

## Implementation of the Istanbul Convention into the National Criminal Legislation in Poland

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**Abstract:** The Council of Europe Convention on preventing and combatting violence against women and domestic violence (further: Istanbul Convention) became part of the Polish legal system on August 1, 2015. The ratification process of the Istanbul Convention was marked with difficulties from its very opening for signature. The provisions of the Convention have caused – and continue to arouse – a range of extreme emotions and doubts. The fierce dispute that has emerged over the implementation of the Convention in Poland at some point even led to action being taken for termination. As things have been to date, Poland has not terminated of the Istanbul Convention. Five years following ratification of the Convention, in March 2020, Poland submitted a report on the implementation of measures giving effect to its provisions into the Polish legal system, as required under the monitoring mechanism. Poland's report was considered by GREVIO, with an assessment made of Polish legislation in this regard and an evaluation report issued in June 2021. Notwithstanding the comments that Poland made to the GREVIO report, the key conclusions of the assessment should be highlighted as regards compliance of Polish criminal legislation with the standard of protection of women against violence, including domestic violence, under the Convention. Since the Convention was opened for signature, and in particular since its ratification, the Polish legislator has introduced a range of amendments to the Criminal Code aimed at raising the standard of protection for victims of domestic violence

and of effective prosecution of offenders. This text highlights the most important of these changes and presents the current state of implementation of the Istanbul Convention into Polish criminal law.

## 1. Introduction

The Council of Europe Convention on preventing and combating violence against women and domestic violence was opened for signature on May 11, 2011 in Istanbul (the “Convention”) as one of the latest human rights treaties in international law. It mandates action to be taken by state parties to combat all forms of violence against women and domestic violence. It is the first-ever piece of international law to have made it clear that violence against women and domestic violence cannot be considered a private affair.<sup>1</sup> Its origins can be traced back to 2002, the year of adoption of the Recommendation of the Committee of Ministers to Member States on the protection of women against violence,<sup>2</sup> being the early seed of the future Convention then plausibly ideated at the Council of Europe Summit held in Warsaw in 2005. However, official work began only in December 2008, with the creation of an ad hoc expert committee tasked with drafting the text of the Convention.<sup>3</sup> A significant breakthrough that accelerated the drafting work came with the 2009 judgment of the European Court of Human Rights in the case of *Opuz v. Turkey*,<sup>4</sup> which clearly pointed to state authorities’ responsibility for the general and discriminatory judicial passivity conducive

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<sup>1</sup> See: Ewa Kowalewska-Borys and Emilia Truskolaska, “Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej z 2011 r. – zagadnienia wybrane,” *Białostockie Studia Prawnicze*, no. 15 (2014): 96.

<sup>2</sup> Recommendation Rec (2002)5 of the Committee of Ministers to the Member States on the protection of women against violence of 30 April 2002, accessed April 30, 2023, <https://www.coe.int>.

<sup>3</sup> See Ad Hoc Committee for preventing and combating violence against women and domestic violence (CAHVIO), accessed April 30, 2023, <https://www.coe.int/en/web/istanbul-convention/cahvio>.

<sup>4</sup> ECHR Judgment of 9 June 2009, Case *Opuz v. Turkey*, application no. 33401/02, [hudoc.echr.coe.int](http://hudoc.echr.coe.int).

to domestic violence.<sup>5</sup> The judgement has since become a cornerstone of the fight against domestic violence and a key milestone on the way to ensuring the actual observance and respect for the rights of women victims of domestic violence.

The ratification process of the Istanbul Convention was marked with difficulties from its very opening for signature. The condition for entry into force of the Convention was acceptance by at least ten signatories (Article 75(3)), which was accomplished with the ratification by Andorra in April 2014.<sup>6</sup> As a result, the Convention entered into force on August 1, 2014, more than three years after its presentation. That more than half of the signatories submitted reservations or other declarations to the Convention also shows the ratification difficulties.<sup>7</sup> Currently, 38 states and the European Union are parties to the Convention, plus seven states that have signed but not yet ratified the Convention.<sup>8</sup>

## 2. Ratification of the Istanbul Convention in Poland

Poland signed the Convention on December 18, 2012 and also made use of the option provided for in Article 78(2) and (3) to submit four reservations and two declarations.<sup>9</sup> Its ratification process, however, only concluded

<sup>5</sup> For more, see: Bonita Meyersfeld, “Opuz v Turkey: Confirming the State Obligation to Combat Domestic Violence,” *European Human Rights Law Review*, no. 5 (2009): 684–93; Elżbieta and Hanna Morawska, “Odpowiedzialność państwa za bierność wobec przemocy domowej i dyskryminację jej ofiar – glosa do wyroku ETPCz z 9.06.2009 r. w sprawie Opuz v. Turcja,” *Europejski Przegląd Sądowy*, no. 2 (2011): 45–52.

<sup>6</sup> See: Wojciech Burek and Katarzyna Sękowska-Kozłowska, “Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej w Polsce: stan gry,” *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. XVIII (2020): 246.

<sup>7</sup> For more, see: Wojciech Burek, “Reservations and Declarations under the Istanbul Convention,” in *International Law and Violence Against Women. Europe and the Istanbul Convention*, eds. Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (Abingdon: Routledge, 2020), 277–95.

<sup>8</sup> See: “Chart of signatures and ratifications of Treaty 210,” Council of Europe, accessed April 30, 2023, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&tratynum=210>.

<sup>9</sup> For more, see: Wojciech Burek, “Zastrzeżenia i deklaracja interpretacyjna zgłoszone przez Polskę przy podpisaniu Konwencji o zapobieganiu i zwalczaniu przemocy wobec kobiet

in 2015.<sup>10</sup> The provisions of the Convention have caused – and continue to arouse – a range of extreme emotions and doubts. The most controversial points in the debate have touched on the ideological foundations of the Convention, as it was based on concepts and definitions that reimagined social attitudes and functions related to the understanding of gender, domestic violence and interpersonal relations in marriage and family. The impact of the Convention on educational curricula and materials designed for children and youth has also raised concerns. Article 14 of the Convention provides for the obligation on state parties to include teaching materials on issues of “non-stereotyped gender roles” (e.g. same-sex couples or civil unions). Concerns have been voiced that this article, which uses language that is broad in meaning (similar to other parts of the text of the Convention), is very general and vague, which may result in it becoming a tool for redefining related concepts in their traditional sense. For supporters of the Convention, the extensive framing of such concepts makes it a specific and specialized tool for changing attitudes and stereotypes to effectively prevent and combat all forms of violence against women, understood as a violation of fundamental human rights. A thorough discussion of the arguments for and against the full implementation of the Istanbul Convention in Poland is beyond the scope of this paper; I would therefore recommend that the reader refer to relevant literature.<sup>11</sup>

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i przemocy domowej – w świetle prawa międzynarodowego,” *Europejski Przegląd Sądowy*, no. 11 (2014): 4–13.

<sup>10</sup> See Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, ratified by Poland on 6 February 2015, Journal of Laws Laws of 2015, item 961, came into force on 1 August 2015.

<sup>11</sup> For more, see: Karolina Pawłowska and Tymoteusz Zych, eds., *Dlaczego Polska powinna wypowiedzieć Konwencję stambulską?* (Warsaw: Instytut na rzecz Kultury Prawnej Ordo Iuris, 2020), 150; Joanna Banasiuk, ed., *Czy Polska powinna ratyfikować Konwencję Rady Europy o zapobieganiu i przeciwdziałaniu przemocy wobec kobiet i przemocy domowej?* (Warsaw: Instytut na rzecz Kultury Prawnej Ordo Iuris, 2014), 112; Paweł Czubik, “Recenzja: K. Pawłowska, I. Zych (red.), *Dlaczego Polska powinna wypowiedzieć Konwencję Stambulską?*,” *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. 18 (2020): 315–26; Katarzyna Sękowska-Kozłowska, “The Istanbul Convention in Poland: Between the ‘War on Gender’ and Legal Reform,” in *International Law and Violence Against Women. Europe and the Istanbul Convention*, eds. Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (London–New York: 2020), 259–76; Łukasz Stefaniak, “Zarys sporu o ratyfikację Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy

The fierce dispute that has emerged over the implementation of the Convention in Poland at some point even led to action being taken for termination. In late July 2020, the Ministry of Justice filed a formal request with the Ministry of Family, Labour and Social Policy (responsible for the application of the Convention in Poland) to undertake work aimed at terminating it. As things have been to date, Poland has not terminated the Istanbul Convention. Still, due to the passage of time, in view of the clause contained in Article 79(1), which in principle sets a five-year period of validity of any reservations made, the Prime Minister presented to the Sejm of the Republic of Poland, on December 8, 2020, a bill on changing the scope of application of the Convention, which resulted in the adoption of the relevant law.<sup>12</sup> Under Article 1(4) of the law, Poland withdrew, among others, its reservation to Article 58 of the Convention, which opened the way to amendments in Polish criminal legislation in respect of the offences defined under the Convention, i.e. its Article 36 (sexual violence, including rape), Article 37 (forced marriage), Article 38 (female genital mutilation) and Article 39 (forced abortion or sterilization). Under Article 58 of the Convention, Poland must take the necessary legislative and other measures to ensure that the statute of limitation for initiating any legal proceedings with regard to these offences will continue for a period of time that is sufficient and commensurate with the gravity of the offence in question, to allow for the efficient initiation of proceedings after the victim has reached the age of majority.

### 3. The Istanbul Convention Monitoring Mechanism

Any changes to have been or be made in Polish criminal law under the Istanbul Convention are not associated solely with Poland's withdrawal from the above reservations. The implementation process is also influenced by

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wobec kobiet i przemocy domowej,” *Roczniki Nauk Prawnych*, no. 3 (2014): 66–73; Burek and Sękowska-Kozłowska, “Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej w Polsce: stan gry,” 256–62; Kowalewska-Borys and Truskolaska, “Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej z 2011 r. – zagadnienia wybrane,” 93–8.

<sup>12</sup> Act of 20 January 2021 amending the scope of the Council of Europe Convention on preventing and combating violence against women and domestic violence, drawn up in Istanbul on 11 May 2011, Journal Laws of 2021, item 149.

the mechanism provided for in the Convention to monitor the implementation of its provisions into the legal systems of the state parties. It is based primarily on the Group of experts on action against violence against women and domestic violence (GREVIO), appointed under Article 66.<sup>13</sup> Further, under Article 68(1), Poland is required to submit a report on legislative and other measures giving effect to the provisions of the Convention. The report is then to be considered by GREVIO to assess compliance with the Convention-laid standard of protection for victims of domestic violence in Poland (Article 68(2)).

The Istanbul Convention is an elaborate document with an extensive preamble and an appendix governing the scope of privileges and immunities enjoyed by members of the monitoring mechanism. The part of the Convention most relevant to these considerations is Chapter V, “Substantive law.” Its provisions are intended to help create a uniform legal framework, covering all state parties to the Convention, as necessary to prevent violence against women, protect them against revictimization and ensure real and effective prosecution of such offences. They cover both civil lawsuits and remedies (Articles 29–32), including compensation and civil consequences of forced marriages, as well as criminal-law measures (Articles 33–47), among others, the obligation to criminalize psychological violence, forced marriage, forced abortion and sterilization, as well as sexual violence, including rape. The Chapter is complemented with provisions on the recognition of sentences passed by other state parties (Article 47) and the prohibition of mandatory alternative dispute resolution processes (Article 48). Next, Chapter VI governs issues related to investigation and other procedural aspects, including those related to the application of protective measures (Articles 49–58).

The remainder of the Convention covers matters related to migration and international protection, including references to obligations under the principle of *non-refoulement*<sup>14</sup> and lays down the principles and scope

<sup>13</sup> For more, see: Wojciech Burek, “Grupa Ekspertów ds. Przeciwdziałania Przemocy Wobec Kobiet i Przemocy Domowej – GREVIO,” in *Pozasądowe mechanizmy praw człowieka i podstawowych wolności Rady Europy*, eds. Elżbieta H. Morawska and Katarzyna Gałka (Lublin: Wydawnictwo Episteme, 2021), 273–308.

<sup>14</sup> This principle states that a person who has been refused refugee status must not be deported to a country where he or she would be at risk of persecution. For more, see: Anna

of international cooperation in this regard. Therefore, the Convention provides for a range of instruments of various natures to clearly identify violence against women as a violation of human rights and a form of discrimination. Due to the limited scope of this paper, the analysis presented here only covers changes made to Polish substantive criminal law as triggered by the Convention and follow-up action taken by GREVIO under the monitoring mechanism towards Poland.

#### 4. GREVIO Report on the Assessment of Polish Criminal Legislation

Five years following the ratification of the Convention, in March 2020, Poland submitted a report on the implementation of measures giving effect to its provisions into the Polish legal system, as required under the monitoring mechanism.<sup>15</sup> Noteworthy, in June 2020, the Polish Commissioner for Human Rights filed an alternative report with GREVIO.<sup>16</sup> Poland's report was considered by GREVIO, with an assessment made of Polish legislation in this regard and an evaluation report issued in June 2021.<sup>17</sup> Notwithstanding the comments that Poland made to the GREVIO report,<sup>18</sup> the key con-

Chodorowska and Anna Trylińska, "Pojęcie zasady non-refoulement w prawie uchodźczym," *Dyskurs Prawniczy i Administracyjny*, no. 2 (2022): 7–23; Olga Łachacz, "Zasada non-refoulement w międzynarodowym prawie uchodźczym – zwyczaj międzynarodowy czy też peremptoryjna norma prawa międzynarodowego?," *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, no. 15 (2017): 134–42.

<sup>15</sup> See: "Report submitted by Poland pursuant to Article 68, paragraph 1 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Baseline Report)," GREVIO/Inf(2020)8, received by GREVIO on 26 March 2020, accessed April 30, 2023, <https://rm.coe.int/grevio-inf-2020-8-eng/pdfa/16809e5394>.

<sup>16</sup> See: "Submission of the Commissioner for Human of Rights of the Republic of Poland to the Group of Experts on Action against Violence against Women and Domestic Violence on the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence in the Republic of Poland," Commissioner for Human Rights, accessed April 30, 2023, <https://rm.coe.int/chr-poland-submission-30-06-2020/16809eed4b>.

<sup>17</sup> See: "GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) POLAND," GREVIO/Inf(2021)5, adopted by GREVIO on 23 June 2021, published on 16 September 2021, accessed April 30, 2023, <https://rm.coe.int/grevio-baseline-report-on-poland/1680a3d20b>.

<sup>18</sup> See: "Comments submitted by Poland on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against

clusions of the assessment should be highlighted as regards compliance of Polish criminal legislation with the standard of protection of women against violence, including domestic violence, under the Convention.

The core review conclusion of the report was favourable for Poland. GREVIO found that the Polish Criminal Code (the “PCC”)<sup>19</sup> contains provisions to criminalize the forms of behaviour covered by Articles 33–40 of the Convention (Section 196 of the Report). However, it pointed out that, with the exception of stalking (Article 190a PCC) and abuse (Article 207 PCC), these are general criminal provisions rather than specific offences referred to in the Convention. Thus, GREVIO concluded that they do not adequately cover all forms of violence against women and that some examples of criminalization are inadequate. Various forms of violence against women are hidden and absent from general offences. At the same time, it recognized that while the Convention does not set out an obligation to introduce specific criminal offences for each of the forms of violence covered, the current approach to criminal legislation, in GREVIO’s view, may reduce women’s access to justice (Section 197 of the Report).

GREVIO raised such concerns primarily as regards combating psychological violence (Article 33 of the Convention), assuming that criminal offences such as threat (Article 190 PCC) and coercion (Article 191 PCC) are designed mainly to punish single acts carried out in isolation and do not take into account abusive patterns of behaviour. Such acts, taken separately, would not necessarily reach the threshold applied by judges for these criminal offences (Section 200 of the Report). Ultimately, GREVIO did not recommend legislative changes in this regard but pointed out (as in many instances in the Report) that training is necessary to increase the understanding among law enforcement agencies, prosecution services and the judiciary as to the serious nature of psychological violence and its potential for escalation.

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women and domestic violence (Baseline Report),” received by GREVIO on 8 September 2021, GREVIO/Inf(2021)10, published on 16 September 2021, accessed April 30, 2023, <https://rm.coe.int/grevio-inf-2021-10-eng-final-comments-gov-poland/1680a3d208>.

<sup>19</sup> Act of 6 June 1997, Criminal Code, consolidated text, Journal Laws of 2022, item 1138 as amended, hereinafter referred to as the PCC.



Poland's compliance with the requirements for combating stalking (Article 34 of the Convention) was assessed favourably. An emphasis was made that the criminalization of the specific crime of stalking should be commended as it entails not only an offline dimension but also criminalizes some important online manifestations of such behaviour. Polish criminal legislation was also given a positive assessment over the recognition of the serious impact which stalking may have on victims, including suicide, and the introduction of an aggravating circumstance to that extent; further, an acknowledgement was made of the increase in penalties for the offence under the 2020 amendment to the PCC as the right path to follow (Section 202 of the Report).

While assessing the criminalization of physical violence (Article 35 of the Convention), GREVIO noted that the application of Article 207 PCC (abuse) is limited to children, vulnerable people, "immediate family members" and "persons who are temporarily or permanently dependent" on the offender and therefore does not apply to ex-spouses or ex-partners as they are not considered to be a "closest person" within the meaning of Article 115 § 11 PCC, with the exception of persons "in a relationship of dependence." Moreover, Article 207 does not apply to non-married partners unless they fall under the legal definition of "persons living together" (Section 209 of the Report). Therefore, in GREVIO's opinion, the scope of application of Article 207 PCC does not cover dating violence or a wide range of cases affecting former and/or non-cohabiting intimate partners. In view of the above, GREVIO urged the Polish authorities to ensure that Article 207 PCC is applied in relation to all forms of intimate partner violence, including violence among non-cohabiting partners, and in particular former partners and spouses (Section 212 of the Report).

Another problem identified for combating violence against women under Article 207 PCC is the fact that the offence forms part of Chapter XXVI PCC, covering offences against the family and custody. Therefore, according to GREVIO, domestic violence is criminalized as an offence against the family and not against an individual. While recognizing the importance of families as central units of society, GREVIO recalled the fundamental human right of all members of the family, including women, to live free from violence. It indicated clearly that the Convention places their rights and needs at the centre. In GREVIO's opinion, it is of fundamental

importance to ensure criminal justice for women who experience violence against them in their families as a bearer of individual rights (Section 208 of the Report).<sup>20</sup>

A key component of the GREVIO Report, one which causes considerable controversy in the criminal law literature,<sup>21</sup> are recommendations regarding the standard for combating sexual violence against women. Notwithstanding the positive assessment of the criminalization of sexual crimes, it was pointed out that none of the prohibited acts contained in Chapter XXV PCC (Articles 197-200 PCC) is based exclusively on the “lack of consent,” which is the central element of the way the Convention frames sexual violence. As a consequence, according to GREVIO, not all forms of sexual violence identified in the Convention are criminalized as required by the Convention under Polish law, as it requires higher thresholds of evidentiary standards of physical resistance and a shifting of the focus onto the victim’s behaviour from the accused’s action (Section 215 of the Report).

GREVIO criticized the missing criminalization of causing another person to engage in non-consensual acts of a sexual nature with a third person, which is covered by Article 36(1)(c) of the Convention. This provision covers scenarios in which the offender is not the person who performs the sexual act but who causes the victim to engage in sexual activity with a third person, for example, as part of the control and abuse in intimate partner violence. The scope of criminal intent is wider than that under the crime of aiding and abetting. It would not only cover the intent to help the commission of an offence, for example, a rape, and the intent of the rape as such but would also extend to the intent of causing both. In other words, the intentional conduct covered by Article 36(1)(c) aims at capturing more

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<sup>20</sup> GREVIO bases this view on the belief that the legislator and judges attach greater importance to the protection of family values, which is at the expense of the victims’ right to life and to live free from violence. In this regard, he refers to scientific publications and information obtained during visits and meetings with experts and representatives of social organizations, see, e.g. Magdalena Grzyb, “We Condemn Abusing Violence against Women: The Criminalization of Domestic Violence in Poland,” *Archiwum Kryminologii*, no. 1 (2020): 163–83.

<sup>21</sup> See: Marika Jaročka, “Definicja zgwałcenia jako jabłko niezgody w polskim systemie prawnym,” *Studia Iuridica Toruniensa*, no. 28 (2021): 45–63; Monika Płatek, “Zgwałcenie. Gdy termin nabiera nowej treści. Pozorny brak zmian i jego skutki,” *Archiwum Kryminologii*, no. 40 (2018): 263–325.

than the instigation or facilitating of a crime by including the malevolent behaviour of abrogating a woman's sexual self-determination (Section 219 of the Report).

Similarly, criticism was also made of the missing criminalization of forced marriage and the associated act of luring a woman abroad (Article 37 of the Convention). GREVIO pointed out that although the offence is covered under the general crime of coercion (Article 191 PCC), its construction is not sufficient, especially since the act of luring a woman abroad with the aim of forcing her into marriage could, at best, only be covered by the act of aiding or abetting unlawful coercion to perform a particular act aiding and abetting or complicity in forcing certain conduct, which solution, according to GREVIO, is inadequate (Section 222 of the Report). The conclusion of this part of the Report explicitly indicated the need to introduce into Polish law a specific criminal offence of forced marriage and to criminalize the intentional conduct of luring another person to the territory of another state with the purpose of forcing this person into a marriage (Section 226 of the Report).

GREVIO's criticism further covered the lack of separate criminalization of female genital mutilation (Section 227 of the Report). It was pointed out that the acts of mutilation described in Article 38(a) of the Convention may be prosecuted under the two health offences set out in Articles 156 and 157 PCC. Still, in GREVIO's opinion, the conduct of coercing, procuring or inciting to undergo female genital mutilation as described in Article 38(b) and (c) of the Convention remains outside the scope of any of the health offences but is captured only under Article 191 PCC, which is inadequate. Moreover, the acts of neither procuring nor inciting a woman to undergo the procedure (e.g. self-mutilation) appear to be criminalized. The acts of aiding or abetting a woman or girl to perform the act of female genital mutilation upon herself cannot be considered compliant with Articles 38(b) and (c) of the Convention. Further, Article 38(c) of the Convention requires the criminalization of behaviour that involves the intentional exertion of influence on a woman who herself does not harbour the intention of undergoing female genital mutilation. The requirement to criminalize aiding or abetting the commission of female genital mutilation also stems

from Article 41 of the Convention.<sup>22</sup> These offences differ from Article 38(c) both in terms of the constituent element of the crime and the scope of intent. The aim of the latter is to ensure that criminal liability occurs, for example, where relatives or community members incite, coerce or procure a woman to undergo female genital mutilation but do not take an active part in ensuring the procedure is carried out (Section 228 of the Report). GREVIO explicitly pointed out the need to supplement Polish criminal legislation in this regard (Section 230 of the Report).

GREVIO gave a favourable assessment of the standard of criminalization of acts specified in Article 39 of the Convention, i.e. forced abortion and sterilization.

Article 40 of the Convention imposes the obligation on state parties to take the necessary measures to ensure that sexual harassment, being any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction. GREVIO noted, however, that in the Polish legislative framework, acts of sexual harassment are regulated primarily by the Labour Code<sup>23</sup> and the Act on Equal Treatment.<sup>24</sup> Even if it welcomed the definition of the conduct, it criticized the Polish system in this respect, as the provisions in question capture sexual harassment only in a limited context of labour relations (Section 233 of the Report). GREVIO stressed that a specific criminal offence of sexual harassment does not exist, but several provisions of the Criminal Code are applicable in principle, which are of a general nature and thus do not capture the essence and characteristics of the phenomenon<sup>25</sup> (Section 234

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<sup>22</sup> The provision of Article 41 imposes a separate obligation on the parties to the Convention to criminalize cooperation, including inciting, aiding and abetting and attempting the crimes provided for therein.

<sup>23</sup> See Article 183a of the Act of 26 June 1974, Labour Code (consolidated text, Journal of Laws of 2023, item 1465).

<sup>24</sup> See Act of 3 December 2010 on the implementation of certain European Union provisions in the field of equal treatment (consolidated text, Journal of Laws of 2023, item 970).

<sup>25</sup> For example, Article 216 PCC. In addition, research was cited which shows that the lack of criminalization of sexual harassment is the main obstacle for victims of this form of violence to take legal action before the situation develops into other forms of violence punishable under the Criminal Code, such as harassment, see: Dagmara Woźniakowska-Fajst, *Stalking*

of the Report). Therefore, GREVIO strongly recommends that the Polish authorities ensure that sexual harassment experienced in all areas of life is subject to criminal or other legal sanctions (Section 236 of the Report).

The GREVIO Report also contained an analysis of criminal sanctions and measures and aggravating circumstances provided for in Polish criminal legislation as aimed at combating violence against women, as well as their actual application by criminal courts. The remarks given are intended to support the implementation of Poland's obligations set out in Articles 45 and 46 of the Convention. In principle, GREVIO welcomed the fact that, for the most part, Polish criminal law foresees adequate sanctions for acts of violence against women. However, it pointed out that there is a wide discrepancy between the available sanctions under the law and those that are imposed in practice by courts. GREVIO concluded that sentences are frequently mitigated or suspended, in particular where convictions under Article 207 PCC, the domestic violence offence, are concerned. Moreover, in cases concerning rape and sexual offences, appeal courts seem to reduce sentences based on the characteristics of the victim and her behaviour, thereby diminishing the criminal liability of the offender (Section 237 of the Report).

GREVIO also noted that in the Polish Criminal Code, some of the aggravating circumstances required by Article 46 of the Convention form part of the elements of the crime. However, in the absence of supporting measures, such as guidelines or other orientation for judges to support their interpretation of aggravating circumstances in light of the requirements of the Convention, it is unclear to what extent the full range of aggravating circumstances are effectively applied, in particular for offences committed against a former or current spouse or partner, by a family member and persons cohabiting with the victim, or in the presence of a child (Section 239 of the Report). It was noted that judges do not always consider the factors surrounding a case of domestic violence on the basis of a gendered understanding or on the other principles of the Convention. Instead, they appear to be guided by stereotypical gender roles and respect for the family as the fundamental unit of society.

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*i inne formy przemocy emocjonalnej. Studium Kryminologiczne* (Warsaw: Wydawnictwa Uniwersytetu Warszawskiego, 2019), 337–49.

## 5. Amendment of Polish Criminal Legislation under the Istanbul Convention

Since the Convention was opened for signature, and in particular since its ratification, the Polish legislator has introduced a range of amendments to the Criminal Code aimed at raising the standard of protection for victims of domestic violence and of effective prosecution of offenders. However, the dispute over the Convention makes it difficult to clearly determine which of these were actually passed under the influence of the Convention and which were determined by the criminal policy objectives pursued by the Polish authorities.<sup>26</sup> There may be opposing opinions in this regard, which both parties to the dispute take advantage of in their arguments. Supporters of the full adoption of the Convention allege that the Polish legislator is reluctant to refer to its text but instead expediently uses its provisions to hail the successes of its criminal policy.<sup>27</sup> Sceptics point out, in turn, that the solutions proposed and passed – in line with the Convention's standard – are the result of unrelated efforts, as demonstrated by the facts of the legislative process.<sup>28</sup> The fact is that references to the Istanbul Convention as a motive for legislative initiatives can be tracked in explanatory notes to relevant bills in a few instances only. Still, there are also some in which the legislator explicitly notes this motive. Whether it is this way or the other way round, in the opinion of the author of this paper, does not matter too much since the overriding end in this regard comes from the question of how Polish criminal law meets the standard of protection for victims of domestic violence set out in the Convention and whether it is actually effective in combating the unwanted phenomenon. The answer to this question allows us to determine the extent to which the standard laid down

<sup>26</sup> An example of such changes, made before Poland ratified the Convention, was the introduction of an *ex officio* prosecution procedure for the crime of rape. Pursuant to the Act of 13 June 2013 amending the Criminal Code (Journal of Laws of 2013, item 849), on 27 January 2014, Article 205 PCC, which provided for the prosecution of crimes under Articles 197, 198 and 199 § 1 PCC. The modification in the procedure for prosecuting these crimes was to be guided by the provisions of Article 55 of the Convention, which obliges states parties to ensure the prosecution of sexual violence and other forms of violence against women *ex officio*.

<sup>27</sup> See: Burek and Sękowska-Kozłowska, "Pięć lat obowiązywania Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet," 255–6.

<sup>28</sup> See: Czubik, "Recenzja: K. Pawłowska, I. Zych (red.), Dlaczego Polska powinna wypowiedzieć Konwencję Stambulską?" 320.

in the Convention has actually been implemented into the Polish criminal law system, regardless of whether it is under the influence of the Convention or not. A complete analysis of related legislative amendments is beyond the scope of this paper; a limited discussion of the key recent updates to the Polish Criminal Code, in particular in the context of the remarks made by GREVIO, is presented instead.

Since the publication of the GREVIO Report (16 September 2021), several laws amending the Criminal Code have been passed. Two introduced significant changes to ensure a more complete implementation of the Convention into Polish criminal legislation. The first one was adopted on July 7, 2022 (the “July amendment”)<sup>29</sup> and the other one on January 13, 2023 (the “January amendment”).<sup>30</sup> The latter, in particular, was designed to provide for a comprehensive implementation of the Convention, as with it, the legislator not only introduced new solutions in criminal law but also adapted civil and administrative law, including in its procedural part, to the standard under the Convention.

The July amendment mainly improved criminal sanctions and measures to combat sexual violence and the statute of limitations for related offences. In the first place, it raised the standard under Article 53 of the Convention by establishing a new mandatory basis for a court to order, at the request of the victim, a restraining order prohibiting the offender from staying in specific environments or places, contacting specific people, approaching specific people or leaving a specific place of residence without the court’s consent, as well as an eviction order to temporarily vacate the premises shared with the victim, after conviction for an offence against sexual freedom or morality (Article 41a § 1a sentence 1 PCC). The restraining or eviction order may be combined with the obligation to report to the police or other designated authority at specified intervals, and compliance with the prohibition of approaching the victim may also be monitored in the electronic surveillance system (Article 41a § 1a sentence 2 PCC). The July amendment also limited the mandatory application of such restraining or eviction

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<sup>29</sup> See Article 1 Act of 7 July 2022 amending the Criminal Code and certain other acts (Journal of Laws of 2022, item 2600).

<sup>30</sup> See Article 5 (4) of the Act of 13 January 2023 amending the Code of Civil Procedure and certain other acts (Journal of Laws of 2023, item 289).

orders where a sentence is issued for imprisonment without conditional suspension for an offence against sexual freedom or morality (Article 41a § 2 sentence 1 PCC). It also specified, by introducing a separate provision, the content of the prohibition of contacting a specific person, which is to cover all activities in an attempt to establish contact with the protected person, including those undertaken by the convict through another person or via an ICT network (Article 41a § 6 PCC).

The amendment considerably expanded the catalogue of offences committed against minors, for which the statute of limitations cannot expire before the victim reaches the age of 40 years. This change was clearly designed to bring Polish measures in line with Article 58 of the Convention. It captures, among others, all sexual offences against a minor (Chapter XXV PCC), with the exception of sexual offences for which the statute of limitations is excluded (Article 105(3) to (6) PCC) or conduct in which pornographic content involves the participation of a minor. The above exclusion of the statute of limitations was also put in place under the amendment. The change consists in expanding the catalogue of crimes contained in Article 105 PCC with aggravated rape and sexual homicide, where the victim is a child under 15 years of age or where the offender acted with particular cruelty, caused severe bodily injury or death of the victim (Article 197 § 4 and 5 PCC).

More extensive changes came with the January amendment, which, as indicated by the legislator in explanatory notes,<sup>31</sup> was intended to ensure compliance of Polish regulations with the Istanbul Convention, in particular after the withdrawal of reservations to Article 58.

The first essential change was made in response to GREVIO's concern over the lack of separate criminalization of female genital mutilation (Section 227 of the Report), as well as the inadequate criminalization of the acts of procuring or inciting a woman to undergo self-mutilation (Section 228 of the Report), which is required under Article 38 of the Convention. Therefore, the legislator decided to supplement Article 156 § 2 PCC with paragraph 3 by specifying that circumcision, infibulation or any other permanent and significant female genital mutilation is a punishable health

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<sup>31</sup> See Form No. 2615, Sejm of the 9th term, text: <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2615>, accessed April 30, 2023.



offence. Thus, using the provision as used in the Convention, it extended the catalogue of acts causing severe bodily injury in this respect. It also concurred with GREVIO that no offence existed in Polish criminal legislation as referred to in Article 38(c) of the Convention for inciting, coercing or procuring another person to self-inflict severe bodily injury.<sup>32</sup> Therefore, the Polish legislator decided to identify, in Article 156a PCC, a new offence of inciting or procuring another person to self-inflict severe bodily injury as referred to in Article 156 § 1 (3) PCC, as well as coercing the victim, by violence or unlawful threat, to self-inflict such injuries.

Another significant change introduced by the January amendment was a response to criticism over the missing criminalization of forced marriage and the related act of luring a woman abroad (Article 37 of the Convention). The Polish legislator accepted these remarks and agreed that Article 191 PCC, which criminalizes coercion to perform a particular act, had not exhausted all the elements of the offence under Article 37 of the Convention. The Criminal Code had not provided for a separate offence of luring an adult or a child to the territory of a party or state other than the one they reside in with the purpose of forcing this adult or child to enter into a marriage. To fill this gap, the Polish legislator decided to identify a new offence that contained all the elements of the offence under Article 37 of the Convention. Hence, Article 191b § 1 PCC criminalizes the use of violence, unlawful threat or abuse of a relationship of dependence, or taking advantage of a critical situation and causing another person to enter into a marriage or a union that corresponds to a marriage in the offender's religious or cultural environment. Furthermore, Article 191b § 2 PCC criminalizes the conduct where the offender, with a view to committing the offence specified in § 1, uses deception or abuses a relationship of dependence or takes advantage of a critical situation to incite or procure another person to leave the territory of Poland.

Noteworthy, for the new types of offences under Article 156a PCC and Article 191b PCC, the legislator also accommodated the statute of

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<sup>32</sup> It should be emphasized that the provision in question is about persuading the injured party, not inciting the perpetrator. This applies to the incitement of the perpetrator. Article 41 of the Convention.

limitations requirement (Article 58 of the Convention) and added it to the catalogue included in Article 101 in § 4 (3) PCC.

As indicated above, the January amendment, in addition to the provisions of the Criminal Code, introduced changes to many other laws and regulations of various natures. Some of those are closely linked to the changes in substantive criminal law. The instrument intended to provide immediate, and therefore more effective, protection for a person affected by domestic violence was to give the police<sup>33</sup> and the military police,<sup>34</sup> within their respective competences, the powers to issue an eviction order to immediately vacate the premises shared with the victim and immediate surroundings, or a restraining order to prohibit the offender from approaching the premises and immediate surroundings controlled by the court. Failure to comply with an issued eviction or restraining order or a court ruling in this regard<sup>35</sup> is treated as a prohibited act, i.e. a petty offence under Article 66b of the Polish Petty Offences Code,<sup>36</sup> as further clarified by the January amendment.

## 6. Summary

There is no doubt that, in principle, the objectives of the Istanbul Convention converge with the objectives of Polish criminal legislation on the prevention and combating of violence against women and domestic violence, both in terms of the essence and the forms of counteraction. The level of protection in place in this respect in Poland should be considered adequate to the standards laid down under the Convention, their ideological references aside. The Istanbul Convention, being a relatively new act operative in the Polish legal framework, has contributed to accelerating its inevitable modifications, the most important of which include primarily changes designed to speed up response to violence, i.e. by introducing a procedure for

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<sup>33</sup> See Article 15aa–15ak of the Act of 6 April 1990 on the Police (Journal of Laws Laws of 2023, item 171).

<sup>34</sup> See Article 18a–18k of the Act on the Military Police and Military Law Enforcement Bodies (Journal of Laws Laws of 2023, item 1266).

<sup>35</sup> It concerns Article 11aa (4) of the Act of 29 July 2005 on counteracting domestic violence (Journal of Laws of 2021, item 1249).

<sup>36</sup> See Act of 20 May 1971, Code of Petty Offences (Journal of Laws Laws of 2022, item 2151).

ex officio prosecution of sexual offences or enabling an immediate eviction order against offenders.

Still, the latest amendment to Article 156 § 1 (3) PCC raises the question of whether the use of specific terms of a casuistic and medical nature (“circumcision, infibulation or any other permanent and significant female genital mutilation”), as they are used in the Convention, is the right legislative solution. First, the offence is conceptually captured under that provision in its hitherto wording, while its description is incomprehensible both to the addressees of the standard and to those who are to apply it. However, it cannot be ignored that the Polish legislator, most likely having recognized the inexpediency of excessive detail in a legal act at a code level, conservatively stopped halfway in its implementation of Article 38 of the Convention *expressis verbis* (under which “Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris”).

Any similar proposals for amending Article 197 PCC citing the need to adapt its wording to the requirements of Article 36 (1) of the Convention, under which “Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person,” should be therefore considered redundant to the solutions adopted in Polish criminal legislation. Apart from the above-demonstrated lack of any justification for changing the description of the conduct as regards the manner of commission, it should be emphasized that the construction of Article 197 PCC is well-established in jurisprudence and defines the lack of consent on the part of the victim as a *sine qua non* condition for establishing the commission of an offence since the essence of the offence under Article 197 PCC is causing another person to have sexual intercourse without their consent, even implied.

Therefore, the implementation of the Convention into substantive criminal law entails significant difficulties, resulting in particular from

the specific nature of the provisions of the Convention and its high level of detail that can hardly be reasonably explained. The Convention undoubtedly promotes a casuistic approach to legal norm-making, which in principle is at odds with Polish criminal legislative practice; moreover, what can be observed in modern criminal law-making is a shift from this methodology in favour of laying down universal principles. To adopt the concept proposed by the framers of the Convention and abandon the existing legislative practice would consequently lead to considerable dents in the systemic coherence of the body of criminal law. As demonstrated above, most of the necessary legislative solutions postulated under the Convention had existed before in Polish criminal law, while others have only been made clear and specific. Still, it remains an open question whether the Polish legislator decides to depart from the current approach to laying down criminal laws based on refrainment from excessive casuistry in favour of setting interpretative directions, which seems to be more aligned with both the tradition developed by the Polish criminal legal doctrine and the criminal law-making approach dominant in contemporary legal cultures.

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