

## Inequality of Imprisonment in Europe. The Polish Perspective



### INTRODUCTION

This article deals with the execution of the penalty of deprivation of liberty. I assert that different criminal policies applied in European countries make the prison population grow and lead to the overcrowding of prisons. Overcrowding means that detainees serve their term in prison in conditions that violate their human rights. Across Europe offenders are detained either in appalling or legally acceptable conditions. This is not a desirable situation in the context of human rights standards. Therefore, firstly, I analyze the international legal framework referring to the execution of the penalty of imprisonment, as adopted by the Council of Europe, the only regional European organization dealing with this issue. Then I present and analyze the statistics. Finally, I present the Polish legal framework related to the detention conditions and its recent evolution aimed at easing the overcrowding.

Imprisonment should be a penalty of the last resort. This is an unquestionable principle underlying the process of application of penalties, expressed in Art. 58 § 1 of the Polish Penal Code<sup>1</sup>, and in numerous documents of the Council of Europe. This principle is based on the fact that imprisonment has damaging effects on a human being<sup>2</sup>. Therefore, first, states, as much as possible, should apply alternatives to imprisonment. Second, if imprisonment is the only adequate punishment, it should be

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<sup>1</sup> Statutory Act of 6 June 1997, which entered into force on 1 September 1998, published in the Official Journal, No. 88, item 553, as amended.

<sup>2</sup> See: M. Foucault, *Nadzorować i karać*, Warsaw 1998; M. Piatek, *Europejskie Reguły Więzienne z 2006 r.*, Państwo i Prawo 2008, No. 2, p. 3.



executed with the utmost respect for offender's dignity, especially by creating conditions allowing the detainee to come back to the society as smoothly as possible. Therefore life in prison should resemble as much as possible the positive aspects of life in the community (Rule 5 of the European Prison Rules<sup>3</sup>). Detention should facilitate reintegration into society of persons who have been deprived of their liberty (Rule 6).

Alternatives to imprisonment were addressed in the 1992 Committee of Ministers of the Council of Europe Recommendation on the European Rules on Community Sanctions and Measures No. (92)16. It encouraged the use of sanctions effectively combating crime and, at the same time, allow to avoid the negative effects of imprisonment. Community sanctions and measures include those which allow to maintain the offender in the community and involve some restrictions of liberty by imposition of conditions and/or obligations, and which are implemented by bodies designated by law for that purpose<sup>4</sup>. The implementation of this recommendation must have been unsatisfactory, as eight years later, in 2000, the Committee of Ministers of the Council of Europe adopted a Recommendation No (2000)22 on Improving the Implementation of the European Rules on Community Sanctions and Measures. This time the Committee was more specific and recommended legislation introducing a "sufficient number of suitably varied community sanctions and measures". The Committee created an open catalogue of sanctions and measures, indentifying some of them: alternatives to pre-trial detention such as requiring suspects to reside at a specified address, to be supervised and assisted by an agency indicated by a judicial authority; probation as an independent sanction imposed without the pronouncement of a sentence to imprisonment; conditional suspension of imprisonment; community service (i.e. unpaid work on behalf of the community); victim compensation/reparation and victim-offender mediation; mandatory treatment of drug or alcohol addicts and in cases mental problems related to their criminal behavior; intensive supervision of certain categories of offenders; restrictions on the freedom of movement by means of, for example, curfew orders or electronic monitoring; conditional release from prison followed

<sup>3</sup> Recommendation Rec(2006)2 of the Committee of Minister's to Member States on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

<sup>4</sup> Appendix—Glossary, p. 1, Recommendation R(92)16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures.



by post-release supervision. The Committee recommended a wider use of non-custodial sanctions and measures instead of imprisonment.

Sometimes, however, the alternatives to imprisonment are not sufficient. In this event, the respect for the human rights of the detained persons should become the primary concern of the penitentiary system and its employees (Rule No. 1 of the European Prison Rules).

Despite the obligation to apply alternative measures, deprivation of liberty is applied relatively often, and in some states even more often than other measures. Deprivation of liberty causes many problems, not only of axiological but also of practical nature. One of the main issues that the penitentiary systems in many European states currently face is the overcrowding of prisons.

This issue has been addressed by the Council of Europe. In 1999, the Committee of Ministers of the Council of Europe adopted Recommendation No. (99)22 concerning prison overcrowding and increase in prison population. It stated that prison overcrowding and prison population growth represent a major challenge to prison administration and the criminal justice system as a whole, both in terms of human rights and the efficient management of penal institutions. Therefore, it laid down the principles which should contribute to the decrease of the prison population. It reemphasized the *ultima ratio* principle, according to which the deprivation of liberty should be regarded as a sanction or measure of the last resort and should therefore be applied only where the seriousness of the offence makes any other sanction or measure clearly inadequate. The Committee of Ministers put forward a variety of measures to decrease the number of detainees. Some of them may seem relatively far-fetched for instance the Committee recommends that the states consider decriminalizing certain types of offence.

The Council of Europe has created the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") – to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection from torture and from inhuman or degrading treatment or punishment<sup>5</sup>. The CPT addresses the conditions of imprisonment, including the amount of the cell surface provided to detainees. It put forward criteria (representing

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<sup>5</sup> Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 26 November 1987.



more a desirable level rather than a minimum standard) allowing to assess the cell conditions, according to which a cell is suitable if it has no less than 7 square meters per person, 2 meters or more between the walls and 2.5 meters between the floor and the ceiling.

Its implementation seems to pose a serious challenge, as many European states face an increasing number of prison sentences. The rules referring to conditions in prisons may be enforced by another institution of the Council of Europe institutional framework, the European Court of Human Rights. It has dealt with cases involving the conditions of detention coupled with violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In Court's view detention upon conviction is not in itself a violation of human rights of the detainee. It holds, however, that Article 3 obligates states to ensure that (i) a person is detained in conditions which respect human dignity, (ii) the manner and method of the execution of the measure do not subject him or her to distress or hardship exceeding the unavoidable level of suffering, inherent in detention and (iii) given the practical demands of imprisonment, his health and well-being are adequately secured<sup>6</sup>.

On several occasions the Court has stated that the overcrowding of prisons constitutes in itself a degrading treatment, and thus is in violation of Article 3 of the Convention<sup>7</sup>. The case-law gives some indications of what may be considered a minimum standard on the grounds of the Convention: overcrowding in itself constitutes a violation of human rights if there is less than 3 m<sup>2</sup> of personal space per inmate<sup>8</sup>. However, if there is more cell surface per person, other aspects of physical conditions of detention are considered, such as ventilation, access to natural light and air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Therefore, the Court found violation of Article 3 of the Convention even in cases where there was 3 to 4 m<sup>2</sup> per inmate, if it was coupled with the lack of ventilation and lighting<sup>9</sup> or of basic privacy<sup>10</sup>.

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<sup>6</sup> *Kudła v. Poland* [GC], No. 30210/96, §§ 92–94, ECHR 2000-XI.

<sup>7</sup> *Kalashnikov v. Russia*, No. 47095/99, §§ 97–103.

<sup>8</sup> E.g. 0.9–1.9 m<sup>2</sup> in *Kalashnikov...*, § 97, 1–2.5 m<sup>2</sup> of space per inmate in *Melnik v. Ukraine*, No. 47095/99, §§ 103.

<sup>9</sup> *Babushkin v. Russia*, No. 67253/01, § 44, 18 October 2007; *Ostrovary v. Moldova*, no. 35207/03, § 89, 13 September 2005, and *Peers v. Greece*, No. 28524/95, §§ 70–72, ECHR 2001-III.

<sup>10</sup> For instance *Novoselov v. Russia*, No. 66460/01, §§ 32, 40–43, 2 June 2005.

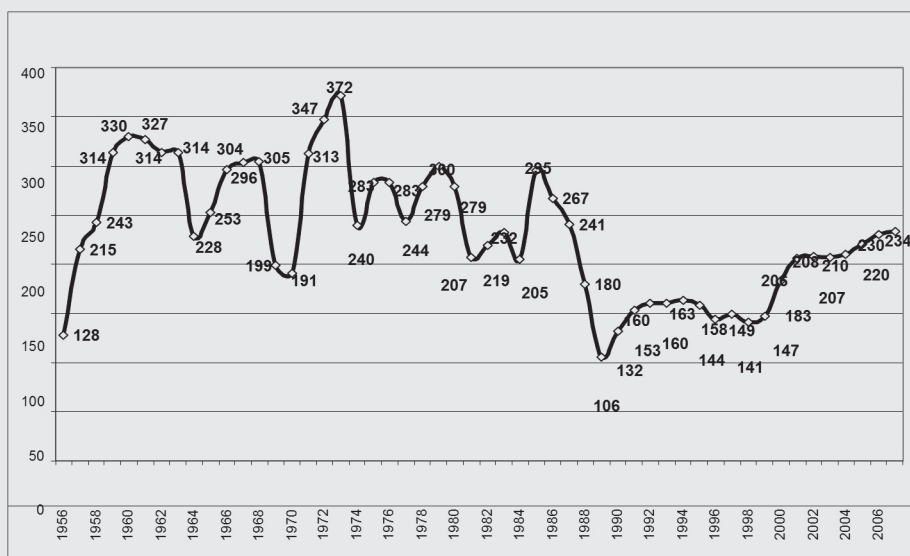


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DEPRIVATION OF LIBERTY IN EUROPEAN COUNTRIES – STATISTICS

Overcrowding of detention institutions is closely related to the rate of imprisonment. Some states are better prepared to face this issue while in others the capacity of penitentiary institutions does not keep up with the growing number of detainees. Poland is no exception. Overcrowding of prisons has always been an issue for the Polish administration of justice. Poland has one of the highest imprisonment rates in Europe during the whole period after the World War II. This rate reached the highest levels under the former communist regime (Figure 1). It decreased only after amnesty had been declared in 1989 by the first post-communist government. However, surprising as it may seem, it has quite quickly started to grow and – as early as around the year 2000 – attained a level similar to that of the 70s.

FIGURE 1. EVOLUTION OF THE IMPRISONMENT RATE IN POLAND IN THE YEARS 1956–2008



Source: Central Statistical Office<sup>11</sup>.

<sup>11</sup> Source K. Krajewski, *Główne tendencje polityki karnej ostatnich dwudziestu lat*, in: J. Jakubowska-Hara, C. Nowak (eds.), *Aktualne problemy polityki karnej w kontekście przeludnienia zakładów karnych w Polsce*, Wydawnictwo Naukowe Scholar, Warsaw 2010.



When the imprisonment rate is so high, the cell space becomes an issue. In Poland in the 90s, the number of places in the penitentiary institutions was higher than the number of detained persons. However, since 2002, when the number of detained persons suddenly grew, the capacity of penitentiary system could never measure up to it (Table 1). This situation continued despite constant efforts by the Polish penitentiary authorities to increase the number of places in prisons by turning all available rooms into cells.

TABLE 1. AVERAGE NUMBER OF DETAINEES AND AVERAGE CAPACITY OF POLISH PENITENTIARY INSTITUTIONS IN THE YEARS 1999–2008

Year	1999	2000	2002	2003	2004	2005	2006	2007	2008
Average capacity of penitentiary institutions	63 994	64 790	69 083	69 469	69 616	70 186	74 562	75 596	79 366
Average number of detained persons	55 436	64 246	81 391	81 321	80 239	82 761	87 370	89 995	85 920

Source: Central Board of Prison Service.

In 2008, the number of reached 85,920, while the capacity of prisons – 79,366. Furthermore, almost 70,000 persons are waiting to serve the penalty of deprivation of liberty (Table 2).

TABLE 2. PERSONS CONVICTED TO IMPRISONMENT NOT DETAINED IN PENITENTIARY INSTITUTIONS (AS OF 31 DECEMBER)

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of sentenced persons	19 931	22 676	27 489	31 040	37 512	46 620	54 313	58 031	69 714	69 864

Source: Ministry of Justice.

It resembles the situation in other post-Soviet countries. There is an important difference in the imprisonment rate between the Western and Eastern part of the continent (Table 3).



TABLE 3. SITUATION IN PENAL INSTITUTIONS ON SEPTEMBER 1, 2006

	Population 2006 – annual estimates (thousands)	Total number of prisoners (including pre-trial detainees)	Prison population rate per 100 000 inhabitants	Total capacity of penal institutions / prisons	Prison density per 100 places
Albania	3 172.2	3 884	122.4	3 341	116.3
Austria	8 327.4	8 780	105.4	8 491	103.4
Belgium	10 430.3	9 971	95.6	8 457	117.9
Bulgaria	7 692.5	12 218	158.8	10 566	115.6
Croatia	4 556.0	3 833	84.1	3 159	121.3
Czech Republic	10 189.0	18 912	185.6	18 936	99.9
Denmark	5 430.0	3 759	69.2	4 104	91.6
Estonia	1 340.0	4 310	321.6	4 472	96.4
Finland	5 261.2	3 714	70.6	3 519	105.5
France	63 195.0	57 876	91.6	50 419	114.8
Germany	82 640.9	79 146	95.8	80 183	98.7
Greece	11 122.5	10 113	90.9	6 019	168.0
Hungary	10 058.4	15 591	155.0	11 378	137.0
Iceland	298.4	119	39.9	137	86.9
Ireland	4 221.2	3 135	74.3	3 426	91.5
Italy	58 778.8	38 309	65.2	43 233	88.6
Latvia	2 289.1	6 531	285.3	9 166	71.3
Lithuania	3 408.1	8 078	237.0	9 574	84.4
Netherlands	16 379.0	20 463	124.9	22 000	93.0
Norway	4 668.7	3 164	67.8	3 330	95.0
Poland	38 140.1	88 647	229.9	75 550	117.3
Portugal	10 578.7	12 636	119.4	12 115	104.3
Romania	21 531.7	35 910	166.8	37 947	94.6
Russian Federation	143 221.3	871 609	608.6	955 421	91.2
Slovakia	5 388.1	8 657	160.7	10 461	82.8
Slovenia	2 000.8	1 301	65.0	1 116	116.6
Spain	43 886.8	64 120	146.1	45 811	140.0
Sweden	9 078.2	7 175	79.0	6 756	106.2
Ukraine	46 557.4	16 5408	355.3	159 966	103.4
UK: England and Wales	53 728.8	77 982	145.1	80 649	96.7

Source: Council of Europe, SPACE 2006.1.



The imprisonment rate is the highest in Central and Eastern Europe. It amounts to 608.6 in Russia, 355.3 in Ukraine, 321.6 in Estonia. In Latvia the imprisonment rate is 285.3, Lithuania – 237.0, Poland – 229.9, Czech Republic – 185.6, Romania – 166.8, Slovakia – 160.7, Bulgaria 158.8, Hungary – 155.0. Top of the list occupy the former communist states. The only exception are Croatia and Slovenia with the imprisonment rates amounting respectively to 85.1 and 65. It can be attributed to their small population and cultural proximity with Austria and Italy rather than the East European countries. Besides, they were formerly parts of Yugoslavia, which had broken from the Soviet Union influence sphere.

The top non-communist states in these statistics are Spain and England with the imprisonment rates respectively equal to 146.1 and 145.1.

There may be various explanations of this situation. However, it seems that one of the main reasons for the high imprisonment rate in the post-Soviet countries is the restrictive penal climate, resulting in the eagerness to resort to imprisonment. As demonstrated in Table 4, there is a difference between the Western and the Eastern part of Europe with regard to the deprivation of liberty. It is applied 18 times more often in Russia and 7 times more often in Poland than in Italy.

TABLE 4. FREQUENCY OF THE APPLICATION OF IMPRISONMENT IN 2006 (PER 100,000 INHABITANTS)

Italy	27,1
Slovenia	43,4
Netherlands	47,7
Denmark	48,5
Norway	53,4
Belgium	55,6
Finland	57,6
Sweden	60,9
France	62,4
Greece	63,3
Austria	74,4
Germany	77,6
Portugal	91,8

Spain	109,8
Hungary	111,6
Slovakia	116,7
England	118
Bulgaria	128,6
Romania	144,9
Czech Republic	162,1
Poland	193,8
Lithuania	195,8
Latvia	210,3
Estonia	243,7
Russia	495,5

Source: Atlas of crime in Poland 4.



In Poland, deprivation of liberty is applied frequently (Table 5). However, its execution is very often conditionally suspended, however the probation system in Poland is dysfunctional. Only ¼ of the convicted persons have a probation officer assigned to assist and supervise them during the probation period. The conditions of a probation are often violated, e.g. by committing another offence, which brings the suspended offender back to prison, thus increasing the number of detainees. Alternative sanctions and measures recommended by the Council of Europe, are seldom used in Poland and in fact do not constitute a real alternative to the imprisonment<sup>12</sup>.

TABLE 5. TYPES OF PENALTIES PRONOUNCED BY I INSTANCE DISTRICT COURTS IN THE YEARS 2002–2008 (PERCENTAGE)

Year	2002	2003	2004	2005	2006	2007	2008
Deprivation of liberty	11	9	9	8	9	9	9
Deprivation of liberty conditionally suspended	60	56	55	59	59	61	60
Limitation of liberty	10	13	15	14	13	11	10
Fine	19	22	21	19	19	19	21

Source: Ministry of Justice.

The structure of penalties applied as well as the average length of deprivation of liberty, which tends to become longer<sup>13</sup>, are the main factors contributing to the high imprisonment rates. However, there remains the issue of the capacity of penitentiary institutions. If it does not keep up with the growing number of detained persons, overcrowding is inevitable. Overcrowding is not characteristic only to the former Soviet bloc. Data contained in Table 3 indicate it plagues other European states as well, however the case-law of the European Court of Human Rights show that the most serious violations related to the conditions of detention take place in the Eastern part of the continent.

<sup>12</sup> See the results of a research project on alternatives to prison, carried out by the Institute of Law Sciences of the Polish Academy of Sciences, published in: A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska, B. Kunicka-Michalska, C. Nowak, J. Skupiński, *Alternatywy pozbawienia wolności w polskiej polityce karnej*, Wydawnictwo Naukowe Scholar, Warsaw 2009.

<sup>13</sup> See: P. Tournier, *Więzienia w Europie – inflacja penitencjarna i przeludnienie*, Państwo i Prawo 2002, No. 7, pp. 36–37.



One must note that the overcrowding results in inequality of persons serving the penalty in different European states. A person convicted in Poland has, statistically, a much higher chance to serve the penalty in an overcrowded institution than in Germany, Italy or Latvia. And as the case-law of the European Court of Human Rights indicates, serving the penalty in such conditions may constitute a violation of human rights. Therefore, states should seek a way to avoid or at least ease overcrowding and consequently the resulting inequality.



### CONDITIONS OF DETENTION IN POLAND

Pursuant to Art. 110 of the Polish Penal Execution Code<sup>14</sup>, a person sentenced to the penalty of deprivation of liberty is placed in an individual cell or a cell shared with other inmates, but in any case the area of the cell per person may not be lower than 3 m<sup>2</sup>. This rule has been considered not sufficient by the CPT on several occasions, which recommended it to be increased to 4 meters<sup>15</sup>.

Despite these recommendations, pursuant to Art. 248 of the PEC it was still possible to place a detainee in a cell with a surface below 3 sq. meters. The right to take such a decision was vested with the director of a prison and limited to justifying circumstances for a certain period of time. This meant that a person could be detained during the whole period of penalty in an overcrowded penitentiary.

This legal framework has recently been changed under the influence of the case-law of the Supreme Court and, especially, the Constitutional Tribunal.

The Supreme Court held that putting a detained person in an overcrowded cell, with no partition between the lavatory and the living part

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<sup>14</sup> Statutory Act adopted on 6 June 1997, force from 1 September 1998, J.O. No. 90, item 557, as amended.

<sup>15</sup> See: *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 30 June to 12 July 1996*, Strasbourg, 24.09.1998, p. 70, the same in: *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 8 to 19 May 2000*, Strasbourg, 23.05.2002, p. 61, as well as in: *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 4 to 15 October 2004*, Strasbourg, 2 March 2006, p. 46.



and with no individual bed for every detainee violates the right to dignity and intimacy and, consequently, justifies compensatory liability of the State Treasury<sup>16</sup>.

Finally, a provision allowing to place a person in an overcrowded cell, contained in Article 248 of the PEC, was found to be violation of the Polish 1997 Constitution by the Constitutional Tribunal. On 26 May 2008 it decided<sup>17</sup> that the provision in question would lose its binding force eighteen months following the publication of its decision, i.e. on 5 December 2009<sup>18</sup>. The Tribunal stated that the provision and its practical application might result in an inhumane treatment of detainees. However, the Tribunal allowed – in exceptional circumstances – for a temporary placement of detainees in cells with less than 3 sq. meters of surface per person. A statute should define the conditions for the application of this extraordinary measure, including maximum time of detention in such cells.

Recently, the European Court of Human Rights found a violation of Article 3 of the European Convention of Human Rights in two cases against Poland concerning overcrowding<sup>19</sup>. The Court based its judgments on the circumstances of the cases, however it also recognized a systemic problem. It noted that almost 160 applications raising the issue of overcrowding and inadequate living and sanitary conditions were pending before it<sup>20</sup>. According to the Court the Polish authorities appeared to ignore for many years the overcrowding and inadequate conditions of detention and, instead, they chose to legitimize the *status quo* in the domestic law which was found to be unconstitutional<sup>21</sup>. The Court was aware that solving the systemic problem of overcrowding might involve significant financial resources, however it emphasized that, as a matter of principle, the lack of resources cannot justify conditions which border on violation of Article 3 of the Convention<sup>22</sup>.

The amendments of the PEC were effectively adopted in November 2009<sup>23</sup>. Currently, pursuant to Art. 110 § 2a of the PEC placement of a de-

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<sup>16</sup> Judgment of 28 February 2007, V CSK 431/06.

<sup>17</sup> SK 25/07.

<sup>18</sup> Published in O.J. No. 96, item 620, on 5 June 2008.

<sup>19</sup> *Orchowski v. Poland*, No. 17885/04, 22 October 2009, *Norbert Sikorski v. Poland*, No. 17599/05, 22 October 2009.

<sup>20</sup> I.e. October 2009, *Orchowski v. Poland*, § 147.

<sup>21</sup> *Ibidem*, § 151.

<sup>22</sup> *Nazarenko v. Ukraine*, No. 39483/98, § 144, 29 April 2003.

<sup>23</sup> Act Amending the Penal Execution Code, of 9 November 2009, published in O.J. No 190, item 1475, which entered into force on 6 December 2009.



tained person in a cell with less than 3 sq. meters per person, but no less than 2 sq. meters of surface per person, is acceptable for up to 90 days in exceptional cases, including e.g. a necessity to prevent a danger of epidemics or other hazards to the safety of persons or to the penitentiary institution. Pursuant to Art. 110 § 2b of the PEC it is also possible to place a detainee in such a cell in other circumstances, generally when there is the necessity to imprison other convicts (e.g. sexual offenders, recidivists, persons temporarily arrested), for a period no longer than 14 days (extended to 28 days upon the consent of the penitentiary judge – Art. 110 § 2c of the PEC).

The amended provisions of the Polish law may be assessed as beneficial, provided that in practice they will be, first, properly observed, and, second, applied with restraint and caution. The situation in Polish prisons will not change overnight just by the adoption of new legal provisions. Prisons continue to be overcrowded and only exceptional measures – such as amnesty – may decrease the number of detainees. Therefore, today the Polish penitentiary system faces two opposite challenges: first, the overcrowding, and second, the legal provisions that do not allow the cells to be overcrowded.

Improving the conditions of imprisonment must go in line with the betterment of the penitentiary infrastructure and – last but not least – with the radical turn of the Polish criminal policy, particularly by adopting methods and sanctions alternative to the deprivation of liberty, as recommended by the European Court of Human Rights<sup>24</sup>.

In a longer perspective, this new framework of overcrowding should contribute to the elimination of inequalities manifest in the conditions of imprisonment across Europe.

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<sup>24</sup> In *Orchowski v. Poland*, § 153, the Court stated: "If the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment".