

**REPORT 2018**

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**RIGHTS  
OF PERSONS  
DEPRIVED  
OF LIBERTY**

FUNDAMENTAL LEGAL  
AND PRACTICAL ISSUES

HFHR PERSPECTIVE



**POLAND**

**Edited by:**

Dr. Piotr Kładoczny

Katarzyna Wiśniewska

Foreword: prof. Zbigniew Lasocik

**Authors:**

Section I – Katarzyna Wiśniewska

Section II – Julia Gerlich, Adam Klepczyński, Piotr Kubaszewski

Section III – Adam Klepczyński

Section IV - Marcin Wolny

Section V - Jarosław Jagura

Section VI – Marcin Wolny

Section VII – Marcin Szwed

Section VIII – Jacek Białas, Daniel Witko

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00-018 Warsaw

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# TABLE OF CONTENTS

FOREWORD.....	5
EXECUTIVE SUMMARY. ....	6
INTRODUCTION. ....	8
PROHIBITION AGAINST TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN INTERNATIONAL LAW.....	9
I. MONITORING OF DETENTION FACILITIES - NATIONAL MECHANISM FOR PREVENTION OF TORTURE (NPM). ....	10
II. POLICE VIOLENCE .....	11
1. State of the law .....	11
a. Current laws.....	11
b. Evaluation of current laws .....	11
2. Inhuman or degrading treatment or punishment – scale of the phenomenon among police officers .....	13
a. Scale of police violence - statistical analysis.....	13
b. Mistreatment by police officers - HFHR practice .....	15
c. Survey research among lawyers about the scale of police violence .....	17
III. ACCESS TO A LAWYER PROMPTLY AFTER DETENTION.....	19
1. Current law .....	19
2. Practical aspects concerning access to a lawyer .....	19
IV. PRISON ESTABLISHMENTS.....	21
1. Standard for size of residential cell per inmate .....	21
a. Current law .....	21
b. Execution of sentencing in practice .....	21
2. Living conditions .....	22
3. Examples of inhuman and degrading treatment by penitentiary facility personnel - HFHR practice .....	23
4. Health care in penitentiary facilities .....	23
a. General remarks .....	23
b. HFHR practice .....	24
5. Treatment of inmates with disabilities .....	24
6. The status of high-risk inmates.....	24
V. COMPLAINTS OF INDIVIDUALS DEPRIVED OF LIBERTY IN PENITENTIARY FACILITIES .....	26
1. Complaints of individuals deprived of liberty in penitentiary facilities.....	26
a. Statistics .....	26
b. Evaluation of the penitentiary complaint and oversight system .....	27
VI. CORRECTIONAL FACILITIES, YOUTH SHELTERS, YOUTH FOSTER CENTERS . ...	28
VII. NATIONAL CENTER FOR THE PREVENTION OF ANTISOCIAL BEHAVIOR.....	29
1. Current law .....	29
2. Doubts concerning compliance of the implemented law with international human rights standards .....	30

3. Application of the Act in practice .....	32
<b>VIII. GUARDED CENTERS FOR FOREIGNERS .</b> .....	<b>33</b>
1. Placement of children in guarded centers for foreigners .....	33
2. Placing victims of torture (and other forms of violence) in guarded centers for foreigners .....	34
<b>RECOMMENDATIONS.</b> .....	<b>36</b>

## FOREWORD

*A delegation of the UN Subcommittee on Prevention of Torture (SPT) will soon visit Poland. I had the honor of being a two-term member of the Subcommittee immediately after it was established and helped lay the foundation for this exceptional institution's later operations.*

*It seems worthwhile to ask two questions, for purposes of this foreword, but also for general consideration. First, why is prevention of torture important? Second, why is the Subcommittee on Prevention of Torture important? Though the answers to both questions seem easy, they are not commonly known.*

*Torture is the inflicting of pain on an individual who has been rendered completely dependent upon the state. Such a definition of torture, as is understood by nearly everyone, is one of the most serious human rights violations, one of the most heinous offenses and a serious crime under the legislation of many states. But we forget, or possibly we do not want to notice, that torture is also an extremely drastic violation of our society's elementary values. It is with such ease that we scribble the slogans of humanism, freedom or respect for others on our banners all the while disregarding the brutality of the police and military, by treating them as mere malpractice or short-term sensation. We are unaware that a single case of torture burdens the collective conscience of all of humanity. Disregarding this dimension of torture speaks even worse of us than lacking sufficient determination to force governments to effectively eliminate torture.*

*The response to the second question is even easier. The Subcommittee is important because it is an exceptional institution. It is the result of an exceptionally long and difficult process of international negotiations, but above all, it is an institution that does good. Obviously, the subcommittee is unable to visit all OPCAT signatory states in the short time that such visits should optimally take place. But the time will come when every country will be honored by a visit. The Subcommittee is also unable to visit all institutions in a given country. In the case, let's be realistic, we don't even expect that. The Subcommittee is an expert body and as such it is neither an effective controller, guardian or assessor. So, why is the Subcommittee important? In my opinion, the most important effect of the Subcommittee's visits is the culture they create. Members of the delegation, experts of the highest order, come to a visited country equipped with a set of standards through which, as if through a prism, they review facilities holding individuals deprived of liberty. The member very often hail from places culturally distant from the visited state and, as a result, they bring a different civilizational perspective and see that which we may no longer see. What is more, as a team, they combine their individual experience into a whole, giving rise to an exceptional tool to seek material information, aggregate data, analyze facts and draw conclusions. In coming to a visited state, the Subcommittee brings all these values that laid the foundation for OPCAT (respect for others, impartiality, dialogue) but also mobilize the vital forces underpinning society and the state – those focused on eliminating torture.*

*This exceptional report is the effect of precisely this kind of mobilization. Reading this report should be obligatory for anyone wishing to understand the situation of individuals deprived of liberty in Poland as well as the social and mental environment of various forms of isolation.*

*I would like to thank the Subcommittee for its planned visit and thank the authors for this report.*

prof. Zbigniew Lasocik  
Member of the Subcommittee  
on Prevention of Torture (2007 – 2012)

# **EXECUTIVE SUMMARY**

## **MONITORING OF DETENTION FACILITIES - NATIONAL MECHANISM FOR PREVENTION OF TORTURE (NPM)**

- The National Preventive Mechanism plays a special role in the system of preventing improper treatment in detention facilities.
- Currently, the system's mandate covers 2600 detention facilities.
- The budget of the Ombudsman is being set at insufficient levels to execute obligations arising under the protocol of the UN Convention on the Prevention of Torture or Other Inhuman or Degrading Treatment or Punishment.

## **POLICE VIOLENCE**

- Torture and inhuman or degrading treatment or punishment has been the subject of renewed public, legal and political discourse in Poland.
- Statistical data obtained by the HFHR show that over 500 complaints are submitted to the police annually in connection with inhuman or demeaning treatment or punishment.
- Each year, HFHR receives up to 20 individuals reporting improper treatment by police.
- All advocates surveyed by the HFHR confirmed that their clients have included individuals complaining of mistreatment by police officers that could reach the level of violations described in art. 3 ECHR and in art. 1 par. 1 of the Convention against Torture.
- There is no specific statute or crime in the Polish Criminal Code that criminalizes the use of torture, inhuman or degrading treatment.

## **PRISON ESTABLISHMENTS**

- Despite efforts by the Penitentiary Service, instances of inhuman and degrading treatment stemming from improper living conditions, improper medical care and abuse of the 'threat to public safety' and 'threat to correctional facility safety' statuses continue to occur in Polish penitentiary facilities.
- Poland has yet to implement CPT and CAT recommendations concerning increasing the standard living area to 4m<sup>2</sup> per inmate.
- Failure to adapt penitentiary facilities to the needs of the disabled remains an ongoing problem.

## **COMPLAINTS OF INDIVIDUALS DEPRIVED OF LIBERTY IN PENITENTIARY FACILITIES**

- Of the more than 40,000 complaints reviewed by Prison Services in Poland submitted by individuals deprived of liberty, slightly over 1% were deemed justified.
- The highest number of complaints concern ill-treatment of inmates by Prison Service officers, living conditions and healthcare.
- The complaint and penitentiary oversight systems do not provide a fully effective structure for the protection of rights and freedoms of individuals deprived of liberty.

## **NATIONAL CENTER FOR THE PREVENTION OF ANTISOCIAL BEHAVIOR**

- The Act dated 22 November 2013 on proceedings with respect to individuals with psychic disorders that pose a threat to life, health or sexual freedom of other individuals, which regulates the post penal detention of perpetrators with psychic disorders, evokes serious controversy from the international human rights standards perspective.
- The therapeutic nature of detention at the National Center for the Prevention of Antisocial Behavior (NCPAB) is extremely doubtful; the detention seems more of a repression violating the prohibition against double criminality and retroactive application of the law.

- The living conditions at the NCPAB may violate the rights of the confined, including through the limitations provided for in the center's rules and regulations on visits with friends and family as well as the planned capacity limits in living quarters.
- The case being handled by HFHR before the ECHR shows that in practice there may occur further violations of human rights, including due to the arbitrary and overly broad application of the Act and extension of the detention contrary to the opinions of NCPAB doctors and psychologists.

## **GUARDED CENTERS FOR FOREIGNERS**

- In Poland, foreign children continue to be deprived of liberty through their placement in guarded centers for foreigners (1103 children in 2014-2017), and their detention often lasts many months, as is confirmed by cases resolved and in progress before the European Court of Human Rights.
- Reports indicate that victims of violence and torture are confined in guarded centers for foreigners.
- When deciding where to confine or house foreigners, officials fail to properly investigate foundations that preclude detention.

## INTRODUCTION

**The Helsinki Foundation for Human Rights** (HFHR or Foundation) is a nongovernment organization with the statutory goal of protecting human rights, including the rights of persons deprived of liberty. We assist victims of violations through various kinds of interventions and by organizing pro bono professional legal assistance, we observe court proceedings in matters that may involve abuse of rights by public officials and monitor facilities where individuals deprived of liberty are detained. At HFHR we also conduct trainings for public officials about the prohibition against torture and inhuman or degrading treatment as well as the jurisprudence of international bodies on this issue.

In light of the above, the Helsinki Foundation for Human Rights has decided to once again present its observations regarding the current situation in detention facilities. We hope these observations will constitute a reliable source of information. At the same time, we emphasize that it is not our goal to present a comprehensive report on the situation of individuals deprived of liberty, but only to signal issues we consider important in areas in which HFHR has undertaken activities.

This report constitutes a continuation of the report published in May 2017 available at: <http://www.hfhr.pl/wp-content/uploads/2017/05/Report-CPT-PL.pdf>.



# **PROHIBITION AGAINST TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN INTERNATIONAL LAW**

## **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

### **Article 7**

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

## **CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

### **Article 1**

*1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

*2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*

### **Article 2**

*1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*

*2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*

*3. An order from a superior officer or a public authority may not be invoked as a justification of torture.*

## **CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

### **Article 3**

*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

# I. MONITORING OF DETENTION FACILITIES - NATIONAL MECHANISM FOR PREVENTION OF TORTURE (NPM)

## Summary:

- The National Preventive Mechanism plays a special role in the system of preventing improper treatment in detention facilities.
- Currently, the system's mandate covers 2600 detention facilities.
- The budget of the Ombudsman is being set at insufficient levels to execute obligations arising under the protocol of the UN Convention on the Prevention of Torture or Other Inhuman or Degrading Treatment or Punishment.

The Helsinki Foundation for Human Rights is convinced that monitoring by state and international bodies as well as NGOs is one of the fundamental ways to prevent torture, inhuman or degrading treatment or punishment.

The National Preventive Mechanism plays an especially important role in the system for preventing improper treatment in detention centers. In Poland, for over a decade, the NPM has operated through the office of the Ombudsman for Human Rights (OHR or Ombudsman). The activity of this body is becoming especially important in Poland due to the growing limitations on nongovernment organizations, including the Helsinki Foundation for Human Rights, on access to detention centers.

The Ombudsman for Human Rights has on numerous occasions emphasized that the office's current staffing levels prohibit the full and complete execution of obligations arising under the protocol of the UN Convention on the Prevention of Torture or Other, Inhuman or Degrading Treatment or Punishment for which the office has been made responsible.<sup>1</sup> Nevertheless, despite increasing needs, the Ombudsman's budget was not increased in 2018, despite such being applied for.<sup>2</sup>

Information provided to the NPM indicates that its mandate currently covers 2600 facilities while its total staff in 2017 consisted of 10 employees. According to annual information, in 2017, NPM staff conducted 76 prevention visits in various kinds of detention facilities, including seven revisits to check the implementation of its recommendations, and 12 visits of a thematic nature related to investigation of psychiatric and psychological care offered to minors held in detention.<sup>3</sup>

## HFHR RECOMMENDS:

- Increasing the availability of human resources and the attendant financial resources that will enable for the reliable and comprehensive execution of the NPM's mandate;
- Assuring NGOs access to detention facilities;
- That the state authorities conduct a thorough analysis of monitoring reports from detention facilities and treat such as a basis to implement relevant legislative changes and modify practices at such facilities.

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1 OHR Report on NMP activity in Poland in 2015 / Raport RPO z działalności w Polsce KMP w roku 2015, available at: <https://www.rpo.gov.pl/sites/default/files/Raport%20RPO%20KMP%202015.pdf> (accessed on: 16.08.2016).

2 <https://www.rpo.gov.pl/pl/content/senacka-komisja-o-budzecie-rpo>

3 OHR's annual information for 2017, available at: <https://www.rpo.gov.pl/sites/default/files/Informacja%20roczna%20RPO%20za%20rok%202017.pdf> (accessed on: 26.06.2018).

## II. POLICE VIOLENCE

### Summary:

- Torture and inhuman or degrading treatment or punishment has been the subject of renewed public, legal and political discourse in Poland.
- Statistical data obtained by the HFHR show that over 500 complaints are submitted to the police annually in connection with inhuman or demeaning treatment or punishment.
- Each year, HFHR receives up to 20 individuals reporting improper treatment by police.
- All advocates surveyed by the HFHR confirmed that their clients have included individuals complaining of mistreatment by police officers that could reach the level of violations described in art. 3 ECHR and in art. 1 par. 1 of the Convention against Torture.
- There is no specific statute or crime in the Polish Criminal Code that criminalizes the use of torture, inhuman or degrading treatment.

### 1. STATE OF THE LAW

#### a. Current laws

Police officers in Poland who commit torture or inhuman or demeaning treatment are subject to criminal liability pursuant to provisions of the Criminal Code (CC);<sup>4</sup> those provisions have not been amended since implementation in 1 September 1998. Art. 246 CC provides: “[a] public official or anyone acting under his orders for the purpose of obtaining specific testimony, explanations, information or a statement, uses force, unlawful threat, or otherwise torments another person either physically or psychologically shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.”.

This is followed by art. 247 § 3 CC, while the full text of art. 247 CC is as follows: “§ 1. Whoever torments either physically or psychologically a person deprived of liberty shall be subject to the penalty of deprivation of liberty for a term of between 3 months to 5 years.; § 2. If the perpetrator acts with particular cruelty, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.; § 3. A public official who, despite his duties, allows the act specified in § 1 or 2 to be committed, shall be subject to the penalty specified in these provisions.”.

Furthermore, for abuse of authority, a police officer may be liable pursuant to art. 231 CC, which provides that: “§ 1. A public official who, exceeding his authority, or not performing his duty, acts to the detriment of a public or individual interest shall be subject to the penalty of deprivation of liberty for up to 3 years.; § 2. If the perpetrator commits the act specified in § 1 with the purpose of obtaining a material or personal benefit, he shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.; § 3. If the perpetrator of the act specified in § 1 acts unintentionally and causes an essential damage shall be subject to a fine, the penalty of restriction of liberty, or deprivation of liberty for up to 2 years.; § 4. The provision of § 2 shall not be applied when the act has the features of the prohibited act specified in Article 228.”

#### b. Evaluation of current laws

One of the ideas that could have a preventive effect is adding the crime of torture to the Criminal Code, by changing e.g. art. 246. This demand has been regularly and consistently reported by the Ombudsman for a long time. In the opinion of the Ombudsman, the Polish regulations does not

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4 Final version: Dz. U. [Journal of Laws] of 2017, pos. 2204 as amended.

penalize all elements of torture referred in art. 1 of the Convention against Torture<sup>5</sup>. Additionally, the Ombudsman pointed out that: “[...] *the provisions of the Criminal Code do not take into account situations of the application of torture ‘for the purpose of punishing individuals for acts committed by them or by a third party, or which they are suspected of committing, or for the purpose of intimidation or exerting pressure on them or on a third party, or for any other purpose arising from any form of discrimination.’ In practice, this may make it impossible to prosecute and punish the perpetrators of torture who apply it for these reasons and purposes. This also violates the victims’ rights to trial and fair compensation.*”<sup>6</sup>.

Also the Committee Against Torture (CAT) in the 2013 report<sup>7</sup> recommended that Poland should introduce the crime of torture into its legal system so that its definition comports with the definition found in art. 1 of the Convention against Torture. Moreover in November 2016, the UN Human Rights Committee noted that not all elements of the crime of torture are penalized by the Polish Criminal Code, nor does the code fully reflect what the actual crime is. In connection with that, it recommended amendment of the Polish Criminal Code so that it would comply with Convention against Torture provisions<sup>8</sup>.

Moreover, in May 2018, at the request of the Ombudsman for Human Rights, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) drafted an opinion that indicates, “*the definition of torture in Polish legislation should be sufficiently broad to include all acts involving violation of personal integrity that have been qualified as torture and other ill-treatment pursuant to international law; it should also cover all elements provided for in art. 1 of the UN Convention, in particular acts inflicting extreme pain or suffering as well as the intent and goal of an act or omission. Furthermore, appropriate legislation should expressly develop the aspect of full state liability for all acts of torture committed upon any territory subject to its jurisdiction when such is committed by a state official or other individual acting in an official capacity or upon their order or their express or silent consent.*” It goes on to say that all acts of torture should be subject to a minimum of six years of deprivation of liberty with no statute of limitation<sup>9</sup>.

### c. HFHR research<sup>10</sup> - need for changes in the criminal code

The above assessment is also confirmed by the research carried out by the HFHR. In March and April 2018, the HFHR conducted a survey among advocates<sup>11</sup>, in which we asked them the following question: “Do you think that the introduction of the crime of torture into the Criminal Code would provide a better qualification and would increase the effectiveness of proceedings in the case of ill-treatment by police officers?”. The results are as follows:

5 Ombudsman’s letter to the Ministry of Justice dated 27 October 2015, Ref. No. II.071.4.2015.ED, p. 3, [https://www.rpo.gov.pl/sites/default/files/Do\\_MS\\_ws\\_tortur\\_0.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MS_ws_tortur_0.pdf) (accessed: 26-06-2018).

6 Ibid, p. 3.

7 Conclusions and recommendations of the Committee against Torture, 23 grudnia 2013 roku, CAT/C/POL/CO/5-6, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr0yVMLY8Itqp7elpaWy9%2fzhpqAgxlv0wYIHQRBCyv-6Z5WSAJ4meQ2lea4vsJ8k3h%2fQY3d6Rp6d2fr%2fQBCD8leI5hagJXI9LdkxR6L9Oq8QZ> (accessed: 26.06.2018).

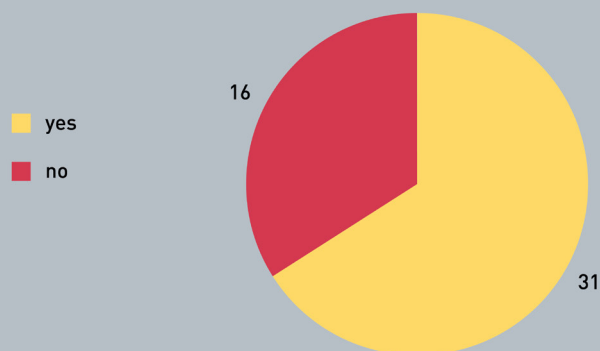
8 Concluding observations on the seventh periodic report of Poland, 23 November 2016, CCPR/C/POL/CO/7, pkt 25-26, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqEnKe%2bgR3Hi9diNTN1CrMSzSrhezG0iSGt-JKSvy8EGXyYBfE5lx500qrhNSRf5J%2b60Y5lx3TIN4JeQpWZ%2fKV0NvWwVotRjK20CL1cs7xzpK> (accessed: 26.06.2018).

9 ODIHR opinion dated May 22, 2018, on the definition of tortur and its absolute prohibition in the Polish legal order, Warsaw 2018, pts. 37 and 42, available at: [https://www.rpo.gov.pl/sites/default/files/325\\_CRIM\\_POL\\_22May2018\\_en.pdf](https://www.rpo.gov.pl/sites/default/files/325_CRIM_POL_22May2018_en.pdf) (accessed on: ).

10 The paragraph below is excerpted from the HFHR report entitled Misreatment of Suspects and Individuals Detained by the Polish Police, A. Klepczyński, ed., Warsaw 2018, pp 10-11, available at: <http://www.hfhr.pl/wp-content/uploads/2018/05/HF-PC-z%C5%82e-traktowanie-podejrzanych-i-zatrzymanych-badanie-ankietowe.pdf> (accessed on: ).

11 More about the research below.

Do you think that the introduction of the crime of torture into the Criminal Code would provide a better qualification and would increase the effectiveness of proceedings in the case of ill-treatment by police officers?



As you can see, the vast majority of advocates believe that the introduction of a torture offense to the Criminal Code would ensure a better qualification and increase the effectiveness of proceedings regarding ill-treatment by police officers. However doctrine indicates that art. 246 and 247 of the Criminal Code do implement the obligations arising from the Convention against Torture.<sup>12</sup>

## 2. INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT – SCALE OF THE PHENOMENON AMONG POLICE OFFICERS

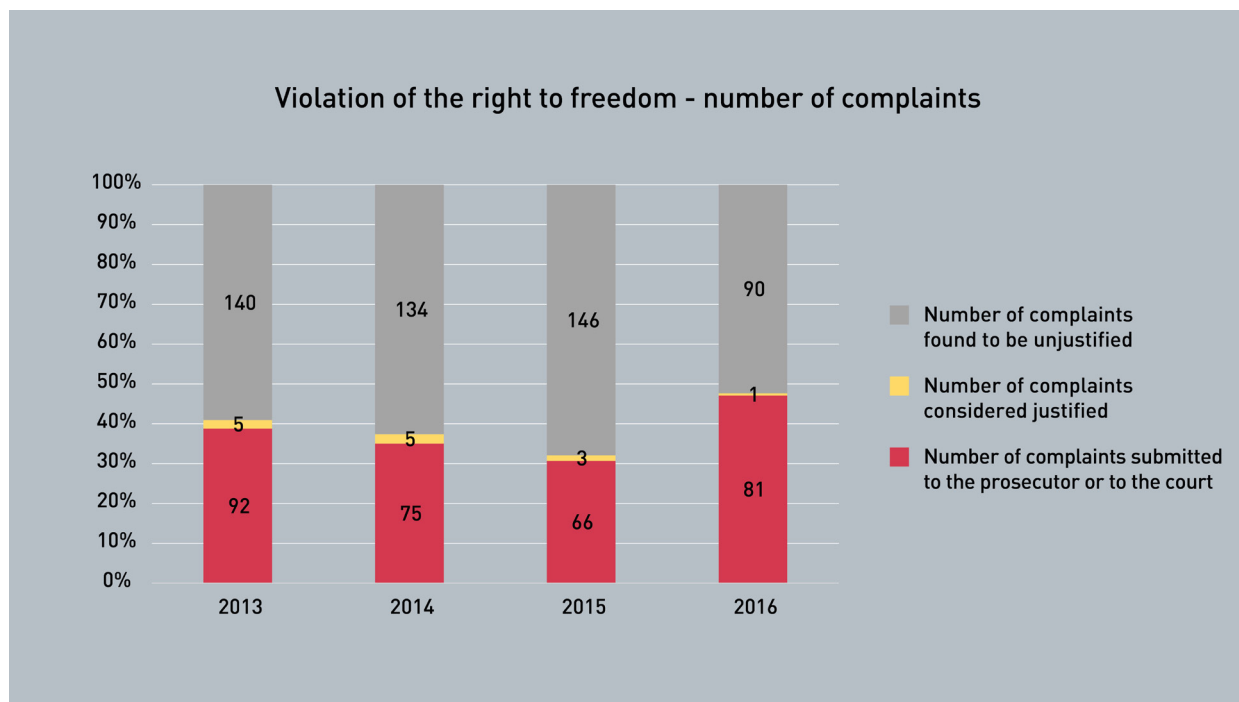
### a. Scale of police violence - statistical analysis<sup>13</sup>

Data made available by the Polish National Police<sup>14</sup> in matters categorized as: “Violations of the right to freedom,” which includes complaints of unreasonable, illegal, improper and unduly lengthy detentions, indicates the number of complaints has decreased year-over-year. Interestingly, the number of complaints submitted to the prosecutorial service in 2013-2015 decreased and then rose in 2016, where nearly 50% of the cases had been submitted to the prosecutorial office. Detailed data are presented below.

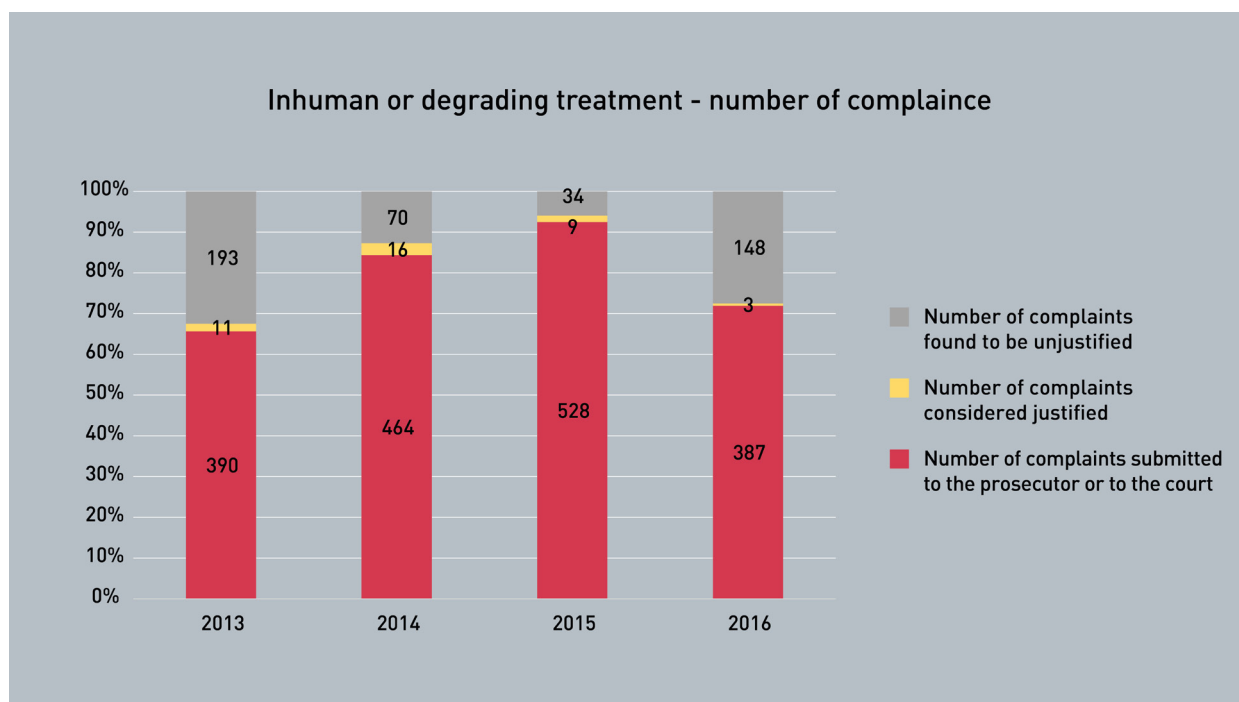
<sup>12</sup> cf. W. Zalewski, “Komentarz do art. 247” [Commentary on art. 247], in: Kodeks karny. Część szczególna. Tom II. Część II. Komentarz – art. 212-316 [The Criminal Code, detailed section: Volume II, Part II, commentary on arts. 212-316], eds M. Królikowski, R. Zawłocki, CH Beck 2013, p. 243; I. Zgoliński, “Komentarz do art. 246” [Commentary on art. 246], in Kodeks karny. Komentarz [The Criminal Code: Commentary], ed. V. Konarska-Wrzošek, Wolters Kluwer 2016, publ. LEX.

<sup>13</sup> The fragment below has been excerpted from an amicus curiae brief submitted by HFHR on April 16, 2018, to the ECtHR in re Robert Kuchta and Sebastian Mętel, complaint no. 76813/16, pp 7-8 including appropriate appendices, available at: [http://www.hfhr.pl/wp-content/uploads/2018/05/Amicus\\_Kuchta\\_ENG.pdf](http://www.hfhr.pl/wp-content/uploads/2018/05/Amicus_Kuchta_ENG.pdf) (accessed on: ).

<sup>14</sup> HFHR obtained access to the reference data as part of a public information request submitted pursuant to the Act dated 6 September 2001 on Access to Public Information [final version: Dz. U. [Journal of Laws] of 2016, pos. 1764 as amended), hereinafter: Act on Access. The information was made available in a writing dated 20 February 2018, Ref. No. GIP-1004/824/18/KR.



For the “Inhuman or degrading treatment”<sup>15</sup> category, the number of complaints filed stayed at the same level. This data, provided by the Polish National Police, includes allegations of improper physical methods/physical violence, direct coercion, psychological violence/threats, forced testimony, explanations, information, declarations, sexual harassment/rape, conditions in facilities for the detained, children’s facilities, in the course of transport, other inhuman or degrading treatment. While the number of filed complaints remained the same, the number of complaints submitted to the prosecutorial office in 2013-2015 grew year-over-year where, in 2015 92% of the submitted complaints were conveyed to investigative authorities. In 2016 the growth tendency significantly slowed. Detailed data are presented below.



15 HFHR obtained access to the reference data as part of a public information request submitted pursuant to the Act on Access. The data was made available via email on 9 March 2018, entitled Gip-1172/18.

In data obtained in 2016 by the Warsaw Bar Association it follows that: “(...) slightly over 2% of cases in which proceedings were initiated [in 2014 this was about 2.45%, in 2015 – about 2.06% and in the first two quarters of 2016 – 2.23%]. Therefore, only slightly above 2% of the cases in which criminal proceedings are initiated are reviewed by an independent court in a judicial proceeding. The others are dropped at the stage of preparatory proceedings (while in over 50% of the cases no criminal proceedings are initiated at all).”<sup>16</sup> Detailed data are presented in the table below<sup>17</sup>.

<b>Offenses related to torture and inhuman or degrading treatment, use of physical or verbal violence by police officers against persons deprived of their liberty</b>	<b>2014</b>	<b>2015</b>	<b>2016 (the first two quarters)</b>
Number of notifications about crime	1386	1354	680
Liczba wszczętych postępowań	732	727	358
Number of initiated proceedings	18	15	8
Number of discontinued proceedings	670	701	286
Number of convictions/ conditionally discontinued proceedings	11	9	4
Number of acquittals	5	0	4

This issue is also reviewed in a report by the Ministry of Internal Affairs and Administration summarizing the “Research concerning the problem of police aggression against individuals from outside the police force which Police officers encounter in connection with execution of their official duties.”<sup>18</sup> The report estimates that in the course of a year, police officers are involved in about 7600 cases of excessive or unreasonable aggression. It further indicates that only 7.63% of all such cases end in review proceedings.<sup>19</sup>

## **b. Mistreatment by police officers - HFHR practice**

One of the permanent elements of HFHR activity includes monitoring violations of police authority. Based on cases submitted to the Foundation, the most serious problems include violation of authority by police officers as well as the improper and illegal use of means of coercion along with negligence in the course of duty. Even though such acts by officers are evoking an increasing public outcry, the same problems continue to come up in HFHR practice. Over the course of the last year, the Foundation received many cases in which the main issue involved violations by police officers. The cases described below constitute examples of the most egregious behaviors encountered by HFHR.

### **Violence**

Jedną One of the most serious cases handled by the Foundation involved Damian G. HFHR learned of Damian’s death through correspondence from his father. Damian G. was detained in a Biedronka supermarket. According to the store’s security guards, Damian G. was suspected of stealing at the location. Officers from the police station at R arrived on the scene. An eyewitness account of the police intervention indicates that Damian G. was carried out of the store barefoot, dragging

<sup>16</sup> Report of the Human Rights Section of the District Lawyers Council in Warsaw dated 26 June 2017 about the problem of treatment of individuals deprived of liberty by police officers and other officials, p. 4.

<sup>17</sup> Table taken from the Report of the Human Rights Section of the District Lawyers Council in Warsaw dated 26 June 2017 about the problem of treatment of individuals deprived of liberty by police officers and other officials, p. 3-4.

<sup>18</sup> <http://www.hfhr.pl/wp-content/uploads/2018/04/Raport-MSWiA.pdf>.

<sup>19</sup> Report of the ministry of Internal Affairs and Administration... , pp 177-178.

his feet, unable to walk on his own. He was transported to the police station and then to a hospital intensive care unit. Hospital staff informed that at about 9 AM of the same day, Damian G. arrived at the hospital patient reception area. His father reported that the nurse receiving Damian G. overheard a police officer answer his phone and say, "I had to do it, but he's alive." Importantly, no one notified Damian G.'s family that he had been detained or transferred to the hospital. His father and wife learned of Damian's presence in the intensive care unit from a family friend. The woman informed that she had seen Damian with a swollen and bloodied face. Damian died the night of 8/9 September 2017 in the hospital's intensive care unit. The family was informed of the death only upon their arrival at the hospital.

In 2017, XY reported to the Helsinki Foundation for Human Rights that he had been beaten at a police station in Bydgoszcz. To substantiate his claim, he submitted medical reports describing a series of facial injuries. According to XY's declaration, after being detained by two police officers and being transferred to the police station, he was treated in a degrading fashion, abused and beaten by one of the police officers. The medical examination found that as a result of the incident he sustained a series of injuries, including black eyes and swelling of the areas surrounding both eyes, trauma from being struck with a blunt object on the right cheek, which was also covered in blood clots along with subcutaneous hematomas in the area of the left jaw angle.

Another case of abuse of police authority in Bydgoszcz involved two brothers. When returning home at night, the two were stopped by the police and asked to show their documents. One informed the police officers that his documents were at home, which was located nearby from the location of the stop. The other of the two brothers produced identification for the police officers. According to him, as he produced the identification, the police officer attacked his brother by pulling his hat over his head and then striking him several times with an open hand. He goes on to declare that after being brought to the police station, the attacked man was handcuffed, taken to the toilet, where he was beaten again by the police officers. As a result of this incident, the beaten man was taken to the Ministry of Internal Affairs hospital, where doctors reportedly found no trauma to his body. Despite such a medical report, the beaten man had black eyes, bruises and a swollen face for a long time after the incident.

HFHR is also handling a case which, despite its occurrence 10 years ago, has still not been completed before the court. On July 26, 2008, in the town of T, police officers abused their authority in the course of stopping Mr. C. Despite incapacitating him by handcuffing his hands behind his back and putting him down on the ground, they beat Mr. C, pressed him to the ground and dragged him across the sidewalk, kicked him in the body and struck him several times in the head. Due to those acts, the victim incurred injuries, including hematomas on the upper and lower extremities, his back and around both eyes (black eyes) accompanied by subconjunctival hemorrhage of the left eye, extensive abrasions of the epidermis, especially on the left side, bruising of the left auricle, which resulted in a health disorder for a time of less than seven days as well as injuries in the form of a perforated right eardrum and attendant hearing impairment lasting over seven days. On September 29, 2014, the Gdańsk-Południe District Court in Gdańsk convicted both of the police officers. The court decision stated that any necessity and justification for the use of force against the victim ended upon his effective incapacitation resulting from the use of gas, handcuffing him behind his back and laying him face down on the ground. Further acts carried out by the defendants constituted abuse of authority. The court convicted the defendants to a year of deprivation of liberty and sentenced them to two years of suspended sentences. The defendant's attorney as well as the prosecutor filed appeals. Currently, the case is being reviewed by the court of first instance and further hearings are being stayed due to medical reasons claimed by the defendants.



## **Lack of sufficient oversight**

Here, HFHR intervened in the case involving the death of a Vietnamese national; we learned of the matter from an article on tvn24.pl. The woman and her partner were detained by Internal Security Agency officers in a flat located in Warsaw's Ochota District. Both were suspected of involvement in an international criminal group. After being detained, i.e. already under the officers' protection, she fell out of a window. The article cites two independent sources claiming the woman was handcuffed at the time.

Violations also occurred in the death of a 29-year-old resident of Łtawa, who died at a police station. HFHR learned of his death from an online article on the website of a local radio station. The man was detained by police officers and transported to the police station in Łtawa. When he was detained, he was under the influence of alcohol, although the examining physician allowed him to be placed in a cell for detained individuals. The following day, one of the police officers noticed that the victim had fainted. The article indicates that an ambulance was called and, after an hour-long attempt to resuscitate him, the victim died. The District Prosecutor in Łtawa opened an investigation in order to establish the cause of death. The matter currently remains in progress.

Another case involves the death of 19-year-old Piotr. Piotr had come to Płock to visit his girlfriend. During his stay, he was assaulted and beaten by a group of 10 individuals. An ambulance and the police were called to the scene. The paramedics supposedly claimed that Piotr had not been harmed but was only under the influence of alcohol or drugs. The police officers decided to detain him, but not as a suspect, but rather to give him a place to sober up, because he was not from Płock and had no place to stay. On the way to the police station, the police officers decided to take Piotr to the hospital emergency room in Winiary. The victim was not appropriately examined, and the physician found that he could be taken to the sobering up facility, where his condition deteriorated. At about 4 AM, an ambulance once again took Piotr to the hospital, this time to the intensive care unit, where it turned out he had an occipital fracture. Subsequently, he was determined to be brain-dead.

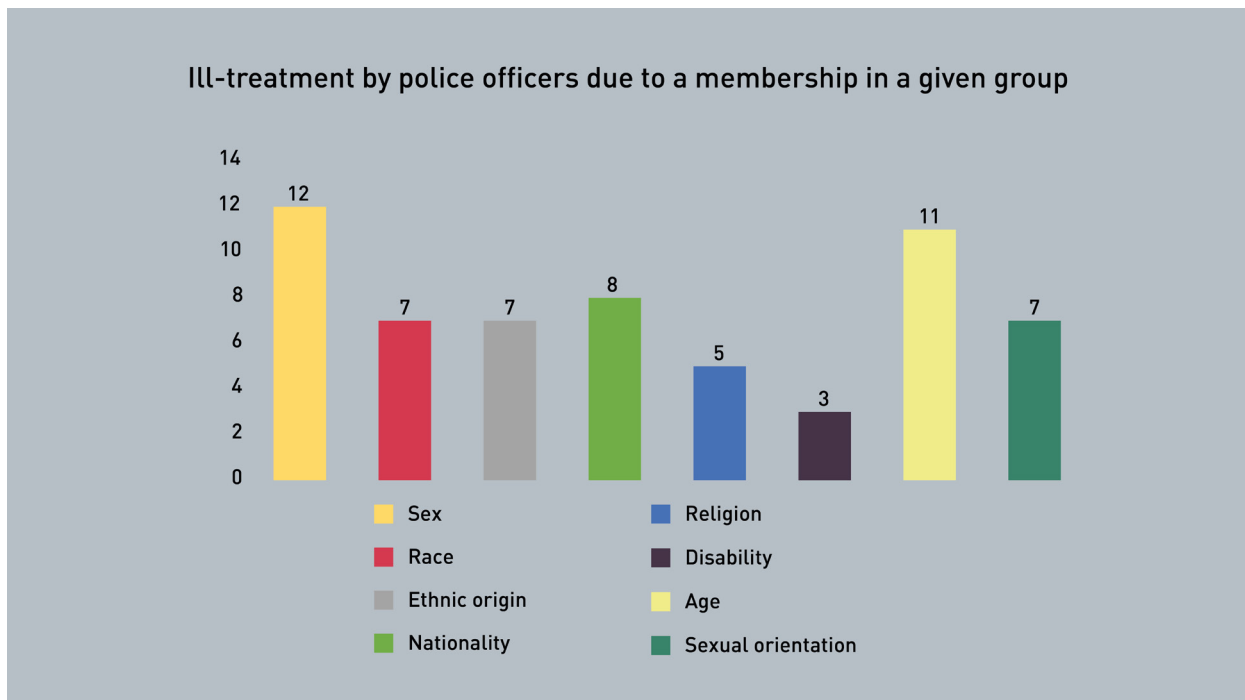
### **c. Survey research among lawyers about the scale of police violence<sup>20</sup>**

The research carried out by the HFHR among advocates shows that all respondents claimed that in cases they handle they had encountered clients reporting the problem of ill-treatment by police officers.

The surveyed advocates also indicated groups particularly subjected to ill-treatment by police officers. Distinguishing characteristics of potential victims included age, gender, ethnic origin, race, nationality, sexual orientation, religion and disability.

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<sup>20</sup> The fragment below was drafted pursuant to an amicus curiae brief prepared by HFHR on April 16, 2018, p 7.



In matters concerning ill-treatment by police officers, the surveyed advocates indicated that usually in such cases they encounter evidentiary problems. Their complaints concerning ill-treatment are ignored, lack of police reaction to the claims of ill or degrading treatment, as well as an improper approach by judges.

#### **HFHR RECOMMENDS:**

##### **In the scope of substantively criminal law:**

- An analysis whether current Polish law assures an effective penal model that fully implements the protective, repressive and preventive functions;
- An analysis of the postulate of the Human Rights Ombudsman to introduce the crime of torture into the Criminal Code, as is supported by the decided majority of those surveyed.

##### **In the scope of practice by procedural bodies:**

- Assuring that procedure bodies fully execute the procedural obligations arising under art. 3 Convention and art. 1 para. 1 Convention On the Prevention of Torture.

##### **Additional systemic changes:**

- Creating a legal framework that allows for recording sound and images of on-duty police officers in action;<sup>21</sup>
- Wholesale change in the procedure of conducting medical examinations of detained individuals, especially with respect to individuals who are to be placed in detention facilities;
- The complete implementation of the model adopted in the Istanbul Protocol because such may lead to the effective prevention of torture by police officers.

<sup>21</sup> The initiative to record officers' interventions originated from the Main Police Headquarters in March 2014. Currently, a pilot of this solution is being carried out in three Polish cities. However, no legal changes have been made to record interventions taking place in places other than public and the cameras placed on police uniforms are turned off in such situations.

### III. ACCESS TO A LAWYER PROMPTLY AFTER DETENTION

Without any doubt, assuring access to a lawyer or legal advisor immediately after detention could prevent torture and inhumane or degrading treatment.

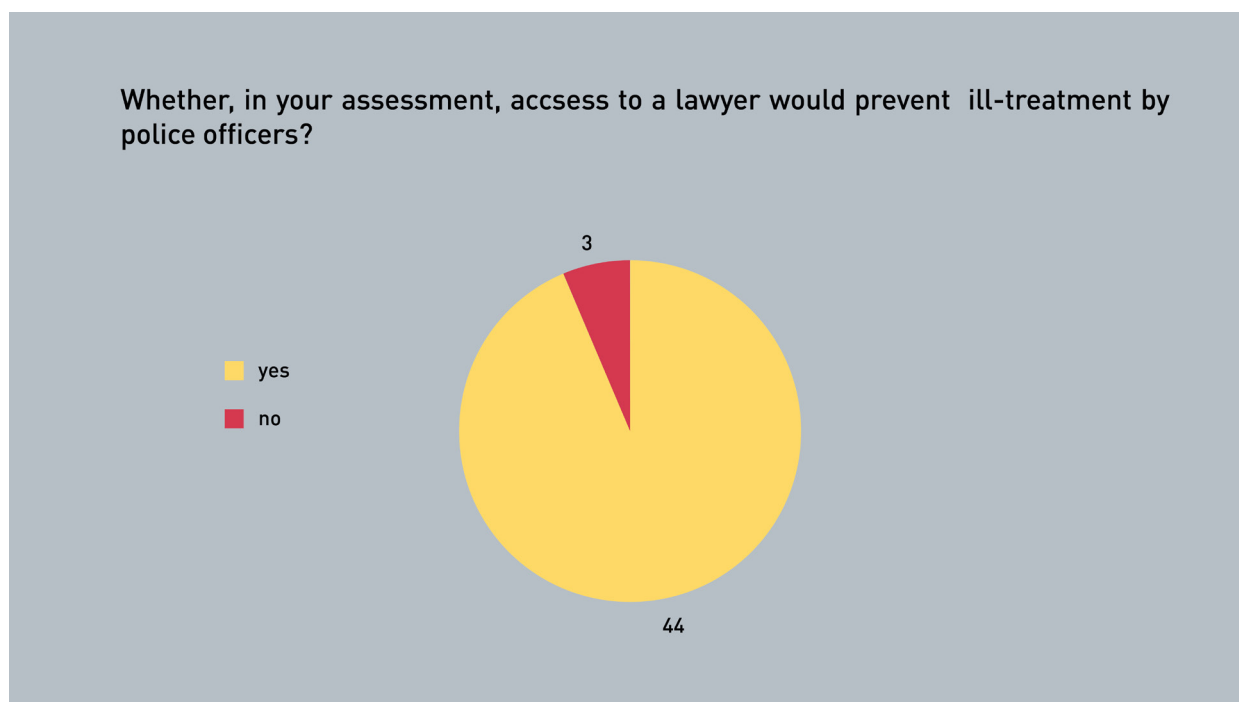
#### 1. CURRENT LAW

Under current law, in accordance with art. 245 § 1 of the Code of Criminal Procedure<sup>22</sup> (CCP): “[d]etained persons, upon their request, shall immediately be given the opportunity to contact an advocate or legal counselor by any means available, and also to talk directly with the latter; (...)”.

#### 2. PRACTICAL ASPECTS CONCERNING ACCESS TO A LAWYER<sup>23</sup>

From the HFHR report: “On the (in)accessible access to an attorney” (hereinafter: the Report on access to lawyers), follows that even though art. 245 of the CCP guarantees the detained person the right to immediate contact with a lawyer and to speak directly with them, lawyers indicated that such contact does not happen. One of the lawyers said that contact is often delayed: “[...] because ‘they want to get as much as they can out of the detainee.’ Another defender stressed that a certain kind of delay in this area is a type of ‘procedural gambit’, whose purpose is to prevent the establishment of a line of defence, because this could ‘disrupt the police and prosecutors’ investigation’, and the presence of a lawyer from the very beginning of the proceedings may be inconvenient and hinder the actions taken.”<sup>24</sup>.

It must also be stated that the majority (94%) of advocates surveyed are of the opinion that increasing access to lawyers from the first moment after detention could prevent situations in which police officers use violence.



<sup>22</sup> Unified text: Dz. U. [Journal of Laws] 2017, pos. 1704 as amended.

<sup>23</sup> Paragraph excerpted from the HFHR report entitled Mistreatment of Individuals suspected and Detained by Police Officers ..., pp 13-14.

<sup>24</sup> Report on access to lawyers, p. 26.

**HFHR RECOMMENDS:**

- Introducing the opportunity to assure detained individuals an ex officio advocate or legal counselor,<sup>25</sup>
- Assuring access to assistance from a lawyer promptly after detention, because this may be the first safety check that prevents violence by police officers;
- Introducing a list of advocates and legal counselor at police stations.<sup>26</sup>

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25 Compare: Resolution of the Warsaw Bar Association on May 24, 2017, on the prohibition against #torture and access to a #lawyer in the event of detention of a crime suspect, available at: <http://ora-Warsaw.com.pl/pl/9388327-uchwala-ora-w-warszawie-z-dnia-24-maja-2017-r-w-przedmiocie-zakazu-stosowania-tortur-i-dostepu-do-pomocy-adwokata-w-razie-zatrzymania-osoby-podejrzewanej-o-popelnienie-czynu-zabronionego> (accessed on: 14.05.2018).

26 Report on access to a lawyer , p 61, Compare: Position of the Cracow Bar Association on access to a lawyer by detained individuals within the first 48 hours after detention, dated April 10, 2015, available at: [http://www.adwokatura.pl/admin/wgrane\\_pliki/file-stanowisko-10-04-2015-11386.pdf](http://www.adwokatura.pl/admin/wgrane_pliki/file-stanowisko-10-04-2015-11386.pdf) (accessed on: 14.05.2018).

## IV. PRISON ESTABLISHMENTS

### Summary:

- Despite efforts by the Penitentiary Service, instances of inhuman and degrading treatment stemming from improper living conditions, improper medical care and abuse of the 'threat to public safety' and 'threat to correctional facility safety' statuses continue to occur in Polish penitentiary facilities.
- Poland has yet to implement CPT and CAT recommendations concerning increasing the standard living area to 4m<sup>2</sup> per inmate.
- Failure to adapt penitentiary facilities to the needs of the disabled remains an ongoing problem.

Since the time of the Polish systemic transformation, Polish penitentiary facilities have made significant efforts and strides with the goal of improving detention conditions for individuals deprived of liberty. Nevertheless, this does not mean they remain devoid of problems in the treatment of those deprived of liberty. Though they are housed in increasingly modern penitentiary facilities, the incarcerated continue to have to deal with the risk of inhuman or degrading treatment.

### 1. STANDARD FOR SIZE OF RESIDENTIAL CELL PER INMATE

#### a. Current law

With its standard of 3 m<sup>2</sup> per inmate, Poland is among the countries that guarantees the lowest amount of residential space per individual deprived of liberty. The situation does not favor realization of fundamental rights, hinders resocialization, generates conflicts between inmates and is conducive to the spread of infectious disease among the population.

#### b. Execution of sentencing in practice

Average population density at penitentiary facilities has decreased in recent years. While in 2009 some facilities exceeded 130% of capacity, by 2015, this indicator dropped to about 84%.<sup>27</sup> This resulted from, inter alia, decisions issued by the European Court of Human Rights in *Orchowski v. Poland*<sup>28</sup> and *Sikorski v. Poland*,<sup>29</sup> in which the court found overcrowding of penitentiary facilities to be a systemic problem.

Unfortunately, numerous legislative changes introduced in recent years, including longer sentences and introduction of mixed sentencing, have increased the repressive nature of Polish criminal law resulting in, inter alia, growth in the number of individuals incarcerated in penitentiary facilities. There has also been a change in the application of temporary rest. While in July 2015 the number of temporarily arrested individuals totaled 4669,<sup>30</sup> in April 2018 that number was 7432.<sup>31</sup>

According to statistics reported by the Prison Service on June 15, 2018,<sup>32</sup> current capacity of penitentiary facilities stands at **91.4%**. As a result, authorities of the Republic of Poland failed to

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27 Annual statistics of the Prison Service for 2015, available at: <https://www.sw.gov.pl/assets/12/29/79/ce6663c30cb8ea38fccc716bb-9b9fd250d4a341f.pdf> (accessed on: 27.06.2018).

28 ECHR decision dated October 22, 2009 in the case of *Orchowski v. Poland*, complaint no. 17599/05

29 ECHR decision dated October 22, 2009 in the case of *Sikorski v. Poland*, complaint no. 17885/04.

30 Monthly Prison Service statistics, available at [https://www.sw.gov.pl/uploads/5846ca74\\_7b1c\\_4f73\\_a944\\_213cc0a80015\\_li-piec\\_2015.pdf](https://www.sw.gov.pl/uploads/5846ca74_7b1c_4f73_a944_213cc0a80015_li-piec_2015.pdf).

31 Monthly Prison Service statistics, available at <https://www.sw.gov.pl/assets/19/62/86/2485517802a98e2f3d-440148dd01351d08b500c1.pdf> (accessed on: 27.06.2018).

32 Monthly Prison Service statistics, available at <https://www.sw.gov.pl/assets/54/25/51/bf564543ad75b56897f300211726d24238bc0f-ba.pdf> (accessed on: 27.06.2018).

exploit the most conducive moment to implement the numerous CPT<sup>33</sup> and CAT<sup>34</sup> recommendations and thereby adapt the national standard for residential cell size per inmate to standards of international law.

## 2. LIVING CONDITIONS

Living conditions of individuals deprived of liberty vary significantly across the country. In new penitentiary facilities, the risk of inhuman or degrading treatment of individuals deprived of liberty stemming from the conditions of their detention is far lower than at older facilities, which are frequently located in historic buildings.

An opportunity for the continued improvement of the living conditions of the prison population should be the act implementing the "Program Modernizing Prison Services in 2017-2020," adopted by the Polish Sejm in 2016. The modernization is to include, inter alia, "improving the condition of prison infrastructure, including renovation of residential buildings as well as increasing electrical energy security, modernizing IT and communication systems, as well as modernizing medical treatment facilities for individuals deprived of liberty."<sup>35</sup>

Program implementation will certainly contribute to improving the state of human rights observance. Nonetheless, it will not resolve all attendant problems. The most significant of these, in addition to the aforementioned living space per inmate, include the following:

- **lack of access in accommodation cells to sunlight:** especially in cells for temporarily arrested individuals; shades effectively block access to sunlight and fresh air in accommodation cells;
- **improper ventilation of accommodation cells:** this is especially evident in older penitentiary facilities; fungal growth that is harmful to health appears on cell walls as a result of insufficient ventilation;
- **improper access to hygiene:** not all penitentiary facilities guarantee individuals deprived of liberty a minimum of two baths per week; a significant problem in this regard is failure to adapt the national bathing standard (i.e. at least one bath per week for incarcerated men) to the requirements of international law. This becomes especially acute when combined with the fact that not all facilities are even equipped with at least periodic availability of hot water for accommodation purposes. Another problem is the insufficient number of toilets in multiperson cells. In such cells, the number of toilets is the same as in two-person cells. As a result, individuals housed in such cells may face difficulties in carrying out their physiological needs, especially in the morning hours.
- **no guarantee of privacy when using sanitary facilities:** the incomplete enclosure of sanitary facilities in accommodation cells and lack of dividers between shower stalls continue to be a problem; according to Prison Service data, nearly 2400 cells in 2016 did not have enclosed sanitary facilities;
- **insufficient amount of time spent outside the accommodation cell;** this primarily concerns individuals incarcerated in closed penitentiary facilities. In such facilities it is a rule that individuals deprived of liberty spend 23 hours a day in their accommodation cell. Incarcerated prisoners have the right to a one-hour walk each day.

33 Report of the European Committee for the Prevention of Torture, Inhuman or Demeaning Treatment or Punishment (CPT) from its visit to Poland in 2013, available at: <https://rm.coe.int/1680697928>

34 Committee Against Torture (CAT), report on the fifth and sixth periodic observation concerning Poland, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr0yVMLY8ltqp7elpaWy9%2fzhpqAgxlv0wYIHQRBCyv-6Z5WSAJ4meQ2lea4vsJ8k3h%2fQY3d6Rp6d2fr%2fQBcD8leLQKy%2fZWvWPMkBg16xrsG1Z> [accessed on: 27.06.2018].

35 <https://www.defence24.pl/rzad-przyjal-program-modernizacji-sluzby-wiezionej>

### 3. EXAMPLES OF INHUMAN AND DEGRADING TREATMENT BY PENITENTIARY FACILITY PERSONNEL - HFHR PRACTICE

Over the last year, the Helsinki Foundation for Human Rights has twice dealt with the issue of inhuman and degrading treatment of individuals deprived of liberty by penitentiary facility personnel.

HFHR intervened in the case of a beating of an inmate by a Prison Service officer. HFHR received an anonymous tip from a correctional services employee along with the film recording the event. The film showed a guard punching a prisoner with a fist while the latter laid on a cot. According to the individuals who reported the incident to HFHR, the facility's director and head of security, after reviewing the film, downplayed the situation and claimed they saw no "behavior that violated the law," and described the guard's activity as an "unconventional manner of handcuffing." After the HFHR intervention, the Director of the District Prison Service Inspectorate notified the prosecutor's office regarding the possibility of the commission of a crime against one of the inmates.

In another case, HFHR contacted the Director of the Correctional Facility in Rzeszów regarding claims of human rights violations raised by a temporarily arrested man held in that facility. The security means applied to him, especially the daily search of his cell and subjecting him to daily personal searches, in the evaluation of HFHR, could constitute a violation of the prohibition against inhuman or degrading treatment.

### 4. HEALTH CARE IN PENITENTIARY FACILITIES

#### a. General remarks

Poland is part of a group of states in which the healthcare system constitutes a part of the penitentiary system and is provided by prison services officers as well as civil employees of the prison service.

This is significant for the standard of healthcare provided because it impacts the relationships between penitentiary healthcare personnel and the inmates. It hinders the coalescence of fundamental trust in the doctor-patient relationship which negatively impacts the daily functioning of the healthcare system and fails to guarantee individuals deprived of liberty reliable and complete healthcare.

In addition, some of the greatest problems of the Polish prison service are related to infrastructure, especially the lack of beds at some hospital departments, shortages of medical equipment, and use of aging historical buildings to house medical facilities. CPT raised this issue in its most recent published report concerning Poland, where it indicated unsatisfactory living conditions in prison hospitals visited by the committee.<sup>36</sup>

Prison service problems have, in the past, constituted elements of numerous ECHR decisions. The most significant of these is *Dzieciak v. Poland*,<sup>37</sup> in which the court for the first time found that Poland substantively violated art. 2 of the Convention. In the decision, the court especially highlighted the lack of appropriate medical infrastructure, lack of coordination between prison health services and the penitentiary court as well as negligence by prison services that failed to react appropriately to the deteriorating health of Zbigniew Dzieciak.

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<sup>36</sup> Report of the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (CPT) from its visit to Poland in 2013, available at: <https://rm.coe.int/1680697928> (accessed on: 27.06.2018).

<sup>37</sup> ECHR decision dated December 9, 2008, in the case of *Dzieciak v. Poland*, case no. 77766/01.

## b. HFHR practice

These issues are reflected in the numerous complaints from individuals deprived of liberty submitted to the Helsinki Foundation for Human Rights. Recently, HFHR has conducted several interventions concerning the failure to assure individuals deprived of liberty appropriate health care.

In one of these cases, and incarcerated man diagnosed with a serious liver illness applied to HFHR. He had been qualified for treatment with interferon and ribavirin in a scheduled manner against chronic liver inflammation. Despite that, he had not received appropriate treatment. In response to his complaint, he was told that *“having found no information concerning the deteriorating state of health in the course of medical checkups and a change in the manner of treating the illness that results in a currently limited number of medical procedures, the patient will continue to await inception of treatment without establishing the precise date thereof.”*

The most tragic occurrence concerning prison health services took place over the course of 2017 in the Warszawa Grochów Investigative Arrest in Warsaw. A woman incarcerated there failed to receive appropriate medical care despite numerous complaints and requests to that end. Statements by other inmates indicate the security personnel had been notified of the woman’s ill health numerous times, but the presiding physician claimed she was malingering. As a result, an ambulance was requested on June 7, 2017, four days after she had been incarcerated. The same day, the woman died. The circumstances of her treatment indicate, in the opinion of HFHR, a significant risk of a substantive violation of art. 2 of the Convention.

## 5. TREATMENT OF INMATES WITH DISABILITIES

A frequently observed problem is failure to adapt penitentiary facilities to the needs of individuals with disabilities. This is regularly reported by the National Mechanism for the Prevention of Torture. In the evaluations in those reports, the monitoring of penitentiary facilities has showed that the decided majority of penitentiary facilities, while labeled as adapted to the needs of individuals with disabilities, actually failed to guarantee them fully independent functioning within the penitentiary facility.<sup>38</sup>

The treatment of inmates with disabilities was the subject of a recent ECHR verdict in *Bujak v. Poland*,<sup>39</sup> where the court found a violation of article 3 of the Convention due to the failure to provide a disabled inmate with appropriate orthopedic devices and appropriate care which forced him to rely on assistance from other inmates. In the opinion of the court, the situation violated his dignity and contributed to a level of suffering, which exceeded that normally associated with deprivation of liberty.

The issue of treatment of individuals with disabilities also falls within the realm of HFHR activity. Recently, the Foundation intervened in the case of an incarcerated man with limited mobility. He complained that because he had been assigned to a cell on the fourth floor, his disability prevented him from executing his right to a one hour walk per day.

## 6. THE STATUS OF HIGH-RISK INMATES

The last of significant problems observed by HFHR is the treatment of prisoners qualified as those that constitute a particular threat to society or to the security of the penitentiary facility (high-risk

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38 Raport Rzecznika Praw Obywatelskich z działalności Krajowego Mechanizmu Prewencji w 2016 r. dostępny pod adresem: [www.rpo.gov.pl/sites/default/files/Raport%20Krajowego%20Mechanizmu%20Prewencji%20Tortur%20w%202016%20r..pdf](http://www.rpo.gov.pl/sites/default/files/Raport%20Krajowego%20Mechanizmu%20Prewencji%20Tortur%20w%202016%20r..pdf) (accessed on: 27.06.2018).

39 ECHR decision from March 21, 2017, in the case of *Bujak v. Poland*, case no. 686/12, 21 March 2017.



inmates). This issue was the subject of precedential ECHR judgments in *Piechowicz v. Poland*<sup>40</sup> and *Horych v. Poland*,<sup>41</sup> in which the court questioned the compliance of Polish practice in this regard with human rights standards.

Moreover, in 2016-2017 alone, ECHR handed down 11 decisions in which it ruled that Poland had violated the Convention through its long-term incarceration of individuals in a regime designated for high-risk inmates. In its decisions, the court primarily noted the automatic and arbitrary assignment of the high-risk inmate status.

The court's critique also concerned the failure to differentiate security measures applied among particular inmates, as a result of which all were subjected to routine personal searches during each entry and exit from their cell irrespective of their behavior and the attendant threat to the security of the penitentiary facility.

**HFHR RECOMMENDS:**

- Guaranteeing individuals deprived of liberty at least 4m<sup>2</sup> of living space per inmate;
- Adapting the living conditions of individuals in penitentiary facilities so that these no longer violate the rights of individuals deprived of liberty;
- Making continued efforts to decrease the number of individuals designated as "high-risk inmates," including the thorough review of inmates currently designated as such;
- Guaranteeing inmates designated as "high-risk inmates" special behavioral support, as well as appropriately tailoring security means used against them proportionally to their relevant threat level;
- The complete and actual adaptation of select penitentiary facilities to the needs of individuals with disabilities.

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40 ECHR decision from April 17, 2012, in the case of *Piechowicz v. Poland*, case no. 20071/07.

41 ECHR decision from April 17, 2012, in the case of *Horych v. Poland*, case no. 13621/08.

## V. COMPLAINTS OF INDIVIDUALS DEPRIVED OF LIBERTY IN PENITENTIARY FACILITIES

### Summary:

- Of the more than 40,000 complaints reviewed by Prison Services in Poland submitted by individuals deprived of liberty, slightly over 1% were deemed justified.
- The highest number of complaints concern ill-treatment of inmates by Prison Service officers, living conditions and healthcare.
- The complaint and penitentiary oversight systems do not provide a fully effective structure for the protection of rights and freedoms of individuals deprived of liberty.

### 1. COMPLAINTS OF INDIVIDUALS DEPRIVED OF LIBERTY IN PENITENTIARY FACILITIES

An effective and efficient mechanism for reviewing complaints submitted by individuals deprived of liberty should be viewed as one of the means for preventing violations of the rights and freedoms.

#### a. Statistics<sup>42</sup>

The most recent available data is from 2016 and indicates that individuals deprived of liberty at organized penitentiary facilities submitted 62,604 complaints. Directors of particular Prison Services facilities handled nearly 48,000 complaints internally. Only 377 of those complaints were recognized, while over 24,000 of them have been rejected and nearly another 24,000 were handled in a different manner.

In connection with the submitted complaints, the directors of penitentiary facilities internally reviewed 41,614 allegations raised in the complaints of which 486 were recognized as justified. The highest number of complaints concerned the treatment of individuals deprived of liberty by Prison Services officers and employees (11,332 allegations contained in complaints handled internally by Prison Services), of which 25 allegations were recognized as justified. The matters most frequently alleged in this category included omission to act (1,881 allegations – 6 recognized as justified), verbal aggression (964 allegations – 0 recognized as justified), the manner of conducting a personal search or the search of a cell (928 allegations – none recognized as justified); drafting applications for disciplinary punishment (874 allegations – 5 justified), failure to provide security (607 allegations – 3 justified). In addition, 274 allegations concerning assault by beating were reviewed and not a single one was recognized as justified. Out of the 109 allegations concerning use of means of direct force, two recognize as justified.

Allegations concerning living condition constituted the second largest group of complaints (of the 6,832 allegations reviewed internally by Prison Services, 138 were recognized as justified). Just over 1.5 thousand allegations concerned conditions in living facilities, of which five were deemed justified. A similar number of allegations concerned nourishment, of which 10 were recognized as justified. Meanwhile, of the 216 allegations concerning overcrowding, not a single one was recognized as justified.

Of the 6,188 reviewed allegations concerning healthcare, 54 were deemed justified. Nearly half of the allegations in this category concerned improper treatment and eight of those where recognized as justified. Of the nearly 600 allegations concerning refusal to grant referral to a physician

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<sup>42</sup> Research project entitled "Strengthening the judicial protection of fundamental rights of remand prisoners in the European Union," financed as part of the European Commissions "Justice" Program. The project is ongoing.

or an unduly long wait for a procedure/consultation, nine were recognized as justified. Finally, of the 521 allegations concerning lack of medication, seven were recognized as justified.

## **b. Evaluation of the penitentiary complaint and oversight system**

During the research project<sup>43</sup> implemented by HFHR, which focused on the protection of fundamental rights and access to legal aid to temporarily arrested individuals, experts who deal on a daily basis with issues faced by persons deprived of liberty, indicated that both the internal complaint procedure (within the prison administration) and the external system, i.e. to a penitentiary judge, are ineffective tools for the protection of the rights and dignity of those individuals. Furthermore, they emphasized that the system of penitentiary oversight over the conditions in which the punishment of deprivation of liberty is executed are purely theoretical because the judges reviewing the cases, in the majority of instances, rely only on documentation provided with the complaint without having any direct contact with the inmate. Additionally, they found the frequency with which judges reviewed penitentiary facilities to be insufficient, although the penitentiary judges raised the significant number of their obligations as the cause thereof.

At the same time, penitentiary judges who took part in the project indicated that the current regulations concerning solitary confinement may render impossible appropriate penitentiary oversight. Pursuant to art. 145 § 3 of the Executive Penal Code, punishing someone with solitary confinement for a period exceeding 14 days requires consent from a penitentiary judge. The punished individual has the right to submit a complaint (irrespective of the length of the punishment assigned), but this does not suspend execution of the punishment. Therefore, the judges evaluation of a submitted complaint in connection with being punished to solitary confinement for less than 14 days may be ineffective because the complaint will likely be reviewed after execution of the punishment.

Interviews conducted with professionals indicated that individuals deprived of liberty generally represent themselves in the complaint procedure, without any legal assistance. This may impact the effectiveness of this legal recourse. In light of the lack of a system of legal assistance for persons deprived of liberty, nongovernment organizations (including those engaged in the protection of human rights) play a special role in the scope of complaints against detention conditions, as do legal clinics as well as institutions monitoring incarceration standards. The experts showed that the activities of these organizations contribute to increased awareness among individuals deprived of liberty of the rights and the attendant required standards of detention, including those stemming from European Court of Human Rights jurisprudence.

Furthermore, in the course of the research project, interviewed individuals noted that foreigners, who do not possess sufficient language skills in Polish, may have particular difficulties in taking advantage of the complaint procedures. Difficulties in accessing translators inside penitentiary facilities, access to documents or regulations translated into a language understood by the individual deprived of liberty continued to be cited as problematic.

### **HFHR RECOMMENDS:**

- Introduction of changes, including organizational changes, within organizations of the justice system that will increase the effectiveness of penitentiary judges oversight over the deprivation of liberty conditions;
- Guaranteeing access to legal aid to individuals deprived of liberty in cases concerning complaints of deprivation of liberty conditions;
- Organize regular trainings, including those for penitentiary judges, lawyers, members of the Prison Services, about torture and degrading treatment or punishment.

<sup>43</sup> Research project entitled "Strengthening the judicial protection of fundamental rights of remand prisoners in the European Union," financed as part of the European Commissions "Justice" Program. The project is ongoing.

## VI. CORRECTIONAL FACILITIES, YOUTH SHELTERS, YOUTH FOSTER CENTERS

In the most recent period, HFHR received no complaints concerning inhuman or degrading treatment of charges of youth correctional facilities, youth shelters or youth foster centers.

However, HFHR would like to highlight incompliance of the Polish legal order concerning incarceration of minors in resocialization facilities with international law and norms, including art. 37 of the Convention on the Rights of the Child, which guarantees children that depriving them of liberty will be considered *ultima ratio* means. The law on proceedings involving minors regulating this issue, in article 10, guarantees this state of affairs only with respect to correctional facilities. In effect, minors may be deprived of liberty in Youth Foster Centers without particular consideration given to whether other educational means could have the same effect on them. The state of affairs should be deemed incompliant with the Convention on the Rights of the Child.

## VII. NATIONAL CENTER FOR THE PREVENTION OF ANTISOCIAL BEHAVIOR

### Summary:

- The Act dated 22 November 2013 on proceedings with respect to individuals with psychic disorders that pose a threat to life, health or sexual freedom of other individuals, which regulates the post penal detention of perpetrators with psychic disorders, evokes serious controversy from the international human rights standards perspective.
- The therapeutic nature of detention at the National Center for the Prevention of Antisocial Behavior (NCPAB) is extremely doubtful; the detention seems more of a repression violating the prohibition against double criminality and retroactive application of the law.
- The living conditions at the NCPAB may violate the rights of the confined, including through the limitations provided for in the center's rules and regulations on visits with friends and family as well as the planned capacity limits in living quarters.
- The case being handled by HFHR before the ECHR shows that in practice there may occur further violations of human rights, including due to the arbitrary and overly broad application of the Act and extension of the detention contrary to the opinions of NCPAB doctors and psychologists.

### 1. CURRENT LAW

The Act dated 22 November 2013 on proceedings against individuals with psychic disorders that threaten the life, health sexual freedom of other individuals (Act) came into force in early 2014. The Act regulates the court proceedings conducted against individuals who, after having completed the punishment of deprivation of liberty, may constitute a threat, and thereby there is the apprehension, that they will commit a crime in the future, due to their mental health condition. The Act was adopted as a reaction to articles in the press, which reported on the imminent release in early 2014 of individuals convicted of the death penalty prior to 1989, which had been commuted to a 25-year imprisonment in 1989.

Pursuant to the Act, proceedings are initiated based on an application from the director of the penitentiary facility incarcerating the individual who may constitute a threat. Such proceedings may be initiated if the individual:

1. Is serving a legally finalized punishment involving the deprivation of liberty or a 25-year prison sentence, executed in the therapeutic system, for an act committed prior to July 1, 2015,
2. During the executory proceeding, the individual suffered from psychic disorders in the form of mental retardation, personality disorder or sexual preference disorder,
3. The diagnosed psychic disorders are of such a nature or intensity that there exists at least a high probability that they will commit a crime of violence or threat of violence against life, health or sexual freedom, which is subject to a sentence of deprivation of liberty the upper limit of which totals at least 10 years.

The court finding of such foundations results in the possibility of applying one of two kinds of preventive means; preventive supervision or incarceration in a special closed facility, i.e. the National Center for the Prevention of Antisocial Behavior. The court decides whether to apply these preventive means in a civil proceeding.

After an individual is confined in the NCPAB, they are covered by a therapeutic proceeding, the goal of which is to improve their state of health and behavior to a degree enabling their functioning in society in a manner that does not constitute a threat. However, in the opinion of psychiatrists, there is no medically recognized treatment currently available that provides effective therapy to such individuals.

The duration of incarceration at the NCPAB is not set beforehand. However, no less than every six months, the court establishes whether continued presence at the NCPAB is necessary, based on the opinions of a psychiatrist and the results of therapeutic proceedings. Furthermore, the individual deprived of liberty may, at the time, apply to the court for a ruling of whether continued incarceration at the NCPAB is necessary.

From the moment it was written, the act evoked numerous controversies in the medical and psychiatric communities. However, by decision dated 23 November 2016, the Constitutional Court ruled the law constitutional. The court allowed for the possibility that the therapy provided at the center may not always be effective. Nonetheless, in the court's evaluation, incarceration at the center constitutes a "form of deprivation of personal freedom that combines elements of forced psychiatric detention (...) and several forms of prevention provided for in the Criminal Code, described in the study of law asked post penal forms of prevention." Despite similarities to the punishment of deprivation of liberty, incarceration in the center was not classified by the Constitutional Court as a criminal penalty. The court described it instead as a "means of pure prevention, security." Judge A. Wróbel submitted a dissenting opinion to the ruling. In his evaluation, "results of research concerning proceedings against particularly high-risk criminals prove that the societal effectiveness of preventive supervision combined with mandatory therapy is superior to various kinds of so-called post penal means of isolation." In the evaluation of Judge A. Wróbel, the "mechanism for placement in the center was not necessary to realize the fundamental goals of the Act, i.e. therapy and resocialization of high-risk criminals, because these goals may be better effected by an approved mechanism of preventive oversight provided for in the Act and through provisions of the act on the protection of mental health."

## **2. DOUBTS CONCERNING COMPLIANCE OF THE IMPLEMENTED LAW WITH INTERNATIONAL HUMAN RIGHTS STANDARDS**

Regulations concerning placing individuals in the NCPAB raise serious doubts as to their compliance with international human rights standards.

First, due to the incapability to achieve the assumed therapeutic effect an argument can be made that a stay at the NCPAB constitutes a criminal punishment involving the deprivation of liberty. In the course of legislative work in the Sejm [Lower House], opinions of psychiatrists were cited, which clearly emphasize that personality disorders cannot be effectively treated forcibly in conditions of isolation, and that the NCPAB will not have a therapeutic nature, but only preventive or repressive. Moreover, individuals who are not "mentally ill" in the medical sense or even "of unsound mind" as defined in art. 5 par. 1 let. e of the ECHR, may be placed in the NCPAB. There are very serious doubts as to whether it is permissible to force therapy on individuals who committed crimes in a state of complete sanity and have completed the punishment to which they were sentenced.

In the event of a finding that incarceration at the NCPAB is of a repressive nature, this may give rise to a violation of the prohibition against double punishment for the same act or the prohibition against retroactive application of the law. As has already been indicated above, the Act applies to individuals convicted of crimes committed prior to July 1, 2015, but it is not necessary for said crime to have been committed after the Act's coming into force (that is, January 2014). In other

words, at the time of committing the crime, the perpetrator was not able to foresee that after completing his or her sentence, their detention could be continued infinitely at the NCPAB.

Even if we deem that the stay at the NCPAB does not constitute a criminal sanction, its proportionality raises additional questions. As is noted in the dissent from the decision of the Constitutional Court, equally good or even better effects may be achieved through the use of less invasive means, e.g. preventive oversight and therapy in ambulatory conditions.

Objections may also be raised as to the procedure used to verify whether continued presence at the NCPAB is justified. Pursuant to the Act, "No less than once every six months, the court, pursuant to the opinion of a psychiatrist and the results of therapeutic proceedings, shall establish, whether continued stay at the Center of an individual that constitutes a threat is necessitated." In the referenced decision, the Constitutional Court found that this provision is unconstitutional as the court should have available the opinion of at least two experts who are institutionally independent of the NCPAB. However, this decision of the court still remains to be implemented.

The means of coercion provided for in the Act are problematic. This list includes means typical of psychiatric facilities such as e.g. isolation, immobilization using a straitjacket, holding down, but also provides for the use of handcuffs, security baton, and manual dispensers of incapacitating substances.

The living conditions at the NCPAB raises a series of additional objections. First, according to information provided to the HFHR by the NCPAB, the mandated number of medical personnel as defined in the ordinance based on the Act, are not currently present – there are only 2 psychiatrists and 8 psychologists for 52 patients, while the ordinance require 1 psychiatrist and 6 psychologists per 10 patients. This undoubtably negatively influences the quality of therapy provided at NCPAB. Second, the standards concerning the maximum capacity of residential rooms at the NCPAB are also not being followed. Initially, the aforementioned ordinance provided that each confined individual was to have an individual residential room. In September 2015, the ordinance was amended and allowed two individuals to reside in rooms designated for NCPAB residents. However, due to the constant influx of new internees, of which there are currently 52, even that standard is no longer being maintained. The NCPAB informed the HFHR that in the centre there are, among others, three rooms with an area of 27m<sup>2</sup> and each one is occupied by 7-8 patients. The Minister of Health plans another amendment of the ordinance, which is to totally remove the limit on the capacity of residential rooms. The justification for the draft bill indicates that the change results from "the need to adapt current legal provisions to the actual conditions at the Center."

Numerous problems also stem from the limitations in the NCPAB Rules and Regulations. Pursuant to the Polish Constitution, any limitations on individual rights and freedoms must have a legislative foundation. However, in the case of the NCPAB, numerous restrictions result from internal regulations. Of special significance here are the regulations controlling patient visits at the NCPAB, which provide that visits shall always take place in the presence of NCPAB security personnel and that "In reasonable cases, with respect to certain patients, the decision may be taken to temporarily limit visitations or completely prohibit such."<sup>44</sup> Such limitations have no foundation in the Act<sup>45</sup>.

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44 Regulation of the NCPAB (in Polish) is available on the website: <http://www.kozzd-gostynin.pl/Regulamin%20odwiedzin.pdf> (last access: 27 June 2018).

45 Also the Ombudsman criticized this problem in his letter to the Chairman of the Senate Commission of Human Rights, Rule of Law and Petitions: <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Przewodnicz%C4%85cego%20Senackiej%20Komisji%20Praw%20Cz%C5%82owieka%20Praworz%C4%85dno%C5%9Bci%20i%20Petycji%20w%20sprawie%20funkcjonowania%20Krajowego%200%C5%9Brodka%20Zapobiegania%20Zachowaniom%20Dyssocjalnym.pdf> (last access: 27 June 2018).

### 3. APPLICATION OF THE ACT IN PRACTICE

A series of other problems stemming from the Act have come to the fore in practice. They are described in a complaint to the European Court of Human Rights submitted by an HFHR client.

The man was convicted in 2004 to a 10-year sentence of deprivation of liberty for the crime of rape. In the course of criminal proceedings, he was not found to have any psychic disorders that rendered him insane or prevented execution of the punishment. About seven months prior to the end of his sentence, he was sent to complete the remainder of that sentence in a therapeutic ward although previously no therapeutic means had been applied with respect to his person. Several months prior to the end of the sentence, proceedings were initiated regarding placing him at the NCPAB. However, prior to those proceedings being finalized, he completed his sentence and was released from the penitentiary facility. He spent about a year in freedom. During this time, his behavior was exemplary – he had no conflicts with the law, formed a relationship, and found a job. Despite this, after year, he was placed in the NCPAB.

In the complaint to the ECHR, the plaintiff alleges he is not “mentally ill” as defined in art. 5 par. 1 let. e ECHR, and therefore his detention is unreasonable. He further argues that confinement at the NCPAB is not of a therapeutic nature but constitutes instead double punishment for the same act (see above). He goes on to argue that provisions of the Act were applied arbitrarily in his case because he was placed under therapeutic proceedings shortly before completion of his punishment, after the coming into force of the Act, which may suggest that the actual goal of the therapy was to simply enable his confinement at the NCPAB.

The plaintiff further alleges that it is unreasonable to extend his confinement at the NCPAB. In light of opinions drafted by the NCPAB in June and December 2017, the plaintiff’s continued confinement is not necessary as he does not constitute a sufficient threat to society anymore. Despite that, the court refused to dismiss him from the NCPAB, citing an outside opinion. Furthermore, proceedings to establish that continued detention was reasonable lasted nearly a year, which is an unduly lengthy period of time.

The complaint also alleges the disproportionate limitation of the right to privacy and family life. The plaintiff alleges that the constant presence of security personnel during his visits with his wife and daughter render impossible unrestricted conversations and contacts with family. The complaint has been registered by the ECHR, but has not yet been communicated to the government of Poland.

**HFHR RECOMMENDS:**

- Abolishing post penal detention at the NCPAB and limitation of means used against high-risk individuals after they have completed their punishment to preventive oversight and therapy and ambulatory conditions.



## VIII. GUARDED CENTERS FOR FOREIGNERS

### Summary:

- In Poland, foreign children continue to be deprived of liberty through their placement in guarded centers for foreigners (1103 children in 2014-2017), and their detention often lasts many months, as is confirmed both by the recent judgement as well as the cases communicated by the European Court of Human Rights.
- Reports indicate that victims of violence and torture are placed in guarded centers for foreigners.
- When deciding on detention of foreigners, relevant bodies fail to properly investigate grounds excluding detention.

### 1. PLACEMENT OF CHILDREN IN GUARDED CENTERS FOR FOREIGNERS

One of the most significant problems handled by the Helsinki Foundation for Human Rights with respect to the rights of foreigners, is the placement of foreign minors in guarded centers for the purpose of securing proceedings to grant international protection or return proceedings. Pursuant to Polish law, if the foreign minor is with family he or she may always be placed in the guarded center, irrespective of age. The situation is slightly different with foreign minors without care. If such a minor is seeking international protection they cannot be placed in the guarded center. Meanwhile, if he or she is under return proceeding or a return decision has been issued, they may be placed in a guarded center only if they are between 15 and 18 years of age.

Provisions of national and international law obligate court to take into account the interest of the child while deciding whether to place the child in the guarded facility. However, HFHR observations indicate that this factor is not always evaluated in the appropriate manner.

In their decisions, courts often indicate that the very fact of placing a child in a guarded center with their parents constitutes acting in the child's best interest. Moreover, when deciding to place a child or families with children in the guarded center, courts issue decisions about their confinement for the maximum possible period of time rather than the minimum time possible.

Importantly, on April 10, 2018, the European Court of Human Rights, issued a decision in the case of *Bistieva and Others v. Poland*, which was being handled by HFHR. The matter concerned placement in a Guarded Center for Foreigners in Kętrzyn of a family of refugees from Chechnya (a mother with three children). In this decision, the Court found violation of the right to family life, i.e. art. 8 of the Convention on Human Rights and Fundamental Freedoms, and indicated that in deciding to place a family in a guarded center, the Polish authorities failed to adequately consider the welfare of the child and also failed to consider the possibility of using measures alternative to deprivation of liberty. Finally, the court found that the extended stay in the guarded center of five months and 20 days further contributed to the violation of the right to family life.<sup>46</sup>

What is more, on January 8, 2018, the European Court of Human Rights, communicated to the Polish authorities the case of *M.Z. and Others v. Poland*, which also concerns a family of refugees, HFHR clients from Tajikistan placed in a Guarded Center for Foreigners in Przemyśl. The complaint alleges, inter alia, violation of the right to family life due to the Polish authorities' failure to consider the child's welfare and the extended deprivation of the family's liberty (over 8 months).<sup>47</sup>

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<sup>46</sup> ECHR decision in *Bistieva and Others v. Poland* (complaint no. 75157/14); decision available at: <http://hudoc.echr.coe.int/eng?i=001-182210> (accessed on: 27.06.2018).

<sup>47</sup> *M.Z. and Others v. Poland* (complaint no. 79752/16); communication of the case available at: <http://hudoc.echr.coe.int/eng?i=001-180603> (accessed on: 27.06.2018).

The Ombudsman for Children also took a position on the detention of four children in Poland. On March 6, 2018, the ombudsman provided the Presidents of Polish appeals courts a set of the latest recommendations from international bodies concerning decisions involving placement of children in guarded centers for foreigners. In the memorandum, the ombudsman emphasized the placement of children in guarded centers never comports with the best interest of the child, always violates the child's rights and may have an extremely negative impact on the minor's continued psychophysical development. He emphasizes that in 2014-2017, 1103 children were placed in guarded centers for foreigners in Poland. In the ombudsman's evaluation, courts frequently superficially investigate the possibility of using means alternative to deprivation of liberty and especially frequently find that families of foreigners seeking international protection may not be obligated to live in a specific location even though they have the legislative right to receive housing in an open center for foreigners maintained by the Office for Foreigners.<sup>48</sup>

## **2. PLACING VICTIMS OF TORTURE (AND OTHER FORMS OF VIOLENCE) IN GUARDED CENTERS FOR FOREIGNERS**

Pursuant to Polish law, foreigners whose psychophysical condition gives rise to a presumption that they experienced violence, shall not be placed in guarded centers (art. 88a par. 3 pt 2 of the Act on Granting Foreigners Protection in the Republic of Poland and art. 400 pt 2 of the Act on Foreigners). The absolute prohibition against detention of victims of violence applies to foreigners seeking international protection as well as those subject to return procedures. However, HFHR observations indicate that in practice, Polish authorities do not have a practical mechanism enabling effective identification of foreign nationals who fell victim to violence, which would enable the proper application of the aforementioned regulations. As a result, there have been cases of foreigners stating explicitly in their refugee status application that they are victims of torture in their country of origin and still being placed in guarded centers. Furthermore, some courts apply the above regulations improperly in that they assume that detention may be allowed if the foreigner is provided with psychological care in the guarded center. Such an erroneous position was also included in guidelines provided by the National Border Guard Headquarters, which states that foreign nationals who were victims of violence are not to be released from guarded centers if they may be provided with adequate psychological assistance at the center.

The aforementioned case of *M.Z. and Others v. Poland* communicated to Polish authorities by the European Court of Human Rights, alleges that Polish authorities also violated art. 3 of the Convention, i.e. the prohibition against inhuman and degrading treatment. The allegation concerns one of the plaintiffs, a woman who was placed in the Guarded Center for Foreigners in Przemyśl, while the authorities failed to adequately consider that she had been a victim of violence in her country of origin. The complaint also states that her psychic condition deteriorated in the course of her time at the guarded center resulting in numerous hospitalizations in a psychiatric hospital.

In three cases handled by HFHR concerning placement of Syrian nationals in guarded centers, courts of the second instance considering appeals against decisions detaining individuals in guarded centers found that foreigners may not be placed in a guarded center only in cases where they have been victims of violence as part of personal political or other repressions. Therefore, in the view of some Polish courts, if the foreigner's psychophysical condition indicates that he or she has been a victim of violence, but that violence occurred e.g. as part of the mass use of violence to put down demonstrations, then such does not constitute a foundation to release that individual from the guarded center. The objection to this kind of reasoning is that it is not supported by provisions of law and subjects individuals who were victims of violence to deeper traumas by depriving them of their liberty.

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<sup>48</sup> OHR position available at: <https://brpd.gov.pl/aktualnosci-wystapienia-generalne/orzekanie-o-umieszczeniu-maloletnich-cudzoziemcow-w-strzezonych> (accessed on: 27.06.2018).

The memorandum of the Ombudsman for Human Rights to the Chief of the Border Guard, dated June 30, 2017, concerning identification of victims of violence in the course of proceedings to place foreigners in guarded centers is worthy of review. The memorandum was delivered after the 2016 visits by the National Prevention Mechanism to several guarded centers for foreigners. The memorandum indicates that the Border Guard has adopted the “Border Guard procedures for dealing with foreigners requiring special treatment.” However, in the OHR’s opinion, this document contains a series of defects in that it e.g. provides for continued stay in the guarded center by a foreigner identified as a victim of violence if it is possible to provide therapy in the guarded center. In the OHR’s opinion, this violates legal regulations that mandate the immediate release of such an individual from a guarded facility. The report also lists a series of examples of foreigners whose psychophysical condition indicates they have been victims of violence but continue to be held in guarded centers.<sup>49</sup>

The report of the National Prevention Mechanism from its visit to the Guarded Center for Foreigners and Arrest for Foreigners in Przemyśl on October 24-26, 2017, indicates that the facility held individuals whose behavior indicated they were victims of torture. The report further noted that foreigners held in the Arrest for Foreigners in Przemyśl are subject to ongoing monitoring which is disproportionate to the threat posed by foreigners. It further indicates that the cells in the arrest facility lack appropriate sanitary installations requiring foreigners to frequently relieve themselves into plastic bottles. The NPM also pointed out that insufficient psychological care, which is unable to provide early detection of victims of torture, violence or inhuman treatment.<sup>50</sup>

Meanwhile, the report of the National Prevention Mechanism from its visit to the Guarded Center for Foreigners in Krosno Odrzańskie on September 18-19, 2017, indicates insufficient psychological assistance to foreigners placed in the center. It also points out that bars are installed in the windows of residential facilities resulting in the atmosphere of confinement and are de facto associated with a prison environment. The report also notes that when the foreigner was taken several hundred meters away to a doctor, he was handcuffed. Foreigners claimed that sometimes they are handcuffed for the entire duration of their presence in the doctor’s office. In the NPM’s view, use of handcuffs when transferring foreigners should only be used in specific individual and justified circumstances.<sup>51</sup>

#### **HFHR RECOMMENDS:**

- The wholesale ban on placing foreign minors in guarded centers because depriving them of their liberty due to their migration status and frequently in connection with decisions taken by their parents invariably contravenes their best interests;
- Identification of victims of torture at the earliest possible stage of proceedings to place foreigners in a guarded center so as to avoid the illegal detention of such individuals;
- Both the Border Guard, which submits applications to place foreigners in a guarded center, as well as the courts reviewing detention cases, should ex officio investigate grounds that absolutely preclude the use of detention.

49 OHR position available at: <https://www.rpo.gov.pl/sites/default/files/Wystapienie%20do%20Komendanta%20Gtownego%20Strazy%20Granicznej%20w%20sprawie%20identyfikacji%20ofiar%20tortur.pdf> (accessed on: 27.06.2018).

50 Report available at: <https://www.rpo.gov.pl/sites/default/files/Wyciag-Strzezony%20srodek%20i%20Areszt%20dla%20Cudzoziemcow%20Przemysl%202017.pdf> (accessed on: 27.06.2018).

51 Report available at: <https://www.rpo.gov.pl/sites/default/files/Wyciag-Strzezony%20srodek%20dla%20Cudzoziemcow%20Krosno%20odrzan%202017.pdf> (accessed on: 27.06.2018).

# RECOMMENDATIONS

## HFHR RECOMMENDS IN THE CONTEXT OF:

### MONITORING OF DETENTION FACILITIES - NATIONAL MECHANISM FOR PREVENTION OF TORTURE (NPM)

- Increasing the availability of human resources and the attendant financial resources that will enable for the reliable and comprehensive execution of the NPM's mandate.
- Assuring NGOs access to detention facilities.
- That the state authorities conduct a thorough analysis of monitoring reports from detention facilities and treat such as a basis to implement relevant legislative changes and modify practices at such facilities.

### POLICE VIOLENCE

#### In the scope of substantively criminal law:

- An analysis whether current Polish law assures an effective penal model that fully implements the protective, repressive and preventive functions.
- An analysis of the postulate of the Human Rights Ombudsman to introduce the crime of torture into the Criminal Code, as is supported by the decided majority of those surveyed.

#### In the scope of practice by procedural bodies

- Assuring that procedure bodies fully execute the procedural obligations arising under art. 3 Convention and art. 1 para. 1 Convention On the Prevention of Torture.

#### Additional systemic changes:

- Creating a legal framework that allows for recording sound and images of on-duty police officers in action .
- Wholesale change in the procedure of conducting medical examinations of detained individuals, especially with respect to individuals who are to be placed in detention facilities.
- The complete implementation of the model adopted in the Istanbul Protocol because such may lead to the effective prevention of torture by police officers.

### PRISON ESTABLISHMENTS

- Guaranteeing individuals deprived of liberty at least 4m<sup>2</sup> of living space per inmate.
- Adapting the living conditions of individuals in penitentiary facilities so that these no longer violate the rights of individuals deprived of liberty.
- Making continued efforts to decrease the number of individuals designated as "high-risk inmates," including the thorough review of inmates currently designated as such.
- Guaranteeing inmates designated as "high-risk inmates" special behavioral support, as well as appropriately tailoring security means used against them proportionally to their relevant threat level.
- The complete and actual adaptation of select penitentiary facilities to the needs of individuals with disabilities.

### COMPLAINTS OF INDIVIDUALS DEPRIVED OF LIBERTY IN PENITENTIARY FACILITIES

- Introduction of changes, including organizational changes, within organizations of the justice system that will increase the effectiveness of penitentiary judges oversight over the deprivation of liberty conditions.

- Guaranteeing access to legal aid to individuals deprived of liberty in cases concerning complaints of deprivation of liberty conditions.
- Organize regular trainings, including those for penitentiary judges, lawyers, members of the Prison Services, about torture and degrading treatment or punishment.

## **NATIONAL CENTER FOR THE PREVENTION OF ANTISOCIAL BEHAVIOR**

- Abolishing post penal detention at the NCPAB and limitation of means used against high-risk individuals after they have completed their punishment to preventive oversight and therapy and ambulatory conditions.

## **GUARDED CENTERS FOR FOREIGNERS**

- The wholesale ban on placing foreign minors in guarded centers because depriving them of their liberty due to their migration status and frequently in connection with decisions taken by their parents invariably contravenes their best interests.
- Identification of victims of torture at the earliest possible stage of proceedings to place foreigners in a guarded center so as to avoid the illegal detention of such individuals.
- Both the Border Guard, which submits applications to place foreigners in a guarded center, as well as the courts reviewing detention cases, should ex officio investigate grounds that absolutely preclude the use of detention.

*This report has been prepared by the members of the Helsinki Foundation for Human Rights team:  
Jacek Biały, Julia Gerlich, Jarosław Jagura, Adam Klepczyński, Piotr Kubaszewski, Marcin Szwed,  
Daniel Witko, Marcin Wolny with substantive advisory from Katarzyna Wiśniewska  
and Dr. Piotr Kładoczny.*



**HR** HELSINKI FOUNDATION  
for HUMAN RIGHTS

## FIND US:

Helsinki Foundation  
for Human Rights  
Zgoda 11 Street  
00-018 Warsaw

tel. (+48 22) 556-44-40  
fax. (+48 22) 556-44-50  
hfhr@hfhr.org.pl  
www.hfhr.pl/en



@hfhrpl



@hfhrpl



@TheHFHR