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The Interpretation and Application of Article 5 and 6 of European Convention of Human Rights and Fundamental Freedoms.

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* INTRODUCTION *

The criminal proceedings is the type proceeding of the social importance. Its construction and efficiency has an impact on the increase or decrease of the public credibility of administration of justice. The consequences of conviction affects also on the life of the accused. The controversial issue is, in particular, detention on remand, which for the interest of the system of justice and securing the proceeding adopts a possibility of imprisonment of a person, who is considered innocent till the conviction.

Establishing a new legal status, the law should be interpreted and implemented in order to guarantee the highest possible efficiency in prosecution of offenses and provide the accused the possibility of efficient defence.

The European Convention of Human Rights and Fundamental Freedoms is significantly helpful in this matter. The rights indicated in Article 5 and 6 of the Convention should be estimated as the fundamental rights for the accused and victim. Ensuring the possibility of exercising the rights is for the government.

Judicial practice of ECHR includes a lot of subjects concerned with the infringement of Article 5 and 6 of the Convention. Due to the limitation of the paper, the authors chose the most interesting and significant issues. Presenting the complete views of the authors upon the whole subject is not possible. The authors worked out the subjects concerning the situations, in which Poland prejudiced the law and discussed the judgments of ECHR, which present other important issues. In the most issues discussed in the paper the authors concentrated on the cases against Poland, as they refer to problems, which are widely spread in Poland.

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Art. 5 of the European Convention on Human Rights belongs to the particularly important group of Convention's provisions- together with its Art. 2, 3, 4 brings up the subject of a human's physical security. It is considered to be a human's fundamental right, yet it is still frequently violated. Because of such huge number of these violations there developed a broad European Court's of Human Rights jurisprudence, which would be analysed hereunder.

There are three grounds, that the discussed article can be divided into: first, specified in the beginning of Art. 5 para. 1- a freedom and personal safety guarantee, second, from para. 1 phrase 2- an enumerated list of the situations, when under specified at law circumstances and in accordance to

the lawful procedure, one is entitled to deprive a person of his liberty and finally, in para. 2- 5 there are indicated several minimal liberties to be ensured to the person deprived of his liberty, that has been executed on the premises specified above[1].

While analysing the relation between the terms "freedom" and "security of person", expressed in the Art. 5 para. 1, the terms appears to be bounded, thus they cannot be interpreted independently. In the light of the ECHR jurisprudence one can find that a right to a personal security is simply a guarantee, that no one shall be deprived of his liberty arbitrarily. Freedom though, needs to be interpreted as a "freedom from being put in the place of isolation"[2].

Because of the need to find a binding interpretation of the term above, there emerged a numerous practical problems, on the grounds that the range and the diversity of the cases that the European Court had to decide upon, was great. It is noteworthy that the deprivation of liberty can be lawful in accordance with the Convention only if it has been executed within the bounds of exceptions set out in Art. 5 and it has to be "lawful" and "in accordance with a procedure proscribed by law". Here Art. 5 refers back to each country's national law and enshrines the obligation to conform both substantive and procedural rules consistent with the Convention, but it is not enough- the second obligation under that Article is that each country should observe their law strictly. Compliance with a national law is not, however, sufficient and it does not assure that in a particular case, particular decision on deprivation of liberty may still be found arbitrary, even if taken under the premises, pointed out in Art. 5. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 para. 1 and the notion of "arbitrariness" in Article 5 para. 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention[3]. The assessment whether the certain case of deprivation of liberty was arbitrary depends on various premises like- the "type" of a deprivation of liberty from Art. 5 para. 1 sub- paragraphs; the way it was actually enforced; compliance with the purpose of such deprivation, described in discussed Article; possibility of applying other, lenient measures and last but not least conforming to the national law substantive and procedural rules[4].

It has to be noted, that there are some crucial judgments creating the interpretation of the terms "a right to liberty" and "a right to security". The case of Guzzardi vs. Italy brings the idea on how the term "deprivation of liberty" could be, in the light of the Art. 5, understood. The applicant, Mr. Guzzardi was placed, on the basis of Court's judgement, on the Italian island- Asinara. In the

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[1] L. Garlicki, P. Hofmański, A. Wróbel, Konwencja o ochronie praw człowieka i podstawowych wolności, Warsaw 2010., p. 158 onwards.
[2] Ibidem, p. 161.
[3] see Saadi vs. Great Britain, para. 67.
[4] M.A. Nowicki, Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka, Warsaw 2009, p. 209 onwards.

Milan Court's decision there have been certain limitations of liberty imposed on him like: an obligation to report to the supervising authorities twice a day, an obligation to abide the curfew, an obligation not to take part in a public meetings, and the others. In this case Court decided, that even if it was not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, cumulatively they certainly raised an issue on the matter of Article 5. European Court stated that, among the others, even though the area around which the applicant could move far exceeded the dimensions of a cell and he was not bounded by any physical barrier, it covered no more than a tiny part of an island to which access was difficult and about nine-tenths of which was occupied by a prison[5]. The issue of the scope of "liberty" and the interpretation of the term "deprivation" was also developed in an interesting judgement of Nielsen vs. Denmark. It was the case of 12- years old boy placed, upon the consent of his mother, in the Department of Child Psychiatry in the county hospital. Firstly, the Commission on Human Rights found that the final decision on the question of the applicant's hospitalisation was not taken by the holder of parental rights but by the Chief Physician of the Hospital. Therefore it engaged the responsibility of the State, under Article 5 para. 1, and the mother's consent was not sufficient to relieve the State from this responsibility. However the European Court stated differently- that it was within the mother's parental right to decide about applicant's admission to and stay in the Child Psychiatric Ward, thus it was not based on the States decision. Although mothers decision could not be assessed under Art. 5, the European Court held that, the restrictions of liberty imposed on the applicant while his stay in the hospital, were no more than the normal requirements for the care of a child of 12- years of age receiving treatment in hospital. Also the applicant was still of an age at which it would be normal decision to be made by the parent, even against the wishes of the child. Thus the applicants hospitalisation did not amount to a deprivation of liberty within the meaning of Article 5[6].

There is a list of the situations, set out in Art. 5, when the deprivation of liberty can be lawful. However this list is exhaustive and calls for a narrow interpretation. According to the discusses Article, these exceptions are:

(a) the lawful detention of a person after conviction by a competent Court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a Court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of un-sound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[5] see Guzzardi vs. Italy, para. 95.
[6] see Nielsen vs. Denmark, para. 58- 75.

Because of limited size of this paper we will focus on a task, which is particularly problematic, especially in the field of its interpretation and application and where evolved a wide ECHR jurisprudence, which often regarded the cases against Poland. The issue would be Art. 1 sub-paragraph c, interpreted in strict connection with Art. 5 para. 3, which imposes an obligation to bring promptly before a judge or officer authorised by law to exercise judicial power everyone arrested or detained in accordance of the provisions of para. 1 (c) and a right to trial within a reasonable time or to release pending trial. The analysis of this provision must effect in an impression that the idea of depriving a human of his liberty, before final sentence, violates the presumption of innocence. Therefore it is important to use this instrument very carefully. On the other hand, this form of deprivation of liberty is often necessary to ensure, that the ongoing investigation would not be interfered. That is the reason why there is a huge amount of the ECHR judgments on the foregoing matter. They are simply an attempt to create a thin line between rights guaranteed in Art. 5 and the proper conduct of the proceeding[7].

The interpretation of a discussed paragraph results mostly from the European Court's jurisprudence. The Court on numerous occasions stated that the persistence of a reasonable suspicion that a person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention[8]. Art. 5 (c) contains an additional premise which allows a deprivation of liberty, that is a risk that a person will abscond. And the last premise, when detention is considered reasonably necessary to prevent the person's committing an offence. However in this matter the Court underlined that a person may be detained based on this preventive premise only in the context of pending criminal proceedings against him[9].

There is a vast number of the judgements where the European Court found Poland's violation of art. 5 para. 1 (c) and para. 3. In this paper we would like to analyse the specific character of these violations and suggest a new ideas on the matter.

Firstly, it should be pointed out that the majority of these violations concerned the delay in adjusting the Polish penal procedure to the Convention's standards[10]. The following issue occurred in the 1990s and was appropriately changed in a subsequent years. Due to the limitations of this paper there would be given only an examples of these. The problem of the legal authorities entitled to impose the detention on the accused is the first example. The authority was at that time in Poland a Court and a prosecutor, who was empowered to order all preventive measures, for the duration of the investigation. Most certainly the prosecutor is not an independent and impartial judicial authority,

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[7] A. Kiełtyka in: „Środki zapobiegawcze w polskim procesie karnym a ochrona praw człowieka" w: Europejskie Standardy ochrony praw człowieka a ustawodawstwo polskie, E. Dynia, P. Kłak, Rzeszów 2005, p.234 onwards, and also A. Trzcińska, Paweł Wiliński: ibidem, p. 251,

[8] see Kudła vs. Poland, para. 111, Kauczor vs. Poland, para. 34.

[9] see Jecius vs. Lithuania, para. 50.

[10] L. Garlicki, P. Hofmański, A. Wróbel, Konwencja o ochronie praw człowieka i podstawowych wolności, Warsaw 2010., p. 159.

who in accordance with the Convention could impose a detention. For this reason this regulation was changed in 1995. The next example would be the wrongful practice that developed due to the statutory lacuna in the Polish criminal procedure. Before 1995 the domestic law did not require an obligation to issue a decision, prolonging the detention, after filing in Court the bill of indictment. Though the basis of the detention, since that moment, was solely the fact that the bill of indictment was lodged. Therefore a person could have been detained for months without any judicial decision based on a specific legal provision[11]. The judgement would be passed only as a result of an appeal being filed. Without any doubt that practice was contrary to the principle of legal certainty and its foreseeability.

Next, probably the biggest group of violations mentioned hereabove, relates to the problem of the length of detention on remand imposed by Polish Court's. The amount of the European Courts verdicts on that matter was so huge that it resulted in the Committee of Ministers Interim Resolution[12]. A good example of such a judgement would be the case of Kauczor vs. Poland, where the detainee spent in custody 7 years, 10 months and 3 days[13]. As a result of the Resolution some measures have been take by the Polish legislator. However, they were mostly focused on eliminating the possibility of prolonging the detention endlessly and not on the improvement on effectiveness and speediness of the process, which is the field where such changes are actually necessary. Implementing these changes was not accompanied by taking appropriate awareness-raising measures with regard to judges and prosecutors. In Polish judicial practice the institution of detention is used automatically, too often and based on week grounds. While deciding, judges tend to forget that the detention is such a serious measure that it is justified only as a last resort, where other, less severe measures have been considered and found insufficient to secure the proper conduct of the proceeding[14]. Frequently, in the Court's decisions there are no exhaustive explanations why the other, less stringent measures, were not used. It should be underlined that judges are obliged to explain so under the Art. 257 para. 1 of the Code of Criminal Procedure. The Code lists a catalogue of preventive measures that are less stringent and could secure the individual and public interest as well as the detention. Unfortunately, the detention on remand is being treated by the domestic regional Courts as the most obvious, effective measure, which will certainly attain its goal- the proper conduct of the proceeding. This are the reasons why the Polish judgements are being found arbitrary so often. A good way of handling the issue for the Court's would be, in every case that appears before the regional court, to consider a possibility of application of other preventive measures and, as it is stated in the Code, giving them a priority, before the detention. Special

[11] see Baranowski vs. Poland, para. 53-58.
[12] Interim Resolution CM/ResDH(2007)75 concerning the judgments of the European Court of Human Rights in 44 cases against Poland relating to the excessive length of detention on remand.
[13] see Kauczor vs. Poland.
[14] see Ladent vs. Poland, para. 54.

emphasis should be put into the contacts of the accused with his family, the intensity of the bond with the society and country, as well as his employment situation. The Court should consider whether it is possible for the person to move with his family and work abroad in order to assess the risk of absconding. These factors should be really important in the process of making a decision free from arbitrariness.

Judgements imposing detention are based on the premises set forth in the Code of Criminal Procedure. The indicated regulations are in accordance with the requirements of the Convention, but their application is not always consistent. These decisions are based on the grounds that may even be reasonable at the beginning of the proceeding but within the lapse of time they are no longer sufficient and do not justify the whole length of the detention[15]. Also the judgements themselves are not specific enough, too brief and the Courts often do not base their statements on concrete circumstances. The European Court justly stressed that the premises such as: the persistence of reasonable suspicion that the person arrested has committed an offence, the risk that a person will abscond or induce the witnesses, with the passage of time inevitably became less relevant. In that case the Court, prolonging the detention, should give the reasonable arguments why these grounds still remain important and justify the decision. In the case of Michta vs. Poland the applicant was detained for 2 years and 11 months. His detention was based on the following grounds: the reasonable suspicion that the applicant had committed the offences which he had been charged with, the complexity of the case and the severity of the anticipated sentence. The Court also vaguely referred to a risk that applicant might abscond or interfere with the proper conduct of the proceedings without specifying the grounds for such suspicion. During the entire period of applicants detention the Court did not consider any other, less stringent measures. In this case the European Court held that the grounds given by the Polish Courts were not "sufficient" and "relevant" and could only initially justify the applicant's detention. The detention prolonging decisions were also based on the risk that the applicant would interfere with the proper course of the proceedings, even after the Court of Appeal found that these suggestions were arbitrary and unsubstantiated[16]. Unfortunately, this judgement is only an example of how the Polish Courts proceed in such cases.

Frequent use of the other premise, set forth in the Polish code- the likelihood that a severe sentence might be imposed on a detainee, is also a problematic issue. In the European Courts jurisprudence it is required to use this premise only as a relevant element in the assessment of the risk of absconding, other interference with the proper conduct of the proceeding or reoffending[17]. In Polish law the issue is regulated in similar mode, but unfortunately, this regulation is imprecise and creates a possibility of its various application, often contrary to the Convention. The example of that

[15] see Kudła vs. Poland, para. 112-116.
[16] see Michta vs. Poland, para. 48-51.
[17] see Kauczor vs. Poland, para. 46.

is when Court uses this premise as a basis of the decision by itself, without indicating a relation between it and the risks mentioned above. This practice stands in an obvious contradiction with the presumption of innocence and effects in finding Polish judgments arbitrary.

In that context the European Court also stresses that a hypothetical "severe" sentence that might be imposed on the accused person, must be reassessed in the light of evidence that Court progressly obtains during the proceeding. As an example, in the case of Łatasiewicz vs. Poland the Court pointed out that the possible sentence in the range from 1 to 10 years needs to be reconsidered with the passage of time[18]. It is also a common practice in Polish jurisprudence to base a detention on remand during the whole proceeding on the ground mentioned hereabove, even after the Court had obtained a necessary evidence to assume that the penalty imposed in the case would not be severe. In nearest future this problems needs to be solved by either specifying Polish law or by standardising jurisprudential practice on that matter.

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Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms indicates that judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

First of all, what should be indicated is that, in polish language version reference is made to public proceedings before the court, whilst in other language versions the thing is about public pronouncement of the judgments.

In Polish legal doctrine the openness to the public is distinguished from the openness to the litigant parties and other participants in legal proceedings. Openness to the public means that the court case should be considered apparently to the society, in other words, in the way, that every interested person should have a possibility to observe the conduct of the proceeding. The openness to litigant parties and other participants in legal proceedings means that the court case should be considered with participation of the litigant parties and theirs representatives, that is the persons, who concern the proceeding[19].

[18] see Łatasiewicz vs. Poland, para. 56-57.
[19] Marszał K., *Proces karny. Zagadnienia ogólne,* Katowice 2008, s. 103. Por. Daszkiewicz W., *Prawo karne procesowe. Zagadnienia ogólne,* t. 1, Bydgoszcz 2000, s. 98.; Grzegorczyk T. Tylman J. *Polskie Postępowanie karne,* Warszawa

In different language versions different terms are used to qualify the same legally relevant acts, which are: proceeding opened to the public, proceeding opened to the litigant parties and other participants in legal proceeding and public pronouncement of the judgments. In English language version there is only one term, which is used to name all this mentioned legally relevant acts, that is "public hearing" and "publicly" [20]. There is no distinguishing on the two types of openness, as it appears polish legal doctrine.

Article 6 of the Convention indicates solely on the openness to the public as the guarantee of the fair trial, so only this type of openness, including the problems of public pronouncement of the judgments will be the subject of this presentation. The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention[21].

This right protects litigant parties from arbitrary resolutions of the court. Proceeding opened to the public is not only advantageous for litigant parties, but also for public interest, that is informing the society about the proceedings and putting it under control of the public opinion. There is a strong connection between the public interest and the interest of the litigant party, because the public control of the proceedings, even if it is sometimes only theoretical or potential, guarantees the litigant parties, that all the acts will be taken seriously and in the reality in order to establish the real state of affair by the judge, whose independence and impartiality could by verified considering the way how the judge exercises the proceedings and performs particular acts of legal procedure[22].

The rights of the litigant party to fair trial and impartial court are the absolute rights, which are not restricted. However, the right to proceedings opened to the public can be restricted, but only in the scope and in the way indicated in the Article 6 of the Convention.

The right to proceeding opened to the public refers both civil cases and penal cases. In the civil law procedure this right concerns all types of cases, including arbitration proceedings, both

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2007, s. 158.; Kaftal A., *Jawność postępowania karnego w świetle nowego kodeksu postępowania karnego,* NP 1969, nr 11-12, s. 1639-1640, 1647.; Kmiecik R. Skrętowicz E., *Proces karny. Część ogólna,* Kraków 2006, s.119-120, 122.; Murzynowski A., *Istota i zasady procesu karnego,* Warszawa: Wydawnictwo Naukowe PWN 1994, s. 191.

[20] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18,*Warsaw 2010, para. 194.

[21] see *Pretto and others,* par. 21; *Axen vs. Germany,* para. 25.

[22] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18,*Warsaw 2010, para. 195.

voluntary and compulsory. The penal proceedings is also usually opened to public, but not always it is advantageous for the accused, e.g. when he gives explanations aggravating co-accused[23].

Some difficulties in ensuring the proceedings attendance of the public can appear when the trial takes place in a penal institution because of the insuperable difficulties in escorting prisoner (arrested accused). In such situation there is a possibility to justify the exclusion of the openness of the proceedings to the public. In polish legal doctrine disciplinary proceedings are not the proceedings, in which the criminal liability of the person accused of commission of an offence is not determined. Disciplinary proceedings are specific proceedings, which are regulated beyond the code of penal proceedings, in particular statutes, and theirs subjects is deciding about disciplinary liability, not penal liability. Taking into consideration a lot of differences between this two types of proceedings, in penal proceedings all the procedural safeguards are absolutely observed. In disciplinary proceedings not all this safeguards, e.g. the openness to the public must be observed. Disciplinary proceedings characterize not opened to the public consideration of a case. Resolutions of the court or disciplinary tribunal concern only acts treated as disciplinary misconducts, whereas this acts from the point of view of theirs criminal character are the subject of the penal proceedings, exercised by the independent and impartial court, preserving all the procedural safeguards.

The proceedings must be open to the public. In any case of managing an affair in penal proceedings outside a regular courtroom, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access[24].

The right to open to the public proceedings includes not only participation of the public, that is people who do not play any role in a proceedings, but also participation of the press, radio and television, because mass media plays specific role in spreading information about the proceeding and its result[25]. Ban on photographing people in a courtroom, binding in some countries is not a restriction of the openness of proceedings. It can be justified by the need of protecting people's privacy[26].

Article 6 of the Convention does not distinguish the right to open to the public proceedings according to judicial stage or instance. However, the Tribunal distinguishes between the proceedings before the court of first instance, the court of the appeal instance or the cassation court. If the openness of the proceedings is ensured before the court of the first instance, lack of it before the court of the appeal instance or the cassation court can be justified because of the particular features

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[23] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18*,Warsaw 2010, para. 196.
[24] see *Riepan vs. Austria,* para. 28-29.
[25] see *Axen vs. Germany,* para. 77.
[26] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18*,Warsaw 2010, para. 198.

of these proceedings. Tribunal says that acceptance of instituting appeal proceedings or the proceedings limited solely to issues of law, in contradiction to issues of fact, can be complying with the requirements of Article 6 of the Convention, despite that the appellant does not have a possibility to be heard by the court of the appeal instance or the cassation court[27].

There is a different situation, when the court of the appeal instance is entitled to complete review of the judgment, that is to the extent of the facts and law. However, the specific character of problems can justify in such situations resignation from oral and open to public trial, but only exceptionally[28]. These Tribunal's statements concern the problems of the openness to the litigant parties and theirs representatives, that is participating by the litigant parties and theirs representatives in acts of legal procedure performed by the court during the trial. However, excluding this openness simultaneously results in excluding the openness to the public, that is the possibility of entering on the trial by the public. At first, Tribunal admitted that neither the letter nor the spirit of Article 6 para. 1 prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public[29]. However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest. In penal cases, before it is recognized that accused, by his implicit behavior, waived crucial right prescribed in Article 6 of the Convention, it is essential to present, that he could reasonably estimate and predict the results of his behavior[30]. In the judgment in the case Hermi the Tribunal indicates, that the applicant was duly informed of the date of appeal court hearing and grasped the meaning of the notice informing him about this fact. The Court also notes that the applicant did not appear to have informed the prison authorities of any difficulties in understanding the document in question. Therefore, the courts substantially accepted the fact, that he tacitly waived his right (para. 89-94).

The right to public pronouncement of the judgments should be treated as a separate right, different than the right to the open to the public proceedings. It stems from the Article 6 of the Convention that a judgment should be pronounced completely orally on the open court sitting. It considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1[31]. The Court has applied the requirement of the public pronouncement of judgments with some degree of flexibility[32], formulates different restrictions and exceptions. Publicity does not always have to have an access to courts decisions pronounced orally on the open to the public proceedings, but this access can be ensured by

[27] see *Helmers vs. Sweden,* para. 36.
[28] see *Ekbatani vs. Sweden,* A 134, para. 32.
[29] see *Albert i Le Compte,* para. 35.
[30] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18,*Warsaw 2010, para. 204.
[31] see *Pretto and others,* para. 26.
[32] see *Moser vs. Austria,* para. 101.

other means complied with Article 6 of the Convention[33]. This mean is e.g. placing the full text of the judgment of the cassation court accessible to the public, so that everyone can inspect a copy of the judgment or request it on a petition[34] (such solution exists in polish penal procedure in Article 418a the code of penal procedure), ensuring that anyone who can establish an interest may consult or obtain a copy of the full text of judgments, including the fact, that the most important judgments are published in the official registry, however, if none of the courts publishes a judgment, ensuring such mean of publishing judgments of the courts of appeal or cassation courts does not meet the requirements of the Article 6 para. 1 of the Convention[35], and public pronouncement of the judgments of the Supreme Court, trying only issues of law, is not necessary, if lower courts pronounce publicly theirs judgments[36].

Article 6 of the Convention orders to pronounce publicly the full text of the judgment. Public pronouncement only of the conclusion of the judgment does not fulfill the aims of this regulation, because the reasons of the judgment would be inaccessible to the public[37].

Article 6 of the Convention contains a catalogue of the prerequisites excluding the openness to the public of the proceedings, that is: the interests of morals, public order or national security in a democratic society, the interests of juveniles or the protection of the private life of the parties, or other circumstances where publicity would prejudice the interests of justice.

National authorities are obliged to indicate prerequisites justifying exclusion of the openness to the public of the proceedings. The Tribunal stated the infringement of Article 6 para. 1 of the Convention, when national authorities didn't recognize unusual circumstances justifying exclusion of the openness to the public of the proceedings[38].

The Tribunal accepted existence of such unusual circumstances in cases, in which the subject of the proceedings are issues of law or technical issues. Examples of such issues are disputes relating to insurance benefits, which are rather of technical character, because theirs outcome depends mainly on an opinion of medical experts. The Tribunal stated that national authorities in such cases should allow for requirements of procedural efficiency and can depart from conducting a trial, if a case can be adequately decided on the grounds of the records of the case and written statements[39].

Above statement of the Tribunal is controversial, because every case should be decided on the open to public proceedings, beyond the extraordinary situation when there is a possibility to exclude the openness of the proceedings. Deciding about the complaint solely on the grounds of the

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[33] see *Pretto and others,* para. 25; *Moser vs. Austria,* para. 102.
[34] see *Pretto and others,* para. 26.
[35] see *Moser vs. Austria,* para. 103.
[36] see *Axen vs. Germany,* para. 32.
[37] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18,*Warsaw 2010, para. 213.
[38] see *Kolb and others vs. Austria,* para. 61.
[39] see *Lundevall vs. Sweden,* para. 3.

records of the case and written statements would weaken the procedural position of the parties, because the parties would be devoid of the possibility of submitting an application to hearing of an expert and to oral explanation or supplement of the opinion. Contact with an expert on a trial allows to ask him some questions and so that to reach the truth more effectively. It should be taken into account that experts often make some mistakes when they draw up the opinions. As a consequence, such proof should be verified in the same way as any other proof shown in the trial. The opinions of the experts should be judged very carefully and their conclusions cannot be accepted without analyzing the whole text of an opinion. Either in penal proceedings, or in civil law procedure exist institutions such as seeking a supplemental opinion or appointing other experts, which give the court the possibility to check the primary opinion. The active participation of the parties on the open to the public proceedings undoubtedly makes verification of such opinion and relying a judgment on the right conclusions easier for the court.

Excluding the openness of the proceedings must correspond to the rule of proportionality. The test of proportionality means satisfying the following requirements: excluding of the openness serves the aims of the Article 6 para. 1 of the Convention, it must exist the appropriate relation between the grounds of excluding the openness and the procedural guarantees which result from the open to the public proceedings, because a decision to exclude the openness of the proceedings is concurrently a determination of the rights and freedoms of the participants in legal proceedings, protected by other regulations of the Convention and it is not possible to reach the aims indicated in this regulation in other way or by using different legal remedies than excluding the openness of the proceedings[40].

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The Article 6 of Convention sets the complex of rules that provide to every person guarantees of fair trial. It creates this in a sophisticated way. Contains three paragraphs – first which should be considered as a general rule, widely applying, and following two which regard particularly principles of criminal procedure.

Article 6 is an individual provision that established complex of crucial rights of every person, but also it is a subsequent instrument, due to the fact that it implements procedural guarantees that

[40] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do Article 1-18,*Warsaw 2010, para. 221.

ensure implementation other legal regulations of Convention. In this meaning the Article 6 coexists with the Article 13[41].

This regulation affords the individual a number of procedural guarantees for the adjudication of disputes which involve „the determination of his civil rights and obligation or of any criminal charge against him"[42].

It has to be mentioned that Article 6 provides guarantees which are considered as a regulations of procedural law, not substantive issue. The provisions of Article 6 regarding the right to a fair hearing relate exclusively to procedural guarantees. In other words, the right to a fair hearing means only a right to have a trial conducted according to certain procedural requirements such as, for instance, the opportunity to examine witnesses or to produce relevant evidence. In fact, a literal interpretation of Article 6 does not go beyond that. This has led to the view that if such procedural requirements are satisfied, the European Court of Human Rights cannot interfere with the result of trial. Indeed, the Court itself has established a practice of not interfering with the result of a trial, on the ground that such an interference would transform the Court into a Court of next instance[43].

It has to be noticed that the construction of the rule of fair trial has became systematically an universal standard. Most of national constitutions, implemented during last 30 years, maintain similar matter. Moreover, in Europe – phrases contained in Article 6 of Convention are frequently literally implemented in national constitutions.

The clear examples of the violations of Article 6 of Convention occurred in cases such as Matyjak vs. Poland, Bobek vs. Poland, Luboch vs. Poland and also Rasmussen vs. Poland[44]. All mentioned cases regarded the issue of lustration proceeding which is relevant in Polish judicial practise due to the geopolitical situation of our country before the 1990. In all these cases the Court held that there has been a violation of Article 6 by not respecting the right of applicant to have a fair and public trial.

In these cases applicants contested the fact that during the proceeding they could not take notes from the case files, make photocopies of documents and read hand -written documents produced by the Security Service. It has to be noticed that the rights pointed above are granted to every party in the criminal proceeding according to the Polish Code of Criminal Procedure so it means that also applicant as a defendant should be allowed to execute his rights in order to facilitate

[41] see L. Garlicki, P. Hofmański, A. Wróbel, Konwencja o ochronie praw człowieka i podstawowych wolności, Warsaw 2010., p. 302 onwards.
[42] see The guarantees for accused persons under Article 6 of the european convention on human rights, S.Stavros, p. 1 -2
[43] see The European Convention on Human Rights: collected essays, Loukēs G. Loukaidēs, p. 197
[44] See Bobek vs. Poland, para. 49 -75, Luboch vs. Poland, para. 59 -79, Matyjek vs. Poland, para. 53 -65, Rasmussen vs. Poland, para. 41 -56.

the conduct of his defence. Applicants also complained that there were limitations in access to the written grounds of judgements [45].

It needs to be mentioned that in the circumstances of the case Luboch vs. Poland also other issues has been submitted by the applicant. He claimed that during the pre -trial stage instituted by Commissioner (which existed in that Polish law that time) he was not allowed to take any actions in order to adduce evidence[46].

To fully understand the discussed issue, it is necessary to determine the scope of the power of the Commissioner of Public Interest. This will describe the inequality between the state officer afore-named and the lustrated person- applicant. The relevant provisions regulating the issue pointed above were set forth in Lustration Act, which entered into force on 3 August 1997. According to the Section 17(d) of this Act the Commissioner is able to hold a pre- trial proceeding while he gathers evidence in order to apply to the Lustration Court to institute proceedings against the defendant. Following Act does not contain any provisions about the right of lustrated person to participate in this pre- trial stage.

The body of Commissioner of Public Interest was removed from the Polish law in 2007 and replaced by the Lustration Bureau. According to the Institute of the National Resemblance Act and Public Prosecution Act, the provisions of Code of the Criminal Procedure concerning the prosecutor apply strictly to the prosecutors exercising function in Lustrating Bureau. The scope of rights granted to these prosecutors is significant. For example prosecutors of Lustration Bureau can order an expert opinion, call and hear witnesses and demand an access to any documents that regard to lustrated person case[47].

At the end of the 1990s the State had an interest in carrying out lustration in respect of the persons holding the most important public functions. However, if State is to adopt lustration measures, it must ensure that the person affected by this enjoys all procedural guarantees under the Convention in every kind of the proceeding in which such measure can be imposed. The European Court pointed that there might be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. One would agree that in these circumstances revealing some documents could put public interest at risk. Nevertheless, such a situation will only occur exceptionally. It is for the government and Commisioner to prove existence of this issue in particular case because ”what is accepted as an exception must not become a norm”[48].

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[45] see Bobek vs. Poland, para. 51.
[46] see Luboch vs. Poland, para. 50
[47] see Section 52e and 52f para. 1 and 2 of Institute of the National Resemblance Act
[48] see Luboch vs. Poland, para. 67

We share the statement presented by the Court in the case Turek vs. Slovakia that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services[49].

In this point one agrees with the Courts opinion that a system under which the outcome of lustration trials depended to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remained classified as a top secret, creates a situation in which the lustrated person's position was put at a disadvantage[50].

It has to been taken into consideration what is at stake for the applicants in the lustration proceedings– not only their good name but also a right to exercise public functions, to hold public office or to practise as for example an advocate profession [51]. This leads to the conclusion that there is a strong requirement to ensure respecting the principles of the fair trial, equality of arms, access to the case file and right to public trial in order to create the lustration proceeding in the way that prevents putting individual holding the most important public functions at the unnecessary risk. The Article 6 needs to be respected also due to the fact that only proper applying of this provision can preserve public trust and encourage the conviction that lustration proceeding not only is an effective, but also a fair and impartial trial. Given this social importance of the lustration proceedings and severe consequences for an individual, the principles of the rule of law and procedural guarantees for the lustrated person must be scrupulously observed by the society.

Nowadays Lustration proceeding regulated by the Lustration Act, Code of Criminal Procedure and National Institute of Resemblance cannot guarantee respecting of the Article 6 of Convention. According to acts indicated above, defendant in lustration trial is limited in obtaining access to the case file due to the fact that this materials can be consulted only in secret register of the court. No copy can be made of materials contained in the court. Defendant cannot remove any notes made during consulting the files from the secret registry of the Lustration Court. Moreover, defendant cannot remove notes taken during hearings, but has to hand them to a person designated by the court after hearing. Leaving this issue without any amendments will lead to situation in which defendant and his lawyers are effectively prevented from using information from case file and have to rely solely on their own memory while preparing the defence. It has to be added that prosecutor has a full access to the case in the trial stage and in pre- trial stage as well, while lustrated person

[49] see Turek vs. Slovakia, para. 115
[50] see Matyjek vs. Poland, para. 62
[51] see Luboch vs. Poland.

receives this (limited what was described above) right only in a judicial stage[52]. In this issue there is an obvious inequality between defendant and Commissioner. This leads to affirmation that Polish Criminal Procedure which is applied in the lustration proceeding violets the right to have the fair, but also public, trial.

At the pre- trial stage, the prosecutor (Commissioner within the meaning of the 1997 Lustration Act) has a right of access, in the secret registry of his office or of the Institute of National Resembrance, to all materials relating to the lustrated person created by the former security services. Prosecutors from Lustration Bureau of National Institute of Resemblance (which is body that replaced the Commissioner of the Public interest after 2007) can conduct the pre- trial proceeding, which subject is to examine the lustration declaration. If results of this examination require it, he can take actions in order to gather information against defendant that will be used later in Lustration Court. Prosecutors mentioned above and other employees of the Lustration Bureau during the pre-trial stage can hear witnesses, order expert opinion, issue search warrants. The described proceeding can last 6 months before submitting application to the Lustration Court[53]. At the same time the lustrated person in practice does not have a right to participate actively in prosecutor's preparation proceeding. Situation of this person is more detrimental than that of a suspect in the pre- trial investigation in "regular" criminal proceeding, due to the fact that suspect, as a party of this proceeding, has a right to adduce evidence.

The other noticeable violation of the rule of fair trail concerns the issue of written ground of judgement. According to the Section 100 para. 5 of Polish Code of Criminal Procedure it provides that if the case had been heard in camera because of the substantial interests of the State, instead of written reasons of judgement, notice will be served to the effect that the reasons have been prepared. This part of verdict cannot be read out of the Court, but only in secret register of the Lustration Court[54]. In the light of the above it is obvious that opportunity to prepare a strong and convincing argument against the judgement for the appeal or cassation appeal stage is severely curtailed. The right of defendant to question the judgement if he does not agree with it, is one of the principle privileges which are parts of a right to have a fair trial in the meaning of the Article 6 of Convention. The situation in which this ability is practically limited is unacceptable in modern judiciary practice[55].

The last violation of Article 6 concerned holding hearings in camera by the domestic courts. In mentioned cases lustration hearings were held this way[56]. It has not been disputed that public

[52] see Luboch vs. Poland, para. 63.
[53] see article 52f of Institute of National Resemblance Act
[54] see Bobek vs. Poland, para. 13.
[55] see Bobek vs. Poland, para. 67 and 69.
[56] see Rasmussen vs. Poland, para. 11, Matyjek vs. Poland, para. 20, Luboch vs. Poland, para. 16. In the case Bobek vs. Poland the hearing was held in public on request of Commissioner and the applicant.

character protects litigants against administration of justice, it is also one of the means whereby confidence in the courts can be maintained. The examination of the public opinion is necessary, especially in lustration proceeding which is vital for the society. The Public is able to scrutinise the administration of justice[57]. We believe that in mentioned cases the scope of the public access to the lustration judgements was insufficient to ensure the transparency of the proceedings and it has to be improved in future.

To summarise considerations presented above it has to be highlighted that to ensure respecting in practise principles of Article 6 of European Convention on Human Rights new solutions need to be implemented into Polish law. We think that there is a noticeable lack of provisions that ensure wider access to the case file in lustration proceeding.

It is obvious that the inequality between defendant and lustrating prosecutors has to be reduced or even breached. It can be achieved either by vesting lustrated person with additional rights or by implementing a new body of administration of justice.

However, new solutions and invoking them cannot put at risk the public interest. Thus, we believe that creating new body would be more effective and preferable reform.

The new body should be implemented as an opposite to the prosecutors of Lustration Bureau. The task would be to assist the lustrated person in preparing and conducting the defence. Of course it cannot perform function similar to advocate but could be simply an additional assist and an intermediary between lustrated person and the authorities which administer the files and materials classified as a top secret.

To fully present advantages of this solution it will be supportive to apply the example of the Commissioner of the Public Interest, the body which existed in Polish law for ten years. We believe that the new institution should be organized similar to the body of Commissioner. It has to be highlighted that, according to the provision of 1997 Lustration Act, the function of Commissioner could be exercised by the person who meets requirements to become a judge. In point of fact, this function was performed only by judges[58]. According to the section 85 para. 4 of System of Common Courts Act, the judge is the person who has the fully access to every materials, files, documents that contain classified information. By creating the additional assist of the public officer with fully admittance to classified records, the inequality between lustrated person and prosecutor could be limited. "The Commissioner of Private Interest"[59] could cooperate with lustrated person and his lawyer in preparing defence during the pre- trial stage. Simultaneously "Private Commissioner" would be able to decide which files can be used out of the secret register, processed or publicised, in order to ensure the right of defendant to have a fair trial. That would be also an advantageous for

[57] see Bobek vs. Poland, para. 65 and 68

[58] see http://pl.wikipedia.org/wiki/Rzecznik_Interesu_Publicznego.

[59] For the purpose of this paper the presented body will be further reffered to as „Commissioner of Private Interest".

public interest, which could be prevented from revealing the confidential information– none of it could be used without a permission of authorities represented by the "Commissioner". Regarding to this pre– trial stage, it cannot be disputed that implementing this institution into polish law would ensure active participation of defendant in this part of proceeding. It should be considered as a useful idea to evoke provisions, that could allow institute other, separate preparatory proceeding in order to gather evidence which could challenge the version of events put forward by the public prosecutors.

In connection with the above it has to be mentioned, that "private Commissioner", being a judge and a person with unlimited admittance to all "secret" and "top secret" information, would also be able to extend an access of lustrated person to classified files, concerning his case in all lustration proceedings, including trial stage. That would significantly facilitate conducting defence by the lustrated person and his advocate. Private Commissioner would be also empowered to decide which files and documents, and especially notes made by lustrated person can be removed from a secret register of the Lustration Court. By making this decision the Commissioner would be able to divide these files into materials that could be used in a way presented above and those that could not, due to the requirements of a public interest. This solution would ensure that no public information would be put at risk of revealing without a knowledge and permission of authorised public officer.

The following concept would remove the other issue that leads to violating Article 6 of Convention connected with limitation in lustrated person's access to written grounds of judgement. As it was presented above if the case has been heard in camera because of the substantial interests of the State, instead of written reasons of judgement, notice will be served to the effect that the reasons have been prepared. The only possibility for lustrated person to acquaint with this part of a verdict is to read it in secret register of the Lustration Court. This leads to situation in which lustrated person might be not enough informed about the evidence and the data that were base of the domestic courts judgement. Following issue can occur when written grounds are extensive. To dispose of this limitation it would be necessary to empower "the Commissioner of Private Interest" to be delivered with the written reasons of judgement and to select information from it that could be revealed to the lustrated person.

It is undisputed that presented concept would not solve all matters connected with the occurring violations of Article 6 of European Convention on human rights in Lustration proceeding. Although, we think that solution presented above will significantly decrease the inequality between lustrated person and public prosecutor, thus facilitate conducting the defence in lustration trial.

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