FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN POLAND IN 2003

January 2004

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* Submited to the Network by Marek Antoni Nowicki. This report has been prepared by Marek Antoni Nowicki within the Helsinki Foundation for Human Rights in Warsaw with the assistance of Ms. Magdalena Kmak.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.
Les documents du Réseau peuvent être consultés via :
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The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.
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PRELIMINARY REMARKS

This is the first public report on the situation of observance of fundamental rights in Poland, prepared within the EU Network of Independent Experts on Fundamental Rights. It has been no easy task due in part to the limited scope of the report which did not allow to present – by way of an introduction and to facilitate understanding of the issues touched on in the report – in a more detailed way, the principles of the Polish constitutional system, legal institutions and the process of democratic reforms, that have taken place since 1989.

The reforms, among other things, led to the creation of solid legal foundations and institutional guarantees for the protection of the rights of an individual. There are still areas, however, where legal provisions or practice depart from the standards of the Charter of Fundamental Rights or other international documents pertaining to human rights protection.

In current discussions in Poland, where the independent media play a very positive role, the necessity of improving the legal system and the process of its constitution, are a frequent subject of debate, among other things. It is emphasised that, on account of multiple changes and not every time well-considered amendments, the law becomes unintelligible and does not provide the necessary legal certainty, which makes it possible to apply the law in an arbitrary manner. The administration of justice, steeped in crisis, is in need of a courageous, fundamental reform. The spread of corruption poses a serious threat.

In the report, the author is aiming to illustrate, as thoroughly as possible, the developments in the areas covered by the Charter of Fundamental Rights in the period from December 2002 to December 2003, the efforts of the authorities and their achievements as well as omissions and cases of neglect, along with emerging risks relating to human rights protection in Poland. He emphasises the areas where particular efforts are required to ensure the observance of the provisions of the Charter to the greatest possible extent.

The report has been prepared mainly on the basis of available information from reports of international organisations and institutions, public institutions as well as non-governmental organisations considered to be reliable. Much of the information and data has been prepared and made available solely for the purpose of this report.

Due to organisational and technical difficulties it was not possible to obtain all the relevant official data by the end of the reporting period, i.e. 15 December 2003. It was thus necessary to use available data from an earlier period. However, this should not diminish the cognitive value of this report and the conclusions therein.

CHAPTER I : DIGNITY

Article 1. Human dignity

Practice of national authorities

The Polish Ombudsman (Rzecznik Praw Obywatelskich - RPO) has requested the Minister of Justice to initiate legislative efforts with a view to introducing into the Family and Child Protection Code (Kodeks Rodzinny i Opiekuńczy – KRO) a provision on the obligation to respect the child's dignity as one of the fundamental requirements of parental authority.[1]

Reasons for concern

- lack of a provision in the Family and Child Protection Code introducing the obligation to respect the child's dignity as one of the fundamental requirements of parental authority.

Article 2. Right to life

National legislation, regulation and case law

On 3 May 2002, Poland signed, but so far has not ratified, Protocol No. 13 to the European Convention on Human Rights Protection and Fundamental Rights (ECHR), which de-legalised the death penalty in all circumstances.

Abortion is allowed under Polish law[2] when the pregnancy is a threat to the woman's life or health, in the case of the foetus' grave defects or a disease that endangers its life or when pregnancy is a result of a prohibited act.

Euthanasia is prohibited[3] and so far no discussion has been launched on its legalisation.

Practice of national authorities

In 2002 the Police uncovered 200 cases of abortion carried out with the woman's consent in violation of the law and 10 abortions carried out without the woman's consent in violation of the law.[4] In 2003 not a single offence of euthanasia was uncovered by the Police.

During the period of time covered by this report, the Police uncovered 28 359 cases of crimes against life and health, mainly: 903 cases of murders, 13 900 cases of bodily injuries and 12 195 cases of batteries and beatings. At the end of 2002 the rate of detected crimes by Police in this area was around 90 %[5].

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[1] General Approach by the Ombudsman to the Minister of Justice – General Prosecutor (RPO-377276-XI01) of 28 August 2003

[2] Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, (Dz.U. z 1993 r. nr 17, poz. 78) [The Law on family planning, protection of the human embryo and conditions of legal termination of pregnancy, of 7 January 1993, (The Official Journal of 1993, No. 17, item 78)]

[3] Art. 150 Kodeksu Karnego z 6 czerwca 1997 (Dz.U. z 1997 r. nr 88, poz. 553 z późn. zm.) [Art. 150 of the Penal Code of 6 January 1997 (The Official Journal, 1997, No. 88, item 553, as amended)]

[4] Art. 152 i 153 Kodeksu Karnego z 6 czerwca 1997 (Dz.U. z 1997 r. nr 88, poz. 553 z późn. zm.)
[Art. 152 and 153 of the Penal Code of 6 January 1997 (The Official Journal, 1997, No. 88, as amended)]

[5] Statistics: Police www.kwp.gov.pl.

Article 3. Right to the integrity of the person

National legislation, regulation and case law

The extraction and transplantation of cells, tissues and organs from deceased persons or from living people is regulated by the Law of 26 October 1995 on extraction and transplantation of cells, tissues and organs. Extraction and transplantation of cells, tissues and organs from human bodies can be carried out if the dead person did not state his or her objection when alive. No financial benefits can be requested or accepted for extraction and transplantation of cells, tissues and organs from human bodies or from living people. Persons trafficking in organs commit an offence punishable by deprivation of liberty.[6]

The Code of Medical Ethics, amended on 20 September 2003, prohibits doctors from participating in the procedures of euthanasia and human cloning (whether for therapeutic and reproduction purposes). The article on the issue of genetic prediction, i.e. on prediction of the future health condition of a person on the basis of his or her genetic record, is a novelty.[7]

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

International case law and concluding observation of international organs

The living conditions in the Radom Detention Centre were the subject of a complaint lodged with the European Court of Human Rights. The applicant was detained with five other arrested persons in a cell of 12.49 sq.m. without running water and access to a toilet. The matter was resolved following a friendly settlement, and the applicant was awarded compensation.[8] The complaint concerned the situation in 1995.

According to a report by the Commissioner for Human Rights of the Council of Europe[9] there are cases of inhuman treatment of persons detained in police custody. It would appear that the majority of victims of such ill treatment are prostitutes, Roms and victims of trafficking. Most victims do not report such cases, as they fear that they themselves will be prosecuted and the said incidents rarely reach the courts.

The report by the Commissioner for Human Rights of the Council of Europe also suggests that there is a widespread phenomenon of hazing ("fala", in Polish), which is the brutal demeaning of young conscripts by their senior colleagues in military service. Although the Penal Code provides the penalty of imprisonment for this offence, several hundred such cases are reported yearly, and very many more go unreported.

National legislation, regulation and case law

In the Ministry of Justice a draft regulation has been prepared providing for better public control over the execution of penalties, means of punishment, security and preventive measures. The draft provides for conversations with the convicts, inspections of rooms, accepting complaints and requests and control of application of therapeutic measures.[10]

[6] Art. 20 ustawy z dnia 26 października 1995 roku o pobieraniu i przeszczepianiu komórek, tkanek i narządów (Dz.U. z 1995 r., nr 138, poz. [Art. 20 of the Law of 26 October 1995 on extraction and transplantation of cells, tissues and organs (The Official Journal, 1995, No. 138, item682)

[7] Medical Review Puls Medycyny, available on the web page: http://www.pulsmedycyny.com.pl/arch/3610

[8] Eur. Ct. H.R. P.K. v Poland, judgment of 6 November 2003, appl. No. 37774/97, friendly settlement

[9] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4.

[10] Daily „Rzeczpospolita"" of 11-12 October 2003 p. C2

Practice of national authorities

Poland has not implemented the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment pertaining to ensuring the standard of at least four sq.m. of living space per prisoner. Since September 2000 the penitentiary system has not even ensured living space of three sq.m. per prisoner, as provided for by Polish legislation.[11]

This largely ensues from an increase of 50% in the number of prisoners in recent years. There are currently 80 281 persons detained in prisons and 30 118 convicted persons are awaiting execution of their sentences. The number of conditional releases from serving full sentence is decreasing, whereas there are too many provisional detentions.[12]

According to the Central Management of the Prison Service (Centralny Zarząd Służby Więziennej - CZSW) the number of officers and penitentiary system employees is too small to ensure implementation of all the tasks of the Prison Service at an adequate level. The ratio of detainees to Prison Service officers has been on a constant increase and currently amounts to 3.72 prisoners per officer. Funds allocated to the penitentiary system constitute a decreasing share of the entire budget of the administration of justice and currently account for 24.64% of this budget (against 43.54% in 2001).

The draft of the budget of the administration of justice for 2004 provides for an increase in funds allocated to the prison system by 2.4 per cent, including 500 new posts for prison officers. This will decrease the indebtedness of the prison system and increase expenditure on current needs and necessary investment. By way of comparison, the entire budget of the administration of justice is set to grow by nearly 11 per cent next year.[13]

The situation in the prison system was a subject of particular concern for the Polish Ombudsman (Rzecznik Praw Obywatelskich - RPO), who made the General Approach to the Minister of Justice – General Prosecutor concerning general conditions in detention centres and prisons.[14]

The monitoring report in this area carried out by the Helsinki Foundation for Human Rights in 2000 suggests that many police lock-ups do not ensure the required basic level of living standards to many arrested persons.[15] As the situation in this respect has not improved substantially over the period of this report, those conclusions remain valid.

Information provided by the CZSW suggests that only a small number of complaints lodged by detainees against officers and other employees of the Prison Service concerning living conditions in correctional institutions are recognised as well grounded[16]. Failure to abide by the rules of discipline is the main offence for which disciplinary proceedings are carried out against officers of the Prison Service. Moreover prisoners frequently complain about the conditions prevailing in their cells.

[11] Centralny Zarząd Służby Więziennej, Podstawowe Problemy Więziennictwa [Publication of the Central Management of the Prison Service, Fundamental Problems of Prison Management], Warsaw May 2003, available at the website http://www.czsw.gov.pl , 1 July 2003

[12] Prof. Zbigniew Hołda for Daily „Rzeczpospolita", Daily „Rzeczpospolita"" of 21 October 2003, p. C2

[13] Daily „Rzeczpospolita" of 25 November 2003 p. C1

[14] General Approach by the Ombudsman to the Minister of Justice – General Prosecutor (RPO-421296-XI/01) of 28 August 2003.

[15] S. Cybulski, Policjanci i ich klienci, Prawo w dzia³aniu, Raport z monitoringu (Policemen and their clients, Law in action, A monitoring report) , the Helsinki Foundation for Human Rights, Warsaw 2001, p. 162

[16] Information from a letter from Deputy General Director of the Prison Service of 29 July 2003, No BPZ-070-28/03/533

Mental institutions:

The rights of patients with mental disorders, and of the mentally ill or mentally retarded are regulated by the Law on the Protection of Mental Health[17]. The Office for Patients' Rights operating with the Minister of Health receives letters of complaints about the use of direct coercion in cases of placement in mental institutions. However, a majority of complaints concern living conditions in mental hospitals, in particular medical care, welfare and custody. In the first half of 2003 only one such a complaint was lodged concerning the absence of adequate care in a hospital where a patient fell from a window[18]. The Office for Patients' Rights is not an independent institution and does not have the authority to perform its own investigations. Within the framework of its competences, the office intervenes through the Ministry of Health.

Domestic violence:

It is estimated that 18% of married women suffer from violence at home and 41% of women following a divorce claim to have been subjected to such violence[19]. During the period of time covered by this report, Police uncovered 20 716 cases of domestic violence. Although violence at home, both mental and physical, is punishable under Polish law[20], this issue has been treated as a taboo subject, and therefore the actual number of women suffering from domestic violence is difficult to estimate. One of the reasons why women do not report being victims of domestic violence is that they do not believe in the effectiveness of legal protection. Despite numerous requests advanced by non-governmental organisations, work on an adequate law has not yet commenced. As of today, no order of protection has been introduced under which the woman – the victim of violence – would not need to leave home and it would be the perpetrator who would be obliged to move. The number of adequate shelters for women is insufficient. Beyond that, there are no suitable programmes in violence prevention and sex education. However, the topic of domestic violence has recently become the subject of public discussions and violence at home has been generally condemned. This may present an opportunity for the improvement in the situation of women who fall victim to such violence.

Reasons for concern:

- lack of required basic level of living standards to many detainees (in particular lack of adequate living space per detainee);
- number of officers and penitentiary system employees too small to ensure implementation of all the tasks of the Prison Service at an adequate level;
- many police lock-ups do not ensure the required basic level of living standards to arrested persons;
- inadequate efforts to fight domestic violence;
- inadequate efforts to fight against the brutal demeaning of young conscripts by their senior colleagues in military service.

[17] Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego (Dz.U. z 1994, nr 111, poz. 535) [The Law on the Protection of Mental Health of 19 August 1994 (The Official Journal of 1994, No. 111, item 535)]
[18] Information from the Office for Patients' Rights of 6 August 2003, No. BPP-726-076-380/BG/03
[19] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003,
[20] Art. 207 Kodeksu Karnego z 6 czerwca 1997 (Dz.U. z 1997 r. nr 88, poz. 553 z późn. zm.) [Art. 207 of the Penal Code of 6 January 1997 (The Official Journal, 1997, No. 88, item 553, as amended)]

Practice of national authorities:

Poland is a country of origin, a transit country and a destination country for trafficking victims.

In 2003 (up to 30 June) the police uncovered 23 cases of pimping, 141 cases of drawing financial benefits from prostitution, 2 cases of abducting a person abroad for prostitution purposes and 5 cases of trafficking in human beings.

In 2003 the Border Guard sent four indictment acts to the courts in cases of trafficking in human beings. The proceedings in one case were suspended, and one case was transferred to the public prosecutor's office. In two cases investigation is still taking place[21]. According to information provided by the National Public Prosecutor's Office, the scale of the problem as well as the prosecution of offences is on the increase. The lack of effective procedures for dealing with minor victims of human trafficking and prostitution remains a problem.

The District Court in Warsaw sentenced three Bulgarians to nine, five and four years in prison for pimping and human trafficking. In the District Court in Rzeszów a trial is taking place against 15 persons from Poland and Ukraine who are accused of trafficking in women[22].

For the past 18 months, meetings have been held in the framework of the UN's international programme "Criminal Justice Responses to Trafficking in Human Beings in the Czech Republic and Poland" developed by the Centre for Preventing Transnational Crime. The National Co-ordinator monitoring implementation of this programme in Poland was appointed on 9 May 2003. On 16 September 2003 the National Programme against trafficking in human beings was approved by the Council of Ministers. In the National Public Prosecutor's Office work is in progress on the preparation of methodological guidelines for prosecutors conducting investigations relating to trafficking in human beings.

Reasons for concern

- lack of effective procedures for dealing with minor victims of human trafficking and prostitution.

Article 5. Prohibition of slavery and forced labor

National legislation, regulation and case law

On 18 December 2002 the Sejm (the lower chamber of Polish Parliament) passed the Law on ratification of the Protocol signed on 4 October 2001 to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime[23].

[21] On the basis of the data obtained from the Operation and Investigation Management of the Main Headquarters of the Border Guard. Statistical data for the period from January 1st to October 31st, 2003.

[22] Daily „Rzeczpospolita" of 6 August 2003, p. C2

[23] Ustawa z 18 grudnia 2002 roku o ratyfikacji protokołu o zapobieganiu, zwalczaniu oraz karaniu za handel ludźmi, w szczególności kobietami i dziećmi, uzupełniającego Konwencję Narodów Zjednoczonych przeciwko międzynarodowej przestępczości zorganizowanej, przyjętego przez Zgromadzenie Ogólne Narodów Zjednoczonych 15 listopada 2000, .(Dz., 2003r., nr 17, poz. 153)
[The Law of 18 December 2002 on ratification of the Protocol signed on 4 October 2001 to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, adopted by the UN General Assembly on 15 November 2000, .the Official Journal., 2003, No. 17, item 153)]

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

International case law and concluding observation of international organs

In December 2002 and in the first half of 2003 the European Court of Human Rights delivered two judgments on the violation by Poland of Article 5(3) of the ECHR concerning imposing detention on remand by the prosecutor[24]. The Court found that the applicant's right to be brought "before a judge or other officer authorised by law to exercise judicial power" was not respected. In another case, Jasinski v. Poland, the Court decided that the complaint in this respect is admissible[25]. In the case Matwiejczuk v. Poland the Court found a violation of Art. 5(3) of the ECHR on the grounds of the unjustified length of detention on remand suffered by the applicant[26]. All these cases concerned complaints lodged with the Court in 1996 or 1997. Since that time the legal situation had changed dramatically and according to the ECHR standards, detention on remand can only be imposed by a judge. The length of detention on remand has however remained a serious problem.

On 3 December 2002 the European Court of Human Rights found a violation by Poland of Article 5(1b) of the ECHR on account of unjustified detention in police custody of a person who refused to undergo psychiatric examination, twice before the examination for the period of 8 and 28 days and of detention in custody after the examination for respectively one and eight days. The Court found that the Polish authorities had failed to draw a proper balance between the importance of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty[27].

In another case, the Court delivered a judgment on violation of Art. 5(1) on the basis of detention on remand without legal grounds, after the court's decision had expired[28]. In the case filed by citizens of Libya who were detained in the transit zone of Warsaw airport waiting for expulsion, without any legal grounds and with the violation of legal procedures, the Court also found a breach of Art. 5(1) of the ECHR.[29].

In one of the cases the Court found the violation of Art. 5(4) on the grounds of inadequacy and not adversarial proceedings to review the lawfulness of detention[30].

National legislation, regulation and case law

According to the Law on Granting Protection to Aliens within the Territory of the Republic of Poland of 23 June 2003, which entered into force on 1 September 2003[31], third country nationals who - on the day of filing an application for the granting of refugee status - do not have the right to enter the territory of Poland, stay illegally on Poland's territory, have illegally crossed or attempted illegal crossing of Poland's border or who previously received an expulsion decision, will be placed in a guarded centre or expulsion detention centre. The period must not exceed one year.

[24] Eur. Ct. H.R. Salapa v. Poland, judgment of 19 December 2002, appl.No. 35489/97, Eur, Ct. H.R, *Klamecki v. Poland* (no.2), judgment of 3 April 2003, appl. No.31583/96
[25] Eur, Ct. H.R *Jasinski v. Poland,* decision of 21 January 2003, appl. No. 30865/96
[26] Eur, Ct. H.R *Matwiejczuk v. Poland*, judgment of 2 December 2002, appl. No. 37641/97
[27] Eur. Ct. H.R. *Nowicka v. Poland*, judgment of 3 December 2002, appl. No. 30218/96
[28] Eur. Ct. H.R. *Góral v Poland,* judgment of 30 October 2003, appl. No. 38654/97
[29] Eur. Ct. H.R. *Shamsa v. Poland,* judgment of 27 November 2003, appl. No. 45355/99
[30] Eur. Ct. H.R *Salapa v. Poland*, judgment of 19 December 2002, appl. No. 35489/97
[31] Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (Dz.U. nr 128, poz 1176) [The Law on Granting Protection to Aliens within the Territory of Republic of Poland, The Official Journal 2003, No. 128, item 1175].

A judge who takes a decision to place a foreigner in a guarded centre or an expulsion detention centre has no choice. He or she only checks whether statutory conditions are adhered to. If so, the judge has to deprive the foreigner of liberty. Such a solution is incompatible with Art. 5 para. 3 of the ECHR because of the too limited scope of the judge's decision.

Those provisions of the Law on Granting Protection to Aliens within the Territory of the Republic of Poland raise reservations also from the point of view of Article 31 of the Geneva Convention Concerning Refugee Status, which provides that the Contracting State shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened (...), enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Practice of national authorities

Detention on remand remains the most frequently applied preventive measure in criminal cases. Another serious problem is the lengthy period of such detentions. Approximately 13% of persons detained on remand by regional courts and 20% of those detained on remand detention pursuant to a decision of district courts remained in remand prisons for two or more years. Only a small percentage (approx.10%) of appeals against detention on remand were allowed and remand was transformed into a less severe measure, mainly police surveillance.

Requests by public prosecutors addressed to the courts for application or prolongation of detention on remand are frequently general, vague, and without specific evidence[32]. All too often the reasons for decisions provided by courts fail to indicate the reasons for detention on remand ensuing from circumstances pertaining to a specific case and quoting solely the wording of the relevant provisions[33].

Police officers frequently violate procedures binding during arrest. In many cases they prepare documentation incorrectly and do not always respect the rights of arrested persons, in particular the right to information on the reason of arrest and on the other rights to which a detainee is entitled. There have been cases of police brutality during arrest[34].

Mentally disabled persons are not adequately protected during proceedings concerning legal incapacitation. Provisions regarding the legal incapacitation proceedings are frequently breached: decisions are often taken in the absence of the persons concerned without providing them with proper legal representation[35].

Poland has not yet implemented conclusions ensuing from the judgment of the European Court for Human Right in the case Witold Litwa vs. Poland[36] regarding consideration of the possibility of applying towards intoxicated persons less severe measures than a sobering-up centre so that detention in such an institution remains the last resort.

The Constitutional Tribunal found certain provisions of the law on education in sobriety and the fight against alcoholism[37] incompatible with the Constitution due to – inter alia – failure to guarantee to persons brought to a sobering-up centre the right to participate in the complaint

[32] Daily "Rzeczpospolita" of 31 March 2003, p.C1
[33] E.g. a decision by the Regional Court for Warszawa Śródmieście II Penal Department, No. II K 3463/02
[34] S. Cybulski, Policjanci i ich klienci...; op. cit. p. 62
[35] Information by the Ombudsman, RPO Bulletin No. 47, Warsaw 2003
[36] Eur. Ct. H.R., *Witold Litwa v. Poland,* judgment of 4 April 2000, appl. No. 16629/95
[37] Ustawa z dnia 26 pazdziernika 1982 o Wychowaniu w Trzezwosci i zapobieganiu alkoholizmowi (Dz.U. z 2002 r., nr 147, poz. 12310) [The law on Education in Sobriety and the Fight against Alcoholism of 26 October 1982 Text after amendments: the Official Journal of 2002, No. 147, item 1231]

examination procedure[38], for the reason of breaching the rules of fairness of judicial procedure. However, work on necessary changes to those provisions adjusting them to the requirements of Article 45, paragraph 1 of the Constitution (right to a fair and public hearing of the case, without undue delay, before a competent, impartial and independent court) have not yet been undertaken[39].

Many intoxicated persons are detained or brought to police stations instead of sobering-up centres for the purpose of sobering up. Frequently these persons are unaware of their rights and obligations throughout their detention in a Police station. This problem was the subject of an intervention by the Ombudsman directed to the Chief Police Commander[40]. In his response, the Chief Police Commander informed the Ombudsman that the regulation draft prepared by the Police in 2001 was submitted to the Ministry of Internal Affairs and Administration and it is now being discussed in cooperation between various parts of the Government[41].

Reasons for concern

- scope of the decision of a judge placing a foreigner in a guarded centre or an expulsion detention centre too limited and incompatible with Art.5 para.3 of the ECHR;
- application of detention on remand too frequent;
- too long periods of detention on remand in criminal cases;
- requests by public prosecutors addressed to the courts concerning detention on remand frequently too general;
- courts' decisions concerning detention on remand frequently too general;
- frequent violations by police officers' procedures binding during arrest;
- mentally disabled persons are not adequately protected during proceedings concerning legal incapacitation;
- failure of implementation of conclusions from the judgment in the case Litwa v. Poland regarding consideration of the possibility of applying less severe measures than a sobering – up centre to intoxicated persons.

Article 7. Respect for private and family life

International case law and concluding observation of international organs

In three cases the European Court of Human Rights has delivered judgments on violation of Art. 8 of the ECHR (right to respect correspondence). In two of them the complaint concerned control of correspondence of persons detained on remand with the European Commission of Human Rights, by prison guards[42].

In one case the Court found the violation of Art. 8 of the ECHR on account of the court's limitation of the rights of family members to visit the detained person to one visit per month since the person refused to undergo psychiatric examination[43]. In another case the Court ruled

[38] Judgment of the Constitutional Tribunal of 11 June 2002, No. SK 5/02, the Official Journal of 2002, No. 84, item 763.
[39] General Approach by the Ombudsman to the Minister of Health (RPO-355719-XI/00) of 16 April 2003.
[40] General Approach by the Ombudsman to the Chief Police Commander (RPO-179236-VII/95/16) of 13 February 2003
[41] Reply of the Chief Police Commander to the Ombudsman of 4 March 2003
[42] Eur. Ct. H.R. *Sałapa v. Poland* judgment of 19 December 2002, appl. No. 35489/97, Eur. Ct. H.R. *Góral v. Poland* judgment of 30 October 2003 appl. No. 38654/97; Eur. Ct H.R. Matwiejczuk v. Poland of 2 December 2003, appl. No. 37641/97
[43] Eur. Ct. H.R. *Nowicka v. Poland*, judgment of 3 December 2003, appl. No. 30218/96

on the violation of the right to respect for private life through repeated orders for psychiatric reports[44].

The UN Committee on Economic, Social and Cultural Rights in Concluding Observations on Poland[45] emphasised the insufficient level of education in the field of sexual and reproductive health, inadequate family planning services, insufficient access to cheap contraception and restrictive legislation on abortion. In his Report, the Commissioner for Human Rights of the Council of Europe points to cases when women were refused consent to have an abortion even in cases when it would be legally admissible. Women were also refused access to prenatal diagnosis. An important problem is that programmes of sex education have been removed from school curricula and replaced with classes in introduction to family life[46].

National legislation, regulation and case law

Telephone network operators lodged a complaint with the Constitutional Tribunal concerning regulations imposing upon them an obligation to make available at each request by state security agencies and at their own cost, technical devices and all requested data[47].

On 9 May 2003, the Sejm adopted the Law on the Military Information Services, granting a significant freedom to those services in their operational activities[48].

The Law of 27 June 2003 on the establishment of Voivodeship Tax Boards and the amendment of the Law on fiscal control (The Official Journal, 2003, No. 137, item 1302)[49] introduces the possibilities for fiscal intelligence to obtain, collect, process and use information on persons, incomes, turnovers, belongings and proprietary rights in the form of operational and cognitive activities, including the activities allowing for obtaining information and fixing of traces and evidence in a confidential way and to obtain data on telecommunication connections without the court's assent only at the written request of the General Inspector of Tax Control.

After the intervention of the Ombudsman[50] in the amendment to the Law on Border Guard there have appeared proposals to apply psycho-physical examinations to candidates to this public service. So far these issues were regulated in provisions at the sub-statutory level.

The Ombudsman also pointed out that the obligation of officers who begin their duties to declare the possession of more than PLN 200 and the prohibition to use private mobile phones when on duty, which was introduced by the Chief Customs Officer, violates Art. 49 of the Constitution (the freedom and privacy of communication)[51].

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[44] Eur. Ct. H.R. *Worwa v. Poland,* judgment of 27 November 2002 appl. No. 26624/95

[45] Concluding Observations of 19 December 2002, E/C.12/1/Add.82

[46] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003,

[47] Rozporządzenie Ministra Infrastruktury z dnia 24 stycznia 2003 roku w sprawie wykonywania przez operatorów zadań na rzecz obronności, bezpieczeństwa państwa oraz bezpieczeństwa i porządku publicznego, (Dz.U. 2003 r., nr 19, poz. 166)[Regulation of the Minister of Infrastructure on performance by operators of tasks for the benefit of defence, security of state as well as public security and order of 24 January 2003, the Official Journal 2003, no. 19, item 166]

[48] Ustawa z dnia 9 lipca 2003 roku o Wojskowych Służbach Informacyjnych (Dz.U. z 2003 r., nr 139, poz. 1326) [Law of 9 July 2003 on the Military Information Services (The Official Journal, 2003, No. 139, item 1326)]

[49] Ustawa z dnia 27 czerwca 2003 roku o utworzeniu Wojewódzkich Kolegiów Skarbowych oraz zmianie ustawy o kontroli skarbowej (Dz.U. z 2003 r., nr 137, poz. 1302) [The Law on fiscal control (The Official Journal, 2003, No. 137, item 1302)]

[50] General Approach by the Ombudsman to the Minister of Interior and Administration (RPO-413939-IX/02) of 1 January 2003.

[51] General Approach by the Ombudsman to the President of the Council of Ministers (RPO-426316-IX/02) of 1 July 2003

Reasons for concern

- insufficient level of education in the field of sexual and reproductive health:
- inadequate family planning services;
- insufficient access to cheap contraception;
- sex education programmes removed from school curricula and replaced with classes in introduction to family life;
- regulations imposing upon telephone network operators an obligation to make available at each request by state security agencies and at their own cost, technical devices and all requested data;.
- vast broadening of the possibilities for fiscal intelligence to act without the court's consent

Article 8. Protection of personal data

National legislation, regulation and case law

The Law on Electronic Provision of Services of 18 July 2002 has been in force since 10 March 2003[52]. It specifies the modality for personal data protection of persons using the services thus provided. The Law makes the sending of a commercial offer dependent on the prior consent of the addressee. The consent cannot be alleged and can be withdrawn at any time. The Law also outlaws the sending of unrequested commercial information to a specified recipient of electronic mail. The Law also regulates the principles of excluding of responsibility of entities that provide services electronically. Under the regulations the provider of services is not responsible, e.g. for the data kept if he/she is not the initiator of the transmission, does not select the recipient, does not remove and does not modify the data transmitted. When the service provider obtains reliable information or an official notification on the unlawful character of the data or the activity connected with the data, he or she is obliged to make access to the data impossible.

In the first half of 2003, amendments to the Lustration Law of 11 April 1997 [53] were twice the subject of a debate before the Constitutional Tribunal. In its judgment of 5 March 2003 the Constitutional Tribunal declared as incompatible with Article 47 of the Constitution (the right to legal protection of private life) those provisions of the Law that make confidential or exclude from obligation to make public the data concerning the type and period of service in the state security bodies [54].

Practice of national authorities

The body appointed by the Sejm responsible for personal data protection is the General Inspector for Personal Data Protection (Generalny Inspektor Ochrony Danych Osobowych - GIODO).

[52] Ustawa z dnia 18 lipca 2002 o świadczeniu usług drogą elektroniczną (Dz.U. z 2002 r. nr 144, poz. 1204) [The Law on Electronic Provision of Services of 18 July 2002, The Official Journal of 2002, no. 144, item 1204]

[53] Ustawa z dnia 11 kwietnia 1997 o ujawnianiu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1955-1990 osób pełniących funkcje publiczne; (tekst jednolity: Dz.U.1999r., nr 42, poz.428, ze zmianami w latach 2000-2003 (ostatnia: z 14 marca 2003r., Dz.U. 2003r., nr 44, poz.390) [The Law on disclosing work or service in state security bodies or co-operation therewith in the years 1955-1990 of persons fulfilling public functions of 11 April 1997; text after amendments: The Official Journal of 1999, no. 42, item 428, as amended in the years 2000-2003 (the last amendment: of 14 March 2003, The Official Journal of 2003, no. 44, item 390)]

[54] Judgment of the Constitutional Tribunal of 5 March 2003, No. K 7/01; The Official Journal of 2003, No. 44, item 390

According to GIODO, the level of familiarity of the Law on Personal Data Protection of 29 August 1997 [55] remains unsatisfactory. The weakest element of the personal data protection system is the underestimation of the importance of the need to protect personal data on the part of entities covered by provisions of this Law. Violations most frequently identified in the process of investigations carried out by the General Inspector include: processing of personal data without a legal basis (also including making personal data available to third parties); processing incompatible with its purpose; inadequacy of data processing; failure to inform the person concerned by the data; inadequate protection of personal databases[56].

Publication on the web of so-called "black lists" of unreliable customers remains a certain problem. They do not follow the requirements of the Law on Personal Data Protection. Pursuant to the Law, publication in the press or on the Internet of personal data of customers who failed to perform under a concluded contract is only possible with their consent. Conditions revealing information concerning payment credibility of consumers to third parties can also be found in the Law on Disclosing Economic Information of 14 February 2003[57]. However, there is the risk that the Law may cover many categories of persons whose data could be revealed in the situation of very small financial obligations.

According to GIODO, the law on personal data protection is often breached by political parties that collect votes of their supporters and on many occasions copy the information about them without their consent and use it, e.g. in the next elections, although they have not got the right to keep and copy such information[58].

Unclear regulations provide an opportunity for the police to maintain fingerprint cards and photographs of persons acquitted by final court decisions or persons for whom criminal investigation was discontinued.

The issues of personal data protection were also the subjects of cases before the Supreme Administrative Court (Naczelny Sąd Administracyjny - NSA). In 2003 the NSA reversed two decisions of GIODO. In one of its judgments the NSA confirmed the patient's right to obtain all information concerning him/her from medical documentation of a hospital or dispensary[59]. In another case the NSA confirmed that banking secrecy covered both bank operations and customers' data[60]. It also decided that the Municipal Guard are authorised to request from the individual their personal data when it could be justified by the necessity of obtaining them[61].

Reasons for concern

- unclear regulations providing an opportunity for the police to maintain fingerprint cards and photographs of persons acquitted by final court decisions or persons for whom criminal investigation was discontinued.

[55] Ustawa z dnia 29 sierpnia 1997 roku o ochronie danych osobowych (Dz.U. z 1997 r., nr 133, poz. 983 [The Law on Personal Data Protection of 29 August 2003, The Official Journal of 1997, No. 133, item 983].
[56] GIODO information of 21 July 2003 No. GI-DP-024/789/03/1128, and of 9 December 2003 No. GI-DP-024/1329/03/1851
[57] Ustawa z dnia 14 lutego 2003 r. o udostępnianiu informacji gospodarczych (Dz.U. z 2003 r., nr 50, poz. 424) [Law on Disclosing Economic Information of 14 February 2003, The Official Journal of 2003, No. 50 item 424]
[58] Daily „Rzeczpospolita" 21 October 2003, p. A4
[59] Judgment of Seven Judges of the General Administrative Chamber of Supreme Administrative Court of 19 May 2003, No. O SA 1/03
[60] Judgment of Supreme Administrative Court of 4 April 2003, No. II SA 2985/02
[61] Judgment of Supreme Administrative Court of 28 January 2003, No. II SA 2210/01

Article 9. Right to marry and right to found a family

Practice of national authorities

Registrar offices in many cases give incorrect instructions and refuse to accept the certificates of marriage from foreigners who are in Poland illegally, although they fulfil all conditions listed in the Law on the acts of marital status of 29 September 198662. In one such case, following an appeal against the negative decision of the Head of the registrar's office, the District Court in Chełm issued a decision that there were no obstacles to contract marriage63.

Reasons for concern

- cases of incorrect instructions and refusal to accept the certificates of marriage from foreigners who are in Poland illegally.

Article 10. Freedom of thought, conscience and religion

Practice of national authorities

Currently there are 154 churches and religious organisations registered in Poland, of which only nine were registered after the amendment of the Law of 17 May 1989 on the guarantees of the freedoms of conscience and confession, which has significantly increased the requirements for registration of a church or a religious union. In the negative replies to the applications for registration of a given church or a religious organisation there appeared the justification "lack of characteristics of a religion", although the concept of religion has not been defined in Polish law and religious experts use different definitions. Religious communities also have problems with renting premises for their activities[64].

Under the Constitution, the Law on the guarantees on the freedom of conscience and confession and the Law on the general duty of protection of the Republic of Poland, persons whose religious convictions or proclaimed moral principles make it impossible for them to serve in the military and who do not use deferment of military service, can apply for an alternative service[65].

According to the information obtained in the Main Headquarters of the Polish Army, on average 2% of conscripts apply for the replacement of compulsory military service with an alternative service and the majority are given consent. It remains a problem, however, that the Ministry of Economic Affairs, Employment and Social Policy does not ensure employment possibilities for the persons enlisted for alternative service.

In most schools, classes in ethics for pupils who do not attend classes in religion have not been organised. The survey carried out in 2002 by the Helsinki Foundation for Human Rights

[62] Ustawa z dnia 29 września 1986r. Prawo o aktach stanu cywilnego, Dz.U. z 1986 r. nr 36, poz. 180 [The Official Journal of 1986 No. 36 item 180]

[63] Judgment of the District Court in Chełm, III Family and Minors Division, of 14 August 2003 r. (case No. III RNs 135/03)

[64] A. Mikulska, Wolność sumienia i wyznania, Raport z monitoringu (Freedom of conscience and religion, A monitoring report), the Helsinki Foundation for Human Rights, Warsaw 2002, pp. 70-72

[65] Art. 85 ust. 3 Konstytucji Rzeczypospolitej Polskiej, art. 3 ust. 3 ustawy z dnia 17 maja 1989 r. o gwarancjach wolności sumienia i wyznania (Dz.U. z 2000r., nr 26, poz. 319), art. 189 ust. 1 ustawy z dnia 21 listopada 1967 r. o powszechnym obowiązku obrony Rzeczypospolitej Polskiej (Dz.U. z 1992 r. nr 4, poz. 16) [Art. 85 par.3 of the Constitution of the Republic of Poland, , Art. 3 par.3 of the Law of 17 May 1989 on the guarantees of freedom of conscience and confession (The Official Journal, 2000, No. 26, item 319), Ar. 189 par. 1 of the Law of 21 November 1967 on the general duty of protection of the Republic of Poland (The Official Journal, 1992, No. 4, item 16)

suggested that ethics classes were held in less than 2% of primary schools, 7% of gymnasiums and 8% of secondary schools. The scale of the phenomenon remains basically unchanged.

Reasons for concern

- too restrictive approach of authorities taking decisions on the registration of churches or religious unions;
- failure of the Government to ensure enough employment possibilities for persons enlisted for alternative service;
- failure in most schools to organise classes in ethics for pupils who do not attend classes in religion.

Article 11. Freedom of expression and of information

International case law and concluding observation of international organs

27 May 2003 the European Court of Human Rights found a violation of Art.10 of the ECHR in the case of Skałka v. Poland concerning a prisoner sentenced to imprisonment for insulting judges in a letter[66].

In the report on Poland the Commissioner for Human Rights of the Council of Europe expressed his worries about the lack of independence and impartiality of Polish media, in particular in relation to the National Council for Radio and Television (Krajowa Rada Radiofonii i Telewizji - KRRiT)[67].

National legislation, regulation and case law

In 2003 the Supreme Court, dealing with the matter of journalists' responsibility for factual presentation of described phenomena and events, stated that a journalist is only obliged to particular care and honesty in the process of collection and use of press material[68]. In another decision the Supreme Court, taking into account the cassation appeal filed by the Ombudsman in the criminal case of a journalist, stated that the freedom of the press also included the possibility to use exaggeration, or even provocation[69]. The Supreme Court also confirmed the existence of the right to express critical views on the activities of persons fulfilling important public functions[70].

Practice of national authorities

In the world ranking of press freedom, published for the first time by "Reporters without Borders", Poland came 29th[71].

From 2000 to 2003 in prosecutors' offices in Warsaw, 36 cases against journalists who revealed economic scandals or corruption were pending [72]. The legal basis of the proceedings are mostly articles of the Penal Code on disclosure of state and business secrets, obstruction

[66] Eur. Ct. H.R.: Skałka v. Poland, judgment of 27 May 2003, appl. No. 43425/98
[67] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4, Rec1589(2003) by the Parliamentary Assembly of the Council of Europe of 31 January 2003.
[68] Judgment of the Supreme Court of 14 May 2003, No. I CKN 463/01
[69] Daily " Rzeczpospolita" of 5 August 2003, p. C2
[70] Judgment of the Supreme Court of 10 April 2003, No. IV CKN 1901/00
[71] Information from the Center for Monitoring of Press Freedom available on the web page: http://www.freepress.org.pl/wolnosc.html
[72] Daily „Rzeczpospolita" of 12 November 2003, p. A1

of proceedings, disclosure of information from investigation without the prosecutor's consent and on insult and defomation by the media.

The Centre of Monitoring Press Freedom and the Ombudsman expressed their concern about the initiations of prosecution against investigating journalists working for important Polish newspapers (Życie Warszawy, Super Express and Rzeczpospolita), who were describing corruption scandals in which prominent Polish personalities were involved. In one of the cases the District Court in Jaworzno ordered the billings of the journalist's telephone conversations to be revealed in the trial against the person who was accused of commissioning the murder of the journalist in question. The disclosure of the billings would lead to the identification of the journalist's informant and would expose him or her to serious danger[73].

The Regional Court in Warsaw prohibited the newspaper from publishing any information on one of the suspects in a large corruption scandal until the proceedings in this case come to an end. The court considered the motion, although a ruling was previously made to dismiss the petition of the suspect to prohibit publications of information about him[74].

According to the World Association of Newspapers, the government blocks the privatisation of one of the biggest Polish dailies "Rzeczpospolita" and the prosecutor's office initiates criminal proceedings in matters relating to civil disputes among the shareholders who issue the newspaper. The notifications about the offence are made by the state shareholder of the company. A special commission set up by the Association investigated the matter in Poland and stated that taking into account the number and character of initiated proceedings, one may have the impression that the government has been trying to exert influence on the company's activity[75].

In the view of the Ombudsman, it has become necessary to introduce mechanisms that guarantee the independence of local press, which is particularly exposed to attacks by local authorities.[76]

Reasons for concern

- question of independence and impartiality of the National Council for Radio and Television;
- worrying number of prosecutions against journalists revealing economic scandals, corruption etc.;
- lack of mechanisms to guarantee the independence of local press

Article 12. Freedom of assembly and of association

National legislation, regulation and case law

The Law of 23 July 2003 on the amendment of the Law – Law on road traffic[77] came into force, which significantly limits the freedom of assembly. As opposed to the regulating principle of the organisation of assembly in the Law on assemblies[78], that required only the adequate authorities to be informed about the intention of organising an assembly, the

[73] Daily „Rzeczpospolita" of 25-26 October 2003, p. A1
[74] Daily „Rzeczpospolita" of 25 November 2003, p. A1
[75] Daily „Rzeczpospolita" of 21 November 2003, p. A3
[76] Daily „Rzeczpospolita" of 22 January 2003, p.C1
[77] Ustawa z dnia 23 lipca 2003r. o zmianie ustawy - Prawo o ruchu drogowym, Dz.U. z 2003 r. nr 149, poz. 1451 [The Official Journal of 2003 No. 149, item 1451]
[78] Ustawa z dnia 5 lipca 1990 r. Prawo o zgromadzeniach (Dz.U. z 1990, nr 51 poz. 297) [The Law on assemblies of 5 July 1990 (The Official Journal of 1990 No. 51, item 297)]

amendment introduces the need to obtain consent to organise certain types of assembly, with this consent being dependent on the fulfilling of many difficult conditions by the organisers – such as the requirement to present the bylaws of the assembly to be accepted by the authorities, the requirement to ensure adequate medical assistance, sanitary facilities, short-wave transmitters, life-saving equipment and fire extinguishers, warning and information signs, barriers and fences to separate the assembly. The permission to organise the event, in the form of an administrative decision, is given by a suitable body if the motion to organise the assembly was submitted at least 30 days before the planned beginning. The regulation concerns sport events, rallies, races, assemblies and other events that result in impediments in traffic or require a particular mode of road usage.

According to the "Solidarity" trade union, legal requirements will lead to high costs on the part of the organisers, which may in practice render the legal organisation of a mass street demonstration impossible.

Reasons for concern

- amendments of the law on road trafficking significantly limiting freedom of assembly.

Article 13. Freedom of the arts and sciences

National legislation, regulation and case law

The District Court in Gdańsk found an artist guilty of insulting religious feelings for the presentation in the Wyspa Gallery in Gdańsk of an installation – "Passion" – with the photography of male genital organs placed on a cross (the whole presentation, in addition to the object in the form of a cross, was composed of a video projection and a darkened interior). The Court sentenced the artist to six months' restriction of liberty through unpaid, supervised social work for 20 hours a month and a fine[79]. The artist filed an appeal against the judgment. The case is now in the Regional Court in Gdańsk.

Article 14. Right to education

Practice of national authorities

The government does not have reliable knowledge on the number of children not fulfilling the compulsory education duty and the systems of gathering and transferring of this data are not working properly.
Administrative penalties are rarely applied to parents who do not have regard for their children fulfilling the compulsory education duty[80]. The Helsinki Foundation for Human Rights consider that it is necessary to make the provisions on control of compulsory education duty and the change of practice of persons responsible for control – officials, school directors. The Ombudsman addressed the Minister of National Education and Sport on the score of control of fulfilment of the compulsory education duty and science[81].

Over 80% of children who receive individual education at home remain in this system for most of the time in their school education, although this should be a temporary solution. In the

[79] Judgment of the District Court in Gdansk, IV Penal Division , No. IV K 638/02, Daily „Rzeczpospolita" of 19-20 July 2003, p. C3
[80] Prawo do nauki, Raport z monitoringu [Right to education, A Monitoring Report], the Helsinki Foundation for Human Rights 2002, pp. 126-127
[81] General Approach by the Ombudsman to the Chairman of the Committee for Education, Science and Youth in the Sejm of 21 January 2003 (RPO/428299/03/XI)

new regulation of the Minister of National Education and Sport of 29 January 2003 on the way and mode of organisation of individual education of children and youth[82] there is no provision for individual education also at school. Under the regulation this can only happen at home where the child lives. This was a matter of intervention of the Ombudsman[83].

In December 2002 the Ombudsman filed a motion to the Constitutional Tribunal regarding the incompatibility of the conditions under which students are granted financial assistance with the Constitution. This issue is regulated in a legal act on a sub-statutory level. According to the Ombudsman, these conditions are not clear and should be specified in a legal act at the statutory level[84].

In his approach to the Minister of National Education and Sport the Ombudsman pointed out that the binding standards in human rights require much greater participation of parents and children in the process of education and upbringing than had been provided for in the legislation in force. However, according to the Ombudsman, the problem has been completely ignored in the government draft on the amendment of the Law on the system of education[85].

School authorities often refuse to accept children of foreigners who stay illegally in Poland. This practice violates Art. 28 of the Convention on the Rights of the Child and Art. 94a of the Law on the system of education.

Reasons for concern

- lack of proper control of the compulsory education duty;
- no provision for individual education at school;
- practice of school directors of refusal to accept children of foreigners who stay illegally in Poland;

Article 15. Freedom to choose an occupation and right to engage in work

National legislation, regulation and case law

The amendment of the Law of 14 December 1994 on employment and fighting unemployment[86] significantly increased the penalties for breaching its provisions. The minimum fines for working in the grey zone are PLN 3000 for the employer, PLN 500 for the employee (PLN 1000 for a foreigner). In the first six months of 2003 labour inspectors referred 3879 cases for penalties across the country. As a rule, courts apply extraordinary mitigation of penalty, use reprimands or refrain from imposing a penalty. In the view of judges, adjudged fines cannot fail to take into account financial means of the accused. However, in the assumptions of the draft of the Law on the promotion of employment, which is to replace the legislation in force, there is a proposal to increase the fines to a minimum of PLN 5000[87].

[82] Ustawa z dnia 20 grudnia 2002r. o zmianie ustawy o zatrudnieniu i przeciwdziałaniu bezrobociu, Dz.U. z 2003 r. nr 6, poz. 65 [The Official Journal of 2003 No. 6, item 65]
[83] General Approach by the Ombudsman to the Minister of National Education and Sport (RPO-435566-XI-ST/03) of 1 July 2003
[84] RPO-425313-XI/ST
[85] Information by the Ombudsman, RPO Bulletin No. 47, Warsaw 2003 p. 131
[86] Ustawa z dnia 7 września 1991 o systemie oświaty (Dz.U. z 1996 r. nr 67, poz. 329 z późn. zm) [The Law on the system of education of 7 September 1991 (The Official Journal of 1996, No. 67, item 329, with further amendments)]
[87] Daily „Rzeczpospolita" of 17 September 2003, p. C1,

Practice of national authorities

The rate of registered unemployment in Poland at the end of October 2003 was 17.4%[88].

Based on a study of economic activity of the population, the Main Office of Statistics estimates that approx. 900,000 persons are employed in the economic sector undeclared to the fiscal authorities[89].

Article 16. Freedom to conduct a business

National legislation, regulation and case law

A discussion on the Law on freedom of economic activity is currently underway. This Law would replace the Law on economic activity. It is to contain general regulations binding for entrepreneurs. Concrete changes in the law are to be included in law enforcement provisions. However, the drafts of those regulations contain many solutions that are incompatible with the provisions of the Law. This refers to, inter alia, the principles of control in enterprises, in particular the limitations of those controls and of their duration. In the law enforcement provisions there are no amendments relating to the application for particular permits although the Law on freedom of economic activity facilitates the procedure of applications for permits for particular types of economic activity. Although the draft law introduces a general principle of granting concessions by way of a tender, it follows from the law enforcement provisions that it does not refer to all types of concessions, e.g. for transfer of electricity.

On 25 September 2003 provisions of the amendment of the Civil Code came into force, which are to facilitate economic relations[90] through specification inter alia, of the concepts of an entrepreneur, an enterprise and a consumer, modification of the restrictions of concluding contracts, in particular of submitting electronic offers. According to the assumptions of the budget for 2004, taxes for economic activity for 2004 were decreased to 19% for vast majority of entrepreneurs.

The Ombudsman filed a motion to the Constitutional Tribunal against the provisions of the Law amending the Law on municipality self-government that imposed on the persons fulfilling public functions the duty of making statements on wealth possessed by them and the members of their families as well as on economic activity pursued by these persons. If this requirement is not met, the mandate of the municipal councillor expires. According to the Ombudsman, the provisions of the Law transgress the proper balance between the public interest (fighting corruption) and the freedom to pursue economic activity[91].

Article 17. Right to property

National legislation, regulation and case law

Thus far, no "re-privatisation" law has been adopted that would comprehensively regulate issues of property restitution or compensation to owners of properties nationalised or otherwise taken in the past by the state or to their successors. The problem concerns not only Poles but also inter alia, the Ukrainian community displaced as a result of operation "Wisła"[92]

[88] Data from the Main Statistical Office available on the web page: http://www.stat.gov.pl.
[89] Gazeta Ekonomiczna, weekly feature of the Daily „Gazeta Prawna" of 28 February - 2 March 2003
[90] Daily „Rzeczpospolita" of 23 September 2003, p. C1
[91] Daily „Rzeczpospolita" of 5 May 2003, p. C1
[92] General Approach by the Ombudsman to the President of the Council of Ministers (no. RPO-422775-XV/02) of 6 February 2003

immediately after WW II, and restitution of properties belonging to the Jewish community, the value of which is estimated at two billion USD[93]

On 16 July 2003 a Law of 11 April 2003, regulating the issue of trading in arable land, came into force[94]. According to the Law, the Agency of Arable Property always has the pre-emption right to each piece of land sold when the transaction does not serve to increase a family farm and the buyer does not live in the rural municipality where the land is situated or in the neighbouring municipality. This refers to all legal ways of property transfer, including exchange, division of joint property after divorce, and non-cash contribution of arable land to a company under commercial law.

In its judgment of 14 May 2003 the Supreme Court found that there are no legal obstacles to restitution of property under the framework of the so-called "small privatisation", i.e. return to owners of the title to properties taken pursuant to the nationalisation decree of 18 May 1918, if they were invalidated due to incompatibility with the decree [95].

In its resolution of 21 March 2003[96] the Supreme Court decided that owners of land in Warsaw who, after being deprived of property pursuant to the decree of 26 October 1945 on Ownership and Usufruct of Lands on the Territory of the Capital City of Warsaw[97], did not receive – in violation of this law – hereditary tenure or right to building the land over, have the right to ask for compensation from the city for those lands.

The Constitutional Tribunal, in its judgment of 25 November 2003, decided on the unconstitutionality of the Law submitted to the President of the Republic of Poland for signature declaring a part of the Hel Peninsula to be an area of particular importance for national defence. This Law introduced a restriction to testate succession, making the acquisition of real estate on the Hel Peninsula dependent on the permit of the Navy Commander. The provision only concerns testamentary heirs without reference to legal heirs. According to the Tribunal, the objective of the Law, which is to ensure the security and defence readiness of the state, does not justify the division of heirs. The Tribunal declared this provision incompatible with Art. 64 of the Constitution (the right to ownership, other property rights and the right of succession)[98].

Practice of national authorities

The situation of the victimized former owners of nationalised enterprises pursuant to the Law of 3 January 1946 on Transfer to State Ownership of Basic Branches of National Economy (the law on nationalisation) [99] is rendered difficult by the fact that the Council of Ministers has so far failed to fulfil its statutory duty to issue a regulation concerning the rules and modalities for payment of compensation. The wronged persons lodged a constitutional complaint with the Constitutional Tribunal against the blocking of the recourse to law for the realisation of compensation claims and the Prime Minister's inaction[100]. At the moment, they can apply for restitution or compensation only when a given decision on nationalisation has been invalidated.

[93] Daily „Rzeczpospolita" of 13 June 2003, p. C1
[94] Dz.U. z 1946 r. nr 3, poz. 95 [The Official Journal of 1946, No. 3, item 95]
[95] Daily „Rzeczpospolita" of 15 May 2003, p. C2.
[96] Resolution of Supreme Court of 21 March 2003, No. III CZP 6/03.
[97] Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m.st. Warszawy (Dz.U. z 1945 r. nr 50, poz. 279) [The Decree on Ownership and Usufruct of Lands on the Territory of the Capital City of Warsaw of 26 October 1945, [The Official Journal of 1945, No. 50, item 279].
[98] Judgment of the Constitutional Tribunal of 25 November 2003 r. No. K 37/02
[99] Judgment of the Constitutional Tribunal of 25 November 2003 r. No. K 37/02
[100] Daily „Rzeczpospolita" of 30 June 2003, p. C1

A profound and commonly acknowledged crisis currently experienced by the administration of justice, which is discussed in more detail in another part of this report, has led to a situation in which a significant number of cases concerning ownership issues wait too long for decisions by civil or economic courts and for their execution. This raises a problem not only of the respect of the right to fair trial in reasonable time, but also – at least in more drastic situations – a serious issue under Article 1 of Protocol no. 1.

Rights of Poles displaced from Poland's former eastern borderlands after World War II to compensation for properties they were forced to leave behind:

87,000 claims by Poles displaced from Poland's former eastern borderlands after World War II and their successors requesting compensation for abandoned properties remain to be considered[101]. Until recently, courts dismissed their claims justifying their rulings by the absence of a relevant official publication of so-called republican agreements of 1944 between Poland, Ukraine and Belarus, which stipulated the right to compensation for abandoned properties. Only the District Court in Kraków delivered two judgments in favour of former inhabitants of the eastern borderlands.

At the same time the NSA ruled that the aforementioned republican agreements are valid and are still in force [102]. According to this ruling, the Minister of Foreign Affairs should request the Prime Minister to announce them officially.

Despite the judgment of the Constitutional Tribunal[103] beneficial for former inhabitants of the eastern borderlands, granting them the right to make bids in public tenders organised by specialised government agencies administering the state-owned real estate (Agency of Military Property and Agency of the Agricultural Property of the Treasury), complicated legal problems still seriously limit the possibility to exercise those rights.

The former inhabitants of the eastern borderlands have already lodged several hundred complaints concerning the refusal to grant compensation with the European Court of Human Rights. In one of these cases, Broniowski v. Poland[104], where the plaintiff claimed a violation of Article 1 of Protocol No. 1 to the ECHR, the Court declared the complaint admissible and the judgment of the Grand Chamber of the Court is expected soon.

On November 12 the Sejm adopted a Law on pecuniary settlement of the state with the former inhabitants of the eastern borderlands. Under this law the persons who have not yet received compensation for lost property shall receive in compensation 15% of the value of their property, but not more than PLN fifty thousand. The organisations representing the former inhabitants of the eastern borderlands have declared that they will file an appeal to the Constitutional Tribunal on the grounds that the value of the compensation has been decreased[105].

In the precedent ruling of 21 November 2003[106] the Supreme Court recognised the rights of the former inhabitants of the eastern borderlands to compensation for the property they were made to leave behind in the East. The Supreme Court reversed the judgments of the courts of the first and second instance and decided that the case should be reconsidered in the recognition that the republican agreements were valid and should be officially published. In

[101] Daily „Rzeczpospolita" of 22 May 2003, p. C2
[102] Agreements were entered into force in 1944. On 9 September 1944 after ratification by the Country's National Council. Judgments of NSA of 29 May 2003, No. II SAB 419 and II SAB 420
[103] Judgment of the Constitutional Tribunal of 19 December 2002, No. K.33/02; Official Journal of 2003, No. 1 item 15
[104] Eur. Ct. H.R., (dec.), appl. No. 31443/96, 19 December 2002, Grand Chamber
[105] Daily „Rzeczpospolita" of 14 November 2003, p. C1
[106] Judgment of Supreme Court of 21 November 2003, No. I CK 323/02

the view of the Tribunal, in the situation where the right of the former inhabitants of the eastern borderlands to compensation has not been properly realised as a result of the length of the authorities, they deserve compensation for the decrease in value of the rights they are entitled to.

Reasons for concern

- failure to adopt "re-privatisation" law that would comprehensively regulate issues of property restitution or compensation to owners of properties nationalised or otherwise taken in the past by the state or to their successors;
- length of proceedings in civil or economic cases and delays with execution of judicial decisions.

Article 18. Right to asylum

National legislation, regulation and case law

Under Polish legislation the institution of asylum was separated from refugee status. The granting of refugee status is regulated by the Law on Granting Protection to Aliens within the Territory of the Republic of Poland, pursuant to the Convention relating to the Status of Refugees. Asylum is a separate issue regulated by Article 50 of the same law. Pursuant to the wording of this article "a third country national can, at their own request, receive asylum in the Republic of Poland when this is required for the purpose of their protection and when it is recommended due to an important interest of the Republic of Poland." However, requests for asylum pursuant to Article 50 are made very rarely.

Practice of national authorities

Cases of refusal of entry into the territory of Poland to non-nationals applying at the border for refugee status indicated in the Report of the Commissioner for Human Rights of the Council of Europe[107] are presently very infrequent.

There are many cases however when the statutory six-month period for issuing a decision is exceeded. There are also such extreme cases, such as that of an Armenian – a Jehovah witness – who has been waiting for a final decision since 12 September 1996. In this case the NSA on 1 June 2003 quashed the administrative decision again[108] and the case was sent back to the first instance, i.e. the President of the Office for Repatriation and Aliens.

Reasons for concern

- number of cases exceeding the statutory 6-month period for issuing a decision on a refugee status.

[107] Report of the Commissioner for Human Rights of the Council of Europe on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4 p. 15-16.
[108] Judgment of Supreme Administrative Court of 1 June 2003, No. VSA 3034/02

Article 19. Protection in the event of removal, expulsion or extradition

National legislation, regulation and case law

The new Law on Aliens of 23 June 2003 specifies the period of stay in a guarded centre or expulsion detention centre, which shall not exceed 90 days. However, this period can be prolonged up to a maximum of one year if the expulsion decision cannot be executed because of the foreigner's fault. This regulation raises serious doubts as to whether it observes the rule of proportionality.

The law on granting protection to foreigners on the territory of the Republic of Poland introduced the institution of tolerated residence for a foreigner who cannot be expelled to his/her country, in particular when this expulsion could only be to a country where he or she could be subject to torture or inhuman or degrading treatment or punishment or be compelled to work or be deprived the right of a fair trial or be punished without legal grounds in the meaning of the ECHR or when this foreigner is a spouse of a Polish national.

Practice of national authorities

There were two cases of deportation of Russian citizens of Chechen nationality from the territory of the Republic of Poland, although this could have exposed them to torture, inhuman or degrading treatment or punishment on the territory of the Russian Federation. One of the cases was that of a person who, on many occasions, illegally crossed the state border between Poland and Germany. However, in accordance with the reports of international organisations on the situation in Chechnya, in spite of violation of the Polish law, the expulsion of those persons must be interpreted as violation of Art. 3 of the ECHR.

Reasons for concern

- serious doubts as to whether the provision of the new Law on Aliens of 23 June 2003 specifying that a period of stay in a guarded centre or expulsion detention centre, which shall not exceed 90 days can be prolonged up to a maximum of one year if the expulsion decision cannot be executed because of the foreigner's fault, does observe the rule of proportionality.
- cases of expulsion of Chechens to the Russian Federation.

CHAPTER III : EQUALITY

Article 20. Equality before the law

National legislation, regulation and case law

The amendment of the Penal Code, which entered into force on 1 July 2003, introduces regulations aimed at preventing corruption. Under Art. 230a of the Code, the penalty specified in the Code does not apply to the person who granted or proposed to grant financial benefits in return for intervention in resolving a case in a state institution, in local authorities, in an international organisation or in an entity having public funds at its disposal that would involve unlawful exertion of influence on decisions, activities or omission by this person fulfilling a public function, if he or she informed a law enforcement organ about this fact and revealed all circumstances of the offence before this organ obtained this information[109].

[109] Art. 230a Kodeksu Karnego z 6 czerwca 1997 (Dz.U. z 1997 r. nr 88, poz. 553 z późn. zm.) [Art. 230a of the Penal Code of 6 January 1997 (The Official Journal, 1997, No. 88, item 553, as amended)]

Practice of national authorities

According to the 2003 index of perceived corruption prepared by Transparency International, which covered 133 countries, Poland is one of the countries in which corruption is perceived to have grown[110].

According to the recent report by Transparency International on the corruption of local authorities, in the Polish law there are several dozen regulations that in fact trigger corruption among these authorities. One of the most harmful regulations is the lack of sanctions for officials who postpone administrative decisions. Many provisions are unclear and open to arbitrary interpretation by officials[111].

Reasons for concern

- perceived growth of corruption

Article 21. Non-discrimination

International case law and concluding observation of international organs

By the closing of the period covered by this report, Poland did not sign Protocol No. 12 to the ECHR, which was the subject of concerns of the Commissioner for Human Rights of the Council of Europe, expressed in the report on his visit to Poland[112].

As has been noted in the report of the European Commission, *Equality, diversity and enlargement, Measures to combat discrimination in acceding and candidate countries*[113], discrimination cases rarely reach the courts. This is due to the ignorance of applicable rights and the general conviction that taking a matter to court will not bring expected results because of the length of proceedings and high legal fees.

Apart from provisions on employment, Polish legislation does not contain a coherent system of protection against discrimination, especially in cases of ethnic or national origin, in particular in provisions relating to education, health care, and access to services. This problem was also touched on in the report of the Commissioner for Human Rights of the Council of Europe [114]

The report also emphasises the cases of discrimination based on sex, sexual orientation, disability or HIV/AIDS.

On 21 March 2003 the United Nations Committee on the Elimination of Racial Discrimination published Concluding Observations with regard to 15 and 16 periodic reports, submitted to the Committee by Poland under Article 9 of the Convention on the Elimination

[110] Transparency International, Corruption Perception Index 2003, availableon the web page: http://www.transparency.pl./htm/indeks-korupcji2.htm
[111] Daily „Rzeczpospolita" of 22 November 2003, p..A3
[112] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH (2003)4.
[113] European Commission, Equality, diversity and enlargement, Measures to combat discrimination in acceding and candidate countries, available on the web page: http://europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm
[114] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4.

of All Forms of Racial Discrimination[115]. The Committee called attention to the practice of dismissing some cases of racial discrimination with reference to their low degree of damage to society and to cases of racial discrimination against Jews, Roma/Gypsies and persons of Asian and African origin, which have not been properly investigated by law enforcement agencies.

Moreover, the Committee pointed out irregularities during the Universal Census with regard to the recording of information of persons claiming a nationality other than Polish. The Committee also called attention to the need to improve the situation of the Roma. This concerns in particular the system of education for Roma children. Similar remarks were included in the Report of the Commissioner for Human Rights of the Council of Europe [116].

National legislation, regulation and case law

On 9 January 2003 the Sejm ratified the additional protocol to the UN Convention on the elimination of all forms of discrimination against women[117].

In Polish legislation there is no single act prohibiting discrimination. Anti-discrimination provisions are to be found in various legal acts. The Labour Code, amended by the Sejm on 14 November 2003, provides for the broadest protection[118]. The prohibition of discrimination in employment refers not only to sex, age, disability, race, nationality and convictions but also religion, trade union affiliation, sexual orientation and full-time and part-time employment and for a defined and undefined period. It is declared that everyone has the right to equal remuneration for equal work or for work of equal value.

The ban on discrimination on the labour market is included in the Law on professional rehabilitation and employment of disabled persons[119] and the Law on employment and fighting unemployment[120].

A person whose rights and freedoms are violated through discriminatory practices may seek protection on the basis of general provisions. In a situation when discriminative actions are an offence, they are prosecuted *ex officio*.

An injured person can also assert his or her rights in civil proceedings on the basis of general provisions on the protection of personal interests[121] and on the duty to redress a wrong[122].

An employee can initiate proceedings before the labour court in the case of e.g. an unjustified termination of the employment relationship by the employer. One of the bases for initiation of such proceedings may be discriminative practice used by the employer.

[115] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Poland 21 March 2003. CERD/C/CO/6. (Concluding Observations/Comments)
[116] Report of the Commissioner for Human Rights of the Council of Europe, Mr. Alvaro Gil Robles, on his visit to Poland 18-22 November 2002, for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4 p. 9-10
[117] Dz.U. z 2003 r. nr 41, poz. 343 [The Official Journal of 2003 No. 41, item. 343]
[118] Ustawa o zmianie ustawy – Kodeks pracy i zmianie niektórych ustaw z dnia 14 listopada 2003r. (The Official Journal of 2003, No.213 item 2081)
[119] Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i zatrudnianiu osób niepełnosprawnych (Dz.U z 1997 nr 123, poz. 776) [Law on vocational rehabilitation and employment of disabled persons of 27 August 1997 (The Official Journal of 1997 No. 123 item 776)]
[120] Dz.U. z 2003 r. nr 58, poz. 514 [The Official Journal of 2003 No. 58, item 514]
[121] Art. 24 Ustawy z dnia 23 kwietnia 1964r. - Kodeks Cywilny (Dz.U. z 1964, nr 16, poz. 93 z późn. zm. [Art. 24 of the Civil Code of 23 April 1964 (The Official Journal of 1964, No. 16, item 93 with further amendments)]
[122] Art. 415 Ustawy z dnia 23 kwietnia 1964 Kodeks Cywilny (Dz.U. z 1964r., nr 16, poz. 93 z późn. zm. [Art. 415 of the Civil Code of 23 April 1964 (The Official Journal of 1964, No. 16, item 93 with further amendments)]

The above mentioned amendments of the Labour Code introduce regulations concerning equal treatment in employment.

According to the new regulations, employees should be treated equally in respect of establishment and termination of the employment relationship, conditions of employment, promotion and access to training regardless of sex, age, disability, race, religion, nationality, political convictions, trade union affiliation, confession, sexual orientation and also regardless of the type of employment. The amendment cancels the restrictions on the value of compensation in case of violation of the principle of equal treatment by the employer. Under the amended Art. 18(3d) the person, with regard to whom the employer has violated the principle of equal treatment in employment, has the right to compensation in an amount not lower than the minimum remuneration for labour.

The Constitution of the Republic of Poland[123] guarantees to everyone whose Polish citizenship has been confirmed under the law the right to permanent settlement on Polish territory. The Law of 9 November 2000 on repatriation[124] violates, in this regard, rights of certain categories of persons of Polish origin. Under Art. 9 of this Law a visa for repatriation can be issued to a person of Polish origin who lived permanently on the territory of the Asiatic part of the Russian Federation or the former Soviet Republics before the law came into force. This deprives persons of Polish origin from the European part of the Russian Federation of the right to repatriation.

The Constitutional Tribunal, considering the complaint lodged by the Ombudsman on certain provisions of the law on social assistance regulating the area of organisations and financing of foster families, ruled that the regulation in the law on social assistance that differentiates the value of funds paid by the Treasury for the continuation of education by children from foster families and children in social care institutions[125] is incompatible with Art. 32 para. 1 of the Constitution (equality before the law and the right to equal treatment by public authorities).

Reasons for concern

- failure to sign Protocol No.12 to the ECHR;
- lack of a coherent system of legal protection against discrimination;
- lack of adequate investigation of discrimination cases by law enforcement agencies;
- need to improve the situation of Roma in particular in the field of education of their children;
- discrimination of certain categories of persons of Polish origin in the field of repatriation.

Article 22. Cultural, religious and linguistic diversity

International case law and concluding observation of international organs

On 12 May 2003 Poland signed the European Charter for Regional or Minority Languages, and consultations are underway concerning languages to be covered by the provisions of the Charter.

[123] Art. 52 para. 5
[124] Ustawa z dnia 9 listopada 2000 o repatriacji (Dz.U. z 2000 r. nr 106, poz. 1118) [The Official Journal of 2000, No. 106, item 1118]
[125] Judgment of the Constitutional Tribunal of 26 February 2003, No. K 1/01

National legislation, regulation and case law

A range of work is underway in the Sejm on a draft Law on National Minorities. However, no final agreements have been reached as of the end of the reporting period.

During the Universal Census of 2002, 172,000 persons in Poland declared Silesian nationality[126]. A final judgment of the European Court of Human Rights in the case of refusal on the part of Polish authorities to register an association under the name of Związek Ludności Narodowości Śląskiej ("Union of Population of Silesian Nationality") is expected soon.

Practice of national authorities

Currently Polish authorities are implementing "The pilot Governmental Programme for the Roma Community in Małopolskie Voivodeship for the Years 2001-2003"[127]. This is the first comprehensive project targeted at the Roma undertaken in Poland after the systemic transformation of 1989. The main pillar of the programme is the issue of education of the Roma children. Poland departs from the model of so-called "Roma classes" in the schools. An increasing number of Roma children attend integrated classes with complementary teaching. In some localities, however, there remains the problem of elder children with a low level of education. School attendance among Roma children increased up to 80%. On the other hand, adults are not eager to receive education. The Roma are virtually absent from vocational training. In April 2003 a budget was approved for the next year of the programme's operation. The extended Roma programme covering the entire territory of Poland, prepared by Ministry of Internal Affairs and Administration was approved by the Government and should be implemented from the beginning of the year 2004.

Article 23. Equality between man and women

International case law and concluding observation of international organs

The Commissioner for Human Rights of the Council of Europe welcomed the actions undertaken by the Plenipotentiary for Equal Status of Women and Men, in particular the plan to prepare a new law on the equal status of women and men[128]. However, as of today, the work on this law has yet to be completed.

In its Concluding Observations on the reports submitted by State-Parties in relation to Art. 16 and 17 of the International Covenant on Economic, Social and Cultural Rights 19 December 2002, the Committee for Economic, Social and Cultural Rights has, inter alia, expressed concern over the discrimination of women on the labour market with regard to remuneration and employment promotion and the differences in the retirement age of women and men[129].

[126] On 20 December 2001 the Court (appl. No. 44158/98) has found no violation of Article 11 of the ECHR; at the applicant's request the case was transferred to the Grand Chamber (Article 43 of the ECHR).
[127] Resolution of the Council of Ministers of 13 February 2001.
[128] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4
[129] Concluding Observations of 19 December 2002, E/C.12/1/Add.82

Practice of national authorities

On 19 August 2003 the Council of Ministers adopted a National Action Programme for women – the 2nd implementation stage for the years 2003-2005[130]. The necessity to implement the 2nd stage of this programme was caused, according to the Plenipotentiary for Equal Status of Women and Men, by the failure to realise important tasks for the sake of equalisation of life and professional opportunities of women and men of the 1st stage of the programme as well as by the loopholes in legal provisions.

The differences in the retirement age of women and men were the subject of an address of the Ombudsman to the Minister of Economy, Labour and Social Affairs[131]. He requested a flexible regulation of the retirement age, based on the establishment of a uniform retirement age for women and men, which would leave insured persons the decision to use the earlier retirement opportunity. The programme of restoration of the economy, prepared by the Minister, includes the proposal for making the retirement age for women and men equal gradually. However, only 7% of women in Poland consider equal retirement age for both sexes to be justified. 90% of women are against the proposed changes, although as a result of this disparity their pensions are at least one third lower than the pensions received by men[132].

Reasons for concern

- discrimination of women in the labour market with regard to remuneration and employment promotion
- need for establishment of a uniform but flexible retirement age for women and men.

Article 24. The rights of the child

International case law and concluding observation of international organs

Poland does not fulfil the obligations of the World Declaration for Children adopted in New York in 1990 with regard to the preparation of a programme for children for the period of 1990-2000. Work is currently underway in the Ministry of National Education and Sport to prepare a Programme for children.

As follows from the report of the Committee of Independent Experts of the Council of Europe, Poland has not been implementing the provisions of the declaration and the action plan adopted in 1996 in Stockholm during the first world Congress against Sexual Commercial Abuse of Children. None of the recommendations has been implemented fully, as a result of which the problems of sexual commercial abuse of children are resolved only partially and with limited effectiveness. There are no systemic solutions for counteracting violence[133].

National legislation, regulation and case law

The Ombudsman addressed the Constitutional Tribunal to examine the provision of the Family and Custody Code on the necessity to obtain the mother's consent for recognizing a child and establishing paternity in court.

[130] Information available on the web page: http//www.rownystatus.gov.pl/ver_pl/zrodlo/krpr1.htm
[131] General Approach by the Ombudsman to the Minister of Economy, Labour and Social Affairs (RPO-404154-III/02) of 2 July 2003
[132] Portal Onet.pl. – The Polityka weekly, the information available on the web page http://polityka.onet.pl.
[133] Daily „Rzeczpospolita" of 4 August 2003, p. C2

The Constitutional Tribunal ruled that this state of affairs was incompatible with the Constitution. In the view of the Tribunal, the right of the natural father to establish paternity is based on the principle of protection of the child's rights (Art. 72 para. 1 of the Constitution). Beyond that, rendering it impossible for the father to assert his rights of the marital status violates, in the opinion of the Tribunal, the constitutionally guaranteed right to a court (Art. 45 para.1 of the Constitution) and blocks the recourse to law (Art. 77 of the Constitution)[134].

Practice of national authorities

The problem of commercial and sexual exploitation of children and the absence of co-ordinated social policies regarding the child and family was raised in the approach addressed by the Ombudsman and the Ombudsman for Children to the President of the Council of Ministers[135]. They underlined that Poland did not implement the Concluding Observations of the 31st session of the UN Committee on the Rights of the Child made after considering the second periodic report of Poland on implementation of the Convention on the Rights of the Child submitted to the Committee on 2 October 1999[136].

It is estimated that in Poland, particularly in rural areas, approx. 200,000 children fall victim to violence[137].

By the day the reporting period was closed, several thousand cases were reported to the office of the Ombudsman for Children[138]. They generally concern the request for medical treatment to be reinstated at schools, preventive medical examinations, health insurance, allowances for disabled children in public transport, liquidation of orphanages, integration schools, increased effectiveness in combating violence towards children and their safety at school. As of today, no reform of state assistance to children deprived of parental care has been carried out, even though children in reformatories are not adequately prepared for life[139].

Conditions of detention for juveniles generally meet international standards. Legal provisions require judges to investigate the legality of keeping juveniles in shelters and reformatories. There are problems however in many cases where juveniles are kept for prolonged periods in Police child stations due to a lack of places in juvenile shelters and reformatories. There are no vacancies in guardianship centres, which offer alternative places for the reclaiming process and educational work with juveniles.

The subject of the Ombudsman's intervention with the Minister of Justice was the unlawful placement of juveniles in Police child stations. According to the information obtained by the Ombudsman, courts often direct juveniles to Police child stations without specifying the time to be spent by them in those institutions[140].

At the initiative of non-governmental organisations and the Ombudsman, a programme of early intervention in cases of mentally and physically disabled children was created. This programme, tendered by the Ombudsman to the Ministry of Education, is subject to debates between different parts of the Government as well as with societal partners and trade unions.

[134] Judgment of the Constitutional Tribunal of 28 April 2003, No. K 18/02
[135] Approach of the Ombudsman and the Ombudsman for Children (No. RPO-426819-02/XI/GR) of 27 January 2003
[136] Concluding Observations of the 31st session of the UN Committee on the Rights of the Child, 30 October 2002, CRC/C/15/Add.194
[137] Daily „Rzeczpospolita" of 11 March 2003, p. C2
[138] Daily „Rzeczpospolita" of 6 October 2003, p. C2
[139] Daily „Rzeczpospolita" of 15 February 2003, p. C1
[140] Daily „Rzeczpospolita" of 27 November 2003, p. C1

Reasons for concern

- problem of commercial sexual abuse of children resolved only partially and with limited effects;
- no systemic solutions for counteracting violence against children;
- cases of placement of juveniles in Police child stations without specifying the time to be spent by them in those institutions;
- cases of holding juveniles for prolonged periods in Police child stations due to a lack of places in juvenile shelters and reformatories;
- lack of a reform of state assistance to children deprived of parental care.

Article 25. The rights of the elderly

Practice of national authorities

In Poland in recent years the average age of retirement has systematically decreased. It is now one of the earliest in Europe – 57 years for men and 52 for women. The opportunities for professional activity in more advanced age are very limited. The situation of the elderly in the process of transition deteriorated on account of general cultural changes and the increase in barriers to integration[141].

In the opinion of experts it is necessary to change the policy of employment – the current Governmental programmes are moving towards a limiting of the earnings of pensioners through financial restrictions on the part of the employed and of the employers, in cases where pensions are added to revenues from employment. It is also imperative to adjust the character and network of medical care institutions to the needs of the elderly. There is no system of assistance for families – custodians of the elderly in the form of appropriate medical and legal assistance, social work, psychological support and access to adequate equipment to assist the elderly at home. Neither does any programme give the elderly and persons staying alone the choice of the form of assistance – at home or at a suitable social care institution. It is necessary to facilitate the elderly access to cheap services in everyday matters.
The state does not support persons taking care of the elderly who are not self-reliant. Neither is there any programmes aimed directly at the elderly[142].

The government plan of rationalisation of public expenditure provides for changes in the increase in the value of pensions through abandoning the automatic yearly procedure of increasing pensions regardless of the rate of inflation. The plan also involves gradual limitation of pre-retirement benefits and verification of granted pensions[143].

According to the information of the Ombudsman, the elderly are discriminated against by banks when applying for loans[144].

Reasons for concern

- lack of state support to persons taking care of the elderly who are not self-reliant;
- lack of Governmental programmes aimed directly at the elderly.

[141] Brunon Synak, Położenie ludzi starych - ekspertyza wykonana na zlecenie organizacji Wspólnota Robocza Związków Organizacji Społecznych WRZOS w ramach programu ACCESS [The situation of the elderly – a study for WRZOS, the Working Community of Social Organisations under the ACCESS programme)
[142] Prof. Zbigniew Woźniak, Status społeczny i prawny polskich seniorów na tle europejskiej polityki społecznej, [The social and legal status of the elderly in Poland in the context of European social policy], WRZOS
[143] Information available on the web page: http://www.tvp.pl of 25 November 2003
[144] Information by the Ombudsman, RPO Bulletin No. 47, Warsaw 2003

Article 26. Integration of persons with disabilities

National legislation, regulation and case law

Since 1 February 2003 the amendment of the law on professional and social rehabilitation and on employment of the disabled has been in force.[145]. Among other matters, it introduces a stricter system of controls on pronouncement of disability and the level thereof, a change in the system of financial assistance for employers who employ disabled persons through ascribing a certain amount of money to a disabled person rather than to the employer. Financial assistance has been differentiated depending on the level of disability of the employee.

Practice of national authorities

Disabled persons are much more poorly educated than people without disabilities and they work more rarely. According to data from 2001, 16.1% disabled persons aged 15 and more were employed, whereas the adequate figure for people without disabilities is 51.1%[146].

Legal provisions on the rights that the disabled persons are entitled to on the labour market are incoherent and unstable. The law on employment and professional rehabilitation of disabled persons has been amended over 30 times already. Disabled persons have no access to information on their rights. Full participation of disabled persons in social life is difficult, which is also due to architectonic barriers and the passivity of the concerned.

The State Fund for the Rehabilitation of Disabled Persons (Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych - PFRON) has the possibility to finance institutions that decide to employ or to train disabled persons. The Police have already employed 1020 such persons and under the agreement concluded with the PFRON in police structures over 800 such persons are to be employed[147].

According to the government plan for the reform of public expenditure, the excess of statutory privileges a disabled person is entitled to leads to an increase in the cost of employment of such a person. That is why it is proposed to cut employment costs of disabled persons through abolishing privileges concerning work time, the change in the structure of expenditure for support to employment of disabled persons through budgetary assistance of programmes co-financed from EU funds, the change in the structure of expenditure for assistance for employers in order to eliminate abuses. It is also proposed to introduce subsidies to which all employers are entitled by virtue of employing a disabled person. The programme also provides for the liquidation of the State Fund for Rehabilitation of Disabled Persons and the takeover of its tasks by the Social Insurance and local authorities[148].

According to NGOs dealing with disabled persons, the proposal to liquidate PFRON, with no alternative solutions in its stead, will drastically aggravate their situation. The liquidation of allowances related to their work time will also contribute to this. On the other hand, changes relating to the system of financial assistance to employers employing disabled persons is perceived favourably, which gives hope for the elimination of abuses and will improve the situation of disabled employees.

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[145] Ustawa z dnia 20 grudnia 2002 r. o zmianie ustawy o rehabilitacji zawodowej i zatrudnianiu osób niepełnosprawnych oraz o zmianie niektórych ustaw, [Law of 20 December 2002 on the amendment of the Law on vocational rehabilitation and employment of disabled persons and on the amendment of certain laws], the Official Journal of 2003 No. 7, item 79

[146] The information available on the web page of the Government Plenipotentiary for Disabled Persons http://www.mgpips.gov.pl/_osobyniepelnosprawne.php?dzial=389&dokument=451

[147] Information obtained from the Main Headquarters of the Police

[148] Daily „Rzeczpospolita" of 29 October 2002, p. B4

Reasons for concern

- Incoherent and unstable legal provisions on the rights of disabled persons on the labour market;
- still existing architectonic barriers

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

National legislation, regulation and case law

On 13 March 2003 a Law on specific principles of termination of the employment relationships with employers for reasons unrelated to employee[149]. From 1 January 2004, it replaced the previous law on collective dismissals.

One of the changes introduced by the new law is the extension of information responsibilities of employers towards the trade union organisation and the regional labour office in case collective dismissals are made. The chairman of the enterprise will have to consult with the organisations on the intention to make a group dismissal, and in particular matters such as the possibility of avoiding or decrease in volume of the group dismissal and the related worker affairs, the possibilities of re-qualification or vocational retraining and other opportunities for employment for the dismissed. The employer will also need to inform the trade union organisations about the reasons for collective dismissal, the number of employed persons and the professional groups they belong to, the professional groups of the persons who are intended for collective dismissal, the period when such a dismissal is going to take place, the proposed criteria of selection of persons for dismissal, the order of dismissals and proposals for resolving worker issues and the modality for establishing the amount of financial benefits. Within 20 days of the notification the employer and the Institute of Health Care conclude an agreement specifying the principles of the collective dismissal. If it is carried out in accordance with the regulations, it is binding for the employer. If no agreement is reached, the employer himself specifies the principles of the dismissal in the bylaws, taking into account as far as possible the suggestions of trade union organisations. If there is no such organisation in the enterprise, the employer will have to consult the provisions of the rules of dismissal with the representatives of employees selected in the form accepted by a given employer[150]

Art. 29 §3 of the amendment of the Labour Code of 14 November 2003, imposes on the employer the duty of informing the employee in writing no later than within seven days of concluding the employment contract about the binding norm of daily and weekly work time norm, frequency of remuneration payments, holiday and the length of notice to terminate the contract of employment. If the employer has not got the duty of establishing the bylaws, additionally he or she is obliged to inform the employees about night time work, the date and time of the remuneration payment as well as about the accepted way the employees confirm the arrival and presence at work and justify their absence[151].

[149] Ustawa z dnia 13 marca 2003 r. o szczególnych zasadach rozwiazywania z pracodawcami stosunków pracy z przyczyn niedotyczacych pracowników (Dz.U. z 2003 r. nr 90, poz. 844) Dz.U. z 2003 r. nr 90, poz. 844 [Law of 13 March 2003 on specific principles of termination of employment relationships with employers for reasons unrelated to employees (the Official Journal 2003 No 90, item 844)]The Official Journal of 2003, No. 90, item 844]

[150] Article 2, 3 and 4 of the above mentioned law.

[151] see: footnote 119

Article 28. Right of collective bargaining and action

International case law and concluding observation of international organs

The Commissioner for Human Rights of the Council of Europe emphasises the information he received from the representatives of trade unions on the limitation or blocking of the activities of trade unions in the private sector. Such limitations occur e.g. in supermarket chains. The Commissioner recommends the Polish authorities to ensure freedom of association in trade unions.[152].

National legislation, regulation and case law

In one case of blocking of trade union activity, in which 30 women were made redundant in a clothing company when they established a trade union – the court ruled in favour of the former employees. In the decision of 30 September 2003 the court found that the president of the company had broken the law since he did not consult the dismissals with the trade unions[153].

In its judgement of 18 November 2002, the Constitutional Tribunal found that the provisions of the Labour Code that regulated the termination of collective labour contracts violated the constitutional principle of the freedom of collective bargaining and were incompatible with Art. 59 para. 2 and Art. 20 of the Constitution (Trade unions, employers and their organisations' right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour contracts and other arrangements and the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners) and with Art. 4 of Convention No. 98 of the International Labour Organisation of 1 July 1949 and Art. 6 para. 2 of the European Social Charter of 18 October 1961.

These regulations made it impossible to be released from the duty to apply the provisions of the labour contract in force, even after the expiry of the period of this contract. In the case when the labour contract concluded for an indefinite period of time is terminated it is also impossible to be automatically released from the obligations specified therein.[154]

On 1 July the amendment of the Law Labour Code of 26 July 2002 limiting protection resulting from the employment relationship of any given number of trade union activists, which was specified in Art. 32 para. 1 of the Law on trade unions, entered into force. In a judgement of 7 April 2003 the Constitutional Tribunal declared this provision to be incompatible with the Constitution in the scope that it refers to the protection of the members of the audit commission of the local trade union organisation. The Tribunal stated that the situation of an audit commission member in fact did not differ from the position of other employees. Therefore, the glaring difference between the situations of similar entities – ensuing from Art. 32 para. 1 of the Law appealed against – was not justified[155]. According to the present wording of the Law, such protection is only available for the members of the management board or other employees who are members of the local trade union organisation and are entitled to represent this organisation before the employer.

[152] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4.
[153] Daily „Rzeczpospolita" of 1 October 2003, p. C2
[154] Judgment of the Constitutional Tribunal of 18 November 2003, No. K 37/01
[155] Judgment of the Constitutional Tribunal of 7 April 2003, No. P 7/02

Reasons for concern

- Number of cases of limitation or blocking of the activities of trade unions in the private sector.

Article 29. Right of access to placement services

National legislation, regulation and case law

In the Ministry of Labour work on the preparation of draft legislation on employment promotion has commenced. This is going to be the responsibility of employment offices, especially labour offices and vocational advisors. At the moment they are able to devote only several minutes per year to one unemployed person. It is also necessary to coordinate the programmes of fighting unemployment at the level of local authorities, voivodeships and at governmental level[156].

The amendment of the Law of 20 December 2002 on employment and the fight against unemployment, which came into force on 6 February 2003, imposes on the state the duty to support persons who remain unemployed not only by means of unemployment benefits but it also provides for certain persons being directed to intervention works for the time up to 24 months. At the same time any person, who for no apparent reason refuses to participate in intervention works or public works, loses the status of an unemployed person for six months[157].

Article 30. Protection in the event of unjustified dismissal

National legislation, regulation and case law

The amendment of the Labour Code of 14 November 2003 has introduced changes that increase the protection of employees in case of the transfer of an enterprise. In accordance with the text of the amendment, if there are no local trade union organisations in the firm of the employer who takes over the enterprise, the former and the present employer inform their employees in writing about the expected date of the transfer of the enterprise to the new employer, the reason for the transfer, the legal, economic and social consequences, and the intended actions relating to the conditions of employment. The employer should deliver the information at least 30 days before the expected date of the transfer of the enterprise. The amendment increases the deadline by which an employee of the transferred enterprise can terminate the employment relationship without giving notice to two months. It is treated as the termination of an employment relationship at notice. The reservation has been added, according to which the transfer of an enterprise or of a part thereof to a different employer cannot be the justifying reason for the employer to terminate the employment relationship.

Article 31. Fair and just working conditions

National legislation, regulation and case law

The above-mentioned amendment of the Labour Code prohibits mobbing. It also restores the principle that the third contract concluded for a definite period is a contract for an indefinite

[156] Daily „Rzeczpospolita" of 1 July 2003, p. C2
[157] Dz.U. z 2003 r. nr 6, poz. 65 [The Official Journal of 2003, No. 6 item 65]

period; it specifies the 40-hour working time and regulates the issues connected with work time, holiday issues and principles of safety and hygiene at work[158].

Practice of national authorities

The State Labour Inspection (Państwowa Inspekcja Pracy - PIP), on carrying out controls on the observance of labour law provisions revealed, in 73,761 employers examined, 10,174 violations of the rights of the employees and sent 846 notifications of cases with reasonable suspicion of committing an offence to the prosecutor's office. According to the PIP employers frequently do not know legal provisions or misinterpret them in their favour. Many provisions are also unclear. Other offences reported by the PIP include failure to pay compensation for working overtime or equivalent for the use of own clothing – these are cases of not complying with the provisions of the law in initiation and termination of the employment relationship. 32% of employers do not terminate employment contracts for an undefined period. Working conditions are increasingly changed unilaterally. Inspectors have issued over 641,000 decisions concerning safety and hygiene at work[159].

Article 32. Prohibition of child labor and protection of young people at work

National legislation, regulation and case law

In accordance with the amendment of the Labour Code of 14 November 2003, work on the part of children up to 16 years old is only allowed in the areas of art, culture, sport and advertisement and requires consent on the part of the legal custodian and permission from the labour inspector.

Practice of national authorities

According to the PIP in 2002 only incidental violations of the law were noted when employing juveniles consisting in employing juveniles at nightime and overtime, employment in incorrect daily volume of work and refusal to send juveniles to medical examination controls[160].

However, according to the Ombudsman for Children, a great number of children fall victim to accidents at work, especially at family-run farms[161].

Article 33. Family and professional life

International case law and concluding observation of international organs

In the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights that have been mentioned above, the Committee expressed its concern over the fact of discrimination against women in the sphere of employment, the continuing disparity between the provisions of the law and the existing practice relating to equal pay for work of equal value and the possibility of employment promotion. The Committee recommended that the Polish authorities ensure implementation of adequate provisions in this regard[162].

[158] Daily „Rzeczpospolita" of 15 October 2003, p. C3
[159] Report from the activities of the State Labour Inspection available on the web page http://www.pip.gov.pl/Infor/spraw2003/sprw-int/spis_spr_02.htm
[160] Report of the State Labour Inspection available on the web page http://www.pip.gov.pl/Infor/spraw2003/sprw-int/spr04b-6.htm
[161] Daily „Rzeczpospolita" of 6 January 2003, p. C2
[162] Concluding Observations of 19 December 2002, E/C.12/1/Add.82

National legislation, regulation and case law

On 12 November 2003 the Sejm adopted a law introducing a reform of the system of family benefits. They will be financed from the state budget and not from social assistance, as has been the case so far. The changes involve one basic family benefit complete with further payments instead of many different benefits. The change is unfavourable to lone parents or persons with more than two children[163]. The Maintenance Fund, the state fund from which maintenance is paid to persons who for different reasons are unable to collect the money to which they have the right is going to be liquidated. A maintenance benefit shall be introduced in its place, regardless of whether and what maintenance has been awarded and whether it is indeed paid. It depends solely on income per person in the family. New principles of family benefits are to enter into force on 1 May 2004.

Practice of national authorities

According to women's organisations, women are discriminated against in the sphere of employment. In particular, the practice of employers asking questions on private life and plans for the future. Women receive remuneration lower by 20-30% than that received by men for the same work or for work of equal value. They have worse access to employment promotion.

Restrictions in the work of women are also caused by the lack of attempts at equalising opportunities on the labour market for women, e.g. through the existing chain of nurseries or other institutions that provide care for children free of charge. Only 2% of children below three years go to nursery and 37% of children attend a kindergarten[164].

According to the report prepared by the PIP in 2002, various types of violations of the rights of employees connected with parenthood were eliminated in nearly 300 places of employment covered by planned controls. The violations consisted mainly in termination of the contract of employment for pregnant employees or when on maternity leave (13 cases), termination of contracts of employment after the third month of pregnancy (eight cases), employment of pregnant women for more than eight hours a day (seven cases), refusal to grant child care leave (20 cases)[165].

Reasons for concern

- continuing disparity between the provisions of the law and the existing practice relating to equal pay for work of equal value and the possibility of employment promotion for women

Article 34. Social security and social assistance

International case law and concluding observation of international organs

Poland still has not signed the Revised European Social Charter and the Additional Protocol relating to the collective complaints procedure. The Commissioner for Human Rights of the

[163] Daily „Rzeczpospolita" of 15-16 November 2003, p. C1
[164] Gender equality and EU accession. The situation in Poland. Information sheet prepared by Kinga Lohmann and Anita Seibert, Karat Coalition, Poland. November 2003
[165] Report of the State Labour Inspection available on the web page http://www.pip.gov.pl/Infor/spraw2003/sprw-int/spr04c-caly.htm

Council of Europe emphasised this and pointed out the necessity for the Polish authorities to ensure full respect for economic and social rights[166].

National legislation, regulation and case law

On 24 April 2003 the Sejm adopted a law that entitles the President of the Republic of Poland to ratify Convention No. 102 of the International Labour Organisation on minimum social security norms. However, the situation in Polish legislation does not allow for the ratification of all its parts. Polish law provides for shorter sickness benefits, lower benefits in case of unemployment, less favourable conditions in the case of accident benefits as compared to the conditions outlined in the Convention and the possibility of suspension of pension rights in case of inability to work[167].

One of the forms of assistance in abandoning poverty and in regaining skills and satisfying basic needs is the law of 13 June 2003 on social employment[168]. It introduces classes in centres of social integration and clubs of social integration as well as supported employment, i.e. assistance in finding employment or commencing economic activity through refund of a part of the remuneration paid by the starosta (head of county government) or an employment office. There are plans to create 16-20 such institutions by 2004. In these centres, creative, trade and service activities will take place, which will not be treated as economic activity.

In the Sejm work is underway on the law on social assistance, which is to replace the law of 1990, amended many times. According to the justification of the Government project the drafted changes are aimed at shortening the period of drawing social benefits through emphasis placed on the activisation of persons benefiting from social assistance and assistance in their difficult financial standing. The draft introduces new criteria that entitle persons to financial benefits from social security, in particular through accepting a uniform income level for persons living in households of more than one person to PLN 316 per person and establishment of an income level that entitles single persons to benefits of PLN 461. The law departs from the valorisation of the income criterion and benefits from social security and introduces new verifications carried out every three years on the basis of an analysis of a basket of goods and services.

The draft also contains new kinds of benefits and new principles of payment for a stay in a social assistance facility.

According to representatives of NGO's the draft – although it does not include very innovative amendments – unifies the existing regulations and makes the social assistance system clearer.

Practice of national authorities

The Ministry of Economic Affairs, Labour and Social Policy together with the State Office for Housing and Urban Development prepared a programme of support for social housing that is to help municipalities in building and adapting flats for persons with the lowest income and to facilitate resolving problems related to evictions[169].

[166] Report of the Commissioner for Human Rights of the Council of Europe, Mr Alvaro Gil-Robles, on his visit to Poland 18-22 November 2002 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg 19 March 2003, CommDH(2003)4.
[167] Daily "Rzeczpospolita" of 25 April 2003, p.C2
[168] Ustawa z dnia 13 czerwca 2003 r. o zatrudnieniu socjalnym (Dz.U. z 2003 r. nr 122, poz. 1143) [The Official Journal of 2003 No. 122 item 1143]
[169] Daily „Rzeczpospolita" of 10 July 2003 p. C1

The present system of social assistance is not coherent and changes in regulations or their interpretation thereof on many occasions deprive certain categories of persons of the basic means to live. Numerous such situations were the subject of intervention of the Ombudsman.

The Ombudsman emphasised the conditions for obtaining the right to disability benefits by the victims of war and the post-war period. According to the Ombudsman there is a need to verify the principles of procedure used with victims of political repressions. He is critical about the conditions under which the rights to benefits are acquired, especially those relating to remote health consequences experienced by the victims of repressions.[170].

Reasons for concern

- failure to fulfil conditions for the full ratification of the ILO Convention No.102;
- failure to sign the Revised European Social Charter and the Additional Protocol relating to the collective complaints procedure;
- lack of required coherence of the system of social assistance.

Article 35. Health care

National legislation, regulation and case law

On 1 April 2003 the law of 1 January 2003 on general health insurance in the National Health Fund entered into force, by virtue of which the National Health Fund replaced the regional patients' funds (regionalne kasy chorych)[171]. The new regulations were to improve the new situation in health care in particular the access of patients to health care.

Practice of national authorities

Despite the fact that the new Law on the National Health Fund entered into force, the situation in health care remains dramatic. National Health Fund branches refused to renegotiate contracts above the stated limits with medical care institutions. Patients have to queue for planned operations for several months. Because of insufficient funds many hospitals have begun to close certain wards, others have begun to charge patients for their services. Only the most seriously ill patients have had a chance of being treated before the end of the year 2003[172].

Health care institutions are severely in debt and their personnel do not receive timely remuneration. The principle "money goes after the patient", which was to be the basis for financing benefits from health insurance, hardly functions at all. This poses a serious threat to life and health of individuals[173].

Reasons for concern

- dramatic general situation in the health care system.

Article 36. Access to services of general economic interest

No significant development to be reported during the period under scrutiny

[170] General Approach by the Ombudsman to the Minister of Economic Affairs, Labour and Social Policy (RPO-442520-III/03) of 3 July 2003
[171] Dz.U. z 2003 r. nr 45, poz. 391 [The Official Journal of 2003 No. 45 item 391]
[172] Daily „Rzeczpospolita" of 10 November 2003, p. A1
[173] Daily „Rzeczpospolita" of 11-12 October 2003, p. C1

Article 37. Environmental protection

National legislation, regulation and case law

On 9 May 2003 the UN Convention of 25 June 1998 on the access to information, public participation in decision-making and access to justice in environmental matters, ratified by the Law of 21 June 2001, was published[174].

On 11 July the Law amending the Construction Law[175] entered into force. On the basis of this Law the parties in the proceedings relating to a construction permit can only be the investor and the owners, perpetual usufructuaries or users who manage real estate within the scope of the property. The law excluded non-governmental organisations from this group. According to the Environmental Law they can only participate in the proceedings relating to investment that can have a significant impact on the environment.

The law on planning and spatial development has also introduced the limitation of participation of non-governmental organisations in investment process[176].

These changes, although motivated by the will to facilitate the investment process, have restricted the impact of environmental organisations on the decisions that may significantly influence the environment in a negative way.

Reasons for concern

- introduction of additional restrictions on the participation of environmental NGOs in the investment process.

Article 38. Consumer protection

National legislation, regulation and case law

On 15 December 2002 the amendment of the Law of 15 December 2000 on the protection of competition and consumers[177] came into force, which gave broader prerogatives to the Head of the Office of Consumer and Competition Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK) and strengthen protection of the interests of the consumers. The Law prohibits practices violating collective interests of the consumers, in particular the use of provision of patterns of contracts that have been included in the register of provisions of patterns of contracts considered illicit, the violation of the duty to provide honest, true and full information and dishonest and misguiding advertisements. In the decision on declaring a practice to violate collective consumer interests the Head of the UOKiK orders to abandon such practice[178].

The Law contains the regulation concerning establishment of the National Council of Ombudsmen for Consumers as a permanent consulting and advisory body acting for the Head

[174] Dz.U. z 2003 r. nr 78, poz .706 [The Official Journal of 2003 No. 89 item 970]
[175] Ustawa z dnia 27 marca 2003 r. o zmianie ustawy Prawo budowlane. [Law of 27 March on amendment of the Construction Law] The Official Journal of 2003 No. 80, item 718
[176] Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym. [Law of 27 March 2003 on planning and spatial development] The Official Journal of 2003 No. 80, item 717
[177]Ustawa z dnia 15 grudnia 2000 r. o ochronie konkurencji i konsumentów (Dz.U. nr 122, poz. 1319) [Law of 15 December 2000 on protection of competition and consumers (the Official Journal, No. 122, item 1319)]
[178] Ustawa z dnia 5 lipca 2002 roku o zmianie ustawy o ochronie konkurencji i konsumentów, ustawy - Kodeks postępowania cywilnego oraz o zwalczaniu nieuczciwej konkurencji (Dz.U. z 2002 r. nr 129, poz. 1102) [Law of 5 July 2002 on amendment of the law on protection of competition and consumers, acts – Code of Civil Procedure and on combatting unfair competition (the Official Journal, 2002, No. 129, item 1102)

of the UOKiK in the scope of rights connected with the protection of consumer rights at the local level.

In connection with the growing number of transactions realised and contracts concluded through the Internet, the Sejm adopted an amendment to the Law of 2 March 2000 on the protection of certain consumer rights[179]. The amendment guarantees the possibility to resign from shopping made through the Internet even on the tenth, last day from the conclusion of the contract, although the resignation will reach the entrepreneur over a dozen days after the contract was concluded.

Practice of national authorities

Consumer interests are frequently violated. The results of control checks carried out by the Commercial Inspection suggest that 30% of entrepreneurs do this[180]. According to the report prepared by the Office of Consumer and Competition Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK) for 2002, published in May 2003 in the Office, 580 decisions on anti-trust cases were issued. In 82 cases illicit practices were found to have been used in matters relating to the abuse of the dominant position, in 168 cases consent for a merger of enterprises was granted. The UOKiK initiated 619 proceedings on agreements restricting competition, on abuse of the dominant position and concentration control[181].

The Ombudsman for consumers is frequently confronted with complaints about entrepreneurs using unfair market practices, covering granting of loans, in particular mediation of various entities for banks, ruthlessness of vindication firms, monopolistic practices employed in telecommunication and postal services, complaints about railway ticket controllers, and charging consumers for bank services that should be provided by the bank free of charge[182].

The UOKiK has a publicly accessible register of illicit contractual clauses that cannot be used in contacts with customers. At present there are 81 such clauses in the register.

CHAPTER V : CITIZENS' RIGHTS

Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament

Not relevant

Article 40 - Right to vote and to stand as a candidate at municipal elections

Not relevant

Article 41 - Right to good administration

Not relevant

[179] Ustawa z dnia 19 września 2003 r. o zmianie ustawy o ochronie niektórych praw konsumentów oraz o odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny (Dz.U. z 2003 r. nr 188, poz. 1837 [The Official Journal of 2003, No. 188, item 1837]

[180] Daily „Rzeczpospolita" of 5 December 2002, p. C1

[181] Report on the activities of the Office of Competition and Consumer Protection for 2002 available on the web page: http//www.uokik.gov.pl/dokumenty/dokument585.doc 27.10.03

[182] Information by the Ombudsman, RPO Bulletin No. 47, Warsaw 2003

Article 42 - Right of access to documents

Not relevant

Article 43 - Ombudsman

Not relevant

Article 44 - Right to petition

Not relevant

Article 45 - Freedom of movement and of residence

Not relevant

Article 46 - Diplomatic and consular protection

Not relevant

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observation of international organs

In the period 1 January – 15 December 2003 the European Court of Human Rights has found in 39 cases against Poland a violation of Article 6 para.1 of the ECHR[183] due to the length of proceedings. The cases concerned complaints sent to Strasbourg in the years 1997-1999. Many similar cases against Poland are still pending before the Court. 20 cases have been struck out following a friendly settlement[184].

National legislation, regulation and case law

[183] Selected judgments: Eur. Ct. H.R.: *W.M. v. Poland* judgment of 14 January 2003, appl. No. 39505/98*; Kubiszyn v. Poland*, judgment of 30 January 2003, appl. No. 37437/97; *Fuchs v. Poland*, judgment of 11 February 2003, appl. No. 33870/96*; Rawa v. Poland*, judgment of 14 January 2003, appl. No. 38804/97; *Sobański v. Poland*, judgment of 21 January 2003, appl. No. 40694/98; *Bukowski v. Poland*, judgment of 11 February 2003, appl. No. 38665/97; *Kroenitz v. Poland*, judgment of 25 February 2003, No. 77746/01; *Orzel v. Poland*, judgment of 25 March 2003, appl. No. 74816/01*; R.O. v. Poland*, judgment of 25 March.2003, appl. No. 77597/01; *Andrzej and Barbara Piłka v. Poland*, judgment of 6 May 2003, appl. No. 39619/98; *Majkrzyk v. Poland*, judgment of 6 May 2003, appl. No. 52168/99*; Gryziecka and Gryziecki v. Poland*, judgment of 6 May 2003, appl. No. 46034/99; *Sobierajska-Nierzwicka v. Poland*, judgment of 27 May 2003, appl. No. 49349/99;
Eur. Ct. H.R *B.R. v. Poland,* judgment of 16 September 2003, appl. No. 43316/98; Eur. Ct. H.R. *Skawinska v. Poland,* judgment of 16 September 2003, appl. No. 42096/98; Eur. Ct. H.R. *Cegielski v. Poland,* judgment of 21 October 2003, appl. No. 71893/01; Eur. Ct. H.R. *Goral v. Poland,* judgment of 30 October 2003, appl. No. 38654/97; Eur. Ct. H.R. *Lobaszewski v. Poland,* judgment of 25 November 2003, appl. No. 77757/01; Eur.Ct. H.R. *Matwiejczuk v. Poland,* judgment of 2 December 2003, appl. No. 37641/97; Eur.Ct.H.R. *Peryt v. Poland*, judgment of 2 December 2003, appl. No 42042/98; *Stańczyk v. Poland*, judgment of 2 December 2003, appl. No. 50511/99

[184] Selected judgments: Eur. Ct. H.R. *Niziuk v. Poland,* judgment of 15 July 2003 appl. No. 64120/00, *M.M. and E.M.M. v. Poland,* judgment of 29 July 2003 appl. No. 76158/01

The Constitution in Article 45 and legal provisions regulating judicial and administrative procedures confirm the right to a hearing within a reasonable time. In practice this right is seriously violated in a large number of cases. This is one of the negative consequences of the deep crisis in the administration of justice.

In the Polish legal system there is still no legal remedy protecting individuals against violations of the "reasonable time" requirement.

Work is underway on a draft law granting such a legal instrument to parties in judicial proceedings [185]. The existence of such an instrument is required by Article 13 of the ECHR. Poland is also directly obliged to introduce the effective legal remedy in this respect in order to comply with the judgment of the European Court of Human Rights in the case Kudła v. Poland[186]. In two cases the Court, at the same time with violation of Art. 6 (1) of the Convention, ruled violation of Art. 13 of the Convention on the grounds of the lack of an effective legal measure in the situation of the length of the proceedings[187].
During consultations the draft law has been approved inter alia by the National Judiciary Council. On 8 October the draft law was accepted by the Government and soon after sent to the Sejm.

Under the law currently in force, in a case of material damage due to unjustified length of proceedings one could claim compensation before a civil court.

Backlog of cases in courts

National legislation, regulation and case law

Work of courts is to be improved inter alia, through amendments to procedural codes aimed at enhanced efficiency of judicial procedures. On 1 July 2003 an amendment to the Code of Criminal Procedure entered into force[188]; work is underway in the Sejm on amendments to the Code of Civil Procedure. The amendments to the Code of Criminal Procedure introduce over 250 changes[189]. The first effects of all these measures are already visible. In 2002, for the first time, Polish courts settled more cases than they received in that period.

Practice of national authorities

Since 1990 in Poland there has been an increase in the number of cases in courts by over 400%, while the number of judges at the same time increased by only 70%. About nine million cases are currently pending in Polish courts decided by over 9,000 judges (in the first half of 2003 all together 4,568 thousand cases were submitted to Polish courts).

The nation-wide average length of proceedings in criminal cases at the first instance is approximately 5.8 months in regional courts and 5.9 months in district courts.

According to figures related to the first half of 2003 in commercial cases this figure was at the level of 6.4 months in regional courts and 5.4 months in district courts. In civil matters the average length of proceedings was approximately 8.6 months in district courts and 5.2 months in regional courts.

[185] The Governmental draft of 1 July 2003 of the Law on a Complaint concerning Violation of a Party's Right to Examination of a Case in Judicial Proceedings within Reasonable Time.
[186] Judgment of 26 October 2000, Grand Chamber, appl. No. 30210/96,
[187] Eur. Ct. H.R. *Cegielski v. Poland* judgment of 21 October 2003, appl. No. 71893/01; Eur. Ct. H.R. *Lobaszewski v. Poland* judgment 25 November 2003, appl. No. 77757/01
[188] Dz.U. z 2003 r. nr 17, poz. 155 [the Official Journal of 2003, No. 17, item 155]
[189] Daily „Rzeczpospolita", 1 July 2003, p. C1

The worst situation exists in the Warsaw area, where over 10% of all cases in Poland are decided. In the Regional Court the average length of proceedings at first instance is approximately 7.9 months in criminal cases and 10 months in civil ones. In criminal matters at first instance the average length of proceedings is between 5.7 and 24.4 months in the District Court for Capital City of Warsaw. In district courts of the Warsaw region this figure at the level of seven months. The average length of proceedings in commercial cases is also very long. It amounts to 11.1 months in the Regional Court in Warsaw and to 16.5 months in regional courts.

Serious problems also exist due to the length of execution proceedings in civil and social security cases (average waiting period - 6.4 months).

Significant difficulties are also experienced by the NSA in this respect, where the average time spent for adjudication of the case is currently approximately 14 months. A chance for improving the efficiency of the administrative justice is the reform and entry into force on 1 January 2004 of the two-instance system. Following the statements of the NSA President the backlog of cases (93 thousand) will be cleared[190].

With a view to improving the system of administration of justice, various remedial actions have been taken. The budget for 2003 was increased by as much as one third, with extra funds allocated to improve the situation in the main cities. The spokesman of the National Judiciary Council, Marek Celej, called this budget a breakthrough in satisfying the needs of courts[191]. 450 new full-time jobs for judges were created as well as about 1550 additional administrative jobs (including 200 jobs for judges' assistants) with a view to relieving judges from administrative, technical and registering functions. A two-shift working system was introduced in certain courts in Warsaw, Gdańsk, Kraków and Poznań. The Minister of Justice and court presidents can review the efficiency of proceedings in individual cases[192]. In 2003 it was planned to establish 25 new sections in the first instance courts to consider small matters.

The 2004 draft budget of the administration of justice, provides for an increase in the measures earmarked for the administration of justice in Poland by 11% as compared to the previous year. According to the assumptions, the number of full-time posts in the administration of justice is going to rise by 2055, including those of judges and qualified officials who could take over most administrative tasks in courts. According to the representatives of the administration of justice this budget will allow to cover the current expenditure of the courts and to begin the necessary investment[193].

On 1 July 2003 in the Daily Rzeczpospolita newspaper, along with the Association of Polish Judges IUSTITIA and the Helsinki Foundation for Human Rights, a societal debate on streamlining the work in courts began.

Swift, promising effects were brought about by computerisation of the National Court Register (Krajowy Rejestr Sądowy - KRS), which is of particular importance for business activities. In 2002, 225,000 cases were entered into the register; 247,000 cases were settled; this cut by half the existing backlog. Information provided by the Ministry of Justice suggests that current backlog is equivalent only to one-month inflow of cases [194].

[190] Daily „Rzeczpospolita", 7 April 2003, p. C1.
[191] Marek Celej for Daily „Rzeczpospolita", 28.March 2003, p. C1.
[192] Rozporządzenie Ministra Sprawiedliwości z dnia 25 Października 2002 sprawie trybu sprawowania nadzoru nad działalnością administracyjną sądów (Dz.U. z 2002 r., nr 187, poz. 1564) [Regulation of the Minister if Justice of 25 October 2002 on the modality of performing supervision over administrative operations of courts (the Official Journal of 2002, No. 187, item 1564)]
[193] Daily „Rzeczpospolita" of 2 November 2003, p. C1
[194] Daily „Rzeczpospolita", 30 July 2003, p. C1.

Land and mortgage registers have not yet been computerised. Currently the waiting time for an entry into a land and mortgage register takes several months (from 8.8 months in Warsaw to over a year in Szczecin). There is however a chance for improvement. The Law laying down the modality for transfer of hardcopy land and mortgage registers into IT systems entered into force on 1 July 2003[195].

Work is also underway on the Prosecutor's Office IT System (SIP) providing for computerisation of the department for organised crime, investigation department and - later – of regional public prosecutor's offices.

On 15 April 2003 the Minister of Justice adopted the document: "Strategic tasks of the Ministry of Justice and the Central Management of the Prison Service for 2003 and Subsequent Years"[196].

Access to legal assistance

Practice of national authorities

The law does not specify expressly any category of civil or other non-criminal cases for which free legal assistance should be provided. Lawyers appointed ex-officio participate only in a small percentage of those cases.

A restriction for the possibility to obtain free legal assistance ensues – inter alia – from the absence of detailed legal specification how a poor person is to "duly prove" that he/she is unable to bear the costs of defence or legal representation in a civil matter. Moreover there is no appeal against decisions denying free legal assistance.

Difficulties appear in cases of improper legal representation provided by advocates. Every year one witnesses a considerable number of complaints laid by their clients. Contrary to Article 6 par. 1 of the ECHR, intra-corporate disciplinary proceedings take place under conditions of limited public access. As a result there is no adequate control by the public and a lack of appropriate guarantees against possible abuse or ill-conceived corporate solidarity[197].

Access to the legal profession

National legislation, regulation and case law

In Poland there are markedly fewer active advocates than in the EU countries. Their number is limited by corporate modality of selection of candidates for the profession. Currently a debate is pending concerning the access to the profession of an advocate. The Ombudsman and NGOs (Stefan Batory Foundation, Helsinki Foundation for Human Rights) took interest in this issue.

A complaint was lodged with the NSA from a young lawyer who was denied admission to an apprenticeship within the Bar. The court turned to the Constitutional Tribunal with a legal question concerning compliance with the Constitution of provisions of the Law on the Bar

[195] Ustawa z 14 lutego 2003r. o przenoszeniu treści księgi wieczystej do struktury księgi wieczystej prowadzonej w systemie informatycznym (Dz.U. z 2003 r. nr. 42, poz. 363) [The Law of 14 February 2003 on transfer of the contents of a land and mortgage register into the structure of a land and mortgage register managed within an IT system, (The Official Journal of 2003, No. 42, item 363)]

[196] Daily „Rzeczpospolita", 16 April 2003, p. C1, the document is available at the web page: http://www.ms.gov.pl/ministerstwo/regulacje.shtml

[197] HFHR, Information about Studies on Access to Legal Assistance paid by the State, June 2002, available on the web page: www.hfhrpol.waw.pl

granting to the Supreme Bar Council competencies to lay down the rules of apprenticeship competitions and to specify the number of members of the corporation[198]. The question is waiting for adjudication by the Tribunal. A draft Law on Access to Legal Professions elaborated by the parliamentary group of the political party "Prawo i Sprawiedliwość" was submitted to the Sejm[199]. It assumes that entrance examinations for legal apprenticeship and professional exams (concluding the apprenticeship) shall be conducted by State commissions while professional corporations will be responsible for conducting the apprenticeship itself. A different draft was submitted by the Government on performance by professional self-government of supervision over due exercise of public trust professions and on monitoring of the activities of professional self – government [200]. The act is supposed to specify general rules concerning all public trust professions, including the advocates.

In the judgment of 26 November 2003 the Constitutional Tribunal declared the provision of the code of misdemeanours specifying fines for legal counselling delivered by a person with legal education but without the rights of a legal counsellor or an attorney to be unconstitutional. The sentence was passed after a constitutional complaint of a law student who had her economic activity, involving legal counselling. The Tribunal stated that a penal sanction towards persons with legal education, providing legal counselling, is incompatible with Art. 42 of the Constitution that guarantees to everyone the freedom of pursuing a profession and the choice of a workplace. According to the Tribunal exceptions to this rule must be explicitly stated in the Law[201].

Independence and impartiality of judges

National legislation, regulation and case law

The system for appointment and promotion of judges does not raise serious reservations. However, their professional qualifications are frequently a problem. Work is underway on an amendment to the Law on the System of Ordinary Courts aiming at centralisation and significant improvement in the quality of the education system for judges and candidates for judges. The Law will enter into force on 1 September 2004 [202].

Practice of national authorities

The problem of corruption within the system of administration of justice is so often tapped in public discussions that it should be treated seriously. This is all the more important as the problem is much broader and encompasses the entirety of public institutions.

According to the Centre for Implementation of Social Studies of the Institute for Philosophy and Sociology at the Polish Academy of Science, courts and prosecutors' offices are those institutions where – in the public assessment – corruption is most frequent[203]. Also in the Centre for Public Opinion Polls (Ośrodek Badania Opinii Publicznej –OBOP) studies 57% of respondents are convinced that a favourable ruling can be "bought" in a court with money[204].

[198] NSA decision of 1 July 2002, OSA 1/02, published in: "Palestra" 2002, Nos. 9–10; available on the web page http://www.adwokatura.org.pl., registration numbers of cases before the Constitutional Tribunal: P 21/02 and P 23/02

[199] The Law amending the Law on the Bar and certain other Laws. The draft published by: Klub Parlamentarny "Prawo i Sprawiedliwość", Warsaw 2003..

[200] Several different versions of the draft have been elaborated. The first draft carried the date of 27 September 2002, the most recent one – draft IV carries the date of 1 March 2003.

[201] Judgment of the Constitutional Tribunal of 26 November 2003, No. SK 22/03

[202] Daily „Rzeczpospolita". 22 July 2003, p. C2.

[203] I. Rzeplinska, A. Rzeplinski, Scientific information, the Bulletin of Polish Criminological Society, Warsaw 2002, pages 7-26.

[204] Survey "Common image of corruption" by the Centre for Public Opinion Polls carried out on the days 11-13 January 2003 on a representative random group of 1007 Poles over 15 years of age.

However, according to information obtained from the National Prosecutor's Office, in the first half of 2003 there have been only 10 cases brought to the courts concerning acceptance by judges or prosecutors of bribes in exchange for issuing favourable judgments or other decisions.

On 19 February 2003 the National Judiciary Council adopted a binding set of principles of professional ethics for judges specifying the norms for judges' behaviour on duty and in private life[205]. Moreover, for the first time judges were obliged to respond when the parties to the case display prejudices pertaining to race, gender, religion, nationality, social status or sexual preferences. The National Judiciary Council is obliged to supervise the enforcement of the principles.

In the public discussion serious doubts have been raised concerning the existing system of selection of lay judges (in Polish: ławnicy).

Reasons for concern

- length of judicial proceedings in civil, criminal, economic and administrative cases;
- lack of an effective legal remedy against the length of judicial proceedings;
- inadequate access to free legal assistance in civil or other non-criminal cases;
- lack of full publicity in the intra- corporate disciplinary proceedings against advocates;
- access to the legal profession too restrictive;
- corruption within the system of administration of justice in the public's assessment;
- serious doubts concerning the system of selection of lay judges.

Article 48. Presumption of innocence and right of defence

National legislation, regulation and case law

The recent amendments to the Code of Criminal Procedure limit the scope of the obligatory defence resigning from the obligatory participation of the ex-officio defence counsel in stages preceding the closing of an investigation. Moreover there is no obligation to notify the suspect and defence counsel on the final deadline for getting acquainted with case files. They should be notified only at their request[206].

Limitations also ensue from a change in provisions concerning the obligatory defence in criminal proceedings before a regional court as a first instance, when the defendant is deprived of his/her liberty. According to hitherto regulations, detention on remand made defence obligatory during the whole trial; following the amendments to the Code of Criminal Procedure defence ceases to be obligatory if the defendant is released [207].

[205] Resolution No. 16/2003 available on the web page: http://www.krs.pl

[206] Art. 321 § 1 i § 3 Kodeksu Postępowania Karnego z 6 czerwca 1997 w brzmieniu zmienionym ustawą z dnia 10 stycznia 2003 r. nowelizującą Kodeks Postępowania Karnego (Dz.U. z 2003 r. nr 17, poz. 155) [Art. 321 para. 1 and para. 3 of the Code of Criminal Procedure in the wording introduced by the Law of 10 January 2003 amending the Code of Criminal Procedure, (The Official Journal of 2003, No. 17, item 155); entered into force on 1 July 2003]

[207] Art. 80 Kodeksu Postępowania Karnego z 6 czerwca 1997 w brzmieniu zmienionym ustawą z dnia 10 stycznia 2003 r. nowelizującą Kodeks Postępowania Karnego (Dz.U. z 2003 r. nr 17, poz. 155) [Art. 80 of the Code of Criminal Procedure in the wording introduced by the Law of 10 January 2003 amending the Code of Criminal Procedure, (The Official Journal of 2003, No. 17, item 155); entered into force on 1 July 2003]

The amendment of the Code of Criminal Proceedings, which entered into force on 1 July 2003, restricted also the number of persons entitled to the obligatory defence in criminal proceedings. Art. 79 para. 1, point 4, that granted obligatory defence in criminal proceedings to a person who does not speak Polish, was reversed[208].

Practice of national authorities

The number of advocates and legal counsels is not increasing in proportion to an increase in the number of criminal cases received by courts. Since 1990, the 400% increase in the number of cases was accompanied by an increase in the number of advocates and legal counsels by merely approximately 5%.

At least half of all defendants in criminal cases at first instance, including many persons deprived of their liberty, were not assisted by lawyers [209].

The main problems with access to free legal assistance in criminal matters exist at the investigation stage, before the case is sent to a court[210]. In a significant number of cases the first personal contact between a suspect and his/her defence counsel takes place as late as during the final acquaintance with case files before sending an indictment act to a court.

Reasons for concern

- inadequate legal assistance for defendants in criminal cases;
- restricting the number of persons entitled to obligatory defence.

Article 49. Principles of legality and proportionality of criminal offences and penalties

No significant development to be reported during the period under scrutiny

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No significant development to be reported during the period under scrutiny

[208] Art. 79 § 1 p. 4 Kodeksu Postępowania Karnego z 6 czerwca 1997 w brzmieniu zmienionym ustawą z dnia 10 stycznia 2003 r. nowelizującą Kodeks Postępowania Karnego (Dz.U. z 2003 r. nr 17, poz. 155) [Art. 79 para. 1 p. 4 of the Code of Criminal Procedure in the wording introduced by the Law of 10 January 2003 amending the Code of Criminal Procedure, (The Official Journal of 2003, No. 17, item 155); entered into force on 1 July 2003]

[209] The Helsinki Foundation for Human Rights (HFHR), Information on Studies on Access to Legal Assistance Paid by the State, June 2002, available on the web page: www.hfhrpol.waw.pl

[210] Information from letters received by the Helsinki Foundation for Human Rights.

ERRATA TO THE REPORT ON POLAND

Article 6. Right to liberty and security.

At p. 14 of the report, the sentence “A judge who takes a decision to place a foreigner in a guarded centre or an expulsion detention centre has no choice. He or she only checks whether statutory conditions are adhered to. If so, the judge has to deprive the foreigner of liberty. Such a solution is incompatible with Art. 5 para. 3 of the ECHR because of the too limited scope of the judge’s decision” should be disregarded.

At p. 16 of the report, under the heading *Reasons for concern,* the phrase “scope of the decision of a judge placing a foreigner in a guarded centre or an expulsion detention centre too limited and incompatible with Art.5 para.3 of the ECHR” should be disregarded.