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Liability of State Treasury for „judicial errors" – Polish experiences and legal solutions[1]

I. Introduction

No one has yet created an ideal criminal justice system, entirely free from error. For this reason, it is important to examine the consequences of errors committed by state bodies involved in criminal proceedings. Implications of such errors can be analysed in two dimensions. At an individual level, they engender violations of the fundamental rights and freedoms of a person. While at a more general level, they undermine the trust citizens feel towards the justice system as a whole and threaten its authority.

The preceding observations inspire intensification of debates. These focus, on the one hand, on the factors which provoke errors and methods for their elimination and, on the other hand, on appropriate state reactions in cases when an error was identified and adequate liability for pecuniary and non-pecuniary damage. Individual cases, which illustrate the extent of harm caused by judicial errors, frequently give momentum to such debates. When a given case "shows" the face of an individual with their particular back-story, it also draws the public's attention to the matters and becomes an important element in social discussions.

The following paper concentrates on the liability of the State Treasury for unfair application of coercive measures in criminal proceedings[2].

[1] The paper was prepared as a part of the research project *„Polish model of the State's liability for the violations of rights and freedoms in connection with the application of penal and procedural measures"* funded by the National Center for Science under Decision *DEC-2013/09/N/HS5/04268.* For the first time, the detailed results of the research were presented in the book prepared in Polish under the title *„Model odpowiedzialności Skarbu Państwa za naruszenia praw i wolności jednostki w związku ze stosowaniem środków karnoprocesowych i penalnych"* (accepted for publication).

[2] The conclusions presented in the current paper will partly be based on the case file research and analysis conducted between 2014 and 2018. In the course of research, 463 cases made available by regional courts were analysed in detail. The analysis encompassed the proceedings conducted based on motions filed and registered with the Regional Court in Kielce, Gliwice, Gdańsk, Łódź, Warsaw, Wrocław and Katowice. The selection criterion applied was whether a motion was filed and registered with a court with geographic and substantive jurisdiction in the period between 1 January 2008 and 1 July 2016. The research was also conditioned on the final conclusion of proceedings.

II. Regulations on the liability for damages in Poland

In recent years, Poland has seen significant legislative changes in the criminal procedure which also affected State Treasury's liability for damages[3]. The basic principles of this liability are set forth in Chapter 58 of the Code of Criminal Proceedings (further: "CCP")[4] which regulates, among others, the grounds for compensation claims for pecuniary and non-pecuniary damage, the court mandated to consider a compensation motion, the composition of the bench, the costs of proceedings, and the statute of limitations on such claims.

According to the current law:

> ***Article 552.***
>
> *§ 1. The accused who, as a result of a renewal of proceedings or a cassation appeal, has been acquitted or punished with a less severe penalty shall be entitled to compensation from the State Treasury for pecuniary damage incurred, as well as to compensation for non - pecuniary damage suffered, resulting from the enforcement in relation to them, in whole or in part, of a penalty that should not have been imposed on them.*
>
> *§ 2. The provision of § 1 shall be applied also when, after the revocation of conviction, the proceedings have been discontinued as a result of circumstances which were not taken into account in the earlier proceedings.*
>
> *§ 3. The right to compensation for pecuniary and non – pecuniary damage arises also in relation to the application of a protective measure in the conditions defined in § 1 and § 2.*
>
> *§ 4. Compensation for pecuniary and non-pecuniary damage shall also be payable in the case of undoubtedly unjustified pre-trial detention or arrest[5].*

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[3] See, among others, P. Wiliński (ed.), *Kontradyktoryjność w polskim procesie karnym,* Warszawa 2013; M. Rogacka – Rzewnicka, *Unconventional ways of adjudication in criminal cases within the solutions in the Polish trial*, „Ius Novum" 2016, no. 2, p. 142-155, available at: https://iusnovum.lazarski.pl/fileadmin/user_upload/dokumenty/czasopisma/ius-novum/2016/Ius_Novum_2_16_10_M_Rogacka_Rzewnicka.pdf (accessed: 1.05.2019); W. Jasiński, *Polish criminal process after the reform* , Warsaw 2015, available at: http://www.hfhr.pl/wp-content/uploads/2015/07/hfhfr_polish_criminal_process_after_the_reform.pdf (accessed: 1.05.2019).

[4] Law of 6 June 1997 – Code of Criminal Proceedings (Journal of Laws of 1997, No. 89, position 556 with amendments).

[5] *Art. 552 § 1. Oskarżonemu, który w wyniku wznowienia postępowania lub kasacji został uniewinniony lub skazany na łagodniejszą karę, służy od Skarbu Państwa odszkodowanie za poniesioną szkodę oraz zadośćuczynienie za doznaną krzywdę, wynikłe z wykonania względem niego w całości lub w części kary, której nie powinien był ponieść.*

The quoted provisions show that the Polish CCP regulates the application procedure for compensation of pecuniary and non-pecuniary damage only in case of selected errors committed by the bodies involved in criminal proceedings. As part of criminal proceedings, based on Chapter 58 of the CCP, claims can only be made in relation to unjustified conviction, unjustified application of a protective measure (*środek zabezpieczający*), undoubtedly unjustified pre-trial detention and arrest. Thus, Chapter 58 of the CCP does not foresee liability for damages in all situations which lead to deprivation of liberty and are related to criminal proceedings. Beyond the scope of this Chapter, there remain such situations as deprivation of liberty on account of an unjustified decision to execute a previously suspended prison sentence,[6] execution of a disciplinary fine (*kara porządkowa*) of deprivation of liberty in case of a breach of solemnity, peace or order of court activities,[7] or detention of a witness in criminal proceedings in connection with an imposed disciplinary fine.[8] In these cases, compensation can be sought in civil courts based on the provisions of the Civil Code[9]. Similarly, liability for execution of non-custodial preventive measures can only be enforced through civil proceedings.

It is important to nevertheless note that for nine months, between July 2015 and April 2016, the law was in place which foresaw a much wider scope of liability for damages in criminal proceedings[10] than presently. The provisions allowed for, among others, claiming compensation for pecuniary and/or non-pecuniary damages in a criminal court for application of criminal measures (*środki karne*), non-custodial preventive measures as well as security on

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§ 2. Przepis § 1 stosuje się także, jeżeli po uchyleniu skazującego orzeczenia postępowanie umorzono wskutek okoliczności, których nie uwzględniono we wcześniejszym postępowaniu.
§ 3. Prawo do odszkodowania i zadośćuczynienia powstaje również w związku z zastosowaniem środka zabezpieczającego w warunkach określonych w § 1 i 2.
§ 4. Odszkodowanie i zadośćuczynienie przysługuje również w wypadku niewątpliwie niesłusznego tymczasowego aresztowania lub zatrzymania.

[6] Resolution of the Bench of Seven Judges of the Supreme Court of 8 February 1996, I KZP 37/95, OSNKW 1996 r., Vol. 3-4, Position 15.

[7] Resolution of the Supreme Court of 10 January 2019, II KK 128/18, Lex no. 2636209.

[8] Judgement of the Appellate Court in Katowice of 28 May 2009, II AKa 127/09, Lex no. 519650.

[9] See, among other, Article 417 *§ 1. of the CC: „The State Treasury or an entity of local government or some other legal person who by virtue of law exercises public authority shall be liable for the damage inflicted by an illegal act or omission committed while exercising the public authority* (...)" and Article 417^2: „*Where an injury to a person has been inflicted by the exercise of the public authority compliant with the law, the injured party may demand a complete or partial redress of it as well as pecuniary compensation for the wrong suffered, where the circumstances and in particular an inability of the injured party to work or his grave financial situation indicate that the reasons of equity require it"* (Translation: T. Bil, A. Broniek, A. Cincio, M. Kiełbasa, G. Dannemann. S.Fischer, F. Zoll, available at: Lex).

[10] Law of 27 September 2013 on the amendments of the law – Code of Criminal Proceedings and some other acts, Journal of Laws 2013, position 1247.

property (*zabezpieczenie majątkowe*). A wider scope of liability for damages resulted from the work of the Criminal Law Codification Commission affiliated by the Minister of Justice which prepared a comprehensive draft law amending the criminal procedure.[11] In the rationale for amendments, the authors emphasised that very often the application of the above-mentioned measures caused a much more serious distress than the imposed penalty itself, and it is not justified to force people affected by such measures to enter the long path of civil proceedings. In the Commission's opinion, the fact that a damage or harm were caused in specific circumstances of criminal proceedings by state law enforcement bodies and the criminal justice system justifies a conclusion that the recompense should be available through criminal proceedings.[12] The discussed amendments also extended the right to compensation for pecuniary or non-pecuniary damages to situations in which a cassation appeal or renewal of proceedings resulted in a determination that it was undoubtedly unjustified to execute a conditionally suspended penalty or a penalty interrupted as a result of the convict's conditional release, or re-open a conditionally discontinued proceedings and apply a penalty or a criminal measure. In March 2016, the legislators resigned from this solution.[13]

The above-noted amendments and the frequency with which they were introduced underscore the need for appropriate analysis on the extent to which the law currently in force ensures effective compensation for judicial errors.

III. Statistics on State Treasury's liability for damages

1. Compensation awarded by Polish courts

Statistical data confirm the importance of research concerning State Treasury's liability for damages. Each year courts register approximately 700-900 motions initiating proceedings based on Chapter 58 of the CCP.[14] According to the statistics gathered by the Ministry of Justice, in the last 10 years (i.e. in the period between 2009 and 2018), as a result of such

[11] Its main premise was the introduction of an adversarial model of criminal proceedings.
[12] Explanatory memorandum to the Bill amending the Criminal Code, the Code of Criminal Procedure and Certain Other Acts, prepared by the Criminal Law Codification Commission.
[13] Law of 11 March 2016 on the amendments of the law – Code of Criminal Proceedings and some other acts, Journal of Laws 2016, position 437.
[14] According to data received based on a freedom of information request, between 2008 and the first half of 2016, altogether 7,200 motions for compensation for pecuniary and non-pecuniary damages were filed with Polish regional courts based on Chapter 58 of the CCP.

proceedings, Polish regional courts obliged the State Treasury to pay compensation for pecuniary and non-pecuniary damages amounting in total to 154,931,681 PLN.

More than 90% of all payments were related to unjustified pre-trial detention and arrest. They amounted in total to 140,435,638 PLN (32,659,451 EUR).[15] The year 2014 proved to be a record year in this context, as regional courts awarded compensation on these grounds in the overall amount of 20,097,116 PLN (4,673,748 EUR). In the discussed period, the highest number of people received compensation for pecuniary damages in 2011 – 204 people, while for non-pecuniary damage in 2014 – 344 people. In 2018, the number of people who were awarded compensation for pecuniary and non-pecuniary damages in relation to undoubtedly unjustified pre-trial detention decreased in comparison to 2017. Compensation for pecuniary damages was awarded to 89 people and non-pecuniary to 197.

Compensation sums awarded for unjustified conviction constitute less than 10% of the amount presented above. In 2018, compensation for pecuniary damages on this ground was awarded to 10 people, while compensation for non-pecuniary damages to 12. The total value of the former reached 721,150 PLN (167,709 EUR) and the latter – 846,300 PLN (196,814 EUR).

Least frequently, the courts awarded compensation for unjustified application of a protective measure. In the last decade, they awarded compensation for pecuniary damages only to 12 people, and for non-pecuniary damages to 25 persons. The year 2014 was exceptional in this respect, as motions for pecuniary damages were effective in the case of four people and for non-pecuniary damages – 10. In 2018 the regional courts did not awarded compensation on this ground.

Year	**Compensation for pecuniary damages based on Article 552 of the CCP for unjustified**								
	conviction - §1 and 2			**application of a protective measure - §3**			**pre-trial detention or arrest - §4**		
	# ppl	**Total amount awarded (PLN)**	**Average awarded amount (PLN)**	**# ppl**	**Total amount awarded (PLN)**	**Average awarded amount (PLN)**	**# ppl**	**Total amount awarded (PLN)**	**Average awarded amount (PLN)**
2009	18	359 746	19 986	1	40 000	40 000	175	2 360 096	13 486
2010	33	809088	24518	1	2725	2725	167	4305308	25780
2011	19	326824	17201	3	3850	1283	204	4225422	20712

[15] Included the years 2009-2018.

2012	15	160415	10694	-	-	-	171	4516001	26409
2013	8	179963	22495	3	83594	27865	164	5561172	33909
2014	7	112173	16025	4	98962	24741	156	7436178	47667
2015	22	551461	25066	-	-	-	146	5036507	34496
2016	25	721150	28846	-	-	-	103	4311489	41859
2017	10	417574	41757	-	-	-	101	4091860	40513
2018	5	342696	68539	-	-	-	89	5606857	62998

Year	**Compensation for non-pecuniary damages based on Article 552 of the CCP for unjustified**								
	conviction - §1 and 2			**application of a protective measure - §3**			**pre-trial detention or arrest - §4**		
	# ppl	**Total amount awarded (PLN)**	**Average awarded amount (PLN)**	**# ppl**	**Total amount awarded (PLN)**	**Average awarded amount (PLN)**	**# ppl**	**Total amount awarded (PLN)**	**Average awarded amount (PLN)**
2009	6	95516	15919	1	1000	1000	101	2381873	23583
2010	32	1022700	31959	1	20000	20000	229	5129136	22398
2011	19	651697	34300	6	26400	4400	312	9276324	29732
2012	23	638606	27765	-	-	-	286	8998131	31462
2013	32	714061	22314	3	130000	43333	306	12212570	39910
2014	18	697725	38763	10	223500	22350	344	12660938	36805
2015	32	1423900	44497	1	8000	8000	258	9512588	36870
2016	70	2727817	38969	3	25000	8333	215	10769521	50091
2017	27	1033600	38281	-	-	-	243	11789524	48517
2018	12	846300	70525	-	-	-	197	10254143	52051

2. The practice of pre-trial detention in Poland

The importance of analysis concerning State Treasury's liability for damages is also underscored by the statistics on the application custodial preventive measure in recent years. It should first be emphasised that the number of people detained pre-trial has again been rising since 2016. The difference in the number of pre-trial detainees between 31 December 2016 and 31 December 2018 amounted to almost 2,000.

Year	**Motions for application of pre-trial detention in the course of pre-trial proceedings**[16]	**Resolutions on the application of pre-trial detention in the course of pre-trial proceedings**	**% of successful motion for pre-trial detention**
2009	27 693	24 755	89,39 %
2010	25 688	23 060	89,77 %
2011	25 452	22 748	89, 37 %
2012	22 330	19 786	88, 60 %

[16] Data obtained at: https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed: 1.05.2019).

2013	19 410	17 490	90, 11 %
2014	18 835	17 231	91, 48 %
2015	13 665	12 580	92, 06 %
2016	15 172	13 791	90, 90 %
2017	18 750	17 140	91, 41 %
2018	19 665	17 762	90, 32 %

Year	# of pre-trial detainees on 31 December[17]	Total population of prisons and remand centres	% of pre-trial detainees in the overall population of prisons and remand centres
2009	9,460	84,003	11.26
2010	8,389	80,728	10.76
2011	8,159	81,382	10.02
2012	7,009	84,156	8.33
2013	6,589	78,994	8.34
2014	6,238	77,371	8.06
2015	4,162	70,836	5.88
2016	5,396	71,528	7.54
2017	7,239	73,822	9.8
2018	7,360	72,204	10.19

3. The Polish justice system from the perspective of the European Court of Human Rights

The statistical argument should be supplemented with information on applications which were submitted against Poland to the European Court of Human Rights (further: "ECtHR"). By the end of 2018, the ECtHR issued 1,166 judgements in Polish cases, including 978 in which it found at least one violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (further: "Convention" or "ECHR").[18] For the subject of this paper, judgements issued based on Article 5 hold the greatest importance. In Polish cases, ECtHR has delivered 305 such judgements. Of course, this group also contains cases where deprivation of liberty was not imposed within criminal proceedings or is not related to criminal proceedings.

[17] Data obtained at: http://sw.gov.pl/pl/o-sluzbie-wieziennej/statystyka/statystyka-roczna/ (accessed: 1.05.2019).
[18] Convention on the Protection of Human Rights and Fundamental Freedoms (adopted at the session of the Committee of Ministers of the Council of Europe on 4 November 1950).

Without a doubt, the presented statistics constitute sufficient justification for continuing deepened discussions on the effectiveness of the current Polish model of State Treasury's liability for damages.

IV. Assessment of the current model of State Treasury's liability for damages

The national model of State Treasury's liability for damages should be assessed from the perspective of its building blocks which include:

- provisions which form basis for claiming compensation for pecuniary and non-pecuniary damages;
- an organ mandated to rule on whether "a judicial error" has been committed;
- an organ mandated to award compensation for pecuniary and non-pecuniary damages;
- legal and other barriers limiting the right to initiate proceedings;
- formalism of compensation proceedings;
- access to legal aid within compensation proceedings;
- proportionality of sums awarded as compensation for pecuniary and non-pecuniary damages to the damage suffered;
- the manner for determining adequate compensation;
- burden of proof to establish the occurrence of a pecuniary and non-pecuniary damage;
- cost of initiating compensation proceedings at the national level;
- the moment which activates State Treasury's liability for damages;
- statute of limitations on compensation claims;
- length of compensation proceedings.

The assessment of these elements should be undertaken from the perspectives of:

- international regulations;
- constitutional standards;
- as well as practical experiences.

The major focus of the current paper will be on those issues which have, in recent years, been subject to scrutiny by courts and tribunals.

1. Assessment of the current model from the perspective of the European standards

In order to present the current model of State Treasury's liability for damages it is necessary to evaluate the compliance of Polish regulations and jurisprudence with the regulations contained in international documents, in particular the ECHR and the standards developed by the ECtHR.

The following provisions of the ECHR are the most significant for the discussed subject-matter:

- Article 5 (5) of the ECHR, providing that: *„Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation";*

- Article 3 of Protocol 7 to the ECHR, providing that: *„When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him"*[19].

In this context, it should be noted that the number of judgements in which the ECtHR found a violation of these provisions by Poland is not particularly high. Only in few cases, however, has the ECtHR established that Poland had violated Article 5 (5) in connection with criminal proceedings. Until today, the ECtHR has not yet ruled that Poland violated Article 3 of Protocol 7. However, for this discussion, the seriousness of the issues raised by Polish citizens in their applications to the ECtHR is much more important than the quantity of cases.

[19] Similar standards are established by the International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49). According to Article 9 (5): *„Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".* Article 14 (6) provides that: *"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".*

Before I further proceed to discussing particular cases, it is useful to pinpoint the differences between Convention standards and national regulations. Some divergence can already be identified by comparing the content of Article 552 of the CCP with the quoted Convention provisions.

According to ECHR, prior to the application of Article 5 (5), it should be determined that an arrest or pre-trial detention was not in compliance with Article 5 (1)[20] and violated the safeguards provided in paragraphs 2-4 of Article 5, namely: the right to be informed promptly, in a language that one understands, of the reasons for arrest and of charges;[21] the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power, the right to trial within a reasonable time or to release pending trial;[22] the right to initiate proceedings by which the lawfulness of detention shall be decided speedily by a court and release ordered if the detention is not lawful.[23]

The Polish legislator presents a different approach. The CCP conditions liability for damages related to pre-trial detention or arrest with the determination that they were *undoubtedly unjustified.* The term adopted in the 1997 code replaced the earlier formulation of an *obvious unjustifiability*. However, at this point, the opinion that this modification did not have important practical implications should be considered as dominant.[24]

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[20] See, among others, ECtHR, Judgement of 28 March 2000, *Baranowski v. Poland*, application no. 28358/95; ECtHR, Judgement of 18 March 2008, *Ladent v. Poland*, application no. 11036/03; ECtHR, Judgement of 19 September 2000 r., *Włoch v. Poland*, application no. 27785/95; ECtHR, Judgement of 4 April 2000, *Witold Litwa v. Poland*, application no. 26629/95; ECtHR, Judgement of 20 January 2004, *G.K. v. Poland*, application no. 38816/97.

[21] See, among others, ECtHR, Judgement of 18 March 2008, *Ladent v. Poland*, application no. 11036/03.

[22] See, among others, ECtHR, Judgement of 21 March 2017, *Porowski v. Poland*, application no. 34458/03; ECtHR, Judgement of 23 February, *Matczak v. Poland*, application no. 26649/12; ECtHR, Judgement of 3 November 2015, *Chyła v. Poland*, application no. 8384/08; ECtHR, Judgement of 4 November 2014, *Mierzejewski v. Poland*, application no. 9916/13.

[23] The scope of safeguards should be interpreted in accordance with ECtHR case-law. More on the subject: *Guide on Article 5 of the European Convention on Human Rights*, Strasbourg 2019, available at: www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf (accessed: 1.05.2019).

[24] Ł. Chojniak, *Odszkodowanie za niesłuszne skazanie, tymczasowe aresztowanie lub zatrzymanie*, Warsaw 2013, p. 141; L. Paprzycki, *Kodeks postępowania karnego. Komentarz*, J. Grajewski (ed.), pp. 377-378. Cf. S. Waltoś, *Proces karny*, p. 567, P. Kruszyński, *Z problematyki odszkodowania za niewątpliwie niesłuszne tymczasowe aresztowanie*, [in:] *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia*, J. Czapska (ed.), A. Gaberle, A. Światłowski, Warsaw 2000, p. 279. Cf. Resolution of the Supreme Court in case I KZP 27/99: *"the legislator aimed at expressing a different message in this manner (unless it was solely for linguistic reasons or those related to legislative techniques). Additionally, there is another statement which can be related to the new term in the Rationale for the draft code that the aim behind Article 552 § 4 of the CCP is to slightly widen the liability of the State Treasury for unjustified pre-trial detention."* The Court added, however, that *"it may be irrelevant that the authors of the draft CCP of 1997 were convinced that, by using a different word than the CCP of 1969 related to the unfairness of pre-trial detention, they assigned a new meaning to Article 552 § 4 of the CCP. For it does not matter what the legislator wanted to*

Currently, according to the view expressed in the Resolution of the Supreme Court of 15 September 1999 in the case I KZP 27/99, it is an established understanding that *"as undoubtedly unjustified, in the meaning of Article 552 § 4 of the CCP, one may consider such pre-trial detention which was applied in violation of the provisions of Chapter 28 CCP and pre-trial detention of an accused (suspect) causing distress which s/he should not have felt in light of the entirety of the circumstances in a given case and, in particular, its final conclusion."* This stance constituted a point of departure for the judgements examined in the course of the case file review and, despite legislative changes, is still applicable.

According to the above-described and unified interpretation of Polish law, two main categories of cases can be distinguished in which we can talk about an undoubtedly unjustified pre-trial detention. The first category encompasses cases concerning *"pre-trial detention [which] should not have been applied, regardless of the final conclusion in the case, i.e. detention imposed in violation of the provisions of Chapter 28 of the CCP (...)."*[25] Importantly, in the analysed sample of case files, it was not a common practice to base motions for compensation solely on this argument.[26] The second, and most frequent, category of cases are those in which the motion focused on the undoubtedly unjustified pre-trial detention in light of the *result* of conducted proceedings. It is worth emphasising that the jurisprudence in this respect is not unified and has been evolving as a result of subsequent developments in law. The widest understanding of *"undoubtedly unjustified"* means was presented in the resolution of the Supreme Court no. I KZP 27/99.[27] The Court stated therein that *"in principle, every pre-trial detention of an accused (suspect) should be considered as undoubtedly unjustified if eventually (and finally): a person was acquitted; the proceedings in their case were discontinued, including conditionally; the court resigned from imposing a penalty; a person was convicted to imprisonment with conditional suspension of its execution; a non-custodial penalty or criminal measure was imposed; or a person was convicted to imprisonment shorter than the length of pre-trial detention. In the last instance, compensation*

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express in a legal norm, but what they expressed by using terms endowed with a specific meaning in the Polish language."

[25] Judgement of the Appellate Court in Katowice of 23 December 2009, II AKa 329/09, unpublished. The provisions of the Chapter 28 of the CCP outlines the grounds for pre-trial detention and other preventive measures, as well as the procedures for such orders and requests.

[26] In literature and case-law, this category of cases includes pre-trial detention applied in violation of the provisions related to this measure in the circumstances of a particular case, especially Articles 249, 253, 254, 257-259, 263 and 264 (L.Paprzycki, *Kodeks postępowania karnego. Komentarz*, LEX/el. 2015).

[27] See, among others, Judgement of the Regional Court in Gliwice of 10 February 2014, IV Ko 35/13, Lex no. 1870671.

relates only to the length of pre-trial detention which exceeds the length of the imposed punishment. However, the circumstances established in a given case can form basis for a conclusion that in some of the above-listed situations, pre-trial detention was indeed unjustified, but it was not undoubtedly unjustified, which in light of Article 552 § 4 of the CCP (a contrario) constitutes an exonerating circumstance. Such circumstances will be created by a deliberate behaviour of an accused which would justify raising a charge against him or her, from a social standpoint, of bringing upon oneself a disadvantageous ruling on the matter of pre-trial detention."[28]

The ECHR standard is not as far-reaching as Polish regulations and interpretation of the current regulations. In the case *Del Latte v. the Netherlands*, the Court emphasised that the Convention, including Article 5 (5), does not create a right to compensation for damages caused by pre-trial detention which, at the time, was applied in accordance with the law, but turned out to be unjustified in light of the accused's acquittal.[29] As observed during the case file research, this judgement was used by Polish courts (e.g. the Appellate Court in Cracow).[30]

A juxtaposition of Article 552 § 1 of the CCP with Article 3 of Protocol 7 to the ECHR also, inevitably, leads to the conclusion that national solutions concerning liability for unjustified conviction, as codified, meet the Convention requirements.[31] A comparison between Polish law and the ECHR justifies a claim that Article 3 has a narrower substantive scope because the Protocol does not create grounds for claiming compensation in situations of an acquittal as

[28] Resolution of the Supreme Court of 15 September 1999, I KZP 27/99, OSNKW 1999/11-12/72. The same opinion was presented in the judgement of 22 Feburary 2007, II AKa 9/07, KZS 2007, no. 3, position 38.
[29] ECtHR, Judgement of 9 November 2004, *Del Latte v. the Netherlands*, application no. 44760/98. See also ECtHR, Judgement of 25 August 1993 *Sekanina v. Austria*, application no. 13126/87, Decission of 26 January 1999 *Hibbert v. the Netherlands*, application no. 30087/97.
[30] Judgement of the Appellate Court in Cracow of 17 September 2015, II Aka 156/15, Lex no. 1842415. Cf. S. Trechsel, S. J. Summers, *Human Rights in Criminal Proceedings*, Oxford 2006, p. 497.
[31] The ECtHR has analysed one Polish case on the matter – *Bachowski v. Poland*, application no. 32463/06 and pronounced it as inadmissible (Decission of 2 November 2010) because the circumstances of the case, in the Court's view, did not fall within the scope of Article 3 of Protocol No. 7 of the Convention. However, it should be underlined that the case related to rulings delivered based on the Law on considering as invalid the judgements issued against persons persecuted for their activity for the independent existence of the Polish State (*Ustawa o uznaniu za nieważne orzeczeń wydanych wobec osób represjonowanych za działalność na rzecz niepodległego bytu Państwa Polskiego*) and not the Code of Criminal Proceedings. The applicant complained under Article 3 of Protocol No. 7 to the Convention that his right to compensation for a manifestly unjustified conviction had been breached, as the compensation which he had received for pecuniary and non-pecuniary damage caused by his imprisonment had been very low and had been calculated using an unfair method.

a result of a cassation appeal or if a more lenient punishment was imposed in renewed proceedings,[32] as provided for in the Polish CCP[33].

The preceding analyses were limited to the letter of the law. To show the discussed issues in a wider context, it is necessary to review the practical problems which have so far been raised in applications against Poland to the ECtHR.

For the first time, the ECtHR found that Poland violated Article 5 (5) of the ECHR in connection with a claim based on Chapter 58 of the CCP in the judgement *A.S. v. Poland* of 20 June 2006.[34] The judgement did not, however, lead to a deepened discussion on the grounds for liability in the national legal system. It appears that this was due to the lack of more developed argumentation from the ECtHR and the fact that the case concerned an outdated legal framework.

In the discussed judgement, the ECtHR found a violation of Article 5 (3) of the Convention, since pre-trial detention was applied by a prosecutor who was not an *"other officer authorised by law to exercise judicial power."* The ECtHR also concluded that the requirements of Article 5 (1) were not fulfilled in the case either. It expressed an opinion that, since the preventive measure was effected in accordance with domestic law, the applicant had no enforceable right to claim compensation before a Polish court. This argumentation led the ECtHR to conclude that the case was valid and find a violation of Article 5 (5) of the Convention. The ECtHR did not, however, award any just satisfaction.

Another judgement worth analysing was issued in the case *Bruczyńki v. Poland.*[35] According to the established facts, the applicant was arrested on suspicion of several offences of mugging and extortion committed as part of an organised criminal group. The district court mandated to hear the case applied pre-trial detention relying on the reasonable suspicion that the man had committed the offences in question. The applicant's detention was then extended on several occasions.[36] He was only released after having spent about 3.5 years in detention

[32] M. Wąsek-Wiaderek, *Niesłuszne skazanie w świetle Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności*, [in:] *Niesłuszne skazanie – przyczyny i skutki*, Ł. Chojniak (ed.), Warsaw 2017, pp. 17 – 27.
[33] M. Wąsek-Wiaderek, *Niesłuszne skazanie w świetle Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności,* [in:] *Niesłuszne skazania – przyczyny i skutki*, Ł. Chojniak (ed.), Warsaw 2017, p. 21.
[34] ECtHR, Judgement of 20 June 2006 r., *A.S. v. Poland*, application no. 39510/98.
[35] ECtHR, Judgement of 4 November 2008, *Burczyński v. Poland*, application no. 19206/03.
[36] In July 2003, the applicant filed a constitutional complaint. The Constitutional Tribunal in a judgement of 24 July 2006 (SK 58/03) pronounced Article 263 § 4 of the CCP as incompliant with the Constitution insofar as it

on remand. Following criminal proceedings, the applicant was convicted as charged and sentenced to five years' imprisonment.[37] In its judgement, the ECtHR admitted that, in this instance, national courts faced a particularly difficult task of ruling on a case of an organised criminal group. Nevertheless, the Strasburg Court stated that there were no grounds for applying pre-trial detention for the whole analysed period. In its view, a violation of Article 5 (3) was committed due to the excessively long application of a custodial preventive measure. During the proceedings before the ECtHR, the Polish government noted that the charge under Article 5 (5) of the ECHR was unjustified, since pre-trial detention was applied in accordance with domestic law. The ECtHR did not share this opinion. The Court emphasised that an arrest and detention can be in accordance with domestic law, but still violate Article 5 (3).[38] It also underlined that the applicant, at the time of filing their complaint with the Court, could not avail oneself of Article 552 § 4 of the CCP, since reliance on this provision pre-supposes that the criminal proceedings giving rise to remand have been terminated.[39] The Court also noted that the remedy provided in Article 417 (3) of the Civil Code could not have been invoked by the applicant[40], since it did not apply in respect of unlawful actions that occurred before 1 September 2004. As a result, the ECtHR concluded that the applicant did not have any *enforceable* right to compensation in relation to his detention, which was found in violation of Article 5 (3) of the Convention. Therefore, a breach of Article 5 (5) was also found and he ECtHR awarded the amount of 1,500 EUR as just satisfaction and 1,650 EUR as reimbursement of the costs of proceedings.

The case *Jamroży v. Poland* also holds some importance for the conducted discussion.[41] Undoubtedly, if the case had been decided by the Court on the merits, it could have had significant impact on the assessment of the Polish model of state liability, in particular the

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allowed the courts to prolong pre-trial detention for a period exceeding two years in a situation when this was necessary due to other important obstacles which cannot be overcome. The Tribunal pointed out that *"the overturned decisions limited the possibility of exercising the rights and freedoms guaranteed by the Constitution in such an imprecise and arbitrary manner that they violated the basis for constitutional freedoms."*

[37] At the time of filing an application with the ECtHR, the proceedings in the case were still conducted in connection with a cassation appeal filed by the applicant.

[38] ECtHR, Judgement of 29 November 1988, *Brogan and others v. the United Kingdom*, applications no. 11209/84, 11234/84, 11266/84, 11386/85.

[39] The application was filed in June 2003. The judgement in the first instance was issued on 13 August 2004 and in the second on 16 November 2005.

[40] According to the then law: *„If the damage has been inflicted by the failure to issue a ruling or a decision where the law provides for a duty to issue them, its redress may be demanded after it has been acknowledged in an appropriate proceeding that the failure to issue the ruling or the decision contradicted the law, unless separate provisions provide otherwise"* (Translation: T. Bil, A. Broniek, A. Cincio, M. Kiełbasa, G. Dannemann. S.Fischer, F. Zoll, available at: Lex).

[41] ECtHR, Decision of 9 December 2008 , *Piotr Jamroży v. Poland*, application no. 14470/04.

adequacy of awarded compensation. However, the Court did not deliver a substantive ruling, since the case was settled. The application concerned disproportionate compensation awarded by the domestic court. The applicant also alleged a violation of Article 13 resulting from the lack of legal aid for preparation of a cassation appeal. According to the statement of the facts, in domestic proceedings the applicant claimed 10,000 PLN in compensation for five months of an undoubtedly unjustified pre-trial detention. The claimed amount was estimated based on average remuneration. The regional court awarded 4,000 PLN to the applicant and dismissed the remainder of the case. In the rationale, the court pointed out that the applicant cannot claim compensation in respect of pecuniary damage, since he had not worked prior to detention. Consequently, only the claim for compensation in respect of non-pecuniary damage could be seen as justified. The court also established that the applicant was deprived of liberty under "normal conditions." The applicant's criminal record further influenced the decision. Such reasoning convinced the court that detention did not deprive the applicant of his reputation (*dobre imię*). The appellate court upheld the judgement. The President of the Division negatively assessed the applicant's motion for legal aid for the purpose of appeal proceedings. In his assessment, the compensation awarded was sufficient to cover the costs of hiring a lawyer. Eventually, the applicant accepted the government's offer to pay 10,000 PLN to settle the case and the ECtHR accepted such a conclusion.

The most important Polish case related to the matter at hand is, however, *Włoch v. Poland (no. 2)*.[42] The judgement in this case has had the greatest impact on domestic jurisprudence and regulations. The ECtHR had to evaluate whether a common practice of refusing financial compensation on account of crediting the period of pre-trial detention towards the imposed fine or other penalty on the basis of Article 63 of the Criminal Code[43] was in accordance with the Convention.[44] In the judgement, the Court confirmed that Article 5 (5) of the ECHR does not prohibit conditioning the award of compensation on the ability of the interested person to indicate the damage incurred as a result of the Convention's violation. It was decisive for the ECtHR that in the applicant's case domestic courts had never actually examined whether any loss of a pecuniary or non-pecuniary character had occurred. They did not determine either

[42] ECtHR, Judgement of 10 May 2011, *Włoch v. Poland* (no. 2), application no. 33475/08.

[43] According to the then law: *Art. 63. § 1. The period of actual deprivation of liberty in criminal proceedings, rounded to a full day, is credited towards the imposed penalty, with one day of the actual deprivation of liberty being equal to one day of the penalty of deprivation of liberty, two days of the penalty of limitation of liberty or two daily rates of fine.*

[44] The same issue was presented to the Court in the case *Górzyński v. Poland* (application no. 20142/08). However, the application was removed from the list for formal reasons.

whether crediting the period of the applicant's pre-trial detention towards the imposed fine had offered a fair compensation for the damage incurred. In the Court's assessment, crediting the total period of the applicant's pre-trial detention automatically towards another penalty imposed in respect of an unrelated offence could not have been considered in compliance with the enforceable right to compensation contained in Article 5 § 5 of the Convention.

The ECtHR's jurisprudence and guidelines led to the change of Polish law under amendments introduced in 2013.[45] The changes were partly retained after the reform of 2016. According to the current wording of Article 553a of the CCP, *"[w]hile determining the amount of damages, the court shall take into account the crediting of any period of the unjust enforcement of penalties, preventive measures, pre-trial detention, or arrest which the motion for damages concerns against penalties or preventive measures imposed on the accused in other proceedings."* Despite certain doubts expressed by some scholars, it should be concluded that the current regulation allows for an interpretation in accordance with the Convention spirit and the Strasburg case-law. This is confirmed by the judgement of the Supreme Court which stated that, *"as a rule, application of pre-trial detention causes more distress than execution of a prison sentence due to the extent of constraints imposed on the accused. For this reason, when pre-trial detention proves unjustified, which relates in particular to a situation of the perpetrator's acquittal, crediting the period of pre-trial detention towards the penalty of imprisonment imposed in another case (i.e. related to another offence) can (but does not have to) fully satisfy a compensation claim for pecuniary damages, but cannot limit claims*

[45] According to the then law:
Article 552 *§ 1 (...) In case the accused is convicted again, damages and compensation are due for unjustified enforcement of coercive measures to the extent that they have not been credited towards the penalties or measures imposed.*
Article. 552 a. § 1. In the event of acquittal or dismissal of the case against the accused in cases other than those referred to in Article 552 § 1-3, the accused is entitled to claim from State Treasury damages for the loss incurred and compensation for the harm suffered, resulting from the enforcement in the proceedings of coercive measures referred to in Section VI.
§ 2. In case when an accused is convicted, he is entitled to a claim for damages or compensation referred to in § 1 for unjustified execution of preventive measures or security on property to the extent in which, due to the kind and severity of imposed penalties or criminal measures, it was not possible to credit them towards the periods of execution of corresponding preventive measures subject to such crediting or fully use the applied security on property.
Article 553 § 4. One is not entitled to claim damages if, before the claim is made, the period of execution of penalties, criminal measures, protective measures and coercive measures which are subject to the motion was credited towards the penalties, criminal measures and protective measures in other proceedings, which does not preclude making a claim for compensations due to their execution.
Article 553a. While determining the amount of compensation, the court takes into account whether the period of unjustified application of penalties, criminal measures, security measures or coercive measures which the motion relates to was credited towards the penalties, criminal measures and protective measures imposed in other proceedings.

concerning compensation for non-pecuniary damage (harm).”[46] However, the concern still persists that, based on the current wording of the law, Polish courts could automatically conclude that such crediting, in fact, compensates the damage in full. If this practice was developed, it would still be possible to effectively raise a charge in proceedings before the Strasburg Court. Moreover, potential difficulties in applying Article 553a of the CCP have been noted in relevant literature. These included, among others, the lack of guidelines on the criteria to be applied by courts while determining the compensation amount when taking into account the crediting.[47] Given these considerations, it should be noted that the influence of the judgement *Włoch v. Poland (no. 2)* and the indicated legislative changes on the courts' jurisprudence merits further and deepened monitoring, both by the legislator, as well as the practitioners and theoreticians of the law.

The described cases prove that, while the provisions of the CCP concerning State Treasury's liability for damages are in compliance with the Convention,[48] in practice many interpretational ambiguities persist, leaving space for potential applications to the ECtHR and, even, judgements finding violations by Poland of the Convention rights. Particular attention should be drawn to the interpretation of the term *“undoubtedly unjustified”* through the prism of Convention grounds, to amounts awarded in compensation proceedings and the manner for determining adequate compensation.

The conclusions drawn from presented cases justify a recommendation that Polish judges make more frequent use of the directives formulated by the ECtHR[49]. Such a recommendation

[46] Resolution of the Supreme Court of 19 July 2017, V KK 104/17, Lex no. 2334907. In a resolution of 4 May 2016, the Supreme Court Stated that *“[o]ne has to agree that, especially when crediting pre-trial detention towards a fine or limitation of liberty, the matter of fully compensating the damage and harm which could have resulted from undoubtedly unjustified application of pre-trial detention, as well as the matter of proportionality of pre-trial detention to the penalty towards which it was credited acquires particular importance. It does not mean, however, that Article 5 (5) of the Convention was violated and that the court cannot dismiss the motion for compensation in a situation when pre-trial detention was credited towards a fine or limitation of liberty imposed in the case in which it had been applied and the penalty imposed in another case, if the court established that a person claiming compensation did not suffer any damage and the crediting itself constitutes an adequate and proportionate compensation.” (*Resolution of the Supreme Court of 4 V 2016, V KK 375/15, Lex no. 2046082).

[47] D. Świecki, *Kodeks postępowania karnego. Komentarz. Vol. II*, Second edition.

[48] This is also emphasised by the Supreme Court. In a resolution of 4 May 2016, the Supreme Court noted that *„(...) provisions of Chapter 58 of the CCP concerning compensation for unjustified conviction, pre-trial detention or arrest, including also Article 552 CCP are in compliance with the norms of the Convention, including Article 5 (5). Thus, the Appellate Court rightly concluded that there were no grounds to grant the defendant's claim to derive the right to compensation in his case directly from the regulation of Article 5 (5) of the Convention”*(Judgement of the Supreme Court of 4 May 2016, V KK 375/15, Lex no. 2046082).

[49] The Appellate Court in Poznań in one of its rulings emphasised that *„it is groundless for the applicant to refer to Convention provisions (here Article 5 (5)), as the content of Article 5 of the Convention is reflected in domestic provisions and more precisely Article 552 of the CCP concerning damages and compensation for*

is also justified in the light of observations made during the case file research, namely that in compensation proceedings based on Chapter 58 of the CCP, it is not common for the courts to refer to the standards and case-law of international bodies, including the ECtHR. A solution that may contribute to the dissemination of Strasbourg jurisprudence in common courts is the appointment of a coordinator for international cooperation and human rights in criminal cases. This institution was introduced into the Polish legal order on 12 August 2017, pursuant to the Law of 12 July 2017 amending the Law on the System of Common Courts and certain other acts. Due to the recent character of this regulation, it is not possible to assess its practical meaning. However, it should be pointed out that earlier in the scientific discussions an idea of creating such an institution had surfaced and it has been seen as an opportunity to disseminate Strasbourg standards.

2. Constitutional basis for State Treasury's liability for damages

The notion of State Treasury's liability for damages is also strongly rooted in the Constitution of the Republic of Poland and is inextricably related to the rights and freedoms which enjoy constitutional protection[50].

The following provisions are the most important for the current paper:

- Article 41 (5) of the Constitution which provides that *„[a]nyone who has been unlawfully deprived of liberty shall have a right to compensation"* (*„Każdy bezprawnie pozbawiony wolności ma prawo do odszkodowania")*

and

- Article 77 (1) of the Constitution which indicates that *„[s]tatutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights"* (*„Każdy ma prawo do wynagrodzenia szkody, jaka została mu wyrządzona przez niezgodne z prawem działanie organu władzy publicznej")*[51]

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unjustified conviction (serving a prison sentence which should not have been imposed), undoubtedly unjustified pre-trial detention or arrest and provisions concerning the application towards the accused of pre-trial detention, enshrined in Article 28 of the CCP (Article 249 and subsequent)" – Judgement of the Appellate Court in Poznań of 28 November 2013, II AKa 213/13, Lex no. 1416256.

[50] P. Wiliński, *Odszkodowanie za stosowanie środków reakcji karnej lub przymusu procesowego – w świetle konstytucyjnej gwarancji prawa do odszkodowania*, „Wrocławskie Studia Sądowe" 2012, no. 1, pp. 10–15

[51] These regulations should be seen as supplementing the safeguards concerning deprivation of liberty foreseen in Article 41 (1)-(4) and the activities of public authorities based on the law. Due to the scope of this article, they will not be analysed in detail.

According to the jurisprudence of the Constitutional Tribunal, *"existence of the constitutional guarantees concerning the liability of public authorities for damages means (...) that statutory provisions cannot arbitrarily shape the scope of this liability. The sheer existence of a constitutional norm presupposes (...) that this should be real and enforceable liability, and not just its veneer."*[52] Besides, the Constitution ensures that lower-level acts contain procedures allowing for an assessment of public authorities' actions and issuance of an appropriate decision confirming that such an event occurred.[53]

In reference to the comparison between domestic regulations and provisions of the ECHR presented above, it is worth noting that the Polish Constitution (similarly to the Convention) connects liability for damages with the notions of "*unlawfulness*" and "*infringement of freedoms and rights*." The Constitution does not refer to acts which are "*undoubtedly unjustified"*. This means that the legislators extended the scope of liability for damages in comparison to the constitutional standard.[54]

Due to the scope of this article, it is impossible to describe here all the constitutional issues raised by scholars and practitioners in relation to the current model. For the purpose of this paper, the attention will be given to the subject which was considered by the Constitutional Tribunal and which provoked legislators' reaction, namely the statute of limitations on claims regulated in Chapter 58 of the CCP.

According to the current wording of Article 555 of the CCP:

> *„The claims provided for in this chapter shall be time-barred* ***in a year*** *from the date on which the ruling providing the basis for damages and compensation became final, in the case of pre-trial detention – from the date on which the ruling concluding the proceedings in the case became final, and in the case of arrest - from the date of release."*[55]

[52] Judgement of the Constitutional Tribunal of 1 September 2006, SK 14/05, OTK-A 2006/8/97.
[53] Judgement of the Constitutional Tribunal of 1 April 2008, SK 77/06, OTK-A 2008/3/39.
[54] There are no constitutional barriers for relating public authorities' liability for damages in common laws to such a wide category.
[55] *„Roszczenia przewidziane w niniejszym rozdziale przedawniają się po upływie roku od daty uprawomocnienia się orzeczenia dającego podstawę do odszkodowania i zadośćuczynienia, w wypadku tymczasowego aresztowania - od daty uprawomocnienia się orzeczenia kończącego postępowanie w sprawie, w razie zaś zatrzymania - od daty zwolnienia".*

It should first be emphasised that Article 555 of the CCP includes a civil law statute of limitations. This means that the State Treasury can, but does not have to, raise such a charge in case of claims filed by applicants after the statute's expiry. Moreover, dismissal of a motion by the court is not possible when raising such a charge would contravene the rules of social coexistence (*zasady współżycia społecznego*).

Article 555 of the CCP, in the same wording as the present one, was reviewed by the Tribunal in proceedings no. SK 18/10.[56] In the constitutional complaint, the applicant motioned for a review of the constitutionality of Article 555 of the CCP insofar as this provision introduced an excessively short, year-long statute of limitations for claims related to compensation for pecuniary and non-pecuniary damages from the State Treasury in cases of an undoubtedly unjustified pre-trial detention of a Polish citizen, which in a longer perspective barred access to compensation in a rule of law state. As a result of the proceedings, the Constitutional Tribunal concluded that Article 555 of the CCP complied with Article 41 (5) of the Constitution.[57] The Tribunal's decision did not, however, prevent representatives of the academia and legal professions from calling for a modification of this provision. Such calls have mostly been justified by the specific character of state interventions which give rise to compensation claims, involving criminal proceedings and application of measures which interfere with the very basic rights and freedoms of an individual. To some extent, the voices of scholars and commentators proved effective, as the amendments passed in 2013 introduced a three-year-long statute of limitations[58]. However, following further amendments in March 2016, the previous (year-long) statute of limitations was reinstated. The justification for this legislative decision did not provide much detail.

The conducted case file research shows that the statute of limitations can be seen as a significant barrier in claiming compensation[59]. In 10.15 per cent of cases, i.e. 47, prosecutors

[56] Judgement of the Constitutional Tribunal of 11 October 2012, SK 18/10, OTK-A 2012/9/105.
[57] P. Sobolewskiego emphasised in his comment to the judgement of the Constitutional Tribunal of 1 September 2006 r., SK 14/05 that the norm decoded from Article 77 (1) does not contain guidelines on the statute of limitations either (P. Sobolewski, *Commentary on the judgement of the Constitutional Tribunal of 1 September 2006, SK 14/05*, „Państwo i Prawo" 2007, no. 3, p. 134-138).
[58] W. Jasiński, *Odszkodowanie i zadośćuczynienie za niesłuszne skazanie, wykonanie środka zabezpieczającego oraz niezasadne stosowanie środków przymusu po nowelizacji kodeksu postępowania karnego,* „Prokuratura i Prawo" 2015, no. 9, p. 49 – 80.
[59] In detail, the research was described in article: K.Wiśniewska, *Przedawnienie roszczeń o odszkodowanie i zadośćuczynienie za niesłuszne skazanie, zastosowanie środka zabezpieczającego, niesłuszne tymczasowe aresztowanie lub zatrzymanie (pomiędzy teorią a praktyką), „Czasopismo Prawa Karnego i Nauk Penalnych",* 2018, no. 4.

raised the expiry of the statute of limitations as a charge. The majority of those cases, as many as 93.6 per cent, were claims based on Article 552 § 4 of the CCP. Only two proceedings on unjustified conviction were considered as time-barred and one claim was related to unjustified application of a financial guarantee and security on property. In seven cases (approx. 14.89 per cent), the courts referred to Article 5 of the Civil Code (i.e. the rules of social coexistence) and did not dismiss the motion despite the charge.[60] A similar statistical balance was observed in the report of the Institute of Justice (*Instytut Wymiaru Sprawiedliwości)*. In a sample of 110 analysed cases, its authors noted 13 in which the prosecutor made use of Article 555 of the CCP.[61]

3. Practical problems with determining adequate compensation amount for non-pecuniary damages

Apart from the above-noted issues of a constitutional and conventional nature, it is also worth noting practical problems which applicants can encounter in the course of proceedings based on Chapter 58 of the CCP.

The greatest diversity in the case-law of Polish courts can be seen in the manner of determining an adequate compensation for non-pecuniary damages. The research shows that there is no unified practice country-wide concerning awarding compensation for unjustified application of criminal procedural and penal measures. In the analysed cases, it was possible to observe both diverse approaches towards the factors to be taken into account while determining the compensation amount, as well as towards the weight ascribed to specific factors.

The conducted case file research shows that, in determining the amount of compensation for non-pecuniary damages, the courts consider the following elements:
- the period when a measure was applied or a penalty executed;
- the family situation of the applicant before, during and after deprivation of liberty;

[60] In one case, the appeal was filed effectively against a judgement of the Regional Court dismissing the motion as time-barred.
[61] K. Dudka, B. Dobosiewicz, *Odszkodowanie za niesłuszne tymczasowe aresztowanie lub zatrzymanie w praktyce orzeczniczej sądów powszechnych*, available at: http://www.iws.org.pl/pliki/files/badania/raporty/raporty/Dobosiewicz%20Dudka%20Odszk%20za%20nies%C5%82%20skazanie%202012.pdf (accessed at: 1.05.2019).

- state of health before, during and after the period in which the measure was applied/penalty executed,
- effects on the psychological sphere,
- living conditions in the place of detention (diverging from typical standards present in penitentiary units),
- the manner of apprehension,
- the way of living before and after the period of isolation or proceedings (including employment status, performed profession, performed function, criminal record or lack thereof, contact with law enforcement bodies),
- treatment by other prisoners, police officers and the Prison Guard,
- loss of reputation and a high media profile of the case.

The courts also relied on the jurisprudence and academic discourse on civil law. In introductory remarks to their argumentation, emphasis was placed on the fact that, due to the individual character of compensation for non-pecuniary damages, final determination of a specific amount adequate to the harm suffered lies within the judge's discretion, but the decision cannot be arbitrary.[62] The Supreme Court in its judgements has consistently indicated that decisions concerning compensation for undoubtedly unjustified pre-trial detention are not binding upon other courts, since each such case is specific and unique. The Supreme Court also emphasised that each person reacts differently to harm, as he or she is a complex personality and lives in different conditions.[63] This stance has been repeatedly quoted by the representatives of the doctrine.[64]

Despite such statements and declarations of full individualisation of compensation sums, in practice courts have referred to the developed standards and practices shaped by the jurisprudence. The Regional Court in Katowice noted that *"the only rational criterion in estimating the compensation sum is, on the one hand, the feeling of this being just and, on the other, comparison of a given case with harm done in similar cases."*[65] The same stance was

[62] Judgement of the Appellate Court in Katowice of 12 June 2014, II AKa 133/14, Lex no. 1488617. Similarly: Judgement of the Supreme Court of 18 August 2000, II KKN 3/98, Lex no. 50900.
[63] Judgement of the Supreme Court of 7 May 2015, WA 3/15, Lex no. 1729289. Similarly: Judgement of the Supreme Court of 29 May 2008, II CSK 78/08, Lex no 420389; Judgement of the Supreme Court of 22 June 2005, III CK 392/04, Lex no. 177203; Judgement of the Appellate Court in Szczecin of 23 April 2013, II AKa 68/13, Lex no. 322064.
[64] At the same time in many studies the sum awarded per day or month of deprivation of liberty is still analysed, which creates a certain contradiction in argumentation.
[65] Judgement of the Regional Court in Katowice of 15 January 2014, XXI 185/12, unpublished.

presented by the Regional Court in Gdańsk which admitted that, while only additionally, it analysed the amounts awarded as compensation for non-pecuniary damages in other cases of a similar type. It noted that *"the idea resulting from the compensation provisions contained in Chapter 58 of the CCP is to adjudicate fair and reasonable amounts (...), and also similar amounts in similar cases, so that there is no violation of equality before the law.*"[66] In the opinion of the Regional Court in Gdańsk, significant disproportions in the compensation granted would create a sense of injustice, which would in turn trigger escalation of claims. Additionally, the Gdańsk court referred to the need for unification underscored in the doctrine. This need was justified by arguments of a constitutional nature. It was emphasised that, in one of its judgements, the Constitutional Tribunal ruled that *"in the case of moral harm of an identical or similar nature arising from a culpable action and in similar circumstances which accompanied the cause of harm, the courts are obliged to behave similarly when it comes to the assessment of the need for and adequacy of pecuniary compensation."*[67] The Regional Court in Kielce stated, in turn, that the amounts awarded in other cases can only be an unbinding guideline.[68]

Apart from the practices developed in various divisions, courts or appellate circuits, while determining compensation amounts the courts have taken into account other values which could serve them as a point of reference in ruling on compensation. The Regional Court in Gliwice directly noted in many of its rulings that it had taken into account living conditions and the average standard of living in the society.[69] This approach was motivated by the intention to ensure predictability and unification of practice, which in the court's opinion guarantees comparable treatment of persons in similar situations.[70] The Regional Court in Gdańsk repeated after the Supreme Court that *"the standard of living of the victim does not have an influence on the amount of pecuniary compensation for the harm suffered (Article 445 § 1 of the Civil Code)."*[71] The Regional Court in Łódź presented a different position in this respect, as in several cases it treated the applicant's income as the main criterion for

[66] Judgement of the Regional Court in Gdańsk of 24 June 2016, XI Ko 41/16, unpublished.
[67] Judgement of the Regional Court in Gdańsk of 24 June 2016, XI Ko 41/16, unpublished.
[68] Judgement of the Regional Court in Kielce of 3 November 2015, III Ko 246/15, unpublished.
[69] W. Jasiński rightly emphasises that a reference to the standard of living cannot constitute an argument limiting the amount of compensation in a situation when the level of harm is higher than average. (W. Jasiński, [in:] *Kodeks postępowania karnego. Komentarz.*, J. Skorupka (ed.), Warsaw 2016)
[70] Judgement of the Regional Court in Gliwice of 12 October 2011, IV Ko 14/11, unpublished.; Judgement of the Regional Court in Gliwice of 23 November 2015, IV Ko 22/14, Lex no. 2108014.
[71] Judgement of the Supreme Court of 17 September 2010, I CSK 94/10, M.Prawn. 2011/17/943-946; Similarly Ł. Chojniak, *Odszkodowanie za niesłuszne skazanie, tymczasowe aresztowania, zatrzymanie*, Warsaw 2013, p. 166.

determining the value of adequate compensation. However, the Appellate Court in Łódź did not share this opinion, emphasising that such a practice contravenes the character of compensation for non – pecuniary damage as an institution. In the examined cases, only in few did the reasoning make a direct reference to the use of the "tariff method" to determine the amount of compensation for harm (non-pecuniary damage).[72] In one of the justifications, however, the Regional Court in Kielce presented a mathematic formula for determining the amount of compensation, indicating that *"it should be considered that the amount of 1,800 PLN (9 days x 200 PLN = 1,800 PLN) will compensate for the size of (...) physical and mental suffering."*[73]

The courts justify their use of this "tariff schema" of sorts by the need to ensure the constitutional principle of equality. It appears, however, that in the current shape this objective is not fulfilled, and the method serves solely to simplify the adjudicating process. The analysis of decisions made in various parts of the country may lead to the conclusion that it even amounts to the denial of the above-mentioned standards. In the years 2008-2009, the Regional Court in Gliwice assumed that the amount above 1,000-2,000 PLN (232– 465 EUR) for one month of undoubtedly unjustified detention is an adequate compensation;[74] between 2013 and 2014, the equivalent of 1,000-2,500 PLN (232 – 581 EUR) was considered as such,[75] and in 2016 – 4,000 PLN (930 EUR). In the audited period, the Regional Court in Wroclaw treated the value of 4,000 PLN (930 EUR) as a starting point. It is worth emphasizing that at the same time, for example, the Regional Court in Kielce considered 5,000 PLN (1163 EUR) as an appropriate amount. In the case of compensation for an arrest, the amounts granted were visibly more uniform. They ranged between 300 (70 EUR) and 5,000 PLN (1163 EUR) per day of the measure's application. Most often, courts decided to award amounts beginning with 1,000-2,000 PLN (233 – 465 EUR).

In conclusion, the schematic calculation of compensation amounts by multiplying a chosen standard value by a time unit should unequivocally be assessed negatively. It is hard to resist the feeling that this leads to the simplification of the decision-making process and a violation

[72] In research conducted by the Institute of Justice such judgements were identified in regional courts in Cracow, Lublin and Świdnica.
[73] Judgement of the Regional Court in Kielce of 6 February 2015, III Ko 70/14, unpublished.
[74] Judgement of the Regional Court in Gliwice of 14 December 2009, IV Ko 6/08, unpublished.
[75] Judgement of the Regional Court in Gliwice of 20 October 2014, IV Ko 18/14, Lex no 1870670.

of the principle of individuation. In many cases it may negate the constitutional principle of full compensation for non-pecuniary damages.[76]

V. Conclusions

Summing up, the Polish legislator decided to introduce a special procedure for enforcing State Treasury's liability for damages for some errors committed by the criminal justice bodies. The adopted model is consistent with the solutions operating in some European countries and derives from the Polish legislative tradition. Moreover, as it was shown above, the applicable legislative framework mostly builds upon the standards enshrined in the Constitution of the Republic of Poland and international law. However, in practice it is still possible to come across situations which give rise to justified doubts whether errors of the criminal justice bodies receive an adequate response from state authorities and whether this response sufficiently restores confidence in the justice system.

The comments and findings presented above lead to the conclusion that it is still justified to continue debates on the changes to the current model of State Treasury's liability for damages. The formulated propositions should be addressed, on the one hand, to the Polish legislator, and on the other hand, to courts adjudicating on this matters. In the first place, the changes should include the basis for pursuing liability claims, the statute of limitations on claims, as well as the manner of determining adequate compensation. However, it is also reasonable to initiate a thorough debate about further-reaching changes which should aim at limiting the formalism of compensation proceedings and guaranteeing, in practice, the principle of full compensation of damages resulting from the widely understood *"judicial errors."*

[76] In the judgement of 10 May 2018, the Supreme Court confirmed that *"such "calculations" are by default incorrect. The applicant was deprived of liberty for 2 years, 6 months and 20 days. This does not mean that each month he e.g. suffered the same from his dental illnesses, felt the consequences of imprisonment the same way (a matter of adjusting or not to the conditions) or the consequences of being deprived of contacts with relatives, or an inability to perform work in accord with his qualifications and interests"* (Judgement of the Supreme Court of 10 May 2018, II KK 451/17, Lex no. 2563495). Similarly: Judgement of the Supreme Court of 3 July 2007, II KK 321/06, LZS 2007, no. 12, position 28.