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## **HAPPY ANNIVERSARY? 10 YEARS SINCE THE ESTABLISHMENT OF PREVENTIVE DETENTION IN POLAND**

### **Abstract**

The 10th anniversary of the National Center for the Prevention of Dissocial Behaviour prompts reflections on its functioning. Unfortunately, in addition to an increasing population of patients isolated from society and rising expenditures, we have not seen fundamental changes. These are necessary in the law of 22 November 2013, which is the legal basis for the creation of the Center, as well as in the philosophy of the operation of this type of detention facilities. The article presents the CPT's recommendations and observations included in a report that was published in 2024, following a visit to the Center in 2022. The article presents the latest statistics, information on cases communicated to the Polish government before the ECtHR. It provides an assessment of the current status of the National Center after a decade since its establishment, and at a time when it is possible to believe that the Ministry of Justice, together with the Ministry of Health, will proceed with legislative and conceptual changes.

### **KEYWORDS**

preventive detention, human rights, National Center for the Prevention of Dissocial Behaviour, society protection

## SŁOWA KLUCZOWE

detencja prewencyjna, prawa człowieka, Krajowy Ośrodek Zapobiegania Zachowaniom Dyssocialnym, ochrona społeczeństwa

### I. INTRODUCTION

The ‘2013 Act’, enacted on 22 November 2013, addresses the treatment of mentally disturbed individuals who pose a danger to the life, health, or sexual freedom of others.<sup>1</sup> This legislation established the framework for the creation of isolation facilities designed for individuals who persist in posing a threat to society even after completing their sentences. However, over the past decade, this law has inadvertently led to the violation of human rights within the facility called the National Center for the Prevention of Dissocial Behaviour (hereinafter: Center or NCPDB).<sup>2</sup> It can be argued that the application of these provisions is unconstitutional.<sup>3</sup> Therefore, the article relates to the systemic problems of the Center over the past decade. First and foremost, I pay attention to several aspects of its reality, which also became the subject of interest for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT) during its visits to Poland in 2017 and 2022. Secondly, this article aims to explore the principles of preventive detention in Poland, shedding light on several issues that arise in the context of ten cases against Poland. These were communicated to the Polish government by the Strasbourg Court in 2022 and 2023.

Lastly, I want to emphasize that the text reflects my insights gathered from the visits to the NCPDB as a representative of the Commissioner for Human Rights. Visiting the facility almost every year, talking to patients, employees, and judges deciding the cases of the Center, I have formed the conviction that legislative changes are particularly urgent, just as it is necessary to change the organization of the Center and the rules of its operation.

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<sup>1</sup> Journal of Laws (Dziennik Ustaw), consolidated text: 2022, item 1689.

<sup>2</sup> In the period 2014-2022, the only such place of detention was located in Gostynin, in central Poland (Masovian Voivodeship). A second building in Czersk in the northern part of the country (Pomeranian Voivodeship), which is a branch of the NCPDB, was opened in February 2022.

<sup>3</sup> The Constitutional Tribunal of the Republic of Poland ruled the constitutionality of the challenged provisions of the 2013 Act, with the exception of the provision relating to expert witnesses giving opinions at the stage of the determination of release from the Center. The judgment of 23 November 2016, ref. act K 6/14.

## II. DEPRIVATION OF LIBERTY TO PROTECT SOCIETY

As noted by Christopher Slobogin, we should carefully analyze how we deprive people with mental disorders of freedom.<sup>4</sup> This is undoubtedly a valid claim, also in the context of Poland's experience of using preventive detention after serving the sentence as it is used towards people who have mental disorders such as personality disorder, sexual disorders, or mental impairment.

Indeed, increasing punitiveness is being noted in the politics of countries around the world, pointing to the changes in the laws of many states in order to protect the public from them.<sup>5</sup> An example of the growing trend toward deprivation of liberty in Poland is represented not only by enactment of the legal basis for isolating from society those who have already served their whole prison sentences. The amendment to the Polish Penal Code<sup>6</sup> in July 2022 is an even more drastic example of tightening penal policy by providing absolute life imprisonment even if it is inconsistent with international standards highlighted repeatedly in ECtHR rulings.

The definition of 'preventive detention' was created many years ago<sup>7</sup> and remains the state's response to addressing dangerous offenders. There are numerous scientific studies<sup>8</sup> on the subject of the criminal legal response of states to individuals who are highly likely to re-offend with significant social harm, especially focusing on sex offenders. The topic arguably requires constant monitoring and review of how legislation in this area evolves as well as an examination of the factors leading to the introduction of new legal solutions allowing for the deprivation of liberty of those considered a threat to society – sometimes arguably up to the point of their death. It also raises the question how should a state respond to public pressure to protect society from those people who appear to present a continuing danger of violence.<sup>9</sup>

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<sup>4</sup> Christopher Slobogin, *Minding Justice. Laws that deprive people with mental disability of life and liberty*, Harvard University Press (2006) ix.

<sup>5</sup> Monika Płatek, 'Kreowanie „groźnych, niebezpiecznych i złych”', *Archiwum Kryminologii* 41 No 1 (2019) 125, 128.

<sup>6</sup> Parliamentary Paper No 2024, Act on Amendments to the Criminal Code and Certain Other Acts, enacted on 7 July 2022.

<sup>7</sup> Tamara Tulich, 'Critical reflections on preventive justice' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt, Sarah Murray (eds) *Regulating Preventive Justice. Principle, Policy and Paradox* (Routledge 2017).

<sup>8</sup> Jörg-Martin Jehle and others, 'Dealing with Dangerous Offenders in Europe. A Comparative Study of Provisions in England and Wales, Germany, the Netherlands, Poland and Sweden', *Criminal Law Forum* 32 (2001) 181.

<sup>9</sup> Andrew Hammel, 'Preventive Detention in Comparative Perspective', *Annual of German & European Law* 2 (2006), 85.

Preventive detention in Poland was created in the course of a rapid legislative process.<sup>10</sup> As it turned out in subsequent years, the law is full of legislative errors and loopholes, leading to the operation of the Center based on internal regulations, the issuance of which is not even supported by the law.<sup>11</sup> Moreover, internal regulations cannot form a basis for restricting the constitutional and conventional rights of persons deprived of their liberty in this place.

The first patient was deprived of liberty in Gostynin Center in early 2014 and his criminal history prompted the Polish legislator to swiftly draft a bill.<sup>12</sup> All this, amid the creation of fear, use of dehumanizing terms against those to be covered by the act from the media and politicians.<sup>13</sup>

In the context of the single and dual-track system concept presented within the literature regarding post-conviction detention,<sup>14</sup> the preventive detention established in Poland under the 2013 Act leans towards the single-track approach. Within this framework, a criminal court can impose only punishment, and the necessity for additional isolation (which is not a punishment but is connected with therapy) within the NCPDB transitions to civil proceedings at the end of serving the sentence. It can be suspended upon the request of the prison director and this procedure is applicable only to individuals who committed a crime before 1 July 2015. Conversely, in the case of a conviction for an offense committed after that date, the legislator implemented a dual-track system. This is because the criminal court, while convicting and imposing a sentence of imprisonment, simultaneously decides on isolation within a psychiatric hospital to safeguard society upon release of such a person from prison. Both legal solutions operate concurrently. While developing a new concept of protecting the public from people who pose a serious threat,<sup>15</sup> we should, in my opinion, concentrate both on isolation security measures and the NCPDB.

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<sup>10</sup> See more details in Ewa Dawidziuk, 'Human rights in the context of post-conviction preventive detention in Poland' in Czarnecki Łukasz (ed), *Human Rights Protection and Ius Puniendi. Perspectives from Central Europe and Latin American countries* (Springer Nature 2023) 19.

<sup>11</sup> The law does not contain a provision authorizing the director of the Center to issue rules of procedure.

<sup>12</sup> For more see in Marcin Szwed, 'The Polish Model of civil post-conviction preventive detention in the light of the European Convention on Human Rights', *The International Journal of Human Rights* (2021) 1.

<sup>13</sup> Maciej Bocheński, 'Populizm penalny w polskim wydaniu - rzecz o kryminologicznej problematyce ustawy o postępowaniu wobec osób stwarzających zagrożenie', *Czasopismo Prawa Karnego i Nauk Penalnych* (2015) 127.

<sup>14</sup> Dirk van Zyl Smith, Catherine Appleton, 'Life Imprisonment a Global Human Rights Analysis' (Harvard University Press 2019) 76.

<sup>15</sup> In April 2024, the Minister of Justice established a Criminal Law Codification Commission to address it, among other issues.

I recommend taking into consideration the Dutch concept in which facilities are divided into TBS<sup>16</sup> where intensive therapy is provided for 9-10 years to enable people to integrate into society again without reoffending and Long-Stay Forensic Care (LFPC) for people who are not likely to make a recovery and whose functioning during they stay in TBS is not improving.<sup>17</sup>

### III. STATISTICS

Currently,<sup>18</sup> 103 people (77 patients in Gostynin, 26 in Czersk),<sup>19</sup> including two women,<sup>20</sup> are deprived of liberty within the NCPDB and are isolated from society. In fact, current legislation does not require separate placement of women and men in treatment entities (forensic psychiatry wards, centers where preventive detention is implemented).<sup>21</sup> The number of people deemed to pose a threat to society is steadily increasing. In 2014-2018, 205 cases were pending under the 2013 Act.<sup>22</sup> Subsequent research data from 2020 already account for 275 cases under this Act.<sup>23</sup> File surveys conducted on a sample of 106 cases under the 2013 Act revealed a predominance of individuals who had previously committed acts against sexual freedom and morality, property, as well as life and health.<sup>24</sup>

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<sup>16</sup> It means treatment on behalf of the state, oryng. *Terbeschikkingstelling*, and it is regulated in Article 237 of the Dutch Penal Code. It was created in 1920s.

<sup>17</sup> Marjam Veerle Smeekens, Peter Braun, 'Long-Term Forensic Care: The Dutch Perspective' in Birgit Völlm, Peter Braun (eds), *Long-Term Forensic Psychiatric Care* (Springer Nature Switzerland AG 2019).

<sup>18</sup> Since statistics are volatile, it must be indicated that this data is as of 1 April 2024.

<sup>19</sup> By comparison, as of 15 June 2020, there were 86 patients in the NCPDB. Throughout the Covid-19 pandemic, more people were admitted, even when there were outbreaks of coronavirus in the Center. For the courts, this was not an obstacle for referral under preventive detention: <<https://bip.brpo.gov.pl/pl/content/zla-sytuacja-epidemiologiczna-w-kozzd>> accessed 16 August 2022.

<sup>20</sup> The first woman's stay since 2016 has been widely reported in the media: <<https://wiadomosci.onet.pl/tylko-w-onecie/dobra-i-zla-janinka-dlaczego-panstwo-zawiodlo-obie/hl7nc5c>> accessed 30 July 2022. The second woman was admitted to the NCPDB in 2022. Both patients stayed in the same room at the beginning. Now they are separated in two different buildings.

<sup>21</sup> The rules are shaped differently in penitentiary units, where it is obligatory to place women separately from men. All over the world there are disputes about which is better: coeducation or separate gender divisions.

<sup>22</sup> Agnieszka Gutkowska and others (eds), 'Gdy kara nie wystarcza... O praktyce stosowania wybranych rozwiązań prawnych wobec sprawców z zaburzeniami psychicznymi stwarzających zagrożenie dla społeczeństwa' (Instytut Wymiaru Sprawiedliwości 2020).

<sup>23</sup> Ewa Dawidziuk, Jolanta Nowakowska (eds), 'Izolacja sprawców przestępstw uznanych za niebezpiecznych dla społeczeństwa' (Biuro Rzecznika Praw Obywatelskich 2020).

<sup>24</sup> Detailed file survey data are available in the 2020 Institute of Justice publication: Agnieszka Gutkowska and others, 'Gdy kara nie wystarcza... O praktyce stosowania wybranych

As reported by the Center's director on 12 April 2024, at the conference organized by the University of Warsaw, over the years 154 people have been admitted to it, 18 left the NCPDB on different grounds, and 5 died with patient status – one in the Center, the others in external institutions like hospitals or hospices. The Center has 490 employees as of the date of this information, of which just over 200 are security personnel. This figure includes those employed in both Gostynin and Czersk.

#### IV. CONDITIONS OF PREVENTIVE DETENTION IN THE NCPDB

Persons considered dangerous for society are no longer kept in prisons.<sup>25</sup> Such individuals undergo treatment within a medical care center with the primary goal of providing an extended therapeutic intervention.<sup>26</sup> Another challenge lies in the perceived efficacy of this therapy, as highlighted by Płatek<sup>27</sup> or the reluctance of many patients to participate in it (only 50% want to attend it).<sup>28</sup> The duration of stay in the preventive detention center is not predetermined, and the civil court<sup>29</sup> reviews the necessity for further stay every six months.

In addition, it is important to highlight that the subjective scope of the 2013 Act specifically encompasses only a limited set of mental disorders, namely personality disorders, sexual preference disorders, and mental retardation. The legislation explicitly excludes coverage for any disorders other than those stipulated in Article 1 of the 2013 Act. Specifically, it does not apply to individuals diagnosed with mental illness, as determined by the Supreme Court when addressing legal questions on the matter.<sup>30</sup> Nevertheless, in practice, there are instances of indi-

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rozwiązań prawnych wobec sprawców z zaburzeniami psychicznymi stwarzających zagrożenie dla społeczeństwa' (Instytut Wymiaru Sprawiedliwości 2020).

<sup>25</sup> In cases against Germany, including *M v Germany*, the ECtHR took the position that the conditions under which detention is carried out after a prison sentence has been served must be different from those in prison, given the different purpose of detention.

<sup>26</sup> Wojciech Zalewski describes rules regarding therapy within the German system of preventive detention in 'Detencja "terapeutyczna" – wątpliwości konstytucyjne i polityczno-kryminalne w kontekście ustawy o "bestiach"' *Gdańskie Studia Prawnicze* 4 (2018), 371. It might be a comparison for the Polish Center.

<sup>27</sup> Monika Płatek, 'Negatywne skutki iluzji terapii. Uwagi o stosowaniu ustawy o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób' *Państwo i Prawo* 11 (2020), 93.

<sup>28</sup> The NPM report of the visit to Czersk on 16-19 October 2023, KMP.574.2.2022.RK, 15, available at the website of the Commissioner for Human Rights.

<sup>29</sup> In other countries, such as Germany and the Netherlands, the criminal court decides on preventive detention both initially and on a regular basis to prolong the deprivation of liberty.

<sup>30</sup> Supreme Court decision of 16 April 2015, Case No I CSK 825/14: <<http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20csk%20825-14-1.docx.html>> accessed 29 July 2022.

viduals being placed in the NCPDB, where psychiatrists at the Center, along with forensic experts, identify mental illness.<sup>31</sup> This poses challenges both in terms of regulatory compliance and, more significantly, from a psychiatric therapy standpoint. Conducting treatment of mentally ill people, under the conditions that prevail in the NCPDB and among people with mental disorders, especially those presenting abnormal personality traits of a dissocial nature, creates many therapeutic difficulties for the staff.

In addition to the mentioned mental disorders, eligibility for referral to the NCPDB requires a prior history of serving a sentence, of any duration, in a therapeutic unit, coupled with the diagnosed mental disorders of such a nature or severity that there is at least a high probability of committing a criminal act with violence or the threat of violence against life, health or sexual freedom, punishable by imprisonment, the upper limit of which is at least 10 years. This content of the provision raises questions of interpretation and difficulties in expert opinion.<sup>32</sup>

Królikowski and Sakowicz emphasize that the use of preventive isolation is not a punishment.<sup>33</sup> The Constitutional Court in Poland affirmed that the regulations of the 2013 Act align with the provisions of the Polish Constitution.<sup>34</sup> This judgment faced widespread criticism<sup>35</sup> because, at the time when individuals affected by the 2013 Act were sentenced to imprisonment by a criminal court, legislation did not permit preventive detention after they had completed their prison terms. Despite this, the Constitutional Court concluded that there was no violation of the principles of *lex retro non agit* and *ne bis in idem*. As we anticipate the inaugural historic judgments from the ECtHR regarding complaints filed by patients of the post-penal detention center, it is likely that the identification of Article 5 violations of the ECHR will play a crucial role in shaping the assessment of the legality of deprivation of liberty in the NCPDB.

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<sup>31</sup> The information was provided by the Polish Ombudsman within its report, inter alia: NPM in Poland report 2019, KMP.574.1.2019.JZ, 4, available at [www.rpo.gov.pl](http://www.rpo.gov.pl).

<sup>32</sup> Agnieszka Gutkowska and others, 'Gdy kara nie wystarcza... O praktyce stosowania wybranych rozwiązań prawnych wobec sprawców z zaburzeniami psychicznymi stwarzających zagrożenie dla społeczeństwa' (Instytut Wymiaru Sprawiedliwości 2020).

<sup>33</sup> Michał Królikowski, Andrzej Sakowicz, 'Granice legalności postpenalnej detencji sprawców niebezpiecznych', *Forum Prawnicze* 5 (2013).

<sup>34</sup> Case K 6/14 23 November 2016 Polish Constitutional Tribunal (Trybunał Konstytucyjny).

<sup>35</sup> Jan Kluza, 'O granicach zasad *ne bis in idem* i *lex retro non agit*. Uwagi na tle wyroku Trybunału Konstytucyjnego w sprawie tzw. „ustawy o bestiach”' *Krytyka Prawa*, vol 10, no 3 (2018), 41; Maciej Bocheński, 'Practical aspects of assessment of risk of re-offending by "especially dangerous" offenders in the context of the judgment of the Constitutional Tribunal of 23 November 2016 (K 6/14)' *Problems of Forensic Sciences* 108 (2016) 632.

## V. VISITING BODIES IN THE NCPDB

The Centers in Gostynin and Czersk have been visited multiple times by various human rights protection institutions – the Commissioner for Human Rights,<sup>36</sup> National Preventive Mechanism,<sup>37</sup> and the European Committee for the Prevention of Torture (CPT). The CPT visited the NCPDB twice – first in 2017<sup>38</sup> and then for the second time in 2022.<sup>39</sup> The Subcommittee on Prevention of Torture (SPT) has never conducted visits in the Center, despite inspecting places of detention in Poland in July 2018.<sup>40</sup>

The CPT noted the lack of visits to the facility by the Minister of Health who supervises the NCPDB. The Director of the Center held weekly online or telephone consultations with relevant higher-level officials of the Ministry of Health, but there was no practice for Ministry representatives to physically visit the facility. As a result, in CPT's opinion, they were not sufficiently aware of the current situation and challenges faced by the NCPDB.<sup>41</sup>

The fact that the new government created in 2023 is taking an interest in the Center, and that the Deputy Minister of Health and Justice finally visited the

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<sup>36</sup> The Criminal Executive Law Department and Civil Law Department deal with complaints from the patients of the NCPDB. The representative of the first mentioned Department visited the center in the past to check systematic issues as well as to examine complaints. Detailed information and reports can be found at website: <<https://bip.brpo.gov.pl/pl/kategoria-tematyczna/kozzd-gostynin>> accessed 10 January 2024. Over the past 10 years, the Ombudsman, having no legislative initiative, has addressed nearly 70 general letters to state bodies (mainly the Minister of Health and the Minister of Justice), indicating specific demands for legislative changes.

<sup>37</sup> The NPM calls the NCPDB as post-penal detention facilities: <<https://bip.brpo.gov.pl/pl/content/wizytacje-kraochejowego-mechanizmu-prewencji>> accessed 2 February 2024

<sup>38</sup> Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, Strasbourg, 22 February 2024, CPT/Inf (2024) 10, <<https://rm.coe.int/1680ae9529>> accessed 1 April 2024.

<sup>39</sup> Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017, Strasbourg, 25 July 2018, CPT/Inf (2018) 39, <<https://rm.coe.int/16808c7a91>> accessed 1 April 2024.

<sup>40</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Comments of Poland on the recommendations and observations addressed to it in connection with the Subcommittee visit undertaken from 9 to 18 July 2018; <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2F-POL%2FCSPRO%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FOP%2F-POL%2FCSPRO%2F1&Lang=en)> accessed 2 May 2024.

<sup>41</sup> CPT's report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, paragraph 85.

NCPDB in April 2024, gives hope that this time the problem of the functioning of the preventive detention will not be neglected.<sup>42</sup>

## VI. CPT'S ASSESSMENT OF THE PREVENTIVE DETENTION CENTER IN POLAND

CPT pointed out that both NCPDB buildings had a satisfactory number of care staff who seemed adequately trained and highly motivated. Patients were offered (on a voluntary basis) a range of medical and psychosocial treatments.<sup>43</sup>

When CPT visited the Center in 2017, it noted that living conditions were characterized by overcrowding in all quarters, even though the population density was much lower at that time than in subsequent years. In 2022, CPT described the living conditions as acceptable, however heavily overcrowded.<sup>44</sup> During the CPT visit to Gostynin in 2022, there were 94 patients in a facility with a capacity of 60, while 180 cases were pending under the 2013 Act at that time. In Czersk, the capacity was set at 40 people. During the CPT's visit in 2022, this branch was not yet populated. It was put into use at the beginning of 2022 as a temporary solution, with the building being leased for a period of 3 years, considering plans for the construction of a dedicated facility for preventive detention.

As presented above, population density has been fluctuating over the years. However, the number of patients is increasing year by year, despite some patients leaving the center due to death or being transferred to a penitentiary unit to serve their sentences. After nearly 30 people were transferred to Czersk, living conditions in Gostynin improved, but still there are rooms for 6-8 people. This improvement occurred at a time when some patients were seriously ill and required care. The director decided to purchase a few hospital beds instead of bunk beds, commonly used in prisons. Seriously ill patients were placed in single rooms (e.g. a patient with cancer staying in bed permanently). My personal reflection from the last visit to Gostynin in October 2023 was that the NCPDB is transforming into a facility similar to a social welfare home. From this perspective, the reality of the Center has changed – the number of patients in rooms has decreased, thanks to the possibility of transferring some patients to Czersk. At the same time, patients are increasingly older, more infirm, after a stroke, with a diagnosed

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<sup>42</sup> Deputy Minister of Justice Maria Ejchart reported on this visit during a conference regarding NCPDB, held at the Faculty of Law of the University of Warsaw on 12 April 2024. Prof. Janusz Heitzman also participated in this visit.

<sup>43</sup> CPT's report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, paragraph 74.

<sup>44</sup> *ibid*, paragraph 71.

cancer, requiring care and frequent consultations with specialist doctors outside the NCPDB.

The director of the Center adopted principles<sup>45</sup> that patients who were previously in Gostynin and do not show somatic illnesses, can be transferred to the unit in Czersk. Individuals requiring special care – such as patients with cancer, post-strokes, wheelchair users – are housed in Gostynin. Construction of a dedicated NCPDB building has not yet begun, despite plans that the Center’s management has been talking about for a decade, which the CPT inquired about after their visit in 2017. The director states that the current task facing the Center is updating the existing project documentation to comply with current legal requirements, energy standards, as well as the key aspect of increasing the number of available beds and room layouts. Following this update, further progress in the investment project will be possible.

Undoubtedly, the establishment of living conditions different from the current ones – such as the creation of single rooms with sanitary facilities, therapy rooms, workshops, a space equipped with physical exercise equipment, and a designated area for meal preparation or outside recreational area – will facilitate better preparation for leaving the NCPDB or ensure that individuals can live there with dignity until the end of their lives. Unfortunately, I have no doubt that not everyone will have the opportunity to leave this facility.

## VII. CASES BEFORE THE ECTHR

Ten cases communicated to the Polish government regarding the preventive detention in Poland have not yet been resolved by the ECtHR, and none of the judgments have been issued. These are: *W v Poland*,<sup>46</sup> *J.R. v Poland*,<sup>47</sup> *A.W. v Poland* and *W v Poland*,<sup>48</sup> *J.T. v Poland*,<sup>49</sup> *L.K. v Poland*,<sup>50</sup> *P.W. v Poland* and 2 other applications,<sup>51</sup> *A.S. v Poland*,<sup>52</sup> *T.S. v Poland*,<sup>53</sup> *J.C. v Poland*,<sup>54</sup> *H.A. v*

<sup>45</sup> The information was presented by the director of the NCPDB in the correspondence with the author in April 2024.

<sup>46</sup> Ap. No 43562/17.

<sup>47</sup> Ap. No 49560/17.

<sup>48</sup> Ap. Nos. 43691/18 and 9173/21.

<sup>49</sup> Ap. No 74254/17.

<sup>50</sup> Ap. No 20228/19.

<sup>51</sup> Ap. Nos 78366/17, 83161/17, 38717/19. The applicant died in 2023 within the NCPDB but the case is crucial so the Polish Ombudsman decided to lodge the *amicus curiae*.

<sup>52</sup> Ap. No 28295/21.

<sup>53</sup> Ap. No 47406/21.

<sup>54</sup> Ap. No 15624/20.

*Poland*.<sup>55</sup> It will not be an exaggeration to say that these will be historic cases, and the Court's rulings will likely have a significant impact on the shape of preventive detention in Poland. The cases relate to violations of Articles 3, 5 and 8 of the ECHR in the following contexts: the conditions of detainees' stay and therapy, the preventive use of handcuffs during transportation or medical examinations outside the Center (Article 3 of the ECHR); the legality of the deprivation of liberty, the procedure for release or prolongation of the detainees' stay in the NCPDB, the therapeutic interventions (Article 5 of the ECHR); the authorization of temporary release to attend the funeral of one of the parents, as well as the constant presence of a guard in the visiting room during meetings with the family, as well as body searches to which the patients were subjected each time they had a visit (Article 8 of the ECHR).

It is important to notice that the ECtHR struck off three cases from the list of cases to be considered due to the lack of response by the patients from the NCPDB. One of them removed from the list was previously taken up by the Commissioner for Human Rights, considering that the case raises systemic issues worthy of support by the Commissioner's *amicus curiae* opinion.

In my opinion, it might show that the involvement of lawyers representing patients from the Center should be greater. In one case, the patient is represented by the HFHR. However in the other cases, patients sent their complaints on their own. There is a possibility that they will not understand letters received from the Tribunal in Strasburg. Removing the cases from the list is alarming especially as I am aware of the infringements of human rights in the Center.

## 1. LIVING CONDITIONS

Alleging violations of Article 3 of the ECHR, NCPDB's patients specifically highlight their living conditions before the ECtHR. From January 2014 to February 2022, the patients were housed in a single building located in Gostynin. At first, the rooms were single, then double, and over time bunk beds were added to the larger rooms placing as many as 8-10 people. The constant accessibility of the room doors did not enhance the comfort of the stay. The Center's rules stipulated that patients could only talk on the phone in the living rooms or outdoors while walking. At the same time, the rooms were overcrowded with insufficient space for personal belongings and that resulted in conflicts among patients.<sup>56</sup> After the director of the NCPDB refused to accept 3 people referred to the Center<sup>57</sup> under

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<sup>55</sup> Ap. No 24676/18.

<sup>56</sup> Description prepared by the author, who visited NCPDB.

<sup>57</sup> See more: Patryk Kukliński, 'Pandemia w instytucji totalnej na przykładzie Krajowego Ośrodka Zapobiegania Zachowaniom Dyssocjalnym w Gostyninie' *Studia Iuridica* vol 91 (2022) 164.

court orders, having nowhere to put them, the legislator began work on changing the regulations.<sup>58</sup> These allowed the lending of buildings from the Prison Service. As a result, the second NCPDB<sup>59</sup> building was opened on the site of the former prison in Czersk. It helped to introduce improvements in living conditions.<sup>60</sup> The rooms at the Czersk facility hold a maximum of four people, with bathrooms located outside the living quarters, with the exception of a room adapted for people with physical disabilities, which is equipped with a built-in sanitary facility. Still, the infrastructure of the two buildings does not allow for the organization of individual rooms for those deemed dangerous to society, a solution which is commonly used in other European countries.

## 2. THERAPY

Patients complain before ECtHR that the Center does not resemble a therapeutic facility due to poor living conditions, understaffing, overcrowding and lack of space. They also complain about the intimidating atmosphere caused by the possibility of using direct coercive measures such as batons, handcuffs and pepper spray, as well as lack of an individualized therapy plan.<sup>61</sup> In the literature, there are opinions that effective therapy is one of the biggest problems.<sup>62</sup> The CPT report from the visit indicated that about 75% of patients were not interested in therapy. In this case, the delegation could not resist the impression that there was a general problem with the concept of therapy and, in particular, there was no clear vision of what to do with patients who refuse treatment and participation in rehabilitation activities. The Committee recommended considering the concept and philosophy of treatment at the NCPDB.<sup>63</sup>

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<sup>58</sup> The legislative process went quickly - the draft was submitted to the Sejm on 9 April 2021, Parliamentary Print No 1071, and the act was already passed on 15 April 2021.

<sup>59</sup> However, the local community protested against the organisation of a preventive detention center in their city <https://wiadomosci.onet.pl/trojmiasto/gostynin-niebezpieczni-przestepcy-trafia-do-czerska-mieszkancy-protestuja/pgby5ek> accessed 16 August 2022; <https://wiadomosci.dziennik.pl/wydarzenia/artykuly/8339854,osrodek-pedofile-czersk.html> accessed 16 August 2022.

<sup>60</sup> For more on this topic, see the NPM report on the 2022 visit to the NCPDB branch in Czersk: <https://bip.brpo.gov.pl/index.php/pl/content/rpo-w-oddziale-zamiejscowym-kozzd-w-czersku-kmpt> accessed 29 July 2022.

<sup>61</sup> Among others, case *T.S. v Poland*, Ap. No 47406/21.

<sup>62</sup> Patryk Kukliński, 'Terapia, readaptacja czy mrzonka? Porównanie polskich i niemieckich doświadczeń w terapii zaburzonych psychicznie sprawców niebezpiecznych izolowanych od społeczeństwa' in Diana Dajnowicz-Piesiecka, Emilia Jurgielewicz-Delegacz, Emil Pływaczewski (eds), *Badania kryminologiczne a praktyka. Perspektywa krajowa i międzynarodowa* (Wolters Kluwer 2021).

<sup>63</sup> Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017, Strasbourg, 25 July 2018, CPT/Inf (2018) 39, paragraph 121.

Unfortunately, nothing has been done in this matter to this day. The previous Minister of Justice did not want to deal with the law and the problem of the Center, and the Ministry of Health began to prepare an amendment<sup>64</sup> without including opinions presented during social consultations on the website of the government legislative center. The NCPDB's staff themselves have not been able to draw from the experiences of other countries. This is primarily, of course, the responsibility of the legislator.

### 3. SECURITY MEASURES

Patients have raised complaints to the ECHR that they are under constant surveillance of closed-circuit television cameras in the premises of the Center, including bathrooms.<sup>65</sup> CPT also observed a very high level of security that did not seem individualized and adapted to the level of risk posed by specific patients within the facility. This related to privacy during therapeutic consultations (always within sight, though not within hearing, of security personnel), handcuffing during external medical consultations (including dental and gynecological), but primarily to cameras covering absolutely every area where patients were present, including toilets and showers. Additionally, large screens on which security guards watched CCTV recordings were placed in such a way that other passersby (including unauthorized personnel and even patients) could see what was transmitted on the screen. Security personnel wore special equipment (batons, handcuffs, and pepper spray) at all times, including inside living quarters and in the presence of patients. As CPT highlighted in the 2017 report, this is an intimidating and unjustified practice.<sup>66</sup> These reservations were reiterated in 2022. According to the CPT, steps should be taken to ensure that all security measures (CCTV monitoring, presence of guards within sight during consultations and therapeutic interventions, use of handcuffs, etc.) are based on duly justified and documented individual assessments and adjusted to the level of risk posed by each specific patient.<sup>67</sup> Relevant legal provisions should be appropriately amended.

### 4. BASIS OF PLACEMENT AND LENGTH OF STAY IN THE CENTER

Some patients have pointed to violations of Article 5 §1(e) of the ECHR when referring a complaint to the ECtHR.<sup>68</sup> CPT noted during interviews with patients

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<sup>64</sup> Draft amendment, number UD350, < <https://legislacja.gov.pl/projekt/12358362> > accessed 3 May 2024.

<sup>65</sup> Inter alia in case *L.K. v Poland*, Ap. No 20228/19.

<sup>66</sup> CPT report from 2017 visit to Poland, paragraph 128.

<sup>67</sup> CPT report from 2022 visit to Poland, paragraph 69.

<sup>68</sup> Among others *W v Poland*, Ap. No 43562/17.

that they did not understand the reason for their placement in the NCPDB and were unable to predict how long they would have to stay there. This has a negative impact on their mood, attitude, and motivation to cooperate with staff.<sup>69</sup> As I mentioned at the outset, five patients died – in the hospital, hospice, or within the Center. The procedure for releasing individuals in poor health is so lengthy that patients die while still being the patients of the NCPDB. I also know a case where consent was given by the court for temporary stay outside the center in a hospice. However, a person in a terminal state of health was still on its roster and was not released. This is because the court would have to appoint forensic experts, and this process takes a long time.

### VIII. FINANCIAL ASPECTS

The provision of Article 56 of the 2013 Act clarifies the limits on state spending on the NCPDB's operation. While it was 5 million zlotys in 2014 when the Center began operating, from 2015 to 2022, expenditures were planned at 7 million zlotys, but with the condition that they are estimated up to a limit of 10 patients. This number was exceeded not long after it was opened. The 60-patient limit set by the Health Ministry's regulation<sup>70</sup> was exceeded in 2018.

Since the number of 10 patients was exceeded in 2016, the expenses for the operation of the NCPDB increased drastically, amounting to 15 million zlotys in 2017, 35 million zlotys in 2018, and in the following years, respectively, 2019 – 30,600 million zlotys, 2020 – 59,370 million zlotys, 2021 – 65,375 million zlotys, 2022 – 56,886 million zlotys, 2023 – 94,925 million zlotys. As was publicly announced in April 2024,<sup>71</sup> currently the costs are more than 135 million zlotys. Therefore, the question should be raised as to whether, at such high expenses from the state budget, the Center effectively achieves all its goals, and whether the effectiveness of its therapy is evaluated in the form of scientific research. According to my knowledge, the latter is not the case. Huge funds allocated for the functioning of the NCPDB may constitute another argument for an in-depth analysis of the direction of changes in the functioning of preventive detention in our country.

<sup>69</sup> CPT report from 2022 visit to Poland, paragraph 86.

<sup>70</sup> Regulation of the Minister of Health dated 16 January 2014 on the National Center for the Prevention of Dissocial Behavior, in § 2 stipulates that the number of beds at the Center is 60. The capacity of the Gostynin center has never been increased, even though the regulation was amended in 2015, 2018 and 2022.

<sup>71</sup> The information presented by Monika Platek, during the conference: <<https://www.youtube.com/watch?v=RVq4HdJoH1M>> accessed 28 April 2024.

## CONCLUSIONS

The anniversary of the preventive detention center cannot be treated as a moment to celebrate. On the contrary, it must be a moment to say stop to postponing legislative changes, turning a blind eye to violations of national and international law, and disrespecting standards of treatment of persons deprived of their liberty. New philosophy of post-penal isolation needs to be created. In my opinion, it should rather lead us towards the solutions used in the Netherlands than Germany.

Over the years changes have occurred, however in the direction of increasing overcrowding. Against this backdrop, CPT emphasized that it is aware that not only living conditions are a problem, and many more systemic issues need to be addressed regarding the future operation of the NCPDB and creating effective alternatives to that.<sup>72</sup> Over the past decade, the leadership of the Center has changed, following the death of the previous director, the atmosphere between patients and staff has evolved from crisis situations manifested in hunger strikes to a certain stability recently. However, the number of patients continues to increase and the concept of preventive detention requires new legal solutions that will take into account: past experience of its implementation in Poland as well as other countries within the framework of legal comparative analysis, and voices of experts from various fields – not only lawyers but also psychologists, psychiatrists, and sexologists.<sup>73</sup>

It is crucial to have a debate on security measures among those dealing with this issue, remembering that since 2015, the legal status has changed, and individuals ‘posing a threat’ may be isolated after serving their sentence in psychiatric institutions. It should be a fundamental change. CPT gives an indication that it refers to a change from the safety-based to rehabilitation-based one, involving appropriate preparation for release, in cooperation with society.<sup>74</sup> The current overcrowding in the National Center in Gostynin can be addressed not only by expanding the facilities but also by assisting more patients in reintegrating into society (under appropriate supervision when required). Additionally, amended law should contribute to increased use of alternative measures such as preven-

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<sup>72</sup> Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 March to 1 April 2022, CPT/Inf (2024) 10, Strasbourg 2024, paragraph 86.

<sup>73</sup> Józef K. Gierowski, ‘Uwagi psychologa sądowego o możliwościach opiniowania o stopniu zagrożenia u osób objętych ustawą z 22 listopada 2013 r.’ *Przegląd Więziennictwa Polskiego* 82/2014, 15; Filip Szumski, Krzysztof Kasperek & Józef Gierowski, (2020) ‘Wysokie czy bardzo wysokie ryzyko recydywy?: możliwości oceny kategorii ryzyka recydywy sprawców na potrzeby Ustawy z 22.11.2013’ *Psychiatria Polska* 54.6, 1181.

<sup>74</sup> *ibid*, paragraph 86.

tive supervision to reduce the number of patients referred to preventive detention centers.

Therefore, the 10th anniversary of the Center cannot be considered a celebration of a well-functioning system of law, it is rather an occasion for a sad reflection that, despite the numerous scientific conferences highlighting the poorly functioning system of preventive detention, the institutions responsible for legislation and protection of society have not yet addressed this issue.

Last but not least, in my opinion, the CPT should also develop general recommendations on the standards of operation of places of preventive detention, just as it recently did regarding transgender persons in prisons.<sup>75</sup>

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<sup>75</sup> CoE, Prison Standard. Extract from the 33rd General Report CPT/Inf (2024) 16 – part (2024).

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