszawa, Wolters Kluwer, 2013) 503-504.

30 See Wąsek-Wiaderek, 'Dostęp do Akt Sprawy' 65.

31 Hofmański/Garlicki, *Konwencja o Ochronie* 214-215.

32 The person leading the preparation proceedings orders the access. *Ustawa z dnia 16 lipca 2009 o zmianie ustawy – Kodeks postępowania karnego* (Dz. U. z 2009 r. Nr 127 poz. 1051), Art. 1; Skorupka, 'Stosowanie i przedłużanie' 122.

33 Wąsek-Wiaderek, 'Dostęp do Akt Sprawy' 66, 69-70.

the court decides that the presence of the accused's defender is sufficient.[34] The court must instruct the accused of his right to make such a motion. If the accused does not have a defender, the court assigns a public defender to him (Art. 451 KPK).[35] In order to comply with the requirement of 'speediness' of the court's decision on lawfulness of detention under the ECHR, the amendment of the Code that came in force on 1 July 2015 provides that appeals against an order of pre-detention must be reviewed by a court speedily. This means 'no later than within 7 days after the appeal with the necessary case files were handed over to the court' (Art. 252 § 3 KPK).[36] Moreover, the current Code of Criminal Procedure satisfies the requirement that a person deprived of liberty is to be brought before a 'judicial power' by providing that only a court, not a prosecutor, can order pre-detention (Art. 250 § 1 KPK).[37]

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34 According to an amendment that came into force on 1 July 2015, an accused has a right to participate in the court hearing; a court may oblige the accused to take part in the hearing. The amendment from 2003 was induced by, *inter alia*, the ECtHR's ruling in *Belziuk v Poland* App no 45/1997/829/1035 (ECtHR, 25 March 1998), where the Court found 'a violation of Art. 6 § 1 taken in conjunction with Art. 6 § 3(c) of the Convention,' as Mr Belziuk could not take part in the appeal hearing, as the court did not agree to bring him from prison, there was no lawyer acting on his behalf and no one else represented his interests at the appeal.

35 *Ustawa z dnia 10 stycznia 2003 r. o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające Kodeks postępowania karnego, ustawy o świadku koronnym oraz ustawy o ochronie informacji niejawnych* (Dz. U. z 2003 r. Nr 17 poz. 155) Art. 1, pkt 185.
The presence of a detainee during an appeal from a detention order is not separately regulated.

36 *Ustawa z dnia 27 września 2013 o zmianie ustawy,* Art. 1 pkt 72(b). This change came into force on 1 July 2015. Before it came into force, the appeal needed to be reviewed speedily, but there was no deadline for the court.

37 This change was introduced to the previous Code of Criminal Procedure on 29 June 1996 as a result of the ratification of the ECHR by Poland and the ECtHR's rulings *Niedbała* and *Baranowski v Poland* App no 28358/95 (ECtHR, 28 March 2000) [*Baranowski*]. In the first case, the Court stated that prosecutor had no judicial statute under Polish law, was a party of the criminal proceedings and was subject to the supervision of the executive branch of the Government; therefore prosecutor's decisions did not meet the standard of independence required by Art. 5 § 3 of the Convention (*Niedbała,* paras 52-55). In the second case, the Court found, *inter alia*, that detaining a person 'for an unlimited and unpredictable time and without his detention being based on a concrete legal provision or on any judicial decision is in itself contrary to the principle of legal certainty' (*Baranowski*, para 56). See also Hofmański/Garlicki, *Konwencja o Ochronie* 202-203.

However, the most problematic for Polish authorities seems to be compliance with Art. 5 (3) of the Convention, particularly with its part stating that 'everyone arrested or detained (…) shall be entitled to trial within a reasonable time or be released pending trial.' This issue was noticed by bodies concerned with the adoption of human rights in Poland. For example, the Committee of Ministers of the Council of Europe adopted a resolution on 6 June 2007, in which it encouraged Poland to, *inter alia*, continue examining and implementing further measures to limit the time of detention on remand. They also encouraged Poland to undertake measures to increase awareness among judges and prosecutors with regard to detention on remand and the possibility of adopting alternative preventive measures.[38] The Council of Europe's Commissioner for Human Rights released a 'Memorandum to the Polish Government' on 20 June 2007 in which it urged Poland to undertake measures aimed at preventing excessive length of criminal procedures and increasing dissemination of the ECtHR's rulings.[39] Also, Polish scholars found that judgments made in cases against Poland were often caused by inadequate adoption of law and persistent inaction of Polish prosecutors and judges.[40] In that respect, in February 2009, the ECtHR observed that:

The solution binding before 1996 was criticized in the literature, see e.g. B Gronowska, 'Polskie Rozwiązania Dotyczące Zatrzymania i Aresztu Tymczasowego w Świetle Uniwersalnych Standardów Ochrony Wolności i Bezpieczeństwa Osobistego' in J Skupiński (ed), *Standardy praw człowieka z polskie prawo karne* (Warszawa, Instytut Nauk Prawnych PAN, 1995) 124; Z Świada, 'Podstawy i Tryb Stosowania Tymczasowego Aresztowania w Świetle Reguł Prawa Międzynarodowego, Obowiązującego Kodeksu Postępowania Karnego i Projektu Zmian Kodeksu Postępowania Karnego z 2000 Roku' in S Stachowiak (ed), *Współczesny polski proces karny Księga ofiarowana Profesorowi Tadeuszowi Nowakowi* (Poznań, Biuro Usługowo-Handlowe „Printer", 2002) 182.
In preparation proceedings, a prosecutor can apply other than detention preventive measures (Art. 250 § 4 KPK).

38 Interim Resolution CM/ResDH(2007)75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland (see Appendix II) relating to the excessive length of detention on remand; <wcd.coe.int/ViewDoc.jsp?id=1146407&Site=COE> accessed 25 September 2017.

39 Commissioner for Human Rights <wcd.coe.int/ViewDoc.jsp?id=1155005&Site=COE> accessed 25 September 2017.

40 See e.g. M Wąsek-Wiaderek, 'Standard "Niezwłoczności" Doprowadzenia Osoby Zatrzymanej przed Sędziego i Prawo do "Osądzenia w Rozsądnym Terminie albo Zowlnienia na Czas Postępowania" w Świetle Art 5 § 3 Europejskiej Konwencji Praw Człowieka' in A Dębiński, A Grześkowiak, K Wiak (eds), *Ius Et Lex Księga*

> the violation of the applicant's right under Article 5(3) of the Convention originated in a widespread problem arising out of the malfunctioning of the Polish criminal justice system which has affected, and may still affect in the future, as yet unidentified, but potentially a considerable number of persons charged in criminal proceedings.[41]

Furthermore, 'numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of a practice that is incompatible with the Convention.'[42] In many cases the ECtHR found that domestic courts limit reasoning for extending pre-trial detention 'to paraphrasing the grounds for detention provided for by the Code of Criminal Procedure' and 'failed to envisage the possibility of imposing other preventive measures expressly foreseen by Polish law to secure the proper conduct of the criminal proceedings.'[43] This violation was identified for example in the case *Kudła v Poland.*[44] In this case, the person in detention was deprived of the right to 'trial within a reasonable time' (Art. 5 § 3),[45] to a 'hearing within a reasonable time' (Art. 6 § 1),[46] and to 'an effective remedy before a national authority' enforcing this person's right to a 'hearing within a reasonable time,' as guaranteed by Art. 6 § 1 of the Convention' (Art. 13).[47] During the 9 plus years of criminal proceedings, Mr Kudła spent a total of four years and thirteen days in detention (two years, four months and three days during court proceedings).[48] Initially, the detention was grounded in the suspicion that Mr Kudła committed the crimes he was accused of and re-detention was reasoned by the fact that he could abscond. The ECtHR found that the reasons that could initially justify the detention and the re-detention became less relevant with passage of time and were not compelling enough to justify such

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Jubileuszowa ku Czci Profesora Adama Strzembosza (Lublin, Wydawnictwo KUL, 2002) 511-514; J Skorupka, 'Konstytucyjny i konwencyjny standard tymczasowego aresztownia' (2007) 7 *Państwo i Prawo* 57, 66.

41 *Kauczor v Poland* App no 45219/06 (ECtHR, 3 February 2009), paras 58, 60 [*Kauczor*]. See also *Hilgartner v Poland* App no 37976/06 (ECtHR, 3 March 2009).

42 Ibid.

43 *Kauczor,* para 59.

44 *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000) [*Kudła*].

45 Ibid, paras 116-117.

46 Ibid, para 131.

47 Ibid, para 160.

48 Ibid, paras 105, 107, 129; during court proceedings: from 4 October 1993 to 1 June 1995 and from 22 February to 29 October 1996.

a long detention.[49] Nor could the complexity of the case justify the length of the proceedings.[50] Further, the Court stressed the lack of 'effective remedy before a national authority for an alleged breach of the requirement to hear a case within a reasonable time.'[51]

To prevent unreasonably long detention during criminal proceedings, the current Code of Criminal Procedure provides that during preparatory proceedings, a court can order a maximal detention duration of 3 months. On the application of a prosecutor, this can be extended to a maximum of 12 months if, due to the particular circumstances of the case, the preparatory proceedings could not be completed within the 3 months (Art. 263 § 1 and § 2 KPK). The length of detention before the first ruling of the court of first instance cannot exceed 2 years (Art. 263 § 3 KPK). Only a court of appeal may extend this time-span under restricted circumstances (Art. 263 § 4 KPK).[52] Since 22 January 2009, the duration of the detention can no longer be extended 'because of other important obstacles whose removal

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49 Ibid, paras 114-115. Other examples of cases against Poland in which the Court found a violation due to not sufficient and not relevant grounds for unreasonable long period of detention on remand: *Finster v Poland* App no 24860/08 (ECtHR, 8 February 2011); *Jabłoński v Poland* App no 33492/96 (ECtHR, 21 December 2000) (the Court emphasized that alternative to detention preventive measures should have been considered); *Klamecki*; *Michta v Poland* App no 13425/02 (ECtHR, 4 May 2006); *Piechowicz v Poland* App no 20071/07 (ECtHR, 17 April 2012); *Wozniak v Poland* App no 29940/06 (ECtHR, 7 July 2009). For standards of sufficient length of detention on remand see Wąsek-Wiaderek, 'Standard "Niezwłoczności"' 506-507, 509, 512.

50 *Kudła,* para 130.

51 Ibid, paras 148, 152, 156. The Court stated that there was also no 'opportunity of preventing or putting right the violations alleged against [*Poland*] before those allegations are submitted to the Court' and, therefore, Mr Kudła could have not 'obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.'

52 *Kauczor*, para 27, the Court translated the relevant article:
The pre-trial detention shall be extended beyond the period specified in paragraphs 2 and 3, only by the court of appeal in whose jurisdiction the proceedings are conducted, upon a motion from the court before which the case is pending, and at the investigation stage, upon a motion from the appellate prosecuting authorities. This can be done if deemed necessary in connection with a suspension of criminal proceedings, in connection with actions aiming at establishing or confirming the identity of the accused, prolonged psychiatric observation of the accused, prolonged preparation of an opinion of an expert, conducting evidentiary action in a particularly intricate case or conducting them abroad, or intentional protraction of proceedings by the accused.

has not been possible.'[53] Further, to provide effective remedies for an alleged breach of the requirement to hear a case within a reasonable time, the *Act of 17 June 2004 on the complaint for breaching party's right to have its case heard without undue delay in the preparatory proceedings conducted or supervised by a prosecutor and in judicial proceedings* was adopted.[54] As recommended by the ECtHR, this statute provides relief at the national level and regulates the rules and mechanisms of bringing and hearing complaints of persons whose cases, as a result of the prosecution's or a court's actions or lack thereof, were not heard without undue delay (Art. 1 § 1). The complaint needs to be lodged during the unduly delayed proceedings (Art. 5) and is heard by a court superior to the court where the proceedings are taking place (Art. 4 § 1). The ruling needs to be given within 2 months from the date the complaint was lodged (Art. 11). If the superior court finds an undue delay, a party may demand remedies in amount from 2.000 to 20.000 Polish złotych (about 500 to 5.000 Euros) (Art. 12 § 4). Additionally, in separate proceedings, a party can demand compensation from the State Treasury for damages suffered due to an undue delay in proceedings (Art. 15 § 1).[55]

The problems identified by the ECtHR inspired not only changes in law, but also provoked certain bodies to undertake activities to adopt the relevant provisions of the ECHR. In 2007, the Polish Council of Ministers adopted the 'Plan of Actions of the Government for the execution of judgments of the European Court of Human Rights in respect of Poland.'[56] Under this plan, on 19 July 2007 the Interministerial Committee for Mat-

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See also A Trzcińska, P Wiliński, 'Tymczasowe aresztowanie w świetle Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz Międzynarodowego Paktu Praw Obywatelskich i Politycznych' in E Dyni and C P Kłaka (eds), *Europejskie Standardy Ochrony Praw Człowieka a Ustawodastwo Polskie* (Rzeszów, Wydawca Mitel, 2005) 259-260.

53 *Kauczor*, para 27.

54 *Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu przygotowawczym prowadzonym lub nadzorowanym przez prokuratora i postępowaniu sądowym bez nieuzasadnionej zwłoki* (Dz. U. z 2004 r. Nr 179 poz. 1843).

55 Ineffective application of this legislation by Polish courts that refuse to award any compensation for proceedings unduly delayed was criticized by the ECtHR in case *Zwoźniak v Poland* App no 25728/05 (ECtHR, 13 November 2007).

56 Ministerstwo Spraw Zagranicznych: < http://www.mfa.gov.pl/en/foreign_policy/human_rights/european_court_of_human_rights/execution_judgments/ > accessed 25 September 2017.

ters of the European Court of Human Rights was established that is responsible for, *inter alia*, proposing actions aimed at preventing violations of the ECHR and at adopting judgments made by the ECtHR.[57] Every year the Committee prepares and publishes a report from the realization of the Ministry of Council's Program in executing the ECtHR's rulings in Poland.[58] Further, the plan obligates the Polish Ministry of Justice to organize training for judges and prosecutors dedicated to discussing the ECtHR's case law and to increasing awareness of violations identified by the ECtHR under Polish criminal law.[59] These measures were welcomed by the ECtHR[60] and resulted in Polish courts being more reluctant to apply pre-trial detention. The number of people being detained reduced rapidly in the last 15 years.[61] At the same time, other preventive measures, such as bail or police supervision, is applied more often.[62]

B. Post-Communism Issues

Poland inherited unresolved legal problems from the pre-1989 communist era. An example is the case of compensation for Poles forced to abandon their property in Poland's former eastern territories after World War II. Poland obligated itself to provide them compensation for the property. However, Poland did not fulfill this duty.[63] After 1989, claims of Poles that were moved to Poland could not be satisfied, in kind, under the legis-

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57 Ibid.

58 Ibid. In the Report for the year 2015, the Committee itself admitted that the biggest group of the ECtHR's rulings that still need to be enforced compromises violations due to excessive lengthiness of court proceedings.

59 See also M Indan-Pykno, 'Changes of Polish Law and Polish Case-Law due to Implementations of the Judgments of the European Court of Human Rights in Strasbourg by Poland' in M Sitek, G Dammacca, A Ukleja, M Wójcicka (eds), *Europe of Funding Fathers: Investment in common future* (Olsztyn, 2013) 447.

60 *Kauczor*, para 62.

61 In 2001 24,275 persons were detained on remand on average, while in 2016 there were only 4,158 such persons. More information: <www.sw.gov.pl> accessed 25 September 2017.

62 Kiełtyka, 'Środki zapobiegawcze' 246, 248; Skorupka, 'Stosowanie i przedłużanie' 117-118.

63 *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004), paras 11, 39ff [*Broniowski*]; The Poles were supposed to be compensated by deducting the value of the abandoned property from the price of real property purchased from the State

lation in force at the time, as there was no property available for this purpose.[64] The number of properties designated for repatriated persons was further limited under various legal acts between 1993 and 2001. In 2002 the Polish Constitutional Court found legal provisions limiting the possibility of receiving compensation unconstitutional.[65] In response to this ruling, on 30 January 2004, the *Act of 12 December 2003 on offsetting the value of property abandoned beyond the present borders of the Polish State against the price of State property or the fee for the right of perpetual use* came into force, under which 'the State's obligations towards persons, who have already received some compensatory property under previous legislation were considered discharged.'[66]

The ECtHR considered this problem in the case *Broniowski v Poland*[67] and found a violation of Art. 1 Protocol No. 1, as Poland failed to implement Mr Broniowski's right to entitlement to compensatory property which he held under the law binding at the time he lodged his application. The Court found that Mr Broniowski's 'possessions' comprised his 'entitlement to obtain further compensatory property.'[68] The ECtHR referred to a ruling of the Polish Supreme Court, in which the Polish Court was of the opinion that the law applicable prior to 2002 provided only theoretical and illusory right to compensation.[69] Further, because of the restrictions imposed on the compensation right, this right could not be realized in practice and, therefore, unjustified in a democratic country. The law 'was incompatible with the constitutional principle of maintaining citizens' confidence in the State and the ensuing rule of law.'[70] The ECtHR found the procedure of implementing one's compensatory right under the legislation binding before 2003 (auction bidding procedure) ineffective and inade-

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or from the fee for 'perpetual use' (a maximum period of 99 years) of State property.

64 Ibid, paras 22-23.

65 Wyrok Trybunału Konstytucyjnego z dnia 19 grudnia 2002 r, sygn. akt K 33/02, Dz.U. z 2003 r. Nr 1 poz. 15; *Broniowski*, paras 79ff.

66 *Ustawa o zaliczaniu na poczet ceny sprzedaży albo opłat z tytułu użytkowania wieczystego nieruchomości Skarbu Państwa wartości nieruchomości pozostawionych poza obecnymi granicami Państwa Polskiego* (Dz. U. z 2004 r. Nr 6 poz. 39). *Broniowski*, para 37.

67 Ibid.

68 Ibid, para 131.

69 Ibid, para 172.

70 Ibid, para 173.

quate.[71] The State, by reason of its obstructive actions, hindered Mr Broniowski from 'the peaceful enjoyment of his possessions.'[72] With regard to the Act introduced in 2003, under which repatriated persons were deprived of compensation property if they had been compensated in any degree, the Court stated that a State is allowed to expropriate property as well as to reduce the levels of compensation for such an expropriation however, 'the amount of compensation granted for property taken by the State' needs to be 'reasonably related' to its value.[73] The Court found that the compensation received by the Mr Broniowski's family under the earlier legislation, a mere 2 per cent of the abandoned property value, did not justify depriving him of any further compensation. The Court concluded that depriving Mr Broniowski of his compensation could not be justified by 'general community interest pursued by the authorities.'[74]

The Court stated that the identified violation 'resulted from a malfunction of Polish legislation and administrative practice which has affected and remains capable of affecting a large number of persons;' therefore, the Court recommended setting up effective remedies.[75] In response to this recommendation, the Polish Parliament adopted the *Act of 8 July 2005 on realization of the right to compensation on account of leaving real property outside the current borders of the Republic of Poland*.[76] This Act entitles Polish citizens and their successors that were repatriated from prior territories of Poland or departed these territories as a result of World War II, to compensation for real property abandoned outside the Poland's current boarders (Art. 1, 2, 4). The market value of the abandoned property is calculated on the basis of the current price of similar real property located in an adequate market area in Poland according to the conditions of the abandoned property at the day it was abandoned (Art. 11(1), (5)). Credit value of the abandoned property as well as the cash benefit amounts to

71 Ibid, para 181.
72 Ibid.
73 Ibid, para 186.
74 Ibid, para 187. For an analysis of other issues considered by the Court in its ruling, see P Filipek, 'Sprawa "Mienia Zabużańskiego" przed Europejskim Trybunałem Praw Człowieka' *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, vol. I, A.D. MMIII 162.
75 *Broniowski*, paras 189-194.
76 *Ustawa z 8 lipca 2005 r o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami RP (o roszczeniach zabużańskich)* (Dz. U. z 2005 r. Nr 169 poz. 1418).

20 % of the value of these properties (Art. 13(2)). The deadline for submitting applications for compensation was set at 31 December 2008 (Art. 5).

Steps taken to address the issues raised by the ECtHR and amendments of laws that violate the ECHR prove Poland's commitment to adjust to standards represented by the ECHR. Nevertheless, as pointed out by international and national bodies, there are still unresolved problems, mostly due to the manner of enforcing laws rather than to the content of legal norms themselves. However, due to the direct influence of the ECtHR's rulings on law changes in Poland, further improvements are expected.

IV. Issues Raised by the ECtHR

Not all violations identified by the Court have been addressed by Poland. Most of the unresolved problems regard Polish law of criminal procedure and the Polish penitentiary system, these are e.g. lack of effective criminal investigation,[77] insufficient free legal advice for accused,[78] unjustified restriction of contact between the accused and his family,[79] inadequate medical care for prisoners and detainees[80] and overcrowded prisons.[81] Violations under Polish civil and administrative law were also found. Some of the violations that have already been identified by the ECtHR may keep recurring despite the Court's rulings due to social resistance to standards promoted by the Court in Strasbourg.

Not all violations found by the Court require amending Polish law. As shown in the following discussion of case law, there are problems with enforcing basic rights already provided under Polish legislation, exercising discretion by state authorities and accepting the ECtHR's rulings by mem-

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77 E.g. *Byrzykowski v Poland* App no 11562/05 (ECtHR, 27 June 2006); *Dzieciak v Poland* App no 77766/01 (ECtHR, 9 December 2008); *Wiktorko v Poland* App no 14612/02 (ECtHR, 31 March 2009).

78 E.g. *Antonicelli v Poland* App no 2815/05 (ECtHR, 19 May 2009); *Kulikowski v Poland* App no 18353/03 (ECtHR, 19 May 2009); *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007); *Staroszczyk v Poland* App no 59519/00 (ECtHR, 22 March 2007).

79 E.g. *Ferla v Poland* App no 55470/00 (ECtHR, 20 May 2008); *Kurkowski v Poland* App no 36228/06 (ECtHR, 9 April 2013).

80 E.g. *Kaprykowski v Poland* App no 23052/05 (ECtHR, 3 February 2009); *Mojsiejew v Poland* App no 11818/02 (ECtHR, 24 March 2009).

81 E.g. *Orchowski v Poland* App no 17885/04 (ECtHR, 22 October 2009).

bers of the society. Therefore, in some cases, solving issues that were raised by the Court requires long-term enforcement.

A. Right to Marry

In two cases the ECtHR identified violations of the right to marry regulated in Art. 12 of the Convention with regard to a detainee and a prisoner, who requested leave to contract a marriage in prison. Under Polish law, the competent authority (a court or a prison's authority) has full discretion with regard to granting such a leave.[82] The Court did not recommend any changes in the current binding law, but questioned the manner of applying the authorities' discretion.

The first case, *Frasik v Poland*,[83] considers Mr Frasik, who on 5 September 2000 was arrested for 'suspicion of having committed rape and uttered threats' against a woman with whom he once had a 4 year relationship (they terminated the relationship several months before the alleged rape). He was detained on remand.[84] The woman requested that the prosecution institute criminal proceedings against Mr Frasik.[85] However, prior to the trial the woman, who had forgiven Mr Frasik for everything he had done and wanted to marry him, expressed her wish to be absolved from testifying against Mr Frasik.[86] This wish, not to testify, was repeated during court proceedings but was rejected by the District Court.[87] Before the beginning of the trial, in April and in May 2001, Mr Frasik and the woman asked the District Court to grant them leave to marry in prison.[88] The District Court refused to grant the leave, as, in the Court's opinion, 'a prison or remand center is not a place to hold (...) a wedding' and that

82 *Frasik v Poland* App no 22933/02 (ECtHR, 5 January 2010), para 44 [*Frasik*].
83 Ibid.
84 Ibid, paras 8-9.
85 Ibid, para 10.
86 Ibid, paras 15-16.
87 The District Court found that the request not to testify 'was dictated by her fear of [*Mr Frasik*] and that their relationship lacked the necessary psychological, physical and financial bonds to be regarded as a *de facto* marriage and, consequently, a "particularly close personal relationship" within the meaning of the Code of Criminal Procedure that would override her duty to testify against the applicant at the trial' (para 25).
88 *Frasik*, paras 34-35.

the marriage was just another tactic to stop the woman from testifying.[89] In November 2001 the District Court sentenced Mr Frasik to 5 years imprisonment and, in May 2002, on appeal, a regional court reduced it to 3 years.[90]

In the second case *Jaremowicz v Poland*,[91] Mr Jaremowicz was serving a conviction of imprisonment when, in June 2003, he asked for leave to marry in prison another prisoner, who also asked for such leave.[92] The Governor of the prison in which Mr Jaremowicz was imprisoned refused to grant the leave, *inter alia*, because neither of the prisoners could prove that they had had a relationship prior to imprisonment and that their relationship was not superficial.[93] Further, the prison authorities reported that the prisoners' relationship emerged from illegal contact in prison.[94] After receiving the refusal, the prisoner complained to various institutions.[95] In November 2003 the Deputy Governor of the prison issued a certificate confirming that Mr Jaremowicz had obtained leave to marry the other prisoner in prison, nevertheless, the prisoners did not marry.[96]

In both cases, not the discretion enjoyed by the District Court and the prison authorities, but the arbitrary character of the decision and the failure to 'strike a fair balance of proportionality among various public and individual interests,' caused the violation of Art. 12 of the Convention.[97] The Court found:

> no reason why the trial court [*or prison authority*] should have assessed – as [*they*] did – whether the quality of the parties' relationship was of such a nature as to justify their decision to get married, or to analyze and decide which time and venue were or were not suitable for their marriage ceremony.[98]

89 Ibid, para 38.
90 Ibid, paras 31-32.
91 *Jaremowicz v Poland* App no 24023/03 (ECtHR, 5 January 2010) [*Jaremowicz*].
92 Ibid, para 11.
93 Ibid, paras 12, 14.
94 Ibid, paras 15-16.
95 Ibid, paras 13-17; He sent a letter to e.g. Ombudsman and the Regional Director of the Prison Service.
96 Ibid, paras 19-20.
97 *Frasik*, para 100; *Jaremowicz*, para 64.
98 *Frasik*, para 95. See also *Jaremowicz*, para 58.

Further, the Court stressed that:

> [t]he choice of a partner and the decision to marry him or her, whether at liberty or in detention, is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision

and that the right to marry may not be restricted 'unless there are important considerations flowing from such circumstances as danger to prison security or prevention of crime and disorder.'[99] In neither case did the Court find such circumstances.[100]

B. Exceptions to the Prohibition of Abortion

In three cases, *Tysiac v Poland,*[101] *RR v Poland*[102] and *P. and S. v Poland* [103] involving legal request to lawfully terminate a pregnancy, the Court found a violation of the right to respect for private and family life regulated under Art. 8 of the Convention. The cases attracted considerable attention because terminating a pregnancy is prohibited in Poland and constitutes a crime.[104] The cases considered by the ECtHR regard exceptions provided under the *Family Planning Act* (*Act of 7 January 1993 on family planning, protection of the human fetus and conditions permitting pregnancy termination*).[105] Under this act, a pregnancy can be terminated by a physician if the 'pregnancy endangers the mother's life or health' (Art. 4a(1)) or if 'prenatal tests or other medical findings indicate a high risk that the fetus will be severely and irreversibly damaged or suffer from an incurable life-threatening disease' (Art. 4a(2)). In the second case, 'an abortion can be performed until such time as the fetus is capable of surviving outside the mother's body' (Art. 4a(2)). In both situations, 'a physician other than the one who is to perform the abortion' shall certify circum-

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99 *Frasik*, para 95. See also *Jaremowicz*, para 59.

100 L Garlicki, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności Komentarz do Artykułów 1-18*, *Tom I* (Warszawa, Beck, 2010) 714, 718-719.

101 *Tysiac v Poland* App no 5410/03 (ECtHR, 20 March 2007) [*Tysiac*].

102 *RR v Poland* App no 27617/04 (ECtHR, 26 May 2011) [*RR*].

103 *P. and S. v Poland* App no 57375/08 (ECtHR, 30 January 2013) [*P and S*].

104 Termination of a pregnancy not in accordance with the *Family Planning Act* (see below) is a crime under Art. 152 of the Polish Criminal Code.

105 *Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży* (Dz. U. z 1993 r. Nr 17 poz. 78).

stances permitting the abortion, 'unless the pregnancy entails a direct threat to the woman's life' (Art. 4a(5)). Further, an abortion can be conducted if 'there are strong grounds for believing that the pregnancy is a result of a criminal act' (Art. 4a(3)), but only 'until the end of the twelfth week of pregnancy' (Art. 4a(2)).

The first case *Tysiac v Poland*, regards a pregnant, single mother of two, both born by Caesarean section, who suffers from severe myopia.[106] Concerned with the impact of the pregnancy on her health, she consulted an ophthalmologist, who stated that 'due to pathological changes in the applicant's retina, the pregnancy and delivery constituted a risk to her eyesight.'[107] Nevertheless, in spite of Ms Tysiacs request, three other specialists 'refused to issue a certificate for' a pregnancy termination. In their opinion, it was not certain whether the retina would 'detach itself as a result of pregnancy.'[108] Ms Tysiac obtained medical advice in favor of abortion from a general practitioner.[109] However, a gynecologist Ms Tysiac was referred to found no grounds for terminating the pregnancy and refused to perform it.[110] Ms Tysiac's eyesight deteriorated significantly during her term and, after delivery, she faced the risk of going blind.[111]

For *RR v Poland*, a woman of 29 years and mother of two, was informed around her 18th week of pregnancy that 'it could not be ruled out that the fetus was affected with some malformation.'[112] Following two ultrasound scans by two independent doctors over the next week, the likelihood of a malformed fetus was confirmed.[113] A genetic examination (amniocentesis) was recommended.[114] However, her family doctor refused to issue a referral for the test, as he did not believe that the fetus' condition satisfied the conditions for a legal abortion.[115] The woman was admitted to two hospitals and underwent various tests during which her intention to

106 *Tysiac*, paras 8-9, before Ms Tysiac's pregnancy 'the degree of myopia was established at -0.2 in the left eye and -0.8 in the right eye. (…) She was assessed by a State medical panel (…) as suffering from a disability of medium severity.'
107 Ibid, para 9.
108 Ibid, para 9.
109 Ibid, para 10.
110 Ibid, paras 13-14.
111 Ibid, paras 15-16.
112 *RR*, paras 8-9.
113 Ibid, paras 12-13.
114 Ibid, paras 12-13.
115 Ibid, para 14.

terminate the pregnancy was criticized and the genetic examination as well as the abortion were refused to her.[116] A genetic test (amniocentesis) was finally performed in the third hospital in the 23rd week of pregnancy.[117] When the results of the exam were available, two weeks later, doctors refused to terminate the pregnancy because, by law, it was too late: the fetus was sufficiently developed to 'survive outside the mother's body.'[118] The woman gave birth to a child with Turner syndrome.[119]

In the last case, *P. and S. v Poland*, a 14 year old girl was raped.[120] Together with her mother, she decided to terminate the pregnancy and a prosecutor 'issued a certificate stating that the pregnancy had resulted from unlawful sexual intercourse with a minor under 15 years of age.'[121] At the first hospital the girl was referred to, she was taken, without her prior consent, for a talk with a catholic priest.[122] Thereafter, the head of the gynecological ward refused to perform the abortion and forbid the doctors working at the hospital from doing it.[123] At the second hospital to which the girl was admitted the abortion was refused when the doctors succumbed to pressure put on the hospital by pro-life activists.[124] During the girl's stay at this hospital, anti-abortion activists visited and messaged her.[125] When departing the second hospital, the girl was taken to a police station and, subsequently, based on a court order, to a juvenile shelter.[126] The court order was based on information suggesting that the girl was pressured into abortion by her parents.[127] The decision was quashed approximately 14 days later.[128] The girl's pregnancy was terminated shortly thereafter, when, by intervention of the girl's mother, a car sent by the Ministry of Health took the girl and her mother to a hospital located ap-

116 Ibid, para 20.
117 Ibid, para 28.
118 Ibid, para 33.
119 Ibid, para 37. See also M A Nowicki, *Europejski Trybunał Praw Człowieka Wybór Orzeczeń 2011* (Warszawa, Wolters Kluwer Polska, 2012) 125ff.
120 *P and S*, paras 6-8.
121 Ibid, para 10.
122 Ibid, paras 14-17.
123 Ibid, para 21.
124 Ibid, para 27.
125 Ibid, para 26.
126 Ibid, paras 29-32.
127 Ibid, paras 33-35.
128 Ibid, paras 36-37.

proximately 500 km from their home city.[129] As a result of the first hospital revealing information about the girl's circumstances and about its refusal to terminate her pregnancy to the press, the case became widely discussed in national news.[130] Also, the information about the abortion being carried out was made public.[131]

The ECtHR found that there is 'a striking discordance between the theoretical right to (…) an abortion on the grounds referred to in [*Family Planning Act*] and the reality of its practical implementation.'[132] Women who wanted to obtain legal abortions were faced with procrastination and confusion as well as with 'misleading and contradictory information' to achieve systemically planned delay through subterfuge.[133] In all three cases, the State failed to provide an effective mechanism to enable a pregnant woman to 'effectively exercise her right of access to lawful abortion,' particularly when a disagreement regarding fulfillment of preconditions of legal abortion occurs between a pregnant woman and doctors or between the doctors themselves.[134] Additionally, the woman's legal position during the process of obtaining a legal abortion was unclear.[135] The Court recommended that in situations of disagreement, an independent body should consider a case and guarantee involvement of the pregnant woman in the decision-making process, her right of being heard in person, having her opinion taken into account and being provided with written grounds for the doctors' decision.[136] The decision should be made timely, that is, during the period when performing an abortion is legal and such that any damages to woman's health is prevented.[137]

Further, the Court found that there were no effective and accessible procedures allowing a pregnant woman to vindicate a lawful termination of a pregnancy.[138] Reviewing procedures take place only *post factum* and have a compensatory character.[139]

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129 Ibid, paras 38-41.
130 Ibid, paras 23-24.
131 Ibid, para 41.
132 Ibid, para 111; *RR,* para 210.
133 *P and S*, para 108.
134 *Tysiac*, paras 116, 117, 121, 124; *P and S*, paras 99, 100; *RR*, paras 200, 208-210.
135 *Tysiac*, para 116.
136 Ibid, para 118; *P and S*, para 100; *RR*, para 191.
137 *Tysiac*, para 118.
138 *P and S*, para 110; *RR*, paras 209, 211.
139 *Tysiac*, paras 118, 125; *P and S*, para 110.

Moreover, the Court observed that:

> the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Art. 156 § 1 of the [Polish] Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case.

Therefore, the Court suggested that the provisions regulating the access to a lawful abortion need to be formulated in such a way as to eliminate this effect.[140] Additionally, the health system should ensure that freedom of conscience effectively exercised by health professionals does not prevent patients from accessing services to which they are entitled under the State's legislation.[141]

It is unquestionable that, thanks to the ECtHR's rulings and their publicity, the awareness of the circumstances constituting exceptions to the general ban on abortion regulated in the *Family Planning Act* has increased. Also, access to a legal abortion has improved. This is indicated by the growing number of abortions performed legally in public hospitals, e.g. in 2015 pregnancies were terminated in 1040 cases, which compares to 159 cases in 2002.[142] As opposed to 2002, when abortions were performed mostly due to endangerment of the woman's life, most of the abortions carried out in 2015 took place due to prenatal tests or other medical findings that indicated a high risk of the fetus being severely and irreversibly damaged or suffering from an incurable life-threatening disease.[143] However, a later case, widely discussed in the Polish media, confirms that despite the ECtHR's rulings, in practice, it is not the woman, but her gynecologist that decides whether an abortion takes place. As pointed out by the Court, there are still no effective mechanisms that allow a pregnant woman to access abortion without her gynecologist consent, even when the conditions provided under the *Family Planning Act* are satisfied.

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140 *Tysiac*, para 116; See also Nowicki, *Wokół Konwencji* 697-698.

141 *P and S*, para 106; *RR*, para 206. On conscientious objection for medical professionals in the light of Council of Europe's standards see O Nawrot, 'Klauzula sumienia w zawodach medycznych w świetle standardów Rady Europy' (2012) 3 Zeszyty Prawnicze 1122.

142 'Sprawozdanie Rady Ministrów z wykonywania oraz o skutkach stosowania w roku 2015 ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży' 80-84, <bip.kprm.gov.pl/kpr/bip-rady-ministrow/informacje-i-sprawozda/3869,informacje.html> accessed 25 September 2017.

143 Ibid.

In this case, according to media reports, a woman in her 22nd week of pregnancy was told that there is a significant likelihood that the fetus was severely and irreversibly damaged and suffering from an incurable life-threatening disease.[144] In spite of the woman's immediate wish to terminate the pregnancy (expressed to a different doctor), the woman's gynecologist prescribed various tests that were tardily performed over the next 2 weeks, after which the gynecologist informed the woman that, due to the clause of conscience, he would not perform the abortion. After consulting another doctor, the woman was told that it was now too late to terminate her pregnancy.[145] The child was born and died 10 days after the birth.[146]

V. Conclusions

The discussed examples show that complying with the ECHR and the ECtHR's case law requires a structural change involving amending Polish law and providing mechanisms for its successful enforcement as well as increasing courts and society's awareness of the human rights standards provided under the ECHR and their interpretation. Disrespect of human rights, particularly of rights of defendants in criminal proceedings, can be seen as remains of the communistic system in Poland. The most urgent problems regard inconsistency under the Polish Code of Criminal Procedure and Polish penitentiary law and the Convention and the inefficiency of the judicial criminal system. Enforcing reliable mechanisms is particularly important in dealing with sensitive situations, such as abortion and access to marriage.

The Court as well as international organizations (e.g. Helsinki Foundation for Human Rights) expressed their concern with regard to the Poland's delay to timely address the violations identified by the ECtHR and implement the recommendations made by the Court. However, the refusal to timely implement some of the ECtHR's judgments is grounded in the opposition to the standards imposed by the Court which are inconsis-

144 Wprost, <https://www.wprost.pl/blogi/magdalena-rigamonti/8003141/Do-prof-Bogdana-Chazana-Panie-profesorze-prosze-przestac-klamac.html> accessed 25 September 2017.

145 Ibid.

146 Polityka, <www.polityka.pl/tygodnikpolityka/kraj/1585725,1,zmarlo-dziecko-kobiety-ktorej-prof-chazan-odmowil-aborcji.read> accessed 25 September 2017.

tent with the system of values adopted in Poland. That is visible in cases considering gynecologist reluctance to terminate a pregnancy, in which the ECtHR's rulings impose interpretation of individual rights that are inconsistent with the conservative and religious background of Polish society. Any visible modifications in this area require long-term changes in societal values and striking a fair balance of proportionality among various public and individual interests.

In many instances, there is discord between the theoretical right and the reality of its practical implementation. Many rights that are provided under the legislation (including the Polish Constitution) are not abided by. Therefore, particularly in respect to criminal procedures, especially important seems to be not only amending the law that is inconsistent with the ECHR, but also educating public servants about individuals' rights and changing authoritarian systems to be more supplicants' friendly. Even though system changes were undertaken in public, criminal and civil law, their effectiveness is limited due to post-communistic manner of thinking of some people responsible for implementing them. In the cases, in which violations were found by the ECtHR, public servants used their discretion to the disadvantage of the persons that were under their control. Therefore, a change of attitude must take place. Attitudinal change can be achieved by educating the public servants (particularly prosecutors and judges), replacing them with ones that are aware of the human rights standards and willing to implement them or by enforcing casuistic regulations that would limit the discretion exercised by public servants. The last solution, even if the most effective, would be very difficult to adopt especially in the case of regulation of criminal procedure, which needs to accommodate different situations.

The changes already implemented in Polish law have been welcomed by international bodies. Notably, as confirmed by the decreasing number of cases against Poland heard by the ECtHR, it is clear that Poland has successfully undertaken steps to apply the ECtHR's case law and comply with Art. 46 of the Convention. It can be only hoped that these trends will continue.