

# POLAND

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# 1. Executive summary

## Definitions

- [1]. There is no single definition of disability in the Polish law. Basically, there are different definitions used for purposes of the social security law, anti-discrimination law or civil and criminal law. Mentally ill persons are, however, regarded as disabled persons.
- [2]. There is a different approach towards mentally ill persons under the civil and criminal law. Civil law is interested in the legal consequences of actions undertaken by an individual and provides for an institution of incapacity, to be used with respect to mentally-ill persons. Incapacitated persons are fully or partially restricted in their competence to undertake legal obligations. The criminal law is referring to the state of insanity, which has to describe the state of mind when committing the crime. If a person is declared insane *tempore criminis*, it may not face criminal conviction, but is subject to medical treatment.
- [3]. Current public opinion polls concerning mentally ill persons show that the society does not distinguish between mental illness and mental disability<sup>1</sup>. In Poland mental disability problems is not properly distinguished in laws concerning mental health. Those laws are not adequate to the specific needs of mentally disabled persons. Such persons have certain needs which are not identical with needs of mentally ill persons.

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<sup>1</sup> See reports from public opinion polls „The Poles and mental illness and mentally ill. Komunikat z badań z roku 2005 oraz 2008]: available at [http://www.cbos.pl/SPISKOM.POL/2005/K\\_118\\_05.PDF](http://www.cbos.pl/SPISKOM.POL/2005/K_118_05.PDF), [http://www.cbos.pl/SPISKO.M.POL/2008/K\\_124\\_08.PDF](http://www.cbos.pl/SPISKO.M.POL/2008/K_124_08.PDF) and „Perception of the mentally disabled by the Polish society. Raport quantitative and qualitative House Research Maison, Warsaw 2009”, [Postrzeganie osób upośledzonych umysłowo przez społeczeństwo polskie. Raport z badania ilościowego i jakościowego, Dom Badawczy Maison, Warszawa 2009], available at <http://www.psouu.org.pl/sites/default/files/publikacje/wyniki-bada%C5%84.pdf>

## Anti-discrimination

- [4]. Poland has signed, but did not ratify the UN Convention on the Rights of Persons with Disabilities. The official position is that the Government is preparing to ratify the UN Convention. Nevertheless, it is not clear whether the ratification will take place soon. Second, Poland did not even sign the Optional Protocol to the UN Convention allowing for individual crimes.
- [5]. Poland has implemented the Directive 2000/78/EC which prohibits inter alia discrimination due to the disability at the workplace and in other occupational activities. Relevant provisions were inserted into the Labour Code and other acts. They are used in practice to counteract discrimination due to disability. However, Poland did not adopt yet the complex anti-discrimination law. According to drafts, such law would enrich the protection of disabled persons against discrimination, by increasing the scope of protected areas of life against discrimination. There is a limited possibility to claim discrimination due to disability with the use of general type remedies, like the protection of personal rights, provided in the Civil Code.

## Specific fundamental rights

- [6]. Prohibition of degrading treatment. Poland was found to violate standards of Article 3 of the ECHR in connection with the treatment of mentally-ill prisoners.
- [7]. Right to liberty. Poland was found to violate standards of Article 5 of the ECHR in connection with the use of psychiatric confinement for purposes of the checking the status of insanity of the person subject to criminal trial. This issue was also subject of the important judgement of the Polish Constitutional Court and resulted in the change of procedure of ordering persons for such an examination in a closed ward.
- [8]. Right to decide about personal life. Most of mentally ill persons may not enjoy the decisional autonomy concerning their life. It is a result of discriminating provisions concerning declarations of will as well as common use of the incapacity with respect to persons who have different problems with mental health.
- [9]. The case of *Kędzior v. Poland*, pending currently before the ECHR, shows that there is lack of sufficient standards with respect to the periodical medical checks of mentally-ill persons in order to prolong

the period of incapacitation. Furthermore, there is no remedy that would allow an incapacitated person to be released from the social foster home, without the consent of his/her guardian.

- [10]. Right to court. As a result of the recent judgement of the Constitutional Court, the Civil Proceedings Code changed. Now it is possible for incapacitated person to start proceedings in order to lift the incapacity status.
- [11]. Legal aid. There are, however, significant problems with access to legal aid by mentally ill persons as well as with the effective enjoyment of the right to court by such persons.
- [12]. Remedies. In our opinion there is lack of remedy allowing for effective claims in case of discrimination practices. Such remedy is going to be introduced by the planned complex anti-discrimination law. However, works on this law prolong and currently the only remedy is a general claim for the protection of personal rights.
- [13]. Right to vote. Under Article 62 Section 2 of the Constitution incapacitated persons are deprived totally of the right to vote and the right to be elected. This provision goes against standards stemming from the UN Convention.

## Involuntary placement and involuntary treatment

- [14]. Poland has a complex Law on Protection of Mental Health. It provides for a detailed procedure of involuntary placement and involuntary treatment. There are no serious problems with the application of the said law.

## Competence, capacity and guardianship

- [15]. “In a judgment of 7 march 2007 (Journal of Laws - Dz. U. No. 47, item 319) the Constitutional Court declared that incapacitated person should have a remedy that would allow it for review of the decision on incapacitation. The decision on incapacitation is made by the court. Incapacitated person is accompanied with the court appointed guardian or curator.
- [16]. In a recent judgement the Constitutional Court declared that incapacitated person should have a remedy that would allow it for review of the decision on incapacitation. At the same time the

Constitutional Court stated that in many European countries the institution of incapacitation is abolished and there are new legal instruments introduced. It suggested the Polish legislator to take appropriate action. However, until now no legislative changes were made, except for introduction of the said remedy.

- [17]. In Polish law there is no form of practical support for mentally ill or mentally disabled persons, except for guardian for disabled person („*kurator dla osoby niepełnosprawnej*”). Such support would allow them to perform socially active role, and to integrate with the external world, with public administration and other contacts.
- [18]. The decision on incapacitation has consequences not only for civil rights but also for political rights, such as right to vote. By virtue of the Polish Constitution, such persons are deprived the possibility to vote in any elections and the right to be elected.
- [19]. There are no legally provided periodic reviews of the status of incapacitation (whether mental illness still requires this). There are also no reviews of guardians. The case *Kędzior v. Poland*, pending before the ECHR, raises this problem.
- [20]. There is a growing number of incapacitated persons in Poland, now exceeding 60,000 persons. There is a risk that this institution is abused by families in order to take control over the property held by incapacitated person.

## 2. Definitions

- [21]. In the Polish law there is no universal definition of disability. The Resolution – Charter of Rights of Persons with Disabilities adopted by the Sejm on 1 August 1997 states that “disabled persons, which means persons whose physical, psychical and mental ability permanently or temporarily impede, limits or makes impossible everyday life, education, work and playing social roles according to the legal and customary norms, have the right to independent, autonomous and active live and should not be discriminated against”. Although the Charter does not have a binding force, it obliges the Government to realize the goals of the Charter in its policies and to report annually on actions taken in this regard.<sup>2</sup>
- [22]. Under Polish law there is no uniform definition of disability. What is even more problematic, Polish law uses different inadequate and imprecise terms. The Civil Code (and the civil law doctrine) does not take into account many changes which happened over last years. They concern the approach towards mentally disabled persons as well as organization of different forms of care of such persons. The Civil Code in provisions concerning making declarations of will and grounds for declaring somebody as incapacitated person uses pejorative term “mental under-development” („*niedorozwój umysłowy*”). Similar approach is visible in the family law in provisions on marriage. The Criminal Code uses the term „mental disorder” („*upośledzenie umysłowe*”). The terminology used in the civil law is contrary to the international standards<sup>3</sup>, which refer to mental disability.
- [23]. The Law on Vocational and Social Rehabilitation and Employment of Disabled Persons<sup>4</sup> defines disability as a permanent or temporary inability to play social roles because of permanent or long-term impairment of the capability of the human organism. It does not enlist the types of disabilities. The list of medical grounds used to grant a person the status of a disabled person (not for the purpose of disability allowance) is specified in the Regulation of the Ministry of Economy,

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<sup>2</sup> Official Journal - Monitor Polski 97, No 50, Item 475.

<sup>3</sup>According to ICD-10 and DSM-IV classifications the term „mental disorder” is still used in medicine and rehabilitation. Therefore it is widespread and used by experts in international terminology. However this term is replaced by „mental disability” in specialized literature and international acts.

<sup>4</sup>Article 2 (10) of Law on Vocational and Social Rehabilitation and Employment of Disabled Persons of 27 August 1997 [*Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnieniu osób niepełnosprawnych*], Dz. U. 2008, No 14, Item. 92.

Labour and Social Policy of 15 July 2003<sup>5</sup>. The Regulation is adopted in pursuance to Article 6c para. 9 of the Law. The causes of disability concerning intellectual disability are symbolized as 01-U, and psychical illness as 02-P. The Law uses three categories of disability – severe, moderate and light, which imply different levels of inability to work and different care. Further, the Law on Pensions and Disability pensions<sup>6</sup> defines respectively three levels of inability to work (whereas only persons with light disability are partially unable to work).

[24]. The Law on Protection of Mental Health<sup>7</sup> recognizes that mental health is of fundamental importance for a person and it is the obligation of the state to protect persons with psychical disorders. It further states in Article 3 that psychical disorders concern:

- Mentally ill persons (showing psychotic disorders);
- Mentally disabled persons
- Persons showing other disorders of psychical activity, which according to the actual medical knowledge qualify as psychical disorders, and they require medical care or other forms of help and care necessary to live in the family and social environment.

[25]. According to the above provisions, a person will be regarded as a disabled person under the law only if he or she receives a decision specifying the level of their disability [*decyzja o stopniu niepełnosprawności*] or a decision on disability for children under 16 years of age [*decyzja o niepełnosprawności*]. For the purpose of establishing the right of a disabled person to various social insurance benefits (disability allowances) different decisions are required. They are granted by specialized organs [*organy rentowe*]<sup>8</sup>. Moreover, there is a separate procedure for the recognition of disability of war invalids and farmers. Thus, definitions, procedures and competent bodies used to determine the status and particular rights of disabled persons are not uniformed (separate for granting the status of disabled<sup>9</sup>, disability

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<sup>5</sup>Regulation of 15 July 2003 [Rozporządzenie Ministra Gospodarki, Pracy i Polityki Społecznej w sprawie orzekania o niepełnosprawności i stopniu niepełnosprawności], Dz. U.2003 No 139, Item 1328.

<sup>6</sup>Law on Pension from Social Insurance Fund [Ustawa o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych], Dz. U 1998, No 162, Item 1118.

<sup>7</sup>Law on Protection of Mental Health of 19 August 2004 [Ustawa o ochronie zdrowia psychicznego], Dz. U. No 111, Item 535.

<sup>8</sup>Article 4 (6) and 14 of the Law on Social Pension of 27.06.2003 [Ustawa o rencie socjalnej], Dz. U. 2003 No. 135 Item 1268.

<sup>9</sup>Article 3- 6, 6a, 6 b and 6 b1 of the Law on Vocational and Social Rehabilitation and Employment of Disabled Persons [Ustawa o rehabilitacji zawodowej i społecznej oraz zatrudnieniu osób niepełnosprawnych] Dy. U. 1997 no. 123 item 776



allowance<sup>10</sup>, social allowance [*renta socjalna*]<sup>11</sup>, access to specialized education<sup>12</sup>, etc).

- [26]. The civil law (medical law and family law) refers to persons with mental disorders and regulates such issues as legal capacity [*zdolność do czynności prawnych*] and incapacitation [*ubezwłasnowolnienie*], validity of declaration of will, acceptance to the psychiatric hospital, consent for medical treatment, entering into marriage, etc.
- [27]. The criminal law refers however to the state of insanity [*niepoczytalność*] or persons who are helpless due to her or his psychical or physical state [*nieporadny ze względu na stan psychiczny lub fizyczny*]<sup>13</sup>. For the purpose of civil and criminal law a formal decision declaring the status of a disabled is not required. It needs to be stressed that lack of criminal responsibility does not equal with incapacitation as the state of insanity may occur at the time of committing an offence (*tempore criminis*), but not necessarily later.
- [28]. The state of insanity is regulated in Article 31 para 1 of the Criminal Code, which states that a person with mental disorder<sup>14</sup>, intellectual disability<sup>15</sup> or other disorder of psychical activity<sup>16</sup> who at the time of the act could not recognize its meaning or direct one's conduct is not criminally responsible<sup>17</sup>. Here the existence of the mental disorder has to go together with lack of recognition what the person is doing and what are the consequences of such action or lack of power of control over one's actions. The mere existence of mental health problems does not suffice. Each and every case of insanity is decided by the expert specialized in psychiatry. The court can further decide to place such person in a psychiatric hospital<sup>18</sup>.

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<sup>10</sup>Article 12- 14 of the Law on Social Pension of 27.06.2003 [Ustawa o rencie socjalnej], Dz. U. 2003 No. 135 Item 1268.

<sup>11</sup>Article 4 and 5 of the Law on Social Pension of 27.06.2003 [Ustawa o rencie socjalnej], Dz. U. 2003 No. 135 Item 1268.

<sup>12</sup>Article 2 of the Regulation of Minister of National Education and Sport of 18.01.2005 on conditions of organizing education, raising and care for disabled youth and socially unadjusted in specialized kindergartens, schools and other departments and centers, [Rozporządzenie Ministra Edukacji Narodowej i Sportu w sprawie warunków organizowania kształcenia, wychowania i opieki dla młodzieży niepełnosprawnych oraz niedostosowanych społecznie w specjalnych przedszkolach, szkołach i oddziałach oraz w ośrodkach], Dz. U. 2005 No 19 Item. 166.

<sup>13</sup>Compare Article 207 para. 1, 210 para. 1, 211 of the Criminal Code.

<sup>14</sup>Like different endogenic psychoses i.e. schizophrenia, paranoia, cyclophrenia or epilepsy.

<sup>15</sup>Measured on the basis of intelligence quotient.

<sup>16</sup>This category of insanity is the least sharp - usually it includes persons with psychopathic behaviour.

<sup>17</sup>Article 31 para. 2 of the Criminal Code defines the state of limited criminal responsibility, which can result in extraordinary mitigation of punishment.

<sup>18</sup>Article 94 of the Criminal Code.

- [29]. Current variety of legal definitions and procedures concerning disability not only makes the life of a disabled person more difficult, but may lead to direct or indirect discrimination if the person requires special adjustments or accommodation and does not dispose of a valid decision of a respective organ and her or his disability is not visible at first sight<sup>19</sup>.
- [30]. The UN Convention on the Rights of Persons with Disabilities accepts in Article 1 that “*Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*”. Upon the ratification of the Convention by Poland, this definition will prevail over definitions used in national provisions. For the clarity of legal terminology all national definitions should be replaced by the Conventional one. It is also recommended that the procedures and organs deciding on different rights or benefits related to disability are integrated/unified in one system.<sup>20</sup>
- [31]. According to the Government estimation for 2008 there are approximately 3,8 million disabled people in Poland, out of which 7,9% mentally sick and 2,5 % intellectually disabled. The number of persons with psychical disorders who are treated in outpatient centres or hospitalized is gradually increasing – by 131% and 45% between 1990 and 2004<sup>21</sup>.
- [32]. The main problems related to this situation are lack of free places in the units of psychiatric care and lack of qualified staff (doctors). There is also need for a change from the stationary model of psychiatric care to the environmental one. The government accepted a new draft regulation on the National Program for the Protection of Psychical Health [Narodowy Program Ochrony Zdrowia Psychicznego]. The draft of this Program was recently (from 29.12.2008 to 14.09.2009) consulted with the social partners. The aim of the Program will be to promote mental health and prevent psychical disorders; to provide patients with mental disorders comprehensive and accessible medical care and other forms of help – according to the environmental model; and to develop research and necessary information system in this area. The Program is envisioned for the period 2009-2014 and its realization will be entrusted to the Institute of Psychiatry and Neurology in Warsaw under the supervision of the Ministry of Health

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<sup>19</sup>M. Szeroczyńska, “Definicje. *Niepełnosprawność i osoba niepełnosprawna*”, [in:] Raport *Polska droga do Konwencji ONZ*, pp.12-16, at: [http://www.pfon.org/images/polska\\_droga\\_do\\_konwencji\\_www.pdf](http://www.pfon.org/images/polska_droga_do_konwencji_www.pdf)

<sup>20</sup>Ibidem, p. 18.

<sup>21</sup>Compare: explanatory note to the draft regulation: [http://www.mz.gov.pl/wwwfiles/ma\\_struktura/docs/rrm\\_npozp\\_01092009.pdf](http://www.mz.gov.pl/wwwfiles/ma_struktura/docs/rrm_npozp_01092009.pdf) (p.5).

and with cooperation of other Ministries, the National Health Fund, territorial administration and non - governmental organizations. Within the aim of prevention of mental disorders a particular aim – prevention of discrimination, intolerance and exclusion of persons with mental disorders - has been indicated. This aim would specifically imply that the protection of political and civil rights of such persons, with special emphasis on patients of psychiatric units is monitored on a permanent basis.

- [33]. There was absence of information and cases on point of disabilities definition.

## 3. Anti-discrimination

### 3.1. Incorporation of United Nations standards

- [34]. On 30 March 2007 Poland has signed the UN Convention on the Rights of Persons with Disabilities with a reservation concerning article 23.1 (b) and 25 (a) (reproductive health). However, Poland did not ratify this Convention yet. The Helsinki Foundation of Human Rights urged the Prime Minister in two letters to take necessary steps to complete this process<sup>22</sup>: In the interview given in April 2007 the previous Minister of Labour and Social Policy stated that the ratification of the Convention has real chances to be accomplished<sup>23</sup>. However, the law authorizing the President to ratify the Convention had to estimate the consequences, including the financial ones of the ratification. Therefore, the process of estimating the impact of the ratification requires input from all the sectors of the government.
- [35]. In 2008 the Government took several actions preparing for the ratification of the Convention. However, it has not considered ratification of the Optional Protocol yet. Such strategy is there to avoid responsibility before the international body since the foreseeable number of potential individual complaints seems to be high.

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<sup>22</sup>See: Letter of 12 April 2007 and of 10 March 2008 (available at: [http://www.hfhrpol.waw.pl/pliki/wystapienie\\_niepelnosprawni\\_hfpc.pdf](http://www.hfhrpol.waw.pl/pliki/wystapienie_niepelnosprawni_hfpc.pdf))

<sup>23</sup> Interview with Anna Kalata, published on 20 April 2007, available at: <http://www.niepelnosprawni.pl/ledge/x/18562>

- [36]. Before the ratification process starts, the Government initiated screening of all relevant provisions of Polish law concerning rights guaranteed in the Convention in order to estimate the necessary legislative changes (and their financial consequences), which would accord the Polish law with the Convention. The Government indicated the vague language of the Convention and interpretative problems it may cause, as well as unclear relations between its many articles. The government information provided for the year 2008 assured that the changes will be completed in 2009. The most work must be done with regard to positive measures concerning realization of rights guaranteed in the Convention and preparation of the respective programs and plans of action.<sup>24</sup>
- [37]. As to the most current changes the Ministry of Labour and Social Policy prepared the draft of Law on Equalizing Opportunities of Disabled Persons [*ustawa o wyrównywaniu szans osób niepełnosprawnych*]<sup>25</sup>, which is being consulted with social partners. Moreover, the new horizontal law concerning equal treatment – the law on implementation of some of the European Union provisions concerning equal treatment awaits its final adoption (after several years passed since the initial draft). As the outcome Poland has not completed implementation of the European anti discrimination law in other areas than labour law.
- [38]. The Government underlines that the decision to ratify the Convention will be taken in the moment when the Polish law is in compliance with the Convention, so it is not declaration of intent, but a real obligation<sup>26</sup>. Whereas the estimation of the scope of the necessary legislative changes seems to be indispensable, it is not necessary to introduce these changes before the ratification. The Report “Polish Road to the Convention” [*Polska droga do Konwencji*]<sup>27</sup> prepared from May to December 2008 by the Polish Forum of Disabled Persons [*Polskie Forum Osób Niepełnosprawnych*] and the Foundation Institute of the Regional Development [*Fundacja Instytut Rozwoju Regionalnego*] indicates that according to the Article 4 of the

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<sup>24</sup> Information of the Government of the Polish activities in 2008 to implement the provisions of Sejm’s Resolution of 1 August 1997 available at:

<http://www.niepelnosprawni.gov.pl/aktualnosci/art86,informacja-w-sprawie-karty-osob-niepelnosprawnych.html>

<sup>25</sup> Draft of Law on Equalizing Opportunities of Disabled Persons [*ustawa o wyrównywaniu szans osób niepełnosprawnych*] 6 October 2009, available at:

<http://www.niepelnosprawni.gov.pl/prawo/projekty-ustaw-i-rozporzadzen/>

<sup>26</sup> Information of the Government of the Polish activities in 2008 to implement the provisions of Sejm’s Resolution of 1 August 1997, available at:

<http://www.niepelnosprawni.gov.pl/aktualnosci/art86,informacja-w-sprawie-karty-osob-niepelnosprawnych.html>

<sup>27</sup> [http://www.pfon.org/images/polska\\_droga\\_do\\_konwencji\\_www.pdf](http://www.pfon.org/images/polska_droga_do_konwencji_www.pdf)

Convention the process of adjusting the national law to the Convention can take place after the ratification.

- [39]. Furthermore, the Polish Forum of Disabled Persons started to collect signatures under the petition to the Polish Government concerning ratification of the UN Convention<sup>28</sup>. Unfortunately, according to the Polish law it is not possible to submit so-called “citizens” draft law concerning the ratification of the international treaty.
- [40]. The above strategy of the government in fact delays the ratification and the direct applicability of the Convention in the Polish legal system<sup>29</sup>. After the ratification takes place, it will be possible to invoke Convention rights directly before the courts or the administrative organs, even if these rights are not provided by the statutory law or the law is contrary to the Convention.
- [41]. It is rightly observed in the First EU Disability High Level Group Report on the UN Convention that *“Poland may have to introduce changes that will concern the following areas: access to information, protection and security of disabled persons in cases of natural disasters, war, humanitarian catastrophes, protection of disabled persons - victims of exploitation, abuse, neglect, assistance in living independently, social integration, preventing isolation, access to public buildings, spaces and means of transport, participation in the political and the civil life, including the right to vote, care over children, adoption, guardianship, assistance of all kinds to help to raise children*

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<sup>28</sup>Draft „Mamy naszą Konwencję”:

[http://www.pfon.org/index.php?option=com\\_content&view=article&id=88&Itemid=97](http://www.pfon.org/index.php?option=com_content&view=article&id=88&Itemid=97)

<sup>29</sup> Compare the Second EU Disability High Level Group Report (p. 6)

It is to be noted that Polish policy as concerns the ratification of international agreements is that before opening the final stage of the ratification process (preparing the ratification act and submitting it to the Council of Ministers and the Parliament) amendments to the legal acts must be adopted (or at least well advanced), especially as concerns important ones or those with financial implications. The decision on ratification of the Convention will be taken on the basis of a detailed analysis of its provisions and of the Polish legislation, policy and practice in the area covered by the Convention. A list of necessary amendments to the national legislation will be established as well. This analysis were opened in December 2008 and will take 9 to 12 months taking into consideration complicated nature of the Convention and the necessity to go through extensive consultations within national administration, with social partners and non-governmental organizations. The outcome of the work will be presented to the Council of Ministers together with a proposal as to the future action. It is to be taken into account that in case of an international agreement concerning human rights, the Polish Constitution requires "a major ratification process", which means adoption by the Council of Ministers of a draft Act on ratification, submitting it to the Parliament for consideration and approval, then the President may ratify an international agreement. Practice has shown that it takes at least 6 months from the opening of inter ministerial consultations on a draft Act on ratification to the signing of the Act by the President. Ratified agreements are promulgated in the Official Journal of Laws and constitute part of the domestic legal order. They are applied directly, unless their application depends on the enactment of a statute. By virtue of the Constitution, an agreement ratified upon prior consent granted by statute (it means: in the “major ratification process”) have precedence over statutes if the agreement cannot be reconciled with the provisions of the statutes”.

*(to the extent that may be in line with the Convention), equal treatment of disabled children as concerns family life, providing children and their families with comprehensive and early information, services and assistance, placing children in institutions (some issues), education (facilities to ensure full access, employing disabled persons as teachers), ensuring "multidisciplinary" assessment of needs and potential of a person with disability as concerns the habilitation and rehabilitation services, which should begin at the earliest possible stage, ensuring adequate standard of living for persons with disabilities and their families, financial assistance to cover expenses related to disability (as concerns persons living in poverty). The whole issue of prohibition of discrimination and of equal treatment is to be carefully studied as new obligations may arise from the relevant provisions of the Convention. To introduce amendments to the Polish legislation an ordinary legislative procedure would apply. The issue of preparing a "horizontal" Act to deal with the issues of disability in an exhaustive and coherent way may be considered also thus setting out basis for ratification of the Convention" (pp. 18-19).*

## 3.2. The anti-discrimination national framework

- [42]. A general anti-discrimination clause is formulated in the Constitution of Poland of 2 April 2007. Article 32 of the Constitution reads: "(1) All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. (2) No one shall be discriminated against in political, social or economic life for any reason whatsoever"<sup>30</sup>. This provision does not specify prohibited forms of discrimination<sup>31</sup> or the protected categories of persons (through a list of grounds characterizing persons who are victims of discrimination).
- [43]. On the statutory level Law on the Medical Care Services financed from the public funds states reinforces the principle of equal treatment. According to this regulation "health insurance is based on the principle of equal treatment and solidarity" and "the waiting list is prepared with a due respect to the principle of fair, equal, non-

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<sup>30</sup>Article 32 Constitution of the Republic of Poland [further: Constitution].

<sup>31</sup>"This means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of differentiation which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which differentiation may occur" – see judgement of the Constitutional Tribunal of 16 December 1997, No. K 8/97.

discriminatory and transparent access to medical care services and according to the medical criteria”<sup>32</sup>.

- [44]. There was absence of information and cases on point of equality principle in respect of persons with mental disorders and persons with mental disability.
- [45]. Apart from provisions implementing the Equal Employment Directive in of the area of labour law, there is no prohibition of discrimination with regard to disability in the statutory law. The Charter of Rights of People with Disabilities prohibits discrimination of all disabled without specification of the nature of disability (Article 1 Section 1) but it is formally non-binding. The particular prohibition of discrimination of persons with mental disorders and persons with intellectual disability is also absent from the statutory legislation. The urgent legislative change should include such provision in the Law on the Protection of Mental Health.
- [46]. Preferential treatment arrangements in respect of persons with mental disorders and persons with intellectual disability in Poland can be found in the Law on the Protection of Mental Health. It obliges the authorities to provide social support in the form of psychiatric (medical), vocational and social rehabilitation for such persons, who experience problems in every-day life, in particular in shaping their relations with the environment and in the scope of employment (Article 8 Section 1). Social support in particular means:
- Maintaining and developing abilities necessary for the independent life; and
  - Organizing help of the family, other persons or the social organizations.
- [47]. Experts writing this report did not identify any precedented cases concerning preferential treatment arrangements in respect of persons with mental disorders and persons with intellectual disability
- [48]. Thus, a complex approach to the psychiatric rehabilitation constitutes the preferential treatment of persons with mental disorders and intellectual disabilities as compared to other patients (disabled) requiring medical rehabilitation. Another example concerns vocational rehabilitation and preferential treatment of employers who employ disabled persons in a particularly difficult position on the labour market. When the establishment employees at least 30% (instead of

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<sup>32</sup>Article 20 Section 5 and Article 65 Section 1 of the Law of 27 August 2004 [Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych], Dz. U. 2004, No 210 Item 2135.

40%) of blind persons, persons with mental disorder or intellectually disabled with severe or moderate disability it can already qualify as a protected work establishment [*zakład pracy chronionej*]<sup>33</sup>.

- [49]. This rule compensates the hardship of employing these groups as more challenging than other people with disabilities. On the other hand, the Law on the System of Education establishes the right to education according to the age and the level of development (Article 1)<sup>34</sup>, indicating that content, method and organization of education shall be adjusted to the psycho-physical abilities of children. Article 17 Section 3a of the Law on the System of Education obliges the municipality to provide free transport only for children with the qualification of disability, but Article 64 Section 3 of the Law on the System of Education talks about the duty to provide specialized or didactic-corrective activities for children and youth with developmental disorders. This law is however limited to rehabilitation directed to children and youth, whereas a comprehensive and holistic approach of organized support (rehabilitation) specified for persons with mental disorders or intellectually disabled would be needed<sup>35</sup>.
- [50]. The Employment Equality Directive has been transposed to the Polish law on the basis of the Labour Code (Chapter IIa Equal treatment in employment)<sup>36</sup>, the Law on Promotion of Employment and the Institutions of Labour Market<sup>37</sup> and the Civil Proceedings Code with regard to participation of non – governmental organisations in the court trial concerning discrimination<sup>38</sup>. However, it has not been specifically implemented with regard to the rights of persons with mental disorders and intellectual disability. The general Law on Vocational and Social Rehabilitation and Employment of Disabled Persons refers in Article 2 Section 8 only to a workplace adopted for the needs of a disabled person [*przystosowane stanowisko pracy osoby niepełnosprawnej*].
- [51]. The Labour Law refers to definitions of direct and indirect discrimination, harassment sexual harassment and instruction to discriminate, shifts the burden of proof, introduces the concept of genuine and determining occupational requirements and prohibits victimization. Article 183a of the Labour Code states that all

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<sup>33</sup>Article 28 Section 1b of the Law of Vocational and Social Rehabilitation.

<sup>34</sup>Law of 7 September 1991 on the system of national education [*Ustawa o systemie oświaty*], Journal of Laws [*Dziennik Ustaw*] of 2004, No 256, Item 2572.

<sup>35</sup>G. Magnuszewska-Otułak, “*Habilitacja i rehabilitacja*”, in: Raport, op.cit., p.150-156.

<sup>36</sup>Amendments to the Labour Code of 14 November 2003 [*Ustawa o zmianie ustawy – Kodeks pracy oraz o zmianie niektórych innych ustaw*], Jdz. U. 2003, No. 213, item 2081.

<sup>37</sup>Law of 20 April 2004 on Promotion of Employment and the Institutions of Labour Market [*Ustawa o promocji zatrudnienia i instytucjach rynku pracy*], Dz.U. 2004, No. 99, item 1001.

<sup>38</sup>Article 61 Section 4 of the Civil Proceedings Code.



employees have the right to be equally treated when it concerns conclusion or termination of employment relation, terms and conditions of employment, promotion and access to vocational training without regard to - among others – their disability. The Labour Code does not define what types of disorders qualify as disability.

- [52]. The key judgement related to the Equal Employment Directive was decided on 20 June 2006 by the Regional Court in Legnica in the case of Zbigniew Maciejewski whose job application was rejected on the basis of his disability (hip arthroplasty). The Court recognized that the Police Office Headquarters discriminated the plaintiff in that he was required to present a medical permission to work overtime hours and at night. Moreover, it showed series of irregularities on the level of collection of evidence by the District Court, which rejected the plaintiff's claim as unjustified. The Helsinki Foundation for Human Rights joined in the appeal proceedings and prepared an *amicus curiae* brief. It requested the Court to refer the European Court of Justice with a preliminary question whether the Law on Vocational Rehabilitation and Employment of Disabled Persons (Article 15 and 16) are contrary to the Directive 2000/78/EC, but the Court chose not to do so. In the light of the proceedings before the District Court it was accepted that the medical report is necessary already on the application stage notwithstanding the risk of indirect discriminations. Such interpretation was not shared by the Regional Court<sup>39</sup>.
- [53]. Due to limited application of the Labour Law, there is no ground to believe that prohibition of discrimination would include persons with mental disorders and intellectually disabled in other areas. Lack of statutory prohibition of discrimination on this basis can in practice result in more frequent acts of indirect discrimination.
- [54]. With regard to the duty to provide reasonable accommodation to meet the needs of the person with disability established by the Directive 2000/78/EC and the draft "horizontal" Directive Polish law lags far behind. Currently, there just a few provisions that fall into the concept of reasonable adjustments: in the Law on Vocational and Social Rehabilitation and Employment of Disabled Persons (the workplace adjusted for the disabled is equipped and adopted according to the needs of such persons, taking into account the type and level of disability)<sup>40</sup>; in the construction law (the conditions necessary for the

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<sup>39</sup>Compare: case note at: <http://www.hfhrpol.waw.pl/precedens/aktualnosci/sprawa-zbigniewa-maciejewskiego-wygrana.html>

<sup>40</sup>Article 2 Section 8 and Article 26 of the Law.

use of buildings by the disabled)<sup>41</sup>; the transport law (actions facilitating use of means of transport by the disabled)<sup>42</sup> and the telecommunication law (provision of adjustments for the disabled).<sup>43</sup>

- [55]. One of the most important difficulty for disabled persons who want to undertake employment is the risk of suspension of the social aid pension (payable from the National Social Insurance Fund, *Zakład Ubezpieczeń Społecznych*). It happens if remuneration from employment exceeds 30% of the average monthly salary, as announced by the President of the Main Statistical Office. Such solution makes quite difficult any employment activation.
- [56]. However, there is no clarity whether lack of such reasonable accommodation results in discrimination. There is no provision specifying minimum standards of reasonable adjustment or principles of reasonable financing. The narrow approach taken by the Labour law does not allow further expansion of this duty to other areas outside employment<sup>44</sup>.
- [57]. In Poland there is no equality body. Discussion to establish it are still pending in connection with the need to implement the EU Anti-Discrimination Directives. Most probably some of the functions connected with the representation of victims of discrimination will be performed by the Commissioner of Civic Rights [*Rzecznik Praw Obywatelskich*]. In fact it is one of the competences of the Commissioner to deal with such persons. However, there is no specialized body dealing with such complaints.

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<sup>41</sup> Article 5 Section 1 (4), Article 9 Section 1, Article 34 Section 3(2), Article 36a Section 5(5), Article 59a Section 2(2f) of the Building Law of 7 July 1994 [*Prawo budowlane*], Dz. U. 2006, No 156, Item 1118.

<sup>42</sup> Article 14 Section 2 of the Law on Transit Services of 15 November 1984 [*Prawo przewozowe*], Dz. U. 2000, No 50, Item 601.

<sup>43</sup> Article 81 Section 3(5) and Section 6(2), Article 89 Section 2 of the Telecommunications Law of 16 July 2004 [*Prawo telekomunikacyjne*], Dz. U. 2004, No 171, Item 1800.

<sup>44</sup> M. Szeroczyńska, "Dyskryminacja" and "Racjonalne usprawnienia", in Raport, op. cit., p. 20-24.

## 4. Specific Fundamental Rights

### 4.1. General overview

- [58]. In general persons with mental disorder and persons with intellectual disability can enjoy their civil and political rights unless they are fully or partially incapacitated. However, their legal status does not necessarily mean that they can in fact enjoy these rights due to social barriers in their functioning in the society.
- [59]. The Constitutional system of fundamental rights in Poland is based on the principle of human dignity. Already the Preamble refers to human dignity<sup>45</sup>, whereas Article 30 accepts human dignity as the source of other rights<sup>46</sup>. Further, the Constitution guarantees in Article 31 Section 3 that all limitations of rights must be proportional (provided by the law, necessary in the democratic society and serving the public interest<sup>47</sup>). Article 32 guarantees the right to equal treatment and equality before the law. It also prohibits discrimination in political, social or economic life for any reason whatsoever. Article 39 prohibits medical experiments without voluntary consent. The Constitution foresees also certain social rights (like right to social security - Article 67 and right to health care - Article 68). Moreover, the Constitution contains a programmatic norm in Article 69 imposing a general obligation on the state to provide aid to disabled persons “to ensure their subsistence, adaptation to work and social communication” However, Article 81 makes an important reservation that a person can invoke Article 69 only with respect to particular rights guaranteed in the statutory law. In other words, the government needs to aim at progressive realization of this obligation in its legislative endeavours.
- [60]. Although there is no statute, which comprehensively regulates the status of the disabled persons, the above mentioned Charter of Rights

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<sup>45</sup> “We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland”.

<sup>46</sup> “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities”.

<sup>47</sup> Article 31 para. 3: “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

of Persons with Disabilities is a very important document. The Second EU Disability High Level Group Report on the UN Convention summarizes it as follows:<sup>48</sup>

*“On 1 August 1997 the Sejm of the Republic of Poland adopted a Resolution – Charter of Rights of Persons with Disabilities, whereby it reiterates the rights conferred by the Constitution of the Republic of Poland, Convention on the Rights of the Child and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities. This document defines the rights of persons with disabilities to live a life that is independent, self-reliant, active and free from any aspects of discrimination. It provides a list of ten rights pointing at the crucial areas where vigorous action needs to be taken by the Government and local authorities to carry into effect the rights of persons with disabilities. In particular it calls for action to ensure access to goods and services allowing full participation in public life, school education, work conditions accommodated as necessary, life in environment free of functional barriers including access to public offices, polling stations, public utilities, use of means of transport at ease, access to information and communication” (pp.148-149).*

## 4.2. The right to life

- [61]. The Constitution states in Article 38 that “the Republic of Poland shall ensure the legal protection of the life of every human being”. The right to life is to be enjoyed by everyone equally and cannot be limited even in the state of emergency (Article 233 para. 1). The Constitution does not envision gradation of value of human life or gradation of its protection.
- [62]. In 2007 the attempt to amend the Constitution adding the end phrase “from the moment of conception” failed in the Parliament. Nevertheless, the current constitutional framework established by the key judgement of the Constitutional Court in 1997<sup>49</sup> gives the legal protection also to the foetus.
- [63]. The Polish reservation to the UN Convention reads: „The Republic of Poland understands that Articles 23.1 (b) and 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto”. Furthermore, the Law on Family Planning, Legal protection of the Human foetus and

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<sup>48</sup> <http://ec.europa.eu/social/main.jsp?catId=431&langId=en>

<sup>49</sup> The judgment of 28 May 1997 (K 26/96) declaring that abortion on social or economic grounds is unconstitutional.

Conditions for Termination of Pregnancy<sup>50</sup> provides three exceptions from the general prohibition of abortion. One is the situation when: “prenatal testing or other medical premises indicate high probability of serious and irreversible handicap of the foetus or other incurable illness threatening its life” (Article 4a Section 1 point 2).

[64]. The Law on Family Planning is applied very restrictively and women face serious problems with access to legal abortion services<sup>51</sup>. According to the Government data for 2008, only 499 legal abortions were carried out in public hospitals, 467 because of the malformation of the foetus. The Regulation of the Ministry of Health and Social Care of 22 January 1997 specifies that abortion is admissible only in case of genetic disorders indicated in genetic testing or developmental disorder diagnosed in an ultrasound scanner capture<sup>52</sup>.

[65]. Other terms used in the language of Article 4a Section 1 point 2 remain unclear<sup>53</sup>. Uncertainty as to the meaning of these terms may result in decisions granting women the right to abortion in case of any disability (not limited to serious or irreversible disability) or the opposite – denying abortions in case of serious genetic or developmental malformation of the foetus. Moreover, the Polish Ombudsman publicly challenged that one of the premises of legal abortion, which reads “(1) when the woman's life or health is endangered by the continuation of pregnancy” is not precise and proposed to specify medical grounds, which justify termination of pregnancy. In January 2008 he addressed the Minister of Health and the Minister of Justice to take legislative action in this regard<sup>54</sup> and considered even a motion to the Constitutional Tribunal, but finally withdrew from this project. It is crucial that the Law on the Commissioner of Patients' Rights and the Rights of Patients was adopted introducing the appeal procedure in cases when a patient or a doctor does not agree with a medical decision involving the rights of a

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<sup>50</sup> Law of 7 January 1993 Law on Family Planning, Legal protection of the Human fetus and Conditions for Termination of Pregnancy [ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach przerywania ciąży], Dz. U 1993, No 17, Item 78.

<sup>51</sup> Compare: A. Bodnar, „Analiza spraw sądowych dotyczących braku dostępności świadczenia przerywania ciąży w Polsce” [in:] W. Nowicka, *Prawa reprodukcyjne w Polsce. Skutki ustawy antyaborcyjnej*, Warszawa 2007, pp. 54-78.

<sup>52</sup> *R.R. v. Poland* Appl. No. 27617/04 (pending) allegation that Article 3, 8 and 13 of the Convention of Human Rights were violated in case of denial of prenatal testing enabling the applicant to make an informed decision about the continuation of pregnancy resulting with birth of a child with Turner syndrome.

<sup>53</sup> K. Heba, A. Waszkielewicz, „Dopuszczalność przerywania ciąży” in: Raport, op. cit. p. 96.

<sup>54</sup> J. Kochanowski, “Wniosek w sprawie aborcji, którego (jeszcze) nie ma”, Rzeczpospolita of 14. 01.2009, s. A14-15, <http://www.rpo.gov.pl/pliki/1200299314.pdf>. The Letter to the Minister of Justice available at: <http://www.rpo.gov.pl/pliki/1201529456.pdf>

patient<sup>55</sup>. The necessity to introduce an effective appeal mechanism was indicated in the judgement of the European Court of Human Rights in *Tysic v. Poland* case<sup>56</sup>.

[66]. With regard to prenatal testing and abortion the jurisprudence of the Supreme Court confirms that the denial of legal abortion constitutes an infringement of personal rights of a woman, in particular her freedom to make choices about her personal life<sup>57</sup>. In such cases the Polish State has to pay damage for wrongful birth notwithstanding the collision of personal rights of the foetus and the woman. Interestingly enough, the Court did not agree to award an annuity for the child conceived in result of a rape in order to compensate the costs of his maintenance, unless the mother was not able to cover the justified needs of the child<sup>58</sup>. With respect to costs of bringing up a healthy child who was supposed not to live the Court did not specified any principles how to claim damages. It held however that denial of abortion can incur pecuniary damage encompassing costs related to pregnancy, child birth and loss of expected income. Personal rights are also violated if a woman cannot take an informed decision about continuation of pregnancy because she did not have access to prenatal testing<sup>59</sup>. Denial of prenatal testing breaches also the statutory right of a patient to receive adequate treatment in accordance to medical knowledge and information about her or his state of health<sup>60</sup>. The Supreme Court expressed also a crucial principle that damages paid for a wrongful birth is to be awarded to both parents, not just to the mother. If the denial results in disability of a child whose embryo pathology features would have been otherwise detected, the parents can also claim damage for costs of medical treatment and rehabilitation until 18 years of age. The Supreme Court's approach

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<sup>55</sup> The Law of 6 November 2008 on Patients' Rights and Commissioner of Patients' Rights [Ustawa o Rzeczniku Praw Pacjenta i prawach pacjenta], Dz. U. of 2009, No 52, Item 417 . The law entered into force on 21 May 2009.

<sup>56</sup> *Alicja Tysic v. Poland* – the ECtHR judgment of 20 March 2007, Appl. No. 5410/03 (the Court found that there is no effective procedure of appeal against doctors' refusal to grant abortion certificates necessary to carry out legal abortion on medical grounds). The Court found not only that the appeal procedure should be established, but also specified its components. It should be "before an independent body competent to review the reasons for the measures and the relevant evidence", "guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered", require a written justification of such decisions, "ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion".

<sup>57</sup> Supreme Court judgement of 21 November 2003 (V CK 16/03), OSNC 6/2003.

<sup>58</sup> Supreme Court resolution of 22 February 2006 (III CZP 8/06), OSNC 7-8/2006.

<sup>59</sup> Supreme Court judgement of 13 October 2005 (IV CK 161/05).

<sup>60</sup> See Application *R.R. against Poland* No. 27617/04 (pending) raising violation of Article 3, 8 and 13 of the Convention in case of denial of prenatal testing enabling her to make an informed decision about the continuation of pregnancy resulting with birth of a child with Turner syndrome.

rejected the argument of the lower courts that there is no causal link between the denial of prenatal testing and the possibility to make decision about the abortion (within 24 weeks of pregnancy). Prenatal testing carried out after 20 weeks of pregnancy give a high probability of detecting genetic defects of the foetus. Nevertheless, under the Polish law there is no claim for wrongful life lodged by a child since life cannot be regarded in terms of damage<sup>61</sup>.

- [67]. There is no legal euthanasia in Poland, although there are recent declarations to adopt a law regulating this issue. However, the criminal law foresees lesser sanctions for murder committed out of mercy and on request [*zabójstwo pod wpływem współczucia i na żądanie*] in Article 150 of the Criminal Code. Article 150 Section 2 of the Criminal Code states that in extraordinary circumstances the court can mitigate the punishment or renounce from inflicting a punishment. As the qualified type of murder it is punishable from 3 months (while for a non-qualified type of murder the minimum is 6 months) to 5 years of imprisonment. Only a person who is fully aware of its situation and consequences of his or her decisions can make a valid request for such murder. Thus a murder of an intellectually disabled person, or mentally sick or acting under influence of other impairment of psychical activity resulting in lack of recognition of the meaning of such request is not a qualified type of murder<sup>62</sup>.
- [68]. There was absence of cases on point of right to life in respect of persons with mental disorders and persons with intellectual disability.

### 4.3. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

- [69]. The right to freedom from torture or cruel, inhuman or degrading treatment or punishment is enshrined in Article 40 of the Constitution. With regard to persons with mental disorders this right has mainly application to cases of persons who are deprived of liberty or under control of the state (in hospitals, sobering centres, social foster homes etc.). The court cases concerning this right might not really reflect the scale of the problem due to lack of legal awareness of persons with mental disorders, passivity of their guardians or wardens or limited

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<sup>61</sup> A. Bodnar, *Analiza spraw sądowych dotyczących braku dostępności świadczenia przerywania ciąży w Polsce*, op. cit..

<sup>62</sup> See for example: R. Krajewski, "Przestępstwo eutanazji w polskim kodeksie karnym z 1997 r." in *Prokuratura i Prawo*, 2/2005, pp. 65-71.

access to courts, which are particularly significant for legally incapacitated persons. Prosecution of crimes concerning violation of physical integrity or verbal assaults, is made upon private bill of indictment. Preparation of such act as well as supporting it before the court is a major obstacle for protecting rights of those mentally disabled persons, who have communicational problems.

- [70]. It should be noted that the violence towards mentally disabled persons may happen with ease in social foster homes or closed care centres. Very often, by abusing provisions allowing for the use of direct force towards persons held in those institutions, personnel is violating physical integrity, verbally assaults or otherwise treats in a degrading way mentally disabled persons. Poland witnessed examples of such abuses in recent years. For example, in October 2009 media reported that nuns engaged in social welfare home were beating and struggling the mentally disabled children.<sup>63</sup> Currently, the Polish lower chamber of Parliament is working on provisions which aim towards establishing higher level of control over those institutions. Especially the number of inspectors supervising them is going to be increased<sup>64</sup>.
- [71]. Apart from cases reported by media (see paragraph [70]) experts did not identify any precedented court cases regarding violence towards mentally disabled persons.
- [72]. The right to freedom from inhuman and degrading treatment or punishment is likely to be violated in cases when a person with mental disorder is detained and does not have access to adequate medical treatment. The established case-law of the European Court of Human Rights refers to the positive obligations of the state inferred from Article 3 of the Convention. Although the Convention does not guarantee a right to receive medical care above the standard level of health care available to the population generally (*Nitecki v. Poland*, Application Number 65653/01), the state has the duty to provide medical treatment and assistance, which do “not undermine the dignity and entail particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty”<sup>65</sup>.

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<sup>63</sup> Cf TV reportage on this issue, available at [http://uwaga.onet.pl/24610.news.,przemoc\\_w\\_dps\\_dla\\_dzieci\\_prowadzonym\\_przez\\_zakonnice\\_reportaz.html](http://uwaga.onet.pl/24610.news.,przemoc_w_dps_dla_dzieci_prowadzonym_przez_zakonnice_reportaz.html).

<sup>64</sup> See draft law prepared by Sejm, available at: [http://orka.sejm.gov.pl/Druki6ka.nsf/0/55265F0F544FB977C125762C003A873C/\\$file/2316.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/55265F0F544FB977C125762C003A873C/$file/2316.pdf), and

[http://orka.sejm.gov.pl/Druki6ka.nsf/0/CFD670180CBB820BC12576950047BD11/\\$file/2592.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/CFD670180CBB820BC12576950047BD11/$file/2592.pdf)

<sup>65</sup> *Kaprykowski v. Poland*, judgement of , Appl. No.



- [73]. In 2007 the press reported about a boy who has been conscripted to the army notwithstanding the fact that he had been diagnosed with schizophrenia for 4 years. Both the civilian medical commission and the military recruitment commission [*komisja lekarska i poborowa*] accepted that he is entirely healthy (ignoring his medical tests and his mother's intervention) and capable to serve in the army in the road and bridges brigade. The boy's psychical condition worsened already on second day and he was transported to the psychiatric hospital on the sixth day of his service. He left the hospital at his own will and was placed in the medical ward in another military unit under observation. However, he jumped from the window breaking his spine and one hand. The investigation in this case was discontinued due to lack of evidence that any irregularities of his supervisors occurred or his desperate move was taken as an attempt to escape. His mother claimed compensation from the State Treasury for enrolling his son to the army and leaving him without adequate supervision<sup>66</sup>

## 4.4. The right to freedom from exploitation

- [74]. The right to freedom from exploitation as provided in Article 16 of the UN Convention can be protected through technical solutions concerning for example the way a salary or allowance should be paid to the disabled. In general there is no specific control system, which would ensure that remuneration or other due payments are paid and spent by the disabled. It is recommended to introduce such system<sup>67</sup>.
- [75]. There are general constitutional provisions providing for protection against exploitation. For example, Article 31 Section 2 (second sentence) of the Constitution provides for prohibition of compelling anyone to do what is not required by law. This provision is regarded as one of the components of personal freedom. Second, Article 65 Section 1 of the Constitution provides for freedom to choose profession or occupation. Article 65 Section 2 of the Constitution guarantees that the obligation to work may be imposed only by virtue of legislative act. There is also a general prohibition of torture, degrading or inhuman treatment included in Article 40 of the Constitution. Please note also that Poland has comprehensive legislative guarantees against any form of exploitation included into the Criminal Code or Labour Code.
- [76]. Currently, the executive acts define that in case a person entitled to pension or disability allowance has a guardian or a warden (curator),

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<sup>66</sup> Compare: <http://wyborcza.pl/1,76842,4366529.html>

<sup>67</sup> K. Gędek, „Przemoc ekonomiczna”, Raport, op. cit., pp.110-111

the pension or the allowance is to be paid to a guardian or a warden (curator). Both guardian and warden remain theoretically under the control of the court (Article 165-168 Family and Guardianship Code). However, in a situation when a guardianship or curatorship is to be established in the near future and it is indicated by the administrative organs (and the person entitled does not even have the right to be heard on this occasion), the payments are to be made to the hands of a person who in fact takes care of the person entitled. Such factual carer is not obliged to square up to any authority. This situation bears the risk of abuse in particular in the light of the experience that whole families often live at the expense of the entitled persons.

[77]. Until the judgement of the Constitutional Court regarding the right of the concerned person to institute court proceedings in order to revoke or change the declaration of legal incapacitation<sup>68</sup>, the risk of exploitation of incapacitated persons by their guardians or wardens was relatively high. The reason was lack of effective procedural mechanism that would enable the incapacitated person to change the person who was her or his guardian or warden. According to the Civil Proceedings Code (Article 559), the court had to act *ex officio* in such cases. Currently, the court can act *ex officio* or on the motion of the concerned person. The previous institution was ineffective in situations when the guardian or warden neglected her or his duties, acted contrary to the interest of the concerned person or is unavailable (out of reach of the concerned person). The experience showed that courts and authorities often remained silent even if the concerned person informed them about improper conduct of the guardians or wardens. Such an informal letter to the court sent by the incapacitated person was not treated as a formal motion to institute the court proceedings (as in Article 506 of Civil Proceedings Code) and did not create “a right to receive a legally binding decision” in this respect.

[78]. We consider that freedom from exploitation is additionally guaranteed thanks to quite comprehensive regulations and practice regarding legal aid and other types of assistance provided to mentally disabled persons. This issue is widely and correctly analysed in the First EU Disability High Level Group Report: “According to the Act of 23 April 1964 – the Civil Code, in case of a mental disease, mental deficiency or other psychical disorders, a person over the age of 13 may be fully incapacitated (if she/he is not able to manage her/his own conduct; Article 13 CC). A person over the age of 18 may also be partially incapacitated (if her/his state does not justify full incapacitation but assistance is needed to manage her/his affairs; Article 16 CC). It results from these provisions that the disability in no case may be the

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<sup>68</sup> Judgement of 7 March 2007 (no. K 28/05). The Constitutional Court found that Article 559 in accordance with Article 545 § 1 and 2 of Code of Civil Proceedings is contrary to the Article 30 (the rule of human dignity) and article 31 (the right to freedom) of the Constitution of Poland.

*sole ground for restriction of legal capacity. It is also to be noted that only enlisted specific kinds of disability may be the reason for restricting legal capacity, other disabilities do not give grounds for restricting legal capacity. Guardianship shall be established for a fully incapacitated person, unless she/he is under the parental authority. Curatorship shall be established for a partially incapacitated person. A fully incapacitated person has no right to act at law, except for concluding everyday contracts (on minor issues of daily life) that can be effected with funds of low value. A partially incapacitated person has a restricted right to act at law. The approval of such an act by the ward is, in some cases, necessary for its validity. However a partially incapacitated person can sign an employment contract and dispose of his gain. If the employment contract encroaches the rights of a person, the ward may dissolve the contract. Discussion on the issue of legal capacity of persons with disabilities started a few years ago. Some non-governmental organizations suggest eliminating the institution of incapacitation and replacing it with the institution of "supported decision-making" on the grounds of the provisions in force on a court-appointed guardian (curator), who may be established for a disabled person who needs assistance to manage her/his all affairs, affairs of a certain kind or only to handle a particular matter (Article 183 of the Act of 25 February 1964 – the Family and Guardianship Code). However no changes in legislation have been proposed yet. Non-governmental organizations report also on cases of misuse of the institution of incapacitation, which deprives a person his rights. They claim that, for instance, in some cases the decision of incapacitation is not the interest of a given person but the interest of other persons or institutions and the control of the acts of guards/wards is superficial and thus ineffective. To enable persons with disabilities access to the support they may require in exercising their legal capacity, the following measures have been, inter alia, established:*

*1) Assistance of a court-appointed guardian (curator) - see also the information above*

*2) Community organizations (in Polish: organizacje społeczne), including non-governmental organizations representing the interests of persons with disabilities, are granted with special procedural rights in the Polish law:*

*According to the Civil Proceedings Code, in cases regarding alimonies/maintenance claims and in cases regarding the protection of consumers, the community organizations whose statutory objectives include the protection of equal status and the principle of non-discrimination may, upon the consent of the citizens, institute actions on behalf of the citizens, and may, upon the consent of the claimant,*

*join the proceedings at any stage thereof. Such organisations even if they do not participate in proceedings may present to the court an opinion which is essential to the case in the form of a resolution passed by their duly authorised bodies.*

*By virtue of the provisions of the Code of Criminal Procedure, in judicial proceedings, prior to the commencement of the judicial examinations, a representative of a community organisation may petition the right to participate in the proceedings. It may take place if there is a need to protect a social interest or an important individual interest which lies within the scope of the statutory purposes of this organisation, especially in matters pertaining to the protection of human rights and freedoms. In the petition the community organisation shall designate a person who is to represent the organization. The representative should file his power of attorney in writing. The court shall admit a representative of the community organisation if it finds that his/her participation in the court proceedings will be in the interests of justice.*

*According to the Administrative Procedure Code, in a case concerning an individual person, a community organization shall have the right to file a demand to initiate proceedings and to be admitted to participate in proceedings if the statutory objectives of that organization justify it and it is in the social interest. A state administration agency, acknowledging the demand of the community organization as well-founded, shall decide on initiating the proceedings ex officio, or on admitting the organization to participate in the proceedings. Denial to initiate proceedings or to admit the community organization to participation in the proceedings may be subjected to complaint. The community organization shall participate in proceedings enjoying all the rights of the party to the proceedings. Furthermore, a state administration agency, initiating the proceedings in a case concerning an individual person, shall notify a community organization of the proceedings if it decides that the organization can be interested in these proceedings on account of its statutory objectives and if it is in the social interest. A community organization even if it does not participate in the proceedings may, with the approval of a state administration agency, submit its opinion in the case, expressed in the resolution or in the declaration of its statutory body, to that agency.*

*3) Specialised counselling, in particular legal, provided, according to Article 46 of the Act of 12 March 2004 on Social Assistance, to persons having difficulties in solving their personal problems. Legal counselling covers providing information on family law, social security and protection of tenants.*

4) *Legal information and assistance provided according to professional standards by the Information Centres for Disabled Persons – founded within a PFRON programme*

5) *Advice and information on rights and obligations provided by the Bureaus for Citizen's Advice to help individual persons solving problems concerning: housing, family affairs, social assistance, social security, employment, financial affairs, administration, consumer's protection, heritage, property. Bureaus are open for all; their advice is free of charge, independent and reliable. No specific trainings for professionals who could give legal support for persons with disabilities have been held recently, but such trainings for advocates are planned for the year 2009. Moreover, the problem of rights and needs of persons with disabilities is included in trainings dealing with discrimination on any ground*<sup>69</sup>.

[79]. In Poland there is a practice of “compelling” families to establish incapacity with respect to family members by different public administration bodies. For example, in 2003-2007 the National Social Insurance Fund (ZUS) sent to parents or guardians of mentally disabled persons information on the necessity to deliver to ZUS an official decision of the court confirming their status as a guardian. If not delivered, ZUS claimed that the social aid pension will not be paid to such guardians. However, under Polish legislation the only possibility to appoint legally a guardian is to make the incapacitation procedure. Therefore, such practice by ZUS in fact constituted an act of compelling to make such a procedure.

[80]. Thanks to the intervention of the Polish Association for Persons with Mental Illness, the Commissioner of Civic Rights decided to lodge a motion to the Constitutional Tribunal. In the judgement of 6 November 2007 (No. U 8/05)<sup>70</sup>, the Constitutional Tribunal stated that relevant provisions which concern payment of the social aid pension to representatives of the mentally disabled persons are contrary to the Constitution<sup>71</sup>.

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<sup>69</sup>Second European Union High Level Group on Disability Report, p. 149 - 151

<sup>70</sup>Sentenced was pronounced on 14 November 2007 r. w Dz. U. 2007 No 211, Item 1548.

<sup>71</sup>The Constitutional Tribunal declared paragraph 43 point 2 and 4 of Law of 7 February 1983 [Rozporządzenie Rady Ministrów w sprawie świadczeń emerytalno rentowych i zasad wypłaty tych świadczeń] in so far as those provisions relate to the social pension payments because of mental disability for persons who do not have a legal representative and those provisions relate to actual guardians of these persons and to the bodies of administration required by law to apply to court to establish a legal guardian for the person entitled to pension at contrary to the article 30

- [81]. Despite the judgement of the Constitutional Court and the Supreme Court it is quite common to „compel” to make incapacitation by social aid organs or directors of social aid homes<sup>72</sup>. Those institutions quite often require admittance of the person from earlier incapacitation of the mentally disabled person, upon motion of parents or legal guardian. Accordingly there is a risk that incapacitation becomes an informal pre-condition to make use of social aid. Incapacitation makes easier the work of personnel of the social aid homes. It allows for eventual placing of such persons in a hospital, consent for surgery, application of the medical treatment, management of property, as well as making other decisions concerning the life of incapacitated person, without his/her participation.

## 4.5. The right to liberty and security

- [82]. The right to liberty and security is provided in Article 41 of the Constitution. Standards established under this provision are similar to those under Article 5 of the ECHR. Guarantees contained therein have a clear application to persons who are compulsorily placed in a psychiatric institution. The relevant provision concerning disabled persons is included in the UN Convention (Article 14).
- [83]. In case of *Musiał v Poland* (para. 43), the European Court of Human Rights had the occasion to summarize the principles governing involuntarily confinement on the basis of mental health. “According to the principles which emerge from the Court’s case-law, a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is entitled under Article 5 § 4 of the Convention to take proceedings at reasonable intervals before a court to put in issue the “lawfulness” – within the meaning of the Convention – of his or her detention, inasmuch as the reasons initially warranting confinement may cease to exist (see the *Luberti v. Italy* judgement of 23 February 1984, Series A no. 75, p. 15, § 31; and the *Megyeri v. Germany* judgement of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22)”. The Court found consequently that lawfulness of the applicant’s detention was not decided speedily in the contested proceedings because in the case there were no extraordinary

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and the article 31 of Constitution in conjunction with article 2 and article 93 paragraph 1 Constitution and are contrary to the article 32 paragraph 1 Constitution of Republic Poland

<sup>72</sup>Polish Association for Persons with Mental Handicap [*Polskie Stowarzyszenie na Rzecz Osób z Upośledzeniem Umysłowym*] during realization of the project “Does incapacitation persons with mental disabilities may be provided for social help? In defense of PERSON!” [*Czy ubezwłasnowolnienie osoby z niepełnosprawnością intelektualną może być warunkiem uzyskania świadczenia z pomocy społecznej? W obronie OSOBY!*]. Association conducted a study in social welfare homes in Mazowieckie, Wielkopolskie and Podkarpackie province during 2008 – 2009. The results have not yet been published, but they show a scale of incapacitation problem.

circumstances that could have justified why the proceedings took nearly 2 years. In particular there was no causal link between the complexity of his medical case and the time for preparation of the expert opinion (10 months).

- [84]. According to the Mental Disability Advocacy Centre, the objection to the mental health detention should be treated in the same way like any other objection to a necessary medical treatment. As it stated in the *amicus curiae* brief in case *Kędzior v. Poland* (Application Number 45026/07) “For a person to be lawfully detained by virtue of being of “unsound mind” there is a requirement (except in cases of emergency) that amongst other things the person must be reliably shown, not only to have a “true mental disorder” established on the basis of objective medical expertise but that the disorder must also be of a “nature or degree” warranting compulsory confinement, and that continuance of that confinement must be contingent on the persistence of the disorder (see for example *Winterwerp v. the Netherlands*, judgement of 24 October 1979, para. 39).” (...) “The existence or otherwise of an objective psychiatric assessment prior to one’s incarceration is not therefore of relevance unless that assessment addressed the specific (but weak) requirements of the *Winterwerp* test – namely the existence of a mental disorder of a nature or degree that warrants compulsory detention. Additionally the *Winterwerp* test requires that the assessment be timely, in the sense of immediately preceding the confinement (see *Varbanov v. Bulgaria*, no. 31365/96, judgment of 5 October 2000). The assessment must be subject to repeated review: a person’s mental health, its nature and degree, (like a person’s functional incapacity) can and frequently does, fluctuate over time”<sup>73</sup>.
- [85]. Article 5 read together with Article 8 of the ECHR impose on the states positive obligations to effectively supervise unnecessary detention and forced treatment. Such supervision is needed also in case of involuntary placement in the social foster home. Although it might appear as a right (privilege), it could amount to deprivation of liberty and as such requires adequate judicial review mechanism to question lawfulness of such decision. The aim is to provide mental health treatment which constitutes the least interference in the person freedom.
- [86]. The example when the right of a person to be under the social protection of the state turns into a violation of personal liberty can be found in case *Kędzior v. Poland* (pending). The case concerns an incapacitated person who was placed in a social foster home on the basis of the consent of his guardian and while the guardian lost contact with him, he cannot give up the right to stay there alone.

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<sup>73</sup> Oliver Lewis, *Written comments by the MDAC as Amicus Curiae*, 22 October 2009, p. 5

- [87]. The legal basis for the placement is in Article 54 of the Law on Social Assistance (*ustawa o pomocy społecznej*), which provides that a person who needs permanent care because of age, disease or disability and who cannot function in everyday life, has a right to be placed in social foster home. Decisions concerning admission to the social foster home are made by the competent local authority (*wójt, starosta, marszałek województwa*) and do not require approval by a court. Only the guardian has the right to request that an incapacitated person is placed in or removed from a social foster home and to take him/her away from there. It is rightly observed in the applicant's observations to the government that there are no legal proceedings open to the applicant which would enable him to challenge the lawfulness of his admission to the social foster home and the necessity of his continuing stay therein. Decision to place the applicant was made by his guardian without taking the applicant's opinion into account. Moreover, no psychiatric examination of the applicant was carried out at the admission or at any later stage of his stay in this institution. As consequence the applicant was deprived of his liberty on ground of the guardian arbitrary decision without any chance to revoke it.
- [88]. In March 2009 the District Court in Przemyśl dismissed the application of Mr Kędzior for waiver of incapacitation. Mr Kędzior claimed that there were no rational reasons to diagnose him with schizophrenia and place him in the establishment of social protection. Now, the case *Kędzior v. Poland* is pending before ECHR. "(see paragraph [16]).

## 4.6. The right to fair trial

- [89]. The right to fair trial in the Polish Constitution is conferred in Article 45. The right to fair trial specifically provided to persons with mental disorder and persons with intellectual disability to enable their proper access to justice is provided in Article 48 of the Law on the Mental Health Protection. This provision states that "the court may *ex officio* establish legal aid for a person, who is directly concerned by the proceedings, even without a motion of this person, if the person is not able to file such motion due to her or his mental health and the court finds the participation of the professional representative necessary". The above provision is in unclear relation to Article 79 of the Criminal Procedure Code obliging the court to establish a defence counsel for any accused person who is deaf, dumb or blind, or whose sanity [*poczytalność*] raises reasonable doubts of the court. The Criminal Procedure Code seems to be in tact with Article 13 of the UN Convention, while the Law on the Mental Health Protection not. It is quite obvious that a person with mental disorder or intellectual



disability who is not incapacitated (not represented by the guardian) has a very limited ability to represent her/himself in the court. Free access to legal aid – also on the pre-trial stage – should be in their cases obligatory and automatic. Moreover, the criteria based on the discretionary assessment of the court, which may err in its opinion on the condition of the mental health or sanity of a concerned person due to lack of specific medical knowledge, should be more precise<sup>74</sup>.

[90]. Another obstacle in access to courts for persons with mental disorder and intellectual disability, in particular if they are incapacitated, are the court fees. The case *Kędzior v. Poland*, which is currently before the European Court of Human Rights (cited above) concerns the applicant who unsuccessfully tried to quash the decision on his legal incapacitation. Even after the Constitutional Court judgement recognizing the right of the concerned person to initiate such proceedings, it was not instituted because the applicant did not pay any court fees. The requirement to pay the court fees by a person who in principle cannot dispose of his money, makes his right to the fair trial, in particular to access justice illusory. The Przemyśl Regional Court in this case rejected his motion to change his legal guardian and did not afford him legal aid<sup>75</sup>.

[91]. Please note also information provided in the Second EU Disability High Level Group Report: *“The Polish law guarantees that special needs of persons with disabilities – participants of proceedings are taken into consideration in both criminal and civil proceedings. The Polish Criminal Proceeding Code provides that if an accused is deaf, dumb or blind or in case the court deems it indispensable, he/she must be provided with defence counsel. By virtue of the provisions of the Civil Proceedings Code, the court shall provide the parties and participants in the proceedings who appear without being assisted by a barrister or a legal counsel with any guidance needed as regards actions in the legal proceedings. According to the Code, the statutory agent and the spouse of the person to be incapacitated, beside the applicant and the person to be incapacitated, must participate in the incapacitation proceedings. Moreover, organisations devoted to the support or protection of persons with disabilities have a right to petition to participate in every stage of such proceedings. A guardianship court is empowered to appoint a guardian for a person with disability if he/she needs assistance to manage all of his/her affairs, affairs of a certain kind or only to handle a particular matter. Such a decision may be taken upon the request of the disabled or the aforementioned organisation upon the consent of the disabled. If the*

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<sup>74</sup>K. Gądek, „Obrona z urzędu” in: Raport, op. cit., p. 102.

<sup>75</sup>Decision of Przemyśl Regional Court, decision of 24 February 2009, no. I Ns 119/07.

*disabled is, due to his/her state, incapable of filling the said request or giving the said consent, a guardian can be appointed ex officio”.*

- [92]. Although certain measures are taken with respect to improve physical accessibility of courts, law cabinets, administration and prisons, they concern mainly technical adjustments for those who are physically handicapped.
- [93]. Below are two examples of court practice, which show difficulty as regards dealing with cases concerning or involving mentally disabled persons.
- [94]. In 2007, the Regional Court in Katowice heard a case of 22-years old mentally disabled woman. In the age of 16 she was abused by the teacher of sports. Teacher was sentenced to 5 years of imprisonment. Mother of a woman started proceedings for compensation. The civil court appointed a court expert to establish “whether woman had a possibility to feel harm”.<sup>76</sup>.
- [95]. In December 2009, the District Court in Łódź decided that 33 years old mentally disabled man committed a crime of sexual harassment. The criminal behaviour in the opinion of the court was clapping in buttocks of 11 years old girl while queuing in the shop.<sup>77</sup>.

## 4.7. The right to privacy, including the access to one’s confidential medical records

- [96]. The Constitution of Poland provides in Article 47 the protection of private life. Furthermore, according to Article 50 Law on Protection of Mental Health<sup>78</sup> patient of psychiatric hospital is guaranteed protection as regards all information concerning his treatment. All persons employed in psychiatric hospitals are obliged to keep discretion related to provided health care and maintain the confidentiality of information contained in medical records. This obligation is not limited in time, it also applies to former patient and continues after his death.

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<sup>76</sup> Description of case available at: <http://wyborcza.pl/1,75248,4007710.html>

<sup>77</sup> Description of case available at:

[http://wiadomosci.onet.pl/2094762,11,uposledzony\\_uznany\\_za\\_pedofila\\_klepna\\_w\\_pu\\_pe\\_dziewczynke,item.html](http://wiadomosci.onet.pl/2094762,11,uposledzony_uznany_za_pedofila_klepna_w_pu_pe_dziewczynke,item.html) and <http://lodz.gazeta.pl/lodz/1,35136,3943155.html>

<sup>78</sup> Law of 19 August 1994 [Ustawa o ochronie zdrowia psychicznego] Dz. U. 1994 nr 111 poz.

- [97]. According to Law on Patients' Rights and Commissioner of Patients' Rights<sup>79</sup>, patient has right to be informed about his health and treatment. Additionally, the Law of Medical Establishment<sup>80</sup> in Article 18 says that “medical establishments are obliged to keep medical records and provide it patient or his legal representative or person authorized by patient”. The documentation should contain all diagnostic information (including the results of medical tests) and current records relating to patient’s mental and somatic health and treatment. Patient has to have a free access to his medical documentation. However, if it is not desirable from treatment point of view, than patient may authorize his legal representative or Commissioner for Patient Psychiatric Hospital’s Rights [*Rzecznik Praw Pacjenta Szpitala Psychiatrycznego*] to access to medical records. The law does not precise any form of this authorization. Therefore it does not matter if patient authorizes someone orally or in writing and person, who releasing this documentation has no doubts authorization.
- [98]. Patient, who wants to access to his medical records should submit to hospital director. This application should be considered within 30 days.
- [99]. There was absence of information and cases on point of access to medical records.

## 4.8. The right to property

- [100]. The right to property is provided by Article 140 of Civil Code. Basing on this Article owner can use the things in accordance with socio – economic purpose of rights. Ownership can be acquired by sale, lease, exchange or any other agreement obligating to transfer the ownership. Full capacity to enter into legal actions is required to enter into these transactions.
- [101]. According to Article 82 of the Polish Civil Code any declaration of will which is made without full consciousness is invalid. In particular it is connected with mental disease, mental deficiency or any other even temporary mental disorders. In spite of the literal wording of the Article 82 of the Civil Code, the legal doctrine and jurisprudence are sure that legal actions taken by mental disabled persons are unconditionally invalid. As a consequence this argument is used as an explanation of invalidity these legal actions. Article 80 of the Civil

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<sup>79</sup>Law of 6 November 2008 [*Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta*], Dz. U. 2009 No 52 Item 417

<sup>80</sup>Law of 30 August 1991 [*Ustawa o zakładach opieki zdrowotnej*] Dz. U.1991 No 91 Item 408

Code was another obstacle for mental disabled persons so far. According to this regulation every person who is unable to read because of i. e. his/her blindness is obliged to attest all legal actions by notary. Mental disabled persons face serious problems with official documents (often they are written in small type and are too complicated). In such cases the administration organs demanded notary act what implies extra costs. After protests of non – governmental organizations, the Polish Parliament passed an amendment to the Civil Code<sup>81</sup> (in force since 16 April 2010) which sets aside the applicability of Article 80 of the Civil Code. The amendment has still not be signed by President and is not in force now.

- [102]. Mental disabled persons, who have full legal capacity, can use their right to property in accordance with Article 140 of the Civil Code. The incapacitated persons are represented by their curator or guardian. The guardian's and the curator's main obligation, apart from above described assistance or acting on behalf of the incapacitated person is responsible for proper administration of the incapacitated person's property (see paragraph [178]).

## 4.9. The right to have children and maintain parental rights

- [103]. Furthermore, it is also frequently seen the practice of the notaries public basis on the regulation of Article 82 of the Civil Code and refuse confirming the declaration of intent from person with mental or intellectual disability. Additionally, under Article 82 of the Law on Notary Public [Ustawa o notariacie] notary may refuse attesting the declaration of intent if he begins to entertain doubts about incapacity of person who wants to carry out proceedings. This regulation is controversial because the notaries public often refuse attesting declaration of intent basing only on the presumption of person's mental disability.
- [104]. The essential aspect of right to personal life is family life and the possibility to make choices concerning its character. The Article 12 of the Family and Guardianship Code says that intellectual disabled person can't get married. However, if the mental or health status doesn't endanger the existence of marriage or issue's health, and if person is not totally incapacitated the marriage could be authorized by court. Furthermore, according to Article 11 of the Family and

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<sup>81</sup> Law of 8 January 2010 on amendments to the Law – Civil Code (Journal of Laws 2010 No 40, item 222)

Guardianship Code totally incapacitated person cannot enter into marriage. Unfortunately the Polish legislator uses just the term “mental deficiency” in case of “intellectual disability”. Mental deficiency persons and intellectual disabled persons have no right to get married without previous court’s consent. According to Article 561 Section 2 of the Civil Proceedings Code court can give consent upon the person’s application. Court is obliged (according to the Article 561 Section 3 of the Civil Proceedings Code) to acquaint with experts and psychiatrist’s opinion. Court can also issue an order to inquire at domicile provided by court guard.

- [105]. The right to procreate is another worth paying attention problem concerned to mental disabled persons’ status in Poland. Half of inhabitants of Poland is of the opinion that these persons should not have their own children. There were some case of sterilization these people in Poland. In August 2009 a slightly mental disabled woman was sterilized during childbirth . This case is under investigation now. There is no direct discrimination of mental disabled persons in law . However in practice these persons have often limited their parental authority. In this case children are placed in foster family or in children’s house. Unfortunately in most cases it happens without careful investigation of circumstances and parent’s predispositions. For instance Mr Zbigniew Lisiecki had his parental authority limited only because of fact he is schizophrenic. As a result Commissioner of Children's Rights the court acquainted with expert’s opinion. Experts declared that Mr Lisiecki has adequate predispositions to take care about his children. Court basing on this opinion changed its previous decision and child came back to its father .

## 4.10. The right to vote

- [106]. The Constitution of Poland provides in Article 62 Section 2 that “persons who, by a final judgement of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote”. According to the hierarchy of constitutional norms, any norm contained in the international treaty (like the UN Convention, Article 29, if ratified) conferring the right to vote in a broader scope than the Constitution will be of a secondary rank, over which Article 62 para. 2 prevails.
- [107]. In general, out of all persons with mental disorders in Poland only incapacitated persons are deprived of their voting rights. They do not have the right to vote in elections and in national or territorial referendum, and they cannot be chosen for the most important public offices and accept nominations as a judge, persecutor, advocate, civil

servant or notary. Such persons cannot sign the draft law presented as the citizens' legislative initiative. The consequence of the above situation is that the incapacitated persons are excluded from democratic participation and their interests are not represented by the political parties (not included in the programs) as their preferences / votes do not count in the elections.

[108]. Please note also information provided in the Second EU Disability High Level Group Report: *A number of statutory provisions enable persons with disabilities to exercise their right to participate in national referendum and the right to vote in the presidential and parliamentary elections as well as local elections. It means that:*

- *polling stations should be easily accessible for disabled persons; at least one polling station by municipality is to be made accessible (special technical adaptations are to be provided) and a disabled person may apply for inclusion to the register of voters for the chosen accessible polling station (in the municipality of his residence); the requirements for the polling stations adjusted to the needs of disabled voters have been set out in the Regulation of 31 July 2001 of the Minister of the Interior, issued by virtue of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland; the obligation to provide polling stations adjusted to the needs of disabled voters concerns also elections to the European Parliament, as well as the national referendum;*
- *voter may benefit from the assistance of other citizen in exercising the right to vote; according to the electoral law (Article 69 of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, which applies also to the national referendum; Article 54 of the Act 27 September 1990 on Election of the President of the Republic of Poland; Article 46 of the Act of 16 July 1998 concerning electoral law for elections to the bodies of self-government), a disabled voter, upon request, may be assisted in voting by another person, but who is not a member of an electoral commission or a poll observer authorized by the candidates in the election.*

*To improve enjoyment of the right to vote and enable seniors and persons with disabilities voting by an intermediary (a representative) in the elections to the European Parliament, relevant amendments to the Act concerning voting procedures in these elections were included into the Act adopted by the Polish Parliament on 12 February 2009 with the aim to introduce various changes also into two other Acts (i. e. into the Act concerning presidential election and the Act on national referendum). But this Act of 12 February 2009 did not come into force as some of its provisions were considered by the President*

*of the Republic of Poland not being in compliance with the Polish Constitution and submitted by him to the consideration of the Polish Constitutional Tribunal.*

Additional information on recent developments:

As concerns elections to the European Parliament, the institution of “an intermediary person” representing persons with severe or moderate degree of disability and persons aged 75 and over came into force on 16 December 2009, introduced by the *Act of 12 February 2009 on amendments to the Act on election of the President of the Republic of Poland, the Act on national referendum and the Act on elections to the European Parliament* (Journal of Laws No 202, item 1547), which was signed by the President on 20 November 2009, after the Polish Constitutional Tribunal enabled it passing the judgment of 28 October 2009 in reply to the President’s motion.

The similar solution has been introduced to the act (of 27 September 1990) concerning presidential elections, the act (of 16 July 1998) concerning electoral law for elections to the bodies of self-government and the act (of 20 June 2002) concerning elections of persons acting as bodies of local executive power, by virtue of the amending them Act of 19 November 2009 (Journal of Laws No 213, item 1651) which came into force since 24 December 2009.

At the same time the obligation concerning provision of adjustments to meet special needs of disabled voters in the polling stations used for presidential elections, as well as elections to the bodies of self-government came into force by virtue on *the Act of 19 November 2009 on amendment to the Act on election of the President of the Republic of Poland and to some other acts* (Journal of Laws No 213, item 1652).

## 5. Involuntary placement and Involuntary Treatment

- [109]. The following paragraphs present results of analysis of the legal framework concerning involuntary placement and involuntary treatment as well as involuntary psychiatric examination of persons with mental disorder or persons supposed of having mental disorder

and persons with intellectual disability in Poland. Analysed legal provisions covers also a problem of reaction for acts defined as crimes committed by persons with mental disorders and persons with intellectual disability.

- [110]. The analysed issues in Poland were not covered by the Report on *Compulsory Admission and Involuntary Treatment of Mental Ill Patients – Legislation and Practice in EU-Member States* (2002). The Republic of Poland was not a member of the UE at that time.
- [111]. Generally the United Nations Committee Against Torture (CAT) did not relate to the issue of involuntary placement and involuntary treatment in Poland. Nevertheless the Committee, considering the fourth periodic report of Poland (CAT/C/67/Add.5), noted with appreciation the setting up in 2006 of the institution of the Commissioner of Mental Hospitals' Patients<sup>82</sup>.
- [112]. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) related to the issue of involuntary placement and involuntary treatment in Poland only in the Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 19 May 2000, after visiting Starogard Gdański Neuro-Psychiatric Hospital.
- [113]. Generally the delegation of the Committee received no allegations and found no other evidence of ill-treatment of patients by staff at the hospital. On the contrary, it observed relationships of trust between patients and staff. Nevertheless the Committee recommended:
- efforts to be made to complete the refurbishment of the hospital. The aim should be to create in all wards a positive therapeutic environment, with accommodation structures based on small groups (paragraph 152);
  - strenuous efforts to be made to enhance the possibilities for work at the hospital and other psychiatric establishments; if necessary, the relevant legal provisions should be amended (paragraph 158);
  - the Polish authorities to take steps to reinforce the team of social workers employed at the hospital and to strive to increase the nursing staff/patient ratio (paragraph 162);

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<sup>82</sup>Committee against Torture, Thirty-eighth session, Geneva, 30 April - 18 May 2007, Consideration of Reports Submitted by States Parties under Art. 19 of the Convention, Conclusions and recommendations of the Committee against Torture, POLAND, CAT/C/POL/CO/4, 25 July 2007 (Paragraph 5 (e)); <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/432/66/PDF/G0743266.pdf?OpenElement> (November 2009).



- the instructions on the use of means of restraint to make clear that initial attempts to restrain aggressive behaviour should, as far as possible, be non-physical (e.g. verbal instruction) and that where physical restraint is necessary, it should in principle be limited to manual control (paragraph 166);
- health-care staff in psychiatric establishments to receive training in both non-physical and manual control techniques vis-à-vis agitated or violent patients (paragraph 166);
- an introductory brochure setting forth the hospital routine and patients' rights to be devised and issued to each patient on admission, as well as to their families. Any patients unable to understand this brochure should receive appropriate assistance (paragraph 172).

- [114]. Additionally, the Committee encouraged the policy of discharging chronic patients from psychiatric hospitals and reducing the size of such establishments, whilst expressing a hope that the provision of community care, half-way houses and nursing homes will accompany dehospitalization. The Committee requested also for a number of detailed information.
- [115]. During the fourth periodic visit to Poland, that took place from 26 November to 8 December 2009, the delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited among other establishments Bytom Social Care Home for Adults with mental chronic illnesses [and Poznań Remand Prison and Prison Hospital]<sup>83</sup>. However the Committee has not prepared and published the Report presenting observations, comments and recommendations after the fourth periodic visit yet.

## A. Legal Framework

- [116]. The legal frameworks of the involuntary placement, the involuntary treatment and the involuntary psychiatric examination are basically established in the Law on Protection of Mental Health<sup>84</sup>.
- [117]. Some additional regulations at the area of the involuntary treatment and involuntary psychiatric examinations are provided by the Law on Upbringing in Sobriety and Countering Alcoholism<sup>85</sup>, the act of

<sup>83</sup> <http://www.cpt.coe.int/documents/pol/2009-12-10-eng.htm> (December 2009).

<sup>84</sup> Law of 19 August 1994 [*Ustawa o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi*] Dz. U. 1994 No 111 Item 535

<sup>85</sup> Law of 26 October 1982 [*Ustawa o wychowaniu w trzeźwości*] Dz. U. 2002 No 147 Item 1231

29 July 2005 on counteracting drug addiction<sup>86</sup> (hereinafter referred to as the “Act on Counteracting Drug Addiction”), the act of 6 June 1997 – Criminal Code (hereinafter referred to as the “Criminal Code”), the act of 6 June 1997 – Criminal Proceeding Code (hereinafter referred to as the “Code of Criminal Procedure”) and the act of 6 June 1997 – Criminal Executive Code (hereinafter referred to as the “Criminal Executive Code”). Each of the acts is binding on the whole territory of Poland.

- [118]. Lately there has been passed amendments to the Criminal Code, regulating preventive measures toward perpetrators of crimes resulting from disorders of sexual preferences (this provisions in public debates was named as a chemical castration of paedophiles).
- [119]. The act amending the act – Criminal Code, the act – Code of Criminal Procedure, the act – Criminal Executive Code, act – Fiscal Criminal Code and some other acts was adopted by the Parliament on 5 November 2009 and signed by the President on 26 November 2009. Nevertheless the act has not entered into force yet. According to its provisions the act is entering into force 6 months after its publication in the Journal of Laws.
- [120]. When considering provisions of the Law on Protection of Mental Health the involuntary placement and the involuntary treatment generally are linked strictly together. The involuntary placement is aimed either to carry out the involuntary treatment or to carry out the involuntary medical examination, that can be followed by the involuntary treatment.
- [121]. In Poland there are no provisions prohibiting the involuntary placement without the involuntary treatment, as well as there are no provisions permitting for such situation. Nevertheless, as mentioned above, the aim of the involuntary placement is either the involuntary treatment or the involuntary examination.
- [122]. According to Article 2 Section 1 of the Law on Protection of Mental Health, aims of the protection of mental health are:
- promotion of the mental health and prevention of mental disorders,
  - to provide persons with mental disorders with varied and generally accessible medical care and other forms of care and assistance indispensable to live in family and social environment,

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<sup>86</sup>The Law Counteracting Drug Addiction [*Ustawa o przeciwdziałaniu narkomanii*] Dz. U. 2005 No 179 Item 1485 entered into force on 4 October 2005, and replaced the act of 24 April 1997 on counteracting drug addiction, that provided analogical provisions at the area of the involuntary treatment.

- shaping toward persons with mental disorders appropriate social attitude, especially understanding, tolerance, kindness, as well as prevention of their discrimination.
- [123]. When analysing the criteria to be fulfilled to order the involuntary placement (Article 23 Section 1 and Article 29 Section 1 of the Law on Protection of Mental Health) and the involuntary examination (Article 21 Section 1 of the Law on the Protection of Mental Health), aims of these institutions are:
- protection of a life of a person with mental disorder as well as a life and a health of other persons,
  - support and protection of persons in a situation of inability of satisfying their basic needs,
  - prevention from significant deterioration of condition of a mental health.
- [124]. Provisions of the Law on Protection Mental Health (art. 38 – art. 41) provides possibility of placing a chronic patients – in a situation when a lack of a care may be dangerous for a life of a mentally disordered person, even involuntary – in nursing homes.
- [125]. The Law on Protection of Mental Health does not provide any other provisions considering after-care following the involuntary placement or the involuntary treatment. These issues are a sphere of a medical art and – on the other hand – of a social service.
- [126]. The CPT found the system of dehospitalisation of chronic patients as inadequate. In consequence the CPT encouraged the policy of discharging chronic patients from psychiatric hospitals and reducing the size of such establishments, whilst hoping that the provision of community care, half-way houses and nursing homes will accompany dehospitalisation<sup>87</sup>.
- [127]. There is specific regulation related to the treatment of children. According to Article 22 Section 3 an admission to hospital a person under 16 needs a written consent of his legal representative. According to Article 22 Section 4 of the Law on Protection of Mental Health an admission to a hospital of person over 16 or incapacitated adult person needs agreement of these person. Nevertheless this provision does not apply in a situation when there are fulfilled criteria of involuntary placement. According to Article 30 Section 1 of the Act

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<sup>87</sup>*The Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 19 May 2000*, Strasbourg, 23 May 2002, CPT/Inf (2002) 9(paragraph 176); <http://www.cpt.coe.int/documents/pol/2002-09-inf-eng.pdf> (November 2009).

on Counteracting Drug Addiction upon a motion of close relatives of a minor with drug addiction the court may order he/she to involuntary treatment and rehabilitation.

[128]. When considering the specific legislation that addresses involuntary placement for certain groups of patient, there have to be mentioned the following persons:

- Persons suspected or accused of committing a crime may be placed under psychiatric observations on the basis of the criminal court order when experts-psychiatrists declare such need in a proper psychiatric examination of such persons. The observation may last maximum for a period of 4 weeks, that may be prolonged by a court maximum to 8 weeks (Article 203 of the Criminal Proceeding Code)<sup>88</sup>.
- Persons found by a criminal court as criminally irresponsible as a result of insanity may be placed in psychiatric confinement by a court order when an offender has engaged in a prohibited act involving significant social harm and it is highly probable that he/she will repeat such an act. The duration of the placement is not specified in advance, but the court should order the release when the placement becomes no longer necessary (Article 94 of the Criminal Code). Such measures are being called as a preventive measures.
- Persons addicted to an alcohol may be subjected of the court order imposing on them obligation of undergoing treatment for alcohol addiction. The proceedings is initiated upon a motion of the communal commission for resolution of alcoholic problems (*gminna komisja rozwiązywania problemów alkoholowych*) or of the public prosecutor, when such persons causes a decay of a family life, demoralization of minors, avoid working or systematically disturb the peace or the public order (art. 24 – art. 26 of the Act on Sobriety).
- Minors addicted to drugs – as indicated above (paragraph 40) – may be ordered by a court to involuntary treatment and rehabilitation.

## B. Criteria and Definitions

[129]. According to Article 21 Section 1 of the Law on Protection of Mental Health, the criteria to be fulfilled to order the involuntary psychiatric examination are that a behaviour of the person indicates that as a result of mental disorder:

- he/she may endanger directly to his/her life as well as life or health of other persons,

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<sup>88</sup>See also the judgment of the Constitutional Court of 10 July 2007, case no. SK 50/06.

- he/she is not able to satisfy his/her basic everyday life needs;

[130]. According to Article 23 Section 1 (procedure of hospitalization in urgent cases) and Article 29 Section 1 (hospitalization ordered by a court) of the Law on Protection of Mental Health, the criteria to be fulfilled to order the involuntary placement are:

- the hitherto behaviour of the person indicates that because of a mental disorder he/she endangers directly to his/her life as well as life or health of other persons;
- the hitherto behaviour of the person indicates that non-hospitalization will result in significant deterioration of condition of his/her mental health;
- the person is not able to not to self-sufficiently satisfy his/her basic everyday life needs and it is justifiable that treatment in the psychiatric hospital will result in improvement of a health condition.

[131]. Only one of the above mentioned criteria has to be fulfilled to order the involuntary placement or the involuntary psychiatric examination. The criteria are alternative and independent.

[132]. According to Article 12 of the Law on Protection of Mental Health, when deciding on the choice of a type and a method of a medical treatment there should be taken under consideration not only medical reasons but also other personal interests of a person with mental disorder and they should aim to reach an improvement of a health condition in the least intrusive for such person way.

[133]. An issue of taking into account the opinion of the patient, especially as a criteria for involuntary treatment is quite complicated on the ground of the Law on the Protection of Mental Health. Generally we can say that different provisions of the act expresses such idea.

[134]. According to general rule, expressed in Article 22 of the Law on Protection of Mental Health, hospitalization requires written consent of a patient or/and his/her legal representative. According to Article 23 Section 3 of the Law on Protection of Mental Health, in a situation of involuntary placement a doctors obligation is to explain a patient reason of hospitalization without his/her consent and to inform about his/her rights.

[135]. In the proceedings before the court, concerning hospitalization and dehospitalization of a person with mental disorders, such person is being a participant of the proceedings. As a result such person has an opportunity to present his/her opinion and standpoint. Moreover, the court may order bringing such person to the court room or even hold the hearing in a hospital. Additionally, in a situation of involuntary placement without a prior court's order, a judge visiting a hospital is

obliged to hear the hospitalised person within a 48 hours of getting information about the placement.

- [136]. When considering the involuntary treatment, according to Article 33 Section 2 of the Law on Protection of Mental Health, a doctor informs a patient about planned medical treatments. On the same time, the Ordinance of the Ministry of Health and Social Welfare of 4 August 1995<sup>89</sup> indicates treatments causing higher risk to the patient that require consent of the patient or his/her statutory representative (e.g. an electro-convulsive therapy).
- [137]. Above provisions of the Law on Protection of Mental Health in a very general way refer to endangerment without exemplifying or specifying it. The provisions does not provide any definition of the risk level of danger. The only statutory requirement is directness of the danger.

### C. Assessment, Decision Procedures and Duration

- [138]. In conditions described in Article 21 Section 1 of the Law on Protection of Mental Health (see paragraph [123]) the decision on the involuntary psychiatric placement is being taken by a psychiatrist. In a situation of inability to get an assistance of psychiatrist, the decision may be taken by other doctor.
- [139]. In conditions described in Article 23 Section 1 of the Law on Protection of Mental Health (see paragraph [123]) the decision on the involuntary placement in a situation of danger of life of subjected person or other persons or of health of other persons is being taken by a doctor assigned to this activity after personal examination and – when possible – after consultation with an another psychiatrist or with a psychologist. A hospitalisation in this procedure requires approval of a head of a hospital department within 48 hours of placement. The director of a hospital notifies a placement to the guardianship court within 72 hours of hospitalisation. The court instigates a proceedings concerning placement in a psychiatric hospital. The hearing should take place not later than a 14 days of the notification.
- [140]. In conditions described in Article 29 Section 1 of the Law on Protection of Mental Health (see paragraph [123]) the decision on the involuntary placement is being taken by the guardianship court. The motion, lodged by a close relatives, has to be accompanied with a certificate of a psychiatrist working in an institution of an mental health care system.

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<sup>89</sup> see subscript No. 89

- [141]. Additionally, according to Article 46 Section 2 of the Law on Protection of Mental Health, the guardianship court is obliged to obtain an opinion of a one or more psychiatrists before issuing an order as to the merits. The opinion cannot be prepared by psychiatrists involved in taking decision on hospitalisation or on refusal of dehospitalisation in the examined case.
- [142]. As indicated above (paragraph no.141), depending on the situation, there are required at least one expert opinion during the assessment of the psychiatric condition.
- [143]. According to Article 35 Section 1 of Law on Protection of Mental Health, on the termination of the involuntary placement generally decides the head of the hospital department, if in his/her opinion there ceased reasons of involuntary placement. Additionally, according to art. 36, the patient may fill a motion to the guardianship court for dehospitalization. The patient, his/her statutory representative and close relatives may demand dehospitalization after 30 days of the court order on involuntary placement became final and valid. In a case of refusal of a dehospitalization, above mentioned persons may fill a motion to the guardian court for ordering dehospitalization within a period of 7 days of issuing an information about negative decision of a hospital.
- [144]. According to Article 28 of the Law on Protection of Mental Health, when a voluntary placement becomes an involuntary placement, there applies provisions describing the initial involuntary placement procedure.
- [145]. In the Law on Protection of Mental Health there are not indicated any maximum periods of time between the psychiatric assessment and the beginning of the compulsory placement.
- [146]. There are no specific provisions in the Law on Protection of Mental Health related to duration applied in emergency situation (e.g. nights, weekends or urgent cases). In such situations apply general provisions of the act.
- [147]. In the Law on Protection of Mental Health there is nothing like an initial placement. Features of such institution may be noticed in an involuntary placement of a persons whose behaviour indicates that because of the mental disorder he/she endanger directly his/her life or life and health of other persons, but there are doubts whether such person is mentally disordered. Such involuntary placement, aimed to dispel such doubts, may last maximum 10 days (Article 24 of the Law on Protection of Mental Health).

- [148]. According to Article 33 of the Law on Protection of Mental Health, toward the person involuntary placed may be taken indispensable health care interventions, aimed to eliminate reasons of involuntary placement. The provision does not indicate specific mental health care interventions. The act also does not explicitly prohibit specific interventions. As indicated above (paragraph 1136) the Ordinance of the Ministry of Health and Social Welfare of 4 August 1995 r. indicates treatments causing higher risk to the patient that require consent of the patient or his/her statutory representative. These interventions are e.g. an electro-convulsive therapy (ECT).<sup>90</sup>
- [149]. Issues concerning coercive measures are regulated by Article 18 of the Law on Protection of Mental Health. Following coercive measures are provided:
- a physical restraint (holding),
  - a forced administration of a medicine,
  - an immobilization,
  - a seclusion.
- [150]. The criteria to be fulfilled in order to use coercive measures are:
- a person is acting violently causing hazard to own or other person life or health or to universal safety,
  - a person is devastating in a violent way objects in the surrounding area,
  - a person seriously disturbs or render impossible working of an psychiatric healthcare centre or a social service centre.
- [151]. In practice the above conditions allowing to use coercive measures are in certain instances doubtful. For example the use of word “seriously” may lead towards abuses. Second, possibility to use coercive measure with respect to person “devastating objects” is also too general. The Law on Protection of Mental Health does not precise what kind of objects should be devastated, their value or their owner. It means that devastation of any “object” within the scope of reach of mentally ill person, irrespectively of its value or owner, may justify using coercive measures.<sup>91</sup>

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<sup>90</sup>Detailed reference to the Ordinance – to be inserted.

<sup>91</sup>Por. K. Zgryzek: „Conditions for use of direct coercion against people with mental disability under the Mental Health Protection Act”[„Przesłanki stosowania przymusu bezpośredniego wobec osób z zaburzeniami psychicznymi w trybie ustawy o ochronie zdrowia psychicznego”], [in] *Problemy nauk penalnych*, red. L. Tyszkiewicz, Katowice 1996, s. 395.



- [152]. The decision to use coercive measure is made by a doctor, who determines the type of measure to be applied and supervises its implementation. In emergency situations, when a doctor is not available, the decision may be taken by a nurse who must notify the doctor immediately.
- [153]. When analysing reviews concerning the lawfulness of involuntary placement and treatment most relevant seems to be Article 43 section 1 of Law on Protection of Mental Health. According to this provision, at any time a guardianship judge is entitled to enter a psychiatric hospital or a nursing home for persons with mental disorder and persons with intellectual disability to verify lawfulness of placement and respect for right of patients, as well as conditions of accommodation. Nevertheless there is no procedure of periodic review of lawfulness of involuntary placement and treatment.
- [154]. When confronting the Polish regulations with standards set in art. 25 of the Council of Europe's Committee of Ministers Recommendation Rec (2004)10 it has to be noted that person subject to involuntary placement can effectively exercise the right to appeal against a decision and the right to be heard in person (see paragraph [87]), as well as through a personal advocate or representative. The person concerned as well as his/her advocate or representative theoretically have the right to get access to all the materials. According to a problem of providing the person with a lawyer for all proceedings before the court see paragraph 89.
- [155]. The Law on Protection of Mental Health does not provide to the person concerned in each case a free legal support. Nevertheless, basing on Article 48 of the Law on Protection of Mental Health if the court considers participation of an advocate as required it is allowed to grant free legal aid.

## 6. Competence, Capacity and Guardianship

### 6.1. Full and partial incapacity

- [156]. The following paragraphs present results of analysis of the legal framework concerning legal capacity defined as the right to recognition everywhere as person before the law as well as enjoying by disabled person legal capacity on an equal basis with others in all aspects of life (art. 12 of the UN Convention on the Rights of Persons with Disabilities). The Polish civil law distinguish in these area the legal capacity and the capacity to undertake legal actions.
- [157]. The *Comparative Study on the Legal Systems of the Protection of Adults Lacking Legal Capacity* (2008)<sup>92</sup> does not relate to the Polish legislation, in contrast to the *Second Disability High Level Group Report* (2009)<sup>93</sup>. This report shortly but quite precisely describes the legal regulations related to an issue of the legal capacity of disabled persons in Poland. Nevertheless the document does not present a critical analysis of the issue, especially problems that appear in practice.
- [158]. Pursuant to provisions of the Civil Code<sup>94</sup> and the Family and Guardianship Code<sup>95</sup>, Polish law provides for instruments for the management of affairs of persons that because of their mental disorder or intellectual disability, affecting on their ability to take care of them by themselves, have been declared as partially or fully incapacitated by a court's judgement.
- [159]. Provisions of the Civil Code distinguish the legal capacity and the capacity to undertake legal actions. The legal capacity of a human being is acquired at birth and terminates at death. According to established doctrinal interpretation and jurisprudence of courts the legal capacity is the capacity or ability to be an subject of rights and obligations at the area of civil law *sensu largo*. Each human being has

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<sup>92</sup><http://www.europarl.europa.eu/activities/committees/studies/download.do?file=23687> (November 2009).

<sup>93</sup> <http://ec.europa.eu/social/BlobServlet?docId=2790&langId=en> (November 2009).

<sup>94</sup> Act of 23 April 1964 – Civil Code

<sup>95</sup> Act of 25 February 1964 – Family and Guardianship Code

the same sphere of the legal capacity, irrespectively for the age, the mental condition or disabilities.

- [160]. On the other hand the capacity to undertake legal actions is the capacity to acquire civil law rights and obligations by personal actions. Its scope depends on the person's age and competency. The person may be incapable to undertake legal actions (persons under 13 and fully incapacitated), may have a limited capacity to undertake legal actions (persons between the ages of 13 and 18 and those partially incapacitated) or a full capacity to undertake legal actions (persons that attained the age of 18 and are not declared incapacitated).
- [161]. Such regulation indicates, that persons with mental disorders or intellectual disability exercise the full capacity to undertake legal actions as long as they are not declared by the court's final and valid decision as incapacitated.

## 6.2. Constitutional Court judgement

- [162]. Nevertheless such system has been critically assessed by the Constitutional Court in its judgement of 7 March 2007, case no. K 28/05<sup>96</sup>. The Court noticed existence of a tendency of departing from the strict limitation of rights of persons with mental disorders or intellectual disability (a system of the legal incapacitation) in favour of more flexible solutions, matching a particular situation, which the court adjudicating in a particular case deems more appropriate (a system of flexible forms of guardianship). The Court recommended changes tending to a model of institutional solutions of assistance and flexible care, instead of the incapacitation, resulting in deprivation or limitation of capacity to undertake legal actions. Such model may replace the model of incapacitation as well as exist parallel to legal incapacitation.
- [163]. According to Article 13 Section 1 of the Civil Code, persons aged 13 and over may be declared fully incapacitated if they are not able to control their conduct due to mental illness, mental retardation or any other mental disorder, especially alcoholism or drug addiction. According to Article 16 Section 1 of the Civil Code partial incapacitation may be declared for the same reasons that justify full incapacitation but which do not justify the declaration of complete incapacitation and the person concerned needs only assistance to manage his/her affairs.

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<sup>96</sup> [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_28\\_05\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_28_05_GB.pdf), pp. 28-29 (November 2009).

- [164]. Despite the existence of two levels of incapacitation, in overwhelming majority of cases courts declare complete incapacitation<sup>97</sup>.
- [165]. As mentioned above the legal framework in Poland recognizes partial incapacitation and full incapacitation, that affect the capacity to undertake legal actions.
- [166]. According to Article 13 Section 2 of the Civil Code a person completely incapacitated is provided with a guardianship (guardian), if the person is not still under a parental authority. Whereas, for the person partially incapacitated, according to Article 16 Section 2 of the Civil Code, a curator is established.
- [167]. The main role of the guardian is to manage affairs of fully incapacitated persons that are unable to control their conduct. The completely incapacitated person does not have a right to undertake legal actions. Guardian, appointed by the court, acts on behalf of such person. Only exception are everyday contract in minor issues of daily life, if they are not harmful for the incapacitated person. Such persons are not allowed neither to enter into marriage nor to make a will.
- [168]. The main role of the curator is to support or assist the partially incapacitated persons in their affairs. Generally the partially incapacitated persons may undertake legal actions but they need to be approved by their curator. There are few exceptions, such as everyday contracts in minor issues of daily life, ability to autonomously make decisions concerning the job, making dispositions concerning earnings obtained from the work. Partially incapacitated persons are allowed to enter into marriage but cannot make a will.
- [169]. The incapacitation is an institution of the civil law. Nevertheless it is crucial to a scope of rights also in different areas of law. E.g. by virtue of Article 62 Section 2 of the Constitution incapacitated person have no electoral rights, do not have the right to participate in a referendum, the right of access to public service, the right to set up association or political party.
- [170]. Each person declared partially or completely incapacitated is being placed under the protective system established by the Polish law. After the decision on incapacitation become final and valid, the Regional Court is obliged to inform *ex officio* the District Court – the Guardianship Court about its decision. The District Court establishes then *ex officio* a guardian or a curator to such person.

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<sup>97</sup> Rights of People with Intellectual Disabilities. Access to Education and Employment. Poland. Monitoring Report 2005, Open Society Institute, p. 32; [http://www.eumap.org/topics/inteldis/reports/national/poland/id\\_pol.pdf](http://www.eumap.org/topics/inteldis/reports/national/poland/id_pol.pdf) (November 2009).

- [171]. There are no time limits in Poland of measures placing adults lacking capacity under a protective system. The guardianship as well as the curatorship lasts as long as the person is completely or partially incapacitated.
- [172]. It has to be mentioned, that, pursuant to Article 559 of the Civil Proceedings Code<sup>98</sup> at any time the incapacitation may be revoked by the court, if there are no further reasons of its declaration.
- [173]. The Constitutional Court in the judgement of 7 March 2007 stated that Article 559 of the Civil Proceedings Code, insofar as it does not grant the incapacitated person the right to put forward a motion on initiate proceedings to revoke the declaration of, or change the scope of incapacitation, does not confirm to art. 30 (the right to dignity) and art. 31 (the right to freedom) of the Constitution of the Republic of Poland.
- [174]. According to art. 545 Section 1 of the Civil Proceedings Code the Regional Court may initiate the proceedings concerning declaration of incapacity upon request of a spouse of the person concerned, ascendant, descendants, siblings and statutory representative. When the Regional Court declare incapability, according to art. 558 Section 1 of the Civil Proceedings Code, is obliged to inform about its decision the District Court in order to establish for an incapacity person a guardianship or a curatorship.
- [175]. Jurisdiction of the national authorities:
- to declare the legal incapacity of an adult – the Regional Court competent with respect to the place of residence of the person concerned;
  - to take measures directed to the protection of the person (i.e. appointing a guardian or a curator) – the District Court competent with respect to the place of residence of the incapacitated person (the Guardianship Court);
  - to take measures directed to the property of the person – there is no national body in Poland that takes care of the property of the incapacitated person. This is the role of a guardian or a curator – a natural person appointed by the court. The Family and Guardianship Code recommends that it should be a member of the family of the incapacitated person (e.g. spouse, parents, other close relatives).
  - to ensure and monitor the implementation and follow-up of the above-mentioned measures – the District Court competent with

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<sup>98</sup>Act of 17 November 1964 – Civil Proceedings Code

respect to the place of residence of the incapacitated person (the Guardianship Court), usually the same court that appointed a guardian or a curator.

- [176]. The decision of the Regional Court declaring an incapacitation may be a subject of an appeal to the Court of Appeal. An appeal can be lodged by participants of the proceedings, i.e. a person conducted, his/her spouse, his/her statutory representative and a public prosecutor. To the appeal procedures applies general rules of a civil proceedings.
- [177]. The Family and Guardianship Code recommends to appoint as a guardian or a curator member of the closest family of the incapacitated person<sup>99</sup>.
- [178]. If there is no such person, the Guardianship Court asks the representatives of social service or non-governmental organizations protecting rights of minors to indicate a proper candidate (art. 149(3) and art. 175 of the Family and Guardianship Code).
- [179]. The guardian's and the curator's main obligation, apart from above described assistance or acting on behalf of the incapacitated person (paragraph [102]), is responsible for proper administration of the incapacitated person's property. The guardian and the curator are under the supervision of the Guardianship Court. The guardian is obliged to report to the Guardianship Court at least once a year and produce proof of any financial transactions on behalf of the incapacitated person. A curator can represent the incapacitated person or administer his/her property to the extent specified by the court. E.g., if the guardian or curator wishes to sell property (or anything more than just administer the assets) of the incapacitated person, they must get the agreement of the Guardianship Court.
- [180]. The District Court's decision on the appointment of the guardian or the curator may be subjected to a complaint to the Circuit Court. There has to be noted a lack of regulation providing a right of a complaint to the completely incapacitated person.
- [181]. There is no procedure of periodic reviews of the decisions of incapacity. On the same time, the court at any time acting *ex officio* may revoked the incapacitation.
- [182]. There are no legal instruments of periodical reviews of a guardian. Guardianship/curatorship is linked strictly together with the incapacity.

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<sup>99</sup> Article 176, Article 175, Article 149 Section 2 and Article 178 Section 2 of the Family and Guardianship Code.

[183]. It should be noted that the current regulation on incapacity is not precise. It does not reflect upon important differences in functioning and daily life of different groups of persons who may need legal support, e.g. mentally ill persons and mentally disabled persons. Second, terms used by the law “ability to manage own behaviour” (“*możność kierowania własnym postępowaniem*”) and “aid to manage own affairs” (“*pomoc w prowadzeniu swoich spraw*”) are quite controversial taking into account multitude of fact scenarios. Third, consequences of incapacity are so broad that they lead towards social and legal exclusion of the mentally disabled persons from the social life.

### 6.3. Statistical information

[184]. The Helsinki Foundation for Human Rights, upon the Law on Access to Information request obtained a statistical data concerning the number of incapacitated persons. It is interesting to note that the number of such persons steadily grows and includes now over 60,000 persons. The table below presents a set of data on this:

| Year | Number of incapacitated persons under guardianship | Number of incapacitated persons under curatorship |
|------|--|---|
| 1985 | 20,010   | 3,849   |
| 1990 | 22,787   | 5,288   |
| 1995 | 23,115   | 6,231   |
| 2000 | 30,167   | 7,634   |
| 2005 | 44,958   | 9,529   |
| 2008 | 50,487   | 10,392  |

[185]. In years 2006-2008 there were approx. 12,000 – 13,000 motions directed to courts to grant the incapacitation status. Approximately in half of these motions the status was granted (approx. 6,000 new statuses per year). In most of the cases courts declare full incapacitation. The partial incapacitation is declared in 12-15% cases.

- [186]. According to experts, it is a significant growth of incapacitated persons. Dr Teodor Bulenda claims that it is a result of awareness that incapacitation may be used to cure people from drug or alcohol addiction or to compel mentally ill persons to cure themselves. On the other hand, there is a growing trend of abusing the incapacitation status – in order to take control over the property, usually the flat. It happens that incapacitated person lives in the social foster home, while the guardian (member of the family) lives in his/ her former flat.<sup>100</sup>
- [187]. In consequence of actions by the Polish Association for Persons with Mental Disorder and the Commissioner of Civic Rights, the Ministry of Justice made in 2003 lustration (special review procedure) of cases in which incapacitation was made<sup>101</sup>. Lustration was made on the basis of 385 randomly chosen cases. Results showed that courts in Poland significantly more often provide for full incapacity than partial. Furthermore, very rarely courts are requesting witness testimonies and other sources of evidence helpful to establish the actual condition of the person subject to proceedings. One of the cases was especially harsh. The guardianship was awarded to a relative who was in a conflict with incapacitated person. The information on this conflict was noted in the case file.

## 7. Miscellaneous

### 7.1. Ombudsman for Mental Hospitals Patients

- [188]. Institution of the Commissioner of Mental Hospitals' Patients (Rzecznik Praw Pacjenta Szpitala Psychiatrycznego) was introduced by the act of 1 July 2005 amending the act on the protection of mental health. The act entered into force on 13 August 2005.
- [189]. The basic aim of the Commissioner of Mental Hospitals' Patients is protection of rights of mental hospitals patients. Patients of mental hospitals as well as their legal representatives and guardians have the

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<sup>100</sup>Sylwia Czubkowska, „60 tys. Polaków nie decyduje o sobie” [60 thousand of Poles do not decide about themselves], *Dziennik Gazeta Prawna* of 18 November 2009, available at [http://www.dziennik.pl/wydarzenia/article484249/60\\_tys\\_Polakow\\_nie\\_decyduje\\_o\\_sobie.html](http://www.dziennik.pl/wydarzenia/article484249/60_tys_Polakow_nie_decyduje_o_sobie.html).

<sup>101</sup>I. Kleniewska; „Postępowanie w sprawach o ubezwłasnowolnienie w praktyce sądowej” [Proceeding in cases of incapacitation in judicial practice], in *Prawo w działaniu* 2006, nr 1, Warszawa, s. 119 – 134.



right to contact with the Commissioner of Mental Hospitals' Patients in comfortable and discreet conditions and the right to ask and obtain help and assistance in the protection of his/her rights from the Commissioner of Mental Hospitals' Patients. These group of person has also the right to lodge oral and written complaints and to get information about the decision in his/her case.

[190]. Duties of the Commissioner of Mental Hospitals' Patients present as follows:

- assistance in claiming for rights in cases related to hospitalization, medical treatment, live conditions and dehospitalisation,
- examination and verification of complaints lodged by patients,
- cooperation with family, legal representative and guardian of patients
- initiating and conducting educational and informational activities at the area of rights of the mental hospitals patients.

[191]. The Commissioner of Mental Hospitals' Patients is entitled to entry a hospital; to make motions addressed to doctors, heads of hospital departments or directors of the hospitals to undertake actions aimed to eliminate causes of the patient's complaint or found violations; as well as to get access to medical files of patients upon their consent or consent of their legal representative or guardian.

[192]. Each hospital has his Commissioner, that is employed not by a hospital, but by the Office of Commissioner of Mental Hospitals' Patients. Now moment there are 20 persons holding the position of the Commissioner of Mental Hospitals' Patients in 16 regions of Poland<sup>1</sup>. Directors of hospitals are obliged to provide the Ombudsman proper room in hospital for meetings with patients and to inform patients about ways of contact with the Commissioner of Mental Hospitals' Patients.

[193]. As mentioned above (paragraph [111]), creation of such institution was noted with appreciation in the Conclusions and recommendations of the Committee against Torture after consideration of the fourth periodic report of Poland (CAT/C/67/Add.5)<sup>2</sup>.

## 7.2. Cooperation between the Polish Association for Persons with Mental Handicap and the Law Advice Centre “Law Clinic” at Faculty of Law and Administration of Warsaw University.

- [194]. In the area of the protection of rights of persons with intellectual disabilities there are also active non-governmental organizations. One of them, established in 1991, is the Polish Association for Persons Mentally Handicapped (*Polskie Stowarzyszenie na Rzecz Osób z Upośledzeniem Umysłowym*). Grounds of the Association date back to 1963. The Association is organisation of parents and guardians of persons with mental disorders as well as their families and persons engaged in assistance and resolving their problems. The Association is a member of the Inclusion International and the Inclusion Europe.
- [195]. The Association runs own establishments helping persons with intellectual disabilities in different age and with different levels of disability. They educate, treat, rehabilitate, assist and advise to such persons.
- [196]. Within the framework of cooperation with the Law Advice Centre “Law Clinic” at Faculty of Law and Administration of Warsaw University, the Association for a few years was organizing workshops for persons with intellectual disabilities. There was presented to persons with intellectual disabilities for example advantages and disadvantages of the institution of incapacitation. The students and lawyers of the Law Advice Centre prepared also some guidebooks on legal issues.
- [197]. Additionally students of the Law Advice Centre “Law Clinic” carried out in 2001 analysis of 393 court cases concerning incapacitation all over the Poland. The analysis has shown that on average only half of the legally incapacitated persons take active part in proceedings, while a similar percentage have an attorney and decisions concerning legal incapacitation are rarely changed or appealed against.

# Annexes-Case Law

In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

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| <b>Case title</b>   | <b>Musial v Poland</b>   |
| <b>Decision date</b>  | 25.03.1999   |
| <b>Reference details</b><br>(reference number; type and title of court/body; in original language and English [official translation, if available]) | <b>24557/94</b><br><b>European Court of Human Rights</b><br><u>available at:</u><br><a href="http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=musia%u0142&amp;sessionid=40213896&amp;skin=hudoc-en">http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=musia%u0142&amp;sessionid=40213896&amp;skin=hudoc-en</a>  |
| <b>Key facts of the case</b><br>(max. 500 chars)  | In the course of criminal proceedings on suspicion of manslaughter the medical panel of psychiatrists held the applicant was not criminally responsible. The court decided to place him in a psychiatric institution because he posed a threat to the public order. His lawyer unsuccessfully attempted to appeal the decision concerning his detention, which was based on the medical opinion of psychiatrists of the detention centre. Later the applicant requested to be examined by psychiatrists from the Psychiatric Department of Cracow University, who he believed were unbiased. The expert opinion was prepared 10 months after his examination and recommended a continued detention. The applicant attempted to commit suicide. The Regional Court in Katowice released him after more than 10 years spent in the psychiatric hospital. |
| <b>Main reasoning/argumentation</b><br>(max. 500 chars)   | “[A] person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is entitled under Article 5 § 4 of the Convention to take proceedings at reasonable intervals before a court to put in issue the “lawfulness” – within the meaning of the Convention – of his or her detention, inasmuch as the reasons initially warranting confinement may cease to exist” (para. 43). Article 5 para. 4 confer both the right to judicial review and the right to have the request for release decided in a speedy process.   |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)  | The court proceedings concerning lawfulness of psychiatric detention took one year, eight months and eight days and could not be regarded speedy unless there were exceptional grounds to justify it. The judicial decision should not be based on medical expert opinion produced 10 months after the clinical examination, but should take into account information about the current state of applicant’s health. “[A] delay between clinical examination and preparation of a medical report is in itself capable of running counter to the principle underlying Article 5 of the Convention, namely the protection of individuals against arbitrariness as regards any measure depriving them of their liberty” (para. 50).   |

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| <b>Results (sanctions) and key consequences or implications of the case</b><br>(max. 500 chars)  | The proceedings seeking judicial review of his psychiatric detention (from 16.03.1993 to 9.01.1995) were unreasonably long under Article 5 para. 4. The Court did not find any exceptional circumstances justifying such a delay. It was a violation of Article 5 para. 4. The applicant received 15.000 PLN for non-pecuniary damage.   |
| <b>Proposal of key words for data base</b>   | Psychiatric detention, criminal responsibility, release, judicial review, excessive length   |
| <b>Case title</b>  | <b>Kaprykowski v. Poland</b>   |
| <b>Decision date</b>   | 3.02.2009  |
| <b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b> | <b>23052/05</b><br><b>European Court of Human Rights</b><br><a href="http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=kaprykowski&amp;sessionId=40214308&amp;skin=hudoc-en">http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=kaprykowski&amp;sessionId=40214308&amp;skin=hudoc-en</a>  |
| <b>Key facts of the case (max. 500 chars)</b>  | The applicant is a recidivist offender serving various sentences. He suffered from epilepsy marked by frequent (daily) seizures, personality disorders and encephalopathy accompanied by dementia. He has been classified by the social security authorities as a person with a “first-degree disability making him completely unfit to work”. In July 2001 a medical doctor stated he should be offered a specialized diagnosis outside the penitentiary system (where he received some psychiatric treatment). In 2004 while he remained in prison he was seriously handicapped and required permanent help of another person. His complaints about the quality of the medical treatment in prison were considered ill-founded.                                    |
| <b>Main reasoning/argumentation (max. 500 chars)</b>   | The lack of adequate medical treatment and assistance to a detained person who suffers from various mental disorders can constitute a breach of the prohibition of inhuman and degrading treatment as provided in Article 3 of the Convention. The state has to ensure that “prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance” (para. 60). |

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| <b>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</b>   | In the case there were many medical opinions confirming that the applicant should receive specialised psychiatric and neurological treatment and should be under constant medical supervision. The above requirements were not satisfied if the applicant was just examined by the in-house doctor, not specialized in neurology and had to rely on the help of the inmates. Even a short stay in the general prison hospital does not fulfil the standard of specialized treatment and supervision. The applicant had to rely on the general penitentiary medical care for more than four years and was detained in the specialised neurological hospital of Gdansk Remand Centre on only two occasions. Frequent travels and transfers between the detention centres contributed to worsening of his health condition. For a period of time his previous treatment was changed by ordinary doctors who were not neurologists and he stopped taking generic drugs. This therapy was immediately resumed in the neurological hospital. Being unable to undertake more demanding daily routines put him in the position of inferiority towards other prisoners. |
| <b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>   | “[T]he lack of adequate medical treatment in Poznań Remand Centre and the placing of the applicant in a position of dependency and inferiority <i>vis-à-vis</i> his healthy cell mates undermined his dignity and entailed particularly acute hardship that caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty” [70]. There was violation of Article 3 of the Convention. The applicant received 3000 EUR for non-pecuniary damage.  |
| <b>Proposal of key words for data base</b>   | Adequate medical treatment, assistance, disability, specialized neurological hospital, penitentiary medical care system  |
| <b>Case title</b>  | <b>Kudła v. Poland</b>   |
| <b>Decision date</b>   | 26.10.2000   |
| <b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b> | <b>30210/96</b><br><b>European Court of Human Rights</b><br><a href="http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=kud%u0142a&amp;sessionid=40215145&amp;skin=hudoc-en">http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=kud%u0142a&amp;sessionid=40215145&amp;skin=hudoc-en</a>  |
| <b>Key facts of the case (max. 500 chars)</b>  | The applicant was been held at Cracow Remand Centre, where there had been no psychiatric ward. He argued that no serious effort was made to treat his chronic depression. The applicant attempted to commit suicide on several occasions. His detention lasted three years. During this time, he was placed in a psychiatric ward only once. From 11 June to 29 October 1996 the applicant was kept in custody despite a psychiatric opinion that continuing detention could jeopardise his life because of a likelihood of attempted suicide  |

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| <b>Main reasoning/argumentation (max. 500 chars)</b>   | “[T]he very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention may have exacerbated to a certain extent his feelings of distress, anguish and fear”. In the Court’s eyes the medical treatment provided to the applicant was not inappropriate. During his detention he was frequently examined by various doctors, including psychiatrists. The Court noticed the fact that for more than 4 months the applicant was kept in custody despite a psychiatric opinion recommending his release. However two months later the domestic court obtained a psychiatric opinion stating that his mental condition is compatible with further detention. |
| <b>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</b>   | The execution of detention on remand in itself raises an issue under Article 3 of the Convention; however it does not mean that the state has the duty to release a detainee on health grounds or to place him in a civil hospital in order to provide him a particular kind of medical treatment.  |
| <b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>   | On the basis of the presented evidence, the Court did not find that the applicant was subjected to ill-treatment that attained a sufficient level of severity to come within the scope of Article 3 of the Convention. However, there were no sound reasons to justify such length of his detention. Additionally, his right to a “hearing within a reasonable time” was violated and there was no effective domestic remedy to complain about the excessive length of the criminal proceedings against him   |
| <b>Proposal of key words for data base</b>   | Ill-treatment, level of severity, detention on remand, chronic depression   |
| <b>Case title</b>  | <b>Ślawomir Musiał v. Poland</b>  |
| <b>Decision date</b>   | 20.01.2009  |
| <b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b> | <b>28300/06</b><br><b>European Court of Human Rights</b><br><a href="http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&amp;portal=hbkm&amp;action=html&amp;highlight=musia%u0142&amp;sessionid=40231152&amp;skin=hudoc-en">http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&amp;portal=hbkm&amp;action=html&amp;highlight=musia%u0142&amp;sessionid=40231152&amp;skin=hudoc-en</a>   |
| <b>Key facts of the case (max. 500 chars)</b>  | The applicant was detained on remand and notwithstanding his epilepsy, schizophrenia and other mental disorders he did not receive adequate medical care. He also complained of overcrowding and poor conditions in the detention facilities.   |

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| <b>Main reasoning/argumentation (max. 500 chars)</b>   | The applicant was in need of permanent medical assistance and psychiatric supervision as it was recommended by all doctors who examined him during his detention. However, such supervision was not provided and his access to a psychiatrist has been restricted to emergencies. After his suicidal attempt he was examined by a psychiatrist only as out-patient due to lack of free places in two psychiatric institutions.   |
| <b>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</b>   | “The case raises the issue of the compatibility of the applicant's state of health with his detention in a facility designed for healthy detainees where he is not treated or monitored on a daily basis by specialist medical personnel” (para. 88). Moreover, detention of a person with mental disorder together with other inmates in establishments not suitable for incarceration of the mentally-ill raises a serious issue under the Convention. The assessment whether it is incompatible with the Convention depends on the nature of the psychological condition and the level of severity of his ill-treatment.                        |
| <b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>   | The cumulative effects of the inadequate medical care and inappropriate conditions in which the applicant had been held throughout his pre-trial detention created such conditions, which had clearly had a detrimental effect on his health and well-being. With regard to the nature, duration and severity of the ill-treatment to which the applicant had been subjected were sufficient to be qualified as inhuman and degrading, in violation of Article 3. The applicant was awarded 10.000 EUR in respect to non-pecuniary damage.   |
| <b>Proposal of key words for data base</b>   | Ill-treatment, overcrowded cells, pre-trial detention, adequate psychiatric treatment  |
| <b>Case title</b>  | <b>Nowicka v. Poland</b>   |
| <b>Decision date</b>   | 3.12.2002  |
| <b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b> | 30218/96<br><b>European Court of Human Rights</b><br><a href="http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=Poland%20%7C%20psychiatric&amp;sessionid=40076441&amp;skin=hudoc-en">http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&amp;portal=hbkm&amp;action=html&amp;highlight=Poland%20%7C%20psychiatric&amp;sessionid=40076441&amp;skin=hudoc-en</a>   |
| <b>Key facts of the case (max. 500 chars)</b>  | During the trial against the applicant who was charged with criminal libel as a consequence of a private indictment, the court requested information about her background and mental health. As she failed to attend two psychiatric examinations ordered by the court, the court decided that she should be arrested and detained on remand in order to secure her compliance. She was arrested on 25 October 1994, examined on 2 and 3 November and released. Later, the court decided another psychiatric examination had to be carried out in a medical establishment, which she refused to attend as well. She was consecutively arrested and |

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|  | her family visits restricted to one per month. In arrest she underwent several examination, which showed her level of intelligence is above normal, no signs of mental disorders or retardation and held she was criminally responsible committing the libel.  |
| <b>Main reasoning/argumentation (max. 500 chars)</b>   | Keeping the applicant eight days in detention for the purpose of the first examination and twenty-seven days for the purpose of the second examination could not be justified by any technical reasons. In the opinion of the Court both periods of pre-examination detention were contrary to the requirement of Article 5 para. 1 of the Convention  |
| <b>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</b>   | Deprivation of liberty to be lawful must be in accordance to law and serve the purpose of securing fulfilment of an obligation – in this case undergoing of a psychiatric examination. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist. In the above case 61. Finally, a balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty. The duration of detention is also a relevant factor in drawing such a balance |
| <b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b>   | Applicant's detention, which lasted all together 83 days and was imposed in the context of a private prosecution arising out of a neighbours' dispute was unlawful. There was a violation of Article 5 para. 1 and 8 of the Convention (restriction of visiting rights) and the applicant received 10.000 EUR.   |
| <b>Proposal of key words for data base</b>   | Pre-trial detention, non-attendance of psychiatric examination, criminal libel   |
| <b>Case title</b>  | <b>Fijalkowska v. Poland</b>   |
| <b>Decision date</b>   | 4.08.2005  |
| <b>Reference details (reference number; type and title of court/body; in original language and English [official translation, if available])</b> | Communication No 1061/2002<br>Human Rights Committee<br><a href="http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.1061.2002.En?OpenDocument">http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.1061.2002.En?OpenDocument</a>  |



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| <b>Key facts of the case (max. 500 chars)</b>  | The author suffered from schizophrenia and by the court order she was committed to the psychiatric therapeutic centre against her will according to the procedure provided by law <sup>102</sup> . The court acted upon request of her sister and after she was medically examined. However, the author was not provided with assistance of a professional lawyer and the copy of the court order was delivered to her only after the deadline of appeal has expired. The court dismissed her motion for establishment of a new time limit for the appeal.          |
| <b>Main reasoning/argumentation (max. 500 chars)</b>   | The author claimed Poland violated Article 7 of the Covenant (inhuman and degrading treatment) with regard to confining her against her will notwithstanding the fact she had not been incapacitated. The other charge concerned violation of Article 9 of the Covenant (arbitrary detention) due to lack of possibility to validly appeal against the order.   |
| <b>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</b>         | The author's diminished capacity was likely to effect her participation in the court proceedings. "The Committee acknowledges that circumstances may arise in which an individual's mental health is so impaired that so as to avoid harm to the individual or others, the issuance of a committal order, without assistance or representation sufficient to safeguard her rights, may be unavoidable". However it was not the case her and the author should have been granted legal aid.  |
| <b>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</b> | "[T]he author's right to challenge her detention was rendered ineffective by the State party's failure to serve the committal order on her prior to the deadline to lodge an appeal. Therefore, in the circumstances of the case, the Committee, finds a violation of article 9, paragraph 4, of the Covenant" (para. 8.4). The state was obliged to provide the author with an adequate remedy, including compensation, to make such legislative changes as are necessary to avoid similar violations in the future and to avoid similar violations in the future. |
| <b>Proposal of key words for data base</b>   | Law on Protection of Mental Health, involuntary psychiatric treatment, legal aid  |

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The Law on Protection of Mental Health of 1994, and in particular with Article 29, which stipulates that:

"1. A person mentally ill may also be confined to psychiatric hospital, without the consent required in Article 22:

- 1) whose hitherto behavior has indicated that a failure to confine him/her to hospital will cause substantial deterioration of his/her state of mental health,
- 2) who is unable to provide by himself/herself his/her basic needs, and it is justified to anticipate that treatment in psychiatric hospital will bring about improvement of his/her state of health.

2. A custody court competent as to the place of residence of that person is to decide on a need of confinement to a psychiatric hospital of a person as described in paragraph 1, without his/her consent - upon a request of his/her spouse, relatives in direct line, siblings, his/her statutory representative or person exercising effective custody of him/her."

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