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## **Prohibition of torture and inhuman or degrading treatment in the Polish legal system from a criminal law perspective**

**ABSTRACT:** *The purpose of this chapter is to analyse the Polish legal system in relation to the prohibition of torture and inhuman treatment from constitutional and criminal law perspectives. These issues will be presented based on the analysis of current regulations, as well as through the interpretation of the hitherto developed doctrine, in addition to the opinions of Polish authorities in the field of the protection of human and civil rights and freedoms. As part of these considerations, conclusions are also presented from an analysis of Polish jurisprudence regarding the prohibition of torture in correlation with the use of violence by public officials to extort confessions, the abuse of a person deprived of liberty, and the abuse of power, which are subject to a separate classification under Polish criminal law.*

**KEYWORDS:** *prohibition of torture, crime of torture, prohibition of inhuman and degrading treatment, abuse of power by public officials, extortion of confessions, abuse of a person deprived of liberty, legislation of the Republic of Poland, jurisprudence of the Republic of Poland.*

### **1. Introductory issues**

Currently, the phenomenon of torture may seem to appear only in the context of considerations of the functioning of totalitarian and authoritarian states; for democratic societies, it is only a relic of the past. However, contrary to common expectations, torture is also a problem in various political systems today. Therefore, the current legislation of democratic countries introduces into their legal systems regulations aimed at prohibiting or penalising behaviours comprising inflicting physical or

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mental pain intentionally on someone<sup>1</sup>. Moreover, democratic states also become parties to international acts that prohibit the use of torture and oblige states to introduce regulations into their legal systems that penalise behaviour that meets the criteria of torture. This chapter presents considerations for the prohibition of torture and inhuman treatment from the perspective of Polish constitutional and criminal law regulations. First, an international perspective will be presented regarding the grounds for the prohibition of torture in Poland, followed by an assessment from the perspective of the provisions of the Polish Constitution concerning the prohibition of torture. Subsequently, the currently functioning solutions in criminal law will be discussed, including sanctions for crimes that meet the characteristics of torture, as well as inhuman and degrading treatment. Next, the most important jurisprudence regarding the discussed matter will be analysed, and official statistics relating to the application of such criminal provisions will be presented. Additionally, attention is paid to key cases concerning the Polish state that were pending before the European Court of Human Rights (ECtHR), which referred to the prohibition of torture.

## 2. Grounds for the prohibition of torture in Poland resulting from international law

First, regarding international law, Poland, like other democratic states, is a signatory to numerous international acts under which it has undertaken to protect humans against torture, as well as inhuman or degrading treatment or punishment. The basic ones include, among others, the following: the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup> (hereinafter: ECHR); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>3</sup> (hereinafter: Convention Against Torture); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>4</sup>; the

1 See *Torture as a disgrace of the 21st century*, session 34 during III. Congress of Civil Rights, the Commissioner for Human Rights and Office for Democratic Institutions and Human Rights (ODIHR), <https://bip.brpo.gov.pl/pl/content/panel/sesja-34KPO-zwalczanie-tortur-w-Polsce>.

2 Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5, and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284)

3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 (Journal of Laws of 1989, No. 63, item 378).

4 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, drawn up in Strasbourg on 26 November 1987 (Journal of Laws of 1995, No. 46, item 238)

International Covenant on Personal and Political Rights<sup>5</sup>; the Charter of Fundamental Rights of the European Union<sup>6</sup>; the Universal Declaration of Human Rights<sup>7</sup>; the Rome Statute of the International Criminal Court (hereinafter the Statute of the ICC)<sup>8</sup>; the Convention on the Rights of the Child<sup>9</sup>; the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence<sup>10</sup>; the Conventions on the Protection of Victims of War, signed in Geneva on 12 August 1949<sup>11</sup>; the Convention on the Rights of Persons with Disabilities<sup>12</sup>. Notably, according to Art. 7 § 2 (e) of the ICC Statute, 'torture' means the intentional infliction of severe pain or suffering, whether physical or mental, on any person in the custody or control of the accused. However, pursuant to Art. 1 of the Convention Against Torture, the term 'torture' refers to any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on any person to obtain information or confession from him or a third party, punish him for an act committed or suspected of being committed by him or a third party, intimidate or coerce him or a third party, or fulfil any other purpose based on any form of discrimination where such pain or suffering is caused by a government official or another person acting in an official capacity, at their direction, or with explicit or tacit consent<sup>13</sup>. Recalling this article is crucial from the perspective of further considerations because torture does not have a legal definition under Polish legislation. Therefore, it is accepted based on international acts and the related achievements of doctrine and jurisprudence<sup>14</sup>.

5 International Covenant on Civil and Political Rights opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 167)

6 Charter of Fundamental Rights of the European Union (Official Journal of the EU.C.2012.326.391)

7 Universal Declaration of Human Rights (UN General Assembly Resolution 217 A (III) adopted and proclaimed on 10 December 1948)

8 Rome Statute of the International Criminal Court of 17 July 1998 (Journal of Laws 2003 No. 78, item 708).

9 The Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526).

10 The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, drawn up in Istanbul on 11 May 2011 (Journal of Laws of 2015, item 961).

11 The Conventions on the Protection of Victims of War, signed in Geneva on 12 August 1949 (Journal of Laws of 1956, No. 38, item 171).

12 The Convention on the Rights of Persons with Disabilities (Official Journal of the European Union, L., 2010, No. 23, page 37).

13 Art. 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Hassanová, 2023, pp. 51–73.

14 See Banaszak, 2012, p. 263; Sarnecki, 2003, pp. 1–3; Sobczak, 2013, nb 9; Pająk and Przychodzki, 2019.

### 3. Constitutional grounds for the prohibition of torture

The prohibition of torture, cruel, inhuman, or degrading treatment, and punishment is an absolute rule of international law. This prohibition cannot be waived or modified by other legal provisions (*ius cogens*)<sup>15</sup>. There is no difference in the case of the Polish Constitution—the Constitution of the Republic of Poland, on 2 April 1997<sup>16</sup> (hereinafter, the Constitution). Art. 40 of the Constitution directly prohibits torture and humiliation<sup>17</sup>. According to this provision, no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment; corporal punishment is prohibited. Para. 4 of Art. 41, which guarantees personal inviolability and freedom, confirms that every person deprived of liberty should be treated humanely<sup>18</sup>. When analysing both provisions cited above, they are concerned with the direct protection of human dignity<sup>19</sup>. Public authorities may not use torture under any circumstances because Art. 40 of the Constitution is absolute and may not be limited in any manner. This is closely related to Art. 30 of the Constitution, which expresses the principle of the protection of human dignity<sup>20</sup>. According to this provision, inherent and inalienable human dignity is a source of human and civil freedoms and rights<sup>21</sup>. It is inviolable, and the duty of public authorities is to respect and protect it. The analysis of jurisprudence shows that the prohibition of torture and cruel, inhuman, or degrading behaviour is derived precisely from the essence of human dignity<sup>22</sup>. Therefore, the prohibition of torture and cruel, inhuman, or degrading behaviour is absolute and may not be limited under any circumstances. Notably, earlier fundamental laws referred to the legal limits of punishment, an example of which is the prohibition of physical torment<sup>23</sup>. It is worth recalling Art. 98 of the Constitution of the Republic of Poland dated 17 March 1921<sup>24</sup>, which provided that ‘Prosecution of a citizen and imposition of a penalty is permissible only on the basis of the applicable law. Punishments combined with physical torment are not permitted and no one may be subjected to such punishments’. Art. 40 is also related to Art. 38, which states that the Republic of

15 Daranowski, 1986 pp. 97–109; Lis, 2017, pp. 43–45; Szpak, 2009, pp. 147–162; *Commentary on Art. 246* in Grześkowiak and Wiak, 2021.

16 Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)

17 Ibid. Art. 40

18 Ibid. Art. 41.

19 Błaszczak, 2021, p. 472

20 See Dąbrowski, 2015, p. 67–84; Biśta, 2014, p. 62.

21 Art. 30 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)

22 See Bosek, p. 243

23 Safjan and Bosek, 2016.

24 Constitution of the Republic of Poland of 17 March 1921 (Journal of Laws No. 44, item 267)

Poland provides every human being with legal protection of life<sup>25</sup>, and Art. 39 states that no one may be subjected to scientific experiments, including medical experiments, without their free consent<sup>26</sup>.

As has already been indicated earlier, the Constitution, despite referring to the concept of torture, does not define it. Thus, related literature and jurisprudence refer to definitions formulated in acts of international law to which Poland is a party, as well as jurisprudence and literature referring to these acts<sup>27</sup>.

#### 4. Criminal law grounds for the prohibition of torture

In connection with counteracting the use of torture and in accordance with the provisions of the Convention Against Torture, it is the legislator's duty to shape criminal regulations in such a way that none of the forms of torture fall outside the scope of criminalisation. This also applies to the need to criminalise persons who would commit a crime in the form of an attempt or as an accomplice. In accordance with Art. 4(2) of the Convention Against Torture<sup>28</sup>, although it is the state's competence to determine the level of penalties, the seriousness of the offenses related to the use of torture should be considered when determining culpability. An obligation has been imposed on each State to ensure that anyone who claims to have been subjected to torture in its territory has the right to lodge a complaint with competent authorities and have such a complaint dealt with expeditiously and impartially. Public authorities are also required to take measures to ensure that the complainant and witnesses are protected from any form of ill-treatment or intimidation in connection with his complaints or witness statements<sup>29</sup>. There is no difference in Poland, where everyone is guaranteed the right to a fair and public hearing of a case without undue delay by a competent, impartial, and independent court<sup>30</sup>, and court proceedings are at least two-instance. Notably, in the Polish legal system, there exists the institution of the Commissioner for Citizens' Rights whose subject of activity is, among others, monitoring whether torture is used and whether human and civil rights are violated<sup>31</sup>.

25 Art. 38 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)

26 Ibid. Art. 39.

27 See Banaszak, 2012, p. 263; Sarnecki, 2003, pp. 1–3; Sobczak, Commentary on Art. 4 in Wróbel, 2013.

28 Art. 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

29 Safjan and Bosek, 2016.

30 Art. 45 sec. 1 of the Act of 2 April 1997 – Constitution of the Republic of Poland (Journal of Laws No. 78, item 483, as amended)

31 Act on the Commissioner for Human Rights of 15 July 1987 (Journal of Laws of 2020, item 627)

In the event of suspicion of torture, the ombudsman has the right to report it to the relevant law enforcement authorities—the police or the prosecutor’s office—with information about the possibility of a crime being committed, such as the abuse of a prisoner<sup>32</sup>. Moreover, pursuant to the Optional Protocol to the Convention Against Torture, the Commissioner for Human Rights has been performing the tasks of the National Preventive Mechanism since 2008—visiting places where people deprived of their liberty are detained<sup>33</sup>. As Poland is a signatory state of the ECHR, anyone can file a complaint with the ECHR on the principles set out in the ECHR, pointing to Art. 3, which guarantees freedom from torture and inhuman or degrading treatment or punishment<sup>34</sup>.

In the Polish legal system, substantive criminal law was created under the Act of 6 June 1997 – the Penal Code (hereafter, the Penal Code)<sup>35</sup>. The Polish legislature has not decided to single out a separate crime of torture under the Penal Code, but jurisprudence and doctrine indicate that the use of torture may fulfil the characteristics of several prohibited acts. It is for the assessment of the law enforcement agency, and ultimately the court, to decide on the qualifications of the act. Most often, the court refers to the issue of torture in relation to Art. 231, Art. 246, Art. 247, and Art. 217 of the Penal Code<sup>36</sup>. Regarding the use of torture, some crimes can be committed by anyone; certain other crimes can only be committed by certain entities in certain circumstances and ways. For further consideration, the meaning of public officials under Polish criminal law should be clarified. In the Penal Code, the legal definition of a public official was included in Art. 115 §13. This provision contains an exhaustive list of entities, according to which a public official is any of the following: the president of the Republic of Poland; deputy, senator, councillor; Member of the European Parliament; judge, juror, prosecutor, officer of the financial body of preparatory proceedings or the body superior to the financial body of preparatory proceedings, notary public, bailiff, probation officer, trustee, court supervisor and administrator, person adjudicating in disciplinary bodies operating based on the Act; a person who is an employee of government administration, another state or local government body, unless he performs only service activities, as well as another person to the extent in which he is authorized to issue administrative decisions; a person who is an employee of a state control authority or a local government control authority, unless

32 Świeca, 2010, Commentary on Art. 14

33 Art. 1 § 4 of the Act on the Commissioner for Human Rights of 15 July 1987 (Journal of Laws of 2020, item 627)

34 Krzyżanowska-Mierzewska, 2013, p. 264-265.

35 Act of 6 June 1997 – Penal Code (Journal of Laws of 2022, item 1138, as amended)

36 See [online], <https://bip.brpo.gov.pl/pl/content/sejm-o-zakazie-tortur-rpo-zabiegalo-to-od-2-lat> (Accessed: 15 November 2022); <https://www.prawo.pl/prawnicy-sady/przestepstwo-tortur-nie-tylko-wobec-jencow-powinno-wejsc-do-kodeksu,70226.html> (Accessed: 15 November 2022)

he performs only service activities; a person holding a managerial position in another state institution; an officer of an authority appointed to protect public security or an officer of the Prison Service; a person on active military service, with the exception of territorial military service performed at one's discretion; an employee of an international criminal court, unless he performs only service activities<sup>37</sup>.

The offence of abuse of power regulated in Art. 231 of the Penal Code §1, which Polish courts regularly invoke in cases related to torture, may be committed only by a public official who, by exceeding his powers or failing to fulfil his duties, acts to the detriment of the public or private interest. This crime is punishable by imprisonment for up to three years. Notably, Art. 231 § 3 provides that if a public official committing the basic type of §1 acts unintentionally and causes significant damage, he is subject to a fine, the penalty of restriction of liberty or imprisonment for up to two years. Compared to §1, an act committed unintentionally and causing significant damage is subject to milder criminal liability. Art. 231 §2 provides for a qualified type, wherein if the crime was committed to achieve financial or personal gain, the perpetrator is subject to imprisonment for 1–10 years<sup>38</sup>. Therefore, the legislature increases the limits of criminal liability that may be incurred by a public official because of the existence of an objective in the form of a desire to achieve financial or personal gain. No one can be held criminally responsible for committing this crime except public officials. This is an individual crime that can only be committed by a specific entity<sup>39</sup>. Art. 231 §4 provides that §2 does not apply if the act meets the criteria of a prohibited act under Art. 228 of the Penal Code i.e. the crime of venality. In this situation, the subsidiarity clause of the Polish criminal law applies<sup>40</sup>.

Another crime based on which the court sentenced a behaviour similar to torture was the forcing of a confession by an officer. This offence has been specified in Art. 246—a public official or anyone acting under his or her command who, for obtaining specific testimony, explanations, information, or statements, uses violence, and unlawful threats or abuses another person physically or mentally, shall be liable to imprisonment for 1–10 years<sup>41</sup>. It is an individual crime—it may only be committed by a public official or a person acting on his instructions<sup>42</sup>. When characterising the subjective side, this crime can only be committed intentionally, with direct intention, and with a special colour (*dolus coloratus*). The perpetrator acts to obtain specific

37 Art. 115 §13 of the Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022, item 1138, as amended)

38 Ibid. Art. 231.

39 Banaś-Grabek, Gadecki, and Karnat, 2020.

40 See Grzeškowiak and Wiak, 2023.

41 Art. 246 of the Act of 6 June 1997 – the Penal Code (i.e. Journal of Laws of 2022, item 1138, as amended)

42 Mozgawa, 2021.

testimonies, explanations, information, and statements<sup>43</sup>. Art. 246 of the Penal Code provides for the protection of justice, dignity, bodily integrity, human health, freedom, and property. The perpetrator's behaviour may take the form of violence, unlawful threats, and other forms of physical or psychological abuse. Notably, abuse encompasses inflicting physical or mental suffering in a way different from violence or unlawful threats, which may occur through sleep deprivation, refusal to eat or drink, ridicule, or insults<sup>44</sup>.

Another crime that may meet the criteria for cruel, inhuman, and degrading treatment and punishment is Art. 247 of the Penal Code. This sanctions the crime of mistreating a person deprived of liberty<sup>45</sup>. Pursuant to the wording of this provision, anyone who physically or mentally abuses a person legally deprived of liberty is subject to a penalty of imprisonment for 3 months to 5 years. Anyone can be the subject of a crime of the type specified above. However, in the type from Art. 247 § 3 of the Penal Code, the crime can only be committed by a public official under the obligation to prevent the ill-treatment of a person deprived of liberty. Therefore, the sanctioned behaviour of the perpetrator of the act under Art. 247 § 3 of the Penal Code comprises allowing, contrary to the existing obligation, the abuse of a person deprived of liberty. When analysing the subject matter, the causative action in Art. 247 § 1 and 2 of the Penal Code is defined as abuse—an act or omission comprising inflicting physical pain or severe mental suffering intentionally. The qualified type described in Art. 247 § 2 of the Penal Code comprises abuse combined with particular cruelty, for which stricter criminal liability is provided. Nevertheless, the crime under Art. 247 § 3 of the Penal Code comprises allowing, contrary to the obligation, the abuse of a person legally deprived of liberty. The crime is consequential (material) because its features include the effects of abuse. In practice, we often encounter situations in which a person legally deprived of liberty is allowed to be mistreated by a fellow prisoner or a subordinate public official<sup>46</sup>. Bullying involves several situations. In the literature on the subject, an exemplary enumeration from the perspective of abuse of prisoners, as well as in terms of the specificity of prison subcultures, was made by M. Jachimowicz, who pointed to such activities as follows: beating, kicking, pulling hair, twisting hands, throwing against a wall or floor, binding hands or feet, exposure to extreme cold or extreme heat, spitting on or being forced to perform humiliating actions, burning with a cigarette or iron, destroying or damaging property, contracting a venereal infection or HIV infection, sticking needles under fingernails or toothpicks in the head, insults, unlawful threats, intimidation, mockery, humiliation,

43 Grześkowiak and Wiak, 2021

44 Stefański, 2023.

45 Art. 247 of the Act of 6 June 1997 – the Penal Code (i.e. Journal of Laws of 2022, item 1138, as amended)

46 Grześkowiak and Wiak, 2021.

yelling and insulting the family of a legally deprived person, an order to eat meals in a toilet, a ban on eating meals at a common table, an order to wash toilets by hand, performing cleaning tasks out of turn, among others<sup>47</sup>. In the event that the victim takes his life as a result of abuse by the perpetrator, we deal with the convergence of provisions<sup>48</sup>. Subsequently, the cumulative qualification from Art. 247 § 1 or 2 in accordance with Art. 207 § 3 of the Penal Code should be applied<sup>49</sup>.

As indicated in the literature on the subject, the provisions of Art. 246 and Art. 247 of the Penal Code were introduced into the Polish legal system to fulfil international obligations resulting from the acts of international law ratified by the Polish state, which prohibit the use of torture and other cruel, inhuman, or degrading treatments<sup>50</sup>, which have already been mentioned at the beginning of this chapter.

Art. 207 of the Penal Code sanctions the crime of abuse. Pursuant to §1, anyone who physically or mentally abuses a person closest to him or another person remaining in a permanent or temporary relationship of dependence with the perpetrator is subject to the penalty of imprisonment from 3 months to 5 years. However, §1a introduces the offence of tormenting a helpless person due to their age, mental or physical condition. For this act, the legislature provided for a penalty of imprisonment of six months to eight years—a higher penalty. Nevertheless, according to §2, if the act specified in §1 or §1a was committed with the use of particular cruelty, the perpetrator of the act is liable to imprisonment for 1–10 years. If the result of committing any of the abovementioned acts is the victim's attempt to take his life, the perpetrator, pursuant to Art. 207 §3 of the Penal Code, shall be punishable by imprisonment for 2–12 years<sup>51</sup>.

Art. 217 of the Penal Code describes a violation of inviolability. Pursuant to §1, anyone who hits a person or otherwise violates his bodily integrity is subject to a fine, restriction of liberty, or imprisonment for up to one year. The legislator provided for in §2 the possibility for the court to refrain from imposing a penalty in a situation where a breach of inviolability caused the aggrieved party to behave defiantly or if the aggrieved party responded with a breach of inviolability<sup>52</sup>.

The legislator in Art. 118a §2<sup>53</sup> and Art. 123 §2 of the Penal Code<sup>54</sup> sanctioned the use of torture but in connection with the commission of another crime, such as mass murder. The legislature introduced into the Polish legal system qualified types

47 Gardocki, 2018.

48 See Gądzik, 2014, pp. 6–15.

49 Grześkowiak and Wiak, 2021

50 Stefański, 2023; Grześkowiak and Wiak, 2021.

51 Art. 207 of the Act of 6 June 1997 – the Penal Code (Journal of Laws of 2022, item 1138, as amended)

52 Ibid. Art. 217.

53 Ibid. Art. 118a §2.

54 Ibid. Art. 123 §2.

of crimes characterised by victims being subjected to torture, cruel, or inhuman treatment.

According to Art. 118a §2, anyone who takes part in a mass attack or at least one of repeated attacks directed against a group of people, undertaken to implement or support the policy of the state or organisation, is subject to criminal liability (e.g. torture or subjecting a person to cruel or inhuman treatment). To commit this crime, the perpetrator is liable to imprisonment for a period of not less than 5 years or 25 years<sup>55</sup>.

Art. 123 §1 provides that criminal liability in the form of imprisonment for a period of not less than 12 years, 25 years imprisonment, or life imprisonment is imposed on anyone who, in violation of international law, commits homicide against persons who are 2) wounded, sick, shipwrecked, medical personnel or clergymen, 3) prisoners of war, 4) the civilian population of an area under military occupation or in which hostilities are in progress, or other persons benefiting from international protection under acts related to armed conflicts. The legislator in §2 provides for criminal liability in the case of subjecting the abovementioned individuals to torture and cruel or inhuman treatment, performing cognitive experiments on them, even with their consent, using them to protect a specific area or facility against military actions or their troops with their presence, or detaining them as hostages. To commit this act, the perpetrator is liable to imprisonment for a period of not less than 5 years or 25 years<sup>56</sup>.

Notably, although the term torture was used in Art. 118a §2 and Art. 123 §2, the Polish legislator did not decide to introduce the definition of torture into the statutory glossary formulated in Art. 115 of the Penal Code. Therefore, it is up to the authorities to apply a given provision of the criminal act to specify this concept.

The Act of 6 June 1997–Executive Penal Code in Art. 4–lays down the rules for the execution of penalties and punitive, protective, and preventive measures<sup>57</sup>. Pursuant to §1 of this provision, penalties, penal measures, compensatory measures, forfeiture, security measures, and preventive measures are conducted humanely, with respect for the human dignity of the convict. Torture, inhuman or degrading treatment, and punishment toward a convicted person should be prohibited. However, according to §2, the convict retains civil rights and freedoms. Their limitations may have resulted only from the Act and a valid judgement issued on its basis.

Furthermore, it is worth pointing out the existence of the prohibition of evidence under Art. 171 §5 of the Act of 6 June 1997, the Code of Criminal Procedure, which can also be referred to as the prohibition of torture during interrogation. It states that it is

55 Ibid. Art. 118a.

56 Ibid. Art. 123.

57 Art. 4 of the Act of 6 June 1997 – Executive Penal Code (Journal of Laws 2023, item 127)

unacceptable to influence the interrogated person's statements by means of coercion or an unlawful threat, use hypnosis or chemical or technical means affecting the mental processes of the interrogated person, or control the unconscious reactions of his body in connection with the interrogation<sup>58</sup>.

In Poland, there is an ongoing debate regarding the introduction of the separate crime of torture into the legal system. The National Mechanism for the Prevention of Torture, whose tasks are conducted by the Commissioner for Human Rights, supports the introduction of separate torture crimes into the Polish legal system. The Ministry of Justice argues that the current criminal law regulations are sufficient for the implementation of international obligations that bind the Polish state in the matter of introducing appropriate regulations into the legal system that guarantee the prohibition of torture. The Ministry pointed out that the following crimes function in Polish law, exhausting the scope of activities that correspond to the definition of torture under Art. 1 of the Convention against Torture: The crimes listed were as follows: violation of bodily integrity (Art. 217 §1 of the Penal Code), punishable threats (Art. 190 §1 of the Penal Code), forcing another person to behave by force or unlawful threat (Art. 191 §1 of the Penal Code), exceeding powers by a public official (Art. 231 §1 of the Penal Code), causing damage to health (Art. 156 and 157 of the Penal Code), abuse of a dependent person (Art. 207 §1 of the Penal Code), influencing a witness, court expert or the accused by force or threat (Art. 245 of the Penal Code), using force or threats to obtain testimonies, explanations, statements, or information (Art. 246 of the Penal Code), or mistreatment of a person deprived of liberty (Art. 247 of the Penal Code). Exceeding powers by an officer, and possibly also violation of bodily integrity, will constitute torture comprising ineffective physical impact (e.g. waterboarding), as well as psychological impact that does not exhaust the definition of unlawful threats (e.g. false information about the death of a loved one), if they do not concern a person deprived of liberty (Art. 247 of the Penal Code) or are not used to obtain specific testimonies, explanations, information, or statements (Art. 246 of the Penal Code) or influence personal evidence sources (Art. 245 of the Penal Code)—when they are committed, for example, to punish a person who is, at large, or for intimidating, exerting pressure or for any other purpose resulting from discrimination (torture may be committed under the conditions of Art. 57a of the Penal Code). As indicated by the Ministry of Justice in response to the remarks of the Commissioner for Human Rights, the definition of torture under Art. 1 of the Convention is fully reflected in Polish law. Nevertheless, because of its extensive and complex nature, the relevant provisions are located in different parts of the Penal Code, depending on the type of infringed goods, which is a specificity of Polish criminal law. Introduction to the CC

58 Art. 171 of the Act of 6 June 1997, the Code of Criminal Procedure (Journal of Laws 2022, item 1375, as amended)

of the definition of torture would not be significant from the perspective of human rights protection in Poland because it would only be a repetition of the provisions already in force in Polish law. Additionally, adopting the full wording of the definition of torture as a sign of only one crime violates the accepted rules of systematics in Polish criminal law<sup>59</sup>.

The report of the National Mechanism for the Prevention of Torture for 2021 shows that, according to the authors, the dissemination of knowledge about torture serves to facilitate the monitoring of the accountability of perpetrators of such acts, contribute to their stricter punishment by the courts, and lead to an increase in awareness among officers and the public about the use of torture<sup>60</sup>. On 11 December 2022, a study by the National Mechanism for the Prevention of Torture was published on the crime of torture in Poland<sup>61</sup>, containing descriptions of sentences issued for such acts against police officers, which were finalised in 2020. Based on this publication, the National Mechanism for the Prevention of Torture, operating in the Office of the Commissioner for Human Rights, raised the issue of the lack of a separate crime of torture in Poland. The National Mechanism for the Prevention of Torture postulates the introduction of, for example, an obligation to record hearings in audiovisual form. Areas requiring legislative or organizational changes in the operation of the state are indicated, including disseminating knowledge about the Mendez rules on conducting interrogations of persons detained by state officials, developing guidelines for interrogations and enquiries based on the Mendez rules and CPT standards, and introducing the definition of torture and other cruel, inhuman, or degrading treatment or punishment in the Polish legal system<sup>62</sup>.

## 5. Police practice

It is crucial to present the frequency of initiating proceedings by Polish law enforcement authorities, as well as the number of detected crimes under Art. 231, 246, and 247 of the Penal Code, to show the practice of applying these provisions. The following findings were obtained from official statistics kept by the Polish Police from 1999 to 2020. The statistical data presented below refer to crimes that may, but do not always,

59 Reply of the Minister of Justice of 15 December 2015 to the letter of the Commissioner for Human Rights of 27 October 2015 on the issue of the criminalization of torture in Polish law (reference number II.071.4.2015ED).

60 Machińska, Kusy, Kazimirski, 2022, pp. 125–127.

61 Report: The crime of torture in Poland. Discussion of judgments in cases of offenses under Art. 246 and 247 of the Penal Code, which became final in 2020, Bulletin of the Commissioner for Human Rights, 2022, [https://bip.brpo.gov.pl/sites/default/files/2022-12/Przestepstwo\\_Tortur\\_w\\_Polsce.pdf](https://bip.brpo.gov.pl/sites/default/files/2022-12/Przestepstwo_Tortur_w_Polsce.pdf) (20 December 2022).

62 Ibid.

violate the constitutional prohibition of torture. Only the analysis of individual case files can lead to an unequivocal statement regarding the number of crimes listed below that actually involved the use of torture.

Referring to police statistics, the largest number of crimes of abuse of power under Art. 231 of the Penal Code was found in 2013, with as many as 7,310 cases; in 2014, there were 4,861 cases. In 2020, 1,891 proceedings were initiated under Art. 231, and 1,476 cases were found. In 2019, 2,377 proceedings were initiated, and 1,734 crimes were found. In 2018, 2,708 proceedings were initiated, and 1,019 crime cases were found under Art. 231 of the Penal Code. In 2017, 2,784 proceedings were initiated, and 2,762 crime cases were found<sup>63</sup>.

Analysing crime under Art. 246, over the years 1999–2020, 359 proceedings were initiated, while the number of crimes detected amounted to 208. According to the statistics, the highest number of crimes detected was 28 in 2006. In 2004, there were 25 cases. In 2013–14 and 2016–2020, no crimes were found under Art. 246 of the Penal Code. In 2015, there was only one such case<sup>64</sup>.

According to police statistics, over the years, the number of proceedings initiated under Art. 247 of the Penal Code amounted to 1,868. Of these, 612 were identified as crimes. Most crimes under this provision were committed in 2003 (47 crimes); in 2001, this number was 45. For comparison, the fewest crimes were found in 2015, when 8 such crimes were recorded, and in 1999, when there were 10 cases. In 2020, there were 43 proceedings under Art. 247 of the Penal Code and 16 cases of committing a crime. In 2019, 65 proceedings were initiated, and 21 crimes were found. In 2018, 76 proceedings were initiated, and 20 cases were found<sup>65</sup>.

According to the statistics presented by the Commissioner for Human Rights, 45 police officers were legally convicted in Poland for an offence under Art. 246 of the Penal Code (extortion of testimonies and information) in the years 2008–2017. In 2018, a final judgement was passed, convicting three police officers for an act under Art. 247 of the Penal Code (abuse of a person deprived of liberty). In the same year, a sentence was passed against four police officers for committing the offence specified in Art. 246 of the Penal Code<sup>66</sup>.

63 Police Statistics Art. 231 of the Penal Code, <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-10/63570,Naduzycie-wladzy-art-231.html> (26 October 2022)

64 Police Statistics Art. 246 of the Penal Code, <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63593,Wymuszanie-zeznan-art-246.html> (26 October 2022)

65 Police Statistics Art. 247 of the Penal Code, <https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-11/63595,Znecanie-sie-nad-pozbawionym-wolnosci-art-247.html> (26 October 2022)

66 Report: The crime of torture in Poland. Analysis of final judgments concerning crimes under Art. 231, 246 and 247 of the Penal Code. Bulletin of the Commissioner for Human Rights, [https://bip.brpo.gov.pl/sites/default/files/Tortury\\_w\\_Polsce\\_Raport\\_KMPT\\_lipiec\\_2021.pdf](https://bip.brpo.gov.pl/sites/default/files/Tortury_w_Polsce_Raport_KMPT_lipiec_2021.pdf) (14 November 2022)

In conclusion, the analysis of Polish police statistics from 1999 to 2020 on crimes under Art. 231, Art. 246, and Art. 247 of the Penal Code revealed fluctuating numbers of proceedings and detected crimes, highlighting the evolving nature of applying these provisions.

## 6. Domestic case law on the prohibition of torture and inhuman, degrading treatment

An important criterion for assessing whether the law works properly is the analysis of jurisprudence and checking how legal regulations function in judicial practice. Regarding the most important jurisprudence of Polish criminal courts concerning cases that meet the criteria of cruel, inhuman, and degrading treatment and punishment, Art. 231 of the Penal Code (the crime of abuse of power), Art. 246 (establishing the crime of extorting testimony), and Art. 247 (sanctioning the crime of abuse of a person deprived of liberty) should be mentioned here.

The judgement of the Lublin Zachod District Court in Lublin is worth discussing<sup>67</sup>, according to which three former police officers were found guilty of mistreating two detainees at a sobering-up station. They were beaten and hit in the vicinity of intimate places by a private taser (without service equipment). The justification indicated that the use of a taser in both cases met the definition of torture set out in the Convention against Torture. The court imposed a penalty of three years of absolute imprisonment, as well as compensation for the victims in the amounts of PLN 20,000 and PLN 30,000 and a ban on practising the profession of a police officer for six years<sup>68</sup>.

In the judgement of the District Court in Kalisz on 29 September 2020, the court sentenced public officials for the crime of mistreating detainees. In August 2012, public officials arrested three young men suspected of stealing jewellery from a jewellery store. The victims were beaten with a truncheon on their feet, were pressed to the floor with a shoe, had water poured onto them, and were tased all over their body while they were handcuffed and did not resist<sup>69</sup>. In its judgement, the court did not refer to international standards regarding the prohibition of torture and did not state that there had been a violation of the prohibition of torture within the meaning

<sup>67</sup> Judgment of the Lublin Zachód District Court in Lublin of 30 January 2018 (case no. IV K 717/17)

<sup>68</sup> Cf. *Report: The crime of torture in Poland. Analysis of final judgments concerning crimes under Art. 231, 246 and 247 of the Penal Code*, Bulletin of the Commissioner for Human Rights, [https://bip.brpo.gov.pl/sites/default/files/Tortury\\_w\\_Polsce\\_Raport\\_KMPT\\_lipiec\\_2021.pdf](https://bip.brpo.gov.pl/sites/default/files/Tortury_w_Polsce_Raport_KMPT_lipiec_2021.pdf) (Accessed: 14 November 2022), pp. 13–15.

<sup>69</sup> See Convicting verdict on torture at the police station in Siedlce in 2012. Statement of the National Mechanism for the Prevention of Torture, <https://bip.brpo.gov.pl/pl/content/skazujacy-wyrok-tortury-policji-oswiadczenie-krajowego-mechanizmu-prewencji-tortur> (Accessed: 26 November 2022).

of Art. 1 of the Convention Against Torture. In the case of all five officers, the court ruled that the offence of Art. 246 in conjunction with Art. 231 § 1 of the Penal Code was committed. However, it differentiates between imposed penalties and penal measures. One officer was sentenced to two years and two months of imprisonment and was also sentenced to penal measures in the form of a ban on practising the profession of a police officer for eight years. The second officer was sentenced to 1 year imprisonment with a 3-year suspension, as well as penal measures in the form of a ban on practising the profession of a police officer for three years. The third officer was sentenced to one year and three months of imprisonment and penal measures in the form of a ban on practising the profession of a police officer for three years. Nevertheless, the fourth officer was sentenced to 1 year and 8 months of imprisonment, and penal measures were imposed on him in the form of a ban on practicing the profession of a police officer for six years. The last of the officers was sentenced to one year and ten months of imprisonment and was sentenced to penal measures in the form of a ban on practising the profession of a police officer for seven years. The mother and father of the deceased man who suffered torture during detention were jointly awarded PLN 10,000 as compensation for the harm suffered. Notably, a case is currently pending before the ECtHR, brought by the parents of the deceased man, who accused the Polish state of violating Art. 2, Art. 3, and Art. 6 of the ECHR<sup>70</sup>.

A high-profile media case regarding the use of torture by public officials was the death of Igor Stachowiak at the Wrocław Police Station in May 2016. In the bathroom of the police station, he was stunned by a taser and died. He was electrocuted, although he was handcuffed. This case was examined in the first and second instances. On 21 June 2019, the Wrocław-Sródmieście District Court in Wrocław<sup>71</sup> found a policeman guilty of tasking with an electroshock weapon and sentenced him to two years and six months in prison. Three other police officers were also found guilty and sentenced to two years in prison. In February 2020, the District Court in Wrocław<sup>72</sup> upheld sentences against former police officers who participated in the arrest of Igor Stachowiak. The justification indicated that police officers acted to the detriment of Igor Stachowiak's private interests by violating his dignity, bodily integrity, and right to humane treatment. According to the Court, the defendants also acted to the detriment of the public interest—the proper functioning of the judiciary. The Commissioner for Citizens' Rights appealed to the Supreme Court to set aside the judgement of the District Court in Wrocław and remit the case for re-examination in the second instance<sup>73</sup>, pointing out that the circumstances of the case had not been sufficiently investigated and that the obligation to explain the circumstances of the

70 *Kryszkiewicz v. Poland*, (ECHR, Application No. 17912/21), Pending.

71 Judgment of the District Court for Wrocław – Śródmieście in Wrocław of 21 June 2019, V K 180/18

72 Judgment of the District Court in Wrocław of 19 February 2020, Case IV Ka 1421/19

73 Case number in the Supreme Court: V KK 413/20.

death and establish responsibility for it rests on the law enforcement authorities and the judiciary. Therefore, a detailed explanation of the issues raised in the cassation appeal meets the standards developed based on Art. 2 of the ECHR<sup>74</sup>.

## 7. Cases before the European Court of Human Rights against Poland for violation of the prohibition on torture

It is important to present the most important cases before the ECtHR against Poland for violating the prohibition of torture expressed in Art. 3 of the ECHR.

In the first case, I would like to recall the judgement of the European Court of Human Rights on 26 October 2000 in the case of *Kudła v. Poland* (application No. 30210/96)<sup>75</sup>. Although there was no violation of Art. 3 of the ECHR, it was a landmark judgement from the perspective of ECtHR jurisprudence. It emphasised the basic standard of human dignity, according to which, in relation to Art. 3 of the ECHR, 'The State must ensure that a detained person is kept in conditions that respect his or her human dignity, that the manner and method of detention do not expose him/her to distress and hardship, the intensity of which would exceed the unavoidable level of suffering inherent in detention, and that, given the actual conditions of imprisonment, her health and physical condition were adequately secured by, inter alia, providing her with the necessary medical assistance', the obligation of the state to ensure decent conditions of detention, or the general obligation to release from detention due to the state of health, was pointed out<sup>76</sup>.

On 23 May 2019 (*Kanciał v. Poland*, application No. 37023/13), the ECtHR found that Poland had violated the prohibition of torture and inhuman and degrading treatment. The reason for this was the use of excessive direct coercion during and after the arrest and the lack of appropriate explanatory proceedings. A resident of Gdansk was detained by an anti-terrorist group and the Central Investigation Bureau of the Police for suspicion of kidnapping. The man was beaten and tasered on the back, buttocks, and genitals, although he surrendered and was immobilised. The applicant complained to the prosecutor's office about the treatment during detention. The procedures were discontinued after a year. The Appellate Prosecutor's Office in Gdansk decided that there was insufficient evidence of a crime, and the taser was used in accordance with the regulations<sup>77</sup>. As indicated by the National Mechanism for the Prevention of Torture, this is a groundbreaking judgement emphasising the

74 See [online], <https://bip.brpo.gov.pl/pl/content/sprawa-igora-stachowiaka-kasacja-rpo-od-wyroku-na-policjantow> (Accessed: 11 November 2022)

75 *Kudła v. Poland*, (ECHR, Application No. 30210/96), Judgment 26 October 2000.

76 See Morawska, 2019.

77 *Kanciał v. Poland*, (ECHR, Application No. 37023/13). Judgment 23 May 2019

importance of the correct and proportionate use of coercive measures by authorised services and, above all, the key role played by a reliable investigation<sup>78</sup>.

The judgement of the ECtHR on 5 November 2020 (*Grzegorz Cwik v. Poland*, complaint 31454/10) was important from the perspective of taking evidence. According to this judgement, in criminal proceedings, the use of evidence obtained as a result of the treatment of a person in violation of Art. 3 of the ECHR, regardless of whether the treatment is classified as torture, inhumanity, or degradation, results in the automatic recognition of the entire proceedings as unfair and in violation of Art. 6 of the ECHR. This effect occurs regardless of the probative value of the evidence and whether its use was decisive in securing the conviction of the accused. The ECtHR found that this principle also applies to the admission of evidence obtained from a third party as a result of the ill-treatment provided for in Art. 3 of the ECHR, if such ill treatment was inflicted by private individuals, irrespective of the qualification of such ill treatment<sup>79</sup>.

## 8. Concluding remarks

The Polish legal system has not yet established torture as a separate crime. Although the Polish legislature uses the concept of torture in the Constitution and the Penal Code, it has not decided to introduce a legal definition. As the Polish Penal Code does not provide for a separate crime of torture, currently, perpetrators of cruel, inhuman, degrading treatment and punishment, including corporal punishment, are convicted for other crimes specified in the Penal Code. According to the jurisprudence of Polish courts, crimes such as the abuse of a person deprived of liberty, forced testimony by a public official, and the abuse of powers by an official are the most common grounds for bringing the perpetrator to criminal liability. The most severe punishment for these crimes is imprisonment for 1–10 years, and these crimes are subject to the statute of limitations on the same principles as other crimes. Notably, Art. 43 of the Constitution indicates that there is no statute of limitations for war crimes and crimes against humanity, but this does not extend to cases of torture against an individual. Considering the seriousness of crimes involving the use of torture, I believe that it is reasonable for the legislature to consider whether it should extend the limitation period.

The doctrine draws particular attention to the fact that, in connection with counteracting the use of torture and in accordance with the provisions of the Convention

78 See [online] <https://bip.brpo.gov.pl/pl/content/policjanci-winni-nieludzkiego-i-ponizajacego-traktowania-zatrzymanego-wyrok-europejskiego-trybunału> (Accessed: 20 December 2022)

79 *Grzegorz Cwik v. Poland*, (ECHR, Application No. 31454/10), Judgment 5 November 2020

against Torture, it is the duty of the legislator to shape criminal provisions in such a way that none of the forms of torture can fall outside the scope of criminalisation of criminal law. Analysing jurisprudence practices to date, although there is no separate crime of torture in the Polish Penal Code, some legal regulations in Poland meet the aforementioned international definitions of torture. The problem is the low severity of penalties for this type of crime, although the Act allows for the possibility of adjudicating a higher liability as well as a conviction for a qualified type in the event that the Act is committed with particular cruelty.

Undoubtedly, activities aimed at educating people about torture would contribute to reducing the phenomenon of torture and affect the awareness of ordinary citizens, law enforcement agencies, and representatives of the judiciary. The activities proposed by the Commissioner for Human Rights, comprising making society and public officials aware of criminal behaviour that violates the prohibition of torture, should be assessed as necessary and recommended for implementation. A public official, as an entity with a special professional position and competence related to the exercise of public authority, should enjoy special legal protection, enabling him to perform the duties entrusted to him. Simultaneously, he should be subject to increased criminal liability due to the role he performs and the power he wields. Therefore, it is necessary to train and make public officials aware of the forms that torture can take to prevent it. In this context, it is worth assessing the actions taken by plenipotentiaries and human rights protection teams in Polish police units that undertake information and dissemination activities on the jurisprudence of the ECtHR and ECHR concerning actions taken by the police. An element of this is the publication of selected ECtHR judgements on police websites, the coordination of the process of developing plans or reports on actions taken to implement judgements under general measures, and participation in the work of the interministerial Team for the European Court of Human Rights<sup>80</sup>.

80 See [online], <https://isp.policja.pl/isp/prawa-czlowieka-w-poli/orzecznictwo-etpc/12875,Europejski-Trybunal-Praw-Czlowieka.html> (Accessed: 22 December 2022)

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