

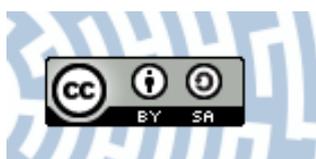


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## Prisoners' Rights.

# Pre-Trial Detention vs. Deprivation of Liberty

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### Mini Review

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### Abstract

The principle of the presumption of innocence is recognised in most legal systems all over the world. That principle requires that public statements and official decisions from public authorities do not refer to the suspects or accused persons as if they were convicts before the final judgement. The trial detention restricts the rights and freedom in most degree. For this reason, it is important to develop such principles for the enforcement of pre-trial detention that the freedom of the individual detained as part of criminal proceedings be limited to the minimum before the final and binding sentence. The objective of this article is not only to present the normative shape of the enforcement of pre-trial detention in the light of Polish regulations and compile a catalogue of limitations resulting from the application of this measure, but also to compare the actual situation of a person placed under pre-trial detention to that of a person serving the penalty of deprivation of liberty.

**Keywords:** Pre-trial detention; Prison; Defendant; Limitation of prisoner's Rights and freedoms; Deprivation of liberty

### Introduction

The execution of the functions of criminal law requires that its procedures are adopted in such a way as to ensure the quick and efficient conduct of criminal proceedings. The most severe preventive measure implemented to ensure the proper handling of criminal procedure is pre-trial detention. This institution is present in virtually all legal systems, and its application has a long history dating as far back as ancient Athens Izydorczyk [1]. It is worth mentioning that the difficulty involved in this matter and the controversy surrounding it arise from the fact that it is imposed on a person who has not been duly sentenced and who is presumed innocent until his guilt has been proven [2]. Therefore, it is important to establish such

principles for the enforcement of pre-trial detention that the freedom of a person detained as part of the criminal proceedings be limited only to a minimal necessary extent before the final and binding sentence is given Szumski [3].

The objective of this article is to present the normative shape of the enforcement of pre-trial detention in the light of Polish regulations and compile a catalogue of limitations resulting from the application of this measure, as well as to compare the actual situation of a person in pre-trial detention to that of a person serving a sentence of deprivation of liberty. The problem is not trivial, because it concerns fundamental human rights. In addition, the scale of the phenomenon is not insignificant: in 2018, there was an average of 74 077 prisoners in

Polish prisons and detention centres, including 7 428 detainees (<http://www.sw.gov.pl/strona/statystyka-roczna>). Moreover, in Poland there is a systematic problem with the excessive length of pre-trial detention. Cases in which detention lasts over two years are not isolated ([http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR\\_PTD\\_2015\\_EN.pdf](http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf)). It should be emphasized that the problem of pre-trial detention is not local and it is not limited to Polish regulations. The institution of detention is known by all legal systems, and the detainees' rights are a global problem.

In general, the enforcement of the penalty of deprivation of liberty appears to share a number of similarities with pre-trial detention. More specifically: 1) both the custodial sentence and pre-trial detention are applied in the course of criminal procedure, and not outside of it; 2) both measures involve isolating individuals from the rest of society; 3) both are applied for a specified period of time; 4) both entail the same legal effects in the case of evidently wrongful application thereof; 5) both can be applied only following a formal decision of a judicial body (court) by way of order or ruling [4]. Nonetheless, problems arise in the case of more detailed regulations on this matter.

As the starting point for a discussion on this issue, let us analyse the wording of Article 214 of the Polish Law on the Enforcement of Criminal Sanctions, pursuant to which a person being held in pre-trial detention shall enjoy at least the same rights as a convicted person serving a sentence of deprivation of liberty. The literature on the subject indicates that the status of a person sentenced to deprivation of liberty is significantly different from that of a person placed in pre-trial detention, given that the principle of the presumption of innocence excludes the possibility of burdening a person subject to pre-trial detention with obligations and precludes the application of numerous restrictions irreconcilable with the objectives of pre-trial detention [5]. It should therefore be noted that the wording of Article 214 of the Law on Enforcement of Criminal Sanctions (and in particular the phrase "at least"), as well as the repeated opinions on it, may suggest that the status of a person being held in pre-trial detention is better than that of a person serving a sentence of deprivation of liberty. In the Polish literature, nonetheless, arguments have been advanced that detention entails a situation – both legally and factually – similar to that created by the penalty of deprivation of liberty [6].

### The Essence and Purpose of the Pre-Trial Detention

It is clear that pre-trial detention constitutes derogation from the constitutional guarantee of personal liberty – Article 41 (1) of the Constitution of the Republic of Poland. Given that the limitations of the rights of detainees arise from the objectives of the preventive measure taking the form of pre-trial detention, it seems necessary first of all to analyse these objectives. Article 207 of the Law on Enforcement of Criminal Sanctions provides that the execution of pre-trial detention is intended to achieve the objectives for which the measure was applied, and in particular, to safeguard the proper course of the criminal proceedings. In this context, Tęcza-Paciorek A [7] lists, following the Polish literature on the subject, three types of safeguards: safeguarding the accused person for the purpose of the proceedings as a source of evidence and as an active party to the trial, safeguarding the accused person for the potential enforcement proceedings, in particular when the imposition of a penalty of deprivation of liberty is expected, and safeguarding criminal proceedings against obstruction of justice on the part of the accused.

In view of the doubts as to what the objectives of pre-trial detention are in the context of Article 207 of the Law on Enforcement of Criminal Sanctions, we should refer to the objectives and functions of this measure as specified in the literature (in particular in the literature on criminal procedure). It is difficult to deny that the postulative and actual functions of pre-trial detention must be identified based on the regulations which provide for the application of this measure, and more specifically, on the statutory conditions for optional pre-trial detention. They are laid down in Article 249 § 1, which provides that:

§ 1. Preventive measures may be applied in order to secure the proper conduct of the proceedings, and exceptionally, to prevent a new serious offence from being committed by the accused. They may be applied only if the evidence collected indicates a high probability that he has committed an offence.

and Article 258, worded as follows:

§ 1. Pre-trial detention and other preventive measures may be applied if:

- 1) there is good reason to fear that the accused may take flight or go into hiding, particularly if he has no permanent residence in this country or when his identity cannot be established;
- 2) There is good reason to fear that the accused would induce other persons to give false testimony or attempt to obstruct the criminal proceedings in some other manner.

§ 2. If the accused has been charged with a crime or with a misdemeanour carrying the statutory maximum penalty of deprivation of liberty of a minimum of 8 years, or if the court of the first instance sentenced him to a penalty of deprivation of liberty of no less than 3 years, the need to apply the pre-trial detention in order to secure the proper conduct of proceedings may be justified by the severe penalty threatening the accused.

§ 3. Pre-trial detention may also be applied, in exceptional cases, when there is good reason to fear that the accused charged with a crime or an intentional misdemeanour would commit an offence against life, health or public safety, particularly if he threatened to commit such an offence.

The aforementioned conditions, in particular the last two set out in Article 258 § 2 and 3, came under considerable criticism in the Polish literature [8-10]. Tylman J [11] argues that in almost all countries pre-trial detention goes beyond the primary objective of securing the proper conduct of the proceedings – to a greater or lesser degree, this measure serves to fulfil other tasks of an extraprocedural nature [4].

It is essential that the difference between the objectives of the penalty of deprivation of liberty and pre-trial detention should be known. It is made clear in the Prison Service Act, pursuant to which the main tasks of the Prison Service include, among others:

1. Provision of correctional treatment and social reintegration measures for persons sentenced to the penalty of deprivation of liberty, in particular through organisation of work conducive to the acquisition of professional qualifications, as well as provision of schooling, cultural activities, sport activities, and specialist therapeutic measures, and
2. Enforcement of pre-trial detention in a manner which secures the proper conduct of criminal proceedings for an offense or fiscal offence. With a view to the application of the principle of the presumption of innocence and the duration of detention, Teodor Szymanowski's [12] opinion that pre-trial detention fails to achieve any penitentiary objectives is hardly surprising. The question arises as to whether the resignation from the preventive objective in the case of pre-trial detention aggravates the situation of the detainee, e.g. by significantly reduced opportunities for participation in various forms of correctional treatment such as cultural and educational activities [13]. It is unacceptable that by reason of the legal situation of a person being held in pre-trial detention and the application of the principle of the presumption of innocence, a detainee is deprived of certain rights on

the sole ground that they are attributed a certain function (e.g. correctional).

### **Rights of Persons Placed in Pre-Trial Detention and Persons Serving a Sentence of Deprivation of Liberty**

Pursuant to Article 214 of the Law on Enforcement of Criminal Sanctions which defines the minimum rights and obligations of persons placed in pre-trial detention, a prisoner on remand shall enjoy at least the same rights as those granted to a person serving a sentence of deprivation of liberty under the ordinary regime in a closed correctional facility. This clearly shows that of all the types of correctional facilities and the different rigor that they entail, the legislator chose the most rigorous one. The question remains open whether that decision was sensible and well thought-out. Clearly, certain restrictions resulting from incarceration in a closed correctional facility must be imposed on prisoners on remand – for instance excluding the possibility of leaving the cell on one's own, due to concerns about establishing illegal communication with other detainees. Nonetheless, some of the privileges reserved for inmates in semi-open or open correctional facilities, such as an increased number of family visits, could and should also be accorded to persons being held in pre-trial detention. It is worth recalling that detaining a person without a valid sentence ought to entail granting of special rights, given that the person in question is not a convict, restriction of whose rights may even seem somewhat justified depending on the gravity of the offence committed. Moreover, convicted prisoners can usually "earn" a transfer to another correctional facility with less rigorous supervision for maintaining good behaviour while imprisoned, but this opportunity does not exist for prisoners on remand. Given the above, it would be appropriate to establish a separate type of facility, account being taken of the special status of persons placed in pre-trial detention, introducing all the necessary restrictions, in particular with respect to communication, but simultaneously granting detainees the widest possible additional privileges, in view of the fact that detention is applied without a valid convicting judgment. These rights could apply to both the cultural and educational sphere (additional classes or courses), as well as the social area (better quality food, additional showers or walks), or correctional measures, as the prolonged pre-trial detention that is often applied deprives a considerable proportion of detainees of the possibility to engage in social reintegration and health care activities available to a person serving a sentence of deprivation of liberty. This

may limit or prevent the achievement of the objectives of the penalty of deprivation of liberty, although the period of pre-trial detention will count towards the enforcement of the penalty of deprivation of liberty, thus reducing its duration, sometimes so much that the penalty will be considered to have been served in full.

A sample list of the rights granted to persons deprived of liberty is laid down in Article 102 of the Law on Enforcement of Criminal Sanctions. Although these rights are vested in each person, depriving anyone of liberty as a result of a decision by the state requires that it is explicitly articulated.

The rights of persons subject to pre-trial detention are not listed separately in the Law on Enforcement of Criminal Sanctions, which does not imply that the legislator completely failed to address this issue. The aforementioned Article 214 of the Law on Enforcement of Criminal Sanctions provides that detainees shall enjoy at least the same rights as those granted to persons serving a sentence of deprivation of liberty under the ordinary regime in a closed correctional facility. Restrictions in this respect, if any, are only justified if driven by the need to secure the proper conduct of criminal proceedings, maintain order and security in the detention facility and prevent demoralisation. The question arises, though, whether in view of the fact that persons placed in pre-trial detention benefit from the presumption of innocence, these restrictions are legitimate.

Starting from the minimum space of 3 square metres for each detainee, as guaranteed under Polish law, it should be noted that while overpopulation in Polish penitentiary facilities has steadily decreased over the past few years, there are no statistics available as to the overpopulation among prisoners on remand. While it would be reasonable to increase the space per one prisoner in all groups of detainees, it is hugely important to do so with respect to prisoners on remand. First of all, prisoners on remand spend almost all day in their cells, and secondly, the principle of presumption of innocence precludes unnecessary burdening of persons being held in pre-trial detention with hardships incompatible with the objectives to be achieved by the imposition of the most severe preventive measure [14], which in this case have no relevance to the standards of detention determined e.g. by the size of the cell. Therefore, consideration should be given to the introduction of a separate, different minimum space for those subject to pre-trial detention and those serving a sentence of deprivation of liberty. It is worth stressing that some countries distinguish between

different cell spaces depending on particular types of detainees [15].

What distinguishes the rights of persons placed in pre-trial detention from those of convicted prisoners is that the former are not allowed to possess communication devices, technical devices used for recording and playing back information, computers, but also, out of deposit, items and documents which may hinder the proper course of criminal proceedings (Article 216 § 1 of the Law on Enforcement of Criminal Sanctions). Whereas some of these restrictions are entirely understandable, a stringent ban on computers, even without an Internet connection, must be surprising, given that convicted prisoners are allowed to possess such equipment upon meeting certain conditions, and it is difficult to perceive the computer as a threat to the achievement of the objectives of the preventive measure.

The rights of persons subject to pre-trial detention are also at risk as regards the contacts of detainees with the external world, in particular prison visits. Prisoners on remand have the right to be visited at least once per month by a member of their inner circle, provided that the authority the detainee remains at the disposal of expresses consent. Consent may be refused when there is a justified concern that the visit will be used to cause an illicit impediment to the conduct of criminal proceedings or commit an offence, in particular to instigate an offence. Thus, although the Law on Enforcement of Criminal Sanctions grants a person being held in pre-trial detention the right to see a person from his inner circle at least once a month, this right is not granted on a mandatory basis, as its exercise is contingent upon the consent of the authority at whose disposal the detainee remains, and the authority is under no obligation to give such consent [14].

The Commissioner for Human Rights several years ago drew attention to illegitimate refusals and extremely long periods without contact with the inner circle (up to 20 months) [16]. This regulation must raise serious doubts. There are no legitimate reasons to prevent persons placed in pre-trial detention from having prison visits in the number provided for open correctional facilities. In situations where the offence committed has no link with the family of the detainee, his meeting with his family will not exert any impact on the course of the criminal proceedings.

Furthermore, persons being held in pre-trial detention who have permanent custody of children less than 15 years of age have no right to additional visits from the

children, whereas convicted prisoners may exercise this right. In addition, regulations concerning the course of such visits also appear illegitimate – persons placed in pre-trial detention may consume food and beverages purchased by visitors in the detention facility only when the visit is organised in such a way that direct contact between the detainee and the visitor is possible (Article 217 § 4 of the Law on Enforcement of Criminal Sanctions). This restriction does not seem rational, as otherwise these products could be handed over to the detainee by a Prison Service officer. On the whole, it should be noted that the regulations concerning visits between a prisoner on remand and his inner circle must be considered insufficient; the legislator should above all take into consideration their situation – the fact that they are detained without a valid sentence and are often placed in facilities located far from their place of residence.

The status of individuals subject to pre-trial detention is also influenced by the scope of the right to contacts with ministers providing religious services. Convicted prisoners have access to religious services, can directly participate in church services on religious holidays, listen to services transmitted by mass media, participate in religious education classes held in the correctional facility, and have the right to individual meetings with a minister. On the other hand, the body at whose disposal a person being held in pre-trial detention is may restrict or otherwise determine how the prisoner on remand may exercise the right to have contact with e.g. ministers, where it is essential for ensuring the proper conduct of criminal proceedings. However, the relevant issue in this case is not restricting individual contacts with a priest, but the possibility of staying in places of collective worship, which results in contacts with other detainees. Although the literature on the subject has questioned the possibility to restrict a prisoner on remand's participation in a church service [17], this is permitted by article 217 § 6 of the Law on Enforcement of Criminal Sanctions, as confirmed by the judgment of the European Court of Human Rights in case *Janusz Kawiecki v. Poland* (23 October 2012, no. 15593/07). In this respect, it should be emphasised that even if the authority at whose disposal the detainee remains deems it necessary to restrict or otherwise determine a detainee's contact with a minister, it is not possible to completely block a detainee's contacts with clergymen.

Contacts of prisoners on remand with the external world are also restricted in terms of free correspondence. Detailed rules on seizing, censorship and supervision over the correspondence of prisoners on remand are laid down in Article 217 a and b of the Law on Enforcement of

Criminal Sanctions. Although the Act only mentions selective supervision over the correspondence of a prisoner on remand by prison authorities, the executive regulation clearly indicates that in the event where the authority at whose disposal the prisoner remains decides against censoring his correspondence, section 4 providing for censorship of such correspondence must apply accordingly (§ 118 (4) and (5) of the regulation of the Minister of Justice of 23 June 2015 on administrative activities related to the enforcement of pre-trial detention, penalties, and coercive measures resulting in deprivation of liberty and documentation of these activities). Thus, despite the decision by the authority at whose disposal the detainee remains against correspondence censorship, the correspondence is still checked by Prison Service officers. Such a restriction of the rights of prisoners on remand seems to be pointless, as it does not by any means reflect the need to secure the proper conduct of criminal proceedings. Moreover, it was introduced by way of regulation and not in the act, and so it must be evaluated negatively [18].

Another problem concerns the functioning of the normative layer in practice – the Commissioner for Human Rights has pointed out the significant delays in the delivery of correspondence, which can last anything from two weeks to several months [16]. This practice causes unnecessary hardship for prisoners on remand; in particular, that correspondence is truly their only form of contact with their inner circle [19].

An important element of communication of detainees with the external world is telephone communication. Persons placed in pre-trial detention cannot use connectivity products other than the telephone. Making telephone conversations is conditional upon gaining consent of the authority at whose disposal the prisoner on remand remains, and the authority in question may refuse the consent if, in their opinion, there is legitimate concern that the conversation will be used to cause an illicit impediment to the conduct of criminal proceedings or commit an offence, and in particular to instigate an offence. It is worth considering whether the introduction of a stringent ban on connectivity products other than the telephone was legitimate. Supervised conversations, e.g. via Skype, make it easier to contact relatives, which can be particularly important in case of conversations with small children. Moreover, email correspondence is faster than traditional mail correspondence with e.g. family members having atypical working hours or living abroad.

The rights of prisoners on remand are also restricted as regards using prison furloughs. Pursuant to Article

217d of the Law on Enforcement of Criminal Actions, granting a person placed in pre-trial detention a furlough under Article 141a § 1 of the Law on Enforcement of Criminal Sanctions is subject to consent from the disposing authority. This automatically extends the waiting period for a decision on temporary leave permit to be absent from prison, which is important insofar as most situations that justify a positive decision in this respect are of an urgent nature and are predetermined in time, as is the case e.g. with funerals of the closest relatives. By way of example, it should be noted that in the year 2012 convicted prisoners were granted 6,392 leave permits under Article 141a § 1 of the Law on Enforcement of Criminal Sanctions, whereas prisoners on remand merely 22 [5].

Another matter that should be mentioned is the possibility to undertake work while being detained. Whereas convicted prisoners may be required to carry out work without their consent, this does not apply to prisoners on remand (except for cleaning tasks on prison premises). Nevertheless, the latter are far less likely to find employment while remaining in detention. Suffice it to say that in 2018, out of 7 428 persons being held in pre-trial detention, only 16 (!) had a paying job in the detention centre or outside (<http://www.sw.gov.pl/strona/statystyka-roczna>). The low employment rate is closely related to the fact that employment outside of the detention centre is subject to consent from the authority at whose disposal the prisoner on remand remains (Article 218 § 1 of the Law on Enforcement of Criminal Sanctions), which automatically translates into a smaller chance of finding work with external entities cooperating with penitentiary facilities.

The rights of prisoners on remand are also different from those of convicted prisoners in terms of the available awards to be granted to them by the prison administration. Whereas the catalogue of awards for prisoners on remand includes awards which are not available to convicted prisoners, such as consent to individual decoration of the cell, additional or longer walks, or consent to receiving a parcel exceeding the weight allowance, convicted prisoners may receive a number of awards not available to persons being held in pre-trial detention, including unsupervised visits, unsupervised visits in a separate room, unsupervised visits to a closest relative or person from the inner circle outside the correctional facility, for a period of time no longer than 30 hours at a time, or leave permit to be absent from prison without supervision for a period of time no longer than 14 days at a time. This comparison leads to two conclusions. First of all, some of the

differences in the awards available to convicted prisoners and those available to prisoners on remand lack any justification and can by no means be justified by the achievement of the objectives of the preventive measure. Based on the objectives of pre-trial detention, it cannot be explained why the awards available only to persons placed in pre-trial detention are not available to convicted prisoners, and vice versa, why persons to whom this most severe preventive measure was applied cannot be given an award or consent to pass a gift to a person of their choice. Secondly, the catalogue of awards available only to convicted prisoners has been unnecessarily narrowed down as regards prisoners on remand with respect to consent to additional visits, unsupervised visits, and unsupervised visits in a separate room. In the event where the authority at whose disposal the prisoner on remand is consents to such awards, it is hard to explain adequately how they might impede the achievement of the objectives of the applied preventive measures, if the persons to be involved in such visits are not relevant to the ongoing criminal proceedings.

While conducting a comparison of the rights of convicted prisoners and prisoners on remand, one must not overlook the fact that such a division of detainees is not of a dichotomous nature. Cases where convicted prisoners serving a sentence of deprivation of liberty in other penal cases are subject to a preventive measure in the form of pre-trial detention are not unheard of. This situation is foreseen in Article 223a of the Law on Enforcement of Criminal Sanctions. In § 1 it provides that such persons shall enjoy the same rights as convicted prisoners, with the exception of: visits, correspondence, the use of the telephone and other wired and wireless connectivity products, keeping things in the cell, receipt of healthcare services. In addition, there are distinct rules regarding the notifying the disposing authority of being classified as a prisoner on remand posing a serious social threat or serious threat to the safety of the correctional facility, notifying the disposing authority of a continuing health treatment at the correctional facility after the release, as well as the consent specified in Article 141a, and in other cases if the need to secure the proper conduct of criminal proceedings so merits – where the provisions of the Law on Enforcement of Criminal Sanctions concerning prisoners on remand apply. Moreover, § 2 of the provision quoted above excludes the possibility of such prisoners on remand being granted prison furloughs, awards involving temporary leave permits to be absent from prison, as well as leave permits to be absent from prison during the period of transition from custody to community. On the whole, the construction of this provision is difficult to accept. The

legislator granted this group of detainees the same rights as those of convicted prisoners, yet established an extremely wide range of exceptions to them. Various authors have argued in the literature that the exceptions to this principle are so numerous that they in fact wholly cancel it [14]. While simultaneous application of a preventive measure to convicted prisoners must entail certain restrictions, it may nevertheless be preferable to grant them the same rights as those conferred upon prisoners on remand.

The analysis presented above must lead to the conclusion that restrictions applicable to individuals being held in pre-trial detention are more stringent than those applicable to convicted prisoners. Since prisoners on remand are to enjoy at least the same rights as convicted prisoners serving a sentence of deprivation of liberty under the ordinary regime in a closed correctional facility, the question arises as to what extent their rights exceed those of convicted prisoners. The analysis of the provisions granting better rights to prisoners on remand than to convicted prisoners is neither extensive, nor significant. Indeed, the permission to use one's own clothing, underwear and shoes (Article 216 § 1 of the Law on Enforcement of Criminal Sanctions), also during procedural activities (Article 216a of the Law on Enforcement of Criminal Sanctions), or (upon consent of the authority at whose disposal the prisoner on remand remains and or the director of the detention centre) one's own food, medication, and personal care products (Article 216 § 2 of the Law on Enforcement of Criminal Sanctions) can hardly be described as having a significant impact on the quality of life of a person being held in pre-trial detention, especially since the Law on Enforcement of Criminal Sanctions provides for exceptions to these rules.

Prisoners on remand have the right to dispose of their own money, valuables and other things while being detained, including the right to deposit money in a bank account, unless the authority at whose disposal a prisoner on remand remains decides otherwise. In this respect, their rights are indeed more extensive than those of convicted prisoners, whose possibilities in this regard are, limited (Article 113 of the Law on Enforcement of Criminal Sanctions). Nevertheless, it is worth stressing that the majority of prisoners on remand are actually unable to dispose of their own money and the disposing authority may deprive them of this right.

The rights of prisoners on remand also appear more beneficial than those of convicted prisoners as regards disciplinary punishments. Sanctions for prisoners on remand do not include up to three months of visits

organised in such a way that direct contact between the prisoner and the visitor is impossible. Neither do they include reducing part of the remuneration for work due to the convicted prisoner by up to 25% for up to three months. In other cases, they are less severe – isolation in a solitary confinement cell may only last up to 14 days (and not 28, which is the maximum length for convicted prisoners), whereas the ban on participation in cultural and educational classes or on purchasing food or tobacco products may not exceed one month (in case of convicted prisoners – 3 months). The only inexplicable differentiation is the possibility of suspending the awards and privileges granted to a convicted prisoner (prisoners on remand may only be entirely deprived of those). In essence, while the catalogue of disciplinary punishments is more favourable to prisoners on remand than to convicted prisoners, the few privileges that they enjoy do not in any way compensate for the numerous restrictions imposed on them as a result of the application of the preventive measure.

### The Duration of Pre-Trial Detention

The analysis of the special restrictions on the rights of persons placed in pre-trial detention would not be complete without a discussion on one particularly acute problem of pre-trial detention, namely its duration. It should be emphasised that the duration of pre-trial detention is not strictly determined and the Polish legal system merely sets out what the relative maximum duration of pre-trial detention can be (Article 263 of the Code of Criminal Procedure). As Zgoliński I [6] has pointed out, "looking at the construction of Article 263 of the Code of Criminal Procedure, one cannot help but think that the legislator developed the regulation concerning pre-trial detention by piling exceptions to a rule. These exceptions accumulate, thus creating exceptions to exceptions that precede them. And alongside this, gradation of the periods of pre-trial detention was somehow created". This means that the person placed in pre-trial detention does not know exactly how long they will be deprived of liberty – and the obligation to determine the duration of this preventive measure each time it is applied does not change significantly, as the period may always be extended. Therefore, all the aforementioned restrictions – no contact with the family, idleness, being unable to carry out any plans one might have – become temporally unforeseeable. The situation of a convicted person serving a valid sentence of deprivation of liberty is totally different – a convicted prisoner knows the incarceration is for a fixed term, and after a period of time specified by law may become eligible for a parole, or even earlier, for a furlough. Moreover, prolonged pre-trial

detention marginalises, or even nullifies other criminal law institutions in the broad sense of the word (e.g. eligibility to qualify for conditional early release in a situation when the remand consumed all or most of the penalty).

The Constitutional Tribunal did not call into question the absence of regulations on the absolute maximum duration of pre-trial detention, although it did point out that the conditions specified in law "are difficult to evaluate using definite and objective criteria" (Constitutional Tribunal, 24 July 2006, SK 58/03, OTK-A 2006, no. 7, item 85). This requirement is not formulated in the Constitution either. Neither is it present in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. It is not even formulated by the European Court of Human Rights [20]. Nevertheless, the position of common courts and the Constitutional Tribunal is clear – the extension of pre-trial detention under Article 263 § 4 of the Code of Criminal Procedure is of an extraordinary nature, and so the conditions for doing so must be strictly interpreted [21]. Hence, it should be noted that court file research encompassing 58 cases (103 defendants) carried out in 2009 by Momot S [22] revealed that the pre-trial detention lasted from 2 to 9 years; in the case of 23 of the defendants it exceeded 4 years; whereas in the case of 9 of the defendants – 5 years. Moreover, it is no secret that Poland lost most cases heard by the ECHR concerning the excessively long duration of pre-trial detention [16].

In the light of the above, it is legitimate to subscribe to the view held by Hofmański P and Zabłocki S [20] who argue it is necessary to set the absolute maximum duration of pre-trial detention (which may differ depending on the degree of gravity of the charges) at no more than 3-4 years, with the exception of situations where the accused intentionally protracts criminal proceedings concerning specified categories of felonies. Although there may be doubts as to whether it is the gravity of the offence – as opposed to the complexity of a case – that should call for an extension of pre-trial detention, the criterion proposed by the authors is clear and precise and adequately fulfils the guarantee function.

### **The Legal Situation of Foreigners Detained in Poland**

The problems indicated above are exacerbated when the prisoner is a foreigner. The latest statistics show that in 2018, in Polish correctional facilities and detention centres there were on average 968 foreigners, which

accounts for slightly more than 1% of all prisoners. It should be noted that this group is not homogeneous in terms of nationality and culture. Monthly statistics confirm that the number of foreigners – although not very significant – is growing steadily, also in 2019. The foreign population is particularly visible among prisoners on remand, which should not come as a surprise (<https://www.sw.gov.pl/strona/statystyka-roczna>; <https://www.sw.gov.pl/strona/statystyka--biezaca>; Central Database of Persons Deprived of Liberty Noe.NET). In the case of foreigners whose life's focus is outside Poland or who, despite living in Poland, have strong links with their country of origin, there is a greater risk that the accused may take flight or go into hiding, which is in fact one of the criteria for the application of the most severe preventive measure (Article 258 § 1 of the Code of Criminal Procedure).

Under the current regulations, foreigners do not constitute a separate category of prisoners on remand, and so are subject to the same formal restrictions as other detainees. However, these restrictions – given who they are applicable to – can gain a different meaning.

The European Prison Rules recommend that "special arrangements shall be made [by member states] to meet the needs of prisoners who belong to ethnic or linguistic minorities" (Point 38.1 of the European Prison Rules). The Polish Prison Service is becoming increasingly aware of the complications that arise from a language barrier between the prisoner and prison staff members, and is organising special courses for the officers. Since the detainees demonstrate different linguistic competencies, English language courses for the officers do not solve the problem. There may be cases where a prisoner and the prison staff do not communicate in the same language, and access to interpreters is limited. Similar obstacles may arise in contacts with other detainees. In such cases, the regime governing contacts with the external world – although frequently justified by the functions of the preventive measure – becomes even more severe. One visit per month may be the only occasion for the arrested foreigner to talk in a language he understands. At the same time, it appears that the fact of having a conversation in a language unknown to prison officers, and thus the officers' inability to control the content of such a conversation, may constitute grounds for refusal to give consent to such visits under Article 217 § 1b of the Law on Enforcement of Criminal Sanctions. Nonetheless, it should be mentioned that the difficulties involved in the proper organisation of such visits should not in themselves constitute grounds for refusal to grant consent. In the event where consent to a visit is granted,

another problem may be the family's arrival for the meeting, in particular when the prisoner's relatives do not live in Poland.

The limited number of prison visits and the difficulties involved in the realisation of visits increase the importance of telephone contacts. Refusal to grant consent to the use of the telephone may completely eliminate the possibility of having a direct conversation with the closest family or others. This makes it all the more important for the authority at whose disposal the prisoner on remand remains to refuse its consent only in duly justified circumstances (Article 217c § 2 of the Law on Enforcement of Criminal Sanctions). The last possible method of contact, namely letters, may also involve further complications. The problems with the prolonged censorship of correspondence outlined above will likely arise also in case it is necessary to involve a translator in order to control the correspondence. It should be stressed that the inability to communicate in the Polish language and lack of knowledge of the law will make certain restrictions even more severe and will most likely create difficulties in the exercise of the prisoner's rights and privileges. Hence, it is important that penitentiary facilities follow the recommendations of the European Prison Rules by ensuring that information on these rights is available in a language familiar to the prisoner (Points 37.4 and 38.3 of the European Prison Rules), even though the Polish law does not provide for such a requirement.

Another issue to be addressed arises from cultural differences not related to language. Regardless of whether a prisoner is a competent speaker of the Polish language or not, he may encounter problems in the exercise of his religious practices, customs, and food practices. Clearly, this problem also affects Polish citizens who may have less popular preferences in this respect. Even where applicable laws provide for certain general rights and liberty guarantees, there are limitations of a factual nature, such as the unavailability of a minister representing a given denomination, or the lack of access to specific grocery products. Given the above, situations where such restrictions are intentional are even more difficult to handle. Examples may include lack of consent for the detainee to use food received from outside the detention centre, e.g. kosher food, or wear his own clothing, e.g. a turban or hijab (Article 216 § 1 and 2 of the Law on Enforcement of Criminal Sanctions). While the fear of the prisoner escaping, combined with reasons of security may justify the refusal to grant consent in such cases, the religious connotations attached to such needs will make the restrictions extremely painful.

At the conclusion of the section devoted to pre-trial detention of foreigners, it is worth noting that the fact that a prisoner is a representative of a different culture may compound adaptation difficulties. Communication problems, different looks, clothes, eating habits, etc. may lead to the isolation of a detainee from the prison community. In this situation, being placed in a multi-person cell, where merely 3 square metres are guaranteed per inmate, may be particularly difficult for foreign prisoners. The ban on the use of the computer may prove equally burdensome for foreign detainees.

Whereas pre-trial detention of foreigners is often fully justified and necessary, one must bear in mind that also his group of prisoners benefits from the presumption of innocence. Any and all restrictions and the resultant hardships may only be applied when they are necessary for the achievement of the objectives of the preventive measure. The situation of foreign prisoners may become yet another impulse for reconsidering the legitimacy of imposing certain restrictions on prisoners on remand.

## Conclusion

The final conclusions that follow from the analysis conducted herein must be preceded by invoking some of the most important directives laid down in the Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. First of all, the Committee of Ministers in the preamble stressed that pre-trial detention may cause irreversible damage to persons ultimately found innocent, and that it may have a detrimental impact on the maintenance of family relationships. For this reason, a stipulation was made in directive 5 that prisoners on remand shall be treated in a way appropriate to their legal status, which entails the absence of restrictions other than those necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others, and in particular the fulfilment of the requirements of the European Prison Rules. The recommendation does not require that the total maximum period of pre-trial detention be specified mentioning only that it should be proportionate to the penalty that may be imposed, that the case should be tried in a reasonable time, and that priority should be given to cases involving a person being held in pre-trial detention (recommendation 22-24). At the same time, the EPR recommend that there should be no restrictions as to the number of letters sent and received by prisoners on remand (recommendation 38), and that remand in custody should not unduly disrupt the education of

children and young persons or unduly interfere with access to more advanced education.

It appears that many of the currently applicable restrictions ought to be eliminated altogether, and those that must remain (e.g. restricted contacts) should be listed, while the conditions for their use should be specified with great precision, allowing for a judicial review of the merits of their use. In conclusion, a separate status, a mode of application of pre-trial detention, instead of the mechanically invoked closed correctional facility regime, must be created. It cannot be denied that pre-trial detention is related to procedure and not enforcement of criminal sanctions, thus, the grounds for its application and also all restrictions (especially the facultative ones) need to have procedural, and not penitentiary objectives. Furthermore, it appears essential that the absolute maximum duration of pre-trial detention should be introduced [7,20]. The justification for such a limit on its duration would be similar to one of the arguments advanced in favour of using the limitation period – the risk of inefficiency and incompetence of the law enforcement authorities and the judiciary is borne by the state and not by the accused (regretfully, sometimes that entails consequences for the injured party). The final postulate concerns the practice of making decisions regarding various rights granted to prisoners on remand upon consent of the prosecution service or court. It appears that the only grounds and justification for the application of particular restrictions are specified in the criminal proceedings. Therefore, if the court decided to apply pre-trial detention due to the fear that the accused may go into hiding, no restrictions should apply to the accused person's correspondence, as it cannot be said that the detainee's correspondence could facilitate his going into hiding. In this context, it is necessary to remember that the ECHR has pointed out on numerous occasions that the state's financial condition cannot justify worse treatment of persons deprived of liberty. In the opinion of the Court, penitentiary policy must be carried out taking into account the financial capability of the state, and not at the expense of the rights of prisoners. Hence, it is our view that the rights of prisoners on remand should be as extensive as possible, regardless of the resultant costs [23].

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