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# **REPORT BY NILS MUIŽNIEKS**

COMMISSIONER FOR HUMAN RIGHTS  
OF THE COUNCIL OF EUROPE

**FOLLOWING HIS VISIT TO POLAND  
FROM 9 TO 12 FEBRUARY 2016**

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## SUMMARY

Commissioner Nils Muižnieks and his team visited Poland from 9 to 12 February 2016. In the course of the visit the Commissioner held discussions with state authorities and non-governmental organisations. The present report focuses on the following human rights issues:

### **Legal and institutional framework for the protection and promotion of human rights**

While Poland possesses a solid legal and institutional framework for protecting and promoting human rights, recent far-reaching legal changes have raised important concerns both in the field of human rights and as regards the country's full adherence to the rule of law and democratic principles, on which the protection of human rights ultimately depends. A worrying common feature of the new changes is their hasty adoption and the lack of an inclusive debate that is required in a democratic society. The Commissioner is concerned in particular at the current paralysis of the Constitutional Tribunal which prevents it from playing its crucial role in upholding the human rights of all Polish citizens. He calls on the Polish authorities to urgently find a way out of the current deadlock, following the related Opinion of the Venice Commission. As stated by the latter institution, the rule of law requires that any such solution be based on the respect and full implementation of the judgments of the Tribunal.

Given the key role the Polish Ombudsman plays in the protection and promotion of human rights, the Commissioner calls on the Polish authorities to guarantee its full independence by ensuring that it can rely on stable and sufficient funding to carry out its mandates effectively, and by safeguarding the fairness, transparency and impartiality of the procedure for lifting the Ombudsman's immunity in the context of criminal proceedings.

Another recent change that has raised concern relates to a new law on surveillance activities, which was adopted following a July 2014 judgment of the Constitutional Tribunal requesting that several shortcomings in the previous legislation be addressed. In the Commissioner's view, the law raises serious concerns of incompatibility with international human rights law as it expands the powers of law enforcement agencies, police forces and security services without establishing the corresponding safeguards to avoid abuse. The Polish authorities should review the legislation applicable to surveillance activities to ensure that it complies with the recent case law of the European Court of Human Rights (hereinafter: the Court) and establish a democratic, independent and efficient system of control of surveillance activities.

The Commissioner is pleased to note that the Polish authorities have ratified a significant number of human rights treaties and recommends the ratification of some additional ones including the revised European Social Charter and its Additional Protocol providing for a collective complaints mechanism, and Protocol No. 12 to the European Convention on Human Rights (ECHR) providing for a general prohibition of discrimination.

### **Administration of justice**

The Commissioner welcomes the efforts made by the Polish authorities in addressing the problem of the excessive length of judicial proceedings. Noting that the problems which generate excessively long proceedings and the dysfunction of the domestic remedy currently in place have already been clearly identified, the Commissioner urges the authorities to accelerate the adoption and implementation of measures capable of solving these problems, and to fully and effectively execute the recent pilot judgment of the Court on this matter.

The Commissioner also notes the positive developments regarding pre-trial detention, including a steady decrease in its use and duration in recent years, and encourages the Polish authorities to promote the use of alternatives to pre-trial detention. Noting recent legal amendments which allow for the use of pre-trial detention solely on the ground of the severity of the penalty faced, the Commissioner recalls the applicable case-law of the Court and calls on the Polish authorities to align their legislation with it.

The Commissioner expresses concern at a number of recent amendments to the Code of Criminal Procedure, which may jeopardise the protection of the right to a fair trial in criminal proceedings as protected by Article 6 of the ECHR. In particular, the use of illegally obtained evidence should be regulated in full compliance with the

case-law of the Court. Furthermore, the many fundamental changes in criminal proceedings introduced in recent years, going in some cases in opposite directions, could potentially affect the quality of administration of justice. Prosecutors and judges must therefore be trained and given all necessary resources to implement the Code of Criminal Procedure in full respect of human rights, in particular the right to a fair trial.

Recent amendments to the Law on Prosecution that came into effect in March 2016 have reversed previous reforms in a way that raises important human rights concerns. As a result, the Minister of Justice and the Prosecutor General will be one and the same person again. This change, coupled with the attribution of new, extensive powers to the Prosecutor General/Minister of Justice without the establishment of corresponding sufficient safeguards to avoid abuse of powers, poses a considerable threat to human rights in the context of criminal law procedures, including the right to a fair trial, the presumption of innocence and the right to defence. The Commissioner recommends that the Polish authorities review the new legislation on prosecution services in light of European standards and best practice in order to secure the autonomy and independence of the prosecution services from political and other interference.

### **Media Freedom**

In recent months, the situation of media freedom in Poland has been the subject of considerable national and international attention and concern, notably following the introduction of sweeping changes to the governance system of public television and radio broadcasters through the so-called “Small Media Law”. While political influence on public service media is an issue that pre-exists the current reforms, the Commissioner emphasises that putting public television and radio under the direct control of the government is clearly not a solution and runs contrary to Council of Europe standards on media freedom. Of particular concern are the immediate termination of office mandates of management and supervisory board members and the elimination of pluralistic criteria of the composition of the boards.

A more comprehensive regulation of public service media (the “Big Media Law”) was under preparation during the visit and is to be adopted in the summer of 2016. The Commissioner notes that the draft legislation has been presented to Parliament without the inclusive debate that is required in a democratic society when considering changes in such vital areas. He recommends that, in consultation with all relevant national and international partners, the Polish authorities introduce safeguards to guarantee the independence of public service media from political influence and that this be reflected in the composition and selection mechanism of any public service media governance institution that is to be created. It is also crucial to ensure that the new arrangements fully preserve the role the Constitution gives to the National Broadcasting Council in the field of safeguarding freedom of expression, the right to information and the public interest in radio broadcasting and television.

Noting that defamation is still criminalised in Poland, the Commissioner encourages the Polish authorities to consider repealing all criminal provisions against defamation and to deal with it through strictly proportionate civil sanctions only. In view of recent threats to the protection of journalistic sources, the Commissioner recalls the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom.

### **Women’s rights and gender equality**

Noting the reported prevalence of gender stereotypes which are detrimental to women in Poland, the Commissioner urges the Polish authorities to take long-term measures to fight against gender-based stereotypes in all sectors and in particular education and the media, in consultation with women’s rights and gender equality experts. He strongly recommends that the Polish authorities reinforce the national machinery for the advancement of women’s rights and gender equality by providing all the necessary financial and human resources to institutions dealing with discrimination on the grounds of sex and gender and ensuring that the Government Plenipotentiary for Equal Treatment and Civil Society puts stronger emphasis on gender equality issues.

The Commissioner welcomes the ratification by Poland of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and the many legislative and other measures taken by the authorities to combat domestic violence. He recommends that the authorities proceed with the full implementation of the Convention and of their National Programme for the Prevention of Domestic Violence.

Women victims of domestic violence and gender-based violence are still confronted with gender bias on the part of medical staff, police, prosecutors and judges. While the number of restraining orders issued by courts against perpetrators is on the rise, there is a need to allow for the issuing of these orders even before a criminal procedure begins and in emergency situations. The procedure of “Blue Cards” aiming at preventing further domestic violence from occurring and implementing individual assistance plans by local interdisciplinary teams remains too cumbersome and needs to be reviewed. Concerning shelters for victims of domestic violence, while the public-run centres are sometimes not sufficiently specialised, the NGO-run shelters are not sufficiently and adequately funded by the authorities.

As concerns violence against women outside the sphere of domestic violence, the Commissioner recommends that the Polish authorities better take the gender aspect of the problem into account and develop gender-based campaigns to counter violence against women.

The Commissioner notes with concern the continuing gender gap in employment and the prevalence of other forms of discrimination affecting women in Poland. A lack of training and awareness may explain the absence of related case-law. Special efforts are needed to address the lack of understanding of the need for temporary special measures aimed at preventing or compensating for deep-rooted gender inequalities where women have been disadvantaged for decades.

Stressing that women’s sexual and reproductive health and rights are human rights, the Commissioner addresses a number of concerns in this field. He recalls that women, including adolescent girls, are entitled to receive sexual and reproductive health information that is evidenced-based, non-discriminatory, and respectful of their dignity and autonomy. The Commissioner urges the Polish authorities to ensure that mandatory, comprehensive sexuality education that is age-appropriate, evidence-based, and non-judgmental be taught in all schools in Poland. Noting that access to contraception is hindered by several factors, the Commissioner recommends that the Polish authorities take all necessary measures to remove barriers in access to contraception for all women throughout Poland.

As concerns access to safe and legal abortion, the Commissioner notes the many obstacles hampering women’s access to abortion in practice, including as a result of the clause of objection invoked by doctors or medical institutions and the difficulty in appealing against a refusal to perform prenatal testing and/or a legal abortion. The Polish authorities should take the necessary measures to remove all barriers and ensure that access to safe and legal abortion as provided by law is fully implemented in practice, notably by fully and effectively executing the three judgments of the Court on access to abortion in Poland. Noting the chilling effect of the criminalisation of abortion on doctors willing to perform the procedure, the Commissioner encourages the Polish authorities to further decriminalise abortion within reasonable gestational limits. In view of proposals to introduce a total ban on abortion, the Commissioner stresses that such a ban would constitute serious backsliding on women’s rights. He therefore strongly urges the Polish authorities to keep lawful, at a minimum, abortions performed to preserve the physical and mental health of women, or in cases of fatal foetal abnormality, rape or incest.

## INTRODUCTION

1. The Commissioner for Human Rights of the Council of Europe, Mr Nils Muižnieks (the Commissioner), conducted a visit to Poland from 9 to 12 February 2016.<sup>1</sup> The visit focused on four sets of issues: the legal and institutional framework for the protection and promotion of human rights; the administration of justice; media freedom; and women's rights and gender equality.
2. During his visit, the Commissioner held discussions with the Polish authorities, including the Deputy Prime Minister and Minister of Culture and National Heritage, Mr Piotr Gliński; the Minister of Justice, Mr Zbigniew Ziobro; the Minister of Foreign Affairs, Mr Witold Waszczykowski; and the Minister in the Prime Minister's Chancellery, Mr Maciej Wąsik. He also met the Deputy Ministers in the Ministries of: Foreign Affairs, Mr Aleksander Stępkowski; Justice, Mr Łukasz Piebiak; Family, Labour and Social Policy, Ms Renata Szczęch; Interior and Administration, Mr Tomasz Zdzikot; Culture and National Heritage, Mr Krzysztof Czabański; the Treasury, Mr Filip Grzegorzczak; and the Deputy Minister and Government Plenipotentiary for Civil Society and Equal Treatment, Mr Wojciech Kaczmarczyk. The Commissioner had further meetings with the Marshal of the Sejm (the lower house of Parliament), Mr Marek Kuchciński; the Marshal of the Senate, Mr Stanisław Karczewski; and the Chairperson of the Polish Delegation to the Parliamentary Assembly of the Council of Europe, Mr Włodzimierz Bernacki. He also met with the First President of the Supreme Court, Ms Małgorzata Gersdorf; the President of the Constitutional Tribunal, Mr Andrzej Rzepliński; and the President of the National Council of the Judiciary, Mr Dariusz Zawistowski; as well as the Polish Commissioner for Human Rights, Mr Adam Bodnar, and the Commissioner for the Rights of the Child, Mr Marek Michalak.
3. The Commissioner also met with police officers from the Warsaw Police Headquarters and from the General Police Headquarters. He held meetings with representatives of international and non-governmental organisations and visited a shelter and a counselling centre for women victims of domestic violence, run by an NGO in Warsaw.
4. The Commissioner wishes to thank sincerely the Polish authorities in Strasbourg and in Warsaw for their assistance in organising his visit and facilitating its independent and smooth execution. He also extends his thanks to all his interlocutors for their willingness to share with him their knowledge and views.
5. The aim of the Commissioner's visit was to examine the situation in the four human rights areas mentioned above and in that context, to follow up on some of the issues raised in the 2007 Memorandum addressed to the Polish Government by his predecessor.<sup>2</sup> However, the Commissioner's visit also coincided with the rapid unfolding in Poland of several events that have attracted international attention and raised important concerns both in the field of human rights and as regards the country's full adherence to the rule of law and democratic principles, on which the protection of human rights ultimately depends. The background for these events is a context of deep political polarisation which, while not a new phenomenon in Poland, appears to have heightened since the October 2015 parliamentary elections. Since then, far-reaching legal changes affecting the protection of human rights in Poland have been introduced, including as regards the composition and functioning of the Constitutional Tribunal, the organisation and powers of the prosecution authorities, the role of Public Service Media and the carrying out of surveillance activities, which the Commissioner decided to cover in this report.
6. A common feature of the new changes is their hurried adoption and the lack of an inclusive debate that is required in a democratic society. Very important laws publicly announced by the government have been tabled in Parliament in haste and through private member's bills to the detriment of the democratic debate that would otherwise be the rule. While insufficient public consultation is not a new phenomenon in Poland, this tendency has significantly worsened in recent months. As already stated at the end of his visit, the Commissioner hopes that in the future the Polish authorities will

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<sup>1</sup> The Commissioner was accompanied by Mr Giancarlo Cardinale, Deputy to the Director of his Office, and by Ms Claudia Lam and Ms Alessandra Ricci Ascoli, Advisers.

<sup>2</sup> Memorandum to the Polish Government, Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)13, 20 June 2007.

secure the public debate that is required in a democratic society when drafting legislation impacting on human rights and take the time needed to consult civil society, the Council of Europe, and all national and international partners.<sup>3</sup>

7. Another trend that has evoked concern is the rhetoric used by members of government and other politicians against judges and the practice of announcing possible prosecution or other forms of investigation or even sanctions in reaction to decisions rendered by judges or judicial authorities at the highest level. Such forms of pressure threaten the independence of justice and undermine public trust in the justice system. In the Commissioner's view, the government and politicians should refrain from taking any action that would constitute a threat to the independence of justice and the further erosion of the system of checks and balance.
8. In addition, many stakeholders voiced concerns about controversial appointments and recruitment procedures introduced in recent months concerning senior or strategic positions not just in the Public Service Media as addressed in this report, but also in the administration and other public sectors. In particular, as a result of amendments to the law on civil service adopted in December 2015, the competition procedure for appointing senior officials was eliminated and replaced by one that was criticised for guaranteeing neither a transparent and fair recruitment nor the expertise, political neutrality and independence of the civil servants appointed. Apart from strengthening public perceptions of cronyism, these changes could be problematic both as concerns the right to equal access to public services and the right to good administration.
9. While all these concerns relate to human rights, they have also raised questions about respect for the rule of law and democratic principles. The Commissioner notes that following the orientation debate of 13 January 2016, the European Commission decided to initiate the structured dialogue under the Rule of Law Framework<sup>4</sup> by sending a letter to the Polish Government with a view to clarifying the situation in Poland, in particular on the situation concerning the Constitutional Tribunal and on the changes in the legislation on Public Service Media. This mechanism, triggered for the first time since its creation in March 2014, allows the European Commission to initiate a dialogue with a European Union member state to prevent the escalation of systemic threats to the rule of law.
10. In recent months and since the visit of the Commissioner in February 2016, there have been other developments of relevance to human rights, including the announcement by the Minister of Justice of a reform of the judiciary and in particular the National Council of the Judiciary that has already raised concerns among human rights stakeholders. At the time of finalising this report, the government was also preparing a draft law on anti-terrorism measures which would *inter alia* further affect surveillance powers.<sup>5</sup> The Commissioner is not in a position to comment on these two developments in this report but he hopes that any human rights concern raised about these reforms will fully be taken into account notably through wide and in-depth consultation processes.
11. These developments have provided the background to the four issues covered in this report: legal and institutional framework for the protection and promotion of human rights (section 1); administration of justice (section 2); media freedom (section 3); and women's rights and gender equality (section 4). Each section of the report contains the Commissioner's conclusions and recommendations addressed to the Polish authorities. The Commissioner wishes to continue his constructive dialogue with the authorities on these issues. He trusts that this dialogue will be facilitated by the present report.

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<sup>3</sup> [Press release](#) of the Commissioner for Human Rights at the end of his visit to Poland, 12 February 2016.

<sup>4</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)

<sup>5</sup> See Amnesty International, [Poland: Rushed anti-terrorism bill a blight on human rights](#), 11 May 2016.



# 1 LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

## 1.1 HUMAN RIGHTS TREATIES

12. Since the 2007 Memorandum to the Polish Government by the Commissioner's predecessor, Poland has ratified a number of international instruments of relevance to human rights, including: the Council of Europe Convention on Action against Trafficking in Human Beings, which entered into force in respect of Poland on 1 March 2009; the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which entered into force on 25 October 2012; the Council of Europe Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, which entered into force on 1 June 2015; the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which entered into force on 1 June 2015; and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, which entered into force on 1 August 2015.
13. However, the Commissioner notes that a number of human rights conventions have not yet been signed or ratified. These include the Optional Protocol to the UNCRPD, which allows for individual communications to be submitted to the UNCRPD Committee, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
14. As for Protocol No. 12 to the ECHR, which provides for a general prohibition of discrimination, the Polish authorities have indicated that the Ministry of Foreign Affairs is analysing the compatibility of Polish law with the Protocol and will soon take a decision on whether Poland may ratify this instrument.<sup>6</sup>
15. Poland is a party to the 1961 European Social Charter; it signed the revised European Social Charter in 2005 but has not yet ratified it. The Polish authorities have explained that the analysis of the compliance of Polish law with the provisions of the European Social Charter is updated on an on-going basis. An assessment of the costs of implementation of the changes that would ensure the compatibility of Polish legislation with certain provisions of the 1961 Charter has been postponed until the fourth quarter of 2016. The Commissioner hopes that the assessment will be finalised soon. As for the Additional Protocol to the Charter providing for a collective complaints mechanism, the Commissioner notes with regret that at present Poland does not plan to be bound by it.<sup>7</sup>
16. Regarding the ECHR, the Commissioner notes that in February 2014, the Justice and Human Rights Committee and the Foreign Affairs Committee of the Sejm jointly established a permanent Sub-Committee on the execution of judgments of the Court. During his visit, the Commissioner was informed that the Sub-Committee was not functioning anymore and raised the issue with the Marshal of the Sejm, who indicated that there were plans to re-establish it.
17. As concerns the status of international human rights treaties in domestic law, Article 91 of the Constitution provides that after promulgation, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. This article also states that an international agreement ratified upon prior consent granted by statute shall have precedence over conflicting statutes. Therefore, it is generally admitted that once ratified, an international treaty becomes a source of domestic law and may be relied on in court and administrative proceedings. It should also be noted that under Article 8 of the Constitution, constitutional provisions (including those protecting human rights) can be applied directly by Polish courts unless the Constitution provides otherwise.

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<sup>6</sup> See Polish Ministry of Foreign Affairs, Report on the implementation by Poland of the recommendations of the Council of Europe Commissioner for Human Rights of 29 May 2007, 5 February 2016.

<sup>7</sup> Ibid.

### 1.1.1 CONCLUSIONS AND RECOMMENDATIONS

18. The Commissioner is pleased to note that the Polish authorities have ratified a significant number of human rights treaties. He urges them to ratify the revised European Social Charter and its Additional Protocol providing for a collective complaints mechanism. The Commissioner strongly urges the Polish authorities to ratify Protocol No. 12 to the European Convention on Human Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Optional Protocol to the UNCRPD.
19. The Commissioner welcomes the plans to re-establish the sub-committee on the execution of judgments of the Court, which strengthens the involvement of the parliament in the execution of these judgments and fosters dialogue between the authorities and civil society. He strongly encourages the Sejm to establish this subcommittee without delay.

## 1.2 HUMAN RIGHTS INSTITUTIONS

20. Established in 1987 and enshrined in the 1997 Constitution, the institution of the Polish Commissioner for Human Rights (hereinafter: the Ombudsman) safeguards the freedoms and human and citizen's rights as set forth in the Constitution and other normative acts, including the principle of equal treatment. Article 210 of the Constitution guarantees the independence of the Ombudsman. The Ombudsman has a broad mandate that includes the handling of individual complaints alleging human rights violations and bringing laws that may be conflicting with human rights before the Constitutional Tribunal. In November 2012, the Ombudsman was re-accredited with an "A" status by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which means that this institution is considered to be fully compliant with the Paris Principles by the Coordinating Committee.<sup>8</sup>
21. The institution of the Commissioner for the Rights of the Child (hereinafter: the Ombudsman for Children) was set up in 2000. Its task is to safeguard the rights of the child defined in the Constitution, the UN Convention on the Rights of the Child and other normative acts, while respecting parents' responsibilities, rights and duties. Since its creation, this institution has been strengthened notably through the attribution of additional powers.

### 1.2.1 BUDGET OF THE HUMAN RIGHTS INSTITUTIONS

22. The Commissioner notes that for several years the Ombudsman has asked for an increase in the budget of the office, notably to meet the needs resulting from an increase in its responsibilities. These include the new roles of: the National Prevention Mechanism under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (NPM) since 2007; the independent mechanism handling complaints about misconduct by police or border guard officers since 2008; the body implementing the EU equal treatment legislation since the adoption of the relevant antidiscrimination legislation in 2010<sup>9</sup>; and the national institution tasked with monitoring the implementation of the UNCRPD since 2012. The Commissioner notes that, for instance, the Ombudsman's role as NPM entails the obligation to monitor on a regular basis over 1,800 places of deprivation of liberty, while the current capacities only permit the monitoring of 120 places a year.
23. Several international and European human rights bodies, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>10</sup>, the Committee on the Elimination of Discrimination against Women<sup>11</sup> and the Committee on the Elimination of Racial

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<sup>8</sup> See the [Document](#) on accreditation status and the [Report](#) and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 19-23 November 2012, p. 22.

<sup>9</sup> Law of 3 December 2010 on the implementation of some regulations of European Union regarding equal treatment.

<sup>10</sup> See CPT, [Report](#) to the Polish Government on the visit to Poland, visit from 5 to 17 June 2013, paragraph 12.

<sup>11</sup> See Committee on the Elimination of Discrimination against Women, Concluding [observations](#) on Poland (2014), CEDAW/C/POL/CO/7-8, paragraphs 14-15.

Discrimination,<sup>12</sup> have raised in recent years the issue of insufficient financial resources given to the Ombudsman to perform all its tasks.

24. In 2015, the whole budget of the Office was of PLN 38,602,000 (approximately EUR 9,000,000). The Ombudsman asked for an increase of 18% (PLN 45,566,000) in the 2016 budget in order to be able to fulfill all its functions but also to renovate the seat of the office and bring it in line with labour law and disability requirements, and to increase the wages of the staff (amounting to 292 staff members as of 31 March 2016) which have been frozen since 2008. However, the Parliament decided not only to refuse the increase (as had already been the case in previous years) but also to reduce the budget, to PLN 35,619,000 for 2016 (approx. EUR 8,100,000).
25. As concerns the way the budget of the Ombudsman is voted, the Commissioner notes that the previous Ombudsman brought a petition to the Constitutional Tribunal in July 2015 against what she considered as an undue interference of the executive power in the Ombudsman's budgetary matters. The problem relates to a practice implemented since 2011 of including the Ombudsman among the entities covered by supplementary budgetary acts – and not by the main state budget act. According to the Ombudsman, using this procedure gives the government the possibility to propose to the Parliament a budget for the Ombudsman that is different from the one requested by the Ombudsman and this, without consulting the latter. The Ombudsman considers that the procedure to be used instead should be the one for the main budgetary acts whereby the request of the Ombudsman is transmitted to the Parliament for decision without the government being able to modify the proposed budget. According to the Ombudsman, this practice results in the breach of the budgetary autonomy of the Ombudsman and therefore also a breach of the constitutional principle of the independence of the Ombudsman, as it allows for an interference by the executive power.<sup>13</sup> It should also be noted that the budgets of the Constitutional Tribunal and the courts in general are also concerned by this practice.
26. Regarding the budget of the Ombudsman for Children, the Commissioner is pleased to note that a 14% increase in the budget was planned to be allocated in 2016, even if that increase does not fully meet the 21% increase requested by the Ombudsman for Children in order to increase the wages of the staff which have been frozen since 2008, and to hire 10 more staff members.

### 1.2.2 FUNCTIONAL IMMUNITY OF THE HUMAN RIGHTS INSTITUTIONS

27. In addition to sustainable financial resources, the independence of a human rights institution requires effective provisions guaranteeing immunity of the institution from a misuse of the criminal legal system against it. Under Article 211 of the Polish Constitution, the Ombudsman enjoys immunity in that he/she shall not be held criminally responsible, nor deprived of liberty without prior consent granted by the Sejm and shall be neither detained nor arrested except for cases when he/she has been apprehended in the commission of an offence and in which such detention is necessary for securing the criminal proceedings.
28. A draft Law was introduced by a group of MPs on 3 December 2015 establishing a procedure for lifting the immunity of the Ombudsman in the context of criminal proceedings. The Commissioner understands that since there is no legal act regulating the procedure for lifting the immunity of the Ombudsman, this draft aims at filling a legal gap. However, the draft law raises a number of concerns and the Commissioner notes that, following a request by the Ombudsman himself the Office for Democratic Institutions and Human Rights of the OSCE (hereinafter: OSCE/ODIHR) issued an opinion on the draft in February 2016.<sup>14</sup>
29. The Commissioner notes that according to the OSCE/ODIHR's Opinion, "the existing Polish legal framework fails to provide sufficient safeguards to protect the [Ombudsman] and his or her staff from

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<sup>12</sup> See Committee on the Elimination of Racial Discrimination, Concluding [observations](#) on Poland (2014), CERD/C/POL/CO/20-21, paragraph 9.

<sup>13</sup> Request of the Polish Commissioner for Human Rights to the Constitutional Tribunal of 22 July 2015.

<sup>14</sup> OSCE Office for Democratic Institutions and Human Rights, Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland, Warsaw, 16 February 2016, Opinion-Nr. NHRI-POL/282/2016 [AIC], available in English and Polish at: <http://www.legislationline.org/countries/country/10>, see paragraph 37.

civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities (“functional immunity”). Moreover, the Draft Law does not indicate with sufficient clarity the modalities and criteria to be taken into account by the Sejm (or its competent authority) to ensure the fairness, transparency and impartiality of the procedure for lifting the [Ombudsman’s] immunity in the context of criminal proceedings”.<sup>15</sup> In particular, it is important that a higher majority in the Sejm than the absolute majority currently foreseen in the draft Law regarding the decision to lift the immunity be provided. This would de-politicise the procedure and guarantee that an Ombudsman could never be removed from office simply because his or her legal acts, undertaken in good faith, are disapproved of or questioned by the governmental majority in Parliament.<sup>16</sup> There should be clear provisions ensuring the principle of presumption of innocence and therefore preventing the Sejm from having access to the criminal case file and analysing the merits of the criminal case when deciding to lift the immunity or not.

30. The Commissioner notes that the draft Law envisages similar amendments as concerns the procedures for lifting the immunity of the Ombudsman for Children, the Inspector General for Personal Data Protection and several other institutions, with a view to ensuring harmonisation of the procedures. Given the important role the Ombudsman for Children and the Inspector General for Personal Data Protection play in the human rights infrastructure, the Commissioner considers that they should also benefit from a transparent procedure that includes all necessary safeguards to guarantee their independence.

### 1.2.3 CONCLUSIONS AND RECOMMENDATIONS

31. Given the crucial role the Ombudsman plays in providing accessible protection to victims of human rights violations and expert advice to the government on human rights-compliant legislation and practices, the Commissioner strongly urges the Polish authorities to ensure that this institution enjoys full independence in practice. To this end, he strongly recommends that the Polish authorities ensure that it can rely on stable and sufficient funding to carry out its mandates fully. Consideration should also be given to strengthening the financial independence of this institution from the executive by avoiding any form of interference from the latter in the adoption of the budget. While welcoming the intention to specify the procedure for lifting the Ombudsman’s immunity, the Commissioner urges the Polish authorities to ensure the fairness, transparency and impartiality of the procedure for lifting the Ombudsman’s immunity in the context of criminal proceedings. In this respect, he draws attention to the OSCE/ODIHR’s final Opinion on the Draft Act amending the Act on the Commissioner for Human Rights of Poland.
32. The Commissioner also recommends increasing the budget and the financial independence of the Ombudsman for Children.

## 1.3 THE CONSTITUTIONAL TRIBUNAL

33. In accordance with the Constitution, the Constitutional Tribunal (hereinafter: the Tribunal) rules on: the conformity with the Constitution of a final decision by a court or a public administration which might infringe the constitutional freedom or rights of a person; the conformity of statutes (legislative acts) and international agreements with the Constitution; the conformity of a statute with ratified international agreements whose ratification required prior consent granted by statute; the conformity of legal provisions issued by central state organs with the Constitution, ratified international agreements and statutes; and the conformity of the purposes or activities of political parties with the Constitution.<sup>17</sup>
34. The Constitutional Tribunal plays a crucial role in the institutional framework for the protection and promotion of human rights, as widely illustrated by the case-law it has developed since its creation. Therefore, the Commissioner is deeply concerned at the crisis regarding the Tribunal which unfolded

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<sup>15</sup> Ibid., paragraph 9.

<sup>16</sup> Ibid., paragraph 59.

<sup>17</sup> Articles 79 and 188 of the Constitution.

shortly before his visit to Poland and which has resulted in the current paralysis of this fundamental institution. Regrettably, this crisis remained unsolved at the time of preparing this report.

35. The Tribunal consists of fifteen judges appointed by the Sejm (by an absolute majority of votes in the presence of at least half of the deputies) for a 9-year non-renewable term. On 25 June 2015, the Sejm in its 7<sup>th</sup> term adopted the Law on the Constitutional Tribunal, which entered into force on 30 August 2015. Pursuant to Article 137 of this Law, on 8 October 2015, the Sejm elected five judges to replace those whose mandate would end that year, including two judges whose mandate would expire only after the end the Sejm's own term. The President of Poland has refused to swear into office these five judges. On 25 October 2015 the parliamentary elections took place. The Law and Justice Party (PiS) obtained the absolute majority both in the Sejm and in the Senate. On 19 November 2015, despite a call from the Commissioner not to do so<sup>18</sup>, new amendments to the Law on the Constitutional Tribunal were rushed through Parliament in its new term introducing, among others: a period of 30 days for the President of Poland to take the oath of a constitutional judge; a three-year mandate for the President and the Vice-President of the Constitutional Tribunal, renewable once; and the end of the mandate of the current President and Vice-President. The Polish President signed the law one day later.
36. On 2 December 2015, the Sejm in its new term elected five new judges, four of whom were sworn into their office the same night. A fifth judge took his oath on 9 December. On 3 December 2015, the Tribunal ruled on an appeal introduced by a group of deputies challenging the constitutionality of the election of the judges of 8 October 2015. The Tribunal found the election of the two judges replacing those whose mandate terminated after the previous term of the Sejm to be unconstitutional, while it declared valid the election of the three other judges. On 9 December 2015, following applications submitted by the Ombudsman, a group of Sejm deputies, the National Council of the Judiciary and the First President of the Supreme Court, the Tribunal ruled that the aforementioned amendments to the Law on the Constitutional Tribunal adopted on 19 November were unconstitutional, except for the provision introducing a three-year mandate for the Tribunal's President and Vice-President, whose re-election, however, would not be legitimate as it might undermine their independence.
37. On 22 December 2015, the Sejm passed a law introducing changes to the *modus operandi* of the Tribunal. After the swift approval by the Senate, the law was signed by the President on 28 December 2015 and entered into force without *vacatio legis*. The act introduced, among others, the following changes: adjudications by a full bench must involve the participation of at least 13 judges of the Tribunal (instead of nine); these adjudications require a two-thirds majority (instead of the simple majority); hearings may not take place earlier than three months from the day of the notification of their date (six months for cases adjudicated in full bench); the early expiration of the mandate of a judge would be declared by the Sejm after a motion by the General Assembly of the Tribunal (instead of by the latter only) and disciplinary proceedings towards a constitutional judge and their dismissal are initiated upon application by the President of Poland or the Minister of Justice.
38. The President of the Tribunal assigned two of the five judges elected in December 2015 to cases. At the time of writing, there are therefore 12 sitting judges, and two groups of three judges (those elected in October who were not sworn and those elected in December who were sworn into office by the President) who have no cases assigned.
39. The First President of the Supreme Court, two groups of Sejm deputies, the Ombudsman and the National Council of the Judiciary filed an application with the Tribunal on the constitutionality of the provisions of the law of 22 December. On 9 March 2016, the Tribunal ruled, by a majority of 10 votes, that these provisions were unconstitutional. At the time of writing, the Prime Minister has not published the judgment on the ground that the procedure through which it was issued violated the law of 22 December.
40. On 30 January 2016, the Sejm passed a law reducing the Tribunal's budget by 10%.
41. On 11 March 2016 the European Commission for Democracy through Law (the Venice Commission) published an Opinion on the Law of 25 June 2015, which was requested by the Minister of Foreign

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<sup>18</sup> See Commissioner's [tweet](#), 19 November 2015.

Affairs.<sup>19</sup> The Venice Commission concluded that “as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only the rule of law is in danger, but so is democracy and human rights”. It also stated that “the publication of the judgment [of 9 March 2016] and its respect by the authorities are a precondition for finding a way out of this constitutional crisis”.<sup>20</sup> The Speaker of the Sejm decided to appoint a group of experts which would examine the Venice Commission’s Opinion and draw up recommendations for future parliamentary work.

42. Most representatives of civil society expressed their concern that the current crisis prevented the Tribunal from functioning properly. The Polish authorities stressed that the crisis is not legal in nature, but political, and that the amendments taken by the current Parliament aim at putting right a situation which had been created by the previous legislator. The Commissioner notes that the current paralysis of the Tribunal has a serious impact on the protection of human rights in Poland as shown by the number of lingering motions brought by the Ombudsman to the Tribunal concerning recent legislative changes that the Ombudsman considers as having a detrimental effect on human rights in Poland.<sup>21</sup> The Commissioner is also concerned at the statements made by the Minister of Justice towards the President of the Tribunal threatening disobedient judges with punitive measures, referring to constitutional judges operating outside the constitutional and legal framework.

### 1.3.1 CONCLUSIONS AND RECOMMENDATIONS

43. The Commissioner is seriously concerned at the current paralysis of the Constitutional Tribunal which bears heavy consequences for the human rights of all Polish citizens. He calls on the Polish authorities to urgently find a way out of the current deadlock following the Opinion of the Venice Commission. As already stated by the latter institution, the rule of law requires that any such solution be based on respect and full implementation of the judgments of the Tribunal. As the Commissioner stated at the end of his visit, there can be no real human rights protection without mechanisms guaranteeing the rule of law, in particular by ensuring checks and balances among the different state powers. The Commissioner is particularly concerned that proceedings regarding the compliance of statutes and decisions with human rights obligations and standards in Poland might be left in limbo for an undetermined period.
44. The Commissioner stresses that when adopting statutes amending vital provisions like those affecting the functioning of the Constitutional Tribunal, a broad debate with all relevant stakeholders, including civil society organisations and academia, is indispensable.

## 1.4 DEMOCRATIC AND EFFECTIVE OVERSIGHT OF SURVEILLANCE ACTIVITIES

45. The oversight of security services is fundamental to ensuring that these institutions both contribute to the protection of the populations they serve (including their human rights) and respect the rule of law and human rights in undertaking this task. Yet the Edward Snowden revelations, the involvement of some European security services in the secret detention and extraordinary rendition of terrorist suspects in the past decade and ongoing allegations of other impropriety in various countries have cast significant doubt on the capacity of national oversight systems to perform this role.<sup>22</sup>
46. In Poland the need for democratic and effective oversight of surveillance activities has also gained prominence following revelations of illegal surveillance of a journalist in recent years. The court of appeal in Warsaw confirmed in 2013 a 2012 ruling by the civil court of first instance according to which the Central Anti-Corruption Bureau (CBA) violated the right to protection of privacy of Bogdan Wróblewski, a journalist whose telecommunication data were gathered by the CBA for six months in the years 2005-2007. The CBA was ordered to apologize publicly to the journalist and to delete all collected data relating to him that the agency had obtained.

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<sup>19</sup> European Commission for Democracy through Law, [Opinion](#) on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted on 11-12 March 2016.

<sup>20</sup> *Ibid.* paragraphs 135 and 143.

<sup>21</sup> [Speech](#) of the Ombudsman before the Constitutional Tribunal, 8 March 2016.

<sup>22</sup> See the Commissioner’s [Issue Paper](#) on “Democratic and effective oversight of national security services”, 2015.

47. According to the Venice Commission there are indications that “serious failings occurred in the democratic system of control over the security and intelligence services” involved in the two cases that were brought to the European Court of Human Rights against Poland concerning the country’s participation in the CIA-run extraordinary rendition programme.<sup>23</sup>
48. During the visit, the Commissioner received numerous reports that the framework in place in Poland on surveillance powers, and in particular new legislation which just entered into force, raised serious human rights issues.
49. Article 47 of the Constitution guarantees the right to the protection of privacy and Article 51 protects the “right to informational self-determination”, that is control of the disclosing of information about oneself to other individuals or entities and on the information itself once in the hands of others. Article 49 guarantees the right to protection of privacy of communication.
50. In Poland, there are several services enjoying special powers, including the aforementioned CBA and intelligence services such as the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, and the Military Intelligence Service. These special services have full powers to access and use personal data including telecommunication and internet data outside the scope of criminal investigations. The police and other law enforcement forces<sup>24</sup> also have access to operational surveillance tools and therefore to some personal data in the scope of their respective missions that fall outside the realm of criminal law proceedings.
51. The Parliamentary Committee on Special Services has the powers of giving opinions on draft laws, making recommendations, evaluating candidates for heads of intelligence services and examining annual reports on the activity of the special services. However, the Commissioner was informed that the structure of the Parliamentary Committee was recently modified with the effect of reducing the role of the opposition MPs in it.
52. The Data Protection Authority (Inspector General for Personal Data Protection) is not entitled to handle complaints from individuals or to issue binding decisions related to data processing activities by security services.<sup>25</sup> At present, there is therefore no expert oversight body in Poland that would have the required expertise and the necessary competencies and powers to place the activities of special services under review.
53. The Commissioner notes that the lack of clarity of the legal rules governing the work of intelligence services raised serious criticism and led to a lawsuit before the Constitutional Tribunal resulting in a decision (No. K23/11)<sup>26</sup> released on 30 July 2014 requesting that measures be taken to fill some legal gaps which threatened human rights. In particular, the Constitutional Tribunal ruled that the provisions regulating the activities of law enforcement forces or security services were contrary to the right to the protection of privacy (Article 47 of the Constitution) and the right to protection of privacy of communication (Article 49 of the Constitution) insofar as they did not provide for an independent supervision of the process of granting access to telecommunication data.
54. Another problem raised by the Constitutional Tribunal was that the legal provisions in question did not contain guarantees for the immediate, witnessed and recorded destruction of material containing information that cannot be used as evidence or that is irrelevant to the proceedings.
55. The Constitutional Tribunal declared that all these legal provisions would become unconstitutional 18 months after the publication of the ruling, that is on 7 February 2016, in order to give the legislator time to enact new provisions that would be in accordance with the Constitution.

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<sup>23</sup> See European Commission for Democracy through Law (Venice Commission), [Update](#) of the 2007 Report on the democratic oversight of the security services and report on the democratic oversight of Signal Intelligence Agencies, adopted by the Venice Commission at its 102<sup>nd</sup> Plenary Session (Venice, 20-21 March 2015), on the basis of comments by Mr Iain Cameron, Member, Sweden, CDL-AD(2015)006, study No. 719/2013, 7 April 2015. The two cases in question are: Al Nashiri v. Poland, Application No. [28761/11](#), 24 July 2014, and Husayn (Abu Zubaydah) v. Poland, Application No. [7511/13](#), 24 July 2014.

<sup>24</sup> This includes border guards, military police and law enforcement forces, fiscal control authorities, and customs services.

<sup>25</sup> See European Union Agency for Fundamental Rights (FRA), *Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU, Mapping Member States’ Legal Framework*, 2015, p. 48.

<sup>26</sup> Constitutional Tribunal, 30 July 2014, Case No. [K23/11](#), also available in [English](#).

56. As concerns judicial control, there is no mechanism ensuring a prior authorisation to retrieve or obtain telecommunication or internet metadata, including data regarding contacts with those working under professional secrecy such as lawyers, journalists or doctors. This means that there is no *ex ante* independent control over access and use of telecommunication and internet metadata by security services and law enforcement forces. It is true that a mechanism for prior judicial control exists for information obtained through operational activities and that the use of such information as evidence in criminal proceedings requires both an authorisation by the court via a prosecutor and the condition that it is in the interest of justice. However, the Commissioner understands that the decision of a court to declare admissible information covered by professional secrecy which was obtained through operational surveillance in criminal proceedings is not subject to an appeal by the defendant.
57. In addition, operational surveillance is possible for up to 18 months, which constitutes a disproportionately long term in the opinion of the Ombudsman. Another problem is that operational and other forms of surveillance can take place without the person subjected to surveillance being informed of it *ex post*. Against this background, it seems that Polish law does not provide for an efficient access to remedies for private individuals in case of unlawful surveillance.
58. On the basis of a proposal from a group of MPs deposited on 23 December 2015, the Sejm passed a Law on Police and other entities relating to surveillance on 15 January 2016 and the Senate accepted it without amendment on 29 January 2015. On 3 February 2016, the President signed the Act into law and it then entered into force on 7 February 2016. The new draft law was not submitted to consultation but was subject to strong criticism by many stakeholders from the outset.<sup>27</sup> Some have stressed that this new legislation amounted to Poland “legalising mass surveillance of its citizens”.<sup>28</sup> The Ombudsman lodged a motion to the Constitutional Tribunal on 18 February 2016 considering that “the provisions which are the subject of this application not only do not implement the cited judgment of the Constitutional Tribunal, but also seriously violate constitutional human rights and freedoms, and the standards set out in international law”.<sup>29</sup>
59. The main criticism against the new provisions is that, instead of implementing the 2014 decision of the Constitutional Tribunal, they expand the powers of law enforcement agencies, police forces and security services to collect and use metadata. While previously only telecommunication metadata (such as billing data, geolocalisation, etc.) were concerned, now these authorities can also collect and use internet metadata (e.g. metadata of sent and received messages, contacts, internet profile, etc.). One of the problems lies in that this expansion of powers was not accompanied by measures establishing clear limits and an efficient and independent control that would avoid abuse of powers by the relevant authorities and breaches of the right to protection of privacy and other human rights.
60. In addition, the scope of cases where access to such telecommunication and internet metadata is possible has been extended from “supporting ongoing investigation” to include “detecting, preventing, investigating or collecting and recording evidence of crimes or for the purpose of saving human life or health or the support of search or rescue operations.” It should be noted that there is no requirement in the law that the offences concerned be of a particular gravity. There seems to be no rule of proportionality ensuring that such surveillance would only be used if there are no other less intrusive ways of obtaining the same type of information.
61. Concerns have been raised that this new legal framework provides for the possibility of concluding agreements with operators based in Poland granting a fast, direct and long-term access to telecom and internet data to the surveillance authorities.
62. While no *ex ante* control has been introduced, the *ex post* control established by the new legislation consists in a semi-annual report by the police to the relevant district court containing the number of cases of telecommunication or internet data acquisition during the reporting period and the qualification of legal acts in connection with which such data were requested or information about the

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<sup>27</sup> See for instance the [Joint Statement](#) issued by 10 NGOs urging the Parliament not to pass the bill (in Polish), 12 January 2016.

<sup>28</sup> See [Platform](#) to promote the protection of journalism and safety of journalists, “Poland Legalises Mass Surveillance of its Citizens”, 25 January 2016, updated on 29 February 2016.

<sup>29</sup> See the Ombudsman’s [Application](#) to the Constitutional Tribunal on the amendment to the Act on the Police.



need to save human life or health or to support search and rescue operations. However, this does not include detailed information that would allow for an in-depth evaluation of the lawfulness of the surveillance activity. In addition, while the district court may review the data contained in the report and indicate where it found a problem, there is no obligation for it to do so. Furthermore, the court will not be in a position to request that the data concerned be destroyed in case of a problem identified. This system has been described by the Ombudsman and other stakeholders as at best illusory in nature.

#### 1.4.1 CONCLUSIONS AND RECOMMENDATIONS

63. As stressed by the European Court of Human Rights in its leading judgment *Klass and Others v. Germany* and ensuing case-law, while some legislation granting powers of secret surveillance over mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime, states do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.<sup>30</sup>
64. The Commissioner considers that the Polish authorities should review the legislation applicable to surveillance activities to ensure that human rights are fully protected against any abuse by relevant services. In so doing, the Polish authorities should ensure full compliance with the most recent case-law of the Court concerning the protection of privacy and personal data in the field of surveillance.<sup>31</sup> They should fully implement the 2014 ruling of the Constitutional Tribunal notably which requires the creation of an independent and efficient supervision of surveillance activities.
65. The Polish authorities should ensure first of all that the law be precise and clear as to the offences, activities and people subjected to surveillance, and that it sets out strict limits on its duration, as well as rules on the disclosure and destruction of surveillance data. Secondly, rigorous procedures should be in place to order the examination, use and storage of the data obtained, and those subjected to surveillance should be given a chance, for instance through a procedure of notification *ex post*, to exercise their right to an effective remedy. Thirdly, the Polish authorities should set up bodies supervising the use of surveillance that are independent, and appointed by and accountable to parliament, rather than the executive.<sup>32</sup> A solution would be to establish an expert oversight body with competence to take authoritative decisions on the lawfulness of the activities supervised. Oversight bodies should also have access to all information, regardless of its level of classification, which they deem to be relevant to the fulfillment of their mandates. Access to information by oversight bodies should be enshrined in law and supported by recourse to investigative powers and tools which ensure such access.
66. The Polish authorities should take into consideration the Commissioner's Issue Paper on the Rule of Law and Internet<sup>33</sup> and the Commissioner's Issue Paper on Democratic and effective oversight of national security services<sup>34</sup> as well as recent guidelines published by the European Union Agency for Fundamental Rights<sup>35</sup> and the Venice Commission<sup>36</sup> in this field. The Commissioner also draws the attention of the Polish authorities to the set of guidelines, called "Necessary and Proportionate"<sup>37</sup> put

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<sup>30</sup> See ECtHR, *Klass and Others v. Germany*, paragraph 56, and *Kennedy v. the United Kingdom*, Application No. [26839/05](#), 18 May 2010, paragraph 167.

<sup>31</sup> ECtHR, Grand Chamber, 4 December 2015, *Roman Zakharov v. Russia*, Application No. 47143/06.

<sup>32</sup> See Council of Europe Commissioner for Human Rights, [Human Rights Comment](#) entitled "Human rights at risk when secret surveillance spreads".

<sup>33</sup> [Issue Paper](#), "The rule of law on the Internet and in the wider digital world", 2014.

<sup>34</sup> [Issue Paper](#), "Democratic and effective oversight of national security services", 2015.

<sup>35</sup> European Union Agency for Fundamental Rights (FRA), [Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU, Mapping Member States' Legal Framework](#), 2015.

<sup>36</sup> European Commission for Democracy through Law (Venice Commission), [Update](#) of the 2007 Report on the democratic oversight of the security services and report on the democratic oversight of signal intelligence agencies, adopted by the Venice Commission at its 102<sup>nd</sup> Plenary Session (Venice, 20-21 March 2015), on the basis of comments by Mr Iain Cameron, Member, Sweden, CDL-AD(2015)006, study No. 719/2013, 7 April 2015.

<sup>37</sup> [Necessary and Proportionate](#): International Principles on the Application of Human Rights to Communications Surveillance, May 2014.

together by a large number of civil society groups, and industry and international experts, which can be helpful in this regard. Also, the Global Network Initiative, GNI, has set out practical steps to protect human rights online in the report on Digital Freedoms in International Law.<sup>38</sup>

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<sup>38</sup> Global Network Initiative (GNI), [Report](#) on Digital Freedoms in International Law, June 2012.

## 2 ADMINISTRATION OF JUSTICE

### 2.1 LENGTH OF PROCEEDINGS

67. In his Memorandum to the Polish government published in 2007, the Commissioner's predecessor examined the long-standing issue of the length of criminal and civil proceedings in Poland and the effectiveness of the domestic remedy for excessive length of judicial proceedings, which had been established in a law of 2004.<sup>39</sup>
68. The Commissioner notes that in its July 2015 pilot judgment in *Rutkowski and Others v. Poland*,<sup>40</sup> the Court acknowledged the general measures adopted since 2007 in Poland in execution of a previous judgment,<sup>41</sup> which had three principal aims: the simplification and acceleration of the proceedings; the transfer of some responsibilities from judges to non-judicial officers where appropriate; and limitation of the scope of the courts' jurisdiction by transferring some cases traditionally examined by the courts to other legal professions, for instance public notaries. The Court also recalled the organisational measures already taken which included: the supervision by the Ministry of Justice of the courts' administrative activities; continued computerisation; and an increase in the number of judges and in the courts' budgets. Despite all these measures, the Court identified the existence of a systemic problem giving rise to many similar applications, unanimously finding a violation of Article 6 § 1 (right to a hearing within a reasonable time) and a violation of Article 13 (right to an effective remedy). It noted that, given the scale and complexity of the problem of excessive length of proceedings, Poland must continue to make further, consistent long-term efforts to achieve compliance by the national courts with the "reasonable-time" requirement laid down in Article 6 § 1.
69. The Court therefore went on to find that the unreasonable length of proceedings in Poland was a multifaceted problem, identifying in particular problems with the belated submission of expert reports and inefficiency in collecting expert evidence; lack of proper case-management and adequate organisation of trials; and the repetition of remittals ordered on appeal.<sup>42</sup> These findings were confirmed to the Commissioner during his visit both by the authorities and civil society. In December 2015, the Committee of Ministers noted that the Polish authorities' responded to these Court's criticisms by closely monitoring and following-up the measures already adopted to combat the excessive length of proceedings.<sup>43</sup>
70. During the visit, the Polish authorities have informed the Commissioner that they continued their efforts aimed at reducing the length of court proceedings, for example by recruiting new auxiliary staff, court referees (registrars) and assistant judges, increasing the courts' budgets and improving the system of recording court proceedings. Legislative action had also been taken to speed up and simplify civil and criminal proceedings and supervisory activities related to unjustified delays were put in place on an ongoing basis. On 23 December 2015, the Minister of Justice adopted a Regulation extending priority status to, among others, cases where complaints pursuant to the 2004 Law were allowed and cases where the Court had found a violation of the right to a hearing within a reasonable time. As a consequence, in these cases it is possible to schedule the hearings with disregard to the order of filing with the court. They also acknowledged that cases were unequally allocated; therefore as of 1 January 2016 an equal load of adjudications was introduced.
71. As for the effectiveness of the existing remedy for those affected by the excessive length of proceedings, the Court indicated in the pilot judgment that it had all the features of an effective remedy in law, but criticised its functioning in practice. It identified two main problems: the fragmentation of the proceedings, whereby the domestic courts do not take into account the entirety

<sup>39</sup> Law on Complaints for Violation of a Party's Right to Trial within a Reasonable Time, 17 June 2004

<sup>40</sup> ECtHR, *Rutkowski and Others v. Poland*, pilot judgment, Applications Nos [72287/10](#), 13927/11 and 46187/11, 7 July 2015, (final on 7 October 2015).

<sup>41</sup> ECtHR, *Kudła v. Poland*, Grand Chamber, Application No [30210/96](#), 26 October 2000.

<sup>42</sup> ECtHR, *Rutkowski and Others* (see above). par. 207.

<sup>43</sup> CM-DH 1243rd meeting, 8-10 December 2015. For more details on the measures taken by the authorities, see the Polish authorities' Action Plan, [DH-DD\(2015\)1146E of 27/10/15](#).

of the proceedings when evaluating their duration; and the low amounts of compensation awarded by the domestic courts.

72. Responding to the criticisms in the pilot judgment, in October 2015 the authorities announced to the Committee of Ministers their aim to improve the practice of domestic courts when applying the remedy through various awareness raising measures. The Committee noted this along with the proposed amendments to the 2004 Law which should address the problem of fragmentation by obliging domestic courts to take into account the whole course of the proceedings for the purposes of calculating awards of compensation. Those amendments will also set minimum levels for such awards, in order to remedy the problem of excessively low awards of compensation.<sup>44</sup>
73. The Polish authorities also informed the Commissioner that since 2012 the National School of Judiciary and Public Prosecution organises systematic training courses on the ECHR for judges and prosecutors, while since 2014 common court judges are provided with tailor-made workshops which focus on the issue of excessive length of proceedings. Also, a Polish translation of European Court of Human Rights judgments is available on the website of the Ministry of Justice.
74. Despite all these measures, the Polish authorities recognise that “the significant number of cases relating to the length of judicial proceedings that still continue to be brought against Poland before the European Court of Human Rights suggests that further efforts are still necessary to accelerate judicial proceedings and increase the efficiency of the domestic remedy in this area”.<sup>45</sup>
75. In December 2015, the Committee of Ministers of the Council of Europe declared<sup>46</sup> the examination of two groups of 205 old cases closed, having noted that the facts of these cases occurred in the absence of any remedy, that a remedy to complain against the excessive length of proceedings was introduced in 2004 and reformed in 2009 and that, in its pilot-judgment, the Court confirmed that this remedy had all the features of an effective remedy in law, revealing only some lacunae in its functioning. As to the remaining cases<sup>47</sup>, the Committee reaffirmed that it would focus its supervision on the further measures to reduce the length of proceedings and secure improvements in the functioning of the remedy, strongly encouraging the authorities to bring forward their proposed amendments to the 2004 law.<sup>48</sup>

### 2.1.1 CONCLUSIONS AND RECOMMENDATIONS

76. The Commissioner welcomes the efforts made by the Polish authorities in addressing the problem of the excessive length of judicial proceedings and in acknowledging the causes of it. However, further efforts are clearly still necessary to accelerate judicial proceedings and increase the effectiveness of domestic remedies for excessive duration of these proceedings. Noting that the problems generating excessive length of proceedings and the dysfunction of the domestic remedy have already been clearly identified, the Commissioner urges the authorities to accelerate the adoption and implementation of measures capable of solving those problems.
77. In particular, concerning the effectiveness of the existing remedy for those affected by the excessive length of proceedings, it is important that the Polish authorities address the two main outstanding problems, namely the fragmentation of the proceedings, whereby the domestic courts do not take into account the entirety of the proceedings when evaluating their duration; and the low amounts of compensation awarded by the domestic courts. The Commissioner encourages the Polish authorities

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<sup>44</sup> For more details on the plans for amending the 2004 Law, see the Polish authorities’ Action Plan, [DH-DD\(2015\)1146E of 27/10/15](#), p. 18.

<sup>45</sup> Report on the implementation by Poland of the recommendations of the Council of Europe Commissioner for Human Rights, 5 February 2016.

<sup>46</sup> Final Resolution [CM/ResDH\(2015\)248](#) adopted by the Committee of Ministers on 9 December 2015 at the 1243<sup>rd</sup> meeting of the Ministers’ Deputies.

<sup>47</sup> The Bąk group, concerning criminal proceedings (ECtHR, Bąk v. Poland, Application No. 7870/04, 16 January 2007) and the Majewski group, concerning civil proceedings (ECtHR, Majewski v. Poland, Application No. 52690/99, 11 October 2005).

<sup>48</sup> Committee of Ministers, 1243<sup>rd</sup> meeting, 8-9 December 2015, Supervision of the execution of the Court’s judgments - [Item H46-15](#), Podbielski and Kudła groups v. Poland (Applications No. 27916/95, 30210/96).

to go ahead with their plans for amending the 2004 Law for that purpose as also recommended by the Committee of Ministers.

## 2.2 PRE-TRIAL DETENTION

78. The Commissioner's predecessor noted that the European Court of Human Rights had repeatedly found violations of Article 5 § 3 of the Convention (right of a person subject to pre-trial detention to be tried within a reasonable time) in respect of Poland. Noting that examples of cases brought to Strasbourg where pre-trial detention had lasted between four to six years were not uncommon, he urged the Polish authorities to review the application of pre-trial detention.
79. Considerable progress has been achieved since then. The Polish authorities informed the Commissioner that from 2008 to 2013 the Code of Criminal Procedure was amended to significantly restrict the application of pre-trial detention and that the statistical data collected from 2008 to 2014 reveals a consistent trend towards more limited use of pre-trial detention, with a simultaneous reduction in its duration.<sup>49</sup> They also stated that the Minister of Justice conducts supervisory activities in cases where pre-trial detention lasted longer than a year.
80. These positive developments were confirmed by the final resolution of the Committee of Ministers of December 2014, which closed the supervision over the execution of the Trzaska group of cases<sup>50</sup> and was reflected also by the Parliamentary Assembly of the Council of Europe, which in a report of September 2015 stated that "some countries, such as Poland, have made considerable progress in reducing pretrial detention, by implementing substantial reforms to execute relevant judgments of the European Court of Human Rights".<sup>51</sup>
81. During the visit, some interlocutors expressed the view that the decrease in pre-trial detention was mainly due to the attitude of prosecutors, who required it less often. They expressed doubts on whether this trend would continue once the new changes affecting the functioning of the prosecution service (see Section 2.4 below) enter into force. Representatives of civil society also pointed out that new legal amendments extend the range of persons to whom pre-trial detention might be applied and might be conducive to its excessive length.
82. In this respect, during the visit the Commissioner was informed that the grounds for pre-trial detention would soon be amended. On 15 April 2016, the Law on Amending the Criminal Procedure Code and some Other Laws entered into force. Pursuant to the new wording of Article 258 § 2, pre-trial detention might be imposed when a person has been charged for a crime for which the maximum possible sentence is at least eight years imprisonment or in case of a conviction in first instance to a sentence of three years imprisonment or more (instead of the previous provision which required a sentence of more than three years imprisonment). As a result, pre-trial detention can be applied on the sole ground of the gravity of the sentence and does not require a specific behavior obstructing the proper course of the proceedings by the defendant.
83. The Commissioner notes that in accordance with the standards established by the Court, the authorities must justify having examined the presence of the legal grounds for detention in view of the circumstances of each case, including consideration of alternatives to detention. The Court has repeatedly held that although the severity of the sentence faced is a relevant element in the assessment of the risk that an accused might abscond or reoffend, the need to continue the deprivation of liberty cannot be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence.<sup>52</sup> Moreover, "the Court has frequently found a violation of Article 5 § 3 of the Convention where the domestic courts have extended an applicant's detention

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<sup>49</sup> Report on the implementation by Poland of the recommendations of the Council of Europe Commissioner for Human Rights, 5 February 2016.

<sup>50</sup> Committee of Ministers, Final Resolution, CM/ResDH(2014)268 on Application No. 25792/94, 11 July 2000.

<sup>51</sup> Parliamentary Assembly of the Council of Europe, Report on the Abuse of pre-trial detention in States Parties to the European Convention of Human Rights, [Doc. 13863](#), 7 September 2015.

<sup>52</sup> ECtHR, *Idalov v. Russia*, Application No. [5826/03](#), 22 May 2012, paragraph 145.

relying essentially on the gravity of the charges and using stereotyped formulae without addressing specific facts or considering alternative preventive measures”.<sup>53</sup>

### 2.2.1 CONCLUSIONS AND RECOMMENDATIONS

84. The Commissioner notes the positive developments regarding pre-trial detention in Poland, including a steady decrease in its use and duration in recent years. The Commissioner encourages the use of alternatives to pre-trial detention and recalls the standards developed by the Council of Europe Committee of Ministers in its Recommendation on the use of remand in custody.<sup>54</sup>
85. The Commissioner is concerned at recent legal amendments allowing for the use of pre-trial detention solely on the ground of the severity of the penalty. He recalls the applicable case-law of the European Court and calls on the Polish authorities to ensure that their legislation fully complies with it.

### 2.3 OTHER ISSUES PERTAINING TO CRIMINAL LAW PROCEDURE

86. Further to a legislative process that started in 2009, the Code of Criminal Procedure (CCP) was significantly changed in 2012 with a view notably to reinforcing the adversarial nature of the criminal procedure, accelerating the course of proceedings and strengthening procedural guarantees in the application of preventive measures.<sup>55</sup> These changes entered into force on 1 July 2015. However, since then a Law amending the CPP was adopted in January 2016 and entered into force on 15 April 2016 for most of its provisions. The Commissioner notes that the new reform partially rolls back the shift towards adversarial criminal proceedings which had just been introduced. He also notes that according to most national human rights observers, that shift had brought about improvements in the field of human rights protection, although it was reversed before an assessment of its concrete impact could confirm this. While several stakeholders, including the Ombudsman’s office, had an opportunity to raise concerns on the draft introducing the latest changes to the CPP, the Commissioner was informed that these concerns were not addressed in the final draft.
87. One recently introduced provision that has raised particular concern establishes that unlawfully obtained evidence cannot as such be declared inadmissible by the criminal courts (illegally obtained evidence is generally referred to as the “fruit of the poisonous tree” in Poland). In 2013, a provision was inserted in the CCP to regulate the use of illegally obtained evidence in line with the Supreme Court’s case-law. However this provision was amended again on 11 March 2016. Under the new provision of Article 168a CCP, evidence cannot be considered inadmissible solely on the basis that it was obtained in violation of procedural rules, except for the case where said evidence was obtained as a result of committing a homicide, causing intentional harm to health or deprivation of liberty by a public official while in the exercise of her/his functions. Human rights NGOs have stressed that this new provision could run against the right to a fair trial as interpreted by the Court as it would oblige courts to accept unlawfully obtained evidence in almost all cases. As for the practice of domestic courts, in a case concerning a politician accused of corruption on the basis of illegally installed cameras and wire-taps, the Court of Appeal of Warsaw ruled that the entrapment organised by agents of the Anti-Corruption Bureau (CBA) was illegal and could not be used as evidence against the person entrapped in such a way.<sup>56</sup> In March 2014, the Supreme Court upheld the acquittal declaring the CBA’s actions—including its entrapment of the politician —illegal.
88. The Commissioner notes that Article 6 ECHR (right to a fair trial) does not lay down any rules on the admissibility of evidence as such. However, the case law of the Court indicates that an assessment under Article 6 of the fairness of proceedings as a whole, can include an examination of the way in which the evidence was obtained.<sup>57</sup> This means that the use of evidence unlawfully obtained should be examined in the context of a more general assessment of the fairness of the whole criminal procedure.

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<sup>53</sup> Ibid. paragraph 147.

<sup>54</sup> Council of Europe Committee of Ministers, [Recommendation](#) (2006)13.

<sup>55</sup> See also above 2.2 Pre-trial detention.

<sup>56</sup> Judgment of the Second Penal Department of the Court of Appeal in Warsaw, II Aka 70:13.

<sup>57</sup> See ECtHR, *Welke and Białek v. Poland*, Application No. [15924/05](#), 1 March 2011.

89. In this context, it is clear from the Court’s case-law that the use in criminal proceedings of statements obtained as a result of a violation of Article 3 ECHR renders the proceedings as a whole automatically unfair, in breach of Article 6 when the facts amount to torture. As to statements obtained as a result of an act classified as inhuman treatment, Article 6 will only be breached if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.<sup>58</sup>
90. As to the use of entrapment as evidence, the Court has emphasised that the police may act undercover but not incite, which means that the use of evidence obtained via entrapment is in breach of Article 6 § 1.<sup>59</sup> Concerning the use of special investigative powers, the Court has considered that such a use can be acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question.<sup>60</sup>
91. In its Recommendation on the role of public prosecution in the criminal justice system, the Council of Europe Committee of Ministers stressed that “[p]ublic prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence”.<sup>61</sup> The Commissioner also notes that Principle XV of the 2014 Rome Charter provides that “[p]rosecutors should refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods, in particular when they constitute a grave violation of human rights. They should seek to ensure that appropriate sanctions are taken against those responsible for using such methods or for other violations of the law”.<sup>62</sup> The Commissioner also notes that the Ombudsman brought a case to the Constitutional Tribunal against Article 168a of the CCP.<sup>63</sup>

### 2.3.1 CONCLUSIONS AND RECOMMENDATIONS

92. The Commissioner expresses his concern at a number of amendments recently brought to the Code of Criminal Procedure which may jeopardise the protection of the right to a fair trial in criminal proceedings as protected by Article 6 of the ECHR. In particular, he stresses that the use of illegally obtained evidence should be regulated in full compliance with the case-law of the European Court of Human Rights. He recommends that the Polish authorities review the new provisions in order to ensure their compliance with Article 6 of the ECHR.
93. The Commissioner is also concerned that the numerous fundamental changes in criminal proceedings in recent years, going in some cases in opposite directions, could potentially affect the quality of administration of justice, as judges are obliged to adapt quickly to different procedures and in some cases, apply different procedures at the same time. In particular, the most recent changes discussed above have been introduced in haste without proper evaluation of the previous changes. It is therefore important that prosecutors and judges be trained and given all necessary financial and human resources to enable them to implement the CCP in the best possible conditions and in full respect of human rights, in particular the right to a fair trial.

<sup>58</sup> See European Court of Human Rights, [Guide](#) on Article 6 – Right to a fair trial (criminal limb), paragraphs 134 *et s.*, 2014, Report prepared by the Research Division.

<sup>59</sup> See, for instance, ECtHR, *Khudobin v. Russia*, Application No. [59696/00](#), 26 October 2006, paragraphs 132-137.

<sup>60</sup> See European Court of Human Rights, [Guide](#) on Article 6 – Right to a fair trial (criminal limb), paragraphs 134 *et s.*, 2014, report prepared by the Research Division.

<sup>61</sup> Council of Europe Committee of Ministers, [Recommendation](#) Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System and Explanatory Memorandum, 6 October 2000, see paragraph 28.

<sup>62</sup> Consultative Council of European Prosecutors (CCPE), Rome Charter contained in the [Opinion](#) No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, CCPE(2014)4Final, Strasbourg, 17 December 2014.

<sup>63</sup> See the Ombudsman’s [motion](#) of 10 May 2016 (in Polish).

## 2.4 ISSUES RELATED TO CHANGES AFFECTING THE PROSECUTION SERVICES

94. The Commissioner notes that in 2009, the functions of Minister of Justice and Prosecutor General (PG) were split with a view to reinforcing the independence of the PG from political pressure, while ensuring accountability by means of an obligation for the PG to present annual reports to the Parliament. This reform was generally considered to be a first step in the right direction that would need further improvements, notably to ensure full accountability of the PG. However, recent amendments to the Prosecution Act that came into effect in March 2016 have reversed this reform in a way that raises important human rights concerns. The amendments were introduced, in haste and without consultation, in December 2015 on the basis of two private members' bills.
95. In accordance with the new provisions, the Minister of Justice and the PG will be one and the same person. There is no requirement of having served as prosecutor or judge for becoming the PG (under the previous system 10 years of service as prosecutor or criminal judge were required). Crucially, the new provisions have also considerably increased the competencies and powers of the PG/Minister of Justice without setting the corresponding clear and solid safeguards against abuse of such powers. The PG/Minister of Justice now has the power to intervene at each stage of legal proceedings led by any prosecutor by issuing instructions, guidelines and orders on specific measures relating to individual cases. The PG/Minister of Justice can also revoke or modify decisions taken by prosecutors. The Commissioner was informed by the authorities that such interventions are to be issued in written form. The PG/Minister of Justice has also been empowered to appoint and dismiss prosecutors on the basis of a discretionary decision and in the absence of a competitive process that would ensure a transparent and open recruitment procedure, and to exercise disciplinary powers against any prosecutor.
96. Another provision that has raised considerable concerns enables the PG/Minister of Justice to release to the media information concerning any investigation. Under Article 12(2) of the revised Law on Prosecution, the Prosecutor General may communicate to the media information about a pending pre-trial case or about the operation of the prosecution service, except if such information is classified, with due consideration to important public interest. The Court recalled in the *Garlicki v. Poland* case<sup>64</sup> its case-law according to which while Article 6§2 (presumption of innocence) does not prevent the authorities from informing the public about criminal investigations in progress, it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected. This case concerned statements made by the then PG/Minister of Justice during a press conference in violation of the presumption of innocence.
97. Another issue of concern lies in the creation of a new department within the Prosecution Office responsible for prosecuting the most serious crimes committed by judges and prosecutors. The potential chilling effect of this on judges and prosecutors and the ensuing negative repercussions on the independence of the justice system were underlined by many of the Commissioner's interlocutors during the visit.
98. The Commissioner also notes the concerns jointly raised by the bureaus of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) in a 2016 report. They stated that "(t)he Polish public prosecution services were reformed in 2009. In this reform, the independence of the prosecution was guaranteed. However, there is still no guarantee of the independence of the prosecution service or the Prosecutor General in the constitution. This, according to the information received from the CCPE member from Poland, leaves the door wide open for majorities in parliament to change the relations between the prosecution and the executive at will and to lower the level of independence already achieved. Moreover, a new reform is under discussion which would remove the separation of functions of the Prosecutor General and the Ministry of Justice. Since a separation of the executive and the prosecution and clear rules on the relations between the two institutions are crucial guarantees for independence, this reform would have a negative effect on the independence of the public prosecution. According to the CCPE member in respect of Poland,

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<sup>64</sup> See ECtHR, *Miroslav Garlicki v. Poland*, Application No. [36921/07](#), 14 June 2011, paragraphs 132 and 133.



another serious risk was the high level of prosecutors being politicized, which made it possible to abuse the prosecution as a political instrument”.<sup>65</sup>

#### 2.4.1 CONCLUSIONS AND RECOMMENDATIONS

99. While a plurality of models for the organisation of the prosecution services exist in Europe, only a few countries belonging to the Council of Europe have a prosecutor’s office forming part of the executive authority and subordinate to the Ministry of Justice. The Council of Europe Committee of Ministers stressed in its Recommendation Rec(2000)19 on the Role of Prosecution in the Criminal Justice System that where the public prosecution is part of or subordinate to the government, states should take effective measures guaranteeing transparency and procedures compliant with international treaties, national legislation and general principles of law.<sup>66</sup> Instruction in a specific case should be made in writing and instructions not to prosecute in a specific case should, in principle, be prohibited.
100. The Commissioner notes that the Venice Commission considered in 2010 that there was a widespread tendency to allow for a more independent prosecutor’s office, rather than one subordinated or linked to the executive. The Venice Commission noted that while in those countries with a subordination link the executive was particularly careful not to intervene in individual cases, in such systems, there may be no formal safeguards against such intervention. It added that the appearance of intervention can be as damaging as real interference.<sup>67</sup>
101. The Commissioner also recalls that, according to the 2014 Rome Charter “the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. Therefore, the general tendency to enhance the independence and effective autonomy of the prosecution services should be encouraged” (Principle IV). “Prosecutors should be autonomous in their decision-making and should perform their duties free from external pressure or interference, having regard to the principles of separation of powers and accountability (Principle V)”. Furthermore, according to this Charter, “the recruitment and career of prosecutors, including promotion, mobility, disciplinary action and dismissal, should be regulated by law and governed by transparent and objective criteria, in accordance with impartial procedures, excluding any discrimination and allowing for the possibility of impartial review”(Principle XII).
102. In this context, the Commissioner considers that the combination of several provisions recently introduced, such as the merging of the functions of the Minister of Justice and the Prosecutor General, the increase in the powers of the Prosecutor General/Minister of Justice in the field of appointing and dismissing prosecutors, in giving instructions to prosecutors in individual cases and in deciding to communicate information to the media pertaining to prosecutorial files, is an issue of concern. Admittedly, much will depend on the way the new law will be interpreted and implemented in practice, for instance when it comes to the notion of “public interest” to be taken into account in respect of disciplinary proceedings and information communicated to the media. Nonetheless, the attribution of such extensive powers to a politically appointed figure without the establishment of corresponding sufficient safeguards to avoid abuse of powers poses a considerable threat to human rights in the context of criminal law procedures, including the right to a fair trial, the presumption of innocence and the right to defence.
103. The Commissioner recommends that the Polish authorities review the new legislation on prosecution services in light of European standards and best practice in the field of securing more autonomy and independence to the prosecution services from political and other interference.

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<sup>65</sup> See “Challenges for judicial independence and impartiality in the member states of the Council of Europe”, [Report](#) prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled “State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe”, SG/Inf(2016)3rev, 24 March 2016, paragraphs 141 and 142.

<sup>66</sup> Committee of Ministers of the Council of Europe, [Recommendation](#) Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000, Explanatory Memorandum on Paragraph 13.

<sup>67</sup> See European Commission for Democracy through Law (Venice Commission), [Report](#) on European Standards as regards the independence of the Judicial System, Part II – The Prosecution Service, 85<sup>th</sup> session, (Venice, 17-18 December 2010), CDL-AD(2010)040, study No. 494/2008, Strasbourg, 3 January 2011, paragraph 26.

### 3 MEDIA FREEDOM

104. The Polish Constitution contains provisions guaranteeing freedom of expression (Article 54) and freedom of the press and other means of social communication (Article 14). Its Article 54 (2) in particular provides that “preventive censorship of the means of social communication and the licensing of the press shall be forbidden. Statutes may require the receipt of a permit for the operation of a radio or television station”. The Constitution also establishes the National Council of Radio Broadcasting and Television (hereafter: National Broadcasting Council) as the entity that shall safeguard freedom of speech, the right to information and the public interest regarding radio broadcasting and television (Article 213). Its members are appointed by the President of the Republic, the Sejm and the Senate.
105. In recent months, the situation of media freedom in Poland has been the subject of considerable national and international attention and concern further to the introduction of sweeping changes to the governance system of public television and radio broadcasters.

#### 3.1 THREATS TO PUBLIC SERVICE MEDIA GOVERNANCE

##### 3.1.1 THE SMALL MEDIA LAW

106. The Law amending the Public Broadcasting Service Law of 1992 was adopted by the Polish Parliament on 30 December 2015 and signed by the President on 7 January 2016. This law is also called the “Small Media Law” as it is transitional legislation, which will be in force until 30 June 2016. The Polish authorities have explained that by that date another law regulating Poland’s public media more comprehensively will be adopted.
107. The Small Media Law introduced the immediate expiration of the term of office of members of the management and supervisory boards of public television and radio, allowing the Minister of Treasury to dismiss discretionally and appoint for an indefinite term the members of these boards. On 5 January, the Commissioner called on the President of Poland not to sign the law and to uphold the independence of Poland’s public service television and radio.<sup>68</sup>
108. The Commissioner warned that by placing public service media under direct government control, the amendments brought by this law contradicted Council of Europe standards which notably require that public service media remain independent of political or economic interference. While the operation of the National Broadcasting Council had not been immune from criticism regarding political dependence in the past, before the entry into force of the Small Media Law, the institution used to select members of supervisory boards of public radio and television through public and open competitions. It also appointed the members of the management boards from candidates selected in a competition held by the supervisory boards. The candidates would only include persons with management as well as radio and television broadcasting experience.
109. The Commissioner notes that on 24 March 2016, the Ombudsman lodged a complaint with the Constitutional Tribunal arguing that the law violates the constitutional guarantees of freedom of speech and media freedom, by subordinating public service broadcasting directly to the government and restricting the constitutional role of the National Broadcasting Council.<sup>69</sup>
110. The manner in which the Small Media Law was adopted is also a matter of concern. It was adopted by Parliament within three days, without previous consultation and in spite of wide national and international calls for caution,<sup>70</sup> and entered into force without *vacatio legis*. The Commissioner also

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<sup>68</sup> Commissioner for Human Rights’ [Statement](#) of 5 January 2016. See also the [Letter](#) of the Secretary-General of the Council of Europe to President Duda, 5 January 2016.

<sup>69</sup> Polish Commissioner for Human Rights’ [Appeal](#) to the Constitutional Tribunal on Media Law.

<sup>70</sup> See the Media Freedom [Alert](#) of the Platform to Promote the Protection of Journalism and the Safety of Journalists, on 4 January 2016, Polish Law on Public Service Broadcasting Removes Guarantees of Independence; the [Statement](#) of the European Regulators Group for Audiovisual Media Services (ERGA) on 11 January 2016; the [Statement](#) of the OSCE Media freedom Representative on 30 December 2015; the [Joint Statement](#) of the European Federation of Journalists (EFJ), the

expressed concern that the law was rushed through the Parliament and did not benefit from the public debate required in a democratic society when considering such important changes in the field of media freedom.<sup>71</sup>

111. The Polish authorities have explained that the State Treasury as the owner of public media companies is free to decide how its ownership is managed and who supervises the management process. They also emphasise that the Small Media Law is a temporary solution, whose aim was to rectify an “improper situation, which was persisting in public media since 1992 and which allowed National Broadcasting Council (the media market regulator) to nominate management and supervisory boards of public service media companies”. The authorities furthermore underline that with the exception of the competencies regarding the composition of the management boards, the competencies of the National Broadcasting Council provided by Public Broadcasting Service Law of 1992 for ensuring media pluralism and freedom of expression remain unchanged.<sup>72</sup>
112. The Commissioner understands that during the adoption of the “Small Media Law” and in its aftermath, a number of employees of Public Service Media were dismissed, while others resigned in protest. At the end of March, more than 100 journalists were reported not to hold their jobs anymore.

### 3.1.2 FUTURE REFORM OF PUBLIC SERVICE MEDIA

113. As mentioned above, during the visit the Polish authorities informed the Commissioner that a more comprehensive regulation of public service media (the “Big Media Law”) was under preparation and would be adopted in the summer of 2016. Among the main objectives of the forthcoming legislation, the authorities highlighted firstly the need to guarantee the independence of public service media (designated as “national media” in the new draft legislation) from government and other influence. This task, which the authorities considered the National Broadcasting Council had been unable to secure, would be mainly fulfilled through a newly-established institution, the National Media Council. Secondly, the authorities referred to the need to secure adequate funding of public service media and to ensure, to that end, that licence fees are universally paid.
114. At the end of his visit, the Commissioner strongly encouraged the Polish authorities to consult civil society and national and international partners when drafting the announced legislation, which would hopefully not only address long-standing shortcomings in the functioning of public media but also redress the controversial changes to the governance of public service media introduced by the Small Media Law, as detailed above. The Commissioner furthermore called for strong safeguards to be included in the forthcoming legislation to protect the independence and pluralism of public media, enabling it to play its role of watchdog in a democratic society.<sup>73</sup>
115. At the time of writing this report, the “Big Media Law” has just been presented as a draft to the Sejm. Having been introduced as a parliamentary, and not a governmental draft, the Commissioner notes with regret that the draft has not been discussed in public consultations prior to its presentation to the Parliament. While the Commissioner is not at this stage in a position to examine the content of this proposal in any detail, his attention has been drawn to a number of issues of concern. Many of these issues regard the lack of safeguards to guarantee the independence of public media service from political influence, as reflected in the proposed composition of the newly-created National Media Council and the selection mechanism of its members or in the perpetuation of some of the arrangements introduced by the Small Media Law. It has also been pointed out that the transfer of certain competencies from the National Broadcasting Council to the National Media Council casts doubt on the conformity of the new arrangements with the role the Constitution bestows upon the former institution in the field of safeguarding freedom of expression, the right to information and the public interest in radio broadcasting and television.

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European Broadcasting Union (EBU), the Association of European Journalists (AEJ), Reporters Without Borders (RSF), Committee to Protect Journalists (CPJ), Index on Censorship, 30 December 2015; the [Statement](#) of the Helsinki Foundation for Human Rights on 31 December 2015.

<sup>71</sup> Commissioner for Human Rights’ [Statement](#) of 5 January 2016.

<sup>72</sup> Official response of the Government of Poland to the Media [Alert](#) of 4 January 2016 on the Council of Europe Platform to Promote the Protection of Journalism and the Safety of Journalists.

<sup>73</sup> [Press release](#) of the Commissioner for Human Rights at the end of his visit to Poland, 12 February 2016.

## 3.2 OTHER THREATS TO MEDIA FREEDOM

### 3.2.1 LAW AND PRACTICE ON DEFAMATION

116. Pursuant to Article 212 of the Criminal Code, defamation is a criminal offence punishable by a fine or a community sentence. However, defamation through means of mass communication (paragraph 2), can be subject to up to one year of imprisonment.
117. In September 2012, the OSCE Representative on Freedom of the Media, Dunja Mijatović, called for the decriminalisation of defamation in Poland.<sup>74</sup> In July 2015, the previous Ombudsman of Poland criticised the possibility of imprisonment under Poland’s criminal defamation law, calling it a potential “constraint on public debate and the freedom of the press”. Earlier in 2012 she had lodged a complaint with the Constitutional Tribunal on the issue of imprisonment under Article 212. However, the Constitutional Tribunal dismissed the application, holding that its previous judgment of 30 October 2006, where it concluded that the criminalisation of defamation did not constitute in principle an unreasonable interference in freedom of expression and freedom of the press, settled the matter.<sup>75</sup>
118. According to information provided by the Polish authorities, in 2013, 52 persons were convicted by first instance courts (non-final judgments) under Article 212 paragraph 2, of whom one with a suspended sentence of deprivation of liberty. In the first half of 2014, 81 persons were convicted, of whom one with a suspended sentence of deprivation of liberty.<sup>76</sup> The Commissioner notes that while defamation convictions have rarely entailed deprivation of liberty in recent years, claims of defamation have reportedly increased.<sup>77</sup>
119. The Commissioner understands that last February a draft law decriminalising public insult of the President or of a constitutional body of the Republic of Poland was sent to the Sejm and was under discussion at the time of drafting this report.

### 3.2.2 PROTECTION OF JOURNALISTIC SOURCES

120. The Commissioner notes that on 18 June 2014 police raided the headquarters of *Wprost* magazine, after it had published conversations among state officials and businessmen secretly recorded in Warsaw’s restaurants, in an attempt to seize the recordings and obtain the sources of the information. The raid was carried out without a prior court order and eventually the material was not seized. The then Minister of Justice stated that the raid “had raised legitimate concerns about breaches of journalistic confidentiality” and “should have never taken place”.<sup>78</sup>
121. The new legislation on surveillance entails serious threats to the protection of journalistic sources which have been described above (under Section 1.4).

### 3.2.3 CONCLUSIONS AND RECOMMENDATIONS

122. As stated by the Committee of Ministers of the Council of Europe in its Recommendation of 2012 on Public Service Media Governance, public service media across Europe face an unprecedented range of challenges.<sup>79</sup> The Commissioner shares the view of the Committee that “the first priority for public service media must be to ensure that their culture, policies, processes and programming reflect and ensure editorial and operational independence”. While political influence on public service media is an issue that pre-exists the current reforms, the Commissioner emphasises that putting public television

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<sup>74</sup> Poland should abolish criminal defamation, [says](#) OSCE media freedom representative following conviction of editor, 17 September 2012.

<sup>75</sup> International Press Institute, [Polish rights ombudsman criticises criminal defamation despite campaign, notorious Art. 212 remains in force](#), 16 July 2015.

<sup>76</sup> DH-DD(2014)1406E, [Action Report](#), Communication from Poland concerning the cases of Kurlowicz, Lewandowska-Malec, Jucha and Żak against Poland (Applications No. 41029/06, 39660/07 and 19127/06), 19 November 2014.

<sup>77</sup> Index, The Voice of Free Expression, [Poland: Worrying implications of defamation through the criminal code](#), 1.12.2015.

<sup>78</sup> <https://freedomhouse.org/report/freedom-world/2015/poland>

<sup>79</sup> [Recommendation](#) CM/Rec(2012)1 of 15 February 2012.

and radio under the direct control of the government is clearly not a solution and runs contrary to the Council of Europe standards on media freedom.

123. The Commissioner is concerned at the immediate termination of office mandates of management and supervisory board members and the elimination of pluralistic criteria of the composition of the boards introduced by the “Small Media Law”. Members of management and supervisory boards should be appointed through a transparent process, taking into account their qualifications and professional skills and their duties related to working for the public service. Involvement by the state in the appointment of the highest supervisory or decision-making authority within the public service media, even if legitimate, should not extend to appointments at executive or editorial management level.<sup>80</sup> The appointment of management and supervisory board members should have a fixed term and measures against board members should include safeguards in order to avoid arbitrary decisions on dismissals.
124. The Commissioner regrets that the draft legislation reforming public service media (the “Big Media Law”) has been presented to Parliament without the inclusive debate that legislation introducing changes in such vital areas requires in a democratic society. He reiterates his encouragement to the Polish authorities to consult civil society, national and international partners, including the Council of Europe, on this broader reform of public service media and to take fully into account their advice and recommendations. The Commissioner recommends that the Polish authorities introduce safeguards to guarantee the independence of public service media from political influence and that this is reflected in the composition and selection mechanism of any public service media governance institution that is to be created. It is also crucial to ensure that the new arrangements fully preserve the role the Constitution gives to the National Broadcasting Council in the field of safeguarding freedom of expression, the right to information and the public interest in radio broadcasting and television.
125. The Commissioner notes that the Polish authorities have not yet decriminalised defamation. As he already stated, “as long as defamation is considered a crime and journalists can be threatened with disproportionate sanctions and fines, a chilling effect risks limiting the exercise of freedom of expression. This situation does not only stifle the media, but ultimately deprives citizens of their right to information, thus affecting negatively the healthy functioning of democracy”.<sup>81</sup> The criminal law provisions send a negative signal to investigative journalists and might prevent the expression of critical or satirical views. The Commissioner encourages the Polish authorities to consider repealing all criminal provisions against defamation and to deal with it through strictly proportionate civil sanctions only.
126. The Commissioner understands that the Ministry of Justice is supporting decriminalisation of publicly insulting the President of Poland. He welcomes this development noting that it strengthens the protection of freedom of expression, which includes information or ideas that may offend, shock or disturb the State or any sector of the population and requires that public officials be subject to wider limits of acceptable criticism.
127. The Commissioner recalls the Court’s case-law underlining the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom. The Court has already considered that a disclosure order imposed on journalists requiring them to reveal the identity of their sources cannot be compatible with Article 10 of the Convention unless there is a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim.<sup>82</sup> Public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can

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<sup>80</sup> Ibid, paragraph 27.

<sup>81</sup> [Joint Statement](#) with UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Dunja Mijatović, OSCE Representative on Freedom of the Media, Defamation in Italy: a draft law to be changed, with Frank La Rue.

<sup>82</sup> ECtHR, *Goodwin v. the United Kingdom*, 27 March 1996, Application No. [17488/90](#), paragraph 39. See also ECtHR, *Financial Times Ltd and Others v. the United Kingdom*, 15 December 2009, Application No. [821/03](#), paragraph 71.

be convincingly established that reasonable alternative measures to disclosure do not exist or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved.<sup>83</sup>

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<sup>83</sup> See Parliamentary Assembly [Recommendation](#) 1950 (2011) on the protection of journalists' sources.

## 4 WOMEN'S RIGHTS AND GENDER EQUALITY

128. In his 2007 Memorandum to the Polish Government, the Commissioner's predecessor recommended that the Polish authorities take measures to advance women's rights, including in the fields of combating violence against women and domestic violence, and women's sexual and reproductive health and rights. While the authorities have since then taken a significant number of steps to reinforce the prevention of domestic violence, further efforts are needed in a number of fields addressed below to ensure the fulfillment of women's rights and gender equality in Poland.

### 4.1 PREVALENCE OF GENDER STEREOTYPES

129. To advance women's rights and gender equality, it is necessary to combat harmful gender stereotypes<sup>84</sup> and wrongful gender stereotyping<sup>85</sup> that affect women and lead to discrimination against them in all fields of life. The reported prevalence of gender stereotypes which are detrimental to women in Poland calls for further action in this field.

130. In 2014, the UN Committee on the Elimination of Discrimination against Women (hereinafter: CEDAW Committee) noted the efforts of the Polish Government aimed at preventing stereotyping of the social roles of women and men in the media and in society in general. However, it also reiterated its concern about the "persistence of deep-rooted gender stereotypes concerning the roles and responsibilities of women and men in the family and society, which continue to be present in the media and education materials and are reflected by the traditional educational choices of women and their disadvantaged position in the labour market, as well as by widespread violence against women".<sup>86</sup> The Committee also pointed at the limited effectiveness of measures to counter negative stereotypes against Roma women, lesbian, bisexual, transgender and intersex women and women with disabilities.

131. Despite measures taken to train police, prosecutors and judges, gender stereotyping reportedly also remains entrenched in the handling of cases by police and courts, a factor which has a negative impact on women's access to justice, particularly in the fields of domestic violence<sup>87</sup>, gender-based violence and trafficking in human beings.<sup>88</sup>

132. It was consistently reported to the Commissioner that in Poland, like in other European countries, attempts to fight gender stereotypes are seen by some groups in society as a threat to "traditional values" such as marriage, family and maternity, which, according to them, are premised on clear-cut differences between the sexes. These groups display a strong opposition to what is pejoratively called "gender ideology". In 2014 the CEDAW Committee was concerned at the absence of measures to counter campaigns against "gender ideology". Human rights NGOs have stressed that the alleged traditional values some wish to protect are in fact based on a persisting patriarchal structure of society, perpetuating discrimination against women in Poland. This patriarchal structure often implies keeping women mainly, if not exclusively, in the role of child-bearers, mothers and caregivers.

133. In this context, the Commissioner notes that the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention) was made difficult due to attitudes which considered that the definition of gender

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<sup>84</sup> Gender stereotypes are generalised views or preconceived ideas, according to which individuals are categorised into particular gender groups, typically defined as "women" and "men" and are arbitrarily assigned characteristics and roles determined and limited by their sex. A gender stereotype is harmful when it limits women's and men's capacity to develop their personal abilities, pursue their professional careers and make choices about their lives and life plans. See OHCHR [webpage](#) on gender stereotypes/stereotyping. See also the Council of Europe [Factsheets](#) on Combating Gender Stereotyping and Sexism in and through Education, and on Combating Gender Stereotyping and Sexism in the Media.

<sup>85</sup> Gender stereotyping is wrongful when it results in a violation or violations of human rights and fundamental freedoms.

<sup>86</sup> Committee on the Elimination of Discrimination against Women, [Concluding observations](#) on Poland (2014) CEDAW/C/POL/CO/7-8, see paragraphs 22-23.

<sup>87</sup> See also below, Section 4.3.

<sup>88</sup> See Group of Experts on Action against Trafficking in Human Beings, [Report](#) concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Poland (2013)6, 6 May 2013, paragraph 217.

contained in the Convention<sup>89</sup> would clash with what they see as the preservation of the “traditional concept of the family”.

#### 4.1.1 CONCLUSIONS AND RECOMMENDATIONS

134. The Commissioner recalls that Article 5 of the Convention on the Elimination of all Forms of Discrimination against Women (hereinafter: CEDAW), ratified by Poland, requires states parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. In its General Comment No. 28,<sup>90</sup> the UN Human Rights Committee stressed that: “(i)nequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes (...) States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.” The Court has also stressed that “gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation”.<sup>91</sup>
135. The Commissioner urges the Polish authorities to reinforce their efforts and take long-term measures to fight against gender-based stereotypes in all sectors and in particular education and the media, in consultation with women’s rights and gender equality experts. In particular, more efforts should be made to deconstruct attacks on gender equality notably by reinforcing the teaching of human rights, critical thinking and democracy in schools and through the use of awareness-raising campaigns in the media and elsewhere. In this respect, the Commissioner encourages the Polish authorities to make full use of the materials developed by the Council of Europe experts in the context of the Council of Europe Gender Equality Strategy 2014-2017.<sup>92</sup>

#### 4.2 NATIONAL MACHINERY FOR THE ADVANCEMENT OF WOMEN

136. There is currently no public institution in Poland dealing specifically with gender equality and women’s rights. A Government Plenipotentiary for the Equal Status of Men and Women was established in 2001, but was replaced by a Department of Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy in 2005. Later on, the Institution of the Government Plenipotentiary for Equal Treatment was established by a Council of Ministers’ Ordinance in 2008 and consolidated with the adoption of the 2010 Law on Equal Treatment. The Plenipotentiary is part of the executive power, is appointed and recalled by the Prime Minister and operates within the Chancellery of the Prime Minister. It does not have a separate budget. Its task is to execute the government’s policy with regard to equal treatment and non-discrimination in general (including on grounds of sex), notably through the National Programme on Equal Treatment.
137. The newly appointed Government Plenipotentiary for Equal Treatment was also designated to deal with civil society and its designation therefore changed to Government Plenipotentiary for Equal Treatment and Civil Society. While his competencies with regards to equal treatment remain the same, his main task as concerns civil society is to prepare the National Programme for the Development of Civil Society and monitor its implementation, as well as coordinate and monitor the state’s co-operation with the NGO sector and other civil institutions. One of the objectives is to increase the level of financial and organisational support for NGOs and increase accessibility to funding opportunities for unrepresented NGO milieus.

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<sup>89</sup> Under Article 3(c) of the Council of Europe Convention on preventing and combating violence against women and domestic violence, “ ‘gender’ shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”.

<sup>90</sup> Human Rights Committee, [General Comment](#) No. 28, Article 3 (The equality of rights between men and women), CCPR/C/21/Rev.1/Add.10, 29 March 2000, paragraph 5.

<sup>91</sup> ECtHR, *Konstantin Markin v. Russia*, 22 March 2012, Application No. [30078/06](#), paragraph 143.

<sup>92</sup> Council of Europe Gender Equality [Strategy](#) 2014-2017.



138. The CEDAW Committee reiterated in 2014 its concern that, since 2006, there is no separate government authority in Poland responsible exclusively for gender equality policies. The Committee was also concerned about the lack of resources and the absence of a separate budget for the Government Plenipotentiary. The Committee further noted with concern the absence of a coordination mechanism to ensure gender mainstreaming at all levels.<sup>93</sup>
139. The Ombudsman also deals with women's rights and gender equality as this institution was designated as the equality body dealing with discrimination in general, including on the grounds of sex. The Ombudsman regularly addresses women's rights issues in his/her work.

#### 4.2.1 CONCLUSIONS AND RECOMMENDATIONS

140. The Commissioner strongly recommends that the Polish authorities reinforce the national machinery for the advancement of women's rights and gender equality by providing all the necessary financial and human resources to institutions dealing with discrimination on the grounds of sex and gender. To this end, he draws attention to the Recommendation of the Council of Europe Committee of Ministers on gender equality standards and mechanisms.<sup>94</sup> The Commissioner stresses that it is important for the Government Plenipotentiary for Equal Treatment and Civil Society to put stronger emphasis on gender equality issues.

#### 4.3 VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

141. The Commissioner recalls that violence against women, including domestic violence, is one of the most widespread human rights violations affecting Council of Europe member states, and combating it must be a top priority.<sup>95</sup> The Istanbul Convention, to which Poland is a party, clearly establishes that violence against women must be understood as a violation of human rights and a form of discrimination. Domestic violence constitutes a form of violence which affects women disproportionately and which is therefore distinctly gendered, as highlighted in the explanatory memorandum to the Istanbul Convention.
142. According to police figures, the vast majority of persons reporting domestic violence are women seeking protection for themselves and their children. For the year 2015, the police registered 69,376 cases of domestic violence against women and 17,392 case of domestic violence against minors, of whom 8,720 were girls.
143. According to a recent survey conducted by the European Union Agency for Fundamental Rights,<sup>96</sup> 19% of Polish women report that they have experienced physical and/or sexual violence by current and/or previous partners, or by any other person since the age of 15 (the average for the EU being 33%).<sup>97</sup> Comparatively and at first sight, this could be understood as Poland being the country with the lowest rate of violence against women in the EU. However, as noted by the survey itself, the figures should be read with caution.<sup>98</sup> Polish women's rights NGOs have informed the Commissioner that these figures do not show the real scale of the problem but rather the low level of awareness in Poland as to what constitutes violence against women and domestic violence.
144. In Poland, the fight against domestic violence is regulated by the Law on Preventing Domestic Violence of 29 July 2005. A 2014-2020 National Programme for Preventing Domestic Violence foresees actions

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<sup>93</sup> Committee on the Elimination of Discrimination against Women, Concluding [observations](#) on Poland (2014) CEDAW/C/POL/CO/7-8.

<sup>94</sup> Recommendation [CM/Rec\(2007\)17](#) of the Committee of Ministers to member states on gender equality standards and mechanisms, adopted on 21 November 2007.

<sup>95</sup> Commissioner for Human Rights, [Human Rights Comment](#) entitled "Fighting violence against women must become a top priority", 29 July 2014.

<sup>96</sup> EU Agency for Fundamental Rights, Violence against women: an EU-wide [survey](#) - Main results, 2014.

<sup>97</sup> *Ibid.*, see p. 28-29 of the survey.

<sup>98</sup> The surveys explains in the introduction that for a country where there is a low figure, an explanation could be that "for example, the subject of violence against women could be considered as something you do not talk about in certain settings and with certain people – including an interviewer who has just entered your home to conduct a survey." See more on the explanations given at p. 25 of the survey.

in four areas: prevention and social education; protection of and assistance to those affected by domestic violence; influence on people using domestic violence; and raising competence of the relevant services. At central level, the Programme is implemented by a National Coordinator in the rank of secretary or undersecretary of state in the office of the Ministry of Family, Labour and Social Policy. The National Coordinator also leads the Monitoring Team for the Prevention of Domestic Violence, a consultative and advisory body to the minister responsible.

145. In 2010, an amendment to the Law on Preventing Domestic Violence introduced the obligation for local authorities to create interdisciplinary teams composed of social assistants, local committees for solving alcohol-related problems, police, educational staff, healthcare staff and representatives from relevant NGOs. The role of the interdisciplinary team is to diagnose, monitor, and take measures to solve problems of domestic violence at local level and in individual cases.
146. While there is no special structure within the police to deal with domestic violence, there is an officer within the prevention division in each *voivodship*, capital city, *poviat*, metropolitan and district headquarters of the police, as well as at the general police headquarters, who is responsible for coordinating the action against domestic violence including the “Blue Cards” procedures (see below). During the visit, the Commissioner met with some of these police officers and could appreciate their knowledge, involvement and commitment to the fight against domestic violence.
147. The Commissioner notes that a number of specialised and/or basic in-service training sessions on domestic violence have been organised for police officers and prosecutors. In 2011, at the request of the Government Plenipotentiary for Equal Treatment, the National School of Judiciary and Prosecution added courses on sexual violence against women to the curriculum for the staff of the judiciary. In 2015, staff of welfare institutions were trained on the rights of victims of sexual violence.
148. Guidelines for the procedure to be followed by prosecutors with regard to counteracting domestic violence and a guide for judges, prosecutors and court probation officers for counteracting domestic violence have been issued and were widely distributed among relevant actors. The guide for judges is used as teaching material at the National School of Judiciary and Prosecution.
149. Despite all these efforts, a number of issues of concern remain. In some cases, women are said to be confronted with indifference, stigmatisation or incredulity on the part of police, prosecutors or judges. Gender bias also plays a role -- for instance judges reportedly sometimes consider the influence of alcohol on a man as an excuse for beating a woman, while a woman found to be alcoholic would be seen as a “suspect” rather than a victim, notwithstanding that women exposed to violence in adulthood actually demonstrate a higher risk of drug and alcohol dependence. This attitude also appears to be reflected in the sanctions imposed on perpetrators of domestic violence, with a high number of suspended sentences being handed down, or the consensual procedure being used in cases where it is not adapted. As concerns medical staff entering into contact with women victims of domestic violence or gender-based violence, it is reported that some members of staff turn a blind eye to the problem or even refuse to communicate medical records to the victim.
150. The Ministry of Justice has confirmed that the highest percentage of all the sentences for domestic violence is that of a conditionally suspended sentence of imprisonment for 2 to 5 years. Information on the gender of offenders, including those convicted under Article 207(1) of the Penal Code (cruelty to relatives) was collected for the first time in 2014. From among 12 699 persons convicted that year, 12,240 were men and 459 were women. From among the victims, 15,119 were women, 3,218 were men and 4,133 were minors, including 1,963 girls and 2,170 boys.
151. The Polish authorities have indicated that each year, there is a marked increase in injunctions issued by courts, as punitive measures or probation orders, to stay away from the victim of domestic violence or to leave the dwelling unit shared with such victims. Furthermore, an increasing number of probation orders are being imposed on perpetrators of domestic violence whereby they are compelled to participate in correctional and educational activities (in 2014: 981 such orders issued, in 2013: 578 and in 2012: 346). However, all interlocutors met during the visit agreed on the need to improve legislation in order to allow for the issuing of restraining orders even before a criminal procedure begins and in emergency situations. For the moment, such tools only exist as a punitive or a probationary measure. Several interlocutors, including from the police, have suggested that the police should be given the possibility to issue restraining orders when there is an immediate threat for the

victim. The Ministry of Family, Labour and Social Affairs has announced that it intends to propose legislative changes to the Law on Police to that purpose.

152. The procedure of “Blue Card” forms was introduced by an Ordinance of the Minister of Labour and Social Policy in 2011. This procedure is independent from and complementary to any other criminal, family and civil law proceedings. It is implemented through the local interdisciplinary teams referred to above and its main purpose is to prevent further domestic violence from occurring and implement individual assistance plans. The procedure is initiated by a representative of a competent service (mostly by a police officer but also by social workers, healthcare staff, teachers, or local committees for solving alcohol-related problems) when he/she suspects domestic violence. The victim of violence is then provided with relevant instructions and invited to a meeting with the interdisciplinary team for a discussion on the most adequate individual assistance plan. The victim may refuse to come but in this case, the procedure can be continued without her/his presence. A separate meeting is organised between the interdisciplinary team and the perpetrator, notably to evaluate the situation of the family and encourage participation in programmes of corrective and educational measures. A Blue Card procedure is terminated when the domestic violence has ceased and if there are strong grounds for believing that there will be no further violence, or if there is a decision stating that the opening of the procedure was not justified.
153. The Blue Card procedure is an interesting tool for the prevention of domestic violence but human rights NGOs consider it far too cumbersome to be effective. Reportedly, the interdisciplinary teams sometimes decide to close a file not because violence has ceased but because they can only keep open the cases they consider the most serious, due to lack of resources. The above-mentioned National Programme envisages the simplification of the procedure.
154. The Commissioner is concerned at information according to which the opening of a criminal or Blue Card procedure is sometimes seen as a tool used by women who are seeking to obtain a divorce “in advantageous conditions”. There is a lack of understanding of how harmful domestic violence can be for the victims. Many people consider that this remains a private matter to be dealt with within the family and does not fall within the remit of criminal law. The first step is therefore to ensure that domestic violence is not seen as a “private and family affair” anymore but as a human rights violation.
155. Concerning shelters for victims of domestic violence, there were 35 public specialised shelters for Poland as a whole in 2015, aiming at protecting victims from further violence and providing professional medical, social, psychological and legal support. These centres are run by local government units at district level, with funds for their maintenance coming from the state budget. They provided assistance to 7,717 persons in 2014. Pursuant to the National Programme, two more such shelters are due to be opened, one in 2018 and another in 2019.
156. In 2014, there were 905 institutions providing some sort of assistance to victims of domestic violence in Poland, including 690 communal institutions and 215 district institutions. Among the institutions, the most numerous are consultation points – 668 (74%), crisis intervention centres – 163 (18%), specialist support centres referred to above – 35 (4%), support centres – 26 (3%), and homes for mothers with small children and pregnant women – 13 (1%).
157. NGOs report that despite this number of public institutions, the lack of specialised shelters remains an issue of concern. For example, shelters for homeless women cannot constitute a solution adapted to the specific assistance and protection needs of a traumatised woman. Thus, for instance the municipal shelter used for accommodating victims of domestic violence in Warsaw is reportedly unfit for this purpose because the duration of stay is too short, its location is too remote and there is a lack of accessible medical assistance adapted to the need of victims of domestic violence. It is therefore not rare that women refuse to go there.
158. The problem for specialised shelters run by NGOs is that their funding is not stable and permanent enough as they are obliged to apply for it every year -- the Commissioner visited one such shelter with an accommodation capacity of 30 people in Warsaw. Another issue is that these shelters all receive the same amount of funding regardless of their capacities and location throughout the country.
159. The National Programme envisages several new measures including the launching of a free 24-hour helpline for victims of domestic violence in 2017; the introduction of new psycho-therapeutic

programmes for perpetrators; the creation of unified statistics broken down by gender; the establishment of two specialist support centres, as mentioned above; an increase in funds for the training of first-contact professionals engaged in the prevention of domestic violence in 2017; and awareness raising initiatives. The authorities have also announced that they will introduce the notion of economic violence which affects in particular elderly persons and persons with disabilities.

160. As concerns violence against women outside the family sphere, the law only prohibits sexual harassment in the field of labour relations, although even in these cases victims reportedly often hesitate to bring complaints. The project on “the rights of sexual violence victims – a new systemic approach. Comprehensive information services, trainings, actions” was implemented between December 2013 and December 2015 by the Office of the Government Plenipotentiary for Equal Treatment. However, the Ombudsman concluded on the basis of a report on preventing violence against women including elderly and disabled women that the national authorities should take into account the specific nature of violence on the grounds of sex, including the special situation of elderly and disabled women. Another conclusion was that measures to protect women in universities, schools or sport as well as in the case of mobbing or sexual harassment outside an employment relationship are also necessary.<sup>99</sup>

#### 4.3.1 CONCLUSIONS AND RECOMMENDATIONS

161. The Commissioner welcomes the ratification by Poland of the Council of Europe Convention on preventing and combating violence against women and domestic violence and the many legislative and other measures which have been taken by the authorities to combat domestic violence. He encourages the authorities to sustain their efforts and urges them to fully implement the Convention and the National Programme for the Prevention of Domestic Violence.
162. The Commissioner encourages the Polish authorities to follow-up as soon as possible on their announced intention to improve legislation in order to allow for the issuing of restraining orders in cases of domestic violence even before a criminal procedure begins and in emergency situations.
163. The Commissioner recommends that the authorities review the Blue Card procedure to improve its efficiency notably by removing obstacles resulting from excessive bureaucracy. The police, prosecution authorities, judges, educational and medical staff should be better trained and made aware of the problems of violence against women and domestic violence. The establishment of specialised units in the police, prosecution services, judiciary, health care and assistance centres would also be an improvement.
164. The Commissioner recommends that the Polish authorities allocate adequate and sustainable funds to ensure the proper running of shelters for women victims of violence run by specialised NGOs throughout Poland.
165. The Polish authorities should draw on the good practices identified in the framework of the Council of Europe Gender Equality Strategy and follow the recommendations made in the General recommendation on women’s access to justice issued by the CEDAW Committee in July 2015.<sup>100</sup>
166. As concerns violence against women outside the sphere of domestic violence, the Commissioner recommends that the Polish authorities better take the gender aspect of the problem into account and develop gender-based campaigns to counter violence against women, including rape, sexual harassment, and verbal and physical attacks against women on the grounds of their gender.

#### 4.4 DISCRIMINATION BASED ON GENDER AND SEX

167. The Commissioner notes that in recent years the Polish Ombudsman highlighted the issue of the insufficient participation of women in public life and decision-making and the clear lack of gender balance at senior positions in business companies. While the current Prime Minister is a woman (as

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<sup>99</sup> See Human Rights Defender, [Summary](#) of the Report on the Activity of the Ombudsman in Poland in 2013, Warsaw, June 2014, p. 63.

<sup>100</sup> CEDAW Committee, [General recommendation on women’s access to justice](#), 23 July 2015.

was her predecessor), the representation of women in politics overall remains weak. In spite of amendments brought in 2011 to the Electoral Act, which introduced a minimum requirement whereby either gender must make up at least 35% of candidates on lists for municipal, district, regional, national and European Parliament elections, only 27% of the Parliament elected in October 2015 is made up by women. Several interlocutors called for the introduction of amendments to the Electoral Law with a view to placing candidates, women and men, in alternating positions on electoral lists (so-called “slide” or “zip” system in order to achieve parity) as also recommended by the CEDAW Committee in 2014.<sup>101</sup> The number of women influencing the most important economic and financial decisions is still much lower than men. In 2014, women represented less than 15% of the members of management and supervisory boards. The Ombudsman called already in 2013 for a statutory regulation requiring gender balance in management and supervisory boards of companies, in particular those functioning with the participation of the state.<sup>102</sup>

168. As to employment, the gender pay gap remains significant. Reasons for women not having paid jobs include the fact that the existing parental leave is in fact almost always taken by the woman and that there is a lack of institutional day-care. According to a recent study commissioned by the Ombudsman, women are the ones who bear the primary burden of care for children and unpaid work at home, while fathers only occasionally take part in household chores. Such a situation leads to the unequal treatment of women with regard to employment.<sup>103</sup>
169. In 2014 the CEDAW Committee expressed concern that the National Action Plan for Equal Treatment 2013-2016 does not sufficiently address women’s rights and their protection from discrimination.
170. While discrimination on the grounds of sex is generally prohibited, there is still a need to train lawyers and judges on the existence of these provisions. The small number of complaints may well be an indicator of the lack of awareness-raising among women and judicial actors. Another issue is that existing programmes to combat discrimination do not have a special focus on discrimination against women.
171. Another problem raised with the Commissioner during his visit is the lack of understanding of the need for temporary special measures aimed at preventing or compensating for deep-rooted gender inequalities where women have been disadvantaged for decades. It has been reported to the Commissioner that the Polish authorities sometimes see these measures as potentially discriminatory towards men. For instance, an NGO that assists women victims of violence and not men has reportedly been refused public subsidies on that ground.

#### 4.4.1 CONCLUSIONS AND RECOMMENDATIONS

172. The Commissioner notes with concern the continuing gender gap in employment and the prevalence of other forms of discrimination affecting women in Poland. He considers that the Polish authorities should guarantee a much better participation of women in education, political and business life, taking account of the relevant Council of Europe standards.<sup>104</sup> In addition, the Commissioner urges the authorities to take measures to address unequal treatment of women in employment and in particular the gender pay gap.
173. The Commissioner draws the attention of the Polish authorities to the fact that in international and European human rights instruments, special temporary measures and other types of positive measures designed to prevent or compensate for deep-rooted gender inequalities and disadvantage

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<sup>101</sup> Committee on the Elimination of Discrimination against Women, Concluding [observations](#) on Poland (2014) CEDAW/C/POL/CO/7-8.

<sup>102</sup> See Human Rights Defender, [Report](#) on the Activity of the Ombudsman in the area of Equal Treatment in 2013, Warsaw, June 2014, p.93.

<sup>103</sup> See the [Study](#) on ‘Compromise between Family and Job Roles. Equal Treatment of Parents on the Labour Market’, available only in Polish.

<sup>104</sup> See, in particular, Recommendation [CM/Rec\(2007\)13](#) on gender mainstreaming in education and Recommendation [Rec\(2003\)3](#) on balanced participation of women and men in political and public decision making of the Committee of Ministers.

do not constitute discrimination. Quite the contrary, they may be necessary to reach *de facto* equality between women and men in Poland.

#### 4.5 SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

174. The Commissioner recalls that women's sexual and reproductive health and rights are human rights. There are numerous international and European legal instruments under which these rights are guaranteed, as widely illustrated by the case law and guidelines of various human rights bodies. In particular, Article 16(e) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) guarantees women's rights in deciding freely and responsibly about the number and spacing of their children and their right to access information, education and means to enable them to exercise these rights.<sup>105</sup> Furthermore, in its General Comment No. 22 on the Right to Sexual and Reproductive Health, the Committee on Economic, Social and Cultural Rights stressed that "due to women's reproductive capacities, the realisation of women's right to sexual and reproductive health is essential to the realisation of the full range of their human rights".<sup>106</sup> The Commissioner agrees with the conclusion held by several UN Human Rights bodies that "(l)ack of or limited access to sexual and reproductive health services, and at times the criminalisation of those accessing or providing such services is the result of discrimination against women and girls, including gender stereotyping".<sup>107</sup> In Poland, persisting discrimination and gender stereotypes as described above also have a negative impact on women's sexual and reproductive health and rights. In this section, the Commissioner focuses on access to sexuality education, contraception and safe and legal abortion.

##### 4.5.1 ACCESS TO SEXUALITY EDUCATION

175. Teaching sexuality education in schools is essential to guarantee women's sexual and reproductive rights. The authorities indicate that sexuality education is part of several classes including family life education classes and is provided for pupils aged 11 and over. However parents can decide to exempt their children from these classes. NGOs also stressed that teachers teaching sexuality education generally lack sufficient training and knowledge in the field of sexual and reproductive health and rights. In some cases, teachers reportedly provide courses based on their personal point of view.
176. When it comes to awareness raising campaigns, NGOs have indicated that the government campaigns focus on cancer and HIV/AIDS prevention. Information campaigns on issues such as promoting responsible sexual behaviour and knowledge of contraceptive methods are organised by specialised NGOs and medical associations.

##### 4.5.2 ACCESS TO CONTRACEPTION

177. In Poland, access to contraception is hindered by several factors, including the clause of conscientious objection invoked by some doctors who refuse to prescribe -- and some pharmacists who refuse to deliver contraceptive devices. NGOs report that refusals of reproductive health care services continue to be very frequent and women are often unable to find a health care provider willing to deliver these services. The legislation in force contains no references to ensuring women's access to modern contraceptive choices and an attempt to improve the legislation in this regard failed in 2012.
178. Under the Law on Doctors and Dentists Professions, if a minor wishes to have access to contraceptive methods, the doctor requires the parents' consent for the necessary medical examinations, which may represent a considerable obstacle to access. Contraceptive pills are reimbursed at 30% and many other, more modern, female contraceptive devices are not reimbursed at all by health insurance. This

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<sup>105</sup> Article 16(e) of the CEDAW.

<sup>106</sup> Committee on Economic, Social and Cultural Rights, [General Comment](#) No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 4 March 2016.

<sup>107</sup> See [Open letter](#) by the Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the CEDAW Committee on the inadequate recognition of sexual and reproductive health and rights in the Post-2015 Development Agenda, November 2014.

is reported to create a barrier, especially for persons in difficult economic situations, in accessing contraceptive methods tailored to their needs.<sup>108</sup>

#### 4.5.3 ACCESS TO SAFE AND LEGAL ABORTION

179. Poland has one of the most restrictive laws on abortion in Europe. Under the 1993 Law on Family Planning, Human Fetus Protection, and Conditions for Abortion, abortion is permitted in three circumstances only: 1) when the pregnancy endangers the life or health of the pregnant woman, abortion is permitted at any stage; 2) when prenatal tests or other medical findings indicate a high risk that the fetus will be severely and irreversibly damaged or suffer from an incurable life-threatening ailment, abortion is permitted until the fetus is capable of surviving outside the pregnant woman's body; and 3) when there are strong grounds for believing that the pregnancy is the result of a criminal act, abortion is permitted until the end of the first 12 weeks of pregnancy. Outside these three situations, abortion is criminalised and doctors or anyone else performing an abortion risk a sentence of imprisonment of up to three years. The pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Law.
180. In his 2007 Memorandum to the Polish Government, the Commissioner's predecessor recommended that the Polish authorities ensure that women falling within the categories foreseen by the Polish abortion law are allowed, in practice, to terminate their pregnancy without additional hindrance and reproach.
181. Since this recommendation, the Court has condemned Poland in three judgments concerning access to abortion, each relating to one of the three different situations where a legal abortion is possible under Polish law. In *Tysic v. Poland*,<sup>109</sup> there was a dispute between the pregnant woman and the doctor as to whether the conditions for legal abortion on grounds of a threat to the woman's health were met. The case *R.R v. Poland*,<sup>110</sup> concerned a possible fetus malformation confirmed by an initial diagnosis. In the most recent case, *P. and S. v. Poland*,<sup>111</sup> a 14-year old girl, who was pregnant as a result of a rape, was seeking to obtain an abortion with the help of her mother. In addition to the lack of access to legal abortion and the ensuing violations of Article 8 ECHR (Right to respect for private and family life), the Commissioner notes with serious concern that the Court ruled twice that Poland had violated Article 3 ECHR (prohibition of torture and inhuman and degrading treatment) as a result of the way in which the authorities had treated women who were seeking a legal abortion and/or a prenatal genetic testing in connection with a legal abortion. In the *R.R v. Poland* case, the Court expressed its regret that the applicant was "so shabbily treated by the doctors dealing with her case". In the *P. and S. v. Poland* case the Court considered that the girl was treated by the authorities in a deplorable manner and that her suffering reached the threshold of severity under Article 3 ECHR. In the Commissioner's view the three above-mentioned judgments of the Court indicate that much remains to be done in Poland to ensure women's effective access to safe and legal abortion.

##### 4.5.3.1 CLAUSE OF CONSCIENCE

182. Pursuant to the Law of 5 December 1996 on Doctors and Dentists Professions, doctors may refuse to perform any medical act, including abortion, that is against their conscience (so called "conscientious objection clause" or "clause of conscience"). Doctors have the obligation to indicate realistic options for receiving such services from another doctor or medical institution and to justify and duly note the decision in medical records. However, there are several shortcomings in the current legal and institutional framework of conscience-based refusal to perform a legal abortion. There is no obligation to provide abortion services where the procedure is urgently required as a matter of medical emergency or where a referral is not possible. Sometimes entire healthcare facilities (including public ones) rather than just individual doctors invoke the conscientious objection clause to refuse to perform legal abortions. The practice of invoking the conscientious objection clause is reportedly

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<sup>108</sup> See International Planned Parenthood Federation (IPPF) - European Network, [Barometer](#) on Women's Access to Modern Contraceptive Choice, Poland, 2013, p. 40-41.

<sup>109</sup> ECtHR, *Tysic v. Poland*, Application No. [5410/03](#), 20 March 2007.

<sup>110</sup> ECtHR, *R.R v. Poland*, Application No. [27617/04](#), 26 May 2011.

<sup>111</sup> ECtHR, *P. and S. v. Poland*, Application No. [57375/08](#), 30 October 2012.

increasing in Poland. This is illustrated by the fact that almost 4,000 Polish doctors signed a “Declaration of Faith of Catholic doctors and medical students regarding human sexuality and fertility”, expressing their commitments to following “divine law” in their professional work. NGOs report that in this context, women are often unable to find a health care provider willing to perform a legal abortion.

183. In this connection, the Commissioner underlines that the Court has ruled that states are obliged to organise their health service system in such a way as to ensure that the exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.<sup>112</sup> However, on 7 October 2015, Poland’s Constitutional Tribunal ruled that the legal duty imposed on objecting doctors to refer women to an alternative facility or practitioners, in order for them to access legal abortion, was unconstitutional. The Polish authorities have indicated that they must now change the legal provisions in force in the light of the Tribunal’s judgment with a view to respecting the doctor’s clause of conscience and at the same time the rights of patients.
184. The Commissioner notes a recent decision of the European Committee of Social Rights (concerning Italy), in which the complainant organisation argued that the vast majority of medical practitioners and other health personnel exercised the right to conscientious objection, thereby preventing effective access to abortion procedures and undermining the right of women to the protection of their health.<sup>113</sup> The Committee concluded that the women seeking access to abortion services continued to face substantial difficulties in obtaining access to such services in practice, notwithstanding the provisions of the relevant legislation. It noted the deficiencies in service provision caused by health personnel who decide to invoke their right of conscientious objection and the fact that as a consequence, women seeking emergency abortions may be forced to move to other health facilities, in the country or abroad, or to terminate their pregnancy without the support or control of the competent health authorities, or may be deterred from accessing abortion services to which they have a legal entitlement in line with national legislation. It therefore held that there was a violation of Article 11§1 (right to health) of the Revised European Social Charter. The Committee also noted that pregnant women seeking to access abortion services are treated differently depending on the area in which they live; this may by extension have an adverse impact on women in lower income groups who may be less able to travel in order to access abortion services. Given that women seeking access to legal abortion services are treated differently from women seeking access to other lawful forms of medical procedures, which are not provided on a restricted basis, the difference in treatment on the grounds of health status, territorial location and socio-economic grounds constituted a violation of Article E (non-discrimination) in conjunction with Article 11 of the Charter.

#### 4.5.3.2 APPEAL PROCEDURE AGAINST REFUSAL TO PERFORM PRENATAL TESTING AND/OR A LEGAL ABORTION

185. In 2007 the Commissioner’s predecessor recommended the creation of an appeal procedure whereby the decision of a doctor not to issue a certificate permitting an abortion (outside the case of conscientious objection) be subject to review. Since then, the Parliament adopted the Law of 6 November 2008 on Patient’s Rights and on the Commissioner for Patients’ Rights, which establishes a general framework to object to a medical decision, including the refusal to permit an abortion. The authorities report that in 2014 the Commissioner for Patient’s Rights received 34 objections, including two relating to the admissibility of termination of pregnancy. However human rights NGOs and the Ombudsman have stressed that the 2008 Law does not constitute a timely and effective mechanism by which pregnant women can challenge a refusal to provide prenatal testing or legal abortion services. The procedure is too complicated, long and ineffective.<sup>114</sup> The time-limit of 30 days for the Medical Board to issue its decision can hardly be considered timely in the case of prenatal testing or abortion.

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<sup>112</sup> Ibid., paragraph 206.

<sup>113</sup> European Committee of Social Rights, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, [Decision](#) on admissibility and the merits, 12 October 2015, published on 11 April 2016, see paragraphs 189-193 and 204-213.

<sup>114</sup> See Human Rights Defender, [Summary](#) of the Report on the Activity of the Ombudsman in Poland in 2014, Warsaw, May 2015, p. 71.



186. As concerns procedural safeguards, the framework in place does not appear to meet the requirements issued by the Court in its case-law on Poland. There is no obligation to record the refusal in writing and the right of the women to be heard by the Medical Board is not guaranteed. What is more, even if a woman secures a positive decision by the Medical Board, it appears that she may often not be able to obtain the relevant services on this basis. There is also a lack of efficient oversight and monitoring mechanisms to guarantee that prenatal testing is available and accessible in practice.<sup>115</sup>

#### 4.5.3.3 CHILLING EFFECT OF CRIMINALISATION OF ABORTION

187. The criminalisation of abortion in cases other than those allowed by law combined with the lack of clarity of the legal framework in force creates a chilling effect on doctors who would be ready to perform the abortion, and who must decide whether the requirements for legal abortions are met in specific cases, as also noted by the Court.<sup>116</sup>

188. The Commissioner is also worried to learn that societal pressure is sometimes so intense that women are afraid of seeking a legal abortion, for fear of a backlash and harassment on the part of certain segments of society, and therefore resort to clandestine abortions, which according to estimates could reach 150,000 per year. Women who can afford it financially travel abroad to abort.

189. The Commissioner is concerned to learn about a bill prepared by a group of citizens to introduce a total ban on abortion, which would mean that abortion would be prohibited except to save a pregnant woman's life. This bill would require the signatures of 100,000 citizens to be brought to Parliament.

#### 4.5.4 CONCLUSIONS AND RECOMMENDATIONS

190. The Commissioner expresses his concern at the regressive trends in Poland which hamper women's access to sexual and reproductive health and rights and endanger progress achieved so far in the field of gender equality. The Commissioner considers that the focus should be on preventing unwanted pregnancies, not on limiting women's choices. He stresses that women, including adolescent girls, are entitled to receive sexual and reproductive health information that is evidenced-based, non-discriminatory, and respectful of their dignity and autonomy.

191. The Commissioner stresses that sexuality education in schools is crucial for the protection of the sexual and reproductive rights of all and, in particular, of women. The UN Committee on the Rights of the Child has underlined that states should ensure that adolescents have access to appropriate information on sexual and reproductive issues, including family planning, contraception and the prevention of sexually transmitted diseases.<sup>117</sup> The Commissioner therefore urges the Polish authorities to ensure that mandatory, comprehensive sexuality education that is age-appropriate, evidence-based, scientifically accurate and non-judgmental be taught in all schools in Poland.

192. The Commissioner recommends that the Polish authorities take all necessary measures to remove barriers in access to contraception for all women throughout Poland.

193. As concerns access to safe and legal abortion in particular, the Commissioner draws the Polish authorities' attention to the view of the Parliamentary Assembly of the Council of Europe that "the lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion" and that a ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality.<sup>118</sup> Where they result in abortions performed abroad, these bans also entail costs, delay the timing of an abortion

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<sup>115</sup> See Center for Reproductive Rights, (Polish) Federation for Women and Family Planning, [Communication](#) under Rule 9(2) of the Committee of Ministers in the case of R.R. v. Poland (Application No. 27617/04), 27 April 2015.

<sup>116</sup> In the *Tysiąc v. Poland* case, the Court stated that "legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case" see paragraph 116.

<sup>117</sup> See in particular UN Committee for the Rights of the Child, [General comment](#) No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15.

<sup>118</sup> [Resolution 1607 \(2008\)](#) of the Parliamentary Assembly of the Council of Europe on access to safe and legal abortion in Europe.

and result in social inequities. For these reasons, the Parliamentary Assembly invited the member states of the Council of Europe to decriminalise abortion within reasonable gestational limits.

194. The Commissioner recommends that the Polish authorities take all necessary measures to ensure that access to safe and legal abortion as provided by law is fully implemented in practice. In this regard, it is important that the Polish authorities fully and effectively execute the three judgments of the Court mentioned above. All existing barriers should be removed, including by ensuring that the practice of opposing conscientious objection by medical practitioners does not hamper access to safe and legal abortion. The Polish authorities should therefore ensure in such cases that throughout the country women seeking an abortion be referred in a timely and efficient manner to another medical practitioner and receive appropriate medical services. Women should also be given access to a timely and efficient procedure to appeal against refusal to perform prenatal testing and/or a legal abortion.
195. The Commissioner notes the chilling effect on doctors resulting from the criminalisation of abortion, when deciding whether the requirements of legal abortion are met in an individual case. He recalls that the Court considered that provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this chilling effect. The Commissioner encourages the Polish authorities to further decriminalise abortion within reasonable gestational limits as a way to alleviate the chilling effect on doctors.
196. The Commissioner considers that introducing a total ban on abortion would constitute serious backsliding on women's rights. He notes that relevant international bodies, and in particular the Human Rights Committee and the CEDAW Committee, on several occasions highlighted concerns relating to the criminalisation of abortion, notably owing to the severe mental suffering caused by the denial of abortion services in cases of rape, incest, serious risks to the health of the mother, or fatal fetal abnormality.<sup>119</sup> The Commissioner therefore strongly urges the Polish authorities to keep lawful, at a minimum, abortions performed to preserve the physical and mental health of women, or in cases of fatal foetal abnormality, rape or incest.

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<sup>119</sup> See the [Concluding observations](#) of the UN Human Rights Committee on Ireland, CCPR/C/IRL/CO/4 (2014), paragraph 9.