The impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland

O impacto da jurisprudência do Tribunal Constitucional nos parâmetros de prisão cautelar na Polônia

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Abstract: Detention on remand is intrinsically linked to the fundamental rights and freedoms of the individual and, in particular, to personal freedom, the right to a fair trial and the principle of the presumption of innocence. This paper explores the constitutional dimension of the application of detention on remand in Poland. Its first part outlines the constitutional values that are violated as a result of detention on remand. The status of the principle of proportionality is pointed out, both in constitutional law and in the criminal law procedure. In further parts, the article presents the role of the Constitutional Tribunal in Poland and analyzes its case law on detention on remand. The jurisprudence of the Constitutional Tribunal in Poland emphasizes the directive to minimize the duration and the principle of proportionality of preventive measures, which imply that detention on remand may only be used *ultima ratio*. In particular, the paper focuses on the rulings concerning the premises for detention on remand, the access to the file of the pre-trial proceedings in the part concerning the decision to apply detention on remand, the access of the persons detained on remand to defense counsels, the duration of detention on remand, and the contact of the persons subject to the most severe preventive measure with their loved ones.

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Keywords: detention on remand; the Constitutional Tribunal; criminal proceedings; access to a lawyer; access to the file of pre-trial proceedings; Poland.

Resumo: *Prisão cautelar é intrinsicamente relacionada aos direitos e liberdades individuais do indivíduo e, em particular, com a liberdade pessoal, o direito ao devido processo e o princípio da presunção de inocência. Este artigo explora a dimensão constitucional da aplicação da prisão cautelar na Polônia. Sua primeira parte destaca os valores constitucionais que são violadas em consequência da prisão cautelar. O status do princípio da proporcionalidade é ressaltado, tanto no direito constitucional como no direito processual penal. Posteriormente, o artigo apresente o papel do Tribunal Constitucional da Polônia e analisa a sua jurisprudência sobre prisão cautelar, que enfatiza a diretiva para minimizar a duração e o princípio da proporcionalidade das medidas cautelares, o qual determina que a prisão cautelar pode ser utilizada como como ultima ratio. Em particular, a pesquisa analisa decisões que tratam do acesso aos autos da investigação na parte relacionada à prisão cautelar, do acesso da pessoa detida ao advogado, da duração da prisão cautelar e do contato do preso com seus familiares.*

Palavras-chave: *prisão cautelar; Tribunal Constitucional; processo penal; acesso à defesa técnica; acesso aos autos da investigação; Polônia.*

I. Introduction

The issue of detention on remand continues to arouse interest among legal scholars and poses numerous questions for practitioners of the justice system[2]. These questions concern the role of detention on remand,

[2] In this paper, I use the term "detention on remand" because it better reflects its scope of application of this institution. I am aware that some authors, when analyzing the criminal process institution under examination, use the term "pre-trial detention"; KLEPCZYŃSKI, Adam; KŁADOCZNY, Piotr; WIŚNIEWSKA, Katarzyna. The Trials of Pre-trial Detention. Report. A review of the existing practice of application of pre-trial detention in Poland. Warsaw: The Helsinki Foundation for Human Rights, 2019, pp. 7-32; MORGENSTERN, Christine; Chapter 21 Poland. In: VAN KALMTHOUT, Anton; KNAPEN, Marije; MORGENSTERN, Christine (eds.). Pre-trial Detention in the European Union An Analysis of Minimum Standards in Pre-trial

the rationale for its application, its duration, and the contacts between the detainees and their lawyers or family members. This is not surprising, since detention on remand is one of the preventive measures provided for by the Polish Code of Criminal Procedure (CCP)[3]. Detention on remand has always been viewed by the doctrine as a dangerous and tempting instrument of executive state power[4]. It is an isolating measure that deeply interferes with rights and freedoms of detainees. The grievousness of detention on remand is due to its direct interference in the sphere of human freedoms. The degree of the interference is so high that it leads to a complete abolition of the detainees' personal freedom. This makes it necessary to indicate precisely who, for what period of time, and according to what rules makes decisions on the application of detention

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Detention and the grounds for Regular Review in the Member States of the EU. Nijmegen: Wolf Legal Publishers, 2009, pp. 717-752; MCSHERRY, Bernadette. Pretrial and Civil Detention of "Dangerous" Individuals in Common Law Jurisdictions. In: BROWN, Darryl K.; TURNER, Jenia Iontcheva; WEISSER, Bettina. The Oxford Handbook of Criminal Process. Oxford: Oxford University Press, 2019, pp. 522-540, https://doi.org/10.1093/oxfordhb/9780190659837.013.28. I believe that the latter term does not fully reflect the meaning of the institution under examination. The term "pre-trial detention" refers only to preliminary proceedings, i.e. the first stage of criminal proceedings in Poland, while the term "detention on remand" also covers depriving the accused of his or her liberty for a predetermined period of time during court proceedings.

[3] The Polish Code of Criminal Procedure provides for the following types of preventive measures: (1) detention on remand; (2) financial surety; (3) surety of a social organization; (4) surety of a trustworthy person; (5) police supervision; (6) order to temporarily leave a premises; (7) suspension of the execution of official duties, and (8) prohibition to leave the country. On the preventive measures in the Polish Code of Criminal Procedure, see: JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, pp. 208-281-297. The Practice of pre-trial detention in Poland Research Report, Helsinski Foundation for Human Rights, Warsaw. 2015, p. 25-43, https://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf; -WILIŃSKI, Paweł; Proces karny w świetle Konstytucji [Criminal Trial in the Light of the Constitution]. Warszawa:Wolters Kluwer Polska, pp. 202-220, 2011.

[4] MORGENSTERN, Christine; KROMREY, Hans. Towards Pre-trial Detention as *Ultima Ratio*. Available at: https://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf. Accessed on March 12, 2022.

on remand[5]. It is therefore important that the grounds for deprivation of an individual's freedom are clearly defined and that the application of a given legal provision is foreseeable. This is a fundamental requirement resulting from the principle of legal certainty and the application of the principle of proportionality expressed in Article 31(3) of the Polish Constitution[6]. It boils down to an examination of whether a particular legal provision meets the following three requirements: usefulness, necessity, and proportionality in the strict sense of the word. These requirements are met if: (1) the legal provision introduced is capable of producing the effects it is intended for (the principle of utility); (2) the provision is necessary for the protection of the public interest to which it is linked (the principle of necessity); and furthermore (3) its effects are in proportion to the burdens it imposes on the citizen (the principle of proportionality in the strict sense of the word)[7]. The third principle is of particular importance. It indicates that if it is possible for the legislator to achieve its objective with a less painful measure, then the legislator's use of a significantly more painful measure that leads to a significant restriction of rights and freedoms violates the constitutional principle of proportionality[8].

The above assumption is extended by Article 257 of the CCP, which expresses the directive to minimize detention on remand (the principle of *ultima ratio*), which means that detention on remand should be used as a last resort when other (non-custodial) preventive measures cannot secure the proper course of criminal proceedings. Consequently,

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5 See: Resolution of the Supreme Court (7) of 30 October 1997, I KZP 26/97, OSNKW 1997/11-12, item 89, as well as Resolution of the Supreme Court of 23 April 1998, I KZP 2/98, OSNKW 1998/5-6, item 24.

6 ŚLEDZIŃSKA-SIMON, Anna; Proportionality Analysis by the Polish Constitutional Tribunal. In KREMNITZER Mordechai; STEINER Talya; LANG Andrej (eds.). Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice. Cambridge: Cambridge University Press, 2020, pp. 385-457.

7 Cf.: judgments of the Constitutional Tribunal of 11 April 2006, ref. SK 57/04, OTK ZU no. 4/A/2006, item 43, and of 11 April 2000, ref. K. 15/98, OTK ZU no. 3/2000, item 86.

8 Cf.: judgments of the Constitutional Tribunal of 11 May 1999, ref. K 13/98, OTK ZU no. 4/1999, item 74, and of 29 June 2001, ref. K. 23/00, OTK ZU no. 5/2001, item 124.

a conclusion that a non-custodial preventive measure is sufficient in a criminal case requires prohibition of the use or continuation of detention on remand[9]. This solution refers to the constitutional principle of proportionality. To be proportionate, detention on remand must be necessary to ensure the presence of the concerned person at the trial and detention must be the only way to achieve that aim. Hence, whenever other, less stringent measures are sufficient for that purpose, detention is not proportionate[10]. Such an assumption is consistent with Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that detention on remand can either be based on reasonable suspicion of that person having committed an offense or "when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so."[11]. Undoubtedly,

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[9] The directive to minimize detention on remand is emphasized in the case law of the ECtHR, see, the ECtHR judgement of 4 October 2005 in the case of *Kankowski v. Poland*, application no. 10268/03, https://hudoc.echr.coe.int/eng?i=001-70368; the ECtHR judgement of 13 September 2005 in the case of *Skrobol v. Poland*, application no. 44165/98, https://hudoc.echr.coe.int/eng?i=001-70114; e ECtHR judgement of 28 July 2005 in the case of *Czarnecki v. Poland*, application no. 75112/01, https://hudoc.echr.coe.int/eng?i=001-69978. In its case law, the ECtHR emphasizes the obligation to consider the use of measures alternative to detention on remand in order to secure the proper course of criminal proceedings. The judgements of the ECtHR related to "Polish" applications indicate that the practice of use and extension of detention on remand in Poland is assessed critically from the point of view of the standards set out in Article 5(3) of the ECHR. The most frequent criticisms of the courts in these judgements include their failure to examine whether the application of another, non-custodial preventive measure would be sufficient in the case to secure the proper course of the proceedings.

[10] MERKEL, Grischa. Detention before Trial and Civil Detention of Dangerous Individuals. In: BROWN, Darryl K.; TURNER, Jenia I.; WEISSER, Bettina. The Oxford Handbook of Criminal Process. Oxford: Oxford University Press, 2019. p. 508.

[11] The directive to minimize detention on remand is emphasized in the case law of the ECtHR, See, see, the ECtHR judgement of 4 October 2005 in the case of *Kankowski v. Poland*, application no. 10268/03, https://hudoc.echr.coe.int/eng?i=001-70368; the ECtHR judgement of 13 September 2005 in the case of *Skrobol v. Poland*, application no. 44165/98, https://hudoc.echr.coe.int/eng?i=001-70114; e ECtHR judgement of 28 July 2005 in the case of *Czarnecki v. Poland*, application no. 75112/01, https://hudoc.echr.coe.int/eng?i=001-69978. In its case law, the ECtHR emphasizes the obligation to

the requirement of legitimate purpose serves the principle of *ultima ratio* but also the presumption of innocence: requiring detention on remand to serve a specific purpose is key to avoiding a situation where deprivation of liberty is used as an "anticipation of punishment."[12] Therefore, justifying detention on remand appears crucial for its rational use.

The aforementioned directive is a consequence of the fact that the Constitution of the Republic of Poland gives a high priority to personal freedom. Pursuant to Article 41(1) of the Constitution, everyone is guaranteed personal inviolability and personal freedom, and deprivation or restriction of freedom may take place only according to the principles and in the manner specified by a statute. Article 41(1) of the Constitution is applicable to the assessment of both the provisions specifying the prerequisites for the use and extension of detention on remand and the provisions on the possibility of repealing or changing this measure to one that is less severe.

The constitutional standard for a decision to deprive a person of his or her freedom is not limited to Article 41(1) of the Constitution. In its further parts, Article 41 of the Constitution guarantees to the person deprived of freedom, and therefore also to the person detained on remand, the right to review the legality of the deprivation of freedom[13].

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12 MARTUFI, Adriano; PERISTERIDOU Christina. The Purposes of Pre-Trial Detention and the Quest for Alternatives, European Journal of Crime, Criminal Law and Criminal Justice, vol. 28, n. 2, p. 155, 2020. https://doi:10.1163/15718174-bja10002. For the *ultima ratio* principle in the use of preventive measures, see: MORGENSTERN, Christine, KROMREY, Hans. Towards Pre-trial Detention as *Ultima Ratio*, available at: https://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf, accessed on March 12, 2022.

13 MORGENSTERN, Christine. Chapter 21 Poland. In VAN KALMTHOUT, Anton; KNAPEN, Marije, MORGENSTERN, Christine (eds.). Pre-trial Detention

The review of the legality of the deprivation of freedom must cover not only the legality of the very decision to deprive the person of freedom, its rationale, and the manner in which it was taken, but also the manner in which it was carried out and the duration of the deprivation of freedom. The right to appeal implies that the court is given appropriate powers to conduct evidentiary proceedings to comprehensively examine the circumstances of the deprivation of freedom. The primary purpose of this arrangement is to bring about the release of a person unlawfully deprived of freedom as quickly as possible.

The provisions of Article 41 of the Polish Constitution are supplemented by Articles 45, 78, and 176(1) of the Constitution. The first of the above-mentioned articles was inspired by the content of Article 14 of the International Covenant on Civil and Political Rights and of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It provides that everyone is entitled to a fair and public hearing of his or her case without undue delay by a competent, independent, impartial, and independent court[14]. In accordance with Article 78 of the Constitution, each party has the right to appeal against judgments and decisions issued in the first instance, while Article 176(1) of the Constitution indicates the two-instance nature of court proceedings.

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in the European Union An Analysis of Minimum Standards in Pre-trial Detention and the grounds for Regular Review in the Member States of the EU. Nijmegen: Wolf Legal Publishers, 2009, p. 720.

[14] Due to Poland's membership in the European Union, the use of detention on remand should be compliant with EU law. For information on this standard, see: BAKER, Estella; HARKIN, Tricia; MITSILEGAS, Valsamis; PERŠAK, Nina. The Need for and Possible Content of EU Pre-trial Detention Rules, *Eucrim*, n. 3, pp. 221-229, 2020, https://doi.org/10.30709/eucrim-2020-020; MANCANO, Leandro. The Use of the Charter and Pre-trial Detention in EU Law: Constraints and Possibilities for Better Protection of the Right to Liberty. *European Papers*. vol. 6. n. 1, pp. 125-139, 2021, https://doi.org/10.15166/2499-8249/457; SKORUPKA, Jerzy. Standard dostępu do informacji o podstawie dowodowej tymczasowego aresztowania w prawie unii europejskiej i prawie polskim (Standard of Access to Information about the Evidential Base of Provisional Detention in European Union and Polish Law). Przegląd Prawea i Administracji, v. CXX, n. 2, pp. 241-253, 2020. https://doi.org/10.19195/0137-1134.120.66.

In terms of the legal situation of a person detained on remand, the right to defense, which is set out in Article 42(2) of the Polish Constitution, cannot be overlooked. Pursuant to this provision, everyone against whom criminal proceedings are conducted has the right to defense at all stages of those proceedings. The provision of Article 42(2) of the Polish Constitution is the standard of review of the applicable provisions of the CCP insofar as those provisions impose restrictions on the confidentiality of contacts between an accused detained on remand and his or her counsel, and restrict access to the file of the pre-trial proceedings.

The indicated provisions set out the constitutional framework for the protection of a person detained on remand. They are also a model for the legislator for adoption of laws that concern deprivation of freedom. However, the constitutional standard for deprivation of liberty has not always been upheld by the legislature. In several rulings, the Constitutional Tribunal found the provisions of the CCP regarding detention on remand to be contrary to the Polish Constitution. . The reason for such decisions of the Tribunal was either the lack of precision of the provisions of the CCP or the occurrence of disproportionate interference with the freedoms and rights set forth in the Polish Constitution. However, the Constitutional Tribunal has not always challenged the existing legislation. It sometimes recognized the legitimacy of a limitation of a constitutional value because of the need to safeguard the proper course of the proceedings and, exceptionally, to prevent the defendant from committing a new, serious crime. In these situations, the Tribunal not only indicated the compatibility of the provisions of the CCP with the Constitution, but also specified the interpretation. Following such actions, the Constitutional Tribunal set the constitutional standard for detention on remand in Poland and for protection of rights of individuals in criminal proceedings. Such activity by the Constitutional Tribunal demonstrates that modern criminal law procedure is inextricably linked to constitutional law. This observation is not in doubt because the idea of a constitutional structure for understanding legal systems is important for the shaping of the criminal process[15].

[15] As John Rawls rightly note the use of political power is fully proper only when "it is exercised in accordance with a constitution the essentials of

The aim of the paper is to present the impact of the Constitutional Tribunal's case law on the regulations concerning detention on remand in Poland. The judgments passed so far by the Constitutional Tribunal include judgments that pertain to detention on remand, as well as judgments that pertain to the evaluation of relevant provisions of the CCP. They relate primarily to the assessment of the current legislation from the point of view of the guarantee of constitutional rights and freedoms. In carrying out a critical analysis of the case law of the Constitutional Tribunal, I will strive to show that the Constitutional Tribunal has had a significant impact on the current shape of the detention on remand procedure. I will also try to show the conservative attitudes of the Tribunal, which has had a negative impact on the duration of detention on remand and the possibility of unrestrained contacts between the detainee and his or her attorney.

II. Tasks of the Constitutional Tribunal

The legal basis for the functioning of the Constitutional Tribunal (the CT) is set forth in Chapter VIII of the Polish Constitution, which was adopted in 1997. The role of the Constitutional Tribunal is to examine the compliance of legal norms with norms of higher rank and, where necessary, to eliminate those incompatible from the legal system. The Constitutional Tribunal, in accordance with its powers set forth in Article 188 of the Constitution, was not established to administer justice. Its essential role boils down to the control of compliance of norms of a lower order with the Constitution, including those concerning fundamental rights and freedoms of individuals that are specified in the Constitution. To better understand the binding effect of the Constitutional Court's decisions, it is necessary to briefly describe the relevant types of proceedings.

which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason", see RAWLS, John. *Political Liberalism*, New York: Columbia University Press, 1996, p. 137; HERLIN-KARNELL, Ester. The Power of Comparative Constitutional Law Reasoning in European Criminal Law Procedure. *Vienna Journal on International Constitutional Law* 2019, vol. 13, p. 2.

According to Article 188 of the Constitution, the CT adjudicates in cases involving: 1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of statutes to ratified international agreements whose ratification required prior consent granted by a statute; and 3) the conformity of legal provisions issued by central state organs to the Polish Constitution, ratified international agreements, and statutes. The result of a violation of a norm of a higher order that is identified in a judgment of the CT is the loss of validity of the act or provision of a lower order that contains the incompatible norm[16].

As part of the hierarchical review of norms, the CT operates on the principle of complaint. It examines cases in response to petitions lodged by authorized bodies: the President of the Republic of Poland, the Speakers of the two chambers of the Parliament (Sejm and Senat), a group of members of each chamber of the Parliament, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor General, the President of the Supreme Audit Office, and the Commissioner for Human Rights. Thus, it cannot act on its own initiative (*ex officio*).

The review of the constitutionality of a normative act, which is the basis of a final judgment issued by a court in a particular case, may also be initiated by a constitutional complaint. Pursuant to Article 79(1) of the Constitution, every person whose constitutional freedoms or rights have been violated by a statute or another normative act on the basis of which a court or a public administration body has decided on his or her freedoms or rights or on his or her obligations set forth in the Constitution has the right to lodge a constitutional complaint. In contrast to the abstract review carried out by the CT, which does not concern specific cases where the examined regulation is applied, the review carried out on the basis of a constitutional complaint is of a concrete nature, since its subject matter is the regulations that have been applied to the complainant. Pursuant to Article 79 (1) of the Polish Constitution, anyone whose constitutional freedoms or rights have

[16] More information can be found in JAMRÓZ, Lech. The Constitutional Tribunal in Poland in the Context of Constitutional Judiciary, Białystok: Wydawnictwo Temida 2, 2014, p. 43.

been violated is entitled, in accordance with the appropriate provisions of the statutory regulation, to lodge a complaint to the Constitutional Tribunal in the matter of a bill's conformity with the Constitution, as well as other normative act, on the basis of which a court or a body of public administration had ultimately ruled about the Constitutionally guaranteed freedoms and rights[17].

The last task of the Tribunal is to answer a question of law posed by a court. Pursuant to Article 193 of the Constitution, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements, or a statute, if the answer to such question of law will determine an issue currently before such. The purpose of a legal question is to obtain an answer regarding the conflict of laws or lack thereof. A legal question serves the purpose of reactive control, i.e. control carried out after a legal act enters into force, which is in a way in opposition to forms of preventive control carried out at the time of enactment of a law under review. In doing so, the court posing the question also seeks a ruling that satisfies the constitutional standard.

However, regardless of the manner in which the proceedings were initiated, the ruling issued as a result of the review of constitutionality always has a general and abstract effect. The Tribunal is bound by the content of the petition or constitutional complaint and may not modify it.

In addition to the powers indicated, the CT may signal to the Parliament and other law-making bodies the existence of inconsistencies and gaps found in the law, the removal of which would be indispensable to ensure the integrity of the legal system of the Republic of Poland. The signaling function is exercised in addition the Tribunal's primary role, which is to review the constitutionality of normative acts. In this regard, the Tribunal issues the so-called signaling decisions[18].

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[17] WICZANOWSKA, Hanna. The Adequacy of The Constitutional Complaint as Extraordinary Means of Human Rights Protection - A Comparison of Polish and German Solutions. *Torun International Studies*. v. 11, n. 1, pp. 5-23. 2018, http://dx.doi.org/10.12775/TIS.2018.00

[18] More information about the signaling function of the Constitutional Tribunal can be found in: JAMRÓZ, Lech. The Constitutional Tribunal in Poland in

III. Grounds for detention on remand in Poland

An analysis of the impact of the case law of the Constitutional Tribunal on the standard of detention on remand in Poland should begin with a brief description of the grounds for the application of this preventive measure. Detention on remand in Poland may be used if the general premise for detention on remand and at least one special premise are fulfilled. The general premise is indicated in Article 249(1) of the CCP, which states that this measure may be applied "(...) only if the evidence gathered indicates a high probability that the accused has committed the crime." It follows from the essence of this premise that the likelihood of the perpetration of a crime must be determined by the evidence existing at the time of the decision to apply detention on remand. Moreover, the likelihood of the perpetration of crime must be high, which means that for any average person the possibility of a conviction must be substantially greater than that of an acquittal or dismissal[19].

At least one of the four special premises must be fulfilled for detention on remand to be applied in Poland. These are listed in Article 258 of the CCP. These premises indicate that detention on remand may be applied:

> a) if there is a justified concern of the accused absconding or hiding, especially when his or her identity cannot be established or he or she has no permanent residence in the country;
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> b) if there is a reasonable fear that the accused will induce false testimony or explanations, or otherwise unlawfully obstruct the criminal proceedings;

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the Context of Constitutional Judiciary, Białystok: Wydawnictwo Temida 2, 2014, pp. 138-140.

[19] WALTOŚ, Stanisław; HOFMAŃSKI, Piotr. Proces karny [Criminal process], Warszawa: WoltersKluwer, 2020, p. 449; JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, pp. 100-101.

> c) if the accused has been charged with an indictable offence [20] or a summary offence[21] punishable by imprisonment of at least 8 years, or if the court of first instance has sentenced him or her to imprisonment of at least 3 years, the need to use detention on remand in order to secure the proper course of the proceedings may be justified by the threat of a severe punishment against the accused (Article 258(2) of the CCP);
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> d) Exceptionally, also when there is a well-founded fear that the accused charged with the perpetration of a crime or an intentional offense will commit a crime against life, health, or public safety, especially when he or she has threatened to commit such a crime (Article 258(3)).

The catalog of these circumstances should be interpreted restrictively. Each of the aforementioned grounds for the application of detention on remand expresses, in essence, an agreement to limit the detainee's rights and freedoms. This interpretation of the premises for detention on remand was noted by the Constitutional Tribunal in its judgment of 24 July 2006, SK 58/03. While the Tribunal recognized that the constitutional right to freedom may be restricted according the terms and in the manner prescribed by a statute, that restriction may not impair the essence of constitutional freedoms and rights.[22] The lack of precision of the premises for application of the measure in question deprives the accused of effective guarantees of protection of his or her constitutional right to freedom, since it does not specify the limits of the possible interference with the sphere of this right. Thus, the presence of indefiniteness in the interpretation of the premises for detention on remand is not acceptable. Only completeness and precision of the statutory provisions that interfere with the rights of individuals do not

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[20] According to Article 7(2) of the Polish Criminal Code, a indictable offence is a prohibited act punishable by imprisonment for a term of not less than 3 years or by a more severe punishment.

[21] A summary offence is a prohibited act punished by a fine higher than 30 times the daily rate, the restriction of liberty or imprisonment exceeding one month (Article 7(3) of the Polish Criminal Code.

[22] Judgment of the Constitutional Tribunal of 8 December 1998, K. 41/97, OTK ZU no. 7/1998, item 117.

allow the authorities applying the law any discretion in determining the final shape of the restrictions. The unambiguity of the provision will therefore exclude arbitrariness that allows for the rights of participants in criminal proceedings to be overly restricted[23]. In particular, the legislator is obliged to pass laws that do not raise doubts among their addressees as to the content of the obligations imposed on them and the rights granted to them. This is because such an expectation of citizens towards a rational legislator stems from the principle of trust in the state and the law adopted by it. Thus, the presence of indefiniteness ambiguity in the interpretation of the premises for detention on remand is not acceptable.

Moreover, the requirement of completeness means that the practice of deciding on a restriction or deprivation of personal freedom by application of any analogy is prohibited. A constitutionally compatible regulation must allow the limits of the court's power to apply detention on remand to be defined in a manner that both is predictable to the accused and takes into account events whose occurrence affects its application. This statement is based on the proposition that detention on remand is, next to imprisonment, the most rigorous restriction of freedom that results in its deprivation.

Among the indicated special premises, the most controversial one is the premise that allows the use of detention on remand due to the severity of the punishment that may be imposed on the accused. The question that arises in connection with Article 258(2) of the CCP is whether the mere consideration of the severity of the threatened penalty of imprisonment can justify the application of detention on remand. This issue has not been clearly resolved in judicial decisions and the doctrine. On the one hand, there are opinions that since the accused is facing a severe prison sentence, he or she will certainly obstruct the criminal proceedings against him or her. This opinion allows the use of detention on remand without having to show a real need to secure the proper course of criminal proceedings. This opinion emphasizes the punishment faced by the accused and does not require demonstration of a genuine need to safeguard the

[23] See the judgments of the Constitutional Tribunal dated: 26 April 1995, ref. K. 11/94, OTK in 1995, part I, item 12; 12 January 2000, ref. P. 11/98, OTK ZU no. 1/2000, item 3; 30 October 2001, ref. K. 33/00, OTK ZU no. 7/2001, item 217; and 26 April 2004, ref. K 50/02, OTK ZU no. 4/A/2004, item 32.

proper course of criminal proceedings[24]. This means that the court only examines the correctness of the legal classification of the act allegedly perpetrated by the accused. On the other hand, it is argued that a mere reference to the upper limit of the statutory penalty is insufficient and it must be determined, based on the credible circumstances in the particular case, that the accused actually does face a severe penalty. Additionally, the general premise for the application of preventive measures, set out in Article 249(1) of the CCP, must be fulfilled[25].

The very occurrence of the indicated discrepancies demonstrates a lack of precision of this premise. However, the shortcomings of Article 258(2) of the CCP are more numerous. As for this ground for detention on remand, it is actually difficult to identify the interest that could justify the restriction of human rights and freedoms in this case. Since Article 258(2) of the CCP is the basis for decisions on the application of detention on remand in situations where there is no reasonable concern that the accused will abscond or hide or that the accused will induce false testimony or otherwise unlawfully obstruct the criminal proceedings, it can be assumed that the indicated grounds for detention on remand only serve the repressive function. In this situation, detention on remand does not serve the preventive function and is rather a measure that anticipates the punishment. According to this approach, Article 258(2) of the CCP is in conflict with the presumption of innocence. This is because the level of the penalty is predicted before all the evidence has been gathered. .

Objections to Article 258(2) of the CCP were also shared by the Constitutional Tribunal in its decision of 17 July 2019 (S 3/19)[26]. Firstly, in the Tribunal's opinion, pursuant to the current wording of Article 258(2)

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[24] Decision of the Court of Appeal in Katowice of 14 December 2005, II AKz 748/05, LEX nr 164607; Decision of the Court of Appeal in Wrocław of 14 December 2006, II AKz 635/06, LEX nr 203405.

[25] Resolution of Criminal Chamber of the Supreme Court of 19 January 2012, I KZP 18/11, OSNKW 2012/1, item 1.; HERMELIŃSKI, Wojciech; NITA-ŚWIATŁOWSKA, Barbara. Tymczasowe aresztowanie ze wzgl5du na grożącą oskarżonemu surową karę (Provisional detention due to the potential severity of penalty). *Palestra*. n. 6, pp. 14-24. 2018.

[26] Decision of the Constitutional Tribunal of 17 July 2019, S. 3/19, OTK ZU - A 2019, item 41;NITA-ŚWIATŁOWSKA, Barbara. Tymczasem aresztowanie. Glosa do postanowienia Trybunału Konstytucyjnego z 17.07.2019, S 3/19

of the CCP, it cannot be ruled out that the severity of the penalty faced by the accused is treated as an almost objective circumstance, clearly determining the need for detention on remand in every case where the charges so warrant. Viewed in this way, it can be concluded that Article 258 (2) of the CCP contains a special kind of a legal presumption, which makes it possible to detain the accused even when no other considerations (the circumstances of the act, the objective possibilities of interference of the accused in the course of the proceedings, his or her past behavior towards law enforcement and the justice system, or the degree of progress of the evidentiary proceedings, etc.) indicate that his or her obstruction of the proceedings is likely.

Secondly, Article 258(2) of the CCP significantly weakens the assumption that preventive measures are to be applied only as long as it is necessary in a given case to secure the proper course of the proceedings. Unless in a given case there is a change in the legal classification of the act or a disclosure of previously unknown circumstances affecting the penalty, the original charge against the accused and the resulting potential penalty remain valid throughout the proceedings. As a result, there is a risk that detention on remand applied on the basis of Article 258(2) of the CCP will be extended automatically until the final closure of the case, even when there are no real and concrete fears that the accused will obstruct the proceedings.

The Constitutional Tribunal noted that the current wording of Article 258(2) of the CCP, allowing to disregard the real need to secure the proper course of the proceedings in a given case, does not meet the criteria concerning the necessity to restrict the rights and freedoms resulting from Article 31(3) of the Polish Constitution. It also limits the judicial review of the correctness of the application of this measure, as required by Article 41(3) in conjunction with Article 45(1) of the Constitution. A reduction of the issue of detention on remand to a mere assessment of the correctness of the legal qualification of the act charged against the accused is in contradiction to Article 257(1) of the CCP. This provision requires the court imposing detention on remand (as well as the court

[*Detention on Remand. Comment on the Constitutional Tribunal Decision on 17 July 2019, ref. S 3/19*]. *Przegląd Sądowy*. n. 4, p. 105-112. 2021.

extending it) to consider whether the use of this custodial measure is necessary to secure the proper course of criminal proceedings or whether another non-custodial measure is sufficient. Thus, the court's focus on the legal qualification of the act charged against the accused and its disregard of other grounds for detention on remand constitutes an unwarranted interference with the individual's personal freedom and dignity, which is protected by Article 30 of the Polish Constitution. Human dignity dictates that the criteria for deprivation of liberty should be particularly carefully examined and reviewed, without any exception for preventive measures. Consequently, allowing detention on remand to be imposed without any reasonable threat to the criminal proceedings may lead to the belief that human subjectivity is thereby violated.

In addition, the Constitutional Tribunal, in making objections to Article 258(2) of the CCP, referred to the case law of the European Court of Human Rights. In the context of the cases against Poland, the Tribunal aptly pointed out that while the threat of severe punishment is rightly a relevant factor in assessing the risk of absconding or recidivism, this cannot justify long periods of detention without reference to specific facts supporting the risk of obstruction of the proceedings[27].

The criticism of the premise for detention on remand based on the severity of the punishment that results from the Tribunal's decision of 17 July 2019 did not lead the Constitutional Tribunal to the conclusion that it is contrary to the Constitution. The Constitutional Tribunal issued

[27] See, the ECtHR judgments of 4 May 2006 in case of *Michta v. Poland*, application no. 13425/02, § 49; https://hudoc.echr.coe.int/eng?i=001-75311; the ECtHR judgments of 16 October 2007 in case of *Malikowski v. Poland,* application no. 15154/03, § 54-56, https://hudoc.echr.coe.int/eng?i=001-82734; the ECtHR judgments of 3 February 2009 in the case of *Kauczor v. Poland*, application no. 45219/06, § 44-46; https://hudoc.echr.coe.int/eng?i=001-91115; the ECtHR judgments of 24 March 2015 in the case of *Stettner v. Poland*, application no. 38510/06, §. 80, https://hudoc.echr.coe.int/eng?i=001-153019. For information on the practice of application of detention on remand in Poland, see: PILITOWSKI, Bartosz. Current practice of applying pre-trial detention in Poland. Report from empirical research, Court Watch Poland Foundation. Available at: https://courtwatch.pl/wp-content/uploads/2019/12/fcwp_PTD_en.pdf Access on: March 13, 2022; A Measure of Last Resort? The practice of pre-trial detention decision making in the EU. Available at: https://fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf, pp. 67-71. Access on: March 13, 2022.

a signaling ruling in this case, in which it drew the attention of the Sejm (the lower chamber of the Polish Parliament) to the need for clarification of Article 258(2) of the CCP in such a way that this provision cannot constitute a basis for detention on remand in the absence of a real fear of obstruction of the criminal proceedings by the accused. Since the decision of 17 July 2019 (S 3/19), the legal situation in Poland has not changed. Thus, there is a risk in Poland that detention on remand may be used solely on the basis of the penalty faced by the defendant.

III. Access to the file of pre-trial proceedings by person detained on remand

Proceedings concerning detention on remand should ensure the possibility of access to a defense counsel and his or her access to the file of the pre-trial proceedings to review the information on the decision concerning the detention on remand. This is a condition for due process and the implementation of equality of arms. Without ensuring access to the evidence that forms the basis for detention on remand, it is also impossible to speak of ensuring an adversarial nature of the proceedings[28]. This is particularly important in the case of appeals against detentions decisions in the course of criminal proceedings (Article 5(1)(c) of the ECHR), because they take place where there is a reasonable suspicion that a punishable act has been committed and this suspicion must be verified in an adversarial procedure in the course of the review proceedings. In the case *Lamy v. Belgium*, a violation of Article 5(4) of the ECHR was found due to the fact that the defense counsel was not allowed to verify the evidentiary value of the materials collected in the course of the investigation on which the decision concerning detention on remand was based[29].

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[28] About the right to defenses at an early stage of criminal proceedings, see: SAKOWICZ, Andrzej. Suspect's access to a lawyer at an early stage of criminal proceedings in the view the case-law of the European Court of Human Rights. *Revista Brasileira de Direito Processual Penal*, vol. 7, n. 3, pp. 1979-2009, set./dez. 2021. https://doi.org/10.22197/rbdpp.v7i3.565.

[29] See, the ECtHR judgement of 30 March 1989 in the case of *Lamy v. Belgium*, application no. 10444/83.

In the Polish CCP, access to the pre-trial proceedings files is only regulated by Article 156(5) of the CCP[30]. According to this provision, "unless otherwise provided for by law, in the course of pre-trial proceedings, parties, counsels, attorneys, and statutory representatives shall be given access to files, allowed to make copies and photocopies, and issued certified copies or photocopies against payment only with the consent of the person conducting the pre-trial proceedings. With the permission of the prosecutor, in the course of pre-trial proceedings, the file may be made available to other persons in exceptional cases." This solution is general in nature. However, when the accused submits a motion for access to the file in connection with a motion for application of detention on remand or its extension, denial of access has specific procedural consequences. The limitation of procedural rights, such as the right to defense and the right to know the charges, is significant. The Act, on the other hand, does not set forth any criteria for determining the scope and grounds for denying access in this particular situation. Such broad discretion and the lack of specific grounds for refusal have raised constitutional doubts, particularly in terms of the right to defense (Article 42(2) of the Constitution). In its judgment of 3 June 2008,[31] the Constitutional Tribunal found that Article 156(5) of the CCP, to the

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[30] It should be explained that pre-trial proceedings, also referred to as preliminary proceedings, are the first stage of criminal proceedings in Poland. Their aim is the preliminary preparation of the case, which leads to the determination of whether the case should be prosecuted or concluded in some other form. Moreover, during preliminary proceedings, evidence is gathered in a very formal way to be later introduced during the trial. In Poland, preliminary proceedings can be conducted in two forms: investigation or inquiry. The main points of difference between them are the following: the type of offences that are the subject of these proceedings, the level of involvement of the prosecutor in the conduct of the preliminary proceedings, and the level of formality of the investigative actions: see: JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, pp. 208-209.

[31] Judgment of the Constitutional Tribunal of 3 June 2008, ref. K 42/07, OTK ZU 2008, 5A, item 77; KARDAS, Piotr; WILIŃSKI, Paweł: O niekonstytucyjności odmowy dostępu do akt sprawy w postępowaniu w przedmiocie tymczasowego aresztowania (Concerning the Unconstitutionality of the Refusing to Inspect Files in the Proceeding in Order to Issue a Preliminary Detention). *Palestra*. n. 7-8, pp. 23-35, 2008.

extent to which it allows arbitrary exclusion of the openness of those pre-trial proceedings materials that justify the prosecutor's motion for detention on remand, is inconsistent with Article 2 and Article 42(2) in conjunction with Article 31(3) of the Polish Constitution.

Several factors contributed to this conclusion by the Constitutional Tribunal. The starting point for assessing the constitutionality of Article 156(5) of the CCP was the conclusion that, generally rightly, pre-trial proceedings - unlike court proceedings - are not based on the principle of full openness of files. The ability to achieve the objectives of pre-trial proceedings depends, among other things, on the secrecy of certain information, evidence, etc. Consequently, the principle of access to files in court proceedings is replaced by the principle of optionality in pre-trial proceedings. This conclusion should not come as a surprise, as pre-trial proceedings, in the course of which evidence is collected and prepared for evaluation by the court, should be carried out in conditions that enable the body conducting the proceedings to operate effectively.[32]

At the same time, it should also be borne in mind that refusal to grant access to files clearly encroaches on the right to defense, which becomes particularly important in the event of application (extension) of detention on remand. A reduction of the procedural guarantee in this regard puts the bodies conducting pre-trial proceedings in a privileged position. Noting these issues, the Constitutional Tribunal held that Article 156(5) of the CCP violates the right to defense in a disproportionate manner, as it allows the body conducting the proceedings to "arbitrarily decide" whether to allow access to files in such important matters as the application and extension of detention on remand. At the same time, the Constitution requires that the prerequisites for limiting constitutional rights be exhaustively regulated by a statute and thus be subject to "objective verification."

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[32] See, WILIŃSKI, Paweł: Odmowa dostępu do akt sprawy w postępowaniu przygotowawczym [Refusal to grant access to case files in pre-trial proceedings]. *Prokuratura i Prawo*, n. 11, p. 79, 2006; SKORUPKA, Jerzy. Standard dostępu do informacji o podstawie dowodowej tymczasowego aresztowania w prawie unii europejskiej i prawie polskim (Standard of Access to Information about the Evidential Base of Provisional Detention in European Union and Polish Law). Przegląd Prawea i Administracji, v. CXX, n. 2, pp. 241-253, 2020. https://doi.org/10.19195/0137-1134.120.66.

In its judgment of 3 June 2008, the Constitutional Tribunal decided on the adoption of the principle of internal openness of the part of the proceedings file that is the basis for a motion for application or extension of detention on remand. It literally concluded that "the scope of the file that should be made available to the detained person and his or her defense counsel should be determined by the effectiveness of the right of defense. Thus, all materials of the pre-trial proceedings that justify the prosecutor's motion for application or extension of detention on remand must be made public."[33] The Constitutional Tribunal justified this conclusion not only by referring to the provisions of the Constitution that regulate the principle of proportionality and the right to defense and personal freedom, but also to the case law of the ECtHR[34]. As a consequence of

[33] A similar opinion was also expressed by the Supreme Court which held that, when filing a motion for application or extension of detention on remand, the prosecutor should ensure that the suspect or his or her defense counsel is acquainted with at least the part of the pre-trial proceedings file that contains the materials intended to justify the motion, as this is necessary to ensure an effective exercise of the right to defense; see the decision of the Supreme Court of 11 March 2008, WZ 9/08, OSNKW 2008/7, item 55.

[34] As a side note, it should be pointed out that the European Court of Human Rights in Strasbourg has repeatedly referred to the issue of secrecy of materials on the basis of which decisions on detention on remand are made during pre-trial proceedings. It took the prevailing view that when the defense counsel of a detained person is denied access to the pre-trial proceedings file, which is essential in order to effectively challenge the legality of the detention, this constitutes a violation of the principle of equality of arms. Although the Court recognized the need to keep secret some of the evidence gathered during the investigation in order to prevent suspects from interfering with that evidence, it emphasized that this could not be achieved at the expense of a substantial limitation of the right to defense, see, among others, the ECtHR judgement of 30 March 1989 in the case of *Lamy v. Belgium*, application no. 10444/83, https://hudoc.echr.coe.int/eng?i=001-57514; the ECtHR judgement of 13 February 2001 in the case of *Lietzow v. Germany*, application no. 24479/94, https://hudoc.echr.coe.int/eng?i=001-59209; the ECtHR judgement of 13 February 2001 in the case of *Schoeps v. Germany*, application no.25116/94, https://hudoc.echr.coe.int/eng?i=001-59210; the ECtHR judgement of 18 January 2005 in the case of *Kehayov v. Bulgaria*, application no. 41035/98, https://hudoc.echr.coe.int/eng?i=001-67982. And in the following cases involving Poland: the ECtHR judgement of 25 June 2002 in the case of *Migoń v. Poland*, application no. 24244/94, https://hudoc.echr.coe.int/eng?i=001-60535; the ECtHR judgement of 24 April 2007 in the case of *Matyjek v. Poland*, application no. 38184/03, https://hudoc.echr.coe.

the judgment of the Constitutional Tribunal of 3 October 2008, ref. K 42/07, the regulations governing criminal proceedings were amended. The amending Act of 16 July 2009 added Article 156(5a) of the CCP. The new provisions introduced the rule t that in the course of pre-trial proceedings, the suspect and his or her defense counsel should be given access to the case file in the part containing the evidence indicated in the motion for application or extension of detention on remand. If other evidence is presented to the court in addition to the evidence described in the motion, the prosecutor is not required to inform the suspect and his or her counsel about that evidence. The existence of such evidence and its submission to the court together with the motion for detention on remand may only be made known to the suspect and his or her counsel if it concerns circumstances favorable to the suspect. In such an event, the court is obliged to take these circumstances into account ex officio, having warned the prosecutor of this fact. The only exception provided for in this respect concerns the testimony of a witness if there is a justified concern about danger to the life, health, or freedom of the witness or a person close to the witness (Article 250(2b) of the CCP). This evidence is not presented in the motion for detention on remand, but is attached to that motion. The fact that the mentioned evidence is not presented in the motion for detention on remand, raises doubts in the light of the view expressed by the Constitutional Tribunal in its judgment of 3 June

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int/eng?i=001-80219; the ECtHR judgement of 6 November 2007 in the case of *Chruściński v. Poland*, application no. 22755/04, https://hudoc.echr.coe.int/eng?i=001-83087 and the ECtHR judgement of 15 January 2008 in the case of *Łaszkiewicz v. Poland*, application no. 28481/03, https://hudoc.echr.coe.int/eng?i=001-84361. For example, in its judgment of 25 June 2002 in the case *Migoń v. Poland* (application no. 24244/94), the Court held that the information contained in the written reasoning for the motion for detention on remand was not sufficient for the applicant to conduct an effective defense in the detention proceedings, since his defense counsel had not obtained the prosecutor's consent to review the case file. The Court further emphasized that information that is relevant to the assessment of the validity of detention on remand imposed on the suspect should be made available in an appropriate manner to the suspect's defense counsel; cf.: WĄSEK-WIADEREK, Małgorzata. Zasada równości stron w polskim procesie karnym w perspektywie prawnoporównawczej [The principle of equality of arms in the Polish criminal process from a comparative-law perspective], Kraków: Zakamycze, 2003, p. 245.

2008. This is because the intention of the Constitutional Tribunal was to grant the suspect and his or her defense counsel access to those materials (evidence) that constitute the basis for the ruling on the application or extension of detention on remand, regardless of whether they are presented in the motion or merely attached to it.

Despite the existence of doubts about the "secrecy" for the suspect and his or her defense counsel of the testimony of a witness if there is a justified fear of danger to the life, health, or freedom of the witness or a person close to him or her (Article 250(2b) of the CCP), it should be pointed out that the judgment of the Constitutional Tribunal of 3 June 2008 had a positive impact on the feasibility (effectiveness) of defense in proceedings concerning detention on remand. The Tribunal proved that the right of access to evidence is a fundamental prerequisite for real participation in ongoing proceedings and its exercise is impossible or at least extremely difficult if the accused or suspect is deprived of access to the evidence gathered in his or her case.

IV. Access of an accused detained on remand to a defense counsel in private

In its judgment of 17 February 2004,[35] the Constitutional Tribunal addressed the issue of access of a person detained on remand to a defense counsel. It should first be noted that according to Article 73(1) of the CCP, an accused who is detained on remand may communicate with his or her defense counsel in the absence of other persons and by mail. The right of the accused to freely communicate with a defense counsel in the absence of third parties is one of the basic requirements of a fair trial. Allowing such contact to the accused gives him or her the opportunity to prepare his or her defense and pursue it during the proceedings[36].

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[35] Judgment of the Constitutional Tribunal of 17 February 2004, ref. SK 39/02, OTK ZU 2004, 2A, item 7.

[36] See JASIŃSKI, Wojciech; KREMENS, Karolina. Poland. International Encyclopedia of Laws: Criminal Law. The Netherlands. Kluwer Law International, 2019, p. 204.

Article 73(1) of the CCP ensures the right of the accused to communicate in a free and uncontrolled manner with his or her defense counsel. It guarantees the person detained on remand contact in person and by mail with his or her counsel in both pre-trial and court proceedings. This principle is fully applicable in court proceedings. In pre-trial proceedings, the public prosecutor could, when granting permission to communicate, in particularly justified cases, stipulate that he or she or a person authorized by him or her must be present during the communication. This possibility also applied to the control of the suspect's mail exchanged with his or her defense counsel (Article 73(2 and 3) of the CCP). These restrictions may not be maintained after the expiry of the period of 14 days from the date of detention on remand.

In a constitutional complaint lodged in the case that gave rise to the judgment of the Constitutional Tribunal of 17 February 2004, the complainant argued that Article 73(2) of the CCP violates the principles of the right to defense and deprives the accused of the possibility to appeal against the decision limiting his unrestrained contacts with his defense counsel. In his opinion, the lack of appellate review creates the potential for excessive discretion and arbitrariness.

The Constitutional Tribunal did not share the applicant's position and ruled on the compatibility of the challenged provision with Article 42(2) and Article 78 of the Constitution. The Tribunal found that limiting the contacts with a lawyer during 14 days of detention on remand did not violate the principle of proportionality in the exercise of freedoms and rights. It based this position on its finding that "the restriction of the accused's right to communicate with his counsel in the absence of other persons - as governed by the provisions of the Code - does not constitute an excessive interference with the right to defense." In the opinion of the Constitutional Tribunal, this is due to the short - only 14-day - period during which the prosecutor may limit the freedom of contacts of the accused with his or her defense counsel. This limitation, as the Tribunal pointed out, cannot therefore have a fundamental effect on the procedural situation of the accused and does not constitute an obstacle to the preparation of the defense.

One cannot agree with the view expressed by the Constitutional Tribunal. The presence of a third party (usually a police officer) during

a conversation between an accused detained on remand and his or her defense counsel is not indifferent. I believe that it not only adversely affects the line of defense at this stage of criminal proceedings, but also prevents unrestrained possibility to agree with the defense counsel on the exercise of the procedural rights. Nor is it appropriate to justify such a restriction by asserting that "an order restricting an accused person's freedom to communicate with his or her defense counsel in the absence of others must be justified by a compelling interest of the pending proceedings." It should be noted that the above view is based on the unfounded belief that the actions of a defense counsel at the initial stage of detention on remand do not serve the interests of preliminary proceedings. It is even suggested that a restriction of such contacts is due to the fact that defense counsels obstruct the proper course of pre-trial proceedings. If such situations have actually taken place, consideration should be given to holding the defense counsels who engage in such conduct criminally or disciplinarily accountable, rather than supporting a claim that nullifies the right to defense at the early stage of a suspect's detention.

It is clear that depriving the suspect of unrestrained contacts with a defense counsel, in particularly justified cases, means that the value of the assistance provided by the counsel is significantly reduced. In this context, one must not ignore contacts by mail between a suspect detained on remand and the defense counsel, which should be particularly privileged because of the guarantees arising from the right to obtain professional legal advice[37].

The shape of solutions related to control of mail exchanged between a suspect detained on remand and his or her defense counsel was also the subject of the judgment of the Constitutional Tribunal of 10 December 2012 (K 25/11)[38]. When examining the compatibility of

[37] It should be added that in the judgment of 25 March 1983 issued in case of Silver *and Others v. the United Kingdom* (application no. nr 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 i 7136/75, https://hudoc.echr.coe.int/eng?i=001-57577) the ECtHR held that whatever the nature of the mail of the person detained on remand, it should not be opened, except in such situations where there is a reasonable suspicion that the mail is being used for an unlawful purpose or contains objects the mailing of which is prohibited.

[38] Judgment of the Constitutional Tribunal of 10 December 2012, ref. K 25/11, OTK ZU 2012, 11A, item 132.

Article 73(3) of the CCP, which provides that "the prosecutor may also stipulate control of the mail exchanged between the suspect and his or her defense counsel" for a period not exceeding 14 days, the Constitutional Tribunal held that this provision does not specify the circumstances in which it is possible for the prosecutor to exercise the option to limit the right to defense by controlling mail. The provision lacked any rationale that would limit the prosecutor's discretion to undertake mail control.

In order to implement this ruling, the legislator amended Article 73(2 and 3) of the CCP in such a way that "in pre-trial proceedings, when granting permission to communicate, the prosecutor may stipulate in particularly justified cases, if the interest of the pre-trial proceedings requires it, that the prosecutor himself or a person authorized by him shall be present at the communication" (Article 73(2)). For the same reasons, it is possible to stipulate control of the suspect's mail exchanged with his or her defense counsel (Article 73(3)). When comparing the current and previous wordings, one should first of all note that the premises to be met for the prosecutor to be able to make a decision on limiting unrestrained contacts of a suspect detained on remand with his or her defense counsel were made more specific. In this regard, a double quantification of the circumstances justifying a limitation of such contacts was introduced by using the criterion of "particularly justified cases, if the interest of the pre-trial proceedings requires it."

Despite the fact that the adopted wording of Article 73(2 and 3) of the CCP emphasizes the exceptionality of situations in which it is permissible to limit the unrestrained contacts between a suspect detained on remand and his or her defense counsel, it still uses a phrase characterized by excessive vagueness and capacity. In essence, this is a vague concept that is "filled" at the stage of application of the law, i.e. during the prosecutor's decision-making process. This allows us to assume that Polish legislation is still not conducive to the full implementation of the right to defense at the early stage of detention on remand. This is because it is impossible to create an atmosphere of mutual trust between a defense counsel and a suspect when they do not have the opportunity to communicate freely in person if the conversation takes place in the presence of a prosecutor or a police officer. In addition to providing psychological support to the accused, it is necessary to explain the charges

to him or her, address the evidence, inform him or her of the legal steps taken, and agree on the line of defense. After all, it is difficult to expect a suspect to provide the defense counsel with all the information required for an effective defense in a situation where their conversation is not confidential. In other words, the contacts between the accused and his or her defense counsel must be unrestricted, because only such contacts guarantee the proper functioning of the defense relationship. It is for this reason that it is impossible to share the position of the Constitutional Tribunal regarding the access of an accused detained on remand to a defense counsel.

V. Duration of detention on remand

The Polish criminal procedure doctrine considers the duration of detention on remand, which is set forth in Article 263 of the CCP, as controversial. According to section 1 of that article, detention on remand may be applied for a period not exceeding three months. However, pursuant to Article 263(2) of the CCP, if the pre-trial proceedings in a case could not be completed within three months, at the request of the prosecutor, the court of first instance competent to hear the case may extend the detention on remand for a period that may not exceed 12 months in total. On the other hand, pursuant to Article 263(3) of the CCP, the total period of detention on remand until the court of first instance issues a judgment may not exceed two years. However, these are not absolutely the maximum periods which, if exceeded, make void further application of this measure. Pursuant to Article 263(4) of the CCP, an appellate court may extend detention on remand for a further specified period beyond the period of 12 months in pre-trial proceedings and 2 years when the case is pending before a court of first instance[39].

[39] In Poland, there is no maximum duration of detention on remand. This issue is not uniform across European countries. Time limits vary with some countries recognizsing maximum limits (e.g. Italy 6 years, and Spain 4 years), and others do not provide for maximum limits and, at least in practice, pre-trial detention can be renewed for undetermined periods (e.g. Netherlands, Germany, Hungary), see MARTUFI, Adriano; PERISTERIDOU Christina. The Purposes of Pre-Trial Detention and the Quest for Alternatives. European

Such an extension may occur at the request of the court before which the case is pending or, in pre-trial proceedings, at the request of the competent prosecutor who is the direct superior of the prosecutor conducting or supervising the investigation - if such a need arises in connection with the suspension of criminal proceedings, activities aimed at establishing or confirming the identity of the accused, the performance of evidentiary activities in a case of particular complexity or outside the country, as well as deliberate protraction of the proceedings by the accused. Moreover, the special possibility to extend detention on remand is allowed after the first judgment of the first instance court. Pursuant to Article 263(7) of the CCP, where there is a need for detention on remand after the first judgment of the court of first instance, any extension may be granted for a period of not more than six months.

The latter provision has been the object of evaluation by the Constitutional Tribunal. In its judgment of 20 November 2012[40], the Tribunal held that Article 263(7) of the CCP, insofar as it does not clearly specify the prerequisites for extending detention on remand after the judgment issued by the first instance court in the case, violates the personal freedom of the accused in a disproportionate manner and may lead to "inhumane treatment" of the person detained on remand. In the opinion of the Constitutional Tribunal, "the norm limiting the extension of detention on remand to no more than six months at a time is unquestionably a guarantee; however, this guarantee is considerably weakened by the fact that both the number of decisions issued on this basis and the total length of time the accused is detained on remand are not only not limited in any way, but (....) are not subject to scrutiny from the point of view of what conduct by the accused which impedes the criminal proceedings can be expected with a high degree of probability under the circumstances in place, at a particular stage of the proceedings."[41]

Journal of Crime, Criminal Law and Criminal Justice, vol. 28, n. 2, p. 156, 2020. https://doi.org/10.1163/15718174-bja10002.

40 Judgment of the Constitutional Court of 20 November 2012, ref. SK 3/12, OTK ZU, no. 10/A/2012, item 123.

41 Ibid.

The Tribunal rightly saw that a prolonged and unpredictable restriction of the defendant's ability to contact his or her family and engage in religious practices, and his or her detention in almost complete isolation from the outside world (censorship of correspondence, prohibition to use means of remote communication) become inhuman treatment over time. What is important, however, is not just the restrictions that affect the person detained on remand. The absence of a maximum period of time for which a court may grant an extension is not in itself inconsistent with the constitutional rights to freedom and definitiveness of law.[42] What raises doubts in terms of compliance with the Constitution is the failure to define the prerequisites for extension of detention on remand. On the one hand, the law makes it impossible for the person detained on remand to predict how long this measure will be imposed on him or her and, on the other hand, it leads to a potential risk of abuse.

The judgment of the Constitutional Tribunal of 20 November 2012 imposed an obligation on the legislator to adopt such amendments to the law that would lead to clearly defined prerequisites for extending detention on remand after the first instance court issues a judgment in the case. Unfortunately, ten years later, the legislator has not yet

[42] In its judgment of 10 July 2019 (ref. K 3/16), the Tribunal held that the failure to specify the maximum total duration of detention on remand after the first judgment of the court of first instance is consistent with Article 41(1) in conjunction with Article 31(3) of the Polish Constitution; see: OTK ZU – A 2019, item 41. In the opinion of the Constitutional Tribunal, the legislator is not obliged to introduce into the system of law a normative provision that specifies the maximum and non-extendable duration of detention on remand. An absolute requirement to release an accused person from custody could, in many cases, prevent the achievement of some the fundamental objectives of criminal proceedings, i.e. detection of the perpetrator of a crime and holding him or her criminally responsible. It would be particularly difficult to accept if it was the accused who, by his actions, sought to prolong the proceedings in order to force his or her release on the grounds that the permissible duration of detention on remand is exceeded. Besides, no provision of the Polish Constitution expressly establishes the requirement to introduce a limit on the maximum duration of detention on remand. Article 41(1) (personal freedom) of the Constitution imposes only "directional" limitations: the adopted solutions must not violate the essence of the right to personal freedom and be disproportionate. All in all, the legislator has a relatively wide margin of freedom to choose solutions that define the duration of detention on remand.

implemented the judgment of the Constitutional Tribunal of 20 November 2012. The provision in question still does not define the prerequisites for an extension of detention on remand and, consequently, still does not make it possible to foresee the maximum time limits for application of this preventive measure after the first judgment issued by the court of first instance. Consequently, on 17 July 2019 (ref. no. S 3/19)[43], the Constitutional Tribunal issued the so-called signaling decision in which it indicated to the lower chamber of the Polish Parliament (Sejm) the need for a legislative intervention due to the lack of clearly defined prerequisites for an extension of detention on remand. To date, that decision has not been implemented. This leads to the conclusion that, with regard to an extension of detention on remand after the first judgment issued by the court of first instance, there is no compliance with the standards of the rule of law and fair trial. A possible restriction or deprivation of freedom pursuant to a statute must also be understood as an obligation on the part of the legislator to establish comprehensive regulations covering all situations in which the restriction or deprivation of freedom is permissible, and not merely an obligation to indicate a general basis for such actions. Only in this way is it possible to define the limits of the court's power to impose detention on remand in a way that is predictable to the accused.

VI. The right of the persons detained on remand to contact their loved ones

The Constitutional Tribunal has played an important role in improving the standard concerning the ability of persons detained on remand to contact their loved ones. This issue is addressed in Article 217 of the Executive Penal Code[44]. According to its original wording, a person detained on remand could be allowed a visit by his or her loved ones after the authority at whose disposal the detainee is issued an order stating a permission for the visit. This provision clearly stipulated that

[43] Decision of the Constitutional Tribunal of 17 July 2019, S. 3/19, OTK ZU - A 2019, item 41.

[44] Journal of Laws no. 90, item 557, as amended; hereinafter referred to as EPC.

the contact between a person detained on remand and his or her family members and loved ones is possible only after the competent authority has issued an order stating its permission for the visit. On the other hand, it did not specify the criteria that the authority should use when refusing to issue a permission for a visit. As a consequence, the legal situation of a person detained on remand with regard to visits of relatives and loved ones differs significantly from that of a convicted person. A person detained on remand may obtain a permission for a visit of family members and loved ones only after the court or the prosecutor's office gives its consent, while a person sentenced to imprisonment has the right to such visits guaranteed by law.

The Commissioner for Human Rights, questioning the constitutionality of Article 217 of the EPC, presented two objections. The first objection concerns the lack of precise premises that would limit the authority's discretion in deciding whether to refuse to grant to a person detained on remand a permission for a visit. The second objection concerns the lack of possibility to appeal the prosecutor's decision not to allow a visit. This means that neither the person detained on remand nor his or her relatives and loved ones are entitled to appeal such a decision

In its judgment of 8 July 2009 (ref. K 1/09)[45], the Constitutional Tribunal supported the aforementioned objections. In its opinion, Article 217(1) of the EPC makes the possibility of exercising the essential elements of the constitutional right to protection of private and family life an exception for persons detained on remand and their family members and loved ones, while the exclusion of this possibility becomes the rule. This even allows one to argue that a visit of a person detained on remand by a family member automatically jeopardizes the objectives of the ongoing criminal proceedings. Meanwhile, interference with the right to protect private and family life is allowed only if the existence of an important public interest justifying it *in concreto* is demonstrated. Consequently, the Tribunal concluded that the premises limiting the ability of a person detained on remand to obtain permission for visits must be clarified at the level of a statute.

[45] Judgment of the Constitutional Tribunal of 2 July 2019, K 1/07, OTK-A 2009, no. 7, item 104.

Regarding the objection concerning the lack of possibility to lodge a complaint against a prosecutor's decision to refuse to grant a permission for a visit, the Tribunal stated that in the case under examination the legislator exceeded the constitutional limits of permissible restrictions on the exercise of the right to appeal against judgments issued in the first instance (Article 78 of the Constitution). Indeed, it is impossible to show the reasonableness of such a restriction in the case of a prosecutor's decision, especially since a court's order refusing to grant a permission for a visit could be appealed against. The legislator should have guaranteed a procedure for reviewing decisions concerning granting permissions for visits regardless of the entities that made such decisions.

It did not take long for the legislator to make a decision. Just four months after the judgment of the Constitutional Tribunal, a law was passed that amended the wording of Article 217 of the CCP. The law added a new paragraph stating that a person detained on remand is entitled to at least one visit of his or her loved one per month. However, there are exceptions to this rule. A person detained on remand may be refused a permission for a visit if there is concern that the visit will be used to unlawfully obstruct the criminal proceedings or to commit a crime, in particular to incite committing a crime. The new law also introduced the possibility to appeal against a prosecutor's decision to refuse to grant a permission for a visit of a loved one to a person detained on remand. The appeal in such cases is reviewed by a superior prosecutor. The newly adopted provisions should be approved of. The ability to appeal against such decisions, combined with the requirement to indicate in the justification the reasons for refusal to grant a permission for a visit, will make it possible to fulfill the requirement, identified by the Constitutional Tribunal, to define clear premises limiting the right of persons detained on remand to be visited by their loved ones at the level of a statute.

VII. Conclusion

This paper presents the importance of the case law of the Constitutional Tribunal in Poland to the determination of the standard of detention on remand. The analysis carried out proved the special

importance of the principle of proportionality when assessing the constitutionality of the provisions of law on the application of detention on remand. On the one hand, this principle requires the legislator (lawmaker) to always ascertain the actual need for interference with the scope of an individual's right or freedom in specific circumstances. On the other hand, it should be understood as a requirement to apply legal measures that are effective, i.e. that actually serve the purpose intended by the legislator. An interference with the sphere of an individual's status must therefore be in reasonable and appropriate proportion to the objectives whose protection justifies the restriction imposed.

The case law of the Polish Constitutional Tribunal also points out that only completeness and precision of the statutory regulation of detention on remand can limit the arbitrariness of courts in their application of this preventive measure. This comment was made on the basis of the considerations of the Constitutional Tribunal carried out in the context of the premise for application of detention on remand based on the severity of the penalty. The Tribunal ruled out the possibility to use this measure merely by reference to the severity of the penalty facing the accused. It correctly concluded that the severity of the penalty faced by the accused could at most make it more likely for the accused to obstruct the criminal proceedings. A clear standard has been set by the Constitutional Tribunal concerning the duration of detention on remand. In particular, the failure to specify the premises for extension of detention on remand may result in prolonged detention, the duration of which cannot be predicted, which may be considered as inhumane treatment.

The paper points out that the case law of the Constitutional Tribunal has had a significant impact on the form of the provisions concerning access by suspects and their defense counsels to the files of the pre-trial proceedings in the parts concerning the decisions to apply detention on remand. Following a decision of the Constitutional Tribunal, the legislator adopted provisions stating that materials from pre-trial proceedings that justify the prosecutor's request to apply or extend detention on remand should be disclosed to suspects and their defense counsels. The case law of the Constitutional Tribunal has also clearly contributed to an improvement of the situation of persons detained on remand with regard to their contacts with their loved ones. The

introduction of the rule that persons detained on remand are entitled to at least one visit per month by their loved ones has undoubtedly improved the protection of the suspects' private and family lives.

Not every position of the Constitutional Tribunal concerning evaluation of the legal provisions that govern detention on remand should be agreed with. What raises doubts is the opinion that limiting the suspect's contacts with a lawyer during the first 14 days of detention on remand does not violate the principle of proportionality in the exercise of freedoms and rights. It is unreasonable to agree that this legal solution does not affect the procedural situation of the suspect and does not hinder the preparation of his or her defense. It seems that the situation should be evaluated quite differently. I believe that legal assistance cannot be effective when the suspect does not have the opportunity to freely consult with a defense counsel. In particular, it is not permissible to restrict in advance confidential contacts between a suspect and his or her defense counsel in order to safeguard the proper course of the criminal proceedings. This is because not every defense counsel acting in the interest and on behalf of his or her client acts outside the boundaries of law.

Despite the latter issue, the case law of the Constitutional Court in Poland on detention on remand has proven that constitutional principles are *sine qua non* for a criminal justice system that respects the rule of law, human rights, and democratic principles.

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